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SEPARATE BUT EQUAL EDUCATION IN THE CONTEXT OF GENDER

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[I]n the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.¹

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth.²

I. INTRODUCTION

The subject of single-sex education³ raises intense arguments and surprisingly fervent emotions, especially given that single-sex schools and classes are currently a relatively rare phenomenon in

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

2. *United States v. Virginia*, 518 U.S. 515, 535 (1996) (emphasis added) (citation omitted) [hereinafter, “VMI”]. The *VMI* case involved a challenge by the United States, represented by the Civil Rights Division of the Department of Justice, to the maintenance by the Commonwealth of Virginia of a public military academy open only to males. The lower courts had upheld the policy of exclusion of all females on the grounds that there are educational benefits to being educated in a single-sex environment and that the vast majority of women could not learn under the so-called “adversative” system, *i.e.*, the extreme boot camp like methods used at VMI. While not challenging the premise that single-sex education might have some benefits, the Supreme Court, in an opinion by Justice Ruth Bader Ginsburg, held that it was a violation of the Equal Protection Clause to offer such an opportunity to only one sex.

3. A word on the use of terms: I will use the value neutral and most common term “single-sex” education rather than “sex segregated” education, which, of course, does characterize some systems around the world, and which usually implies criticism, especially in the context of the *Brown* case of racial segregation. Some prefer “single

this country and almost non-existent in public education. Debates on the subject have already cost the sacrifice of many forests of paper and gigabytes of hard drive, often generating more heat than light. It has given rise to scores of law review articles⁴ and two major symposia⁵ just since *United States v. Virginia*⁶ (“VMI”) was decided in 1996. Many of these materials were written or presented during the years that the VMI case and its sibling case challenging the male-only admissions policy of The Citadel⁷ were pending. Despite the renewed interest in the controversy, occasioned by the passage of the No Child Left Behind Act⁸ (“NCLBA”) and new Title IX reg-

gender” education, but it is much less commonly used and in this circumstance means more or less the same thing.

4. See, e.g., Jill Elaine Hasday, *The Principle and Practice of Women’s “Full Citizenship”*: A Case Study of Sex-Segregated Public Education, 101 MICH. L. REV. 755 (2002); Amy H. Nemko, *Single Sex Public Education After VMI: The Case for Women’s Schools*, 21 HARV. WOMEN’S L.J. 19 (1998); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451 (1999); Valorie K. Vojdik, *Girls’ Schools After VMI: Do They Make the Grade?*, 4 DUKE J. GENDER L. & POL’Y 69 (1997); William Henry Hurd, *Gone With the Wind? VMI’s Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER & POL’Y 27 (1997); Rosemary Salomone, *Rich Kids, Poor Kids, and the Single-Sex Education Debate*, 34 AKRON L. REV. 209 (2000); David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002); Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381 (1999); Christopher H. Pyle, *Women’s Colleges: Is Segregation By Sex Still Justifiable After United States v. Virginia?*, 77 B.U. L. REV. 209 (1997); and Jenny L. Mathews, Comment, *Admission Denied: An Examination of a Single-Sex Public School Initiative in North Carolina*, 82 N.C. L. REV. 2032 (2004).

5. Indeed, one of the aforementioned symposia occurred here at New York Law School in 1997 and was published in the New York Law School Journal of Human Rights, *A Symposium on Finding a Path to Gender Equality: Legal and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. i (1997).

6. 518 U.S. 515 (1996).

7. *Faulkner v. Jones*, 858 F. Supp. 552 (1994), *aff’d as modified* by 51 F.3d 440 (4th Cir. 1995); *U.S. v. Jones*, 136 F.3d 342 (1998) [hereinafter, collectively “The Citadel Cases”]. This case involved a challenge, initially by a private plaintiff, later joined by the United States, to the male only military college maintained by the State of South Carolina. I was, for a time, one of the attorneys for Shannon Faulkner in that case.

8. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6301 *et seq.*). The NCLBA is an initiative of the George W. Bush presidential administration which is intended to raise the standards of the public schools and to make them more accountable for student performance. The main focus of the law is to make federal educational funds available to the states if they in turn require testing of periodic measures of students’ performance on standardized tests. The law has been very controversial for a number of reasons, not the least of which is the failure of Congress and the Administration to fully fund the expenditures required under the statute.

ulations⁹ proposed by President George W. Bush's Department of Education (see *infra*), at this stage I believe there is very little new to be said on the subject. To my knowledge, there has been no major litigation since *VMI*, and little new social science research since then. I, therefore, do not intend to rehash this legal debate except in the most summary form.

I do intend, however, to propose a controlled experiment that might shed some light on the ongoing debate of whether and under what circumstances single-sex education might, as a matter of public policy, be a good idea. The answer to that question may, in turn, inform the discussion concerning whether it is constitutionally and legally permissible. If, however, it turns out that single-sex education does not provide added educational value, the legal debate becomes moot.

For most of my career, I have been an advocate for the rights of women and girls. The current crisis in education in this country, however, is not principally about sex discrimination. In making my proposal, I am gravely concerned both about *quality* and *equality* in public education. We know some of the determinants that are important to quality education, such as small classes and qualified teachers. But, we do not know whether, or under what circumstances, single-sex education, *by itself*, is one of those variables.

The lack of hard data does not prevent individuals or institutions from having very strong opinions and policy positions on the subject. There are a number of considerations contributing to the urgency of the debate: 1) the crisis in public education in general; 2) the perception of continuing sex discrimination in the schools; 3) the fierce belief of many supporters of single-sex education, including many feminists, in the advantages of educating boys and girls (or at least girls) separately; and 4) the equally fierce, though I believe much less prevalent, belief that single-sex education is never acceptable. These factors have led to a renewed effort to experi-

9. 34 C.F.R. 106 *et seq.* (2004) (current regulations generally prohibit sex segregated education in federally assisted education programs but allow exceptions for separation of students by sex within (1) physical education classes that result from the application of objective standards of physical ability, (2) physical education classes involving contact sports, (3) portions of classes in elementary and secondary schools dealing exclusively with human sexuality, and (4) choruses based on vocal range or quality, which may result in a single-sex or predominantly single-sex grouping).

ment with single-sex education as one solution to the many ills of the public schools. Among its better known provisions for pupil testing and other requirements on local schools, the NCLBA specifically calls for greater experimentation with single-sex education,¹⁰ and the Bush Administration has recently proposed amending regulations under Title IX¹¹ to allow for greater flexibility in anti-sex discrimination requirements in order to allow for greater experimentation with single-sex education.¹² The real problem facing the nation, however, is that public schools are failing so many children, regardless of their sex. A preoccupation with single-sex education is arguably a diversion from dealing with schools as a whole. It is thus somewhat ironic that a renewed interest in single-sex education coincides with the 50th anniversary of the *Brown v. Board of Education*¹³ decision, which declared unconstitutional what might be called "single race."

Brown had a major, but indirect, effect on the movement for women's equality. It was, of course, the seminal case of the civil rights movement and that movement was, in turn, the inspiration and the template for many other subsequent struggles for equal rights, including the women's rights movement.¹⁴ But *Brown* itself, the case that *theoretically*¹⁵ put an end to racially segregated public

10. Amendment by former Senator Kay Bailey Hutchison, § 5131(a)(23), codified in 20 U.S.C. § 7215(a)(23).

11. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276 (proposed Mar. 9, 2004) (to be codified at 34 C.F.R. pt. 106), discussed in detail *infra* at pp. 800-02.

12. 69 Fed. Reg. at 11,277. Many groups and individuals have criticized the proposed regulations. For a comprehensive criticism, see National Women's Law Center, at [http://www.nwlc.org/display.cfm?section=education#\(Single-Sex%20Education\)](http://www.nwlc.org/display.cfm?section=education#(Single-Sex%20Education)) (last visited Jan. 18, 2005).

13. 347 U.S. 483 (1954).

14. See, e.g., Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 164 (2003) (noting that a plurality of the U.S. Supreme Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973), agreed with appellants' contention that sex discrimination paralleled race discrimination); Serena Mayeri, Note, "A Common Fare of Discrimination": *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1056 (2001); National Women's History Project, *Living the Legacy: The Women's Rights Movement 1848-1998*, available at <http://www.legacy98.org> (last visited June 13, 2004).

15. Research from the Harvard Civil Rights Project shows that the enrollment of black students in predominantly, and 90-100% minority, schools steadily decreased from 1969 until 1986, when the percentage of black students in predominantly minority schools went back on the rise. The percentage of Latino students in predominantly

schools, has had surprisingly little direct impact on either gender-based discrimination in or exclusions from public education programs, or on single-sex education. Indeed, *Brown* is never cited by the Supreme Court in discussion of these issues, nor has “separate but equal” ever been held constitutionally impermissible in the context of sex.¹⁶

There are at least two important analytical distinctions between race discrimination and sex discrimination, which may explain in part why *Brown* is not usually part of the Court’s discussion of single-sex education.¹⁷ First, in the context of public education, women (at least white women) and people of color started in two very different places. It is true, taking the long view, that separate education for white women and girls, like separate education for newly freed black slaves and other racial minorities in this country, was a first step away from what had previously been total exclusion from educational opportunities. In that sense, both single-sex and racially segregated education were conceived in the sin of discrimination.¹⁸ However, for the most part, public education in this

minority schools did not parallel the decline of the black percentage from 1968 to 1986; the percentage of Latino students in predominantly minority schools has been escalating since 1968. See Gary Orfield & John T. Yun, *Resegregation in American Schools*, (Harvard University 1999), available at http://www.civilrightsproject.harvard.edu/research/deseg/reseg_schools99.php; The National Center for Education Statistics reports that in 2003, “about 40 percent of Black and Hispanic students attended schools in which 90 percent or more of the students were minorities.” *Elementary/Secondary Education, Concentration of Enrollment by Race/Ethnicity and Poverty, The Condition of Education 2004*, at 40 (June 14, 2004), available at <http://nces.ed.gov/programs/coe/2004/section1/indicator05.asp>.

16. See discussion *infra* pp. 789-92.

17. As someone who has spent most of my career litigating for women’s rights, this is not an easy admission, for advocates have often sought to analogize sex discrimination to race discrimination in discussions on a range of issues, including constitutional analysis, employment, public accommodations, the military, and education. The comparison, when it works, has often been the most powerful argument in the rhetorical arsenal.

18. See, e.g., Jack M. Balkin, *Is There a Slippery Slope From Single-Sex Education to Single-Race Education?*, J. OF BLACKS IN HIGHER EDUC. (2002), (“The primary methods of unjust subordination of blacks in American history have been degradation and separation; for women they have been paternalism and role differentiation, emphasizing women’s special responsibilities as caretakers. So whites-only policies always meant something different from men-only policies. Separation of blacks signaled their social inferiority and their enforced separation from white society. By contrast, separation of women actually reinforced their connection to men and their roles as men’s wives, mothers, and daugh-

country, in contrast to public education in many other nations, has largely been co-educational.¹⁹ Although there are still sixty or so private women's colleges in the United States, and depending on the definition of "single-sex" only two or three public women's colleges, there are only three private all male colleges, and since *VMI*, no public all male colleges.²⁰ Many private single-sex institutions, both at the secondary school and college level, began to disappear in the 1970s and 1980s as a result of (more or less) voluntarily going "co-ed" in response to the demands of the market.²¹ The experience of co-education was not equal for boys and girls in the past,²²

ters. While gender discrimination presumed that women would play a subordinate role within families headed by men, race discrimination was premised on keeping black and white families separate so that they would not be social equals.").

19. See generally DAVID TYACK & ELISABETH HANSOT, *LEARNING TOGETHER: A HISTORY OF COEDUCATION IN AMERICAN PUBLIC SCHOOLS* (1990). For a summary of this book and other histories on women and education in the United States, see Denise C. Morgan, *Anti-Subordination Analysis After the United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381 (1999); Denise C. Morgan, *Finding a Constitutionally Permissible Path To Sex Equality: The Young Women's Leadership School of East Harlem*, 14 N.Y.L. SCH. J. HUM. RTS. 95 (1997).

20. See Neal Thompson, *Boyz II Men At Hampden-Sydney College, Single-Sex Education Has Never Fallen Out of Fashion*, WASH. POST, June 22, 2003, at W20 (reporting that Hampden-Sydney, Morehouse College and Wabash College are the only three all-male colleges left in the country); note that all three are private colleges.

21. See, e.g., Mark Mueller, *Students Rally Against Lassell Plans to Go Coed*, BOSTON HERALD, Oct. 15, 1997, at 6, ("Since 1960 . . . the number of U.S. women's colleges has dropped from 300 to 77. Moreover . . . recent surveys show that 96 percent of high school seniors have no interest in single-sex colleges."); Melissa Hendricks, *Great Coed-Spectations*, JOHNS HOPKINS MAGAZINE, Nov. 1999, available at <http://www.jhu.edu/~jhumag/1199web/coed.html> ("Administrators had begun to fear that Hopkins, which in 1969 was \$530,000 in debt and suffering a decline in applications, would continue losing applicants to other previously all-male schools that had gone coed. They argued that admitting women would improve Hopkins's recruitment efforts and social life, and bolster the humanities. In 1969, the academic council, and finally the trustees, voted to admit women as undergraduates."); Irene Harwarth et al., *Women's Colleges in the United States: History, Issues, and Challenges*, available at <http://www.ed.gov/offices/OERI/PLLI/webreprt.html> (last visited Nov. 16, 2004).

22. AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOW SCHOOLS SHORTCHANGE GIRLS* (1992) (concluding that boys receive more attention and encouragement from teachers than do girls, the textbooks used in schools ignore or marginalize historical contributions and experiences of women and girls, sexual harassment of girls by boys is increasing, girls are less likely than boys to take advanced math courses, the gender gap in science is increasing); see also, MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS* (1994).

But note that the study by the American Association of University Women ("AAUW") is often misinterpreted as supporting a new movement for single-sex educa-

and may still present problems of equality today.²³

The second relevant analytical difference between race discrimination and sex discrimination in the context of education is, of course, that women do not constitute an “insular minority” in the

tion. See, e.g., Kristen J. Cerven, *Single Sex Education: Promoting Equality or a Constitutional Divide?*, 2002 U. ILL. L. REV. 699, 700 (2002) (“[s]ingle-sex education has taken a new place at the forefront of educational and psychological research and scholarly discussion in the past decade. This phenomenon is largely attributable to a 1992 report by the [AAUW] entitled, *How Schools Shortchange Girls . . .*” (Footnote omitted)). AAUW has posted Policy Position Papers on its website that clarify its position. AAUW states that it does not oppose the idea of single-sex education, so long as it is appropriate, necessary, and done in a manner consistent with constitutional requirements and existing anti-discrimination laws, but also states that “[s]ingle-sex education is not the solution” and urges policy makers to “look for solutions that benefit coeducational public schools.” See also AAUW’s 1998 report, *Separated by Sex: A Critical Look at Single-Sex Education for Girls* (Susan Morse ed., 1998), available at http://www.aauw.org/member_center/publications/SeparatedbySex/SeparatedBySex.pdf (finding “no evidence that single-sex education is better than coeducation. AAUW makes clear that it “strongly supports Title IX and opposes any effort that would weaken its effectiveness in ensuring equal educational opportunity for all students.”). See also AAUW, *Single-Sex Education*, available at http://www.aauw.org/takeaction/policyissues/single_sex.cfm; and AAUW *Positions on Education*, available at http://www.aauw.org/takeaction/policyissues/positions_education.cfm.

It should also be noted that the Sadker book has been much criticized. See, e.g., Amy H. Nemko, *Single Sex Education After VMI: The Case For Women’s Schools*, 21 HARV. WOMEN’S L.J. 19 n.233 (1998) (“The Sadkers’ research has frequently been based on observations and anecdotal evidence, rather than controlled variable studies.”).

23. Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451 (1999). But see Gene Koretz, *School Is Now Kinder to Girls*, BUS. WK., Mar. 2, 1998, at 32. According to the survey results: “[M]ore girls than boys feel they get positive feedback from teachers for answering correctly, and more girls (76% vs. 67%) report getting helpful comments when they answer incorrectly. Similarly, about a third fewer girls than boys (19% vs. 31%) complain that teachers don’t listen to them. For their part, teachers see girls as more confident, more focused on education, and more likely to graduate from college. This survey showed that minority girls have the highest confidence rating, but minority boys have the lowest expectations for themselves. Boys may suffer in some settings and under some conditions.” (footnotes omitted). There is, of course, also renewed interest in single-sex education for boys, especially African Americans and other minorities. See, e.g., Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15 (2004) (“[s]ex segregation has been deemed particularly necessary for African American males because they are an ‘endangered species . . . target[ed] by this system for destruction and extermination.’ In this connection, arguments for single-sex education focus on the myriad issues confronting Black male students, such as high rates of incarceration and homicide.” (footnotes omitted)).

sense often referred to by the courts.²⁴ That females are a slight majority of the population, though, has not mitigated the sexism and discrimination experienced by women in many aspects of life. The fact that women in this country are fully integrated into whatever ethnic or racial groups to which they belong, and are thus not isolated or separated from the surrounding culture and society in the same sense as racial minorities in this society, may, however, be pertinent to the question of single-sex education.²⁵ With these caveats, I will proceed to a quick review of the relevant legal history.

II. A SNAPSHOT OF THE CONSTITUTIONAL HISTORY OF SINGLE-SEX EDUCATION

Even the most ardent opponent of single-sex education (and there are some, but very few) must agree that *VMI*, as important as it is in sex discrimination jurisprudence, is no *Brown*. *VMI* prohibits a male-only admissions policy in a state-run educational institution where there is no separate and even comparable institution for women.²⁶ The case says nothing about the fate of single-sex education in the non-existent situation (now or ever) of two separate but equal public educational institutions, one for males and one for females. Contrary to the predictions of doomsayers among the *amici* supporting *VMI*,²⁷ the case has not ended, or even threatened, sin-

24. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938), which noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." But, women are not usually considered an insular minority. *See VMI*, 518 U.S. at 575 (noting that "it is hard to consider women a 'discrete and insular minorit[y]' unable to employ the 'political processes ordinarily to be relied upon,' when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns.").

25. There is also the factor of average physiological differences as well as other asserted (average) differences between the sexes. A full discussion of this contentious issue is beyond the scope of this essay, though it has played a large part in the litigation of the leading cases concerning single-sex education. *See VMI*, 518 U.S. at 550, and *Faulkner v. Jones*, 51 F.3d 440, 443 (4th Cir. 1995). It is also highly relevant to the issues concerning women in athletics, particularly under Title IX, but that issue will not be discussed here.

26. *See generally VMI*, 518 U.S. 515.

27. *See, e.g.*, Brief of Amici Curiae Wells College et al. at 5, *United States v. Virginia*, 516 U.S. 910 (1995) (No. 94-1941); Brief of Amici Curiae the State of South

gle-sex education in this country; it has merely ended male-only admissions at the two remaining male-only public colleges. Further, contrary to the accusations of some, ending single-sex education *per se* was never a goal of the movement for women's legal equality.

When Ruth Bader Ginsburg,²⁸ then a Professor at Columbia Law School and the founding director of the Women's Rights Project of the American Civil Liberties Union ("ACLU"), designed the litigation that ultimately led to the establishment of heightened scrutiny for sex-based discrimination under the Equal Protection Clause, the goal was to achieve the same level of constitutional scrutiny accorded to race-based classifications that was first announced in *Korematsu v. United States*,²⁹ i.e., strict scrutiny. While *Brown* was pivotal in inspiring the civil rights movement and consequently the women's movement, the case itself never mentioned the term "strict scrutiny" as a basis for holding that "separate but equal" was inherently unequal, although that may have been assumed.³⁰

The first successful challenge to the constitutionality of legally mandated sex discrimination was, of course, *Reed v. Reed*.³¹ Decided in 1971, *Reed* was the first case in which the Supreme Court invalidated a state mandated sex-based classification. The Court relied on the rational basis test as it always had in sex discrimination cases, but nonetheless invalidated the statute in question. From then to *Craig v. Boren*,³² the Supreme Court developed heightened or middle-tier scrutiny to analyze sex-based discrimination under the

Carolina and the Citadel et al., at 11 n.10, *United States v. Virginia*, 516 U.S. 910 (1995) (No. 94-1941); Brief of Amicus Curiae Mary Baldwin College at 20, *United States v. Virginia*, 516 U.S. 910 (1995) (No. 94-1941); Brief of Amici Curiae Dr. Kenneth E. Clark et al., at 12-13, *United States v. Virginia*, 516 U.S. 910 (1995) (No. 94-1941).

28. See, e.g., Melanie K. Morris, *Ruth Bader Ginsburg and Gender Equality: A Reassessment of Her Contribution*, 9 CARDOZO WOMEN'S L.J. 1 (2002); Toni J. Ellington et al., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 U. HAW. L. REV. 699 (1998); Carey Olney, *Better Bitch Than Mouse: Ruth Bader Ginsburg, Feminism, and VMI*, 9 BUFF. WOMEN'S L.J. 97 (2001).

29. 323 U.S. 214, 216 (1944).

30. 347 U.S. at 483. *Brown's* companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), did refer to strict scrutiny in holding that the public schools of the District of Columbia would also have to be desegregated. *Bolling*, like *Korematsu*, concerned the conduct of the federal government rather than a state government. In any event, by the 1970s when then Professor Ginsburg was working on sex discrimination litigation, the standard clearly applied equally to both levels of government.

31. 404 U.S. 71 (1971).

32. 429 U.S. 190 (1976).

Equal Protection Clause. Although sex discrimination has never been accorded the strict scrutiny sought by Ginsburg and others, in a range of cases coming to the Supreme Court between *Reed* in 1971, through *Mississippi University for Women v. Hogan*³³ in 1982, and *VMI* in 1996, the Court did develop what is sometimes referred to as “skeptical scrutiny.”³⁴ I personally prefer the term “exceedingly heightened scrutiny” because it suggests less deference than the somewhat wishy-washy “heightened scrutiny.” *Hogan* and *VMI* were the only cases involving single-sex education to actually be decided by the Court, and interestingly, each was written by one of the two current women Supreme Court Justices (*Hogan* by Justice O’Connor and *VMI* by now Justice Ginsburg). Each required that legally imposed sex discrimination must be closely and substantially related to an important government purpose (i.e., heightened scrutiny), but added to the earlier formulation the requirement that sex-based distinctions can only be supported by an “exceedingly persuasive justification.”³⁵ Ironically, although both *Hogan* and *VMI* were about gender-based exclusion in state supported education, there was no discussion in either of whether separate but equal is inherently unequal in the context of single-sex education, because in neither instance was there an even (arguably) equal institution available for the opposite sex.³⁶

The bottom line is that *VMI* did not hold that “separate but equal” is unconstitutional in the context of gender for the simple reason that the question was not before the court. The Virginia Women’s Institute for Leadership (VWIL), established at Mary Baldwin College, a private women’s college, by the VMI Alumni Association during the litigation in an attempt to prevent the enrollment of women at VMI, was not even arguably “equal” to VMI. Indeed, its defenders did not claim it was. Rather, they argued only

33. 458 U.S. 718 (1982).

34. *VMI*, 518 U.S. at 531 (holding that “[t]oday’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history”).

35. *Hogan*, 458 U.S. at 724; *VMI*, 518 U.S. at 524.

36. *VMI*, 518 U.S. at 533 n.7, quoting *Hogan*, 458 U.S. at 720 n.1 (“Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide ‘separate but equal’ undergraduate institutions for males and females.”).

that it was “comparable,” which the Supreme court held was completely insufficient.³⁷

Thus, *VMI* and *Hogan* are more comparable to *Sweatt v. Painter*³⁸ than to *Brown*. *Sweatt, McLaurin v. Oklahoma State Regents for Higher Educ.*,³⁹ and their predecessors⁴⁰ represented a litigation strategy that emphasized inequality in graduate and professional education available to blacks. The alternative law school proposed for blacks was measurably inferior to the University of Texas School of Law, from which they were barred, just as VWIL could in no way be said to be equal to VMI.⁴¹ *Brown* not only focused on elementary and secondary schools, but also jumped immediately to the argument that separate is inherently unequal, without relying on a showing that the separate schools were in fact unequal in measurable indices such as resources, textbooks, libraries, and physical plants.⁴²

The sex exclusion cases followed a similar path, though there have been substantially fewer such cases in the context of education. For example, the first time female plaintiffs challenged the elite boys-only Central High School in Philadelphia, arguing, but not proving, that the all-girls alternative was unequal, they did not succeed.⁴³ Several years later, a second challenge was brought under the Pennsylvania Equal Rights Amendment, and there the plaintiffs made the factual showing that the two schools were not equal and that Central High School was superior.⁴⁴ Thus, the argu-

37. The Supreme Court found vast differences between VMI and VWIL in resources, curriculum and course offerings, military and physical education, SAT scores of entering freshmen, prestige and reputation, alumni networks, etc. See *VMI*, 518 U.S. at 548-53.

38. 339 U.S. 629 (1950).

39. 339 U.S. 637 (1950).

40. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *Fisher v. Hurst*, 333 U.S. 147 (1948).

41. See *VMI*, 518 U.S. at 553-54 for a discussion of the comparison to *Sweatt*, 339 U.S. 619.

42. See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); JACK GREENBERG, *BROWN V. BOARD OF EDUCATION: WITNESS TO A LANDMARK DECISION* (2004).

43. *Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880 (1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977).

44. *Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C.3d 682 (1983). The Court's discussion of the material differences in the schools was unnecessary to the holding. The Court's ruling was based on the finding that the single-sex boys school lacked an “important government objective” *Id.* at 711.

ment that separation by sex is inherently unequal, as it is by race, was simply not an issue.

III. ARGUMENTS FOR SINGLE-SEX EDUCATION

The question, therefore, remains whether and under what circumstances “separate but equal” public single-sex education would be constitutionally permissible. Supporters of single-sex education for both sexes make a number of arguments, each of which can be expressed in many different variations. For purposes of this discussion, I will mention only two: the elimination of the distraction of the other sex, especially during adolescence,⁴⁵ and the difference in learning styles between males and females.

Individuals who support the first argument contend that the presence of the other sex will cause distractions and lead to sexual tension, showing off, or girls dumbing themselves down.⁴⁶ However, many people who have experienced single-sex education (including Professor Edward Purcell at the Faculty Presentation Day Panel on *Brown v. Board of Education*) can testify that the absence of the other sex does not necessarily lessen the distraction they may cause. Out of sight, in this instance, is not out of mind. The argument, of course, also renders sexual minorities (i.e., lesbian, gay, and transgender students) invisible. It does not consider the distraction that they may experience in a single-sex atmosphere.

The second argument is the much discussed, allegedly different, “learning styles” of males and females.⁴⁷ It is inarguable that individuals have different learning styles,⁴⁸ and axiomatic that in

45. See, e.g., Jane Gross, *Dividing the Sexes, for the Tough Years*, N.Y. TIMES, May 31, 2004, at B1; Patricia B. Campbell & Ellen Wahl, *Article: Of Two Minds: Single-Sex Education, Coeducation, and the Search for Gender Equity in K-12 Public Schooling*, 14 N.Y.L. SCH. J. HUM. RTS. 289 (1997).

46. Of course, single-sex education does not necessarily eliminate this often observed phenomenon. See, e.g., Daphne Merkin, *The Machines Men Still Want?*, N.Y. TIMES, June 13, 2004, § 6 (Magazine), at 15 (describing her 14 year old daughter and her close friend who attend Brearley, “a Manhattan girls school that prides itself on its high academic standards and is renowned for producing independent-minded young women” and notes that, “what really gnaws at their adolescent souls is not whether they will take over the White House one day but whether they’ll lose the boy if they take over the White House.”).

47. *United States v. Virginia*, 766 F. Supp. 1407, 1434 (W.D. Va. 1991).

48. Patricia B. Campbell & Jo Sanders, *Challenging the System: Assumptions and Data Behind the Push for Single-Sex Schooling*, in GENDER IN POLICY AND PRACTICE: PERSPECTIVES

education one size does not fit all.⁴⁹ But it is a mistake to generalize learning styles on the basis of sex. According to this essentialist theory, males are more competitive and females more cooperative, and thus, each sex benefits from a different educational environment. Counsel for VMI and the District Court⁵⁰ relied heavily on such arguments, i.e., that the important differences in learning styles were sex-based, supposedly based on the work of prominent social scientists such as Carol Gilligan,⁵¹ whom they cited at great length, but never called as witnesses. Those arguments have been thoroughly refuted by the social scientists themselves.⁵² However, even if such sex-based *average* differences could be shown as to a large number of individuals, there is never an attempt to ascertain exactly which boys and which girls actually, as opposed to theoretically, have each type of learning style. As is often the case in the discussion of single-sex education, whether for one or both sexes, the problems of sex-based stereotypes and essentialism are a constant threat, and choices are too often made based on ideology rather than individual needs.

Another important subset of the arguments for single-sex education is that some young men — particularly, it is said, young men

ON SINGLE SEX AND COEDUCATIONAL SCHOOLING 31, 36 (Amanda Datnow & Lea Hubbard eds., 2002) (“Researchers have known for many years that the differences among boys and among girls are far greater than any differences between an ‘average’ girl and an ‘average’ boy . . . There are many boys who learn better in the cooperative relational style commonly associated with girls and many girls who learn better in the competitive individualistic style often associated with boys.”) (references omitted). *See also* David W. Champagne, *General Article: Improving Your Teaching: How Do Students Learn?* 83 *LAW LIBR. J.* 85 (1991).

49. *See VMI*, 518 U.S. at 542 (commenting, “[e]ducation, to be sure, is not a ‘one size fits all’ business”).

50. *United States v. Virginia.*, 766 F. Supp. at 1434.

51. Gilligan, formerly a Professor at the Harvard Graduate School of Education and currently a Professor at New York University, is best known for her book, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (Harvard University Press 1982), in which she asserts that women have differing moral and psychological tendencies than men and that they have different learning styles. Her theories were lifted out of context and used by VMI’s attorneys to argue in favor of single-sex education and for the proposition that women could not benefit from VMI’s “adversative” educational system.

52. Brief of Amici Curiae American Association of University Professors et al. at 10-11, *United States v. Virginia*, 516 U.S. 910 (1995) (No. 94-1941); *see also* Joan E. Bertin, *Legal and Policy Issues Raised By All-Female Public Education*, 14 *N.Y.L. SCH. J. HUM. RTS.* 175 (1997).

of color — have been somehow disadvantaged by being in co-ed settings.⁵³ This must be distinguished, of course, from two more generalized points: first, that minority children of both sexes, especially those suffering other economic obstacles, are often disadvantaged in public schools, and second, that minority males may suffer from a whole range of disadvantages having nothing to do with the presence or absence of women or girls in educational and other institutions. A legal challenge to the male-only academy in Detroit resulted in the school admitting girls.⁵⁴ In either event, any focus

53. See generally *supra* note 23. See also Tenisha Mercer, *Academy's Tough Approach Pays Off; Benjamin E. Mays' Leaders Set High Expectations for Students*, THE DETROIT NEWS, Sept. 11, 2002, at 4Z (Rev. James Perkins, creator of the Benjamin E. Mays Male Academy, stating, "Our boys are in the direst demographic in the country . . . I felt a need to become involved in the crisis of African-American males."). The crisis Mays refers to involves premature death, violence, drugs, crime, poverty and prison; Elaine Ray, *All-Male Black Schools Put On Hold In Detroit; Girls Will Be Admitted After Court Challenge; Education*, THE BOSTON GLOBE, Sept. 1, 1991, at A16 (discussing the disproportionate number of black male drop-outs, disproportionate involvement in the criminal justice system, the disproportionate number of street homicides of young black men, and the dramatic decline in the number of black men attending college.); William Raspberry Column, *Don't Slam the Door On All-Boy Schools*, ST. LOUIS POST-DISPATCH, Aug. 30, 1991, at 3E ("Black boys in Detroit — and in cities across the country — are falling victim to academic failure, joblessness, crime and death."); Isabel Wilkerson, *Detroit's Boys-Only Schools Facing Bias Lawsuit*, THE N.Y. TIMES, Aug. 14, 1991, at A1 ("Desperate over the wasted lives of its young black men, Detroit is about to open the nation's first public schools for inner-city boys, unless a court challenge blocks them."); Janny Scott, *Boys Only: Separate But Equal?; Does Placing Black Youths in Their Own Classes Help Them Do Better? Some Public School Educators Think So and Are Running Maverick Programs That Others Call Illegal or a Civil Rights Retreat*, L.A. TIMES, Jan. 15, 1994, at A1, (Spencer Holland, an educational psychologist at Morgan State University in Baltimore is a "prime advocate of boys only classes. . . . Holland believes that African American boys who grow up in households headed by women develop attitudes toward girls and women that inhibit learning."); Thomas Carrol, *Throwing Wide the Education Doors*, THE N.Y. SUN, Mar. 24, 2004, at 8 ("In Albany, the Brighter Choice Charter School for Boys . . . opened in September 2002 to serve a predominantly low-income, African-American student body. . . . Parents of inner-city boys see all-boys schools as a way to create an environment that focuses on rebuilding a positive male culture.").

54. *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991). The school had never explicitly barred white students. Since it was located in inner city Detroit, which is almost entirely black, it was unnecessary to do so. See Lisa Holewa, *School Focused On Black Culture Evokes Protests By White Neighbors*, L.A. TIMES, Oct. 18, 1992, at A4 ("Ninety percent of 170,000 students enrolled in Detroit public schools [in 1991] were black."); Laura Berman, *Integrated Schools Concept Fades In Reality of Modern Day*, THE DETROIT NEWS, May 11, 2004, at 1C ("Today, 90 percent of the children in Detroit public schools are African-Americans.").

on issues of educating “at risk” youth cannot responsibly ignore the needs of boys.

There are, nonetheless, some who support single-sex education, but only or primarily for women, from a feminist or anti-subordination perspective. They posit the reverse of the logic of *Brown*, i.e., that sex integrated or co-education is inherently, or at the very least sometimes, unequal.⁵⁵ My greatest concern with this rationale is that it assumes that discrimination or something like it, even if unconscious, is inextricably embedded in the co-ed setting. The evidence shows otherwise.⁵⁶ I remain uncomfortable with any argument that either relies on, or can be interpreted as relying on, the notion that women and girls cannot compete and thrive in a co-ed setting. This discomfort, of course, co-exists with a recognition that many outstanding women’s colleges and prep schools, founded at a time when women and girls were excluded from the educational bastions of male dominance, made lemonade when served the lemons of exclusion and discrimination.

One of the problems with allowing single-sex education for girls only is the reverse of the “Catch-22” faced by defenders of single-sex education for men at VMI and The Citadel — if single-sex education is good for (at least some) women, then isn’t it also good for (at least some) men? Also, how can one posit separate but equal if the separate institution is unequal in one key way — namely, it is not single-sex?⁵⁷ If a single-sex setting is itself a factor in increased educational quality, then a co-ed setting can never be fully *equal* to a single-sex setting, even if all *other* factors are equal.

Others posit that single-sex classes and/or schools might be permissible for girls as a form of affirmative action, or as having the

55. See Erin A. McGrath, *The Young Women’s Leadership School: A Viable Alternative to Traditional Coeducational Schools*, 4 CARDOZO WOMEN’S L.J. 455 (1998); Amanda Elizabeth Koman, *Urban, Single-Sex, Public Secondary Schools: Advancing Full Development of the Talent and Capacities of America’s Young Women*, 39 WM. & MARY L. REV. 507 (1998); Heather Johnston Nicholson & Mary F. Maschino, *Strong, Smart, and Bold Girls: The Girls Incorporated® Approach to Education*, 29 FORDHAM URB. L.J. 561 (2001); Jennifer Gerarda Brown, “To Give Them Countenance”: *The Case for a Women’s Law School*, 22 HARV. WOMEN’S L.J. 1 (1999).

56. Campbell & Sanders, *supra* note 48, at 31.

57. For further discussion, see *infra* Section V.

“benign compensatory” intent⁵⁸ permitted by *Kahn v. Shevin*.⁵⁹ This approach raises many questions beyond the scope of this essay. I raise here only the problem that the single-sex education as affirmative action argument ignores the requirement in *Regents of the University of California v. Bakke*⁶⁰ — that in order to meet the demand of narrow tailoring, an affirmative action program cannot include an absolute bar of the non-beneficiary group, which in this case is boys.⁶¹

Finally, and perhaps most important, is the view that single-sex education should be available in a public school setting as it is in private schools, as a *choice* based simply on the preference of parents and/or students, whether or not there is much, if any, social science to support that preference. This is the ultimate idea behind the NCLBA and the proposed amendments to the Title IX regulations. When it comes down to it, the best that supporters of allowing increased experimentation with single-sex education can say about the research on the subject is that it has “*suggested that in certain circumstances, single-sex education provides educational benefits to some students.*”⁶² They go on to acknowledge, as they must, that there is “presently a debate among researchers and educators

58. See, e.g., Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 30 (2004); Denise C. Morgan, *Finding a Constitutionally Permissible Path To Sex Equality: The Young Women’s Leadership School of East Harlem*, 14 N.Y.L. SCH. J. HUM. RTS. 95 (1997); Sara Mandelbaum, *Constitutional, Statutory, and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. 81, 89 (1997); National Women’s Law Center, *Administration’s Plan for Single-Sex Classrooms Would Turn Back the Clock on Girls’ Educational Opportunities*, (Mar. 3, 2004), at <http://www.nwlc.org/details.cfm?id=1797§ion=newsroom>.

59. *Kahn v. Shevin*, 416 U.S. 351, 355-56 (1974) (compare discussion of benign compensatory intent in *Kahn* with *Califano v. Webster*, 430 U.S. 313, 317-320 (1977)). Note that *Kahn* does not use the term “benign compensatory.” The reasoning in *Kahn* was later labeled as “benign compensatory purpose” in *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

60. 438 U.S. 265 (1978) (holding that petitioner’s special admissions program, which considered race in admissions decisions, was unnecessary to the achievement of the goal of a diverse student body).

61. See also *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003) (holding that because the law school engaged in a highly individualized, holistic review of each applicant, it ensured that all factors that could contribute to diversity were meaningfully considered alongside race); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that “the University’s use of race in its . . . freshman admissions policy [was] not narrowly tailored to achieve respondents’ asserted compelling interest in diversity.” *Id.* at 275).

62. 69 Fed. Reg. 11,276 (emphasis added).

regarding the effectiveness of single-sex education.”⁶³ Existing social science studies, including those cited in the proposed regulations, are inconclusive at best.

Over the years, there have been dozens of studies on the effectiveness of single-sex education, all flawed in some way,⁶⁴ often because the paucity of existing models of single-sex education in the public sector makes study of its effectiveness extremely difficult, and compounds the confusion of single-sex education with quality education. The fact that single-sex schools exist primarily in private and parochial school settings makes comparisons to public education, especially in the urban environment, of questionable value. One relevant study was done of the California pilot program that experimented with single-sex schooling in the public sector.⁶⁵ California passed legislation in 1997 to fund a three year study of single-sex schooling. Six school districts serving substantial populations of students who were low-income and/or members of racial and ethnic minorities received a \$500,000 state grant to establish single-sex academies, often within the walls of co-ed school buildings.⁶⁶ The study made a number of major findings, many of which illustrate the potential problems with the single-sex model. These include a finding that although educators ensured that equal resources were provided for boys and girls, they were less concerned about hidden or overt gender biases that affected both sexes. Traditional stereotypes were often reinforced. For example, girls were applauded for being feminine and concerned about their appearance, while boys were told they should be strong and take care of their wives.⁶⁷ Also disturbing was the finding that in at least two districts the implementation of single-sex academies “resulted in negative implica-

63. 69 Fed. Reg. at 11,277 n.3.

64. Campbell & Sanders, *supra* note 48, at 31.

65. Amanda Datnow et al., *Is Single Gender Schooling Viable in the Public Sector? Lessons from California's Pilot Program*, ONT. INST. FOR STUDIES IN EDUC., May 20, 2001, available at <http://www.oise.utoronto.ca/depts/tps/adatnow/final.pdf>. (last visited Nov. 18, 2004).

66. “But the single sex experiment at Marina Middle School and others around the state ended after only one year when the state decided to pull the funding. The 49ers Academy survived because of private donations.” *Same-Sex Public Schools?*, ABC7 NEWS.COM, at http://abclocal.go.com/kgo/news/051502_assign7_girl_boy_education.html (last modified May 15, 2002).

67. See Datnow, *supra* note 65, at 6-7.

tions for the students remaining in co-education[.] [They] were left either with an imbalance in the number of boys or girls, a less motivated group of students who had not opted for the academies, and/or less experienced teachers.”⁶⁸ It is also noteworthy that this study found that the real motivation for administrators implementing the single-sex program was the opportunity to get extra funding for what they saw as the more pressing problems of at-risk students, and not as an end in itself.⁶⁹ For most parents, the “academies were seen as an opportunity for their children to benefit from special resources and to reduce distractions from the opposite sex.”⁷⁰ Thus, it can be argued that this study, as well as the many others that are at best inconclusive about the impact of the separation of the sexes in public education, far from supporting further uncontrolled experimentation, provides a cautionary tale for such willy-nilly separation of the sexes.

IV. EXPERIMENTS: “SINGLE-SEX EQUIVALENTS”

The proposed new Title IX regulations would allow experimentation with single-sex programs,⁷¹ although, without insuring against sex-based bias and without sufficient controls.⁷² Specifically, they would allow for single-sex opportunities for one sex as long as a comparable or “substantially” equal opportunity is available for the excluded sex in a co-ed setting. One particularly telling example given in the preliminary discussion of the proposal is of an all boys AP Calculus class coupled with a “substantially equal” co-ed class.⁷³ This rather curious example raises two series of fundamental questions.

First, what could possibly be the justification for an all boys AP Calculus class? I cannot think of any, at least any that are not based upon the usual assumptions and stereotypes about the alleged relative academic strengths and weaknesses of boys and girls. Defenders of single-sex education for males usually claim that boys and

68. *Id.* at 8.

69. *Id.* at 5.

70. *Id.* at 6.

71. *See* 69 Fed. Reg. 11,276 (proposed regulations).

72. *See* National Women’s Law Center, *supra* note 12 (criticisms of proposed regulations).

73. 69 Fed. Reg. at 11,279.

young men can benefit from a single-sex experience in subjects such as poetry, rather than math or science. They argue that discussions about poetry involve expressing feeling and emotions (the not-so-subtle suggestion being that these are “girl things”), and so boys and young men are more likely to be willing to talk about such things in the absence of girls.

Second, what justification might be given for all girls classes with a co-ed substantial equivalent for boys? Is it that girls may experience difficulty competing in co-ed math and science classes? Even if there is some other justification, some stigma will inevitably attach to the separate girls’ class based on the belief that girls cannot successfully compete with boys. Other questions involve: *Which* girls get the single-sex experience and why? Will the result be that many fewer girls are available for the co-ed classes, thus causing a gender imbalance, as occurred in the California program? What sort of problems might result?

The real problem with the co-ed “substantially equal” opportunity is the inescapable fact that the co-ed setting must inevitably lack the *sine qua non* that single-sex education proponents hold to be so vital — the absence of the other sex. This is the “Catch-22” of single-sex education for its own sake. If the opportunity for single-sex education is an important choice among different educational models, an approach that has significant educational benefits for at least some students, and if the evidence does not show that only the members of one sex can ever so benefit, then providing a single-sex opportunity only to boys or only to girls, with only a co-ed opportunity to the other sex, can never be “substantially equal.”

This was the conundrum faced by the advocates for the continued exclusion of women from VMI and The Citadel, who argued that single-sex education was a good thing, one that ought to be available among a diversity of educational choices. The attorneys for VMI first argued that the Cadet Corps at the Virginia Polytechnic Institute (“VPI”), which was co-ed, was an equal alternative for women.⁷⁴ But as the Fourth Circuit pointed out, VPI was not single-sex and therefore did not afford women a single-sex opportunity.⁷⁵

74. Brief for the Commonwealth of Virginia et al. in Opposition at 12, *VMI*, 518 U.S. 515 (1996) (No. 94-1941).

75. See *United States v. Virginia.*, 976 F.2d 890, 897 (4th Cir. 1992).

Rather than admit women or make the school private, the Commonwealth of Virginia, and more particularly the VMI alumni, then had to create the Virginia Women's Institute for Leadership, a single-sex but unequivocally *unequal* alternative to VMI. Any proposal to replicate such an approach, i.e., one single-sex opportunity "balanced" with a co-ed opportunity, must run into the same "Catch-22" constitutional shoals.

V. WHAT'S TO BE DONE? A PROPOSAL

The usual practice in discussing the controversies surrounding single-sex education is to state one's personal biases and opinion at the beginning of a talk or written piece on the subject. Many people have assumed that they know my views based on the fact that I have been involved in litigation challenging sex-based exclusions in public education,⁷⁶ and have held prominent positions at the ACLU, the Civil Rights Division of the Justice Department during the Clinton Administration,⁷⁷ and the NOW Legal Defense and Education Fund,⁷⁸ all of which have brought challenges against particular single-sex institutions. On the other hand, I myself am a

76. I was at the ACLU when *Hogan* was brought by the ACLU of Mississippi and advised on and assisted with the Supreme Court brief. I was directly involved in the Citadel litigation while there and indirectly involved in *VMI*, both at the ACLU and at the Department of Justice.

77. The Clinton Justice Department sometimes was accused of being opposed to single-sex education, though it took no such position in the litigation. *Cf.* Anita K. Blair, *The Equal Protection Clause and Single-Sex Public Education: United States v. Virginia and Virginia Military Institute*, 6 SETON HALL CONST. L.J. 999, 1002 (1996) ("The Justice Department has supported its arguments with a few colorful or offhand statements painstakingly extracted from the record. These isolated remarks mischaracterize the weight and authority of the testimony by numerous highly qualified experts at two separate trials. The Justice Department invariably condemns as a 'stereotype' any fact that interferes with the Justice Department's preconceived idea about the 'correct' outcome of this case.")

78. NOW Legal Defense (now renamed Legal Momentum) litigated *Garrett* before I was there.

VMI was briefed and argued before the Supreme Court during the first Clinton Administration, and ironically, then First Lady, but now Senator, Hillary Clinton is on record as being very much in favor of single-sex education. *See, e.g.*, 147 Cong. Rec. S5907-08 (daily ed. June 7, 2001) (statement of Sen. Clinton) ("I believe public school choice should be expanded and as broadly as possible. Certainly, there should not be any obstacle to providing single-sex choice within the public school system . . . We have to look at the achievements of a school such as the one in New York City that I mentioned, the Young Women's Leadership Academy, or other schools that are springing

product of single-sex education,⁷⁹ and once urged my then 11 year-old daughter to at least consider one of several excellent all-girls private schools for junior high and high school. As it happens, she refused to even entertain that option, observing that in her view, single-sex education does not prepare one for “real life.” In fact, I am not so much opposed to single-sex education, much less unalterably opposed, as skeptical. I am wary, based on the voluminous reading I have done on its educational benefits and on a fear that the belief in its efficacy is both the result of, and leads to, stereotyped thinking about “essential” differences between the sexes. I also fear that over the long haul the single-sex opportunities provided for women and girls will prove to be unequal. But I do not have a definite opinion, and therefore cannot answer the question, of whether I favor single-sex education or not.

However, knowing how fiercely many people whom I respect continue to defend and push for single-sex education, and because the research to date is both inconclusive and subject to attack on the grounds of failure to control for variables other than the absence of the other sex, I propose the following: I challenge the Department of Education — in contrast to the uncontrolled so-called experimentation with single-sex education, as proposed in the new Title IX regulations — to fund a “gold standard” experiment on the relative advantages of single-sex education. The Department should create a test of the value of single-sex education within a system that enhances both the quality and equality of *all* education.

Because this experiment would be expensive and take time, I doubt that my challenge will be taken up anytime in the near future. Nevertheless, my proposed experiment with single-sex education would proceed roughly as follows: first, choose school populations that are relatively homogeneous in terms of income and educational backgrounds of the parents. Second, solicit participation in a “magnet” program that promises (and delivers) an excellent educational opportunity (including excellent physical

up around the country. We know this has energized students and parents. We could use more schools such as this.”).

79. I graduated from Goucher College in 1967, then a women’s college. It later became co-ed.

plants, well qualified teachers, up-to-date equipment and books, small classes, and required parental involvement) regardless of school or classroom placement. Make it clear that parents must agree to have their children placed in one of four settings without knowing in advance where their child may be placed:⁸⁰ an all boys school, an all girls school, a co-ed school, or a co-ed school that may have some single-sex classes in some subjects (aside from physical education and health education, which are traditionally often single-sex). Fully fund and stir for several years (long enough to measure the long-term outcomes). Measure the outcomes. Constantly monitor all the programs for any creeping inequalities and stereotyping and report same.

I have no idea what, if anything, such an experiment would reveal about the efficacy of single-sex education. Given all these resources, however, I would be surprised if most of these children did not thrive. Would parents rather have their children in a mediocre single-sex school or an excellent co-ed school? What does the obvious answer to that question tell us about single-sex education as a goal in and of itself? Of course, some might say that they want both excellence and a single-sex option. The reality, however, is that in most instances neither is available. What we often have instead is a very small number of students (usually girls) in a well-funded single-sex environment.⁸¹ The vast majority of inner-city public school students (both girls and boys) are “left behind” in under-funded and under-resourced general public schools; besides being no solution, this is profoundly unfair.

80. This is to prevent parental bias concerning single-sex education or co-education from unduly influencing the perceived outcomes.

81. One example is the Young Women's Leadership School (YWLS) in Harlem. See, Kristen J. Cerven, *Single-Sex Education: Promoting Equality or an Unconstitutional Divide?*, 2002 U. ILL. L. REV. 699, 718 (2002) (noting that at the YWLS every classroom has a computer and every student has an email account); Jason M. Bernheimer, *Single-Sex Public Education: Separate But Equal Is Not Equal at the Young Women's Leadership School In New York City*, 14 N.Y.L. SCH. J. HUM. RTS. 339, 349 (2003) (commenting that while New York City's public schools are plagued with overcrowded classrooms and cafeterias, and violence, lack desks for over 90,000 students, and hold classes in locker rooms, students at YWLS enjoy clean, safe classrooms with about 15 students per class, and a curriculum that emphasizes math and science); Liz Willen, *Girls' School Gets Lesson In Controversy/Some Call It Discrimination*, NEWSDAY, Nov. 6, 1996, at A68 (reporting that YWLS has its own library, its labs are stocked with new equipment, and fresh flowers adorn the dining hall).

VI. CONCLUSION

Two things are clear about public education today. First, excellence in education is being prevented by several factors, including: lack of resources, large class size, not enough qualified teachers, creaming off the top students, and little parental involvement. Second, there is public demand to “do something! anything!” about our failing public schools. Well-funded and carefully monitored single-sex opportunities may be valuable for the small number of children who receive them. The same may be said of some charter schools and some voucher programs. Regardless of the efficacy or even the constitutionality of such proposals, policy makers must not be diverted from the larger picture.

To illustrate this point, Patricia Campbell and Jo Sanders⁸² tell the parable of the babies in the river.

Once upon a time there were three people walking next to the Hudson River. Looking over, they saw the river was full of babies. One of the three jumped into the river and started throwing babies out to the shore; the second jumped into the river and started teaching the babies to swim while the third started running upstream. “What are you doing?” cried the two in the water to the third. “There are babies drowning in the river!” “I know,” said the third, “I’m going to find out who’s throwing babies into the river and make them stop.”

To save all the babies we need to focus on both the equality and quality in education for all children, all girls and all boys. Realistically, that means co-education for all but a very few. So we had better make sure that that education is as excellent and as bias-free as possible.

82. Campbell & Sanders, *supra* note 48, at 41-42.

