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Are Single-sex Schools Inherently Unequal?

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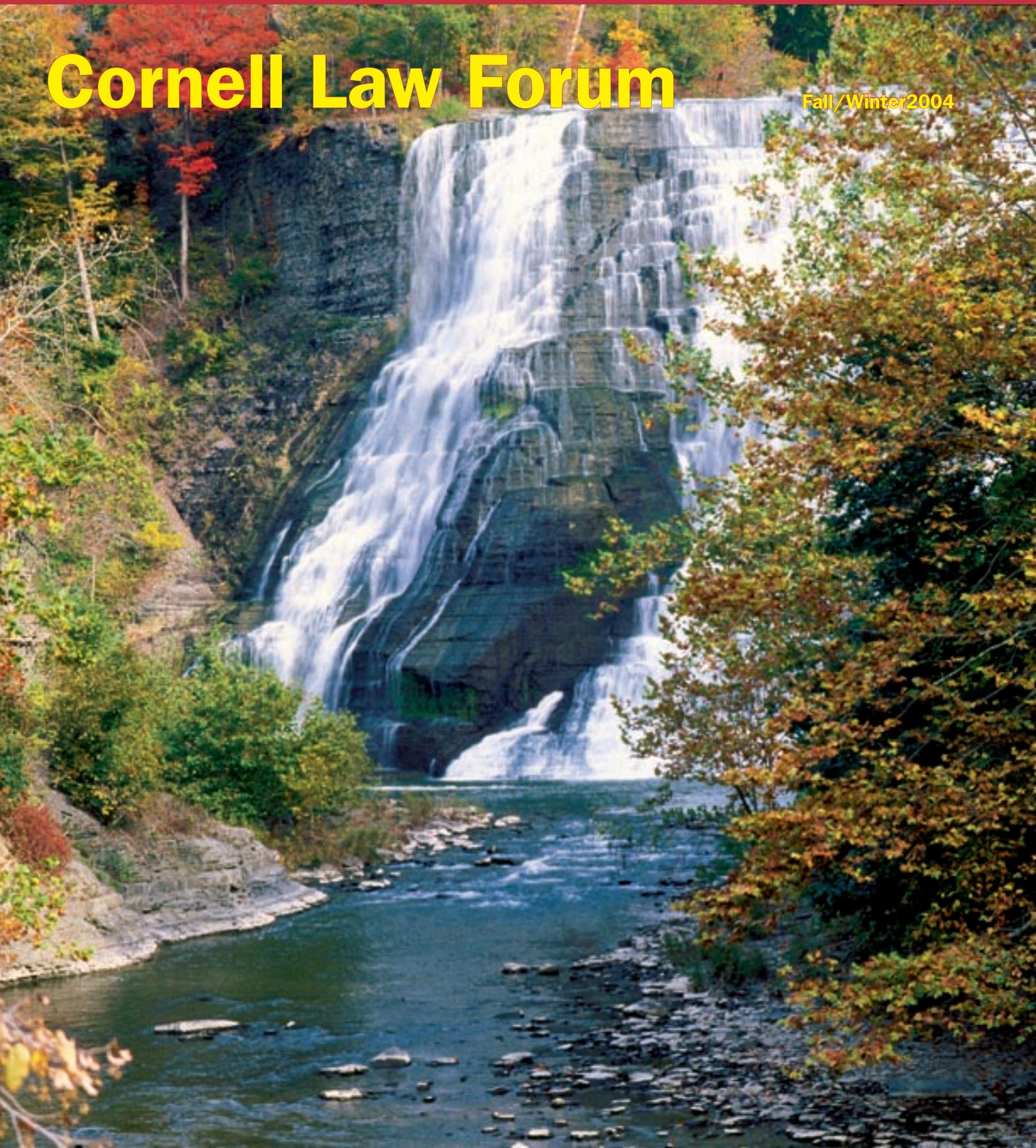
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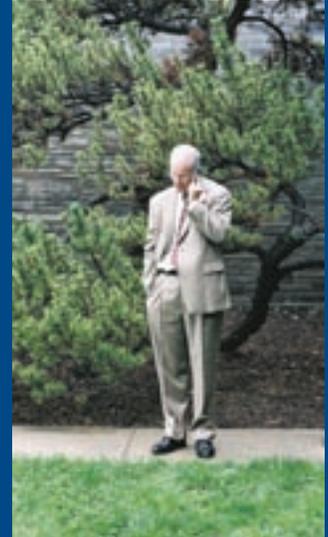
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A Note from the Dean	1
<i>Stewart J. Schwab</i>	
Giving in Trust: Remembering the Law School.....	2
<i>Judith Pratt</i>	
Are Single-sex Schools Inherently Unequal?.....	6
<i>Michael Heise</i>	
Team Play: Collaborative Legal Scholarship at Cornell Law School	12
<i>Antonia Saxon</i>	
Faculty Scholarship	17
Annual Report of Giving: 2003–2004	insert
News	22
New Faculty	22
Multiple High Court Rulings Cite Law Faculty.....	26
Justice Ginsburg Comments on Women in Law.....	27
Okko Behrends Visits.....	28
Clarke Program Cosponsors Law & Development Conference.....	31
Role of the WTO System in the World Economy	33
Good Lawyers Gone Bad.....	36
Dean Lee E. Teitelbaum, 1941–2004	40
Profiles	41
Faust F. Rossi '60.....	41
C. Evan Stewart '77	43
Lance N. Salisbury '96	44
Matthew Faiella '05.....	46
Susannah L. Schmid '05.....	47
Alumni	49
Reunion 2004	50
Class Notes	51

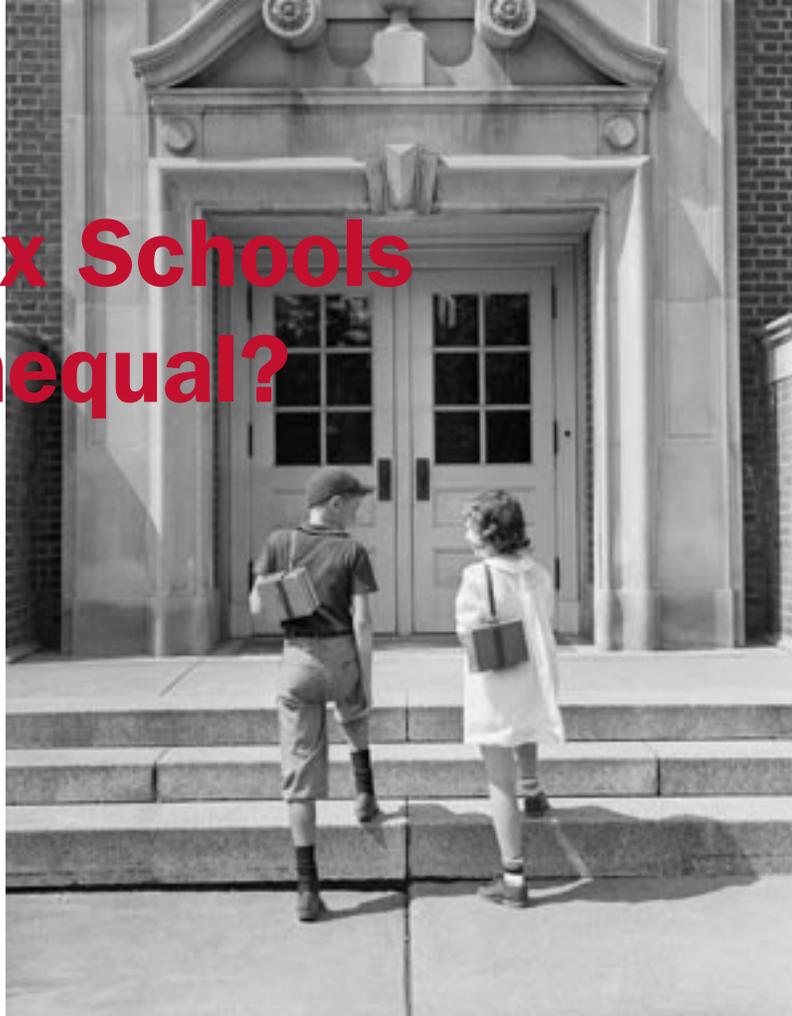


Are Single-sex Schools Inherently Unequal?

Michael Heise

In chess, a “fork” occurs when a player, in a single move, attacks two or more of an opponent’s pieces simultaneously, forcing a necessary choice between unappealing outcomes. Similar to the potentially devastating chess move, single-sex public schooling presents to many such a fork. The issue prompts a critical reexamination of the “separate-but-equal” doctrine’s efficacy, this time through the prism of gender. Although the doctrine—forged in the crucible of race and overcome in the monumental triumph we know as *Brown v. Board of Education*¹—rested dormant for generations, persistent (and increasing) single-sex education options force scholars to rethink long-held assumptions about how to breathe new life into the equal educational opportunity doctrine. To some, “separate” (single-sex) schools threaten to march girls back to the pre-*Brown* era and present a gendered version of an educational Jim Crow. To others, single-sex schools paradoxically *enhance* educational opportunity by affording more girls (or boys)² the chance to achieve their full academic potential. At the policy level, single-sex public schooling forces many to confront a similarly stark and uncomfortable choice between constitutional purity on the one hand and the more pragmatic educational needs of young students—particularly low-income and minority girls—on the other.

Two distinct—though related—events that took place in the summer of 1996 frame the renewed focus on single-sex schooling. First, the Supreme Court invalidated Virginia Military Institute’s (VMI) all-male admissions policy.³ Second, weeks later the New York City School Board announced plans to open the Young Women’s Leadership School, a public all-girls middle school for low-income families in East Harlem.



The two events reflect competing visions of single-sex education. Historically, women and girls were on the outside seeking entry into educational institutions. The successful VMI litigation, and the end of that school’s long history of exclusively male privilege, provided a visceral bridge to women’s past efforts at securing equal rights and educational opportunity.

If VMI aptly symbolized women’s education suffrage of the past, however, the Young Women’s Leadership School in East Harlem is a plausible vi-

Single-sex public schooling prompts a critical reexamination of the “separate-but-equal” doctrine’s efficacy, this time through the prism of gender.

sion of its future. The school embodies an emerging perspective of single-sex education shared by many, including some (but not all) feminists. This collision involving competing visions of single-sex schooling—illustrated by the juxtaposition of VMI and the Young Women’s Leadership School—prompts us to consider

whether the formal equity of coeducation advances or, paradoxically, limits some women's quests for realizing greater equality in education.

Proponents argue that single-sex educational options, especially for girls and low-income families, are now essential as a *remedy* for unequal education. The new girls' school in East Harlem is designed to extend an educational lifeline to low-income (and overwhelmingly minority) girls. The Supreme Court's conclusion that the all-male "Rat Line"⁴ at VMI ran afoul of the Fourteenth Amendment, however, casts a constitutional shadow over that effort. Considered together, the two events uncover unsettling and shifting assumptions about gender, sex, race, education, and ideology. On the fiftieth anniversary of the *Brown* decision, calls for greater scholarly and public attention to equal educational opportunity are particularly apt. In addition, those seeking to help school children obtain a better education will benefit greatly from an increased understanding of how law and policy interact in this important context. Given the recent increased interest in single-sex education, it is unlikely that those committed to greater education equity will be able to ignore how education and gender intersect.

Two questions—one legal, the other policy—moor traditional treatments of the single-sex schooling issue. First, are public single-sex schools constitutional? Second, what educational benefits (for girls *or* boys), if any, are attributable to single-sex schooling?⁵

Single-Sex Schooling and the Constitution

The *Brown* decision and its proclamation that "separate is inherently unequal" rightly animate constitutionalists. *Brown* also fuels opposition to single-sex schooling, shapes its legal analysis, and profoundly informs educational policy across the country. Although *Brown* has not been interpreted to preclude single-sex schooling options, the decision contributes to a rough ride of aborted starts and halting attempts for single-sex schooling projects.

Single-sex schooling implicates *Brown's* core tenant. Insofar as *Brown* is one of this nation's most important legal decisions of the twentieth century, understandable discomfort flows from reopening discussions of whether "separate" can indeed be "equal" in a manner that comports with *Brown's* dictates. The long shadow cast by *Brown* makes many policymakers recoil from

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However discomfiting, the application of *Brown's* separate-but-equal doctrine resides at the analytical core of the VMI decision. The Virginia Military Institute, a public military college, pointed to its unique educational model,⁶ contribution to the state's diverse higher educational offerings, and its newly-created military program for women at the nearby Mary Baldwin Wallace College as justifying its exclusion of women.

The Supreme Court was not persuaded and, in an opinion authored by Justice Ginsburg, concluded that VMI's single-sex admissions policy violated constitutional requirements. The VMI opinion makes clear that public schools seeking single-sex environments need to articulate and defend an "exceedingly persuasive justification" to depart from the default constitutional presumption of coeducation.

Is Coed Coequal? The Role of Social Science

Those familiar with the relevant social science will not be surprised to learn that the determinants of student educational achievement cannot easily be empirically confirmed. Some of the ambiguity rests on the limitations of existing data. The data limits flow from two main sources. First, the variables are complex and

difficult to measure. Second, student achievement in general, and achievement variations between boys and girls in particular, have many meanings. Precisely what causes some students to perform well and others less well is endlessly debated in the literature. Amid this persistent debate, a few points of loose agreement have emerged. For example, most scholars agree that a student's socioeconomic status, as well as the socioeconomic status of the student's peers, influence academic achievement.⁷ Although there is also some agreement that good teachers, strong principals, small schools, small class sizes, and parental involvement can enhance student achievement, the specific significance of these variables remains the subject of debate. Overlaid onto these specific areas of scholarly contest is the more general dispute of whether—and, if so, how—gender might influence student achievement.

A second data limitation flows from research design. Ideally, social scientific protocol strives for double-blind, random assignment of subjects into treatment and control groups. Such a standard is comparatively easier to achieve when the “subjects” are, say, chemicals, and the experiments take place in a controlled laboratory setting. Education research, however, typically takes place outside of the confines of a sterile, dust-free laboratory, and involves real people, not chemicals. A properly designed double-blind study would result in some number of subjects being exposed to inferior educational methods—even if, at the outset, researchers did not know which methods those were. Thus, most institutional review boards understandably frown upon proposed education research studies that seek to use traditional scientific methodological protocols. As a consequence, most education research is limited by virtue of drawing upon something less than the “gold standard” in terms of research design and methodology.

These data limits account for much of the uncertainty about whether single-sex schooling generates educational benefits and, if so, who reaps those benefits.



Social Science's Role in Legal Analysis

What is the proper role for social science evidence in legal analysis? Such a question is neither new nor unimportant. Indeed, the current rise in the production of empirical legal research only enhances the question's timeliness. I have argued elsewhere that the Court's use of social science evidence in the *Brown* decision—whether integral to the outcome or not—led to an increased empiricization of the judicial understanding of the equal educational opportunity doctrine generally.⁸

Separate girls' and boys' entrances at the Belle Sherman Elementary School in Ithaca

The prevailing Constitutional standard considers possible “exceedingly persuasive justifications” for the government's use of gender in the education context.

The application of social scientific evidence is especially apt in many education cases, particularly challenges involving single-sex schooling. The prevailing Constitutional standard—articulated in VMI—considers possible “exceedingly persuasive justifications” for the government's use of gender in the education context. The VMI standard essentially begs for empirical confirmation of single-sex education's asserted benefits.

Empirical uncertainty hamstrings analyses in the single-sex school context, however. Amid this ambiguity, scholars converge on three general points of consensus. First, schoolchildren are not harmed by single-sex schooling, especially as decisions to attend single-sex schools would be volitional. That is, no student would be compelled by the government to attend a single-sex school. Second, single-sex schooling fosters more positive student attitudes in a wider range of academic subjects. Third, where these benefits arise, they disproportionately accrue to minority students. The private school market supplies another source of indirect evidence of benefits. Presumably, tuition-paying families have concluded that private single-sex schools generate real (or at least perceived) educational value.

Having carved out a role for social science evidence in legal analysis, the absence of definitive social scientific answers (as opposed to general points of consensus) to key questions in the single-sex-schooling context creates additional legal questions. One such question is which side of the debate should benefit from the residual social scientific uncertainty. The benefit of the social scientific doubt could just as easily be assigned to single-sex schools or co-ed schools. Moreover, *how* a rebuttable presumption is loaded—how severe and in which direction—could prove enormously important, perhaps dispositive. Indeed, the social scientific uncertainty all but ensures that the position assigned to the wrong side of the rebuttable presumption will lose. Thus, if single-sex schooling must affirmatively shoulder the evidentiary burden of establishing that equal educational opportunity is enhanced before single-sex schools are deemed constitutional, the evidentiary uncertainty likely precludes single-sex schools from surviving “skeptical scrutiny.” In contrast, if opponents must demonstrate that single-sex schools degrade educational equity, single-sex schools will prevail. Regardless, it would be logically uncomfortable to preclude such experimentation—experimentation necessary to generate the sought-after data—*solely* on the grounds that insufficient data exist.

To be sure, gender and the equal educational opportunity doctrine are far from strangers. Since the 1970s,

Popular support for single-sex schooling grows despite an overwhelming preference for coeducation.

gender has been at the forefront of those seeking greater educational opportunity for girls and women. The passage of Title IX and the VMI decision reflect how gender equity in education was pursued legally. The courts’ treatment of gender-related claims in education evidences its process-based, input-oriented conception of what courts construe equal education to mean.

The Future of Single-Sex Schooling

The evolution of American education’s “Holy Grail”—the equal educational opportunity doctrine—persists, and it will continue to influence analyses of single-sex schooling. It is a dynamic doctrine that has changed profoundly in the past few decades. During these years, the equal educational opportunity doctrine’s principal mooring has shifted from an initial focus on race to a focus on resources.⁹ The case that gender warrants a rightful place at the equal educational opportunity doctrine table is ample.

Popular support for single-sex schooling grows despite an overwhelming preference for coeducation. As a consequence of enduring legal and social presumptions, proposals for single-sex schooling begin in a defensive posture. This is so even where too many traditional schools fail utterly in their duty to provide educational services. Such failures are more common in schools that serve low-income schoolchildren. The future of single-sex education will unfold within a larger context that evidences an enduring quest for greater educational opportunity. As well, factors internal and external to single-sex schooling will continue to shape its future.

Private single-sex schooling will continue to inform the future of public single-sex schooling. Public and private school markets do not operate in isolation; both sectors interact in important ways. Amid all the public and scholarly mudslinging over education’s gender battles, interest in single-sex schooling continues to

grow. Due to the legal uncertainty surrounding public single-sex schools, private schools have responded to the increased demand while public schools have balked. During a single school year (1998–1999), enrollment in all-girls elementary and secondary schools rose by 4.4 percent. During the course of a single decade, applications to all-girls schools increased by 37 percent, and enrollment by 29 percent. In New York City, with its high concentration of private schools, applications to all-girls schools increased by 69 percent. All-boys schools enjoyed a similar, though less dramatic, surge, rising by more than 16 percent.¹⁰

The policy implications of the recent growth in interest in single-sex private schools on the public single-sex schooling debate are indirect, but nonetheless profound. Those with the economic ability to exit public for private schools exhibit an increasing preference for single-sex schooling options. Should the ability to act on such a preference be limited only to those families that can afford private schools? If not, then why should a similar education option not be made available to those who attend public schools?

Present efforts to reform schools and restructure education will also inform single-sex education. During the past few decades, the most significant reform efforts in education have addressed governing structures and institutions, and the way educational services are both generated and delivered. Efforts to reform public schooling now embrace market forces to a degree unheard-of even twenty years ago. Specifically, the concept of choice—both public school choice and school voucher programs—has redefined the educational reform landscape. For any version of school choice to make sense, options and variations need to exist. Challenges to the “one best system”¹¹ continue to mount. Thus, the argument that single-sex schools contribute to the overall diversity of educational offerings and enhance school choice parallels a broader reform push, one that seeks to diversify the educational system, making it more responsive to the needs of the increasingly heterogeneous student populations it serves.



Virginia Military Institute cadet

Legislative and research activity will influence single-sex schooling's progress. The federal government's posture in the elementary and secondary education setting changed dramatically with the recent enactments of Goals 2000 and the No Child Left Behind Act. The act contains a provision targeted toward experimentation in single-sex cases as well as single-sex schools.¹² The Bush Administration also expressed its desire for the Department of Education to construe Title IX in a manner that would permit local districts more legal latitude in experimenting with education policies.¹³ Such legislative initiative could provide educational policymakers with much-needed momentum for exploring single-sex schooling options.

As well, related federal research appropriations could supply much-needed financial support for research efforts which have the potential to generate data upon which a legal defense for single-sex schooling could partly rest. As previously discussed, part of single-sex schooling's legal exposure flows from the relative paucity of germane data assessing single-sex schooling's efficacy. Data that exist do not provide definitive answers. Federal research funding targeted

at single-sex schooling could buttress the research foundation that could, in turn, inform legal analyses of single-sex schooling.

Finally, it must be noted with no absence of irony that the fate of boys' education may shape the future of single-sex schooling generally—and, thereby, the fate of all-girls schools. Although the thrust of the modern single-sex schooling movement has been aimed at girls and all-girls schools, concern with the challenges boys confront in school increases. Part of the increased attention to boys' education needs is due to boys' unique circumstances. Another part of the story is comparative. Specifically, emerging data now suggest that girls and women are beginning to outperform boys and men in academic areas where males once held a long advantage. Of course, the data does not necessarily imply any intrinsic problem with males. One explanation holds that females are only now just beginning to recover from generations of education discrimination. Regardless of the explanation, these data help focus attention on males' education needs, and on whether single-sex schools might better serve them.

Conclusion

That the legal and policy efficacy of all-girls schools might hinge on boys' educational fates concerns some feminist critics, who fear that girls' interest in single-sex education can become a policy reality only *after* it becomes clear that single-sex schooling advances boys' interests as well. On the other hand, perhaps it is of some consolation that all-girls schools' proponents can cast their interest across gender lines and leverage interest in all-boys schools to their benefit. Whether such a result ameliorates or deepens the gender paradox remains unclear.

1. 347 U.S. 483 (1954).

2. Throughout this essay, I use conventional education law terminology and refer to "girls" and "boys" when discussing elementary and secondary students. The terms "women" and "men" denote post-secondary students.

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

4. By tradition, first-year students at VMI are informally referred to as "rats." The "Rat Line" narrowly refers to VMI

first-year cadets standing at attention in formation as well as more broadly (and loosely) to a first-year cadet's total experience at VMI.

5. For a fuller treatment of the issues raised in this essay, see Michael Heise, "Are Single-Sex Schools Inherently Unequal?," 102 *Michigan Law Review* (forthcoming 2004) (reviewing Rosemary C. Salomone, *Same, Different, Equal: Rethinking Single-Sex Schooling* [Yale University Press, 2003]).

6. Virginia Military Institute continues to pride itself on its "adversative" education model, described by the district court as including the following key features: "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of desirable values." See *U.S. v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991). For a fuller description see Rosemary C. Salomone, *Same, Different, Equal: Rethinking Single-Sex Schooling* (Yale University Press, 2003) at 153–58.

7. Professor James Coleman was the first to report this phenomenon in his influential 1966 study for the (then) Department of Health, Education, and Welfare, which has since become known simply as the Coleman Report. James C. Coleman et al., *U.S. Department of Health, Education and Welfare, Equality Of Educational Opportunity* 301–04 (Government Printing Office, 1966). Scores of subsequent studies have confirmed Professor Coleman's conclusion. For citations to the literature, see Richard D. Kahlenberg, *All Together Now: Creating Middle-Class Schools Through Public School Choice* 25–28 (Brookings Institute Press, 2001).

8. See Michael Heise, "Equal Educational Opportunity by the Numbers: The Warren Court's Empirical Legacy," 59 *Washington & Lee Law Review* 1309, 1310 (2002). But see James E. Ryan, "The Limited Influence of Social Science Evidence in Modern Desegregation Cases," 81 *North Carolina Law Review* 1659, 1661 (2003).

9. For a fuller account of this point see Michael Heise, "Choosing Equal Educational Opportunity: School Reform, Law, and Public Policy," 68 *University of Chicago Law Review* 1113, 1134–35 (2001).

10. These figures come from Salomone, *supra* note 6, at 5.

11. See generally David B. Tyack, *The One Best System* (Harvard University Press, 1974).

12. No Child Left Behind Act of 2001, 20 U.S.C.A. § 7215(a)(23), Pub. L. No. 107-110, § 1001, 115 Stat. 1425 et seq. (2001).

13. See Diana J. Schemo, "White House Proposes New View of Education Law to Encourage Single-Sex Schools," *New York Times*, May 9, 2002, at A26.



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