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Admission Denied: An Examination of Single-Sex Public School Initiative in North Carolina

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Admission Denied: An Examination of a Single-Sex Public School Initiative in North Carolina

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INTRODUCTION

On June 7, 2001, Senator Hillary Rodham Clinton, standing on the Senate floor, gave her support to an amendment of the No Child Left Behind Act of 2001¹ that provided federal funds to be used to create single-sex public school programs.² Clinton, a graduate of an all-female college, said, “[t]here should not be any obstacle to providing single-sex choice within the public school system.”³ However, five years earlier in his dissent, Supreme Court Justice Scalia declared that the Court’s decision in

1. No Child Left Behind Act of 2001, 20 U.S.C.A. §§ 6301–7941 (West 2003). The amendment read: “programs to provide same gender schools and classrooms, consistent with applicable law.” 147 CONG. REC. S5943 (daily ed. June 7, 2001).

2. See 147 CONG. REC. S5943 (daily ed. June 7, 2001) (statement of Sen. Clinton). The amendment passed, becoming part of the Act. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 5131(a)(23), 115 Stat. 1425, 1782 (2002) (codified as amended at 20 U.S.C. § 1725(a)(23)(2002)).

3. 147 CONG. REC. S5943 (daily ed. June 7, 2001) (statement of Sen. Clinton).

*United States v. Virginia*⁴ made single-sex public education unconstitutional and “ensure[d] that single-sex public education [was] functionally dead.”⁵

Today, to the consternation of the National Organization for Women and the American Civil Liberties Union,⁶ thirty-six public schools in America, including two in Greensboro, North Carolina, limit admission based on gender.⁷ Only four public schools in the entire nation provided single-sex education eight years ago.⁸ The increased interest in single-sex schooling follows a plethora of articles and reports devoted to identifying gender inequalities in coeducational public schools.⁹

This Comment examines the first two single-sex schools in North Carolina and argues that by denying admission to students simply because of their gender, the programs violate both federal statutory and constitutional law. Part I addresses the recent attention given to gender inequalities in public schools and the rising national interest in single-sex schools. Part II discusses the single-sex programs in Guilford County, North Carolina. Part III examines the legal challenges the Guilford County programs may face by first setting forth the restrictions of federal statutes such as Title IX of the Education Amendments of 1972 (“Title IX”),¹⁰ and

4. 518 U.S. 515 (1996).

5. *Id.* at 595–96 (Scalia, J., dissenting).

6. See, e.g., Amanda Elizabeth Koman, Note, *Urban, Single-Sex, Public Secondary Schools: Advancing Full Development of the Talent and Capacities of America's Young Women*, 39 WM. & MARY L. REV. 507, 508 (1998) (describing opposition to the Young Women's Leadership School of East Harlem).

7. National Association for Single Sex Public Education, *Single-Sex Schools: Single-Sex Public Schools in the United States*, at <http://www.singlesexschools.org/schools.html> (last visited Aug. 27, 2004) [hereinafter NASSPE] (on file with the North Carolina Law Review). One-hundred-and-seven coeducational schools in America offer some form of single-sex educational opportunity, like single-sex classrooms. *Id.*

8. *Id.*

9. See, e.g., ROSEMARY C. SALOMONE, SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING 64–84 (2003) (recounting the development of notions of achieving gender equality through single-sex schooling by examining studies of single-sex programs); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 452 (explaining that supporters of single-sex schools justify their support because girls have historically been disadvantaged in schooling and are presently disadvantaged in the classroom); Michelle Conlin, *The New Gender Gap*, BUS. WK., May 26, 2003, at 75 (exploring the ways in which boys are falling behind girls in school). For a summary of research on how schools fail girls and boys, see SALOMONE, *supra*, at 64–115, and Levit, *supra*, at 464–72. See generally JUDY MANN, THE DIFFERENCE: GROWING UP FEMALE IN AMERICA 79–153 (1994) (discussing sexism in public coeducational schools that stifles girls' educational experiences); PEGGY ORENSTEIN, SCHOOL GIRLS: YOUNG WOMEN, SELF-ESTEEM, AND THE CONFIDENCE GAP (1994) (examining through anecdotal evidence coeducational public school conditions adversely affecting girls).

10. Education Amendments of 1972, Title IX, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. § 1681 (2000)).

then analyzing the schools under the constitutional standard announced in *United States v. Virginia*.¹¹ Finally, this Comment concludes that the Guilford County programs violate both federal statutory and constitutional law because the programs are located on the campuses of colleges with incomparable facilities; unjustifiably deny admission based on gender; and perpetuate the legal, social, and economic inferiority of women.

I. RECENT TRENDS IN GENDER AND EDUCATION: INCREASED INTEREST IN GENDER DISPARITIES AND SINGLE-SEX SCHOOLS

Over the past decade, scholars have devoted significant attention to the issue of gender inequalities in coeducational schools. One notable study was *Failing at Fairness: How Our Schools Cheat Girls*,¹² written by two American University professors, David and Myra Sadker.¹³ After spending years observing and analyzing elementary and middle school classrooms, the Sadkers reported that boys ask and answer more questions, control classroom discussion, and receive more praise, help, criticism, and correction than girls.¹⁴ The American Association of University Women ("AAUW") also issued several reports and pamphlets in the 1990s that warned of the gender bias in public coeducational schools.¹⁵

As studies and books in the early 1990s caught America's attention about girls' problems in coeducational public schools, authors like Christina Hoff Sommers challenged the theory of girls' victimization and drew attention to boys' problems in the same context.¹⁶ Sommers noted that girls were more successful academically: girls received better grades,

11. 518 U.S. 515 (1996).

12. MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS* 42-55 (1994).

13. See SALOMONE, *supra* note 9, at 73.

14. See SADKER & SADKER, *supra* note 12, at 42-55.

15. See, e.g., GREENBERG-LAKE: THE ANALYSIS GROUP, *AM. ASS'N OF UNIV. WOMEN, SHORTCHANGING GIRLS, SHORTCHANGING AMERICA* 7 (1994) (summarizing findings of a gender gap in self-esteem that adversely affects women); HARRIS INTERACTIVE, *AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 4-5* (2001) (summarizing the study's major findings of prevalent sexual harassment among eighth through eleventh grade public school students); WELLESLEY COLL. CTR. FOR RESEARCH ON WOMEN, *AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., HOW SCHOOLS SHORTCHANGE GIRLS: THE AAUW REPORT* 118-24 (1995) (explaining that males receive more teacher attention than females).

16. Christina Hoff Sommers was formerly a philosophy professor at Clark University and authored *Who Stole Feminism?: How Women Have Betrayed Women*, and *The War Against Boys: How Misguided Feminism Is Harming Our Young Men*. See SALOMONE, *supra* note 9, at 77. Sommers is currently a researcher with the American Enterprise Institute for Public Policy Research. See AEI—Scholars & Fellows, *Christina Hoff Sommers*, at <http://www.aei.org/scholars/scholarID.56,filter.all/scholar.asp> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

performed better on tests of artistic and musical ability, and participated in more Advanced Placement programs.¹⁷ Girls were also more active in non-sport extracurricular activities, outnumbering boys in student government, in honor societies, and on student newspapers.¹⁸ Sommers also noted that boys were more prone to academic problems, more frequently dropping out of school and being suspended.¹⁹ Boys also were more likely to be involved in illegal activities such as alcohol and drug abuse and perpetration of crimes.²⁰ Some evidence, such as the fact that boys were more frequently diagnosed with attention deficit hyperactivity disorder than girls, suggested that boys have a higher rate of physiological learning problems.²¹ Some psychologists have attributed these problems to a school environment that is unwittingly structured to favor girls.²² They have argued that because boys mature more slowly and are more active learners, learning more often by engaging in a physical activity rather than passively observing or listening, boys are more likely to be classified as special education students and to perform poorly in elementary school.²³

Groups like the AAUW have responded to the concern over boys' problems by acknowledging the disadvantages boys face and calling for educational equity for both boys and girls.²⁴ Many school systems and commentators have sought educational equity through single-sex schools.²⁵

17. CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN* 24–25 (2000).

18. *Id.* at 25.

19. *Id.*

20. *Id.* at 26.

21. *Id.* at 25–26.

22. *E.g.*, WILLIAM POLLACK, *REAL BOYS: RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD* 239 (1998) (arguing that coeducational schools do not recognize the learning needs of boys); DAN KINDLON & MICHAEL THOMPSON, *RAISING CAIN: PROTECTING THE EMOTIONAL LIFE OF BOYS* 23–24 (1999) (noting the predominance of female authority figures in primary schools).

23. *See* POLLACK, *supra* note 22, at 233–48.

24. *See generally* AM. INSTS. FOR RESEARCH, AM. ASS'N OF UNIV. WOMEN, *GENDER GAPS: WHERE SCHOOLS STILL FAIL OUR CHILDREN* (1999) (identifying new issues in gender equity in education, including technology).

25. *See* Koman, *supra* note 6, at 508 (explaining that the Young Women's Leadership School of East Harlem was created in response to studies showing that coeducation disadvantaged girls); Levit, *supra* note 9, at 506–10 (discussing how single-sex proponents have cited gender studies as support for the notion that single-sex schools will further gender equity); Erin C. Logsdon, *Chalk Talk: "No Child Left Behind" and the Promotion of Single-Sex Public Education in Primary and Secondary Schools*, 32 J.L. & EDUC. 291, 291–93, 296 (2003) (explaining that studies show that coeducation has a "detrimental effect" on adolescent girls and concluding that "single-sex education in primary and secondary schools is the answer to greater academic excellence and emotional well-being for America's schoolchildren"). This attempt to achieve gender equity through single-sex schools has continued even in the face of early single-sex schools like Detroit's Afrocentric male academies to survive judicial challenges. *See* *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1014 (E.D. Mich.) (1991) (granting a preliminary injunction

For instance, the Young Women's Leadership School of East Harlem ("TYWLS") opened in 1996 in response to the problems that plague young, inner-city minority women.²⁶ The school's founders hoped to foster confidence and leadership in the young women,²⁷ and they strove to eliminate gender bias from the curriculum.²⁸ In a building with pastel hallways, couches, and cushioned chairs, the school's teachers encouraged the young women to write in journals and to express their feelings in a loud, assertive voice.²⁹

In spite of TYWLS's educational goals of gender equity, organizations such as the National Organization for Women, the New York Civil Liberties Union, and the New York Civil Rights Coalition filed a complaint with the United States Department of Education.³⁰ The New York chapter of the National Organization for Women argued that schooling for girls should be improved in a more realistic coeducational setting.³¹ A representative of the New York Civil Rights Coalition criticized the notion that boys are more disruptive than girls in school classrooms than girls as a stereotype.³² Despite the complaints, no legal challenge has succeeded in closing the school or in forcing TYWLS to admit boys.³³ Moreover, people ranging from Hillary Rodham Clinton³⁴ to

to prevent an all-boys schools from opening).

In 1996, the California State Legislature showed its support for single-sex schools when it passed the Single Gender Academies Pilot Program Act of 1996. 1996 Cal. Adv. Legis. Serv. 204 (Deering) (codified at CAL. EDUC. CODE §§ 58520–58524 (Deering 2004)); *see generally* Jonathan N. Reiter, Note, *California Single-Gender Academies Pilot Program: Separate but Really Equal*, 72 S. CAL. L. REV. 1401, 1405 (1999) (arguing for the constitutionality of the single-gender academies pilot program). California's State Budget provided five million dollars for the yearly establishment of ten pairs of single-gender schools in California beginning in fall 1997. Reiter, *supra*, at 1405. The program was part of an effort to provide students with more choices in public education, and student participation was voluntary. CAL. EDUC. CODE §§ 58521(a), 58522(b)(1) (Deering 2004); *see also* Reiter, *supra*, at 1406 (discussing the voluntary enrollment). The Act required school districts to divide funds equally between the girls' school and boys' school and to maintain equal curricula at both schools. §§ 58521(c)(3), 58522(b)(3); *see also* Reiter, *supra*, at 1405–08 (noting, in part, that equal curricula required "identical courses (with identical lesson plans), facilities, equipment, and extracurricular activities"). The legislature failed to reauthorize funding for the programs in the 1998–1999 school year, and only one pair of the single-gender schools remained open at the end of the 1999–2000 school year. *See* Salomone, *supra* note 9, at 229.

26. *See* Koman, *supra* note 6, at 507–08.

27. *See id.* at 509.

28. *See id.* at 530.

29. *See id.* at 530–32.

30. Tamara Henry, *A New Push for Girls-Only Public Schools: N.Y. Experiment in Leadership*, USA TODAY, Sept. 18, 1996, at 1D, available at 1996 WL 2069083.

31. *Id.*

32. *Id.*

33. *See* SALOMONE, *supra* note 9, at 10–25.

34. 147 CONG. REC. S5944 (daily ed. June 7, 2001) (statement of Sen. Clinton) (referring to

Oprah Winfrey³⁵ have praised the school.

In addition to the attention given to gender issues facing America's public schools and the growing number of single-gender public schools throughout the country,³⁶ the popularity of public magnet schools³⁷ in North Carolina³⁸ and Congress's encouragement of experimentation and school choice,³⁹ have created an environment ripe for an experiment in single-sex education in North Carolina.

II. GUILFORD COUNTY'S SINGLE-SEX PUBLIC HIGH SCHOOL PROGRAMS

In January 2003, Guilford County Schools established an all-girls school pilot program,⁴⁰ the only single-sex public high school in North Carolina at that time.⁴¹ The program, Middle College at Bennett College, was one of many alternative forms of public schools in the Guilford County school system.⁴² Among the alternatives to the traditional high school were

TYWLS as "one of the premier public schools for girls in our Nation").

35. See SALOMONE, *supra* note 9, at 10. Winfrey spoke in 2001 at the school's first graduation. *Id.*

36. See NASSPE, *supra* note 7.

37. Magnet schools "offer enhancements to the [traditional state public school] curriculum based on a theme or approach to learning." WAKE COUNTY PUBLIC SCHOOL SYSTEM, 2003 MAGNET PROGRAMS 1, <http://www.wcpss.net/magnet/pdfs/magnet-brochure.pdf> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

38. See, e.g., *id.* at 1 (listing the more than forty magnet programs in Wake County, North Carolina); Charlotte-Mecklenberg Schools, *Prepare for Greatness—Magnet Options for the 2004–05 School Year*, at <http://www.cms.k12.nc.us/programs/magnet/index.asp> (last visited Aug. 27, 2004) (providing links to web pages describing individual magnet school programs in Charlotte, North Carolina) (on file with the North Carolina Law Review); Guilford County Schools, *Magnet and High School Options Listing*, at http://www.guilford.k12.nc.us/magnet_schools/school_list.htm (last visited Aug. 27, 2004) (listing Guilford County's magnet school options) (on file with the North Carolina Law Review); Winston-Salem/Forsyth County Schools, *The History of WS/FCS Magnet Schools*, at <http://www.wsfcsmagnets.net/history.asp> (last visited Aug. 27, 2004) (describing Forsyth County's six magnet school programs) (on file with the North Carolina Law Review).

39. See No Child Left Behind Act of 2001, 20 U.S.C.A. § 7215(a) (West 2003) (providing funds for innovative assistance programs, including magnet and charter schools, and "activities to promote, implement, and expand public school choice").

40. Bruce Buchanan, *Bennett, District To Open All-Girls School*, NEWS & RECORD (Greensboro, N.C.), Jan. 8, 2003, at A1; Interview with Liz Bridges, Principal, Middle College at Bennett College, in Greensboro, N.C. (Sept. 12, 2003) [hereinafter Bridges Interview].

41. Buchanan, *supra* note 40.

42. See Guilford County Schools, *Magnet and High School Options Listing*, at http://www.guilford.k12.nc.us/magnet_schools/school_list.htm (last visited Aug. 27, 2004) (listing elementary, middle, and high school magnet programs offered) (on file with the North Carolina Law Review). Students gain admission by meeting specific criteria set for each program, submitting an application, and interviewing. Guilford County Schools, *Frequently Asked Questions for High School Options*, at http://www.guilford.k12.nc.us/magnet_schools/q_a_hs.htm (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

Dudley Academy of Engineering, Education, and Health Services; the Early College at Guilford College; International Baccalaureate programs at three high schools; and Weaver Academy for Performing and Visual Arts.⁴³ Also among the options were two coeducational Middle College programs.⁴⁴ Middle College at Greensboro College provided high school students with college preparatory courses.⁴⁵ Middle College at Guilford Technical Community College provided vocational and technical courses in addition to a more traditional high school curriculum.⁴⁶ Like the two coeducational Middle College High Schools in Guilford County, Middle College at Bennett College was designed to target potential high school drop outs.⁴⁷ The program was located on the campus of Bennett College, a private, historically Black, liberal arts college for women.⁴⁸ The pilot program consisted of twenty seventeen- and eighteen-year-old girls who were two or more years behind in school.⁴⁹ Roughly half of the students had children or were pregnant.⁵⁰

43. Guilford County Schools, *supra* note 38. Several high school magnet programs opening in August 2004 include Andrews High School for Advanced Research and Technology; High Point Central High School Institute for International Studies and Languages; Southwest High School Institute of Visual and Performing Arts; and Southern High Academy of Education and Advanced Sciences. Guilford County Schools, *Welcome to the Magnet Programs and High School Options at GCS*, at http://www.guilford.k12.nc.us/magnet_schools/index.htm (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

44. Guilford County Schools, *supra* note 38.

45. See GUILFORD COUNTY SCHOOLS, GREENSBORO MIDDLE COLLEGE HIGH SCHOOL, at http://www.guilford.k12.nc.us/magnet_schools/pdfs/Greensboro%20Middle%20College.pdf (last visited Aug. 27, 2004) [hereinafter GMC] (noting that “[s]tudents participate in core academic courses that meet graduation requirements”) (on file with the North Carolina Law Review).

46. Guilford County Schools, *Middle College High School at Guilford Technical Community College: Curriculum*, at <http://schools.guilford.k12.nc.us/spages/mcgtcc/curriculum.htm> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

47. Bridges Interview, *supra* note 40. Bridges explained that Superintendent Terry B. Grier, Ed.D., believed that students were being “pushed out” of school because they did not fit in, or “pulled out” of school because they were entrenched in a family or social environment that was not conducive to their education. *Id.*; see generally Guilford County Schools, *About Our Superintendent*, at <http://www.guilford.k12.nc.us/leadership/about.htm> (last visited Aug. 27, 2004) (explaining Grier’s accomplishments in Guilford County) (on file with the North Carolina Law Review). Grier started two magnet schools, Middle College at Greensboro College and Middle College at Guilford Technical Community College, to prevent students from dropping out because the students do not benefit from a traditional school environment. Guilford County Schools, *Middle College High School at Guilford Technical Community College: History*, at <http://schools.guilford.k12.nc.us/spages/mcgtcc/history.htm> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review); see also John Newsom, *Board OKs All-Girls School at Bennett*, NEWS & RECORD (Greensboro, N. C.), Jan. 15, 2003, at B1 (announcing the Guilford County School Board’s approval of the all-girls public school at Bennett College and comparing it to the other Middle College programs).

48. Bennett College for Women, *About Bennett*, at <http://www.bennett.edu/about> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

49. Buchanan, *supra* note 40; Bridges Interview, *supra* note 40.

50. Bridges Interview, *supra* note 40. Bridges explained that it was difficult for the girls to

The pilot program generated great interest in the community, and Middle College at Bennett opened in August 2003 with one hundred female students, ages sixteen to eighteen.⁵¹ The school emphasizes reading, writing and math skills,⁵² and students also attend classes in science, social studies, Spanish, and technology.⁵³ Middle College at Bennett aims to keep class sizes small at fifteen students or less.⁵⁴ Bennett College's day care center is available for students with children.⁵⁵ Guilford County Schools encourages Middle College students to enroll in one or more college courses at Bennett College and pays the tuition for these college courses.⁵⁶ Students at Middle College at Bennett attend class in a campus building and enjoy the same benefits as Bennett students, including access to Bennett College facilities such as the library, cafeteria, and computer equipment.⁵⁷

Bennett College was founded in 1873 as a coeducational institution, but has been a women's college since 1926.⁵⁸ Bennett is a small, private college affiliated with the United Methodist Church.⁵⁹ Bennett offers only bachelor's degrees.⁶⁰ There are approximately 481 full time students at Bennett.⁶¹ Ninety-seven percent of students at Bennett are African-

return to school as mothers after missing school to have a baby. *Id.* The girls were "pulled out" of school by the new outside demands of their children. *Id.*; cf. *supra* note 47 (explaining the Superintendent's view that students were being "pushed" or "pulled" out of schools). Another justification for Middle College at Bennett would be to accommodate the needs of single-parent students, who are predominately women. See generally Monica J. Stamm, Note, *A Skeleton in the Closet: Single-Sex Schools for Pregnant Girls*, 98 COLUM. L. REV. 1203 (1998) (discussing alternative programs for pregnant women, which are incidentally single-sex programs). The issue is not addressed in this paper because neither Middle College at Bennett nor Middle College at A&T were created expressly for teenage parents. See Bridges Interview, *supra* note 40. Although teenage parents may be at risk of dropping out of school, the class of potential high school drop outs is much broader than just teen parents.

51. Bridges Interview, *supra* note 40.

52. GUILFORD COUNTY SCHOOLS, MIDDLE COLLEGE AT BENNETT, available at <http://www.gcsmagnetschools.com/pdfs/bennett.pdf> (last visited Aug. 27, 2004) [hereinafter Bennett Brochure] (on file with the North Carolina Law Review).

53. Bridges Interview, *supra* note 40. Some of the teachers at the school are men. *Id.*

54. *Id.*

55. *Id.*; Buchanan, *supra* note 40. Bennett College's day care center is a laboratory preschool for three- to five-year-old children providing Bennett College students with field experience for their child development classes. See The Children's House, *Welcome Parents*, at <http://www.bennett.edu/child/welcome.htm> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review); The Children's House, *General Information*, at <http://www.bennett.edu/child/info.htm> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

56. See Bennett Brochure *supra*, note 52.

57. *Id.*; Bridges Interview, *supra* note 40.

58. 2 AMERICAN UNIVERSITIES AND COLLEGES 1246 (James J. Murray III, ed., 16th ed. 2001).

59. *Id.*

60. U.S. NEWS & WORLD REPORT, AMERICA'S BEST COLLEGES 228 (2004).

61. *Id.*

American, all of them are female, and the average SAT score is 808.⁶² The average class size ranges from twenty to thirty students.⁶³ Bennett has a library collection with 105,000 volumes and 3,504 microforms.⁶⁴ Bennett's sports facilities include a gym, a pool, exercise and gymnastic facilities, an athletic field, and basketball and tennis courts.⁶⁵ Bennett's campus is fifty-five acres close to downtown Greensboro,⁶⁶ and the average alumni giving rate is eighteen percent.⁶⁷

Guilford County Schools began a similar Middle College for boys in the fall of 2003 on the campus of North Carolina Agricultural & Technical State University (A&T).⁶⁸ Middle College at A&T targets male students who are two or more grades behind in school, and it also offers smaller class sizes.⁶⁹ The school offers the same subjects taught at the all-girls school, and Guilford County Schools also pays the tuition for classes at A&T for students who have mastered the high school's curriculum.⁷⁰ Just as the female students at Middle College at Bennett have access to Bennett College facilities, male students at A&T have access to A&T's college facilities, including the library, cafeteria and computer equipment.⁷¹

A&T State University was founded in 1891 and is a public university within the University of North Carolina System⁷² that offers bachelor's, master's, and doctorate degrees.⁷³ There are approximately 7,197 full time students at A&T.⁷⁴ Ninety-two percent of students at A&T are African-American, fifty-two percent are female, and the twenty-fifth and seventy-fifth percentile SAT scores are 790 and 1010 respectively.⁷⁵ The average class size ranges from seventeen to twenty-six students.⁷⁶ A&T has a library collection with 450,000 volumes and 905,087 microforms.⁷⁷ A&T athletic facilities include a gym, sports center, stadium, tennis courts,

62. *Id.*

63. BARRON'S, PROFILES OF AMERICAN COLLEGES 1077 (25th ed, 2003).

64. AMERICAN UNIVERSITIES AND COLLEGES, *supra* note 58, at 1246.

65. BARRON'S, *supra* note 63, at 1077.

66. *Id.*

67. U.S. NEWS & WORLD REPORT, *supra* note 60, at 91.

68. See Bruce Buchanan, *A&T to Host High School Just for Boys*, NEWS & RECORD (Greensboro, N. C.), June 19, 2003, at B1.

69. GUILFORD COUNTY SCHOOLS, MIDDLE COLLEGE AT NORTH CAROLINA A&T STATE UNIVERSITY, at http://www.guilford.k12.nc.us/magnet_schools/pdfs/a&t%20brochure.pdf (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

70. *Id.*

71. *Id.*

72. BARRON'S, *supra* note 63, at 1096.

73. U.S. NEWS & WORLD REPORT, *supra* note 60, at 230.

74. *Id.*

75. *Id.*

76. BARRON'S, *supra* note 63, at 1096.

77. AMERICAN UNIVERSITIES AND COLLEGES, *supra* note 58, at 1267.

student union, field house, and softball and baseball facilities.⁷⁸ A&T's campus is 191 acres close to downtown Greensboro,⁷⁹ and the average alumni giving rate is eighty-one percent.⁸⁰

Both Middle College at Bennett and Middle College at A&T are public schools funded with state, federal, and county tax dollars.⁸¹ Guilford County Schools administers the programs and provides the teachers, while the colleges provide the facilities.⁸² The students at the two programs also have access to college student mentors.⁸³

III. ARE THE GUILFORD COUNTY PROGRAMS LEGAL?

A. *Federal Statutory Law: Title IX, the No Child Left Behind Act, and Office of Civil Rights Regulations*

Title IX states “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”⁸⁴ Public schools receive Federal financial assistance and fall under Title IX. However, the statute goes on to provide that “in regard to admissions to educational institutions,”⁸⁵ including public elementary and secondary schools,⁸⁶ the prohibition against sex discrimination “shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.”⁸⁷ The prohibition against sex discrimination in admissions does not apply to public elementary and secondary schools.⁸⁸ Since Middle College at Bennett and Middle College at A&T are public high schools, the Title IX prohibition against sex discrimination in admissions does not apply to them.

78. BARRON'S, *supra* note 63, at 1096.

79. *Id.*

80. U.S. NEWS & WORLD REPORT, *supra* note 60, at 100.

81. Newsom, *supra* note 47.

82. *Id.*

83. Bennett Brochure, *supra* note 52.

84. 20 U.S.C. § 1681(a) (2000).

85. *Id.* § 1681(a)(1).

86. *Id.* § 1681(c) (defining “educational institution” as “any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education”).

87. *Id.* § 1681(a)(1).

88. *Id.*; see also SALOMONE, *supra* note 9, at 171 (explaining that the statutory language and subsequent case law show that the statute does not apply to the admissions policies of public elementary or secondary schools).

In response to the No Child Left Behind Act,⁸⁹ which provides local education agencies with federal funds to be used for “innovative assistance programs,”⁹⁰ including programs to provide same-gender schools and classrooms, the Office of Civil Rights proposed new regulations for Title IX in March 2004.⁹¹ The new regulations state that a federal financial assistance recipient that operates a public nonvocational secondary school⁹² shall not exclude any person from admission on the basis of sex unless the recipient provides the “other sex substantially equal educational opportunities in a single-sex school, single-sex educational unit, or coeducational school.”⁹³ Guilford County Schools receives federal financial assistance and operates both Middle College at A&T and Middle College at Bennett as public nonvocational secondary schools that exclude students from admissions based on sex. Thus, Guilford County Schools must provide the boys who are excluded from Middle College at Bennett and the girls who are excluded from Middle College at A&T a “substantially equal” educational opportunity, either in a single-sex school or coeducational school.

In determining whether an educational opportunity is “substantially equal,” the Department of Education will consider factors including:

The policies and criteria of admission; the educational benefits provided, including the quality, range, and content of curriculum and other services and quality and availability of books, instructional materials, and technology; the quality and range of extra-curricular offerings; the qualifications of faculty and staff; geographic accessibility; and the quality, accessibility, and availability of facilities and resources.⁹⁴

The Department will assess compliance with these factors by looking at the aggregate educational benefits provided by each school as a whole.⁹⁵

The school that is most similar to Middle College at Bennett and

89. No Child Left Behind Act of 2001, 20 U.S.C.A. §§ 6301–7941 (West 2003). The Act required the Secretary of the U. S. Department of Education to issue guidelines to school districts within 120 days of its enactment on January 8, 2002. *Id.* § 7215(c).

90. 20 U.S.C.A. § 7215(a)(23) (West 2003).

91. Nondiscrimination on the Basis of Sex in Education Programs or Other Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276, 11,284 (proposed March 9, 2004) (to be codified at 34 C.F.R. pt. 106) (Sup. Docs. No. AE 2.106: 69/46), *available at* <http://www.ed.gov/legislation/FedRegister/proprule/2004-1/030904a.pdf> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

92. The regulation does not apply to public single-sex charter schools. *Id.* at 11,285 (to be codified at 34 C.F.R. § 106.34(c)(1)).

93. *Id.* at 11,285 (to be codified at 34 C.F.R. § 106.34(c)(1)).

94. *Id.* (to be codified at 34 C.F.R. § 134(c)(3)(i)).

95. *Id.* (to be codified at 34 C.F.R. § 134(c)(3)(ii)).

Middle College at A&T and most likely to provide the students with “substantially equal” opportunities is Middle College at Greensboro College (“GMC”).⁹⁶ Like Middle College at A&T, GMC was created to prevent students from dropping out.⁹⁷ GMC has a student body of slightly more than one hundred students that take core academic subjects in small classes.⁹⁸ Like students at the other Middle Colleges, students gain admission into the school by filling out an application and participating in an interview.⁹⁹ There are no apparent disparities between the quality of the Guilford County School faculty, staff, instructional materials, or curriculum among the Middle College programs.¹⁰⁰ The main differences among GMC and the other Middle Colleges are the colleges that give identity to the schools and host the students on their campuses and in their classes.

Greensboro College is a four-year coeducational liberal arts college affiliated with the United Methodist Church that has an enrollment of approximately 1,000 students.¹⁰¹ The mean SAT score is 991,¹⁰² and it is ranked as a fourth-tier Liberal Arts-Bachelor college.¹⁰³ Greensboro College’s library holds 103,000 volumes and ninety-five microfilms,¹⁰⁴ and the campus consists of forty acres.¹⁰⁵

Because of the differences among the colleges, the quality of educational experience among students at the three Middle Colleges is not “substantially equal.” As a public university, A&T is larger and has more resources than either Greensboro College or Bennett College. A&T also enjoys a higher ranking by *U.S. News & World Report*. While boys have the opportunity to attend either Middle College at A&T or GMC, girls are denied the opportunity to attend school at the superior college. Guilford County does not provide the female students who are denied admission to Middle College at A&T with a “substantially equal” educational opportunity. Therefore, the Guilford County School System is violating Title IX and the No Child Left Behind Act, and risks losing its federal

96. See GMC *supra* note 45; Middle College at Greensboro College, *Greensboro Middle College: Home*, at <http://schoolcenter.guilford.k12.nc.us/education/school/school.php?sectionid=26> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

97. See Bridges Interview, *supra* note 40.

98. See GMC, *supra* note 45.

99. *Id.*

100. See Bridges Interview, *supra* note 40. Bridges did report that Middle College at Bennett has two Nationally Board Certified teachers who have engaged in additional training and a number of veteran teachers that may not reflect faculty qualifications at other Guilford County High Schools. *Id.*

101. See AMERICAN UNIVERSITIES AND COLLEGES, *supra* note 58, at 1256.

102. *Id.*

103. See U.S. NEWS & WORLD REPORT, *supra* note 60, at 229.

104. AMERICAN UNIVERSITIES AND COLLEGES, *supra* note 58, at 1257.

105. *Id.*

funding if it continues to deny female students admission to Middle College at A&T.

B. Equal Protection Under the Constitution

1. *United States v. Virginia*: The Leading Constitutional Case

Single-sex public high schools must not only comply with Title IX, but they must also comport with the Constitution.¹⁰⁶ Unlike racially segregated schools, the Supreme Court has never held that “separate but equal” gender segregated public schools are *per se* unconstitutional.¹⁰⁷ In 1975, Susan Vorchheimer sued for admission into an all-male public high school for academically talented students in Philadelphia, preferring that school over the school admitting only female students.¹⁰⁸ The Third Circuit found that the schools were substantially comparable and held that they did not violate the Fourteenth Amendment.¹⁰⁹ However, the case was decided before the Supreme Court adopted intermediate scrutiny for gender classifications in *Craig v. Boren*,¹¹⁰ and the Supreme Court only summarily affirmed the Third Circuit’s decision by an equally divided court.¹¹¹

In *Mississippi University for Women v. Hogan*,¹¹² the Supreme Court followed *Craig* and made clear that intermediate scrutiny applies to gender classifications in the public school context.¹¹³ The Court held that the classification must serve “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”¹¹⁴ In *Hogan*, the Court held that for an all-female nursing school to deny admission to men was unconstitutional.¹¹⁵ The Court found that the purported important governmental objective—remedying past discrimination—was not genuine, because women had not

106. See, e.g., Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31,102, 31,102–03 (May 8, 2002) (explaining that schools may be challenged on constitutional grounds as well as statutory grounds).

107. Compare *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that racially segregated schools for African Americans were *per se* unconstitutional under the Fourteenth Amendment), with *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the exclusion of women from the Virginia Military Institute violated the Constitution because Virginia did not have an exceedingly persuasive justification).

108. *Vorchheimer v. Philadelphia*, 400 F. Supp. 326, 328–29 (E.D. Pa. 1975), *rev’d*, 532 F.2d 880 (3d Cir. 1976), *aff’d mem. by an equally divided Court*, 430 U.S. 703 (1977).

109. *Vorchheimer*, 532 F.2d at 887–88 (3d Cir. 1976).

110. 429 U.S. 190, 197 (1976).

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

112. 458 U.S. 718 (1982).

113. See *id.*

114. *Id.* at 724.

115. *Id.* at 733.

been discriminated against in the context of the nursing school, and instead the school's policy perpetuated the "stereotyped view of nursing as an exclusively woman's job."¹¹⁶ Furthermore, the means of denying men formal admission were not substantially related to remedying past discrimination because men were allowed to participate fully by auditing the nursing courses.¹¹⁷ In the aftermath of the *Hogan* decision, a Pennsylvania state court revisited the constitutionality of the all-male high school in Philadelphia and found that it violated the Fourteenth Amendment, effectively reversing the *Vorchheimer* decision.¹¹⁸

While the Supreme Court has not directly addressed whether single-sex public high schools are constitutional, it gave further guidance for analyzing gender classifications in an educational context in *United States v. Virginia*.¹¹⁹ At issue in that case was whether Virginia violated the Fourteenth Amendment's Equal Protection Clause by refusing to admit women to the Virginia Military Institute ("VMI").¹²⁰ The Court applied the same heightened review standard and required the state of Virginia to establish an "exceedingly persuasive justification"¹²¹ for the exclusion of women from VMI.¹²² The Court explained that the justification must be genuine and that it could not be based on overbroad generalizations about the differences between males and females.¹²³ The Court's emphasis on the exceedingly persuasive justification suggests that the Court is moving towards an even higher scrutiny of gender classifications.¹²⁴ However, it is clear that at the very least, a state must show an important governmental interest and a means that is substantially related to achieving that interest.¹²⁵

Virginia's first proffered justification for the gender classification was educational diversity.¹²⁶ The parties did not contest the potential benefits of single-sex education for some students.¹²⁷ However, the Court reasoned that if diversity in higher education was Virginia's genuine purpose in keeping VMI all-male, then Virginia would have provided women a corresponding institution that offered the same adversative learning

116. *Id.* at 729.

117. *Id.* at 730–31.

118. *Newberg v. Bd. of Pub. Educ.*, 478 A.2d 1352, 1354–55 (Pa. Super. Ct. 1984).

119. 518 U.S. 515 (1996).

120. *Id.* at 519.

121. *Id.* at 533.

122. *See id.*

123. *Id.* at 533–34.

124. *Id.* at 571–73 (Scalia, J., dissenting) (noting that the Court's use and application of the phrase "exceedingly persuasive justification" and the Court's use of the other phrases that imply that the Court reserved the question of whether strict scrutiny applies to gender classifications).

125. *Id.* at 533.

126. *Id.* at 535.

127. *Id.*

methodology.¹²⁸ Furthermore, the Court viewed Virginia's conversion of the all-female school at Mary Baldwin College into a coeducational program as undermining the genuineness of Virginia's educational diversity justification.¹²⁹ The Court determined that Virginia's actions in first denying women higher education opportunities, then establishing unequal schools for women, and finally converting those schools to coeducational institutions did not support the conclusion that Virginia had a policy to advance diverse educational opportunities.¹³⁰ The Court determined that VMI's proffered purpose of educational diversity was not genuine. As a result, the court did not have to reach the question of whether educational diversity was an important governmental objective.¹³¹

Virginia's second justification was the preservation of VMI's educational program.¹³² Virginia argued that admission of women would require VMI to alter the program so radically that "men would be deprived of the unique opportunity currently available to them; [and] women would not gain that opportunity because their participation would 'eliminate the very aspects of the program that distinguish [VMI] from . . . other institutions of higher education in Virginia.'" ¹³³ The Court acknowledged as uncontested that women's admission would require accommodations for women in housing assignments and physical training programs. The Court noted as well that, although not all women would thrive in the VMI environment, VMI's pedagogy would suit some women, and some women would prefer the VMI methodology over other educational alternatives.¹³⁴ Thus, the Court rejected VMI's contention that the admission of women would destroy the benefits of the program, explaining that it was "a prediction hardly different from other 'self-fulfilling prophecies' once routinely used to deny rights or opportunities."¹³⁵ The Court stated that Virginia had confused the important governmental objective: it was not the single-sex method of instruction that was the important objective, but the production of citizen-soldiers, and the Court concluded that this objective was "not substantially advanced by women's categorical exclusion."¹³⁶ Thus, preservation of VMI's program was not an "exceedingly persuasive

128. See *id.* at 538–39.

129. See *id.*

130. *Id.* at 538–40.

131. *Id.*

132. *Id.* at 540.

133. *Id.* (quoting Brief for Cross-Petitioners at 34–36).

134. *Id.* at 540–41.

135. *Id.* at 542–43. The Court also noted that the federal military academies had successfully admitted women. *Id.* at 545.

136. *Id.* at 545–46.

justification” for the exclusion of women.¹³⁷

After concluding that the exclusion of women from VMI violated the Equal Protection Clause, the Court addressed whether the creation of an all-female program, the Virginia Women’s Institute of Leadership (“VWIL”) at Mary Baldwin College, was an appropriate remedy for the constitutional violation.¹³⁸ The Court explained that a remedy must “closely fit the constitutional violation,”¹³⁹ meaning that it must directly address the “equal protection denied to women ready, willing, and able to benefit from VMI’s educational opportunities.”¹⁴⁰ VWIL did not meet such a requirement because VWIL was “different in kind from VMI and unequal in tangible and intangible facilities.”¹⁴¹ The Court explained that VMI was unique because it was one of the nation’s first military colleges,¹⁴² it provided training otherwise unavailable in Virginia,¹⁴³ had a reputation as an extraordinary college,¹⁴⁴ benefited from a network of distinguished alumni,¹⁴⁵ and had the largest per-student endowment of all public undergraduate colleges.¹⁴⁶ In addition, Mary Baldwin College—the college hosting the VWIL program and providing the VWIL students with degrees¹⁴⁷—had a student body with an average SAT score 100 points less than that of VMI’s student body.¹⁴⁸ Mary Baldwin College had fewer and inferior physical training facilities than VMI, and its curriculum did not provide students with the opportunity to focus on math or science.¹⁴⁹ Comparing VMIL to the attempt in the 1940s to create a new law school in Texas for African Americans as a remedy for their exclusion from the law school at the University of Texas,¹⁵⁰ the Court concluded that VWIL was not substantially equal to VMI, and it did not remedy the constitutional

137. *Id.* at 546.

138. *Id.*

139. *Id.* at 547.

140. *Id.* at 547–48.

141. *Id.* at 547. Unlike VMI, VWIL did not provide the opportunity for rigorous military training, require students to live in barracks, or use the “adversative method.” *See id.* at 548. VMI used an “adversative method” to prepare students for leadership in civilian and military life. *Id.* at 520. This method emphasized “physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.” *Id.* at 522. Additionally, “VWIL’s student body, faculty, course offerings, and facilities” were held to be unequal to VMI’s. *Id.* at 551.

142. *Id.* at 520.

143. *Id.*

144. *Id.* at 523.

145. *Id.* at 520.

146. *Id.*

147. *Id.* at 551.

148. *Id.*

149. *Id.* at 551–52.

150. *Sweatt v. Painter*, 339 U.S. 629 (1950).

violation.¹⁵¹

The majority was careful to point out that it was not addressing the broader question of whether all single-sex public schools are constitutional¹⁵² or whether a state could support different educational opportunities if done equitably.¹⁵³ Rather, the majority addressed only an educational opportunity that was “unique.”¹⁵⁴ Furthermore, the majority recognized that because of “‘[i]nherent differences’ between men and women,”¹⁵⁵ sex classifications may be used as long as they do not create “artificial constraints on an individual’s opportunity . . . or perpetuate the legal, social and economic inferiority of women.”¹⁵⁶

2. Guilford County’s Single-Sex High School Programs Are Not a Substantially Related Means to an Important Governmental Interest

The Court in *Virginia* asserted that it was addressing only a “unique” educational opportunity.¹⁵⁷ However, the Court indicated that the same “exceedingly persuasive justification” analysis would apply in other cases of gender classification.¹⁵⁸ Since Middle College at Bennett and Middle College at A&T make facial classifications based on gender, the heightened scrutiny analysis of *Virginia* applies. Guilford County must show at least¹⁵⁹ that the exclusion of male students from the program at Bennett and the exclusion of female students from the program at A&T serve “‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”¹⁶⁰

Two likely “important governmental objectives” for the Guilford County High School programs are keeping students who are at risk of dropping out in school¹⁶¹ and providing diversity in educational

151. *Virginia*, 518 U.S. at 553–54.

152. *Id.* at 533–34.

153. *Id.* at 534 n.7.

154. *Id.*

155. *Id.* at 533.

156. *Id.* at 533–34. Some commentators have stated that the prohibition on gender classifications perpetuating the legal, social, and economic inferiority of women applies with respect to legislation that seeks to remedy gender discrimination. See 16B AM. JUR. 2D *Constitutional Law* § 829 (2004) (discussing the legal, social, and economic inferiority qualification in the context of gender classifications used for a remedial purpose).

157. *Virginia*, 518 U.S. at 534 n.7.

158. See *id.* at 531–33 (explaining the evolution of sex from a classification that received rational basis review to a classification receiving a heightened review standard and requiring an “exceedingly persuasive justification”).

159. There are good arguments that the Court’s use of “exceedingly persuasive justification” actually means that the state must show more than an important governmental objective and substantially related means. See *id.* at 571–73 (Scalia, J., dissenting).

160. *Id.* at 533.

161. See *supra* notes 47, 97 and accompanying text (noting that the Middle College programs

opportunities.¹⁶²

a. Denying Admission Based on Gender is Not Substantially Related to Preventing Students from Dropping Out of School

Preventing students from dropping out of school is an important governmental objective because the government has an interest in educating its citizens. The Court in *Brown v. Board of Education*¹⁶³ recognized education as “the most important function of state and local governments” and the “very foundation of good citizenship,” noting that “it is required in the performance of our most basic public responsibilities, even service in the armed forces.”¹⁶⁴ In the recent *Grutter v. Bollinger*¹⁶⁵ decision, the Court acknowledged “education as pivotal to ‘sustaining our political and cultural heritage.’”¹⁶⁶ Dropping out of school adversely affects a student’s future earning power and has been linked to higher incarceration and death rates.¹⁶⁷ Given the importance of education and the consequences of dropping out of school on the individual student and on society, preventing students from dropping out is an important governmental objective. Moreover, preventing students from dropping out is Guilford County’s genuine objective because the Guilford County School System had initiated other programs aimed at preventing students from dropping out even before the initiation of Middle College at Bennett and Middle College at A&T.¹⁶⁸

While preventing students from dropping out of school is an important governmental interest, it is less clear how preventing boys from attending Middle College at Bennett and preventing girls from attending Middle College at A&T is substantially related to achieving that interest. For

targeted potential high school drop outs).

162. “Diversity in educational opportunities” refers to variety and choice of school programs and does not describe the student body diversity held to be a compelling government interest in the recent decision *Grutter v. Bollinger*, 539 U.S. 306 (2003). This Comment discusses only these two justifications out of numerous possibilities because, given the sociological research, the reasons for the creation of the schools, and the educational and social context in which the schools were created, these two justifications are the most likely to pass constitutional scrutiny. Since there is currently no litigation involving the schools, Guilford County Schools has not articulated what might be its potential justifications for the program.

163. 347 U.S. 483 (1954).

164. *Id.* at 493.

165. 539 U.S. 306 (2003).

166. *Id.* at 331.

167. National Dropout Prevention Center/Network, *Quick Facts*, http://www.dropoutprevention.org/stats/quick_facts/econ_impact.htm (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

168. See *supra* notes 47, 97 and accompanying text. Middle College at Guilford County Community College and Middle College at Greensboro College were created to prevent students from dropping out before the program at Bennett College. *Id.*

instance, at least one Federal District Court has found that single-sex education is not substantially related to dropout rates.¹⁶⁹ The Court acknowledged in *Virginia* that "single-sex education affords pedagogical benefits to at least some students."¹⁷⁰ In his dissent, Justice Scalia argued that the "long and continuing history" of single-sex colleges makes it clear that single-sex education is "substantially related" to the important government interest of providing effective education for its citizens.¹⁷¹ Furthermore, some sociological research suggests that single-sex schools are effective in improving academic achievement for disadvantaged minority students,¹⁷² and are advantageous in terms of students' academic achievement, attitudes, and feelings toward school.¹⁷³

While these findings suggest that providing an opportunity for single-sex education is rationally related to preventing students from dropping out of school, the constitutional standard announced in *Virginia* requires that the option of single-sex schools at least be substantially related to preventing students from dropping out and that the justification for the single-sex schools "not rely on overbroad generalizations about the

169. See *Garrett v. Detroit Bd. of Educ.*, 775 F. Supp. 1004, 1007 (E.D. Mich. 1991) (explaining that there was no evidence presented that the presence of girls in the classroom was substantially related to the difficulties facing urban males). A Federal District Court in *Garrett* found that the school board failed to show "how the exclusion of females from the . . . [all-male school] is necessary to combat unemployment, dropout and homicide rates among urban males." *Id.* at 1008. The court found "no evidence that the educational system is failing urban males because females attend schools with males." *Id.*

170. *United States v. Virginia*, 518 U.S. 515, 535 (1996).

171. *Id.* at 576 (Scalia, J., dissenting).

172. See SALOMONE, *supra* note 9, at 235. See generally Cornelius Riordan, *What Do We Know about the Effects of Single-Sex Schools in the Private Sector?: Implications for Public Schools*, in GENDER POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING 10 (Amanda Datnow & Lea Hubbard eds., 2002) (arguing that single-sex schools have the most significant effects on poor, disadvantaged minorities). Riordan attributes the success of single-sex schools to a pro-academic choice made on behalf of the students and a rejection of anti-academic norms that dominate most coeducational schools. Riordan, *supra*, at 20. However, Riordan does not address why a school must be single-sex for a student to make such a pro-academic choice by rejecting the traditional high school. *Id.* A student who chooses to go to Middle College at Greensboro College, as opposed to the traditional high school, is also making a pro-academic choice. Alternatively, Riordan's rationale could fail in this case because the schools are on college campuses and the students may be making a pro-college atmosphere choice rather than a pro-academic choice.

173. See, e.g., Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCH. 381, 388-89 (1986) (finding, after controlling for ethnicity, socioeconomic status, college plans, and religion, that girls in Catholic all-girls schools had higher educational aspirations, science achievement, and interests in math than girls in coeducational Catholic schools); Cornelius Riordan, *Public and Catholic Schooling: The Effects of Gender Context Policy*, 93 AM. J. EDUC. 518, 536 (1985) (finding that girls in Catholic all-girls schools reached higher achievement levels in math and reading than girls in Catholic coeducational schools).

different talents, capacities, or preferences of males and females.”¹⁷⁴ The fact that the Court recognized that education is not a “one size fits all business” and that some students may benefit from single-sex education does not mean that single-sex education is substantially related to preventing students from dropping out of school. Likewise, the “long and continuing history” of single-sex schools also does not mean that single-sex schools are substantially related to the prevention of dropouts. This long and continuing history may have more to do with antiquated gender roles than it does with concern for providing an effective education for students. Finally, the few studies suggesting that single-sex schools are beneficial in the context of the larger body of research on single-sex schools do not establish that single-sex schools are substantially related to preventing students from dropping out of school.¹⁷⁵ Many studies suggest that single-sex schools provide no advantages over coeducational schools.¹⁷⁶ For instance, while one study found that coeducational schools are more effective in promoting girls’ science achievement,¹⁷⁷ another study found that there are no differences between girls’ schools and coeducational schools in promoting girls’ science achievement.¹⁷⁸ The mass media and advocates of single-sex schools often fail to acknowledge these conflicts in their coverage of the studies or in their arguments for single-sex schools.¹⁷⁹

174. *Virginia*, 518 U.S. at 533.

175. See Levit, *supra* note 9, at 522; cf. *Cmtys. for Equity v. Michigan High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 850–51 (W.D. Mich. 2001) (holding that the state athletic association, which provided only anecdotal and circumstantial evidence in the form of surveys, did not carry its burden of showing that disadvantageous scheduling of girls’ sports was substantially related to important logistic-based objectives). Moreover, the failure of the studies to conclusively establish the effectiveness of single-sex education suggests that the schools are based on impermissible overbroad generalizations. *Virginia*, 518 U.S. at 533–34.

176. See, e.g., Paul C. LePore & John Robert Warren, *A Comparison of Single-Sex and Coeducational Catholic Secondary Schooling: Evidence from the National Educational Longitudinal Study of 1988*, 34 AM. EDUC. RES. J. 485, 486 (1997) (finding no differences in academic achievement, educational aspirations, or self-esteem between girls in all-girls Catholic schools and coeducational Catholic Schools).

177. Andrew Stables, *Differences Between Pupils from Mixed and Single-Sex Schools in Their Enjoyment of School Subjects and in Their Attitudes to Science and to School*, 42 EDUC. REV. 221, 227–29 (1990).

178. T.J. Harvey, *Science in Single-Sex and Mixed Teaching Groups*, 27 EDUC. RESEARCH, 179, 179, 182 (1985).

179. See CAROLE B. SHMURAK, VOICES OF HOPE: ADOLESCENT GIRLS AT SINGLE SEX AND COEDUCATIONAL SCHOOLS 17–18 (1998) (explaining how the popular press accepts some early findings as truth despite conflicting studies); Levit, *supra* note 9, at 503 (explaining that advocates of single-sex education often draw on earlier, uncontrolled studies with small samples and anecdotal evidence). See also National Association for Single Sex Public Education, *Single-Sex vs. Coed: The Evidence*, at <http://www.singlesexschools.org/evidence.html> (last visited Aug. 27, 2004) (summarizing sociological education studies that provide support for the efficacy of single-sex public schools) (on file with the North Carolina Law Review). The National Association for Single-Sex Public Education (“NASSPE”) cites three categories of evidence

Instead they rely only on certain results in studies that support their position.¹⁸⁰ All-girls schools advocates often make inaccurate, unsupported or false claims, or make the mistake of generalizing results from studies of women's colleges to all-girls high schools while ignoring developmental differences.¹⁸¹ Additionally, advocates of single-sex schools often cite studies that compare students in all-girls schools to the general population of students, without accounting for differences in socioeconomic class.¹⁸²

Many of the studies mentioned are problematic because student self-selection and the selection process of private schools lead to differences other than gender in the single-sex and coed student populations.¹⁸³ Other characteristics of single-sex schools, such as smaller class sizes, curriculum, faculty, and teaching styles, also make it difficult to determine whether the success of a single-sex school results from the single-sex nature of the school or from other factors.¹⁸⁴ Research results do not necessarily translate across different educational settings, and the vast majority of the studies examine settings that are religiously, geographically, politically, and culturally different from the public single-sex initiatives today.¹⁸⁵

Two additional problems with the sociological research on single-sex schools are the "file drawer problem" and the "rarity effect."¹⁸⁶ The "file drawer problem" occurs because studies with statistically significant results are published while the majority of studies, which show insignificant

supporting a finding that single-sex education is beneficial: "major nationwide studies," "before and after studies," and "academic studies." *Id.* The "major nationwide studies" include studies from England, Australia, and Jamaica. *Id.* The "before and after studies" are anecdotal accounts of the improvements in academic performance and discipline problems in schools that transformed from coeducational classes to single-sex classes. *Id.* The "academic studies" include Professor Cornelius Riordan's study comparing single-sex Catholic schools to coeducational Catholic schools. *Id.* The NASSPE article does not address studies that have found no differences in single-sex or coeducational schools. The studies cited by the NASSPE are studies from different countries, are anecdotal accounts, and are studies of private religious schools that can hardly be generalized to support the contention that single-sex public schools in the United States would be more beneficial to students.

180. See, e.g., National Association for Single-Sex Public Schools, *supra* note 179 (citing only studies supporting a benefit in single-sex education and failing to distinguish studies from foreign countries, anecdotal evidence, and surveys of private religious schools).

181. See SHMURAK, *supra* note 179, at 18–21 (explaining how the popular press accepts some early findings as truth despite conflicting studies).

182. *Id.*

183. SALOMONE, *supra* note 9, at 190. Salomone explains that while researchers attempt to isolate these factors using statistical procedures and computers for modeling of data, it is not "pure science" and researchers disagree among themselves about how to analyze data. *Id.*

184. *Id.*

185. See *supra* note 179.

186. Levit, *supra* note 9, at 504.

results, remain in the researcher's file drawer.¹⁸⁷ The effect of this problem is a misinterpretation of the accumulated research as demonstrating a net benefit for girls.¹⁸⁸ The "rarity effect" is the effect of the scarcity or rarity of the single-sex schools on the student outcomes.¹⁸⁹ Studies suggest that the advantages of single-sex education may be related more to the fact that such educational opportunities are uncommon and unique than to the fact that they are single-sex.¹⁹⁰ Thus, as single-sex schools become more common, they may also become less advantageous to the students who attend them.¹⁹¹

Professor Rosemary Salomone,¹⁹² a supporter of single-sex public schools,¹⁹³ reviewed anecdotal reports and studies published in peer-reviewed journals about single-sex schools.¹⁹⁴ She concluded that the evidence fails to show that single-sex schooling harms students either academically or socially, that single-sex schools may foster fewer negative attitudes regarding traditionally male or female subjects, and that disadvantaged minority students may benefit significantly from single-sex schools.¹⁹⁵ Yet her conclusions were hardly a ringing endorsement of single-sex schools, and she acknowledged that the studies do not conclusively show that single gender schools benefit students.¹⁹⁶

Despite anecdotal evidence from alumni and studies cited by advocates of single-sex schools, sociological research has not yielded conclusive results about the efficacy of single-sex schools.¹⁹⁷ Thus,

187. *Id.*

188. *Id.*

189. *Id.* at 505–06.

190. *Id.* (explaining that the rarity effect in education is similar to the "Hawthorne effect—the effect of observers on the observed phenomenon," and that it may explain some of the differences in the studies on the advantages and disadvantages of single-sex education); *see also* Riordan, *supra* note 172, at 15–16 (explaining the rarity effect).

191. Levit, *supra* note 9, at 506.

192. Rosemary Salomone, J.D., Ph. D. is Kenneth Wang Professor of Law at St. John's University School of Law. St. John's University School of Law, *Faculty Profiles*, at <http://new.stjohns.edu/academics/graduate/law/faculty/profiles/Salomone> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

193. *See* SALOMONE, *supra* note 9, at 243. NASSPE supports Salomone's book, *Same, Different, Equal: Rethinking Single-Sex Schooling*, calling it the "definitive work on the legal and policy aspects of single-sex education in the United States." National Association for Single Sex Public Education, *Useful Books*, at <http://www.singlesexschools.org/links-books.htm> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

194. *See* SALOMONE, *supra* note 9, at 191.

195. *Id.* at 235.

196. *Id.*

197. *See* SHMURAK, *supra* note 179, at 14–21 (summarizing results of research of all-girls schools and colleges and explaining the limitations of such findings); Levit, *supra* note 9, at 503 (explaining that there is no "general consensus" about the positive educational and socialization effects of single-sex education).

without more conclusive data that single-sex schools improve learning, efforts to fight gender disparities in coeducational public schools by implementing single-sex schools may be misguided if based on assumptions about innate differences between male and female students.¹⁹⁸ Moreover, single-sex schools may present a false impression that a school system is addressing gender disparities when in reality it is not improving gender equity at all.¹⁹⁹

Rather than being substantially related to preventing students from dropping out of school, single-sex schools “rely on overbroad generalizations about the different talents, capacities and preferences of males and females.”²⁰⁰ Common beliefs that girls’ learning styles differ from boys’ and that boys and girls learn better when they are not distracted by the other sex are overbroad generalizations that are not sufficiently supported by research data and that do not justify the segregation of boys and girls.²⁰¹ Moreover, gender segregation sends the message that the presence of the opposite sex is an obstacle to education, creates antagonism towards the other sex, and reinforces the belief that gender differences dominate the learning process more than other social or pedagogical issues like learning style, class size, economic status, and parental influence.²⁰² The Court in *Virginia* said that “[t]he notion that admission of women would downgrade VMI’s stature, destroy the adversative system, and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other ‘self-fulfilling prophecies’ once routinely used to deny rights or opportunities.”²⁰³ Similarly, the notion that denying girls the opportunity to attend Middle College at A&T and boys the opportunity to attend Middle College at Bennett will create a better educational environment and prevent students from dropping out of school is one that is “hardly proved, a prediction hardly different from other ‘self-fulfilling prophecies’ once routinely used to deny rights or opportunities.” Thus, the single-sex programs at Bennett and A&T cannot be justified on grounds that they substantially relate to achieving the important governmental interest of keeping potential dropouts in school.

198. See Levit, *supra* note 9, at 508–10 (explaining that the Sadkers and the AAUW had hoped that their findings would improve public coeducation, and not necessarily lead to public single-sex schools).

199. See *id.* at 525. (explaining that single-sex schools do not improve coeducation and that sex segregation itself sends messages that are detrimental to gender equality in the long run).

200. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

201. See Levit, *supra* note 9, at 516.

202. See *id.* at 521.

203. *Virginia*, 518 U.S. at 542–43 (citations omitted).

b. Providing Diversity in Educational Opportunities Is Not an Important Governmental Interest

The Court in *Virginia* did not recognize VMI's asserted interest in providing diversity²⁰⁴ in educational opportunities as an important governmental objective because it found that providing diversity in educational opportunities was not a genuine interest. The Court looked at the history of discrimination against women in education and found that rather than pursue a policy of providing diversity in educational opportunities, Virginia had first excluded women from higher education, then given them schools with inferior resources, and then converted those schools to coeducational institutions.²⁰⁵ Thus, the Court concluded that VMI's asserted interest in diversity in educational opportunities was not genuine and, therefore, the Court did not address whether it was an important governmental objective.²⁰⁶ However, in dicta the Court acknowledged the point made by *amici* that "diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity."²⁰⁷ The Court also acknowledged that Virginia stipulated that diversity among public educational institutions can serve the public good.²⁰⁸ Therefore, the Court left room for a future determination that diversity in educational opportunities could be an important governmental interest, if it is in fact genuinely asserted.

As two of many alternatives to the traditional high schools in the Guilford County School system, Middle College at Bennett and Middle College at A&T are part of a genuine attempt to provide diversity in educational programs. For instance, there are high schools for students interested in pursuing science and math, education and healthcare, and the visual and performing arts.²⁰⁹ The availability of these alternatives to traditional public schools is strong evidence of Guilford County's genuine commitment to diversity in educational programs.²¹⁰ Furthermore, unlike the case in *Virginia*, there is no recent history in Guilford County of affording educational benefits only to females or only to males, and just a few months after Middle College at Bennett opened, Guilford County

204. *Id.* at 538.

205. *Id.*

206. *Id.*

207. *Id.* at 534 n.7.

208. *Id.*

209. See *supra* notes 42–43 and accompanying text.

210. See Reiter, *supra* note 25, at 1445–47 (arguing that the existence of magnet or alternative schools, Charter Schools, and Partnership Academies show that public single-gender academies are part of California's genuine goal of creating diversity in educational opportunities).

Schools opened a similar program for boys. By creating two similar schools almost simultaneously, Guilford County Schools was genuinely trying to enhance educational diversity for all students.

Thus, unlike VMI, Guilford County's interest in providing diversity in educational opportunities is genuine. The fact that the female school is at Bennett College and the male school at A&T is likely a result of practical necessity and does not undermine the genuineness of diversity for students in Guilford County. The President of Bennett College offered Bennett as a host for the female program because it is a female school and because there was already a program at A&T that was easily transformed into a single-gender program for boys.²¹¹

However, even if Guilford County's interest in providing diversity in educational opportunities is genuine, the question remains whether such an interest is at least an important governmental interest. The Court acknowledged that *amici* in *Virginia* urged that diversity was an appropriate government interest and that the parties in *Virginia* did not dispute that diversity in "public educational opportunities" can serve the public good.²¹² Moreover, Justices Scalia and Ginsburg both agreed that education is not a " 'one size fits all' business,"²¹³ suggesting that providing diversity in educational opportunity may be an important governmental interest. However, such statements do not amount to a declaration that diversity in educational opportunity is an important governmental interest, and the Court has not yet answered that question.

Rather than being an important governmental interest, diversity in educational opportunity is most appropriately categorized not as an end in itself but as a means of achieving the important or compelling interest of educating all students.²¹⁴ Unlike preventing students from dropping out of school, which contributes directly to increasing productivity and good citizenship in our society, providing diversity of educational opportunity offers nothing intrinsically valuable. There is no conclusive evidence that diversity among schools and school choice increases student achievement or leads to more productive citizens.²¹⁵ On the other hand, though the

211. See Buchanan, *supra* note 40; Buchanan, *supra* note 68.

212. *Virginia*, 518 U.S. at 533 n.7.

213. *Id.* at 542, 577 (Scalia, J., dissenting).

214. See *Grutter v. Bollinger*, 539 U.S. 306, 354–55 (2003) (Thomas, J., dissenting) (explaining that student body diversity is the means of obtaining educational benefits, and not an end in itself).

215. See THE BROOKINGS INSTITUTION, SCHOOL CHOICE: DOING IT THE RIGHT WAY MAKES A DIFFERENCE 23–24 (2003), (noting that factors other than school choice may influence student learning, such as the teacher's abilities, the supportiveness of parents, and the child's health) <http://www.brookings.edu/gs/brown/20031116schoolchoicereport>. (on file with the North Carolina Law Review).

research on school diversity is inconclusive and often contradictory, there is some indication that providing students and parents with diversity among educational alternatives may increase segregation, hurt children of parents who do not take advantage of these educational opportunities for their children, and inhibit civic cohesion by exacerbating cultural gaps and separatism in some circumstances.²¹⁶ Moreover, the Court in *Virginia* rejected single-sex education as an “important governmental objective.”²¹⁷ Thus, rather than being classified as an end or an important governmental objective, diversity of educational opportunity should be classified as a means of achieving the important governmental objective of fulfilling the educational potential of all students.²¹⁸

If providing diversity of educational opportunity through single-sex schools is correctly recognized as a means of achieving the important governmental objective of an effective education, the question is whether the means of excluding males and females from schools is “substantially related” to achieving an effective education. As the studies discussed in Part III(B)(2)(a) of this Comment show, the option of single-sex education in this case does not meet the constitutional burden of being substantially related to preventing students from dropping out of school or in fulfilling the educational potential of all students. Moreover, given the recent determination by the Supreme Court that student body diversity is so valuable and essential to the educational process that it constitutes a

216. *Id.* at 21–23.

217. *Virginia*, 518 U.S. at 545 (explaining that Virginia’s argument that single-sex education serves an important governmental objective is “circular” and that the proper governmental objective was to produce citizen-soldiers).

218. See BROOKINGS INSTITUTION, *supra* note 215, at 23 (explaining that school choice is only indirectly linked to student learning). The classification of diversity of educational opportunity as a means rather than as an end may at first seem contrary to the Supreme Court’s recent majority decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which held that student body diversity is a compelling government interest rather than a means to achieving an effective education. *Id.* at 328. Justice Thomas, in his dissent, criticized the majority for not distinguishing between the ends of educational benefits and the means of student body diversity. *Id.* at 355 (Thomas, J., dissenting). To reach the holding, the majority deferred to the University of Michigan Law School’s educational judgment that student body diversity is essential to the educational mission of the law school. *Id.* at 328. Guilford County, like Michigan Law School, may determine that diversity in educational opportunity is “essential to the educational mission” of the school system because not all students learn in the same ways. However, the Court in *Grutter* was deferring to a judgment that was in line with the inclusive goals of our democracy. The Court hardly would have deferred to an educational judgment that held that it was essential to maintain only a white male student body. See *id.* at 365–66 (Thomas, J., dissenting) (explaining that racial segregation was rejected long ago). Moreover, Justice Powell had expressly extolled the value of diversity in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978), and the District Court and *amici* provided ample evidence that student body diversity better prepares students for work, for society, and for leadership in the military. *Grutter*, 539 U.S. at 330–32.

compelling governmental interest,²¹⁹ it would be inconsistent to conclude that student body homogeneity of sex—the opposite of diversity and what single-sex schools strive to provide—is also substantially related to achieving an effective education. Thus, providing diversity of educational opportunity through single-sex schools is neither an important governmental objective nor a substantially related means to achieving an important governmental objective. It therefore cannot justify the gender classification made by Guilford County.

While the Supreme Court acknowledged that “inherent differences” between men and women allow gender classifications to be used “to advance the full development of the talent and capacities of our Nation’s people,” such classifications may not be used to artificially limit individual opportunity or “to create or perpetuate the legal, social, and economic inferiority of women.”²²⁰ The Guilford County programs purport to use gender classifications for the purpose of advancing the full development of the talent and capacities of the students by keeping students in school and by providing alternatives to the traditional school experience. However, the programs in fact limit individual opportunity when they deny female students the opportunity to attend Middle College at A&T and male students the opportunity to attend Middle College at Bennett. This limitation is artificial because the sociological data shows that there are more important factors to development than gender.²²¹

The classification used by Guilford County also is likely to “create or perpetuate the legal, social, and economic inferiority of women” because the programs deny females the benefits of attending high school at A&T. The programs at Bennett and A&T are similar in that both are taught by Guilford County School teachers, both follow the same curriculum, both exist for the same purpose of reaching students who are on the verge of dropping out, and both are single-sex. However, the boys’ school is located on the campus of A&T State University, a public coeducational agricultural and technical university that is much larger and more research-oriented than Bennett College, which is a small, private, liberal arts college for women.²²²

When concluding that VWIL was not equal to VMI in tangible and intangible benefits, Justice Ginsburg compared Mary Baldwin’s type of training, method of teaching, student body, faculty, course offerings, facilities, history, prestige, and alumni network with those of VMI.²²³

219. *Grutter*, 539 U.S. at 328.

220. *Virginia*, 518 U.S. at 533–34.

221. See *supra* notes 183–85 and accompanying text.

222. See AMERICAN UNIVERSITIES AND COLLEGES, *supra* note 58, at 1246, 1266.

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

While A&T and Bennett have similarities,²²⁴ they have substantial differences that prevent them from being comparable.

Despite the merits of Bennett College, it is not equal to A&T State University when comparing the same factors that Justice Ginsberg used in assessing VMI. A&T offers graduate programs to its students, has thousands more students, hundreds of thousands more library resources, and is located on a campus three times larger than the Bennett campus.²²⁵ Moreover, the student body at A&T has an average SAT score almost ninety points higher than the average score at Bennett.²²⁶ The *U.S. News and World Report* ranks A&T State University substantially higher than Bennett College.²²⁷ Thus, while male students can choose to go to a high school on the campus of A&T, female students are denied this right and are only offered the option of a single-sex education on a smaller, single-sex campus with fewer resources and less prestige than the campus offered to their male counterparts. The gender classification reinforces “the legal, social, and economic inferiority of women” not only by providing their male counterparts with superior opportunities but also by sending female students the message that they are deserving of the company of students less intelligent than the company their male students receive²²⁸ and that they deserve fewer resources,²²⁹ less space,²³⁰ and less diversity of students than male students receive.²³¹

IV. SHOULD SINGLE-SEX PUBLIC SCHOOLS BE LEGAL?

This Comment has examined the constitutionality of Guilford County’s program under the current positive law of *United States v. Virginia*, which held that gender classifications must at least serve an important governmental objective and that the discriminatory means

224. AMERICAN UNIVERSITIES AND COLLEGES, *supra* note 58, at 1246, 1266 (noting that both schools are historically black institutions).

225. *See supra*, notes 60, 61, 64, 66, 73, 74, 77, 79 and accompanying text.

226. North Carolina A&T University, *Fact book: Admissions*, at <http://qed.ncat.edu/ir&p/avsat.htm> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review). The average SAT score for A&T in 2002 was 899. *Id.* The average SAT score for Bennett College students was 808. *See* U.S. NEWS & WORLD REPORT, *supra* note 60, at 228.

227. U.S. NEWS & WORLD REPORT, *supra* note 60, at 228, 230. The 2004 edition of U.S. News and World Report’s *America’s Best Colleges* ranked A&T as a third tier school within the Best Universities-Master’s category, and ranked Bennett as a fourth tier school in the Best Liberal Arts Colleges category. *Id.*

228. *See supra* notes 62, 75 and accompanying text. Admittedly, SAT scores are not a perfect sign of intelligence or academic ability, but they are arguably the most commonly accepted standard of comparison for the abilities of college students.

229. *See supra* notes 64–65, 77–78 and accompanying text.

230. *See supra* notes 66, 79 and accompanying text.

231. A&T and Bennett are both predominantly Black. However, A&T has both male and female students, adding to the diversity of the campus.

employed must be substantially related to achieving that objective.²³² However, as Justice Scalia pointed out in his dissent, the Court suggested in several different ways that gender classifications deserve an even higher level of scrutiny.²³³ For example, the Court used the phrase “exceedingly persuasive justification”—a phrase that gives teeth to intermediate scrutiny—a total of nine times to describe the burden states must overcome for gender classifications.²³⁴ The Court likened the *Virginia* case to *Sweatt v. Painter*,²³⁵ a case of separate and unequal educational resources for blacks and whites, and a case that was a stepping-stone to *Brown*, decided only four years later.²³⁶ The Court did not have to decide whether the language of *Brown*—“that in the field of public education the doctrine of ‘separate but equal’ has no place . . . [s]eparate educational facilities are inherently unequal”—should apply to gender as well as race because the separate institutions at issue in *Virginia* were not equal.²³⁷ Similarly, the two single-sex schools in Guilford County are not equal, as one is located on a larger campus with more resources. However, if the campuses were more equivalent, for example if the girls’ school was also located at A&T, then the harder and more fundamental question of whether gender segregation itself in education creates or perpetuates the “legal, social, and economic inferiority of women” might finally be addressed.²³⁸ Given the inconclusive results of the research surrounding the efficacy of single-sex education, our country’s history of using so-called gender differences to create inequality, and the known effects of state-maintained segregation based on immutable characteristics, single-sex public schools have no place in our democracy. Admission to public schools should not be denied because of gender.

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232. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

233. *See id.* at 571–73 (Scalia, J., dissenting) (noting the Court’s use and application of the phrase “exceedingly persuasive justification” and the Court’s use of other phrases that imply that it is reserving the question of whether strict scrutiny applies to gender classifications).

234. *Id.* at 571.

235. 340 U.S. 846 (1950).

236. *Virginia*, 518 U.S. at 553.

237. *See id.* at 547.

238. *See generally* Levit, *supra* note 9 (arguing that in general, and in education in particular, gender segregation means inequality).