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**SARA MANDELBAUM: PANEL Two: CONSTITUTIONAL,  
STATUTORY, AND POLICY ISSUES RAISED BY ALL-FEMALE  
PUBLIC EDUCATION**

Sara Mandelbaum

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*Sara Mandelbaum* \*

SARA MANDELBAUM: I'm going to talk today about Title IX<sup>1</sup> and the Equal Protection Clause<sup>2</sup> of the Constitution. Before I do so, I feel obliged to set forth some of the factual premises on which I operate when I approach this issue. One is that coeducation needs a lot of work to make it both responsive to the needs of female students and a less hostile environment.<sup>3</sup> Teachers and administrators have a responsibility to address the practices that interfere with girls' full enjoyment of education.<sup>4</sup> That runs the gamut from sexual harassment<sup>5</sup> to the bias of many teachers,

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<sup>1</sup> 20 U.S.C. § 1681 (1994) (stating "[n]o person 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 . . ."). See also Judy Mann, *Boys and Girls Apart: Single-Sex Education Is One School Choice We Need*, WASH. POST Oct. 20, 1996, at C1 (noting that "[T]itle IX of the Education Amendments of 1972 bars discrimination on the basis of sex in any federally funded program.").

<sup>2</sup> U.S. CONST. amend. XIV, §1. (stating that "[n]o State shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the laws.").

<sup>3</sup> See generally AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, *HOW SCHOOLS SHORTCHANGE GIRLS - THE AAUW REPORT* (1992) [hereinafter AAUW REPORT] (discussing how boys and girls are treated differently in and out of the classroom); See also Tamara Henry, *A New Push for Girls-Only Public Schools N.Y. Experiment in Leadership*, USA TODAY, Sept. 18, 1996, at D1 (quoting the mother of a Young Women's Leadership School student who stated that boys "are very aggressive. They would pull [my daughter's] hair and push her.").

<sup>4</sup> See Peggy Orenstein, *All-Girl Schools Duck the Issue*, N.Y. TIMES, July 20, 1996, at A19 (stating "school boards, administrators and teachers have an obligation to . . . provide a safe environment in which both girls and boys learn their lessons as well [as] respect for each other as equals.").

<sup>5</sup> See generally AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS* (1993).

sometimes inadvertent, in paying more attention to boys than girls,<sup>6</sup> and to the curriculum content which often ignores women's contributions to society.<sup>7</sup> The evidence we have suggests very strongly the need for adequate sex equity training in education<sup>8</sup> and for what some educators have referred to as a "feminist pedagogy."<sup>9</sup>

Another premise that I accept in approaching this analysis is that most students, some ninety-nine percent, are in coeducational classrooms,<sup>10</sup> and whether we are for or against a program like Young Women's Leadership School (YWLS),<sup>11</sup> the fact remains that a program for such a small percentage of the population solves nothing for the vast majority.<sup>12</sup> I, as well as many educators involved in this debate, believe that it is really an open question whether single-sex classes or schools do in fact improve educational outcomes. The studies are, thus far, positively

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<sup>6</sup> See generally AAUW REPORT, *supra* note 3; see also Myra Sadker & David Sadker, *Sexism in the Classroom: From Grade School to Graduate School*, 67 PHI DELTA KAPPAN 512 (1986) (noting that while teachers are unaware of the presence of bias in the classroom, male students often receive more attention from teachers and more time to talk).

<sup>7</sup> See Susan McGee Bailey & Patricia B. Campbell, *Gender Equity: The Unexamined Basic of School Reform* 4 STAN. L. & POL'Y REV. 73, 78 (1993) (explaining that sex stereotypes can be found in the curriculum and teaching practices which places importance on men and boys while girls and women have an "auxiliary role").

<sup>8</sup> See Sadker & Sadker, *supra* note 6, at 512 (pointing out that "[b]rief but focused training can reduce or eliminate sex bias from classroom interaction [and] [i]ncreasing equity in classroom interaction increases the effectiveness of the teacher as well.").

<sup>9</sup> See Bailey & Campbell, *supra* note 7, at 79 (describing the feminist pedagogical theory that the teacher's role is not an all-knowing authority but a "sensitive facilitator" in a class where teachers and students learn together with an emphasis on personal experience).

<sup>10</sup> Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1119 (1993). "Advocates of the single-sex public schools note that . . . coeducation has been the dominant approach to education in the United States . . ." *Id.*

<sup>11</sup> See Jacques Steinberg, *Just Girls, and That's Fine With Them; At a New School, No Boys, Less Fussing, and a Freer Spirit*, N.Y. TIMES, Feb. 1, 1997, at A21 [hereinafter Steinberg, *Just Girls*] (describing the Young Women's Leadership School of East Harlem).

<sup>12</sup> See Mann, *supra* note 1, at C1 (explaining that she is committed to public education because that is "where the majority of our youngsters are taught and th[at] is where we need to develop the best possible learning environments.").

inconclusive on this question.<sup>13</sup> I think that the proponents of single-sex education will concede that there really are no controlled or reliable studies that have been conducted in this country which prove that the single-sex environment, as opposed to other factors such as class size,<sup>14</sup> resources,<sup>15</sup> and tutoring,<sup>16</sup> is responsible for producing positive results.

For example, in 1993, the Department of Education Office of Educational Research Improvement, (OERI) issued a two-volume compilation of essays by educators and researchers on the question of single-sex education.<sup>17</sup> This was prepared under the Bush Administration when Diane Ravitch, a strong proponent of single-sex education,<sup>18</sup> was the Assistant Secretary of the Department.<sup>19</sup> Significantly, this report found that the results were inconclusive as to whether single-sex education is more effective than coeducation in promoting academic achievement and

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<sup>13</sup> See, e.g., VALERIE LEE, U.S. DEP'T OF EDUC., SINGLE-SEX SCHOOLING: PROPONENTS SPEAK (1993).

<sup>14</sup> See MARY MOORE, U.S. DEP'T OF EDUC., SINGLE-SEX SCHOOLING: PERSPECTIVES FROM PRACTICE AND RESEARCH 71 (1993) [hereinafter MOORE, SINGLE-SEX SCHOOLING]. "Many such factors articulated by conferees reflect elements that 20 years of research have shown to be fundamental to effective schools, regardless of their sex policy: a relatively small student body that allows students to develop a sense of personalism and connectedness to the group, a strong emphasis on academic content, high expectations for achievement, and a shared understanding of and commitment to the school's mission and values. Conferees repeatedly noted the importance of a school's signature and its sense of purpose." *Id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*; see also David Gonzalez, *About New York; Girls' Schools: Neighbors for, NOW Against*, N.Y. TIMES, Mar. 5, 1997, at B1 (noting that "a Network of [100] Hispanic female executives and government officials . . . established a mentoring program with the [Young Women's Leadership School]").

<sup>17</sup> See generally U.S. DEP'T OF EDUC., SINGLE-SEX SCHOOLING: PERSPECTIVES FROM PRACTICE AND RESEARCH (1993); U.S. DEP'T OF EDUC., SINGLE-SEX SCHOOLING: PROPONENTS SPEAK (1993).

<sup>18</sup> *Today* (NBC television broadcast, Aug. 27, 1997) (quoting Matt Lauer introducing Diane Ravitch as "a professor of education at New York University, [who] supports single-sex public schools").

<sup>19</sup> DEBRA HOLLINGER, U.S. DEP'T OF EDUC., SINGLE-SEX SCHOOLING: PERSPECTIVES FROM PRACTICE AND RESEARCH 1 (1993) (stating that Diane Ravitch was "former Assistant Secretary for Educational Research and Improvement and Counselor to the Secretary").

psychological development.<sup>20</sup> There have been studies that are cited from other countries, such as Australia<sup>21</sup> and New Zealand,<sup>22</sup> but these improved outcomes cited from those studies appear to be attributable to other factors, such as the small class size,<sup>23</sup> the commitment of the educators to quality education<sup>24</sup> and the commitment of substantial resources.<sup>25</sup> In addition, self-selection often plays a role in the student composition of these types of schools,<sup>26</sup> so that the results of such studies are not to be extrapolated to the general student population.<sup>27</sup> This is particularly true of the studies of religious institutions that are cited by

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<sup>20</sup> See U.S. DEP'T OF EDUC., SINGLE-SEX SCHOOLING: PERSPECTIVES FROM PRACTICE AND RESEARCH at iv (1993) "It also seems clear that further research is needed to clarify the initial conclusions presented in this report. We need to know more about the effects of single-sex schooling and about its value and utility today." *Id.*

<sup>21</sup> See MOORE, SINGLE-SEX SCHOOLING, *supra* note 14, at 48 (citing a survey of 1,675 secondary school students from Melbourne, Australia finding that students who attended single-sex institutions had higher self-esteem, better peer affiliation, and were less apt to adhere to rigid gender stereotypes).

<sup>22</sup> *Id.* at 33 (noting that New Zealand was one country among many cited where single-sex education was "a relatively common educational alternative").

<sup>23</sup> A 1973 study found "that three factors — college size, the ratio of women faculty to women studies, and the proportion of women students bear a strong relationship to the number of women who achieve in their careers." *Id.* at 25.

<sup>24</sup> See *id.* at 48 (discussing a study in Australia which focused on the relationship between academic and school type, peer influences, curriculum, socioeconomics, and influence by teachers in Queensland and Victoria. When all the factors were weighed in, the "achievement of both groups was most associated with teacher encouragement . . .").

<sup>25</sup> *Id.* at 48 (discussing an Australian study on girls which found that one factor which contributed to academic achievement "was associated with higher socioeconomic status of the father.").

<sup>26</sup> See MOORE, SINGLE-SEX SCHOOLING, *supra* note 14, at 74 (noting that one positive aspect of single-sex education is the "pro-academic choice that parents and students make when they decide to enroll in such schools").

<sup>27</sup> See generally LEE, *supra* note 13, at 38. "Of course, a larger question is whether these effects would generalize to public schools. . . . In my opinion, there are several questions to be raised in this context: (1) is the extant research on single-sex schools . . . applicable to the population of inner-city youth?; (2) is research on secondary schools relevant for elementary schools?; and (3) might we interpret the findings which seem to favor girls in private schools as possibly suggesting that single-sex education favors 'disadvantaged' groups?" *Id.*

single-sex proponents.<sup>28</sup> Socioeconomic status is another factor which may account for what appears to be good results of some forms of single-sex education for women.<sup>29</sup>

In addition, there are other competing considerations that come into play in analyzing this issue. One is the reality that many public schools are in serious crisis<sup>30</sup> and there is often little or no learning going on in many of the classrooms.<sup>31</sup> Given that scenario, a little experimentation, within limits, does not seem to be such a terrible idea<sup>32</sup> and, as a lawyer, I would want to think long and hard about mounting a vigorous challenge to a school like YWLS, where primarily Hispanic students are getting something that has been available to wealthy white students for a long time. There is also some compelling anecdotal

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<sup>28</sup> See MOORE, SINGLE-SEX SCHOOLING, *supra* note 14, at 72. “[R]esearch focused on a sample of independent high schools in the United States did not establish the same consistent pattern of positive results for students (especially girls) that emerged when only Catholic school composed the sample.” *Id.*

<sup>29</sup> See ANTHONY S. BRYK ET AL., CATHOLIC SCHOOLS AND THE COMMON GOOD 230. “These students’ families are making a somewhat greater sacrifice to send their children to a single-sex school, which suggests that such families may be placing a higher value on education for their children.” *Id.*

<sup>30</sup> See *National Press Club Luncheon with House Speaker Newt Gingrich*, FEDERAL NEWS SERVICE, Sept. 30, 1997 [hereinafter *Newt Gingrich*] (citing statistics from Mayor Richard Riordan of Los Angeles as saying “that in the poorest neighborhoods of Los Angeles . . . 12 percent of the 18-year-olds can read at an eighth-grade level. Eighty-eight percent cannot read at an eighth-grade level. This is a catastrophe, and it means that instead of learning and going on to vocational-technical school or college, they end up not learning and going to jail”). See generally George Will, *Many Big Problems Cured Only With Bite-Size Programs*, SUN-SENTINEL FT. LAUDERDALE, Sept. 29, 1996, at 7H (explaining that in New York City Schools, about 91,000 of the more than one million pupils in the city’s 1,095 public schools do not even have desks, and classes are being held in locker rooms).

<sup>31</sup> Jacques Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*, N.Y. TIMES, July 16, 1996, at A1 [hereinafter Steinberg, *Sex Bias*]. “A lawyer representing the Center for Educational Innovation, George Shebitz . . . say[s] that the school [the all-girls Harlem school] ‘is a response to an educational need that up to now has not been met’ and ‘doesn’t preclude the Board of Education from starting an all-boys school.’” *Id.*

<sup>32</sup> Ann Rubenstein Tisch and her husband Andrew Tisch are the founders of the all-girls school in Harlem. Mrs. Tisch revealed, in an interview, that the idea for this innovative all-girls public school had been brewing in her mind for years as she observed the decaying quality of urban public education. *Id.*

evidence that some girls like to be in single-sex environments,<sup>33</sup> that they feel better and relieved -- whether it's objectively true or not -- not to have to compete with disruptive boys, not to have to deal with sexual harassment,<sup>34</sup> to have a greater opportunity for leadership and so forth.<sup>35</sup>

I'll now give a broad overview of the law in this area. Title IX prohibits discrimination on the basis of sex in educational programs receiving federal financial assistance.<sup>36</sup> It requires that school districts provide comparable courses, services, and facilities to boys and girls.<sup>37</sup> The regulations implementing Title IX state that a recipient may not "provide any course or otherwise carry out any of its educational program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis . . . ."<sup>38</sup> There are some exceptions to this that are expressly noted in the implementing regulations of Title IX: for contact sports,<sup>39</sup> sex education classes,<sup>40</sup> and choir.<sup>41</sup> Title

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<sup>33</sup> Steinberg, *Just Girls*, *supra* note 11, at A21. Several seventh-grade students, after only five months of a single-sex education (at the Young Women's Leadership School in East Harlem), give the system rave reviews. Such comments include Iris Giboyeaux's statement that "it feels like home," and that single-sex schooling allows her to "be more open." Additionally one of Ms. Giboyeaux's classmates, Albeliza Perez, reiterated similar feelings in being able to bring up subjects that she would not feel comfortable doing in the presence of boys. "Last year, if I would have brought up a question about masturbation, the boys would have laughed . . . this year, I brought it up in class and the girls were like, 'Thanks Abby.'" *Id.*

<sup>34</sup> See generally Henry, *supra* note 3, at D1 (noting that student, Amy Lopez, stated that "she was so shy . . . it was tough to find her voice in front of boys . . . [and] boys would persistently phone the house. 'They are very aggressive. They would pull her hair and push her.'").

<sup>35</sup> Steinberg, *Just Girls*, *supra* note 11, at A21. The founders of the Young Women's Leadership School believe that without boys present girls will be free to build up their self-esteem and develop the initiative and skills to become leaders. *Id.*

<sup>36</sup> See 20 U.S.C.A. § 1681(a) (1988).

<sup>37</sup> See *id.*

<sup>38</sup> 34 C.F.R. § 106.34 (1997)

<sup>39</sup> 34 C.F.R. § 106.34(c) (1997) (allowing separation of students for physical education classes which involve bodily contact).

<sup>40</sup> 34 C.F.R. § 106.34(e) (1997) (allowing separate human sexuality classes for boys and girls).

<sup>41</sup> 34 C.F.R. § 106.34(f) (1997) (allowing choirs to be comprised of one sex).

IX generally prohibits, therefore, the separating of students on the basis of sex.<sup>42</sup> Some schools may seek to and have sought to get around this by alleging that the programs are voluntary,<sup>43</sup> but Title IX addresses the issue of true voluntariness as opposed to subtle coercion.<sup>44</sup> One of the regulations provides that: "Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counselling or appraisal materials by counselors."<sup>45</sup> This addresses the situation where the program is nominally "voluntary,"<sup>46</sup> but, in fact, students are encouraged either directly or in more subtle ways to opt for the single-sex alternative.<sup>47</sup> Title IX, however, does not govern the admissions practices of elementary and secondary schools,<sup>48</sup> only vocational schools,<sup>49</sup> and this exception would seem to provide some statutory leeway for school districts in the case of free standing single-sex institutions.<sup>50</sup> The statute does require, though, that if such schools are

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<sup>42</sup> See generally 20 U.S.C.A. § 1681 (1988).

<sup>43</sup> Daniel Gardenswartz, *Public Education: an Inner-City Crisis! Single-Sex Schools: An Inner-City Answer?* 42 EMORY L.J. 591 n. 180 (1993). Vorchheimer v. School Dist. of Phila., 532 F.2d 880, 885 (1976). "The dissent felt that the majority had ignored the express prohibition found in § 1703(c): The statutory language of the E.E.O.A. convinces me that Congress did not inadvertently add the word 'sex' to the list of prohibited bases for assigning public school students, but included it in those subsections with the express objective of abolishing single-sex public schools." *Id.* at 840 (Gibbons, J., dissenting).

<sup>44</sup> *Id.*

<sup>45</sup> 34 C.F.R. § 106.36(c) (1997).

<sup>46</sup> *Id.* (explaining that this regulation is really voluntary because it is up to the school to determine whether there is a disproportionate number of boys or girls and whether it is due to sex discrimination).

<sup>47</sup> Linda L. Peter, Note, *What Remains of Public Choice and Parental Rights: Does the VMI Decision Preclude Exclusive Schools or Classes Based on Gender?*, 33 CAL. W.L. REV. 249, 262 (1997) "It seems that students may voluntarily choose single-sex classes or schools." *Id.*

<sup>48</sup> 20 U.S.C. § 1681(a)(1) (1997) (stating that 20 U.S.C. § 1681 only applies to higher education).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

established, the school district must make available to the excluded sex, “pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.”<sup>51</sup> You will note this is a somewhat more stringent standard than simply saying they have to set up a roughly comparable program,<sup>52</sup> and it seems to require an extremely high degree of identity between two programs.<sup>53</sup> And then, of course, there’s the question of whether, even if such a strictly comparable program were set up, it would satisfy the United States Constitution.<sup>54</sup>

In *Garrett v. Board v. Education*,<sup>55</sup> which involved the Detroit male-only academies,<sup>56</sup> the defendant tried to argue that this admissions exception in Title IX saved those academies from being declared invalid under Title IX.<sup>57</sup> The *Garrett* court rejected that argument,<sup>58</sup> citing the

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<sup>51</sup> See 20 U.S.C.A. § 1681 (1988).

<sup>52</sup> See *infra* notes 80-83 and accompanying text. See also 116 S. Ct. at 2282-83 (discussing Virginia’s proposed plan, after the exclusion of women from the all-male VMI (Virginia Military Institute) was held unconstitutional, to create a “parallel program” at the VWIL (Virginia Women’s Institute for Leadership) in an attempt to maintain VMI as an all-male institution); see generally Kristen S. Caplice, *The Case for Single-Sex Education*, 18 HARV. J.L. & PUB. POL’Y 227, 268 (1994) (stating that “[a]s long as both sexes have the opportunity to attend substantially equal educational facilities, neither sex suffers impermissible gender discrimination . . .”).

<sup>53</sup> See 116 S. Ct. at 2283-87 (discussing the many differences between the proposed program at VWIL and the existing program at VMI, such as “VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed,” and “[it] does not offer a VWIL student the range of curricular choices available to a VMI cadet.”).

<sup>54</sup> See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (stating that “[s]eparate educational facilities are inherently unequal.”).

<sup>55</sup> 775 F. Supp. 1004 (E. D. Mich. 1991) (holding “[t]his Court views the purpose for which the Academies come into being as an important one. It acknowledges the status of urban males as an ‘endangered species.’ The purpose, however, is insufficient.”).

<sup>56</sup> *Id.* at 1006 (stating that the Detroit Board of Education established three all-male academies that offered a curriculum designed for the special needs of urban males).

<sup>57</sup> *Id.* at 1008-09 (arguing that 20 U.S.C.A. § 1681(a)(1) permits a single-sex educational facility of this type because the academies are not vocational, professional or public graduate or undergraduate institutions).

legislative history of Title IX.<sup>59</sup> as well as a ruling from the U.S. Department of Education's Office of Civil Rights,<sup>60</sup> the agency in charge of enforcing Title IX.

Another argument that might be made in support of single-sex education is that it serves a valid remedial purpose in light of past discrimination against girls and women in education.<sup>61</sup> Title IX does allow a school to take remedial measures to remedy past discrimination.<sup>62</sup> One of the implementing regulations states that, if the assistant secretary for Civil Rights finds that a school that receives federal funds is in violation of Title IX, it may be required by the Assistant Secretary to take remedial action.<sup>63</sup> Even in the absence of a finding of discrimination, a recipient may take "affirmative action"<sup>64</sup> "to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex."<sup>65</sup>

The analysis is similar under the Equal Protection Clause of the

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<sup>58</sup> See *id.* at 1009 (stating that "the [d]efendant's argument is flawed . . . [and] this exemption for admissions [i]s applicable primarily to historically preexisting single-sex schools; [and] it is not viewed as authorization to establish new single sex schools").

<sup>59</sup> See *Garrett v. Board of Educ.*, 775 F.Supp. 1004, 1009 n.8 (discussing the legislative history of Title IX, stating that the exceptions that the defendants were relying upon were "intended to allow continued single-sex admissions by *existing* institution[s]").

<sup>60</sup> See *id.* "[T]he Office of Civil Rights of the Department of Education, ("OCR"), the federal government authority charged with administrative enforcement of Title IX, has opined that all male public elementary and secondary school programs violate Title IX." *Id.*

<sup>61</sup> The Supreme Court has held that when a class has been the object of past discrimination, the government can create programs to compensate that class for the discrimination that it had suffered. See, e.g., *Richmond v. Croson*, 488 U.S. 469, 509 (1989) (holding that local governments may enact affirmative action programs only where evidence of past discrimination exists and where the programs are aimed at rectifying such past discrimination).

<sup>62</sup> See 34 C.F.R. § 106.3(a) (1990). "If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an educational program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination." *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See 34 C.F.R. § 106.3(b) (1990).

<sup>65</sup> *Id.*

United States Constitution<sup>66</sup> under which there is a strong presumption against using a student's sex as the basis for making educational decisions.<sup>67</sup>

In *Mississippi University for Women v. Hogan*,<sup>68</sup> the University argued that the nursing program served a compensatory purpose for women<sup>69</sup> and that this justified the exclusion of Mr. Hogan.<sup>70</sup> The Court rejected the affirmative action rationale noting that nursing has been a predominantly female occupation.<sup>71</sup> The Court specifically stated: "It is readily apparent that a state can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."<sup>72</sup>

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<sup>66</sup> See U.S. CONST. amend. XIV, §1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

<sup>67</sup> See David Blankenship, *Does VWIL Pass Legal Muster?*, RICHMOND TIMES-DISPATCH, Aug. 31, 1997, at F6 (claiming that VWIL's program which denies male applicants on the basis of sex is no longer acceptable).

<sup>68</sup> 458 S. Ct. 718 (1982).

<sup>69</sup> *Id.* at 727 n. 13 (noting the State's argument that maintaining the single-sex admissions policy of MUW was justified because it "provide[d] some form of higher education for the academically disenfranchised" since initially, in the 1850's, women were not offered "access to state-supported higher learning").

<sup>70</sup> *Id.* at 727.

<sup>71</sup> *Id.* at 729 (noting that "Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing . . . when the MUW School of Nursing opened its door").

<sup>72</sup> 458 S. Ct. at 728.

When analyzing whether a single-sex program is valid, I think it is helpful to view these cases on a continuum, with the easiest cases being *United States v. Virginia*<sup>73</sup> and *Faulkner v. Jones*.<sup>74</sup> The contrast between the long-established VMI (Virginia Military Institute)<sup>75</sup> and the blatantly inferior VWIL (Virginia Women's Institute for Leadership)<sup>76</sup> presented a relatively straightforward case.<sup>77</sup> The very purpose of VWIL's existence was exclusionary, to maintain VMI as an all-male institution.<sup>78</sup> On the other end of the continuum I can imagine, for instance, a vocational education class in auto mechanics, where it might be shown that women had been barred from pursuing that vocation, and that having a class consisting predominantly of men could discourage women from taking the class or result in women dropping out due to harassment or other forms of sex discrimination. This example seems like an affirmative action program that should be justified on this continuum.

It is unclear precisely where YWLS falls on this continuum because I do not think we have gotten the information that we need in

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<sup>73</sup> 116 S. Ct. 2264 (1996) (holding that "Virginia's categorical exclusion of women from the educational opportunities VMI provides denies equal protection to women.").

<sup>74</sup> 51 F.3d 440 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 331 (1995) (holding that "South Carolina and The Citadel are in violation of the Equal Protection Clause in offering, without sufficient justification, single-gender education only to males.").

<sup>75</sup> 116 S. Ct. at 2284 (noting that VMI was established 157 years ago).

<sup>76</sup> *Id.* The court determined that "Mary Baldwin College, whose degree VWIL students will gain, enrolls first-year women with an average combined SAT score about 100 points lower than the average score for VMI freshmen[,] . . . [their] faculty holds 'significantly fewer Ph.D.'s and receives substantially lower salaries . . . than the faculty at VMI . . . [also] Mary Baldwin does not offer . . . the range of curricular choices available to a VMI cadet . . . [and] VWIL students attend a school that 'does not have a math and science focus'." *Id.*

<sup>77</sup> *Id.* at 2268 (recognizing that "the VWIL program is a pale shadow of VMI in terms of the range of curriculum choices, and faculty structure, funding, prestige, alumni, support, and influence.").

<sup>78</sup> *Id.* at 2282 (noting that "[t]he Fourth Circuit . . . deferentially reviewed the State's proposal and decided that the two single-sex programs directly served Virginia's reasserted purposes: single-gender education, and 'achieving the results of an adversative method in a military environment.'").

order to make that determination. For example, we need to examine the goals of the program,<sup>79</sup> the content of the program,<sup>80</sup> the procedures for determining access to the program, the educational outcomes of its students, and why the program needs to be limited to all-girls in order to achieve its objectives. If, for example, the admissions process is not tailored to identifying those who have suffered that discrimination, one cannot simply state that the goal is to remedy discrimination.<sup>81</sup> *Hogan* made that clear.<sup>82</sup> We must also ask: Are there less restrictive alternatives? Are there sex-neutral means for achieving the same objectives,<sup>83</sup> such as teacher training,<sup>84</sup> mentoring programs,<sup>85</sup> after-school programs,<sup>86</sup> and the like?<sup>87</sup> I think the likely

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<sup>79</sup> Jacques Steinberg, *Where the Boys Aren't, Schoolgirls Both Eager and Not So*, N.Y. TIMES, Aug. 19, 1996, at B1 [hereinafter Steinberg, *Schoolgirls*] (noting that the Young Women's Leadership School will have longer chemistry laboratory periods, "twice as long as in many other schools[,] a women's studies class, and internships designed to introduce the girls to women working in different professions).

<sup>80</sup> From what we do know, it appears that the school does not screen for girls who have a record of achievement in math and science, which renders highly suspect the school's stated goal of addressing girls' purportedly lower achievement in these areas. See, e.g., Henry, *supra* note 3, at D1 (noting that admissions to the school is based on a formula that was established by the local school board which favors students who come from low-income families and score high on achievement tests).

<sup>81</sup> See Steinberg, *Schoolgirls*, *supra* note 79, at B1 (noting that "[t]he Young Women's Leadership School will make every effort to compensate, not just with concentrated attention but with special flourishes.").

<sup>82</sup> 458 U.S. 718 (1982). The court struck down the University's policy of banning men from the University's School of Nursing when there was no showing that women were disadvantaged in the field of nursing. *Id.* at 729.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* See also Anemona Hartocollis, *Groups Hit All-Girls School*, DAILY NEWS (N.Y.), July 25, 1996, at 64. Anne Connors, president and spokeswoman of the New York City Chapter of NOW, stated that the "city should train teachers to treat boys and girls equally in co-ed classrooms." *Id.*

<sup>85</sup> Deborah L. Rhode, *Single-Sex Schools Can Only Be Way Stations*, NAT'L L.J., Aug. 18, 1997, at A19 (noting that there should be more gender equity policies, including mentoring programs); Gonzalez, *supra* note 16, at B1 (noting that 100 Hispanic females made up of executives and government officials developed a mentoring program with the school).

answer is yes.

In closing, I would suggest that it is the responsibility of teachers and administrators to teach in a gender equitable way<sup>88</sup> before we resort to separation of the sexes. I also believe that boys can benefit from learning from girls,<sup>89</sup> seeing girls and women as role models,<sup>90</sup> and seeing how girls can excel and achieve without having to be separated.<sup>91</sup> To me, the truly radical solution is to work to equalize the coeducational classroom.

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<sup>86</sup> Orenstein, *supra* note 4, at A19 (arguing that educators in coeducational schools should be thriving to establish more after-school programs for girls such as better sports and sexual education programs).

<sup>87</sup> See *supra* notes 84-86; see also Orenstein, *supra* note 4, at A19. Teachers should be taught "how to encourage girls to speak up in class and not [feel] intimidated by boys." *Id.* Textbooks that have contributions by females to science and math should be used. *Id.*

<sup>88</sup> See *supra* note 85 and accompanying text.

<sup>89</sup> Leyla Kokmen, *Businesses Get Ready to Play Host to Daughters, Sons -- Companies Welcome Youth to See Their Future on the Job*, SEATTLE TIMES, Apr. 24, 1996, at E1. Officials from Seafirst Bank and Starbucks stated that the boys can "benefit from seeing women in positions of authority." *Id.*

<sup>90</sup> *Reason to End 'Daughter to Work' Day*, TELEGRAPH HERALD, Apr. 24, 1996, at 4 (noting that "[Take Our Daughters to Work Day] helps boys . . . see women as role models, leaders and important contributors to society.").

<sup>91</sup> Rhode, *supra* note 85, at A19 (noting that coeducational classes that employ teaching strategies that are used in all-female schools have been as successful in improving the performance of girls in math and science as in all-female schools).

