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Rich Kids, Poor Kids, and the Single-Sex Education Debate

Rosemary Salomone

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by

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I. INTRODUCTION

Over the past decade, the subject of publicly supported, single-sex education has generated considerable debate in legal and policy circles. Since 1996, much of that debate has centered around the Supreme Court's decision in the Virginia Military Institute case and how that case intersects with Title IX of the Education Amendments of 1972. In *VMI*, Justice Ginsburg, speaking for the Court, stated that gender classifications must have "an exceedingly persuasive justification" in order to pass muster under the Fourteenth Amendment equal protection clause.[1] That decision has become a key factor in recent efforts by school districts to establish single-sex schools and classes for girls and for minority boys. In the following discussion, I would like to underscore two points: first, that *VMI* may offer more support for single-sex programs than some political pundits may have originally thought; and second, that *VMI* and other Court decisions may command some revisions to the Title IX regulations.

But as Justice Ginsburg demonstrated in her lengthy *VMI* opinion, the legal analysis does not occur in isolation. It involves a complex weaving together of factual data and research from other disciplines, including the history of women's education and the denial of access, the sociology of gender sameness and difference, philosophical notions of equality, and public policy considerations.

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[1] United States v. Virginia, 518 U.S. 515 (1996).

II. DEFINING THE POLICY DEBATE

Since 1991, applications to private, all-girls schools have increased by 33 percent and enrollments by 24 percent.[2] Obviously, parents with the financial resources to exercise real choice see something positive in single-sex education. At the same time, public school systems from New York to California have increasingly defied the canon of coeducation in the name of gender equality for girls and equal opportunity for minority students both male and female. From the Young Women's Leadership School in East Harlem, to dual academies in Long Beach, California, to all-girls technology classes in Olympia, Washington, publicly supported single-sex education has become a hotly contested issue. In fact, on the scale of educational controversy, it is probably surpassed only by school vouchers. Both challenge the conventional wisdom of public schooling.

A 1998 report from the American Association of University Women (AAUW) has fanned the flames of this debate. According to the report, the research findings supporting single-sex schooling are simply inconclusive. In releasing its findings to the public, the group called on educators to address gender inequities throughout the system of coeducational schools. But even prior to the AAUW report, the National Organization for Women and the American Civil Liberties Union had begun to lead the charge against single-sex schooling of any nature. Both groups have persistently argued that public single-sex programs are unconstitutional and that they violate the letter and spirit of Title IX. The Supreme Court's *VMI* decision has added more fuel to the fire. And hovering over the entire controversy is the Office for Civil Rights (OCR) within the U.S. Department of Education, the federal agency charged with enforcing Title IX. Having taken a hard stand against single-sex programs over the years, OCR is now faced with the

[2] NATIONAL COALITION OF GIRLS' SCHOOLS, STATISTICAL PROFILE EDUC. OF NCGS SCHOOLS (1999).

challenge of reconciling the Title IX regulations with the *VMI* decision – and doing so in light of changing demographics, popular opinion, and social realities. Energizing the debate is the school choice movement in its varied forms, not the least of which is the burgeoning world of charter schools which now number more than 1700 nationwide.[3] Families more than ever, and particularly those in the inner city, are looking to exercise more voice in the education of their children. No matter where one stands on the choice question, it is undeniable that the one-size-fits-all neighborhood school is slowly yielding to a new consumer-oriented model.

Given this complex set of political and legal circumstances, it is not hard to understand why this seemingly benign approach evokes almost visceral responses from educators, policy makers, and scholars. Supporters push for experimental programs that address a range of educational and social problems, including lower self-esteem and interest levels among adolescent girls; peer sexual harassment in the schools; gender inequities in the classroom; high rates of teenage pregnancy among minority girls; school violence; and high dropout, drug abuse, and crime rates among young African American men in urban areas. They suggest that beneath coeducation lies a "hidden curriculum"– a subtle but nonetheless harmful institutionalized program of male dominance, differential teacher expectations, and attitudes that prepare students for gender-specific roles in society. They argue that coeducation fails to recognize adequately the range of learning styles and emotional needs that girls and boys bring to school.

Proponents point to an adolescent subculture fostered by coeducation – one that promotes popularity rather than academic achievement – what James Coleman in *The*

[3] Lynn Olson, *Redefining 'Public Schools,'* EDUC. WEEK, Apr. 26, 2000, at 1.

Adolescent Society back in 1961 called the "cruel jungle of rating and dating."[4] And from a broader policy perspective, they argue that single-sex schooling provides educational options to parents and children who lack the economic means to purchase them in the private market. What is good for rich kids should be good for poor kids. Obviously, not all supporters embrace all the above arguments. Some look to compensate girls and minority boys for social conditions and attitudes that have prevented them for succeeding academically. Others look to promote diversity as an end in itself.

Opponents present equally passionate arguments. They argue that single-sex programs smack of benevolent sexism, and deny young women and men the interpersonal skills to relate to each other in the real world. Their worst fear is the return to a pre-Title IX world – a world where gender-segregated public schools and vocational classes shortchanged girls of educational resources and tracked them into a fixed set of low-paying jobs and careers. As a matter of law, opponents argue that separating students by gender violates the "separate is inherently unequal" principle of *Brown v. Board of Education*. They view single-sex programs, at best, as a short-term political fix that ignores pervasive gender and racial inequities in the schools. At worst, they see it as a dangerous mechanism for reinforcing persistent gender and racial stereotypes. As a matter of policy, they interpret the diversity arguments that support the concept as a wedge in the door of school choice on a larger scale and a potential threat to public schooling.

[4] JAMES S. COLEMAN, THE ADOLESCENT SOCIETY: THE SOCIAL LIFE OF THE TEENAGER AND ITS IMPACT ON EDUCATION (1961).

III. GENDER, ADOLESCENCE, AND DIFFERENCE

The current interest in single-sex schooling has centered primarily on girls and secondarily on minority boys, although a recent rush of popular literature on boys in general has broadened that discussion. But what exactly has brought about this change in sentiment, particularly among many, but certainly not all, women's advocates? And why have some local and national leaders within the African-American community embraced the idea, while others have vehemently opposed it? Obviously something happened as the 1980s turned into the 1990s. In the case of girls, it had to do with research on women's adolescent development and the reported failure of coeducation to meet the needs of girls at that age. In the case of minority boys, there was mounting evidence that they were falling behind at record speed both socially and academically and that the current system of schooling was doing little to stop it. Each of these raises both distinct and similar legal and policy issues.

First, consider the girl question. Throughout the 1970s, feminists defined gender equity in terms of formal equality. Girls and boys were identical in intelligence and abilities, they argued. Any differences in interests were purely the result of social conditioning. Their views were premised on an integrationist model that called for fairness. They fought to make schools gender-neutral. But in the 1980s, feminist educational theorists and some writers began to view sex differences through a new lens. The discussion turned to the different experiences of women and men, which have resulted in a different moral and intellectual perspective. These theorists argued that schools reinforced male hegemony and epistemology and marginalized female voices.[5]

[5] DAVID TYACK & ELISABETH HANSOT, LEARNING TOGETHER: A HISTORY OF COEDUCATION IN AMERICAN SCHOOLS 282 (1990).

Carol Gilligan's book, *In a Different Voice*,[6] is considered the seminal work in this genre. And while her work has come under attack in recent years, she undeniably inspired much of the subsequent research on female adolescent development, gender differences, and the effects of schooling. Gilligan challenged classic psychological theory that attached a positive value to certain characteristics culturally defined as "masculine" – separation, detachment, subordination of relationships, and abstract thinking – while negating other characteristics culturally defined as "feminine" – attachment, caring, and interdependence. In her later research on students at the Emma Willard School, Gilligan underscored adolescence as a critical period in the lives of women. She called it a "watershed in female development, a time when girls are in danger of drowning or disappearing."[7] She found that between the ages of twelve and thirteen (the age, she noted, when dropping out of school becomes more common in the inner city), girls' knowledge seems to be buried.[8] However, Gilligan did not intend for her work to support gender separation. She made that point clear more than a decade later in an affidavit filed in the case against the Citadel and in an *amicus* brief submitted to the Supreme Court in the *VMI* case. Nevertheless, her conclusions on difference lent theoretical support to the empirical findings of educational researchers examining gender equity over the next decade.

What ultimately sparked an intense look at coeducational schools were the observational studies of Myra and David Sadker and their now-controversial book,

[6] CAROL GILLIGAN, IN A DIFFERENT VOICE 2 (1993).
[7] Carol Gilligan, *Preface, Teaching Shakespeare's Sister: Notes from the Underground of Female Adolescence, in* MAKING CONNECTIONS 10 (1990).
[8] *Id*. at 14.

Failing at Fairness.[9] The Sadkers found that boys dominated classroom discussion and were more likely to be praised, corrected, helped, and criticized by teachers – all reactions that foster student achievement, so they argued. As the Sadkers started reporting their findings in academic journals, a series of reports on how schools shortchanged girls unintentionally gave new currency to the percolating debate over single-sex education. Through the early to mid-1990s, the American Association of University Women reported that girls disproportionately lost self-esteem and interest in math and science as they approached adolescence;[10] that women were underrepresented in the school curriculum; that teacher behavior and tests tended to favor boys; and that girls lagged seriously behind boys in math and science;[11] that girls experienced widespread sexual harassment in public schools;[12] and that they faced social and institutional challenges as they formed identities and negotiated the middle school environment.[13]

Gilligan, the Sadkers, and the AAUW together painted a painful portrait of growing up as a female in America. And while their methodology and conclusions are not universally accepted,[14] their reported findings indisputably touched off a national discussion among educators, psychologists, and feminists. The impact soon began to reach the admissions offices of private all-girls schools where enrollments increased for the first time in a decade – by almost 2,000 – between the1995 and 1996 school years.

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[9] MYRA SADKER & DAVID SADKER, FAILING AT FAIRNESS (1994).
[10] AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., SHORTCHANGING GIRLS, SHORTCHANGING WOMEN (1991).
[11] AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOW SCHOOLS SHORTCHANGE GIRLS (1992).
[12] AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993).
[13] AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., GIRLS IN THE MIDDLE: WORKING TO SUCCEED IN SCHOOL (1996).
[14] *See, e.g.*, CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? 137-87 (1994); CHRISTINA HOFF SOMMERS, THE WAR AGAINST BOYS 100-23 (2000); Judith Kleinfeld, *Student Performance: Males versus Females*, 134 PUB. INTEREST 3 (1998).

Between 1997 and 1998, that figure increased by another 3,500.[15] The data also generated a flurry of activity in school districts around the country with single-sex math and science classes suddenly gaining favor.

IV. INNER-CITY MINORITY BOYS

Now consider the minority boy question. As interest in single-sex education for girls seemed to explode, inner-city school systems were experiencing a simultaneous movement for boys. This propelled the single-sex debate into another dimension where race and gender became conflated. The focus here was to reverse the downward educational and social spiral of minority students, particularly of African-American males. And the mechanism was the all-boys class and the Afrocentric academy.

Proponents of these programs pointed to the failure of the civil rights agenda to improve the lives of poor inner-city residents. Neither compensatory programs nor court ordered racial integration had proven successful in raising the achievement of low-income minority students. African-American men, in particular, were becoming reduced to a dismal statistic. As they became increasingly swallowed up in substance abuse and crime, African-American boys suffered from the absence of positive role models in their lives.[16] The rationale underlying Afrocentric school programs, in fact, borrowed many of the gender-based features advanced by the proponents of single-sex schooling for girls – same sex (and race) role models and mentors, greater leadership opportunities, and higher academic standards and expectations. Added to these was an African-centered curriculum to enhance self-esteem and develop positive identity.

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[15] NATIONAL ASS'N OF INDEP. SCHS., BACKGROUNDER: SINGLE-SEX INDEPENDENT SCHOOLS (1999).
[16] Spencer H. Holland, *Commentary, A Radical Approach to Educating Young Black Males*, EDUC. WEEK, Mar. 22, 1987 at 24.

The issue came to a head in Detroit where the school board proposed to open three all-male Afrocentric academies on an experimental basis. The racial segregation, in effect, would have been more symbolic than real. The public school enrollment in Detroit was approximately 90 percent African-American and admission to the academies technically would be open to males of all races. Nevertheless, the very concept of officially created, racially identified schools sent shock waves throughout the civil rights community. It also brought to the surface competing desires for integration and segregation that have alternately tugged at the African-American community since the introduction of slavery almost four centuries ago. As one commentator noted, this was a "desperate remedy for desperate times," one that reflected the "grim state of American race relations" four decades after *Brown v. Board of Education*.[17] Dr. Kenneth Clark, whose research had guided the Court in *Brown*, called the schools "academic child abuse" and a "flagrant . . . violation of [the decision]."[18] The NAACP, at its annual convention in 1991, adopted a policy proclaiming its "historical opposition to school segregation of any kind."[19]

The NOW Legal Defense and Education Fund and the ACLU took school officials to court. But while the policy debate within the African-American community focused on racial segregation, the civil rights groups focused on gender discrimination in their legal action. They based their chief arguments on the Equal Protection Clause of the Fourteenth Amendment and on Title IX of the Education Amendments, charging that the

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[17] Larry Cuban, *Commentary, All-Male African-American Public Schools: Desperate Remedies for Desperate Times*, EDUC. WEEK, Nov. 20, 1991 at 36, 37.
[18] Janet Wilson, *Expert Dislikes All-Male Schools, Consultant Says They Harm Black Students*, DET. FREE PRESS, Feb. 24, 1992 at 1B.
[19] NAACP LEGAL DEFENSE AND EDUC. FUND, REFLECTIONS ON PROPOSALS FOR SEPARATE SCHOOLS FOR AFRICAN-AMERICAN MALE PUPILS (1990).

school district was failing to meet the equally pressing needs of girl students. The district court granted a preliminary injunction, finding that the plaintiffs were likely to prevail on most of their claims. The statistics on "at risk" males simply did not convince the court that the exclusion of girls was substantially related to the program's objectives, nor was there sufficient evidence that the system was failing males because of the presence of females. In fact, the system was also failing females. School officials agreed to open the school to girls rather than risk the cost of additional litigation.[20] Subsequent efforts in New York City, Baltimore, and Milwaukee to establish similar programs for African-American boys were either stalled at the start or discontinued under a real or perceived threat of litigation from civil rights groups or enforcement action by the Office for Civil Rights under Title IX.

V. FROM *BROWN* TO *VMI*: IS SEPARATE INHERENTLY UNEQUAL?

As the Detroit case demonstrates, there are two key legal arguments raised against single-sex programs: the first is constitutional, based on the Equal Protection Clause; the second is statutory, grounded in Title IX. At some point, these arguments intersect.

As to the constitutional claim, the arguable violation takes on several casts – that separating girls from boys in public schooling is inherently unequal and therefore unconstitutional and, the less absolutist argument, that offering a particular type of education, i.e., single-sex, to one group while denying it to the other violates the constitutional rights of the group denied. A variation of this second argument is that offering certain benefits to one group in the form of single-sex education demands that comparable benefits be offered to the other, but not necessarily in a single-sex school.

[20] Garrett v. Board of Educ., 775 F.Supp. 1004 (E.D. Mich. 1991).

The first argument looks for a blanket prohibition, the second for equal or same treatment, and the third for comparability as a remedy.

The equality principle draws from *Brown v. Board of Education*. As the controversy over the Afrocentric academies demonstrates, the principle that "separate is inherently unequal" articulated in *Brown* is deeply ingrained in the American psyche. It is not surprising, therefore, that civil rights advocates have invoked that principle in their legal opposition to single-sex schooling. *Brown* tells us that when government policy forces a historically disadvantaged group to remain separate from the dominant group, it stigmatizes the former and conveys the message that its members are of lesser intrinsic worth than the latter.

Over the past three decades, the Supreme Court has applied the equality principle to a number of cases where sex, and not race, was the classifying factor. But the Court has spoken directly only twice on single-sex education. The first occasion was in 1982 when the Court struck down the all-female admissions policy of the Mississippi University for Women's School of Nursing.[21] There, the issue was not gender separation per se, but comparability. The Court, however, left open the possibility that states could provide single-sex education at least for compensatory purposes as long as the intent and the effect were not to promote archaic and stereotypic views of the roles and abilities of females and males.

The second time the Court looked at the issue was a decade later when it struck down the all-male admissions policy of the Virginia Military Institute. But that decade had witnessed an unanticipated turn of events. School districts, particularly in urban areas, had become passionate defenders of single-sex programs. And they were doing so

[21] Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

with the support of some segments of the women's rights community and with increasing affirmation from African-Americans. Suddenly, single-sex education was no longer the violation but rather a remedy to denial of equal educational access. And so the *VMI* case, with very little in common with this new compensatory model, became caught up in the larger debate over single-sex schooling.

Just as an aside, the *VMI* litigation marched through the federal courts in tandem with the more visible case against the Citadel in South Carolina. There we followed the painful efforts of Shannon Faulkner to gain entry despite the determined resistance of school officials, the vocal opposition of alumni, and the cruel hostility of the cadets.[22] Both the Citadel and VMI had a male-only policy remaining from a time when women were considered unfit for higher education and particularly unfit for military service and leadership. Unlike the federal military academies, which prepare cadets for service in the armed forces, both the Citadel and VMI primarily train their students for leadership roles in the corporate world and government.

The Citadel presented a live plaintiff at whom we could direct our sympathy or outrage. *VMI*, on the other hand, was taken into court by the Department of Justice on the complaint of a rejected female applicant who forever remained nameless and faceless. The Citadel grounded its defense in institutional autonomy and lack of student demand. *VMI* took a different approach, placing great weight on its "adversative model" as a justification for excluding women. Throughout the litigation, VMI attorneys argued with remarkable certitude that women were simply unfit for this demanding instructional method whose key features include "physical rigor, mental stress, absolute equal

[22] *See* Faulkner v. Jones, 858 F.Supp. 552 (D. S. C., 1994), *aff'd*, 51 F.3d 440 (4th Cir. 1995); CATHERINE S. MANEGOLD, IN GLORY'S SHADOW (2000).

treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."[23] They claimed that VMI would have to modify the rigors of this method in order to accommodate female cadets, which would destroy the success of the program.

In the course of the litigation, the appeals court found that the VMI program did, in fact, violate the equal protection clause. The court offered the state three options to remedy the violation: VMI could admit women, establish parallel institutions or parallel programs, or forego state support and pursue its own policies as a private institution.[24] In response, the state proposed a separate all-female program, the Virginia Women's Institute for Leadership (VWIL). The Institute would be supported by state funds at Mary Baldwin College, a private liberal arts college for women. But the experience for the women enrolled in the parallel program would stand in sharp contrast to the experience of the cadets at VMI. Here the Corps of Cadets would be little more than ceremonial, with an ROTC program providing the main military experience. The women would not live in barracks, would not wear uniforms on a daily basis, and would not eat all meals together. The program would replace the VMI adversative approach with cooperative learning. It was also clear that the programs were not comparable in other tangible factors. Only 68 percent of Mary Baldwin's faculty held Ph.D.s, as compared with 86 percent at VMI. And there was no realistic comparison between the facilities of the two campuses, especially in athletics.

Justice Ginsburg, speaking for the Court in *VMI*, presented an artfully yet forcefully crafted opinion, stressing the narrowness of the decision and the unique facts.

[23] United States v. Virginia, 766 F.Supp. 1407, 1421 (W.D. Va. 1991).
[24] United States v. Virginia, 976 F.2d 890 (4th Cir. 1992).

She restated and applied with bite the standard used in prior gender discrimination cases, particularly *Hogan* – that classifications by sex must be "substantially related" to an "important governmental interest" and must be backed by an "exceedingly persuasive justification." But the opinion appears to add more teeth to that standard. It talks about courts applying "skeptical scrutiny," taking a "hard look," at "generalizations and tendencies" based on gender. And once a violation is found, the remedy must closely fit it, placing the claimants in "the position they would have occupied in the absence of [discrimination]."[25]

The state of Virginia offered two justifications for excluding women from VMI: to provide diversity in an otherwise coeducational state system, and to preserve the educational benefits of VMI's "adversative approach." On the diversity question, the Court recognized the "state's prerogative evenhandedly to support diverse educational opportunities." But here the state's actions were anything but "evenhanded." It had denied women a unique educational opportunity available solely at the "premier military institute." Justice Ginsburg recounted in detail the history of higher education, replete with pervasive exclusionary policies against women even into the recent past. She counseled that the all-male college, set against that backdrop, is very likely to be a device for "preserving tacit assumptions of male superiority." She warned that even "benign" justifications offered in defense of categorical exclusions were not automatically acceptable.[26] Despite the claims of VMI officials, it was clear from the institution's history that diversity had not driven the decision of its founders, nor had it played a part in continuing to exclude women.

[25] United States v. Virginia, 518 U.S. 515, 554 (1996).
[26] *Id*. at 534-36.

The Court roundly dismissed VMI's arguments supporting the second justification – to preserve the benefits of the adversative method. At trial, expert testimony had established that some women "are capable of the individual activities required of VMI cadets"[27] and the district court had recognized that "some women . . . would want to attend [VMI] if they had the opportunity."[28] Citing *Hogan*, the Court warned that "[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"[29]

The Court in *VMI* stopped short of renouncing all gender-based classifications, leaving open the door to single-sex programs under certain conditions. Nor did it claim that men and women must be treated completely the same under all circumstances. In fact, Justice Ginsburg tells us that the "inherent differences, between men and women" are "cause for celebration, but not for the denigration of members of either sex or for artificial constraints on an individual's opportunity." Gender classifications are permissible where they "advance the full development of the talent and capacities of our nation's people," but not where they are used "to create or perpetuate the legal, social, and economic inferiority of women."[30]

At first glance, this last reference to "women" suggests a particular solicitude toward females. A careful reading, however, more accurately suggests a particular apprehension of discrimination against women in view of single-sex education's dark history. This reference must be read together with the more inclusive language preceding

[27] *Id.* at 540-41, *quoting United States v. Virginia*, 766 F. Supp. 1407, 1412 (W.D. Va. 1991).
[28] *Id.* at 1414.
[29] *Id.* at 541, *quoting* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).
[30] *Id.* at 533.

it. Taken as a whole, this language could be reasonably interpreted as an oblique bow to single-sex schools for inner-city minority students, both female and male. If not, then the passage leads to the conclusion that the Court would only recognize sex classifications that advance the full development of women. Such a distinction could pose a serious problem for single-sex programs for boys. But to categorically deny such programs to boys where they can be offered to girls might violate the decision's principle of evenhandedness.

The Court also suggested that equality must be measured by both tangibles and intangibles. In this case, the state had failed to show "substantial equality." The program at Mary Baldwin was but a "pale shadow of VMI" in terms of curricular and extracurricular choices, the stature of the faculty, funding, prestige, library resources, and alumni support and influence."[31] And while the Court mentioned in passing that the two programs were not "comparable" contrary to the findings of the lower courts, the Court emphasized the language of "equality" rather than the "comparability" standard proposed by Virginia officials. Equality suggests more of an objective inputs standard of some magnitude, even if it is not palpable and measurable with any degree of accuracy. Comparability, on the other hand, suggests a more subjective amorphous standard with less clearly defined guidelines; one that would allow the institution greater discretion, but would also lend itself to greater abuse.

VMI was indeed a landmark case in the quest for gender equity. It was also typical of cases in which the Court strains to reconcile complicated legal and political issues that bear on changing social norms. In that sense, it left a trail of unanswered questions. Those questions raise issues of compensatory purposes and affirmative action, gender

[31] United States v. Virginia, 518 U.S. 515, 551-52 (1996).

differences and stereotypes, girls' versus boys' programs, the meaning of "substantial equality," and the permissible limits of Title IX.

VI. TITLE IX AND OCR ENFORCEMENT

That brings us specifically to the approach taken by the Office for Civil Rights (OCR) with regard to single-sex programs. Title IX prohibits discrimination on the basis of sex in educational programs or activities that receive federal financial assistance.[32] The legal debate over single-sex programs and Title IX has involved two issues: the admissions policies of single-sex schools, and the permissibility of single-sex classes in coeducational schools. First, consider admissions policies. Here the statute applies "only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."[33] It makes no mention of admissions to public elementary and secondary schools, other than vocational schools, and expressly exempts military schools and certain religiously affiliated institutions. The regulations adopted by OCR in 1975 mirror this scope of coverage.[34]

From the legislative language and subsequent history of Title IX, we can reasonably conclude that both the statute and the regulations exclude the admissions policies of public elementary and secondary schools. However, the Title IX regulations place a critical restriction on that exclusion which lends itself to a range of interpretations. According to what is commonly known as the "comparability" requirement, a local school district cannot exclude any student from admission to a school unless it makes available to the student, "pursuant to the same policies and criteria

[32] 20 U.S.C. § 1681 (Supp. 1999).
[33] 20 U.S.C. § 1681(a)(1) (Supp. 1999).
[34] 34 C.F.R. § 106.11-.13 (1999).

of admission, . . . courses, services, and facilities [that are] comparable."[35] This requirement applies only to public school districts, an understandable accommodation to the numerous single-sex schools that existed in the private sector at the time the regulations were adopted. For the opponents of single-sex schooling, comparability means identical. If a school district opens a single-sex school for girls, it must open a corresponding school for boys. But an alternate interpretation is also possible. The argument can be made that, where a school district opens a single-sex school for girls, comparable educational opportunities can be offered to boys in a co-ed setting, such as a comprehensive high school or a magnet school.

The second issue that has arisen involves course offerings. The regulations ban institutions from "provid[ing] any course or otherwise carry[ing] out any of its education program or activity separately on the basis of sex, or requir[ing] or refus[ing] participation therein by any of its students on such basis."[36] The regulations contain limited exceptions for contact sports, programs in human sexuality, musical choral groups based on vocal range or quality, and programs for pregnant students. This seemingly blanket prohibition may or may not be mitigated, depending on one's view, by another provision that supports single-sex programs under certain conditions. The regulations permit schools to take "affirmative action" to "overcome the effects of conditions which resulted in limited participation . . . by persons of a particular sex" even where there are no formal findings of discrimination.[37]

Here the notion of compensation or remediation comes into play. But the regulations are unclear as to whether this provision applies to single-sex schools

[35] 34 C.F.R. § 106.35 (1999).
[36] 34 C.F.R. § 106.34 (1999).
[37] 34 C.F.R. § 106.3(b) (1999).

(arguably unnecessary as the statute impliedly exempts admissions policies) or to single-sex classes (arguably contradictory to the broad mandatory language on "access to course offerings" with specific exceptions). If unnecessary in the first instance, the only reasonable conclusion is that it applies to the second despite the apparent inconsistency. It suggests, nevertheless, that single-sex programs of some nature might be permissible for certain populations if these programs are justified by a compensatory or remedial purpose. The argument can be made that socially and environmentally imposed conditions have impeded the academic advancement of certain groups of students, for example, innercity minorities – and perhaps single-sex programs can compensate for those conditions.

Of course, this raises the question as to whether single-sex classes can be initiated only for remedial purposes. Beyond minority boys and girls in general, where does this line of thinking leave non-minority boys? Can schools establish all-boy classes in language arts or foreign languages, two areas where boys seem to lag behind girls in interest and achievement? What are the so-called "conditions" that have limited their participation in these subjects? Have boys as well as girls been the victims of social stereotyping and cultural pressures that have limited their vision and life options? The past several years have witnessed a wave of popular literature on the "boy question" that seems to point in this direction.[38] Yet the regulations, adopted in the mid-1970s to specifically address discrimination against girls, remain unclear on this newly raised concern.

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[38] *See, e.g.*, MICHAEL GURIAN, A FINE YOUNG MAN (1998); WILLIAM POLLACK, REAL BOYS (1998); DAN KINDLON & MICHAEL THOMPSON, RAISING CAIN (1999).

VII. RECONCILING TITLE IX WITH *VMI*

The underlying question is whether publicly supported single-sex programs are legally permissible. The answer, at least on the national level, lies in reconciling the Title IX regulations with the Title IX statute and with the constitutional parameters that the Court set forth in *VMI*. Obviously the Title IX regulations lend themselves to differing interpretations, assuming that we accept the regulations as a given. But the analysis goes further. The regulations must conform with constitutional standards and with congressional intent, and they must be reasonable.[39] First of all, it is clear that the Court's decision in *VMI* compels a fresh look to see if the regulations fall within constitutional bounds. Of course, this is no easy task, since reading the *VMI* decision and its potential impact is somewhat akin to reading tea leaves. The sweeping and at times opaque language of the decision must now be carefully parsed to distinguish among the limitations set by the holding, the guideposts offered in the dicta, and the interpretive space left open by the unanswered questions. And within that interpretive space, we still have to consider whether changed circumstances now impel federal officials to reinterpret the Title IX regulations or completely rewrite certain provisions. Depending on how you look at it, OCR might now have the legal and political justification to develop a clear position on Title IX that responds to current social conditions and that conforms to contemporary directions in school reform.

One issue, however, is crystal clear from the *VMI* decision. Despite protests of some civil rights groups to the contrary, separate is not inherently unequal in the context of gender. That is, all single-sex programs are not per se unconstitutional. But the

[39] *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Congress's powers under §5 of the Fourteenth Amendment extend only to "measures that remedy or prevent unconstitutional actions and not to measures that make a substantive change in the law").

opposite is also true. All single-sex programs are neither per se, nor presumptively, constitutional. From *VMI,* we can rightly conclude that coeducation is still the norm in public schooling. Nevertheless, school districts may deviate from the norm as long as they have an "important governmental interest" in mind and the justification is "exceedingly persuasive."

One has to read between the lines and behind the historical pages of the Court's decision to figure out how all of this plays into the contemporary interest in single-sex schooling. Actually, the case has little in common with current proposals. *VMI* was more analogous to the first generation of single-sex programs that denied women entrance based on stereotypical notions about their capabilities. Here the Court concluded that VMI's program perpetuated the "inferiority of women" and the superiority of men. The more recent vintage of second-generation single-sex programs has just the opposite intent and projected effect. The new crop of initiatives, for both females and minority males, focus not on the "inherent" deficiencies of the categorically excluded sex, as was the case with *VMI*, but on socially and environmentally created differences and educational needs demonstrated by the included sex. These programs aim to "advance the full development of . . . [the participants'] talents and capabilities," using the language of the Court.

But if single-sex programs cannot be based in "fixed notions concerning the roles and capabilities of males and females," are programs that focus on math and science for girls permissible? Are they not based on stereotypes about the underachievement of girls as a group? Do they imply that girls lack a math or science gene? I suggest that the response, at least partially, turns on the underlying purpose of the program and the way that school officials present it. I do not deny that these programs are based on certain

generalizations about females and males. However, they are designed to address a generalized observation about achievement, participation levels, and the greater willingness of some girls to take intellectual risks in the absence of boys as opposed to a generalized conclusion about intrinsic ability levels. This is not a generalization intended to exclude girls but one intended ultimately to mainstream them into the fabric of society.

This all boils down to context. Furthermore, if the program is designed to expand opportunities and not to limit them, then the justification becomes more persuasive. But the effect must also support the intent. No matter how benign the intent, a program cannot perpetuate a sense of inferiority among its beneficiaries or in the eyes of the general public. School officials would have to exercise extreme diligence in monitoring the program's explicit and implicit messages and assessing its cognitive and affective outcomes on an ongoing basis. And of course, participation must be voluntary.

Given the directives that seem to emerge from *VMI* and other Court decisions, there remain two provisions within the current Title IX regulations that demand re-examination, specifically the one requiring comparability and the other permitting affirmative action. As to the first, as already noted, *VMI* uses the language of "substantial equality" based on tangibles and intangibles rather than the term "comparability". Here it is important to note that the two programs need not be "exactly" but rather "substantially" equal. That distinction rationally flows from the Court's recognition that there exist, in fact, "inherent differences between men and women." And as already noted, substantiality based not only on tangible but also on intangible features, puts more teeth into the standard than mere comparability. The significance of this linguistic shift needs to be watched in future cases.

The question then remains as to whether "substantial equality" can only be met within another single-sex program or within an existing co-educational program. *VMI* does not provide a clear answer. The uniquely "totalistic" approach used at VMI does not lend itself to comparisons with the typical elementary or secondary school. The decision merely indicates that a crucial concern for the Court was that school officials allocate equal resources to both programs and that neither program promotes stereotypical notions of group capabilities or tendencies that might limit life opportunities.

The other – and perhaps more controversial – issue relates to affirmative action. The regulations as they are now written may suggest, as some moderate liberals argue, that single-sex programs are only permissible when based in a compensatory purpose. On this count, *VMI* offers no direct instruction since compensation was part of neither the school's rationale nor its intent. *VMI*, however, compels a *convincing* educational justification and not necessarily a *compensatory* one. Research findings on the technology gap for girls, the compelling social and academic data on inner-city minority students, anecdotal reports on the single-sex experience, and perhaps even more recent data on the educational and emotional problems that boys share as a group may prove exceedingly persuasive, provided that some link can be drawn between the perceived needs and the benefits of single-sex education. The only way to test the truth of that connection is to permit school districts to experiment with various approaches and gather empirical data.

VMI talks in the language of "evenhandedness" which seems to negate the possibility of a true affirmative-action approach. School districts cannot bestow benefits on one sex without offering substantially equal benefits on the other. The concept of

affirmative action also runs into potential conflict with the Supreme Court's evolving views on the use of group-based classifications as a means to remedy non-specific discrimination.[40] Thus, the affirmative action provision in the Title IX regulations may be particularly problematic in view of both *VMI* and the general trend in the Court's thinking.

There is another way, however, to look at the single-sex question that removes it completely from the affirmative action framework. Affirmative action, in the context of job opportunities or college admissions, implies preferential treatment. In the typical case, government provides a tangible benefit to some individuals based on group membership (race or sex) even though they fail to meet objective eligibility criteria that all other applicants for the same benefit must meet. In this sense, affirmative action is not a zero-sum game. The beneficiaries gain an important economic advantage while those who have sought the benefit and been denied solely because they are not members of the preferred group lose even though they could profit equally from it. On the other hand, single-sex education merely offers a particular approach to education based on what we know empirically about the academic, social, and developmental needs of certain groups of students. We have no evidence that boys in general gain any academic advantages from single-sex education while there is some evidence that girls and minority boys do in fact demonstrate gains. At the same time, given a substantially equal allotment of resources, single-sex programs do not necessarily deny *appropriate* education to others. In other words, *different* treatment does not necessarily imply *preferential* treatment which lies at the heart of legal and political opposition to affirmative action. It merely suggests that, for some students, single-sex programs may provide an environment that is

[40] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

more conductive to learning than coeducation, for whatever the reason. Nor does it necessarily reaffirm negative stereotypes particularly where participation is voluntary and the overt and more subtle messages point to individual fulfillment rather than group deficiency.

On a more fundamental level, the provision within the Title IX regulations prohibiting schools from offering a course "separately on the basis of sex," begs for reconsideration. For more than a decade, OCR has consistently interpreted this provision as an outright ban on single-sex classes with few exceptions. On careful reading, however, it appears to conflict with the letter and spirit of the *VMI* decision. It is also difficult to reconcile with Title IX itself. Both the debate surrounding Title IX's enactment and the various exemptions in the statute suggest that Congress did not intend a blanket ban on all single-sex education. The *VMI* decision presents the same view under the equal protection clause so long as programs are voluntary, do not promote gender stereotypes, and provide substantially equal services to both groups. The statute itself implicitly permits a school district to establish an *entire school*, other than a vocational school, that serves students of one sex as long as comparable services are provided to the other group. It seems inconsistent, therefore, and in fact unreasonable, to preclude a co-educational school from merely offering a *specific class* on the basis of gender.[41]

Federal officials are now struggling to reconcile the Title IX regulations with a reasonable reading of the statute and the Court's decisions in *VMI* and in related cases. For over two decades, the OCR appeared to take an absolutist position on the regulations. Since *VMI*, the agency seems to have stepped back on enforcement. As one insider noted,

[41] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (establishing the principle that where Congress was either silent or ambiguous on a matter, a court reviewing agency policy making will let stand the agency's construction of its statutory mandate only if it is reasonable).

the single-sex question is probably the most complex issue the OCR has faced over the years. And, next to women's athletics, it is probably the most politically charged. But OCR's apparent retreat is not simply the result of *VMI*. Urban school districts, in particular, are clamoring for a definitive go-ahead from OCR while the charter school movement is fast creating a fertile field for testing the merits of alternative approaches, including single-sex education.

In the meantime, efforts to make an end-run around Title IX continue to surface in Congress. A proposal by Senator Kay Bailey Hutchison of Texas, for example, would allow school districts to use education reform funds under Title VI for "same gender schools and classrooms, consistent with applicable law."[42] An earlier version, which would have permitted such programs as long as "comparable opportunities" were offered for students of both sexes, received unanimous Republican support with a vote of 69 to 29 the first time it was introduced in the Senate in 1998. But groups such as the National Women's Law Center expressed concern that the comparability standard was a marked retreat from *VMI's* "substantial equality" and could "open the door to sex-segregated programming based on harmful stereotypes."[43] The newer version, which has passed both the House and the Senate as part of an appropriations bill, explicitly requires that programs comply with existing law, however the courts might interpret it.

The regulations covering single-sex schools need clarification, while the apparent prohibition on single-sex classes needs to be replaced with safeguards. What perhaps made sense to OCR officials in 1975 when the regulations were adopted, now appear as regulatory "misjudgment," "obsolescence," even "overkill." At that time, the OCR was

[42] 146 CONG. REC. S.5752 (daily ed. June 23, 2000) (statement of Senator Kay Bailey Hutchison).
[43] Letter from Marcia Greenberger, co-president and Leslie T. Annexstein, senior counsel, National Women's Law Center to Members of the Senate (Sep. 2, 1998).

responding to blatant gender inequities throughout education, widespread gender stereotyping in course offerings, and an all–too-recent memory of prestigious institutions whose doors were closed to women. As a matter of policy, those circumstances seemed to demand a hard line on gender classifications for any purpose. A quarter century down the road, they now require ongoing re-assessment to address more focused inequities and a measure of vigilance to prevent backsliding.

In February of 1999, the OCR issued a brief response to concerns raised in a Senate Appropriations Committee report. The OCR stated that it was "examining whether there is a legal basis for interpreting Title IX to permit single sex classrooms as well as schools where they are justified on educational grounds and do not involve stereotyping or stigmatizing students based on gender and where comparable educational opportunities are afforded to students of both sexes."[44] The report estimated that, if changes in the regulations were necessary, a notice of proposed rulemaking would be published in the spring or summer of 1999. That has still not occurred. Nevertheless, the report made no mention of compensatory purposes or affirmative action.

In May of 2000, the OCR issued civil rights guidelines for charter schools that included a restatement of the Title IX regulations on single-sex programs. Single-sex schools are permissible as long as the school district offers "comparable courses, services, and facilities" to students of the excluded sex and applies the same admissions policies and criteria. The guidelines permit single-sex classes and programs where they are "necessary to remedy discrimination found by a court or OCR" or where they respond

[44] U.S. DEPARTMENT OF EDUCATION, REPORT TO THE SENATE APPROPRIATIONS COMMITTEE ON REVIEW OF TITLE IX REGULATIONS AND POLICIES REGARDING SINGLE SEX PROGRAMS (1999).

to "conditions that have limited participation by sex."[45] Admittedly, this restatement provides no further interpretation. Nevertheless, it responds to oppositionist arguments that single-sex education is permissible under certain circumstances. The guidelines also state that the Department is reviewing the Title IX regulations on single-sex programs and schools.

In the meantime, school districts across the country continue to address the real and present needs of diverse students. The Young Women's Leadership School in New York is completing its fourth year despite a pending complaint with the OCR brought by civil rights groups; Chicago opened a similar all-girls charter school in the fall of 2000; Long Beach, California, has initiated a dual-academy approach for girls and boys; numerous school districts are experimenting with single-sex classes; and Baltimore and Philadelphia continue to operate historically all-girls high schools that are *de jure* open to boys, but *de facto* single-sex.

Regardless of whether the OCR merely re-interprets or revises the Title IX regulations, the *VMI* decision still sets the outer bounds for publicly supported single-sex education. The decision's "exceedingly persuasive justification" places school districts under careful judicial and administrative scrutiny to ensure that single-sex programs meet equal protection standards and avoid the "slippery slope" feared by gender equity advocates. That slope becomes more real when we consider the unequal resources allotted to all-girls schools in the not-so-distant past. The almost scandalous inequities between Philadelphia's Central High School (for boys) and Girls' High School struck

[45] *Applying Federal Civil Rights Laws to Public Charter Schools*, 7 U.S. Department of Education, Office for Civil Rights (May 2000).

down by a state court little more than a decade and a half ago are a vivid reminder of how, absent careful monitoring, separation can lend itself to inequalities.[46]

The *VMI* standard of "exceedingly persuasive justification" begs for compelling research evidence. Yet research findings on the relative merits of single-sex and co-education are inconclusive. But then again, it is difficult to compare findings across existing studies because single-sex education has no fixed definition. There are also significant variables that affect outcomes, not the least of which are socio-economic background; student motivation and pre-program performance; teaching styles and abilities; class size; school resources; and curriculum materials. And, of course, the validity of applying existing findings to public schooling in the United States is highly debatable. Most of the studies have been conducted either abroad or in Catholic schools in this country.[47]

Nevertheless, the findings of one researcher have particular relevance to inner-city minority students. Based on a study conducted in the 1980s using data from Catholic co-ed and single-sex schools, Cornelius Riordan concludes that the academic effects of single-sex education fall within a hierarchy of low-status characteristics (female, racial minority, low socio-economic status). The greatest effects are found among poor African-American and Hispanic females (race/gender/poverty), slightly diminished effects among poor African-American and Hispanic males (race/poverty), smaller effects from white middle-class females (gender), and virtually no differences among affluent students

[46] Newberg v. Board of Educ., 26 Pa. D. & C.3d 682, 704-05 (1983).
[47] For a review of the research evidence on single-sex schools and classes, see Rosemary C. Salomone, *Single-Sex Schooling: Law, Policy, and Research*, *in* BROOKINGS PAPERS ON EDUCATION POLICY, 231-97 (Diane Ravitch, ed., 1999).

regardless of race or gender.[48] These findings support recent efforts by urban school districts to meet the educational needs of poor and minority students through single-sex programs.

VIII. CONCLUSION

I am not suggesting that co-education is the ideal. But then again, this is not an ideal world, particularly for urban minority students. Given the fact that more than three decades of federal remediation and court-ordered integration have failed to stem the downward spiral of inner-city students, single-sex programs are an alternative worth consideration, at least on an experimental basis. As a nation, we have expended billions of dollars on a variety of unproven programs. The ongoing debates over bilingual education and whole language versus phonics are clear cases on point. Yet, as a matter of federal law, these decisions are left to the discretion of state and local governments, without requiring or prohibiting any one approach. Perhaps what distinguishes single-sex programs from other pedagogical approaches is not that the research findings are inconclusive, but that we have difficulty uncoupling gender segregation from its tainted history and, more importantly, from the shameful legacy of racial segregation. Nevertheless, to argue as many opponents do, that single-sex programs are impermissible because they lack adequate supportive data, which in turn cannot be gathered unless such programs are permitted to exist for a sustained period, obviously represents the most irrational and disingenuous form of circular reasoning.

[4848] Cornelius Riordan, *The Future of Single-Sex Schools*, *in* AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS (March 1998); Cornelius Riordan, *Single-Gender Schools: Outcomes for African and Hispanic Americans*, *in* 10 RESEARCH IN SOCIOLOGY OF EDUCATION AND SOCIALIZATION 177-205, (Aaron M. Pallas ed., 1994); CORNELIUS RIORDAN, GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? (1990).

The only way to prove or disprove the educational merits of single-sex education is to lift the legal cloud now hovering over the approach. This would permit local school officials the flexibility to develop diverse programs for a diverse population of students. Without the empirical and anecdotal data these programs can generate over time, the debate over single-sex education will remain mired in political ideology. In the meantime, another generation of poor kids will be denied the benefits of an approach that only the rich now have the freedom to choose for their children.