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Does Gender Equality Always Imply Gender Blindness? The Status of Single-Sex Education for Women

Caren Dubnoff*

Introduction

There were in 1980 more than 125,000 women attending single-sex colleges, and about one million alumnae.1 Enrollment in women's colleges expanded twenty-five percent from 1970 to 1980,2 and several schools continue to report significant increases in enrollment.3 Clearly, the continued existence of these schools is an important issue for many women. Those who opposed the Equal Rights Amendment (ERA) often argued that ratification would have hurt these women by mandating the end of single-sex schools.4 This is not to say that all, or even most, women view an end to women's colleges as a negative development. Single-sex education is an issue which divides many feminists. Some see the women's colleges as more committed to the advancement of women than the coeducational institutions,5 while others claim that single-sex education is detrimental to women.6 Still others are ambivalent.7 The legal commentary has not taken issue with the proposition that sex segregation in public education would no longer be permissible if ERA were ratified. This is apparently because most commentators accepted a view advanced in one of the first and most comprehensive analyses of the amend-

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1. A.B., Bryn Mawr College; Ph.D., Columbia University. Associate Professor and Chairperson, Department of Political Science, College of the Holy Cross.
3. Id.
4. Former Democratic Senator from North Carolina Sam J. Ervin's comments are a recent example. N.Y. Times, Aug. 1, 1983 at A15. The same claim was made in a pamphlet circulated in Connecticut by opponents of ERA. See Emerson & Lifton, Should the ERA Be Ratified?, 55 Conn. B.J. 227, 235 (1981) [hereinafter cited as Emerson].
5. The President of Bryn Mawr College, Mary Patterson McPherson, identified the benefits that women's colleges provided. "Many coeducational schools have admitted women as students but not as full partners in the enterprise." The Daily Progress, (Charlottesville, Va.) Jan. 30, 1983 at F1. For an extreme statement of how coeducational institutions fail women see Adrienne Rich's comment, "The co-educational college mission statement that professes to 'develop the whole man' probably does exactly that. This is no semantic game or trivial accident of language; what we have at present is a man-centered university a breeding ground, not of humanism, but of masculine privilege." Toward A Woman's Centered University (1979) (quoted in Brief for Mississippi College for Women at 18, 19, Mississippi University for Women v. Hogan, 102 S. Ct. 3331 (1982).
ment, that ERA would prohibit the use of all gender classifications. The most that has been said to assuage those who support single-sex schools is that the effect of ERA would be negligible since most remaining single-sex schools are private. This assertion is based on the fact that in a manner quite similar to that of the fourteenth amendment, ERA by its language is a bar only to state action. It leaves private institutions to do as they will unless it can be shown that, as a result of either the functions they perform or the close ties they have to the government, their actions must be considered equivalent to that of the state.

I am not convinced that the state/private distinction could or should prevail in this context. As a political device to diffuse opposition to ERA, it may have had some value. As a logical argument, it is flawed. It is no secret that the government provides considerable financial assistance to such schools, both directly through programatic aid and indirectly in the form of tax exemptions and grants to students. When the verbage is stripped away, what remains is the vulnerable position that what is impermissible for the state to do directly is allowable for it to do indirectly. As a matter of law as well, it is not so obvious that the policies of private colleges and universities would be insulated from the force of the amendment.

It seems likely that ERA would place gender discrimination in a similar category as racial discrimination. The position of private schools under the fourteenth amendment should therefore provide some indication of how the state/private distinction might be approached. Although the Supreme Court has not said that the actions of private schools are directly subject to the equal protection clause, it has held that the government may not provide aid

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9 This is the answer Emerson, supra note 4 offers to the argument advanced by ERA opponents in Connecticut.
10 For an early and extensive analysis of this question see Gallagher, Desegregation: The Effect of the Proposed Equal Rights Amendment on Single-Sex Colleges, 18 ST. LOUIS U.L.J. 41 (1973) [hereinafter cited as Gallagher].
11 It has been argued that education is a quasi-public function independent of the particular institution involved, and also that nearly all private institutions rely so heavily on government funds as to be inseparable from government itself. Thus, one could claim that these institutions should be directly subject to constitutional oversight. See O'Neil, Private Universities and Public Law, 19 BUFFALO L. REV. 165 (1969-70). See also, Arthur S. Miller, Racial Discrimination and Private Education (1957). The public function theory is but one of the ways private conduct may become subject to the commands of the fourteenth amendment. If the state's involvement in the private activity is significant, the constitutional mandates apply, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). There is, however, no exact definition of what constitutes "significant." "Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance." Burton, at 720. The extension of the constitutional bar against racial discrimination to private universities and colleges is compatible with the analyses presented by Brown, State Action Analysis of Tax Expenditures, 11 HARV. CIV.

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to private schools which discriminate against blacks. In *Norwood v. Harrison*, Justice Burger specifically rejected the argument that equated assistance to religious schools with aid to racially segregated schools. The Constitution places a value on religion but not on discrimination. In Justice Burger's words:

"[t]he transcendent value of free religious exercise in our constitutional scheme leaves room for 'play at the joints' to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors. In contrast, although the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause.""
Lower courts have held, and the Supreme Court has affirmed without opinion, that government may not provide specialized tax exemptions to institutions which practice racial discrimination.\footnote{E.g., Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970); appeal dismissed sub nom., Cannon v. Green, 398 U.S. 956 (1970); Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971) aff'd sub nom. Colt v. Green, 404 U.S. 997 (1971); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974) cert. denied, 420 U.S. 927 (1975); Falkenstein v. Dept. of Revenue, 350 F. Supp. 887 (D. Or. 1972) (three judge court), stay denied sub nom., Oregon Elks v. Falkenstein, 409 U.S. 1032 (1972), appeal dismissed, 409 U.S. 1099 (1973). Support for the position that tax exemptions are the functional equivalent of government subsidies is widespread: see, e.g., Reiling, \textit{Federal Taxation: What is a Charitable Organization?}, 44 A.B.A. J. 525 (1958); Warnn, \textit{Property Tax Exemptions for Charitable, Educational, Religious and Governmental Institutions in Connecticut}, 4 CONN. L. REV. 181 (1971). It is a view at least implicitly endorsed by the Supreme Court: Griffin v. County School Board, 377 U.S. 218 (1964); Walz v. Tax Comm'n., 397 U.S. 664 (1970); Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). Consequently, the logical conclusion is that tax exemptions may not be provided private schools which employ racially discriminatory policies. See \textit{Note, The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools}, 93 HARV. L. REV. 379 (1979); Comment, \textit{Racial Segregation and Tax-Exempt Status of Private, Religious Institutions}, 25 HOW. L.J. 545 (1982).} If the state/private distinction does not hold, then it is necessary to come to grips with the substantive issue of whether sex-segregated education has a place in education, and if it does, whether a flat prohibition of gender classifications makes sense. Even if the state/private distinction survives, it could be rendered meaningless should tax exemptions be denied on other grounds. Although the Court has refrained from a direct constitutional ruling on tax exemptions, it recently held in \textit{Bob Jones University v. United States}\footnote{G. Will, \textit{Bob Jones U.: Why Didn't Congress Act?} Washington Post, May 29, 1983, at C7.} that the Internal Revenue Service (IRS) had correctly interpreted the IRS Code in denying tax-exempt status to private schools which discriminated on the basis of race. Critics of the decision were quick to warn that schools which restricted their admissions on the basis of sex might well be next.\footnote{Gallagher, supra note 10, at 74, discusses the effects of a loss of government aid.} Under the current state of the law, the conclusion is unwarranted. However, if gender classifications were to be constitutionally barred or if women's schools were found to have no public benefit, then \textit{Bob Jones} might indeed apply to single-sex institutions. Since most private colleges and universities receive financial support from the government and benefit greatly from tax-exempt status, the threat of withdrawal of these privileges along with the likely ineligibility of students to receive government assistance means that these institutions must in practice comply with constitutional restrictions.\footnote{103 S. Ct. 2017 (1983).}
sex women's colleges is now timely. First, the equal rights amendment continues to have broad support, and although narrowly defeated in the House in November 1983, it will surely be reintroduced. Its proper interpretation remains a significant issue. Experience with racial classifications suggests that on the way to equality, it may be sometimes necessary to take account of race. The same may be true of gender. A candid recognition of this concept is preferable to the tendency either to defer interpretation to the courts or to search for ways around the implications of a blanket rule. Moreover, unaddressed issues may only bolster the opposition to ERA, as exemplified in a recent congressional hearing. In addition, even without ERA, issues of gender classification are raised in the interpretation of the equal protection clause of the fourteenth amendment. The vacillation of the Supreme Court in 1981 concerning the permissibility of gender classifications was followed in 1982 by a reaffirmation of heightened scrutiny. Moreover, that reaffirmation occurred in the context of a challenge to sex-segregated education. In *Mississippi University for Women v. Hogan,* the Supreme Court ordered an end to admissions policies at the Mississippi University for Women's School of Nursing that denied men entrance, thus reopening the question of the constitutionally of sex-segregated public education regardless of whether an equal rights amendment is adopted. Thus, as a result of *Bob Jones,* even if the renewed effort at ERA ratification is unsuccessful, the restrictive admissions policies of private universities could face difficulties if *Hogan* is followed by a determination that sex segregation has no place in public education.

These developments in themselves would warrant a reexamination of the legal status of single-sex schools. They are significant, however, not only for the future of such schools and for the broader question of which tests are to be applied to gender classifications under the Constitution, but also for a still larger issue of constitutional study: the place of fixed rules in constitutional analysis. This Article will undertake a reexamination of the status of private single-sex education for women in light of the developments of the past two years, and in so doing it will address also these larger issues. Part I focuses on the recent *Bob Jones* decision, in which the Court decided on statutory grounds that the IRS had power to deny exemption because discriminating against blacks clearly violates fundamental public policy. In part II, I shall argue that *Bob Jones* neither requires nor allows the IRS to deny tax exemptions to single-sex colleges. This section describes the present position of Congress and the Court with respect to single-sex education. Beginning with the congressional treatment of the issue it assesses the implications of Title

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22 *Id.*
IX of the Education Amendments of 197223 and the Equal Education Opportunities Act of 1974.24 The most recent Supreme Court decision concerning single-sex education is Mississippi University for Women v. Hogan.25 The implications of this case for sex-segregated education are examined, and how the decision fits into the Court’s past treatment of gender classifications is discussed. I argue that Hogan seems to be a narrow decision confined to situations where a school harms women by perpetuating stereotypes. Under the standard adopted by the Court, some single-sex programs can be defended even in state schools. At the same time, the decision contains some reasoning that, if accepted by a majority of the Court, threatens the long-term viability of even private schools. Part III examines the argument for allowing voluntary single-sex education for women. I argue that while it is not conclusive that single-sex education actually benefits women, the evidence at least highly suggests that it does, and there certainly is no convincing data that women have been harmed. Further studies are needed, but in the meantime, single-sex education should not be precluded as an option. This analysis suggests the dangers of reading ERA to prohibit all gender classifications—the view that earlier commentators accepted uncritically.26 Part IV provides a more general argument against a doctrinaire reading of ERA. Finally, the conclusion discusses the place of fixed rules in constitutional interpretation and attempts to distinguish those situations in which the Court should establish a single standard for all cases from situations in which a more flexible position is appropriate.

I. **Bob Jones and Tax-Exempt Status**

In Bob Jones University v. United States,27 the Supreme Court upheld the IRS’s determination that institutions which practice racial discrimination are not entitled to tax-exempt status. Section 501(c)(3) of the Internal Revenue Code provides that to qualify for tax-exempt status an institution must be “organized and operated exclusively for religious, charitable . . . or educational purposes. . . .”28 The IRS determined that this section implicitly includes the additional requirements that such institutions be “charitable” as understood in common law. To be “charitable” an institution must provide a public benefit and must not act contrary to public policy.29 Educational institutions which practice racial discrimination cannot, under this standard, qualify for such status. What are the implications of this ruling? How much

discretion does the IRS now have to allow or disallow tax-exempt status based on its independent determination of public benefit and public policy? Can the IRS now determine, for example, that single-sex schools do not provide a public benefit or that they violate fundamental public policy and hence no longer qualify for tax-exempt status?

The essential facts of the case are only marginally at issue. In 1970, the IRS announced that tax-exempt status would no longer be granted to private schools which had racially restrictive admissions policies. In addition, gifts donated to such schools would no longer be treated as “charitable deductions for income tax purposes [under Section 170].” The IRS acted under pressure from the courts. In January, 1970, a three-judge District Court for the District of Columbia had issued a preliminary injunction forbidding the granting of tax-exempt status to private schools in Mississippi which maintained racially restrictive admissions policies. Subsequently, this initial determination was sustained in a ruling on the merits. Making the injunction permanent, the district court interpreted the tax code as forbidding the granting of tax-exempt status to schools that practiced discrimination. The IRS gave the ruling general applicability.

Two of the schools affected by this policy were Bob Jones University and Goldsboro Christian Schools. Both of these schools, based on their interpretation of the Bible, employ racially restrictive policies. Bob Jones University is an institution of higher education. Until 1975, unmarried blacks were not admitted. As a result of a Fourth Circuit decision in McCrary v. Runyon the school then allowed unmarried blacks to enter, but enforced a prohibition on interracial dating and marriage. Goldsboro Christian Schools, Inc. provides elementary and secondary education. Admissions have been restricted largely to whites although some children of mixed marriages in which one of the parents is white have been allowed to enroll. Bob Jones University and Goldsboro Christian Schools were both denied tax-exempt status as a result of the IRS’s policy. Goldsboro had never been granted such status and Bob Jones University had its status revoked. Each school, making similar arguments, challenged the IRS’s action. Two basic claims were made: (1) the IRS exceeded its authority in revoking the tax-exempt status to institutions

53 103 S. Ct. at 2021 (quoting IRS News Release (7/10/70)).
50 Id.
55 Bob Jones made the additional argument that even if the IRS had the right to deny tax exempt status to schools which practiced racial discrimination, the application to Bob Jones was inappropriate because since 1975 it had not practiced a racially restrictive admissions policy. The Court rejected the argument, pointing out that its policies with respect to dating and marriage were restrictive.
which qualified under one of the statute's designated categories and; (2) in any event, the revocation violated the school's rights under the free exercise clause of the first amendment. The first argument was the only one which gained any serious judicial support. In the *Bob Jones* case, the district court struck down the IRS's action, agreeing with the argument that it had gone beyond its authority. This decision was reversed by the court of appeals, which interpreted the tax code as implying that tax-exempt status could be provided only to institutions that met the listed criteria, and were in addition "charitable". Relying on the common law definition that to be "charitable" an institution must not act contrary to public policy, the court's affirmation of the IRS decision was logical, since racial discrimination in education is clearly contrary to such policy. Goldsboro's claims were rejected in both the district and appellate courts. The suits were combined before the Supreme Court.

In an opinion written by Chief Justice Burger, the Supreme Court affirmed the decisions issued by the appellate court. The suggestion that the IRS action violated the first amendment was unanimously rejected. Attention focused on the IRS's authority. Although no one doubted that Congress had the power to deny tax-exempt status to institutions which violated public policy, at issue was whether the IRS could do so without explicit statutory authorization and, more critically, contrary to what appeared to be the plain language of the statute. In setting the criteria for the granting of tax-exempt status, the statute states that "corporations ... organized and operated exclusively for religious, charitable ... or educational purposes" qualify for tax exemptions. The institutions asserted that this language is incompatible with the IRS's interpretation, and that not only was there no express requirement that an organization be charitable but the use of "or" to separate the enumerated activities means that an institution need meet only one of the required characteristics.

Chief Justice Burger's opinion for the majority conceded that a literal reading of the passage cited would seem to support the University's claim. In rejecting such a literal reading, he relied primarily on four considerations. First, such clause-bound analysis is incomplete. Read more broadly the Internal Revenue Code allows a different interpretation. Specifically turning to Section 170(a), Burger observed that the term "charitable" appears in this section and that here a list of characteristics identical to that employed in Section 501(c)(3) is used to define this term. Burger pointed out that it is unlikely that the list meant different things in the two passages. Charitable

30 Id. at § 501(c)(3) (1976).
32 *Bob Jones Univ. v. United States* 639 F.2d 147 (4th Cir. 1980).
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is the focus; the list is explanatory of what is meant by charitable. This indicates that “in enacting both [Sections 170 and 501(c)(3)] Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.” Second, he traced the historical purpose of enacting tax exemptions and concluded that they were designed to promote the activities of agencies that provided a public benefit. It follows that Congress did not intend to benefit organizations that acted contrary to public policy: “A corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy.”

Next, he examined past operations of the IRS and found it has traditionally exercised broad authority to interpret the Internal Revenue Code, sometimes denying tax-exempt status beyond the specified categories. Finally, Justice Burger noted Congress’s failure to vote out of committee any of the bills introduced to overturn the IRS’s action and Congress’s addition of a provision to the Internal Revenue Code denying tax-exempt status to social clubs that maintained racially or religious discriminatory policies, and determined that Congress was aware of and concurred with the IRS’s action.

It is well accepted that Congress is free to delegate authority to administrative agencies to enforce policy, provided that it has determined the basic policy and has formulated the standards by which agency decisions can proceed. Legislation that delegates broad authority has been consistently upheld because it is recognized that flexibility is needed if the agencies are to carry out the tasks assigned. There is also considerable support for the proposition that Congress can retroactively endorse executive action, and that the approval need not be explicit, Justice Rehnquist’s assertion to the con-

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44 103 S. Ct. at 2026 (1983). In dissent, Justice Rehnquist disputes this reading of the Code. To him the list merely confirms that Congress had established the qualifying criteria. Id. at 2040.
45 Id. at 2028.
46 The Court referred to the denial of a charitable exemption to an organization that engaged in a proscribed political activity prior to the inclusion by Congress of this factor as a basis for disqualification. Id. at 2031.
48 Prize Cases, 2 Black 635 (1863) (upholding seizure of ships pursuant to presidential order subsequently approved by Congress); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (sustaining FCC fairness doctrine approved subsequently by Congress).
49 “[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.” Red Lion Broadcasting Co. v. FCC, 395 U.S. at 381 (footnote omitted).
The problem is that the statute is silent on the authority delegated, and on the standards to be applied in its enforcement. Moreover, the guidance which flows from the subsequent congressional action is unclear. This action might be considered either as granting broad discretionary authority to the IRS, or as limiting the denial of tax exemptions specifically to cases of racial discrimination, or as something in-between. It does seem clear that unless some limiting guidelines are established, the IRS could play a considerable role in shaping political and social policy. Such a role for the IRS is surely undesirable.

The common law concept of charity is very broad. If the Court intended that the IRS were henceforth to assess in every instance whether an institution's activities benefited the public and did not violate public policy, the power granted would be extensive. This is clearly not what the majority purported to do. The Court cautioned the IRS that a declaration of non-charitability "should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy," and that such questions must be approached "with full awareness that determination of public benefit and public policy are sensitive matters with serious implications for the institutions affected." The Court extracted from the spirit of the law the proposition that Congress could not possibly have meant to encourage through tax exemptions—which are designed to foster favored activities—policies it clearly opposed. From this the Court concluded that the IRS had the discretion to deny tax-exempt status to institutions whose policies were without doubt contrary to established policy. If an institution falls into the categories established by Congress, and there is a question as to the value of its activities, then the question should be decided in favor of the institution. It is only when it is inconceivable that Congress would wish to support the activity, and where the policy violated is "fundamental," that tax exempt status could be denied. This is not a license to the IRS to conduct unbounded policy reviews.

Justice Powell took exception to what he viewed as the majority's expansive language, which he feared created a public benefit standard for tax-exempt status. He would have upheld the IRS's determination that tax exemptions should not be granted to institutions which practice racial discrimination, on the basis that subsequent congressional action, in effect,
ratified it. The amendment to the IRS Code which extended the denial of tax exemptions to social clubs was controlling. As noted earlier, finding executive action legal as a result of subsequent congressional action has considerable precedent. Had Justice Powell's view been adopted, it would have been far more limiting. Nonetheless, the Court has not left the IRS with unlimited authority.

Had the Court not found the IRS action justifiable, it would have had to reach the issue, raised in the amicus briefs, of whether the tax exemptions are permissible under the equal protection clause, an issue with implications broader than the one at hand. The desirability of avoiding constitutional issues where possible is apparent here. A claim based on the equal protection clause requires state action as a prerequisite. The consequences of a decision that implies that a university which receives some government aid must abide by the norms of the fourteenth amendment are far-reaching. Such a decision might, for example, mean that universities would have to follow the commands of the due process clause. It might also lead to the conclusion that they would be subjected to the commands of a variety of statutes which at the moment apply only to the state. Yet, the effect of a converse decision that the government could aid schools which deny admission to blacks would be no less serious. Avoidance of the state action issue thus has much to comment it.

In sum, the Supreme Court's decision in Bob Jones is not a broad decision which establishes an analytic framework for delineating the scope of IRS discretion to establish and revoke tax exemptions. Rather, it is not much more than a narrow affirmation of the specific action taken here. It reflects both the deep conviction of the overwhelming majority of justices that racial discrimination in schools is so totally unacceptable that no governmental aid can be countenanced, and the inclination of most justices toward restraint where possible. By finding that the IRS had the power to deny tax-exempt status to schools that discriminated, the Court avoided the constitutional issue of whether the equal protection clause required it to do so.

II. IMPLICATIONS OF Bob Jones FOR PRIVATE WOMEN'S COLLEGES

Where does this decision leave private women's colleges and universities? In the preceding section, I have noted that under Bob Jones, the

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52 Id. at 2037 (Powell, J., concurring).
54 See supra note 46.
56 Tribe, supra note 11, at §§ 18-20.
57 This is not to say that such a broad finding is required.
revocation of tax-exempt status is to be allowed "only where there can be no doubt that the activity involved is contrary to a fundamental public policy." Measured against this standard, private women's colleges and universities should have little difficulty retaining their tax-exempt status.

The Court, in affirming the IRS's determination that Bob Jones University and Goldsboro Christian Schools were correctly denied tax-exempt status, observed, "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice." It supported this assertion with references to congressional actions and to an "unbroken line of cases" dating from Brown v. Board of Education. The position with respect to racial discrimination in education is, in short, clear. The same cannot be said with respect to single-sex education. Neither Congress nor the Court has taken a consistent position on this question.

A. Congress and the Equal Educational Opportunities Act

A review of Congressional action indicates no support for the suggestion that private single-sex education violates any public policy, to say nothing of "fundamental" public policy. Legislative intent in this area is in fact difficult to determine. The situation is particularly complicated where, as here, there is more than one relevant statute, each with its own legislative history. It is possible to offer intelligent, plausible, and yet conflicting interpretations when one attempts to ascertain Congress's attitude toward single-sex education. For purposes of the analysis here, we need only show the absence of definitive opposition.

To the extent that Congress has spoken directly on the subject, it has consciously allowed single-sex institutions to continue. In 1972, Congress sought to assure educational equality for females by extending the prohibition against federal funding for schools which discriminate on the basis of race to include schools which discriminate on the basis of sex. Addressed to the admissions policies of postsecondary schools, Title IX, however, specifically included a waiver for traditionally single-sex schools. The relevant section of the waiver reads: "In regard to admissions this section shall not apply to any public institutions of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex." Those sections of the Bill directed at elementary and secondary schools initially contained a provi-
sion which would have banned single-sex schools. It was eliminated in the Senate. According to Senator Birch Bayh, the sponsor of the relevant change, little was known about the extent and effects of single-sex education. He argued that absent such knowledge, action to ban such schools should be postponed.64

Had this been Congress's only word on the subject its position would be clear. Two years later however, it passed the Equal Educational Opportunities Act of 1974.65 This Act contains language which at first blush would seem to indicate that Congress had reversed its judgment. Two sections are particularly pertinent. Section 1702(a)(1) reads: "The Congress finds that—(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex or national origin denied to those students the equal protection of the laws guaranteed by the fourteenth amendment."66 Section 1703(c) reads:

No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin by . . . (c) 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 an agency than would result if such a 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.67

Whether this Act intended to prohibit single-sex education is not clear.68 As the most recent statute, it would control the issue at least with respect to public schools.

There are several reasons why the statute does not establish Congress's position on single-sex education. To begin with, the most critical fact for the analysis here is that however one interprets the EEOA, it applies neither to private nor to postsecondary schools.69 The dispute concerns what EEOA means for primary and secondary public education. It is not necessarily true that sentiments expressed on these matters will carry over to views on private education where educational diversity might be valued. Beyond that, the language quoted above is not dispositive. First, it is not the only relevant

64 118 Cong. Rec. 5804 (February 28, 1972).

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language. Other sections of the Act specifically omit sex when discussing the segregation that is prohibited. These omissions, taken alone, might lead one to conclude that the statute was sloppily written and/or ambiguous. There are, however, other reasons to consider Congressional treatment of single-sex education with caution. This Act was initially introduced in the same year as Title IX. Perhaps Congress had amassed in the two years between its introduction and passage significant data on which to reverse its earlier postponement. If so, there is no evidence to that effect. Furthermore, if Congress intended to reverse the position it had taken just two years earlier, nowhere does it expressly say so. Absent evidence to the contrary, it is not unreasonable to conclude that Congress's focus was what it had always been—on racial issues.

Two courts called upon to apply the law came up with conflicting positions. In United States v. Hinds County School Board, the Fifth Circuit Court of Appeals ruled that the EEOA bans sex-segregated public schools. Prior to the adoption of the Act, the Amite School District, pursuant to a court order requiring racial integration, had replaced racial segregation with sex-segregation. The plan was approved in the district court but before the Fifth Circuit Court of Appeals had issued a decision the EEOA was passed. At that point, the United States, the original plaintiff in the suit, challenged the sex-segregation. The circuit court then held that the Act placed a ban on sex-segregated public schools and remanded the case to the district court.

The Third Circuit reached a different conclusion in Vorchheimer v. School District. The facts were, of course, distinguishable. The case involved a challenge by Susan Vorchheimer to her exclusion from Philadelphia's all-male Central High School, one of the city's two academic high schools. Both of the academic high schools are sex-segregated: Central is restricted to males; Girls High School, as the name suggests, to females. Susan Vorchheimer was informed that although she was scholastically qualified to attend Central, she was ineligible because of her sex. Vorchheimer preferred Central to Girls

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70 20 U.S.C. § 1703 (1976) provides:
No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin, by (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools; (b) the transfer by an educational agency . . . of a student from one school to another if the purpose and effect of such transfer is to increase segregation of the students on the basis of race, color or national origin . . . ."

71 560 F.2d 619 (5th Cir. 1977).

72 In view of the South's traditional concern that racial integration would lead to interracial marriages, one suspects that the southern plan was based less on carefully considered valid educational purposes than on a desire to limit the social effects of desegregation.

73 United States v. Hinds County School Board, 560 F.2d 619 (5th Cir. 1977).

74 532 F.2d 880 (3d Cir. 1976) aff'd by equally divided Court, 430 U.S. 703 (1977).
because of its academic reputation, her favorable reaction to its atmosphere, and its superior scientific facilities. When she was refused admission to Central, she enrolled in a non-academic high school close to her home and filed a class action in United States District Court for the Eastern District of Pennsylvania, alleging that she had been discriminated against on the basis of sex in violation of the Equal Educational Opportunity Act of 1974 (EEOA) and the fourteenth amendment. The district court ruled in favor of Vorchheimer, holding that the school policy was constitutionally infirm because the school board had failed to demonstrate that the gender classification bore a "fair and substantial relationship" to its legitimate interest. The Third Circuit Court of Appeals accepted the district court's factual finding while rejecting its constitutional holding. In addition, it held that the EEOA did not prohibit the existence of single-sex schools. The court viewed Congress's position with respect to single-sex education as ambiguous. What was important for the court was the attitude of Congress as expressed in Title IX and in the debates surrounding the EEOA beginning in 1972 when it was first introduced. As already noted, Title IX explicitly permits single-sex education in schools in which it has been traditional. The Third Circuit also found, however, that the textual disparities between Section 1702(a)(1) and Section 1703(a) cloud the meaning of the EEOA. What is forbidden by the EEOA is the mandatory assignment of students on the basis of sex, and this did not apply to Vorchheimer since attendance at the academic schools is a matter of choice. Thus, the lower courts are divided on the statutory interpretation of EEOA regarding single-sex education.

To the extent that the executive branch has had anything to say on this subject, it seems to have adopted the position that educational equality but not necessarily educational integration is what is assured. Regulations promulgated by HEW, extending Title IX's coverage to primary and secondary schools even though such schools are not covered by Title IX, specify that federal funding will be denied to "local educational agencies" which maintain single-sex schools or programs unless equal facilities are provided the other sex.

In short, Congress has mandated sexual equality in education but it has not precluded "separate" facilities as a way of attaining this equality even in the public setting.

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See supra text accompanying note 65.
532 F.2d at 886.
Now the Department of Education.
B. The Supreme Court—Recent Decisions

Should the Supreme Court rule as it has done with respect to race that separation by sex in education is inherently unequal, the IRS would not only be justified in denying tax exempt status to private schools with sex-restrictive admissions policies but it might well be forced to do so. Should Congress overturn a statutory interpretation of the tax code under the circumstances just described, it is likely that there would be a direct challenge on the constitutional issue that the Supreme Court avoided in Bob Jones. So far, the Court has declined to make this analogy, although some of the dissenting justices in Mississippi University for Women v. Hogan held that such is the implication of that decision.

1. Early Court Action: Vorchheimer

Until 1981, the Supreme Court had not directly ruled on the issue of single-sex education, but had on occasion denied review of lower court decisions which have sanctioned the practice. Since most such cases were decided prior to the Court’s application of a stricter standard to gender classifications, they provide little guidance for the issue today. The one exception is Vorchheimer v. School District, referred to in the last section. This decision, handed down by the Third Circuit Court of Appeals in 1976, was affirmed by an equally divided Supreme Court in 1977, with Justice Rehnquist not participating, and thus carries no precedential value. Nevertheless, it has shaped the debate on how the issue should be treated and merits attention.

Under current Supreme Court practice, whether or not a classification is seen as constitutionally permissible turns on several related issues, the most important of which is the standard of review applied. In equal protection analysis, the choice of the standard often determines the outcome, since the standard of review determines not only the extent to which the Court will make an independent judgment as to the validity of a law, but also the scope of the review and the amount of evidence required to prove the validity of a classification. The basic standards of review developed by the Supreme Court to assess claims under the equal protection clause are by now familiar. Government actions which distinguish among groups in the population may be subjected to strict scrutiny, intermediate scrutiny, or a rational basis test. When strict scrutiny is applied to a classification, the government must

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65 Tribe, supra note 11, at § 16-30.
demonstrate that its interest is compelling and that the classification is necessary to promote the interest. The Court assesses the legitimacy of the government's ends as well as the congruence between the classification and the legislative purpose. This standard is so difficult, the test has been described as "'strict' in theory but fatal in fact." When, on the other hand, the Court uses a rational relationship test, almost nothing is required by way of proof. Although in theory the rational relationship test involves a mean-ends inquiry, that is, the classification must bear some relationship to a legitimate government objective, in practice, once the Court accepts this test, it makes little effort to challenge the rationality of the government action or to review the aims of the action. The Court has even offered justifications in the absence of an adequate government case. In addition to strict scrutiny and the rationality standard, the Court has used an intermediate standard of review which lies between these two in stringency. In general under an intermediate standard the government must demonstrate an important interest and the relationship of the classification to the interest must be substantial.

I do not mean to suggest in this brief description that there is complete agreement on what is required under each of the standards. For example, under the intermediate standard there are some differences over how important the interest must be or how accurate the fit need be between the interest and the classification. Even the strict scrutiny standard may not be as precise as was long assumed. There has always been some controversy over whether strict scrutiny allows review of government objectives, or only an examination of the congruence of the classification to the end. Its usage in the context of fundamental rights is not as rigorous as when a suspect classification is involved. Moreover, there is language in Regents of the University of California v. Bakke to suggest that even when suspect classifications are involved, less than complete congruence between the classification and the interest might be acceptable. These differences in interpretation of what is required under each standard do not negate the importance of the standard to the outcome. Sex-segregated education can easily

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86 The Supreme Court most commonly employs intermediate scrutiny in sex discrimination cases. For a statement of the standard, see Craig v. Boren, 429 U.S. 190, 197-98 (1976).
87 Tribe, supra note 56, at § 16-30.
89 Karst and Horowitz have argued that although Powell invokes strict scrutiny, he does not require the university to make the sort of demonstration of benefits to be derived from student diversity that would be required under a traditional application of strict scrutiny. Karst & Horowitz, The Bakke Opinions and Equal Protection Doctrine, 14 HARV. C.R.-C.L. L. REV. 7, 13 (1979); see also Fullilove v. Klutznick, 448 U.S. 448 (1979) (Powell, J., concurring).
be sustained if the rational basis test is employed. The state need only show that some respectable educational opinion considers such schools to be preferable. If intermediate scrutiny is employed the level of needed evidence increases.

The differences in the decisions of the district and appellate courts in *Vorchheimer* were very much affected by the choice of scrutiny. The appellate court accepted two key aspects of the district court's factual findings, and then went on to employ a rational basis test. The district court had concluded that the high schools offered comparable educational benefits and that there was educational evidence that supported the value of single-sex education. Given the long history of single-sex education, its wide acceptance, and the equality of the facilities, the court of appeals was reluctant to overturn the decisions of educators who had primary responsibility for running the school system. In addition, the court viewed the segregation as voluntary. That being the case, it did not require a rigorous demonstration that single-sex education was beneficial to one or to both sexes. Instead, it was sufficient that some educators believed that single-sex education was valuable.

The "separate but equal" doctrine seemingly was given new life in the context of sex-segregated education. In my view, the court of appeals made two central errors. First, the schools were not equal even by the court's own description. As the court noted, Central High School's scientific facilities were superior to those at Girls High. Second, the segregation was not truly voluntary. Since there were no coeducational academic high schools, the only additional choice that Susan Vorchheimer had was not to attend an academic high school at all, with obvious costs. Judge Gibbons noted in his dissent that "[Her] choice, like Plessy's is to submit to that segregation or refrain from availing herself of the service." Furthermore, the majority's reasoning had sexist overtones. Only by stereotyping girls could it find the differences in science facilities unimportant. Beyond that, the majority used a traditional sexist justification for discrimination against women in its effort to indicate why classification by race, but not sex, was suspect. The majority claimed that race was a suspect classification because it was irrational: "There is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment." In contrast, the court held that there are dif-

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"Separate but equal" is the well known doctrine that was first stated in *Plessy v. Ferguson*, 163 U.S. 537 (1895), in which the Court did not see action which separated the races as discriminatory as long as each race received equal benefits. Not only did the separation in fact connote inferiority of the minority, but equality of facilities never really was required. Consequently, the phrase "separate but equal" has become synonymous with discrimination.

\[532\text{ F.2d at }882.\]

\[id. at 889 (Gibbons, J., dissenting).\]

\[532\text{ F.2d at }886.\]
ferences between men and women which would make separate treatment rational and therefore allowable. 96

Vorchheimer has served as a perfect foil for those who oppose sex-segregated education. It is filled with sexist assumptions and statements. Judge Gibbons' paraphrase of Plessy v. Ferguson makes the very idea of single-sex education look discriminatory. Commentators following Gibbons' lead have also consistently invoked the Plessy analogy, 98 noting that the Supreme Court in overturning Plessy in Brown v. Board of Education 99 held that racially segregated education is inherently unequal. I shall argue later that it does not follow that one must conclude that sex-segregated education is also inherently infirm under the Constitution. Only by examining who, if anyone, is actually burdened and whether legitimate educational objectives are furthered can the issue be resolved. The point to be emphasized here is that the Supreme Court did not reject the lower court's finding that the sex-segregated education practiced in Philadelphia was constitutional. Nor when it finally chose to speak directly on the subject did it embrace the position of the bulk of commentary that followed Vorchheimer.

2. Mississippi University for Women v. Hogan

Mississippi University for Women v. Hogan 100 does not overrule the broad principle of Vorchheimer that it is not constitutionally objectionable for a state to provide sex-segregated education. It is not even clear that it requires a heavier burden of justification than the court of appeals insisted upon in situations where no disparate treatment between the sexes was established. There is strong reason to believe, however, that the Supreme Court would not so readily accept the characterization of the Philadelphia system as equal and would therefore find that specific arrangement to be impermissible. 101 Hogan may also establish intermediate scrutiny as the standard of review for all gender discrimination.

In 1979, Joe Hogan, a registered nurse who desired to obtain a baccalaureate degree, sought admission to the Mississippi University for Women

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96 Id.
97 163 U.S. 537 (1896).
100 102 S. Ct. 3331 (1982).
101 A Pennsylvania court has in fact just ordered the admission of girls to Central High School. N.Y. Times, Sept. 9, 1983 at A8. The case may never reach the Supreme Court. The city has yet to decide whether to appeal. Beyond that, it may be found to rest on adequate state ground. N.Y. Times, Sept. 13, 1983 at A14.
School of Nursing's baccalaureate program. He was refused solely because that institution was restricted to female students, although he was told that he could audit classes at the school. Asserting that the state had denied him the equal protection of the laws in violation of the fourteenth amendment, Hogan filed an action in the United States District Court for the Northern District of Mississippi asking for injunctive and declaratory relief and also compensatory damages. The district court sided with the state; the court of appeals reversed, and the Supreme Court affirmed, 5-4. The holding itself was a very narrow one; the women-only admissions policy of Mississippi University for Women School of Nursing was held to violate the equal protection clause of the fourteenth amendment. Not only did the Court avoid the question of single-sex education in general, but it left the University's other programs in place. In her opening and closing statements and in a footnote, Justice O'Connor, writing for the Court, emphasized the limited nature of the decision. "This case presents the narrow issue of whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the equal protection clause of the fourteenth amendment. The holding applies "only to Hogan's individual claim for relief." The circumstances are also distinguishable from those in Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1979), aff'd, 401 U.S. 951 (1971). (South Carolina not in violation of equal protection by establishment of single-sex schools). In contrast to South Carolina, Mississippi did not provide Hogan with the opportunity to attend an all male institution, and the system as a whole allocated fewer places in nursing school to males."

This case is distinguishable from the earlier cases. That Hogan suffered an injury is clear—if the women-only policy of MUW were approved, he would be forced either to give up his job or give up his goal of obtaining the baccalaureate degree. Unlike Susan Vorchheimer, Hogan could not obtain his education at even an arguably equivalent school within or near the city in which he worked. The Court left open the question of how it would rule if there were "separate but equal" schools. Hogan does not therefore even overrule the policy established in Vorchheimer. There is another feature of this case, far weightier, that makes it difficult to extend it to other single-sex educational situations. The state contended that the single-sex environment maintained at Mississippi University for Women benefited women and was designed to compensate them for past discrimination. This was a position it found hard to defend. The statement of purpose set forth in the enabling legislation establishing the school suggests not only that compensation was not among the state's goals when it began the program, but that its purpose was highly discriminatory toward women. It did not provide, for the most part, opportunities for education equal to that of men but rather offered women

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102 Mississippi Univ. for Women v. Hogan, 646 F.2d 1116 (5th Cir. 1981).
103a 102 S. Ct. at 3334.
103 Id. at 3335 n.7.
104 The circumstances are also distinguishable from those in Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1979), aff'd, 401 U.S. 951 (1971). (South Carolina not in violation of equal protection by establishment of single-sex schools). In contrast to South Carolina, Mississippi did not provide Hogan with the opportunity to attend an all male institution, and the system as a whole allocated fewer places in nursing school to males.
SINGLE-SEX EDUCATION

education in areas traditionally considered to be appropriate to their gender. The state's case was reduced to the argument that many educational experts support single-sex schools as beneficial to women. However, the fact that some single-sex schools might compensate women for past discrimination does not mean that all do, and MUW's case was particularly weak. Women have not been denied opportunities in nursing, a traditionally female occupation. Not only is the case for compensatory relief nonexistent, but the evidence suggested that MUW's policy harmed women by reinforcing traditional job segregation. As the Court pointed out, "MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." Furthermore, evidence also suggested that excluding males from job categories depresses wages. In short, the Court might well have invalidated the sex-restrictive policy as unjustifiably burdensome for women. No case was made that the state had an interest in such a burden.

There are two aspects of the decision that suggest that its implications might be broader than the Court admitted: (1) the standard of review invoked in the context of a classification that the Court characterized as burdensome to males; and (2) some of the reasoning employed by the Court in its discussion of single-sex education.

In Hogan, the Court invoked intermediate scrutiny in its most stringent form. According to Justice O'Connor, discrimination on the basis of gender, whether directed against males or females, is impermissible unless the state can prove that it "at least...serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" As the earlier discussion indicates, the state did not come close to meeting the requisite burden of proof. In fact, the record discloses a situation so clearly burdensome toward women that the Court could easily have avoided passing on the question of appropriate standards when women are not injured. Does Hogan mean that all restrictive admissions policies require intermediate scrutiny? If it does, does it follow that such policies will fail to meet the required standard?

In the context of sex discrimination, one has to be very careful in attributing authority to announced standards of the Court even when the standard seems to command a majority. Justice O'Connor stated that "[o]ur decisions...establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." Hogan was cer-

105 Id. at 3339.
106 Id. at 3339 n.5.
107 Id. at 3339 (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)).
tainly not the first time the Court invoked these principles or claimed that they represented the agreed upon state of the law.\textsuperscript{109} There is historical evidence, however, which undermines the Court's assertion.

It is generally accepted that the Court abandoned the deferential review it had traditionally given to gender-based classifications in \textit{Reed v. Reed}.\textsuperscript{111} Although a majority of the justices never agreed that sex was a suspect classification, there appeared to be a clear movement in that direction. From 1971 until 1981, the Court did not uphold in a full opinion any statute which employed a gender classification if that statute worked to disadvantage women. However, the Court \textit{did} uphold a number of gender classifications nonburdensome to women,\textsuperscript{112} even though introduction of intermediate scrutiny in \textit{Craig v. Boren},\textsuperscript{113} a case in which males were disadvantaged, left the impression that henceforth all gender classifications would be disfavored. There were of course, instances in which classifications injurious to males were invalidated and intermediate scrutiny applied.\textsuperscript{114} The observation that the Court has implicitly invoked a stricter standard of review when women are burdened compared to when they are not has been discussed in detail in a prior article.\textsuperscript{115} As also noted there, two decisions in 1981, \textit{Michael M. v. Superior Court}\textsuperscript{116} and \textit{Rostker v. Goldberg}\textsuperscript{117} upheld gender classifications harmful to women on analyses that did not even approximate the type of scrutiny that Justice O'Connor claims is the norm.

Justice O'Connor's arrival on the Court may provide more solid and consistent support for the use of intermediate scrutiny, but it would be


\textsuperscript{110} \textit{404 U.S. 71} (1971).

\textsuperscript{111} See \textit{Parham v. Hughes}, 441 U.S. 347 (1979) (upheld a statute which denied unwed fathers the right of recovery for the wrongful death of a child while granting unwed mothers the same right); \textit{Lalli v. Lalli}, 439 U.S. 259 (1978) (permitted distinction between unwed mothers and unwed fathers affecting inheritance rights of illegitimate children); \textit{Quilloin v. Walcott}, 434 U.S. 246 (1978) (upheld statute which permitted an unwed mother to authorize the adoption of an illegitimate child without the father's consent unless he had legitimated the child); \textit{Fiallo v. Bell}, 430 U.S. 787 (1977) (preference accorded relationship between mothers and children in immigration law upheld).


\textsuperscript{113} In addition to \textit{Craig v. Boren}, gender classifications in which males were disfavored were voided in \textit{Caban v. Mohammad}, 441 U.S. 380 (1979) and \textit{Orr v. Orr}, 440 U.S. 268 (1979). Only in \textit{Caban} is it clear that males are the only ones disadvantaged and that the most exacting level of intermediate scrutiny was used. Even in that case, however, there is some ambiguity whether the trigger for close review was the gender classification or the fundamental interest involved (the right to a relationship with one's children). It is hard to be sure, because, as already noted, the Court did not apply the same exacting standard or consider gender classifications objectionable in other situations in which men were harmed. The classification in \textit{Orr} involved a hidden cost for women: the reinforcement of roles within the family.

\textsuperscript{114} \textit{Dubnoff}, supra note 80.

\textsuperscript{115} \textit{459 U.S. 46} (1981).

\textsuperscript{116} \textit{453 U.S. 37} (1981).
premature to predict that it assures a majority. The simple fact is that only Justices Brennan, Marshall, and White have consistently adhered to this standard. The addition of Justice O'Connor would still fall short of a stable majority. Justice Stevens, who represented the fifth vote in Hogan, agrees with the proposition that the scrutiny applied to gender classifications should be the same whether men or women are disadvantaged. However, in the past he has expressed the view that gender classifications are allowable as long as they are the result of a conscious legislative choice and reflect real differences between males and females. This is a step below the requirement of an "exceedingly persuasive" justification. Beyond that, it is unclear whether any gender classification would trigger intermediate scrutiny or only a classification that harms a particular group.

Even if the heightened scrutiny invoked in Hogan survives, it does not follow, Justice Powell notwithstanding, that public education must be coeducational. If legitimate and sufficiently important educational objectives are furthered, sex-segregated education might well meet the burden of proof required under intermediate scrutiny. According to the majority, even a discriminatory gender classification is permissible if its purpose and effect is to redress past burdens: "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." It may therefore be possible to justify the continued existence of at least some private women's colleges. Whether or not similar public schools exist remains to be seen, but even if they do not, it is undisputed that historically women have not been offered educational opportunities equal to that of men. As the Court itself points out, "women's colleges were founded to provide some form of


109 Justice Stevens, dissenting in Caban v. Mohammad, 441 U.S. 380 (1979) wrote, If we assume, as we surely must, that characteristics possessed by all members of one class and by no members of the other class justify some disparate treatment of mothers and fathers of children born out of wedlock, the mere fact that the statute draws a “gender-based distinction”... should not in my opinion, give rise to any presumption that the impartiality principle embodied in the Equal Protection Clause has been violated. Id. at 409-10.

110 For a somewhat different assessment of the possibility of a stable alignment in favor of intermediate scrutiny, see Comment, Gender Discrimination: Males' Fourteenth Amendment Right to Admission to Female Nursing Program, 6 Hamline L. Rev. 145 (1983).

111 102 S. Ct. at 3338 (1983).
higher education for the academically disenfranchised." The evidence indicates that MUW was neither founded as an institution designed to compensate women for past discrimination, nor did it evolve into one. Its mission was to educate women in a traditional woman's career. Yet other women's schools play very different roles. If the relevant question is whether a school enhances or curtails equality, then each school must be evaluated on the basis of empirical evidence making a blanket rule inappropriate.

One comment made in Hogan gives pause. Justice O'Connor suggests that even a demonstration of past discrimination and current benefit may not be sufficient to justify a gender specific policy. To be constitutionally unobjectionable, it must have been consciously undertaken:

Even were we to assume that discrimination against women affects their opportunity to obtain an education or to obtain leadership roles in nursing, the challenged policy nonetheless would be invalid, for the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination.

If the Court intends not only to require that the single-sex policy be beneficial, but that it be consciously undertaken, many single-sex schools may be unable to continue. Missions evolve, and while many women's schools were designed to provide women with advantages that could not be obtained elsewhere, others may have come to do so only more recently.

In sum, with the statutory support and the constitutionality of even public single-sex education still unresolved, there is certainly no basis for the IRS at present to deny tax exemptions to private schools that maintain such policies. I turn now to the question of whether in the future the Court should disallow state support of women's schools, either directly or through tax benefits. It is my position that such a holding would at this time in history adversely affect equality between men and women.

III. SINGLE-SEX EDUCATION: BURDEN OR BENEFIT?

This section looks more closely at the case against single-sex education for women, and examines the premises underlying this case. It is concluded that opponents of single-sex education have not demonstrated that women have been disadvantaged when they are allowed to maintain institutions restricted to their own gender. It is further concluded that there is sufficient reason to allow the continuation of some single-sex schools as an educational option whether or not the reintroduced Equal Rights Amendment is eventually ratified.

122 Id. at 3338 n.13.
123 Id. at 3339 n.16. See, Note The End of an Era for Single-Sex Schools? Mississippi University for Women v. Hogan, 15 CONN. L. REV. 353.
The argument against single-sex education generally begins with a discussion of the parallels in the position of blacks and women. Women, like blacks, have long been subjected to social and legal discrimination; like blacks, they remain politically disadvantaged; like blacks, individuals are classified on the basis of a characteristic over which they have no control and which is for the most part inescapable; and like blacks, they have been traditionally viewed as inferior. The parallels persist when one examines educational policy. Just as separate educational facilities for blacks and whites were prompted by prejudice and the desire to keep blacks in their inferior position, separate educational facilities for women were similarly motivated. As Cynthia Lewis asserted:

Sex segregated education, like racial segregation, did not represent a genuine attempt to guarantee equality. Just as improvements in the legal status of blacks prompted the development of separate but equal doctrine in the field of race, an improvement in the status of women, i.e., the recognition by some that women could and should be educated, prompted the development of separate schools for women. Women could no longer be denied an education but they could be denied coeducational learning. It is highly unlikely that females would have been educated separately from males had there not been prejudice against and stereotypical notions about women.

Further, just as there has never been symmetry of treatment for blacks, facilities for women have not been equal to those of men. Women's institutions have been inferior even when only tangible facilities are measured. In a 1973 study, Alan Sorkin compared women's colleges to coeducational institutions with respect to a number of variables associated with the quality of an institution. These factors included percentage of the faculty with a Ph.D., number of library books per student, student-faculty ratio, faculty salaries and expenditures per student. Distinctions were made between public and private institutions and among categories based on selectivity of the student body. It was found that the women's colleges had fewer resources than the men's colleges and the coeducational institutions. It is further argued that even if the facilities are not obviously inferior but merely different, single-sex education is against women's interests because it allows for evasions.


Comment, supra note 6, at 559; see also Shaman, supra note 124, at 613.


Sorkin, Women's Colleges and Universities: A Qualitative Assessment, COLL. AND U. 92 (Winter, 1973); See also Harris, The Second Sex in Academe, 56 A.A.U.P. BULL. 283, 293-94 (1970); Shaman, supra note 124, at 614.
Since schools are not identical, some judgment must be made as to the importance of specific differences. Judges’ sensitivity to sex discrimination will affect their assessments, and there is a risk that insensitive or biased judges will, if given discretion, perpetuate situations which disadvantage women. To illustrate the danger, opponents of single-sex education cite Vorchheimer. No real effort was made here to weigh the importance of intangible factors. In addition, the admittedly unequal science facilities were not viewed as sufficiently important to produce unequal schools.

Thus, the argument goes, blacks and women have faced strikingly similar conditions. It is therefore likely that if, as the Supreme Court found in Brown v. Board of Education, racial segregation adversely affects the self-image of black children, sex segregation will have the same effects on females. Separation in each case conveys a stigma and perpetuates stereotypes. The argument extends beyond the condemnation of forced separation of a minority by the majority. Opponents of single-sex education usually take the position that all separation is bad, whether or not voluntary, and that all gender classifications should be declared unlawful. The reasoning is that gender classifications implicitly reinforce stereotypes about women, and that such stereotypes inhibit the achievement of equality. The argument is akin to the color-blind branch of the fourteenth amendment equal protection theory. It is not necessary to oppose all gender classifications in order to conclude that single-sex education is unconstitutional. Even if it is conceded that some gender classifications are to be permitted, these must be subject to at least intermediate scrutiny which would require a demonstration that the classifications are substantially related to an important government interest. If single-sex education is subjected to such scrutiny, it will fail since there is no such relationship.

Some opponents of single-sex education thus are led to a need to discredit the proposition that women may benefit from attending single-sex schools, since demonstration of such a benefit might lead to a legitimate societal, and hence governmental, interest in preserving this type of educational option. A prime target has been a 1973 study by Elizabeth Tidball. Tidball examined the educational backgrounds of successful women by selecting at random 1,500 women in equal numbers from three editions of Who's Who of

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128 The fear that the separate but equal doctrine sometimes allows judges to escape serious consideration of allegations of deprivation may have been realized in the Vorchheimer case itself. Both the District Court and the Court of Appeals glossed over the acknowledged fact that the science facilities at Central High School are superior to those at Girls’ High, and therefore are not absolutely equal.

Comment, supra note 6, at 610 n.82.


130 See Shaman, supra note 124, at 613; Note, supra note 124, at 163; Comment, supra note 6, at 621, 622 n.82.

131 Comment, supra note 6, at 621, 622 n.82.
American Women. She found that twice as many of these women had attended women's colleges as had gone to coeducational institutions. On the basis of this data, she concluded that single-sex education promoted achievement, both by eliminating male distractions and also by providing role models for women. This study has been faulted on many grounds. The women who attended women's colleges may have started out more talented than the women who attended coeducational institutions. This was in fact likely, since until recently often the only colleges open to women were single-sex schools. Second, Tidball did not control for socio-economic background, and yet the correlation between socio-economic background and career success may be significantly higher than the influence of the particular college attended. It is certainly likely that the “more prestigious, and expensive women's colleges are more likely to attract students of high socio-economic status and strong career orientations.” A third criticism is that Who's Who in American Women does not measure success in American society but only success relative to other women. The role model hypothesis is also flawed, since men dominate women's institutions. This is particularly true at the higher ranks. Statistics for the 1974-75 academic year reveal that of the seven “sister” colleges, only Barnard and Wellesley had faculties in which women made up more than half of the total.

Finally, opponents of single-sex education point out that the real world is populated by both sexes, and women will not be equal until they learn to operate effectively within it. This is a lesson they are more likely to learn in a coeducational institution. Much of the material in support of this position comes from anecdotal statements of women who felt their own experiences in women's colleges had been unrealistic.

122 Tidball, Perspectives on Academic Women and Affirmative Action, 54 EDUC. REC. 130 (1973) [hereinafter cited as Tidball].
123 Comment, supra note 6, at 638-39.
124 Id. See also Baker, supra note 6, at 156.
125 Id.
126 Bryn Mawr, Barnard, Smith, Mount Holyoke, Wellesley, Radcliffe and Vassar.
127 Comment, supra note 6, at 640.
128 Id. See also Shaman, supra, note 124, at 621-22.
129 Baker, supra note 6. The thrust of Baker's book is that women's colleges have failed because they have reflected society rather than changed it, and therefore have not done nearly enough for women's equality. For example, Baker remarks at 145, “Of the forty-nine presidents (or deans in the early days of Barnard and Radcliffe), the ratio of men and women has not been so lopsided as might be expected in institutions committed to the education of women: twenty-one men to twenty-eight women.” However this ratio is significantly different than that for coeducational institutions. Data from 1981 indicates that “67% of all women's college presidents are women, compared to 8% nationally.” Profile II, supra note 1. Baker also quotes women who felt the colleges failed them. However, one can certainly find many women whose experiences were positive. See, e.g., Stimpson, Women at Bryn Mawr, 6 CHANGE 25 (1974). It is of course difficult to draw any meaningful conclusions from anecdotal data.
The arguments against single-sex education as summarized above are far from conclusive, and may be questioned on many grounds. Before proceeding, it is essential to restate what is at issue. I have no quarrel with the view that forced separation of women, a societal minority group despite their numbers, violates the fourteenth amendment equal protection clause even as it is now interpreted, and would surely violate the Equal Rights Amendment were it to be ratified. My concern is with the question of whether women should be allowed to attend single-sex institutions voluntarily, as one educational option. With the parameters established, I shall turn to an evaluation of the arguments previously presented.

Drawing a parallel between women and blacks is appropriate if the purpose is to indicate that a classification which could be used to injure a group should be strictly scrutinized. It may not be appropriate when determining whether a particular action is benign because the situation for blacks and women, while similar, is not identical. Even Gunnar Myrdal, who pointed out many parallels between women and blacks, noted that “[w]oman was elevated as an ornament and looked upon with pride, while the Negro slave became increasingly a chattel and a ward.”

Women live in close association with men and are evenly distributed in all social classes. In short, they have enjoyed a higher status than blacks. Further, the intimidation which they have faced is quite different from that encountered by blacks. When blacks have attempted to exercise rights, they have often been physically and economically abused. For females, fear of rejection has a greater reality than fear of physical violence. Thus, the very intangible factors that may result in damage from forced racial segregation may lead to the opposite result in sex segregation. For example, assertiveness, independence, and competitiveness have been traditionally viewed as unfeminine, and there is considerable evidence to suggest that many women respond either with anxiety or with appropriately conforming behavior which negatively affects achievement. Margaret Mead made the point clearly when she stated: “Each step forward as a successful American regardless of sex means a step back as a woman.” There is little to suggest that women’s liberation has changed this. In contrast, blacks

140 G. MYRDAL, AN AMERICAN DILEMMA at 1073 (1944).
142 See Horner, Toward an Understanding of Achievement-Related Conflicts in Women, 28 J. SOCIAL ISSUES 157 (1972) [hereinafter cited as Horner].
143 Id.
144 M. MEAD, MALE AND FEMALE (1949), cited in Horner, supra note 142.
145 Horner reports:
A review of the results of the several studies carried on over the past few years ... substantiates the idea that despite the emphasis on a new freedom for women, particularly since the mid-sixties, negative attitudes expressed toward and about successful women have remained high and perhaps even increased and intensified among both male and female subjects.
Horner, supra note 142, at 159.
need not fear success. With respect to education specifically, it should be remembered that the original Brown decision did not preclude voluntary segregation if sought by blacks. Fourteen years later, the Court held that voluntary separation was too suspect to be tenable since violence, psychological and physical, precluded blacks from exercising real choice. As noted above, however, women are not in the same situation.

To question the analogy between women and blacks is not to prove that single-sex education is desirable. It does suggest that there are differences in the factors that affect black and female school performance, and one should not automatically draw conclusions about one group from experiences with the other. As I have argued elsewhere, moreover, the constitutional standard for a gender classification which does not disadvantage women and which does not allocate a scarce resource should be strict rationality rather than a compelling or important state interest, whether under the fourteenth amendment or the proposed Equal Rights Amendment. The central issue must therefore be the actual impact of single-sex education upon the involved students.

The consequences of any educational environment are not easy to measure. It is difficult even to define the goals of schools. The promotion of achievement in society is often used as a yardstick. Several studies, notably those of Tidball, Astin, Kistiakowsky, Oates and Williamson, and Brown have attempted to demonstrate the linkage between educational environment and achievement or career choice. Yet, promotion of career achievement, though certainly important, is actually only one of several possible objectives of an educational system. If is difficult, however, to apply educational or psychological research studies in other areas directly to the question of whether single-sex education harms or benefits women students. Even when career achievement is used as an outcome measure, educators have difficulty agreeing how best to define and measure this parameter, and how to correlate results with different educational variables. Studies which include convincing controls are often very difficult to design. For example, a finding that women who attend single-sex institutions are more likely to pursue certain careers may indicate that the educational environment influences

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146 Dubnoff, supra note 20.
148 A. Astin, Four Critical Years (1977) [hereinafter cited as Astin].
149 Tidball & Kistiakowsky, Baccalaureate Origins of American Scientists and Scholars, 193 Science 646 (1976) [hereinafter cited as Tidball & Kistiakowsky].
that outcome. An equally plausible explanation might be that the women who select those institutions have such career interests and talents prior to their choice of schools.

Even with all the appropriate caveats, there is evidence which suggests that single-sex education is not harmful to women, but may even be significantly beneficial. The results of studies which have directly examined the impact of educational environment have indicated positive correlations between attendance at a women's college, and both the achievement and the selection of nontraditional careers. The 1973 Tidball study provided preliminary data to this effect, even if it did not prove that single-sex institutions generated the observed effects. The criticism that Tidball used the wrong yardstick for achievement because she did not compare women with men is invalid. It is not relevant to the matter at hand that achievement rates between the sexes might be different in an unequal society. We are interested instead in determining which women are likely to be successful. Tidball also found that women's colleges had higher ratios of female faculties than coeducational colleges, and suggested that the differences in achievement of graduates reflected the influence of female role models. This hypothesis remains unproved, but the basic correlation between achievement and single-sex institutions is independent of this hypothesis.

More recent studies have supported the above observations. A 1976 study done by Tidball and Vera Kistiakowsky compared various baccalaureate institutions with respect to the number and percentage of graduates who went on to receive doctorates. The data for this study was obtained from the Doctorate Records File, which has the advantage that it is not biased by criteria of selection that may exclude some recipients. The sample of institutions finally selected contained 137 colleges and universities. These were stratified according to various criteria and ranked according to the number and percentage of doctoral recipients produced. “Twelve institutions, eight that admitted women only and four universities, appear in the top 25 with respect both to the number and to the percentage of their women graduates who subsequently obtained doctorates.” When it is recognized that the coeducational colleges are approximately five times as numerous as women's colleges the reported figures show a strong correlation between attendance at a women's college and receipt of a doctoral degree. The study also compared the productivity of different institutions within fields. The data obtained confirmed the findings of earlier researchers that women who attend single-sex institutions are more likely to study and pursue a

153 Tidball, supra note 132.
154 Tidball & Kistiakowsky, supra note 150 at 651.
155 Id. at 649.
156 Id.
career in nontraditional fields than are those who attend coeducational colleges. "Nine of the 24 institutions with the highest percentages of women who subsequently received doctorates in the physical sciences and engineering are women's colleges." A still more recent article by Tidball specifically addressed some of the objections raised to her earlier assertions. As already noted, some critics had argued that the positive correlations between achievement and attendance at a women's college had little significance since women have not been able to attend coeducational institutions in significant numbers. The data indicate, however, that since 1910, women had ample opportunity to attend coeducational institutions, and in fact, many more of them graduated from such institutions than from women's colleges. In 1918, 11,000 women graduated from coeducational institutions compared with 4,500 from women's colleges; in 1932, the figures were 36,000 to 7,300. Even more interesting is the comparison in productivity of schools of equal selectivity. The data indicated that "the highly selective women's colleges were twice as productive of achievers as were the highly selective coeducational colleges." Similarly, all other women's colleges were twice as likely to have produced achievers as were all other coeducational colleges." These differences could not be explained by differences in academic expenditures.

In 1966, the American Council on Education initiated a long term study, the Cooperative Institutional Research Program (CIRP), to examine questions of college impact. Some of the data developed in this study have direct relevance to the question of the effects of single-sex education. Two analyses drawn from this data are of particular interest. The first is Alexander Astin's evaluation based on the first ten years of the study. Astin traced attitudinal changes within the four-year college experience, examining the effects of a number of variables. His findings were that attendance at a women's college positively affects the development of self-esteem, high aspirations and leadership potential. Such effects are not only positive in themselves but might account for later differences in achievement reported in other studies.

Relying on the same data base as Astin, Marsha Brown used multivariate regression analysis to assess the affects on career choices of a number of potential factors. The variables examined, in addition to college environment, included parental income, high school achievement, religion, marital

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103 Traditional fields for women have been education and the humanities.
104 Tidball & Kistiakowsky, supra note 150.
105 SIGNS, supra note 148.
106 Id. at 507.
107 Id. at 512.
108 ASTIN, supra note 149.
109 Id. at 232-35, 246.
110 Brown, supra note 152.
status, self-esteem, attitudes, and previous career plans, among others. The results indicated positive influences of women’s colleges in certain time periods. Selective women’s colleges positively affected within four and five years of enrollment, the career plan of women who entered college with BA/MA plans. Selective and unselective sectarian women’s colleges had a positive influence on application to graduate school and “unselective sectarian women’s colleges had a positive effect on enrollment in graduate school.” There was no indication from the data that women’s colleges were detrimental to achievement.

More recent studies also bear out the correlation between educational background and career choice. Marvin Bressler and Peter Wendell studied the differences in career choice of men and women attending comparable single-sex and coeducational institutions on career ambition and achievement. They reported that both male and female white, middle-class, academically capable individuals were more likely to follow non-sex stereotyped occupational choices if they attended single-sex schools. Linda Lenz found a positive correlation between attendance at single-sex schools and career success.

There has also been research which indicates a correlation between single-sex education and choice of subject. Girls who attend single-sex secondary schools are more likely to choose science or mathematics than are girls who attend coeducational institutions. Research by M.B. Ormerod illustrates the point. His examination of the subject preferences and subject choices of 1,204 pupils in nineteen secondary schools in England and Wales concludes that subject choices in coeducational schools were more affected by sex stereotypes than were choices in single-sex schools.

Less direct, but nonetheless relevant, are some of the theories of motivation developed by psychologists. These studies include work on sex stereotypes, women’s conflicts stemming from achievement, and linkage of self-esteem and success. It has long been recognized that certain types of behavior are identified with one or the other of the sexes. Educators have observed that boys and girls behave differently as they progress through school. As boys get older their motivation increases; for girls maturation has

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164 Id. at 6.
165 Bressler & Wendell, The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations, 51 J. OF HIGHER EDUC. 50 (1980).
166 Lentz, An Analysis of the Effects of Four Years of Attendance at a Women’s or Coeducational College on Women’s Career Salience. Paper presented at the annual meeting of the American Educational Research Association (Apr. 10, 1980).
167 Ormerod, Subject Preference and Choice in Co-educational and Single-Sex Secondary Schools, 45 BRIT. J. OF EDUC. PSYCHOLOGY 257 (1975). It certainly could be argued that this study is not relevant since British and American experiences differ. This is a debatable point, but in my view the societies are not fundamentally different, and the implications of the results of the study are still meaningful.
the opposite effect. Some psychologists have looked at sex stereotypes for an explanation. Competitiveness, aggression, independence and intellectual leadership have been traditionally viewed as masculine, the opposite characteristics as feminine. Drawing from what is known about the process by which boys and girls develop a perception about what behavior is acceptable, it is not unreasonable to assume these perceptions will have behavioral effects later on. A strong determinant of sex role identity is that sex-appropriate behavior is rewarded and sex-inappropriate behavior is punished. Early in life, it is generally the parents who provide the cues; later, peers may serve the same function. Thus, if it is true that competence and intellectual leadership are viewed as unfeminine, women who exhibit these tendencies may become anxious, or may suppress their career motivations. The research of Matina Horner is particularly interesting in this respect. Horner posited the existence of widespread avoidance of success, and noted that “the presence of a motive to avoid success ... implies that the expression of the achievement-directed tendencies of most otherwise positively motivated young women is inhibited by the arousal of a thwarting disposition to be anxious about the negative consequences they expect will follow the desired success.” This fear was generated by perceived conflicts between the goals of feminity and achievement. The views of male peers were found to have clear impact on female behavior. As had been hypothesized, competitive situations aroused the fear with the result that “young women, especially those high in the motive to avoid success, would be least likely to develop their interests and explore their intellectual potential when competing against others, especially against men.” Horner also indicated that there is evidence that the women’s movement has not succeeded in eliminating stereotypical thinking. In fact, “despite the emphasis on a new freedom for women, particularly since the mid-Sixties, negative attitudes expressed toward and about successful women have remained high and perhaps even increased and intensified among both male and female subjects.” Thus it is unlikely that the concern for equality has weakened the existence of the motive to avoid success.

11 Horner, supra note 142.
12 Id. at 159.
13 Id. at 165. The thesis that women are ambivalent about success and that this ambivalence affects their behavior has been widely researched. While there has been considerable support for Horner’s findings, there has also been criticism. See Anderson, Motive to Avoid Success: A Profile, 4 SEX ROLES 239 (1978), for a discussion of some of the literature. See also Condry and Dyer Behavioral and Fantasy Measures of Fear of Success in Children, 48 CHILD DEV. 1417 (1977) for support for the thesis that girls are affected by a fear of success and that this fear increases as they get older.
14 Horner, supra note 142, at 159.
Other research confirms the correlation between fear of success and performance in mixed sex competition.\textsuperscript{175} Some researchers have questioned Horner's psychological construct. According to Condry and Dyer, "Horner's concept seems not to represent a fear of success but rather a fear of the negative consequences incumbent upon deviating from traditional sex-role standards in \textit{certain situations}. For women, the negative consequence that is probably feared most is male punishment."\textsuperscript{176} The behavioral consequences are the same whether one is talking about a "fear of success," as Horner postulates, or a "fear of social rejection," as Condry and Dyer have described. Moreover, the fact that there is a basis to female fear of rejection that "they are simply demonstrating a clear perception of reality,"\textsuperscript{177} reinforces the importance to be derived from a supportive environment.

The fact that some women have difficulties when placed in competitive situations does not automatically speak for an educational system which reduces this competition. Indeed, as noted earlier, some opponents of single-sex education argue that women will ultimately benefit from forced exposure to the "real world."\textsuperscript{178} However, if one accepts the proposition that adequate self-esteem is a precondition of happiness, it is not unreasonable to value a temporary environment for some young women which might promote a more positive self-image at a very vulnerable time, and which might thereby better prepare them to face competitive realities later. The point was well stated by Patricia McCarty:

Women who desire a rigorous experience and who are capable of taking the pressure, can now attend Harvard and Yale, especially when these schools are under pressure to enroll more women. But many college women need and desire a different kind of experience . . . in order to counteract the negative conditioning of 18 years, young women urgently need four years of dedication to their intellectual and personal development in an atmosphere of positive reinforcement and respect.\textsuperscript{179}

IV. ERA AND THE STATUS OF GENDER CLASSIFICATIONS: A REASSESSMENT

The Equal Rights Amendment, if ratified, would guarantee "equality of rights under the law" to both sexes. Its broad purpose is to promote equality between men and women in society. The same goal underlies heightened


\textsuperscript{176} Condry & Dyer, \textit{supra} note 175, at 75.

\textsuperscript{177} \textit{Id.}

\textsuperscript{178} \textit{See supra} note 138 and accompanying text.

\textsuperscript{179} McCarty, \textit{A New Perspective on Women's Colleges}, NATIONAL ASSOC. OF WOMEN'S DEANS AND COUNSELORS (Winter 1977).
scrutiny of gender classifications under the equal protection clause of the fourteenth amendment. As the discussion of single-sex education demonstrates, there may well be a conflict between a blanket prohibition against gender classifications and the achievement of gender equality. Consequently, before reading ERA as making all such classifications impermissible, we should examine whether such a rule is the best way to cure the inequalities to which ERA is directed. If it is not, a blanket rule should be abandoned in favor of a more workable approach.

There is nothing in the language of the Equal Rights Amendment that requires barring all gender classifications. To restate, what is required is equality of rights. How this is to be achieved is open to question, but we are not without some experience as to how to proceed. It is a situation quite similar to the one posed by racial classifications under the equal protection clause and it is, therefore, appropriate to draw from the experience of the constitutional treatment of racial classifications under that constitutional provision. There is a school of thought which holds that the effect of the fourteenth amendment is to create a "color-blind" constitution. The extreme statement of this position is that racial classifications should simply be impermissible. This view has substantial support in the legal commentary and even more in public opinion. In practice, this means that all racial classifications should automatically trigger strict scrutiny. Justice Rehnquist adheres to this view. Justice Powell seems to come close. I shall begin by examining the underpinnings of this position.

One argument offered in support of a color-blind interpretation is that this principle is neutral and limits court activism. There is no way to establish an objective principle to assess harm. In arguing against preferential policies, Richard Posner writes,

The exception is inadmissible, because it requires the court not only to consider whether there is discrimination but to decide whether the discrimination harms or hurts a particular racial group, and to weigh the competing claims of different racial groups, and the additional inquiries rob the principle of its precision and objectivity.

It is also argued that it is impossible to determine when race may be used in

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182 Justice Powell, in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), argued that all racial classifications should be viewed as suspect, although the application of this rule is somewhat distinct, as discussed in the text.

183 Posner, supra note 180.
a benign fashion. Its use to give preference may in fact stigmatize the group to whom the preference is accorded. Others will consider the special treatment as indicating the inferiority of the involved group. Furthermore, special treatment generates resentment, and may also reinforce stereotypes. Thus, it is contended that the courts lack a way to distinguish between burdens and benefits of a particular classification and hence should not try. 184

Implicit in these arguments is a concern regarding the legitimacy of court intervention to review legislative judgments. Anxiety about the undemocratic character of judicial review fosters the search for clear principles that can justify an exercise of power by the courts, and the color-blind principle seems to provide one. The arguments for a color-blind interpretation are likewise directed toward issues of judicial role and competence. 185 A rule that race is a prohibited classification is obviously clearer than one that requires judgment concerning the classification's impact. This suggests yet another advantage; permissible and impermissible behavior are known in advance. Finally, it is claimed that the color-blind interpretation is fairer. Just as it was in the past inequitable to deny minorities benefits on the basis of race, it is unfair to favor them today.

The same arguments are used to defend the elimination of all references to gender. Particular concern is expressed about the Court's capacity to assess consequences since its past performance indicates that it is even less equipped to judge impact where gender is concerned than where a racial classification is at issue. As Nancy Gertner accurately pointed out recently,

[T]here is the conceptual problem of distinguishing paternalistic classifications which stereotype women from "benign" affirmative action classifications . . . .

The root of the difficulty lies in the fact that discrimination against women has always been ostensibly benign, done in the guise of protecting women, compensating for their physical frailties or making allowance for their special contributions to society. 186

This common rationale may increase the difficulty in determining when a

185 The issue of judicial role stems from the concern that decision-making by appointed life-tenured judges is contrary to the basic tenets of democratic government. The adoption of clear cut principles could minimize potential conflict both by providing a justification for court action and by limiting the injection of judicial preference. The current efforts in that direction owe much to Herbert Wechsler. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959).
gender classification is truly benign and when in fact it works against women's interests.

For the most part, the parallel between racial and gender classifications is apt. There has been widespread de jure discrimination against women that has left them in an inferior position—economically, politically, and socially. In judging whether a gender-blind interpretation of either the Equal Rights Amendment or the equal protection clause is appropriate, we should look more closely at the color-blind interpretation of the fourteenth amendment. The most serious problem with the color-blind approach is that it would leave many of the effects of past discrimination in place. This is particularly apparent when the complex and extensive linkage between past discrimination and current disadvantage is recognized. Negative attitudes toward blacks led to discrimination in employment and housing. Racial discrimination in employment consigned blacks to lower paying jobs. Discrimination is perpetuated even after the opening of employment opportunities by seniority systems based on the "last hired, last fired" principle, and by "subjective promotional criteria, evaluated primarily by white supervisory personnel" who may use "consciously or unconsciously biased decisionmaking." It is not uncommon to recruit employees informally, further advantaging those already employed. As Duncan pointed out, "it is all too common for employers to rely on their white male work force to do word-of-mouth recruitment, thereby effectively excluding minority applicants." Inequalities in employment can also lead to inequalities in housing which perpetuate inequalities in education. How this complex mix of disadvantage can be corrected without affirmative action is unclear.

The Supreme Court has reluctantly come to accept this position. There

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189 Id. at 513.

190 Id. at 518.

was a time when it appeared that no legal distinctions based on race would be allowed. Those who argue for a color-blind interpretation point to a series of decisions from *Korematsu v. United States* through *Loving v. Virginia*, in which the idea of race as a suspect classification was developed. In fact, however, strict scrutiny was the standard only for part of the Court’s history. Since the ratification of the fourteenth amendment, the Court has taken three different approaches to racial classifications. Early case law upheld discriminations we no longer consider constitutional. Cases from the 1940s to the early 1970s adopted the standard of strict scrutiny. While the language in these cases strongly suggests that racial classifications are impermissible, it is essential to note that they all involved classifications which clearly burdened racial minorities. The Court was not asked in these cases to confront the question of whether classifications that might benefit minorities could be acceptable. Likewise, the cases outlawing segregation have also been said to rest on the premise that all racial classifications are impermissible. It is clear, however, that the segregation laws were aimed at disadvantaging blacks. In sum, these cases do not prove that all racial classifications must meet a strict scrutiny standard of review.

More recently, the Court has in other circumstances accepted and sometimes required racial classifications. One line of precedents involves the establishment of race-conscious remedies for past discriminations. In *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court upheld

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192 323 U.S. 214 (1944).
193 388 U.S. 1 (1967).
194 In *Korematsu*, which validated a particularly invidious discrimination against a racial group, Justice Black wrote: “It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that the courts must subject them to the most rigid scrutiny.” 323 U.S. at 216. There are three cases that provide further support for the color-blind proposition: *Bolling v. Sharpe*, 347 U.S. 497 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964); and *Loving v. Virginia*, 388 U.S. 1 (1967). In *Bolling*, the Court, in ruling against school segregation in the District of Columbia said, “Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.” 347 U.S. at 499. That position finds further support in Justice White’s opinion for the Court in *McLaughlin*. He wrote, “This strong policy renders racial classifications constitutionally suspect and subject to the ‘most rigid scrutiny’ and ‘in most cases irrelevant’ to any constitutionally acceptable legislative purpose.” 379 U.S. at 192. Finally, in ending miscegenation laws, the Court wrote, “At the very least, the Equal Protection Clause demands that racial classifications . . . be subject to the ‘most rigid scrutiny’ and if they are ever upheld, they must be shown to be necessary to the accomplishment of some permissible state objective.” 388 U.S. at 11.
195 See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (statutory scheme to prevent interracial marriages held to violate the equal protection and the due process clauses of the fourteenth amendment).
196 See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954) (segregation of Negro school children, even if they are provided equal facilities, imposes upon the student a burden constituting an arbitrary denial of fifth amendment due process rights).
the use of racial criteria in making school assignments to eliminate segregation. There is dicta in the opinion to the effect that even voluntary race-conscious remedies would be allowable. The necessity of race-consciousness in some circumstances was described by Chief Justice Burger in *North Carolina Board of Education v. Swann.* In the course of invalidating a state statute that prohibited the use of race in making school assignments, Chief Justice Burger wrote that a requirement mandating color-blindness "against the background of segregation, would render illusory the promise of *Brown.*" Similarly, the Court has upheld the use of racial criteria to remedy past discriminatory practices in employment. It has also allowed race to be taken into account in the drawing of legislative districts when such action is taken in compliance with the Voting Rights Act of 1965. Most recently, the Court has allowed Congress to fashion remedies for past discrimination that are race-specific, and there is some indication that some race-specific action that is seen as benign will also be allowed in other settings. In sum, most justices today will admit that race-consciousness is at least necessary in order to assess the extent of compliance, and is also acceptable in styling remedies to direct violations. Justice Blackmun stated, "I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary, and is, in truth, only a relic of the past. ... At some time, the United States must and will reach a stage of maturity where action along this line is no longer necessary." In short, the actual experience of the Court in evaluating racial classifications provides compelling evidence that, for the present at least, the elimination of all racial classifications would not serve the goals of racial equality.

199 Chief Justice Burger, in noting that the remedial powers of federal courts were limited to situations in which a constitutional violation had been proven, remarked that the school authorities had greater power to institute race conscious remedies:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole, to do this as an educational policy is within the broad discretionary powers of school authorities.

Id. at 16.


201 Id. at 45-46 (citing *Brown v. Board of Educ.,* 347 U.S. 483 (1954)).


205 Five Justices, Powell, Brennan, Marshall, Blackmun and White, in *Bakke* indicated that some race consciousness in university admissions was allowable. *Bakke,* 438 U.S. at 265.

206 *Swann* was a unanimous decision, and all but Justices Powell, Rehnquist, Stevens and O'Connor participated. Powell indicated some willingness to allow race conscious remedies in *Bakke* and in *Fullilove.*

207 438 U.S. at 404.
Again, the justification for gender-conscious action to equalize opportunities for women parallels those used to support attention to race, for it can certainly be argued that complete gender neutrality will be unlikely to remedy past sex discrimination. Remedial classifications would, therefore, be fully consistent with “equality of rights under the law.” Even some who have claimed that ERA implies gender blindness admit that

[a]uthority to remedy the effects of past discriminations as well as to implement the provisions of the Equal Rights Amendment in available and unquestioned. Thus the courts have power to grant affirmative relief in framing decrees in particular cases. As in racial desegregation cases, such decrees could provide remedies for past denial of equal rights which take into account sex factors and give special treatment to the group discriminated against. Similar remedial measures, on a broader scale, could also be the subject of legislative action. This form of affirmative action may appear, paradoxically to conflict with the absolute nature of the Equal Rights Amendment. But where damage has been done by a violator who acts on the basis of a forbidden characteristic, the enforcing authorities may also be compelled to take the same characteristic into account in order to undo what has been done. This form of relief is a common feature of laws seeking to eliminate discrimination, whether the restriction imposed be absolute or not.207

Some gender-consciousness may advance equality even when not narrowly compensatory. Attention to gender may compensate for past stereotyping that has limited job opportunities for women. It may prevent gender-neutral actions from perpetuating past discrimination. Some gender-specific action may “[increase] women’s access to new social roles.”208 As has been discussed in a prior section, there is evidence that single-sex education may have that effect. While permitting gender distinctions often involves placing the interests of one of the sexes over that of the other, this is not always the case. Again the example of single-sex education is illustrative. Since post-secondary educational facilities do not generally represent a scarce resource, males will probably not suffer a significant injury by being excluded from a relatively small number of schools with females-only admissions policies. Explicit consideration of gender may be clearly neutral in effect. Surely single-sex bathrooms and sleeping areas do not carry the same negative connotations that separate racial facilities do.

To say that the Court has not done well in distinguishing burdensome from nonburdensome classification is not to say that it should not try in the


208 Gertner, supra note 186, at 209.
future. These judgments are no more exacting than other assessments that courts are called upon to make. I have discussed elsewhere several criteria for assessing burden. In brief form, essential characteristics of burdensome classifications include discriminatory intent, restriction of privileges, limitations of rights or responsibilities, imposition of tangible burdens such as economic disadvantages or harsher punishments for wrongdoing, and the imposition of intangible harm in the form of stigma, negative assessments of capabilities, or role stereotyping.

In sum, neither ERA nor the equal protection clause compels the elimination of all gender classifications. Writing just before the first effort at ERA ratification failed, Paul Brest commented, "If it had been adopted, it would obviously have required that gender classifications meet a standard higher than 'rational classification,' but just what the standard would have been and under what circumstances is not clear." What is clear is that a uniformly applied strict scrutiny standard is ill suited to the achievement of the goal of equality between men and women in society.

CONCLUSION

In summary, there is considerable evidence that many women's colleges have exerted a positive influence on equalizing the position of men and women in society. A denial of tax-exempt status would have a devastating effect on such schools. The holding in Bob Jones does not in itself threaten this status. Women's schools could, however, be jeopardized either by a determination by Congress or the Supreme Court that single-sex education is harmful and provides no public benefits, or by a decision by the Court that effectively invalidates all gender classifications by subjecting them to strict scrutiny, whether under the equal protection clause, or under a ratified Equal Rights Amendment. It, therefore, becomes important to remember that empirical data from the social sciences supports the concept that the preservation of some single-sex schools as an educational option ultimately benefits society. Furthermore, the value of preserving this benefit offers by example a persuasive argument in favor of a flexible approach toward gender classifications. ERA is needed to affirm the commitment of this country to gender equality, but this commitment does not require the elimination of possible means of achieving it.

The substantive analysis presented in this Article has some bearing on a

209 When the state places a limitation on the time or place of speech, the Court must assess whether the regulation is reasonable. It has no more obvious criteria to guide it in weighing competing interests in this situation than if it were called upon to assess the impact of a classification in an equal protection claim.

210 Dubnoff, supra note 20, at 387-90.


212 See supra note 27 and accompanying text.
broader question of constitutional interpretation: the place of fixed rules in adjudication. The appeal of proscribing all gender classifications is clear. Ambiguity is limited, judicial discretion is confined, and there is an appearance of fairness. But there are pitfalls in establishing too rigid a standard—most seriously the potential distortion of the underlying objective. A strict prohibition would represent an example of the "absolutist" approach to constitutional adjudication and has all the virtues and defects of this approach, as discussed by Craig R. Ducat.213 The search for some balance between standardless and mechanical adjudication cuts across doctrinal areas and is at the core of much constitutional analysis. Without some guiding principle, it is hard to see how the Court can avoid either total abdication or significant intervention into the legislative process. Yet with too narrow a standard, outcomes may be produced which are inconsistent with desired objectives. The broad question then is when, if ever, is it better for the Court to proceed on a case-by-case basis rather than to establish general rules applicable beyond the immediate case.

The prohibition of specific classifications, whether they be racial, religious, gender-specific, or age-specific, comes closer to a rule of decision than a statement of broad principle.214 The Constitution contains some very specific sections, such as the minimum age requirement for presidents and the number of senators allowed each state. In the main, however, the Constitution is broadly worded and establishes norms, the specifics of which are left open. In the words of John Marshall: "It is intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." The Constitution, according to Marshall, must remain flexible:

To have prescribed the means by which government should, in all future times, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.215

Marshall's observations are no less valid today.

An analysis of situations in which specific rules are appropriate and those in which they should be avoided leads to several generalizations. First, the broader and the more complex an issue, the less likely a narrow rule will equally serve all its ends, and the more likely that changed conditions will require alteration in the means by which the principles are effected. For example, the twenty-fifth amendment provides very specific answers to questions

of presidential succession. Anything else could create a series of unmanageable problems at a time of crisis. In contrast, the ways in which certain practices affect equality are complex and may change with the circumstances. A second feature that sets the specific provisions of the Constitution apart from the more conceptual is that the former deal with procedural rather than substantive guarantees. They are not the embodiments of principles in themselves, but serve rather to advance wider objectives. For example, the procedural guarantees afforded the criminally accused are designed to assure, insofar as possible, that the innocent are not wrongly convicted, that each individual is treated with dignity, and that the integrity of government is preserved. The guarantees serve as means to those ends.

ERA embodies a vision—a society in which personal achievements and goals will no longer be constrained on account of gender. Its purpose is to ensure that government, at least, would no longer be able to contribute to inequality. But what is equality of rights? "Equality" and "rights" are both terms which lend themselves to various interpretations. We know that the equal protection clause of the fourteenth amendment was once narrowly construed as limited only to political rights. Clearly, the legislative history of ERA requires more than this. In fact, its intended scope could not be broader, involving as it must the entire population and encompassing the entire range of activities in which government is engaged: employment, education, rules of property, family law, law enforcement, and so on. The breadth of its interest leaves room for those yet to be anticipated. Equality is also a term of uncertain meaning. Is what is intended equality of treatment? Is it equality of results? In 1983, "placing men and women on an equal footing" most often translates into assuring that there should be more freedom for both men and women in their choice of roles and that they will be treated equally in these roles. Some recent writing on gender equality seeks a redirection in the current thinking that "assimilation is the most women can or should ask for." The point is not that a particular position should be adopted but rather that equality is a broad term: notions of equality evolve. Our experience with the equal protection clause of the fourteenth amendment cautions against fixing the meaning of the term "equality of rights" in the Equal Rights Amendment.

The question of single-sex education illustrates the dangers of replacing a principle with a specific rule. There is another danger in defining sex discrimination as simply the use of explicit classifications that distinguish between males and females. Precisely because it identifies the classification itself as the manifestation of inequality, this definition increases the chances

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216 Plessy v. Ferguson, 163 U.S. 537 (1896).
that the Supreme Court will either not recognize, or will ignore, other more subtle forms of sex-based action. We have already seen some costs of such a focus in the Court's treatment of veteran's preference laws\textsuperscript{219} and in its holding that classifications by pregnancy status are not true gender classifications.\textsuperscript{220} The promise of equal treatment is as surely compromised if the Court does not correctly identify the classification as when it misperceives burden.

It does seem clear that the goal of equality of men and women is not a narrow one that can be accomplished by the simple tool of eliminating all references to sex, but the goal should rather be treated as a broad substantive principle whether or not ERA is ratified. Within this larger context there can remain sufficient flexibility to look empirically at individual situations, and to permit certain classifications, such as single-sex education, which are felt ultimately to be of societal benefit for both sexes.

\textsuperscript{219} Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).