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Are Single-Sex Schools Inherently Unequal?

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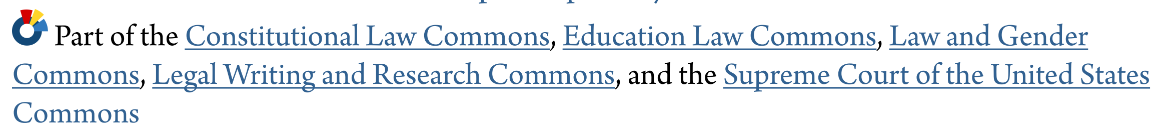
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ARE SINGLE-SEX SCHOOLS INHERENTLY UNEQUAL?

*Michael Heise**

SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING. By *Rosemary C. Salomone*. New Haven: Yale University Press. 2003. Pp. xv, 287. $29.95.

INTRODUCTION

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 forks many constitutionalists and feminists. Constitutionalists are forced to reexamine 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 are forcing scholars to rethink long-held assumptions about how to breathe new life into the equal educational opportunity doctrine. To some constitutionalists "separate" schools threaten to march girls back to the pre-*Brown* era and 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.

The prospect of single-sex public schooling also forces many feminists to confront a similarly stark and uncomfortable choice between theoretical purity and intellectual honesty on the one hand and the more pragmatic educational needs of young girls —

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

2. Throughout this Review 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.

particularly low-income and minority girls — on the other. The mere idea of publicly supported single-sex schools strikes some feminists as anathema, which reflects an appalling retreat and the gender wars' unfinished business. Single-sex schools are especially painful for those women who still carry scars from the days when girls' educational interests were reflexively subordinated to boys' educational interests. After protracted and difficult battles and having finally established in 1979 a statutory foothold in Title IX,[3] the prospect of "going back" to state-sponsored *de jure* "girls-only" schools represents for many feminists an unfathomable retreat. Consequently, some feminists do not even blink at the necessity — however regrettable — of sacrificing the present educational needs of some girls — even girls from low-income households ill-served by failing traditional coeducational public schools — on the altar of coeducation's theoretical purity. For these feminists, acknowledging possible differences between girls and boys and entertaining the prospect of single-sex public schools tailored to such differences would produce unacceptable political costs. For those *reflexively* opposed to single-sex schooling, emerging education data — however uncomfortable — are simply insufficient to trump ideological purity and consistency. For other feminists, however, coeducation's ideological purity and consistency gave way to a pragmatic assessment of girls' educational needs. These feminists have concluded that separatism is a small (indeed, perhaps, sometimes welcome) price for a focused educational program and that single-sex education can be structured in a manner that neither risks gender subordination nor perpetuates the "legal, social, or economic inferiority of women."[4]

For constitutionalists and feminists the stakes posed by single-sex schools are high, the implications indelicate and uncomfortable. Opponents of single-sex schooling "remain transfixed in equality as sameness" (p. 63). In contrast, proponents "weave through the maze of sex differences, women's historical subordination, and inequalities based on race and class while struggling to avoid the deep and dangerous pitfalls of deficiency, essentialism, and categorical stereotypes" (p. 63). For those "forked" by the single-sex schooling issue none of the options looks especially appealing. Professor Rosemary C. Salomone's book, *Same, Different, Equal: Rethinking Single-Sex Schooling*,[5] stands unblinking at the intersection where

3. Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86).

4. 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, 112 (1998).

5. Professor Salomone is the Kenneth Wang Professor at St. John's University School of Law.

these two competing visions collide. Salomone's analyses skillfully sketch the contours of options that flow from seemingly irreconcilable visions of gender and education that continue to define public and scholarly debates about single-sex schooling.

Professor Salomone deserves praise for even approaching such contentious terrain. That she does so with intellectual rigor, honesty, and a healthy dose of scholarly discipline and distance warrants even more praise. What is clear from the book's opening paragraph is that Professor Salomone possesses a clear understanding of the larger social context that frequently frames complex legal and policy questions, such as the one posed by single-sex schooling. Salomone structures her treatment of single-sex schooling by juxtaposing two distinct — though, as Salomone notes, related — events that took place in the summer of 1996. First, the Supreme Court invalidated Virginia Military Institute's ("VMI") all-male admissions policy;[6] 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 (p. 1). Both events aptly reflect competing visions of single-sex education. But the Supreme Court's conclusion that the all-male "Rat Line"[7] at VMI ran afoul of the Fourteenth Amendment casts a constitutional shadow over the effort to create an academic safe haven in East Harlem designed to provide an educational lifeline to low-income (and overwhelmingly minority) girls. Salomone's suggestion that these two events may be inextricably intertwined helps to uncover unsettling and shifting assumptions about gender, sex, race, education, and ideology.

Two questions — one legal, the other policy — moor Professor Salomone's treatment of single-sex schooling. First, are public single-sex schools constitutional? Second, what educational benefits (for girls *or* boys), if any, are attributable to single-sex schooling (pp. 5-6)? After surveying the relevant theoretical literatures, working through Title IX and the Fourteenth Amendment, and exploring the available social-science evidence, Professor Salomone's analyses and arguments support the weight of her unambiguous conclusion: "[I]t defies reason for government to mandate coeducation for all students enrolled in public schools" (p. 243).

Regardless of whether one agrees with Professor Salomone's conclusion, *Same, Different, Equal* succeeds on many levels. At a general level, Salomone's treatment of single-sex schooling

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

7. By tradition, first-year students at VMI are referred to, informally, 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. *See* Scott M. Smiler, *Justice Ruth Bader Ginsburg and the Virginia Military Institute: A Culmination of Strategic Success*, 4 CARDOZO WOMEN'S L.J. 541, 560-61 (1998).

successfully straddles law and policy. This is a considerable accomplishment as such undertakings traditionally emphasize either law or policy or unfold in a schizophrenic manner. At a more specific level, her comprehensive treatment of single-sex schooling advances our understanding of the increasingly congested intersection of law and education policy. In so doing, the book achieves the more modest goals of tracking the equal educational opportunity doctrine's development and enhancing our understanding of the courts' role in promoting it. On the fiftieth anniversary of the *Brown* decision, calls for greater scholarly and public attention to equal educational opportunity — such as Salomone's — are particularly apt. In addition, those seeking to help schoolchildren 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,[8] it is unlikely that those committed to greater educational equity will be able to ignore how education and gender intersect. Scholars and policymakers who engage with the single-sex-schooling issue need to take account of Salomone's analyses.

Within the single-sex education literature, *Same, Different, Equal* should serve as the reference point for the foreseeable future. This book is important not only for what it says, but for how it says it. As to the former, Part I of this Review explores how single-sex schooling forces constitutionalists and feminists to confront the complicated and dynamic equal educational opportunity doctrine. How Professor Salomone develops and structures her thesis is equally important, and Part II focuses on Salomone's use of social-science evidence to inform her legal analyses and drive her policy analyses. Perhaps unsettling to some, Salomone's use of social-scientific evidence — necessary for her policy arguments — arcs back to the *Brown*[9] opinion and enhances our evolving understanding about what equal education means.[10] Finally, Part III considers the possible future of single-sex schooling within the larger context of the evolving educational reform setting.

8. For example, the National Association for Single Sex Public Education reports that in August 2003, six new single-gender schools opened their doors. *See* Single-Sex Public Schools in the United States, *at* http://www.singlesexschools.org/schools.html (last visited Aug. 12, 2004).

9. 347 U.S. at 494 n.11.

10. *Compare* Michael Heise, *Equal Education by the Numbers: The Warren Court's Empirical Legacy*, 59 WASH. & LEE L. REV. 1309 (2002) (arguing that the equal educational opportunity doctrine became increasingly empirical post-*Brown*) [hereinafter Heise, *Equal Education by the Numbers*], *with* James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659 (2003) (arguing that the equal educational opportunity doctrine did not become increasingly empirical in post-*Brown* desegregation cases) [hereinafter Ryan, *The Limited Influence of Social Science Evidence*].

I. UNCOMFORTABLE FORKS

A. *Constitutionalists*

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 roller-coaster ride of aborted starts and veiled attempts" (p. 117). Single-sex schooling directly confronts *Brown*'s core tenant. The long shadow cast by *Brown* makes many recoil from contemplating anything remotely resembling separate but equal. Insofar as *Brown* is one of the most important legal decisions of the twentieth century,[11] inevitable discomfort flows from reopening discussions of whether "separate" can indeed be "equal" in a manner that comports with *Brown*'s dictates.[12]

Although the application of *Brown*'s logic to single-sex schooling — the potential constitutional transitivity of race and gender — possesses obvious and intuitive appeal, Salomone devotes considerable effort to illustrating how the analogy itself is limited (p. 119). Antidiscrimination and antisubordination principles make *Brown* relevant to the single-sex schooling issue, and both principles resonate deeply with women's past treatment in the education arena. To assess competently the constitutional efficacy of today's single-sex schools, however, Salomone urges that we "disengage" from past indignities and come to terms with both the subtle nuances and the sharp distinctions between then and now (p. 119). Although ever

11. *See, e.g.*, Jack M. Balkin, Brown *as Icon*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 3, 8, 12 (Jack M. Balkin ed., 2001).

12. To be sure, Salomone is not the first to take up the constitutional question raised by public single-sex schooling. Indeed, the *VMI* decision spurred a growing discussion in the literature. *See generally* Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227 (1994-1995) (advocating for single-sex education); William Henry Hurd, *Gone With the Wind?, VMI's Loss and the Future of Single-Sex Education*, 4 DUKE J. GENDER L. & POL'Y 27 (1997) (arguing for greater constitutional accommodation of single-sex schools); 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, 384 (1999) (identifying the circumstances that might help single-sex schools survive constitutional scrutiny); Amy H. Nemko, *Single-Sex Public Education After* VMI*: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19 (1998) (arguing for greater constitutional accommodation of single-sex schools); Carolyn B. Ramsey, *Subtracting Sexism from the Classroom: Law and Policy in the Debate Over All-Female Math and Science Classes in Public Schools*, 8 TEXAS J. WOMEN & L. 1 (1998) (arguing that all-girl math and science classes do not necessarily violate the Fourteenth Amendment); Valorie K. Vojdik, *Girls' Schools After* VMI*: Do They Make the Grade?*, 4 DUKE J. GENDER L. & POL'Y 69 (1997) (arguing that all-girls schools are unconstitutional); Verna L. Williams, *Reform or Retrenchment: Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15 (2004) (arguing that single-sex schooling is unconstitutional in part due to its intersection with race).

mindful of the past, Salomone asks readers to look forward where, according to Salomone, the constitutional view differs.

Salomone distinguishes between past and present single-sex schooling. In the current context, attendance in single-sex schools is voluntary, and coeducational options remain, if not predominate.

Salomone also outlines "fundamental differences" between race and sex and correctly notes that the Court recognizes such differences by imposing a less onerous standard of judicial review upon sex-based classifications (pp. 120-21). Finally, and most importantly, Salomone inverts the *Brown*-based constitutional critique of single-sex schooling by arguing that the current push for single-sex schools (unlike many past campaigns) endeavors to fulfill — indeed, perhaps, to enhance — the promise for equal educational opportunity articulated in *Brown* (p. 120). To be sure, the argument that *Brown* can be honored by "separate but equal" is a complicated and deep constitutional paradox fraught with peril. But notwithstanding the peril, in a dramatic twist loaded with irony, Salomone urges that in the education context, as it relates to gender, separate can be inherently equal. It is difficult to overemphasize the complexity and force of this rhetorical inversion. Her case studies describing the legal fights over single-sex schooling in Philadelphia and Detroit make these difficulties painfully clear (Chapter Six). In the end, Professor Salomone, as mindful as anyone of the associated risks, is prepared to depart from the past, look anew, and embrace such a paradox. Opponents of single-sex schooling will not or can not do the same.[13]

B. *Feminists*

If constitutionalists find the single-sex schooling issue uncomfortable, many feminists find it downright painful. Feminists coalesced around the legal assault against the previously all-male publicly-funded Virginia Military Institute. The multiyear effort consumed substantial time, effort, resources, and energy. In the main, these feminists managed to maintain a strong facade of repulsion against the single-sex admissions policy. Their effort culminated in June 1996 when the Supreme Court, in an opinion authored by Justice Ginsburg, one of feminisms' "own,"[14] struck down VMI's single-sex admissions policy as contrary to constitutional requirements.[15] The Court's sweeping *United States v. Virginia* ("*VMI*") decision endures

13. *See, e.g.*, Williams, *supra* note 12.

14. *See, e.g.*, Carol Pressman, *The House That Ruth Built: Justice Ruth Bader Ginsburg, Gender and Justice*, 14 N.Y.L. SCH. J. HUM. RTS. 311, 314-15 (1997-1998) (discussing Justice Ginsburg's crusade against gender discrimination, especially in her capacity as co-director of the ACLU Women's Rights Project).

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

as a rallying cry for feminists and the quest for gender equity in education.

Several weeks later, the loud, public feminist rallying cry turned to audible gasps and groans as the nation's media turned its attention to a decision by the New York public school district to launch a public all-girls middle school for inner-city minority students.[16] Almost instantly, parents in East Harlem busily prepared their daughters for an opportunity at an educationally liberating environment — one previously preserved for those wealthy enough to afford private school tuition. At the same time, some feminists, fresh from their passionate and successful assault against VMI's all-male policies, regrouped to support a single-sex school designed to help girls. In contrast, many feminist organizations as well as organizations sympathetic to mainstream feminist positions (including the National Organization for Women and the American Civil Liberties Union) condemned all-girls schools just as ferociously as they opposed all-boys schools. The feminist coalition, publicly united in its successful campaign to extinguish VMI's all-male heritage, began to implode when confronted with an education initiative seeking to serve traditionally underserved minority girls. Feminists suddenly realized that if their fight against VMI resembled the "Great War," their subsequent fight against East Harlem's all-girls school resembled Vietnam.

The traditional feminist and liberal coalitions split from the start. Long-assumed lines frayed; alliances dissolved. Leading progressive icons rebuked what they perceived to be a reflexive assault on single-sex education. Those who for decades fought side-by-side on behalf of sex equality now face off against one another in legal and policy squabbles (p. 39). Professor Derrick Bell — whose liberal credentials remain above reproach — symbolizes this dissonance. In a widely noted essay published on the opinion page of the *New York Times*, Professor Bell chided the ACLU for their "war against [the] girls' school in Harlem."[17] With his especially acute sense of constitutional history in general and the equal educational opportunity doctrine in particular, Professor Bell's impression that the NOW and the ACLU's interpretation of constitutional requirements ran directly against the needs of poor minority children gained particular attention. Bell also invoked the haunting mixed legacy of the school desegregation effort by noting that even successful lawsuits with the best of intentions can sometimes "do no more than maintain a woeful status quo."[18]

16. *See* Sarah Kershaw, *Feds Set to Approve All-Girl Academy*, NEWSDAY, Feb. 12, 1998, at A29.

17. Derrick Bell, *Et Tu, A.C.L.U.?*, N.Y. TIMES, July 18, 1996, at A23.

18. *Id.* Professor Bell's complex and nuanced views on race in general and school desegregation in particular resist facile description. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 108-09 (1987) (considering

Critical changes in single-sex schooling are one source of the fracture in the traditional feminist movement.[19] Where single-sex schooling in the past typically worked to the disadvantage of girls and women, some single-sex schooling options now stand to benefit them. Thus, as Salomone correctly points out, feminists' historic posture has been turned "inside out" (p. 150). Traditionally — and historically — women and girls were on the outside seeking entry into educational institutions. Consequently, admission into schools previously reserved for men and boys was correctly viewed as an integral part of securing broader equality of opportunity. Indeed, many viewed full equal access to education as an essential element of women's equality. The ultimately 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 educational suffrage of the past, the Young Women's Leadership School in East Harlem symbolizes its future. The Young Women's Leadership School embodies an emerging perspective shared by a growing number of feminists, especially second- and third-generation feminists. The disputes about VMI and the Young Women's Leadership School force us to consider whether the formal equity of coeducation advances or, paradoxically, limits women's quest for realizing greater equality in education (p. 53). Salomone and other single-sex school supporters share a conviction that single-sex education — especially for girls and low-income families — is now essential as a *remedy* for unequal education.

C. *The Peculiar (and Evolving) Role of Justice Ginsburg*

Justice Ginsburg's important and unique role in shaping the legal framework for sex discrimination informs single-gender education as well as straddles an emerging generational "divide" that is beginning to distinguish emerging feminists from their foremothers. Indeed, Justice Ginsburg's personal history supplies essential context. Given Justice Ginsburg's biography, it is difficult to imagine a person better

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alternative motives for the *Brown* decision); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 104 (1992) (discussing possible unintended consequences of the *Brown* decision).

19. Numerous other factors contributed to the splintering of the traditional feminist coalition on the issue of single-sex schooling. Regrettably, Professor Salomone does not delve into other factors with the same rigor as she devotes to single-sex schooling. To be fair, although single-sex schooling and feminist theory inevitably intersect, Professor Salomone sought to analyze the former and not the latter, formally anyway. It would strike me as unfair to criticize a book for what it did not undertake as opposed to dwelling on what it did undertake. For those interested in pursuing a more detailed analysis of intrafeminist fighting, see, for example, NANCY LEVIT, THE GENDER LINE: MEN, WOMEN, AND THE LAW 153-67 (1998).

positioned to embody the rich complexity that characterizes the single-sex schooling issue. And to the extent that the warring factions within the feminist community share any common ground — and this is a big if — the broad intellectual terrain marked by Justice Ginsburg's vision might define it.

Ruth Bader Ginsburg graduated at the top of her high school class and with high honors from Cornell University. Two years after graduating from Cornell she entered Harvard Law School. After her second year (and earning an offer to join the *Harvard Law Review*) she transferred to Columbia Law School incident to her husband accepting a position with a New York City law firm. Ginsburg petitioned Harvard Law School for a law degree pending the successful completion of her third year of legal studies at Columbia. However, although law schools routinely permit students to undertake their final year of law school at a "commensurate" or "peer" institution and receive a diploma from the law school where they began and completed two of the required three years course of study, Harvard Law School declined to extend Ginsburg such a courtesy.[20] Consequently, she completed her legal training at and received her law school diploma from Columbia.[21]

Following law school graduation, Ginsburg served as a law clerk to District Court Judge Edmund Palmieri. In 1963 Ginsburg began teaching at Rutgers Law School and launched a successful academic career. During her stint at Rutgers, then-professor Ginsburg became involved with the ACLU New Jersey affiliate. Soon thereafter she founded and codirected the ACLU Women's Rights Project. In 1972, Ginsburg departed Rutgers and returned to Columbia as the first female tenured member of its law faculty. She joined the U.S. Court of Appeals for the District of Columbia in 1980 and, in 1993, was elevated to the United States Supreme Court.

During the 1970s Ginsburg quickly earned a reputation as one of the nation's leading women's rights litigators. She argued numerous

20. *See* Gerald Gunther, *Ruth Bader Ginsburg: A Personal, Very Fond Tribute*, 20 U. HAW. L. REV. 583, 583 (1998) (noting that Harvard Law School denied Ginsburg's petition even though similar petitions by men were "quite frequently granted"); *see also* Herma H. Kay, *Ruth Bader Ginsburg, Professor of Law*, 104 COLUM. L. REV. 2, 9 (2004) (same).

21. At Columbia Law School, Ginsburg shared the top graduating spot with one other student. This vignette did not end with her graduation from Columbia, however. Years later Harvard Law School, (correctly) sensing a lapse in its institutional judgment by previously declining to permit Justice Ginsburg the honor of joining its roll of alumnae, endeavored to "fix" the situation in 1972 when it invited Justice Ginsburg to exercise the option of receiving a formal Harvard Law School degree. By that time Justice Ginsburg was well into her academic career and work litigating gender discrimination claims with the ACLU and, in particular, its Women's Rights Law Project. Justice Ginsburg declined Harvard Law School's invitation and remains a full alumna of the Columbia Law School. For a full discussion, see ELEANOR H. AYER, RUTH BADER GINSBURG: FIRE AND STEEL ON THE SUPREME COURT 31 (1994).

path-breaking cases venturing into new terrain, carved new law in the civil rights area, and litigated many of the era's leading gender discrimination cases.[22] Notable was Ginsburg's work on the *Vorchheimer v. School District of Philadelphia*[23] case.

In *Vorchheimer*, a girl was denied admission to Philadelphia's prestigious Central High School for Boys solely on the basis of her gender. The applicant, Susan Vorchheimer, confronted the argument that her access to either coeducational schools or the Philadelphia High School for Girls satisfied the school district's statutory and constitutional requirements. Simply put, Philadelphia advanced a "separate-but-equal" theory. Although the academically able applicant prevailed at the district court level, an underdeveloped ("paltry," according to Salomone) trial record hamstrung her case at the court of appeals (p. 123). The Third Circuit concluded that the plaintiff's access to a public single-sex option, though not the precise single-sex option that the plaintiff preferred, conferred an "equal benefit and not discriminatory denial."[24]

As the *Vorchheimer* case progressed to the Supreme Court, the ACLU's Ruth Bader Ginsburg took the lead in crafting the certiorari petition. The petition advanced the strong form of the *Brown* doctrine: in the education context, separate is inherently unequal for gender, just as it is for race (p. 123). In reaching that conclusion, the ACLU petition drew extensively from sociological work by Professors Jencks and Riesman. In their work on all-male colleges, Professors Jencks and Riesman noted that it would be easier to defend all-male colleges had they emerged from a society where women were co-equals with men. But, in the context of a male-dominant society, the researchers concluded that all-male colleges implicitly or explicitly reinforce assumptions about male superiority — "assumptions for which women must eventually pay" (p. 123).

Twenty years later, in *VMI*, Justice Ginsburg again had occasion to engage with and reshape the legal analysis of single-sex education. Factual similarities linked the two cases. Similar to Philadelphia's Central High School for Boys, VMI's all-male admissions posture was a relic of a past era when society considered women unfit for higher

22. During the 1970s Justice Ginsburg argued seven cases in front of the Supreme Court, losing only one. *See* Duren v. Missouri, 439 U.S. 357 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Edwards v. Healy, 421 U.S. 772 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Kahn v. Shevin, 416 U.S. 351 (1974) (lost); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

23. Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Vorchheimer v. Sch. Dist. of Phila., 532 F.2d 880 (3d Cir. 1976) (No. 75-2005), *aff'd by an equally divided Court*, 430 U.S. 703 (1977).

24. P. 122; *see Vorchheimer*, 532 F.2d at 887-88. Indeed, the Philadelphia High School for Girls, established in 1848, enrolls almost 1,500 girls and is the largest single-sex public school in the United States.

education as well as military service. Eerily parallel to Philadelphia's Girl's High, VMI, in light of mounting legal pressure, invested considerable resources for the development of a "separate-but-equal" program for women, located at nearby Mary Baldwin College. What became manifestly clear during trial, however, was that the separate program at Mary Baldwin College "scarcely" resembled what VMI offered to its male students and, therefore, was hardly equal (p. 157).

Despite similar cases, Justice Ginsburg advanced a slightly different position on single-sex education. In contrast to the "separate is inherently unequal" position Ginsburg advanced as a litigant on behalf of her client in *Vorchheimer*, the position she crafted in her capacity as an Associate Justice for the Court in *VMI* does not expressly preclude gender separatism in education. The formal test articulated in *VMI* imposes upon state uses of gender classification "skeptical" judicial scrutiny. Specifically, gender classifications must be "substantially related" to an "important" governmental interest and supported by an "exceedingly persuasive justification."[25] Of particular import is that any sex classification not rest upon "fixed notions concerning the roles and abilities of males and females."[26]

The onus upon state sex classifications in the education setting is quite severe (just how severe remains to be seen), and Justice Ginsburg's *VMI* opinion contributes to the severity. That said, the legal analysis in the *VMI* decision conveys a desire to cautiously navigate constitutional doctrine between competing visions of sex equality or equal treatment. Unlike race, the Court in *VMI* declared that "the inherent differences between men and women" are "cause for celebration," but not for the denial of equal opportunity.[27] Unlike her position two decades earlier in *Vorchheimer*, in *VMI* Justice Ginsburg appears intellectually open to the possibility that a public single-sex school can pass constitutional muster. Indeed, conspicuously absent from the Court's *VMI* opinion is *any* reference to *Brown*. The analytical trick, as Professor Cass Sunstein notes, is to prevent instances where different treatment transforms gender differences into disadvantages.[28]

That Justice Ginsburg wrote the Court's opinion in *VMI* teems with irony. Indeed, neither the history nor irony of the moment were lost on Justice Ginsburg as she remarked that the decision was like "winning the *Vorchheimer* case twenty years later" (p. 165). Then Georgetown Law School Dean Mark Tushnet noted that, for Justice

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25. United States v. Virginia, 518 U.S. 515, 524, 531 (1996).

26. *Id.* at 541 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

27. *Virginia*, 518 U.S. at 533-34 (internal quotations omitted).

28. CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 165 (1999).

Ginsburg, the *VMI* decision was one she had hoped the Court would one day arrive at when she began generating the legal precedent decades earlier (p. 165).

Irony aside, what accounts for Justice Ginsburg's almost Solomonic desire to strike down VMI's all-male policies yet preserve the constitutional possibility of single-sex schooling? Moreover, what explains Justice Ginsburg's varying views about the constitutionality of single-sex public schooling? The variation — however slight — disgruntled some of Justice Ginsburg's feminist allies.[29] First, the decidedly different roles that Justice Ginsburg played in the *Vorchheimer* and *VMI* litigation possess important explanatory value. In her capacity as an attorney zealously representing her client's legal interests in *Vorchheimer*, Justice Ginsburg's position that separate is inherently unequal makes obvious sense. In contrast, Justice Ginsburg's role in *VMI*, an Associate Justice seeking to craft an opinion that garnered as many votes as possible, might help explain her unwillingness to preclude the constitutional possibility of single-sex schooling.

Second, Justice Ginsburg's personal history provides additional clues. On the one hand, it is hardly surprising that Justice Ginsburg would side with the Court's majority and conclude that VMI's male-only admissions policy violated the Fourteenth Amendment. Having confronted — and overcome — significant gender-related barriers throughout her professional life, Justice Ginsburg was especially well-positioned to understand the plight of women pushing past gender stereotypes to achieve full equality and justice.

Other aspects of Justice Ginsburg's personal history might explain why she did not stake out a stronger position — one articulated in *Brown* and echoed in *Vorchheimer* — concluding that separate is inherently unequal, as some feminists would urge.[30] Although Justice Ginsburg is surely conscious of women's struggles with discrimination, she is also mindful of some of the benefits that single-sex education can provide. This is especially true as Justice Ginsburg educated her daughter at The Brearley School, an exclusive, private all-girls school in Manhattan.[31] Therefore, it is perhaps less than surprising to find in the *VMI* opinion — albeit in dicta — support for the position, advanced by a group of women's colleges in an amicus brief, that the

29. *See, e.g.*, Carey Olney, *Better Bitch Than Mouse: Ruth Bader Ginsburg, Feminism, and* VMI, 9 BUFF. WOMEN'S L.J. 97, 146 (2000-2001) (noting that some scholars question whether Justice Ginsburg maximized her opportunity to advance gender equality through the *VMI* opinion).

30. *See* LEVIT, *supra* note 19, at 86.

31. Justice Ginsburg's daughter graduated from The Brearley School in 1973. Obviously, as a technical matter, The Brearley School's status as a private school distinguishes it from the publicly funded schools at issue in *Vorchheimer* and *VMI*.

Constitution has no quarrel with single-sex schools that "dissipate, rather than perpetuate, traditional gender classifications."[32]

Third, it remains at least plausible that Justice Ginsburg has always been sympathetic to some forms of public single-sex education, for the reasons advanced by Salomone. Indeed, Justice Ginsburg's position may have evolved over time, just as women's status has evolved. From Justice Ginsburg's vantage point, perhaps the women's movement progressed enough during the twenty years between *Vorchheimer* and *VMI* that the threat posed by public single-sex schooling has diminished to the point where public single-sex schools like the Young Women's Leadership School in Harlem are positioned to advance rather than ossify gender stereotypes. If so, it is possible to reconcile her legal positions articulated in *Vorchheimer* and *VMI* and her support for private and presumed support for some forms of public single-sex schools.

II. Is Coed Coequal? The Role of Social Science

Along with *what* Professor Salomone thinks about single-sex schooling, *how* she crafts her argument matters. Professor Salomone treats the single-sex schooling question on both normative and empirical grounds. With respect to the latter, she carefully and even-handedly summarizes the present social-scientific research base (Chapter Eight). Professor Salomone is confident enough to point out where, as is frequently the case, the data are largely indeterminative.

A. *Empirical Ambiguity*

The empirical ambiguity on the question of determinants of student educational achievement in single-sex settings is unsurprising, certainly to those familiar with the relevant social science. Some of the ambiguity rests on the limitations of existing data. The data limits flow from two main sources. First, the underlying dependent variables of interest — student achievement in general and achievement variations between boys and girls in particular — are especially complex and difficult to measure. Efforts to measure student academic achievement have attracted significant and sustained attention from social scientists. 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

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

student academic achievement.[33] Although there is also some agreement that good teachers, strong principals, small schools and class sizes, and parental involvement can enhance student achievement, the specific significance of these variables remains the subject of debate.[34] 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 distinct, though related, structural limitation relates to research design. Ideally, social-scientific protocol strives for double-blind, random assignment of subjects into treatment and control groups.[35] 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 exposing some students to inferior educational methods — even if, at the outset, researchers did not know which methods were inferior. 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.

Although Professor Salomone correctly emphasizes the limitations of existing data and difficulties in research designs seeking to generate useful data, several nuggets of clarity emerge. And while flashes of clarity can contribute to important insights, what to make of or do about the insights is not always clear. The following example explicates.

For years policymakers tried to make sense of two disparate yet related threads of evidence relating to girls' and boys' test results. On the one hand, despite some variation between math and verbal scores, on average girls' overall mean test scores exceed those of boys. To be

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33. 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 S. COLEMAN ET AL., U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 301-04 (1966). Scores of subsequent studies have confirmed 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 (2001).

34. For a further discussion of research on this point, see KAHLENBERG, *supra* note 33, at 86-90.

35. *See* Jay P. Greene, *The Surprising Consensus on School Choice*, 144 PUB. INT. 19, 19 (2001) (describing the aspirational "gold standard" research design for school choice studies).

more precise, the girls' advantage in verbal skills "substantially outstrips" the boys' advantage in math (p. 80). On the other hand, boys are far more likely than girls to achieve extraordinarily high test scores and boys outperform girls on most Advanced Placement tests. This anomaly fuels confusion about whether girls or boys (or, for that matter, both) are being "shortchanged" academically.

Professor Salomone's discussion of recent empirical research on this puzzle in "Myths and Realities in the Gender Wars" (Chapter Four) uncovers a powerful explanation that will make sense to anyone with a passing familiarity of elementary statistics. Simply put, the key to unlocking the puzzle surrounding boys' and girls' achievement levels is to understand that the shapes of their *distributions* vary. Specifically, the distribution of boys' test scores display greater variability than girls' test scores (p. 80). Thus, if one envisions how the two differently shaped distribution curves overlap (the boys' achievement curve distributes flatter and wider; the girls' curve is taller and thinner), the seemingly puzzling outcome — girls possessing a higher overall mean while more boys end up at the upper (and lower) tail of the bell curve — makes sense. *Why* boys' and girls' distribution curves vary and, as a normative matter, *what* policy ought to do about it, if anything, although worthy questions, fall outside the scope of Salomone's book. Identifying and discussing such differences, however, and understanding what they might mean for single-sex schooling are central tasks that Salomone aptly undertakes. In the education context, where comparatively little is known to any degree of certainty, even small advances can yield important insights and gains. Indeed, even learning more about what might *not* be happening to girls and boys can add scholarly value.

Another point of social-scientific clarity involves the generally accepted assertion that children attending schools with high concentrations of low-income students rarely perform as well academically as their middle-class counterparts.[36] Tending to obscure this larger point are persistent (and growing) squabbles about who is "winning" and "losing" in the academic race between the sexes (p. 114). Sex-specific student achievement differences defy simple answers. As well, any such sex differences in academic performance cut in different directions on a wide range of indicators and continue to evolve over time.[37] Without denigrating the legitimacy and import of disputes about sex-specific student achievement differences, Salomone points out such disputes "pale in comparison" to the escalating academic catastrophe that presently envelopes far too many students from low-income households and neighborhoods (p. 114).

36. *See* sources cited *supra* notes 33-34 and accompanying text.

37. *See* sources cited *infra* notes 77-78 and accompanying text.

Notably not clear in the social-scientific literature, however, is whether single-sex schooling generates benefits and, if so, who reaps those benefits.

B. *Social Science's Role in Legal Analysis*

While Professor Salomone ably synthesizes the social-science evidence relating to single-sex schooling and Title IX and the Constitution, she also backs into a larger question: Namely, 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. Its intellectual pedigree arcs back in time directly to another education law case, *Brown v. Board of Education*.[38] 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 equal educational opportunity generally.[39] Professor Salomone's treatment of the social-science evidence in the single-sex schooling context is consistent with my thesis. More importantly, Professor Salomone's book on single-sex schooling contributes to the emerging literature that contemplates new models of educational services' production and delivery.[40] Of small regret is that Professor Salomone does not engage more directly with the largely normative question about whether and, if so, what type of role social-science evidence should play in the single-sex schooling debate.[41] Of course, the very structure of Salomone's analysis prominently features relevant social-science evidence, implicitly suggesting that Salomone perceives a role for empirical research in the related legal and statutory analyses.

Salomone hopes to make legal scholars more sensitive to relevant social-science evidence. After all, the *VMI* decision makes clear that public schools seeking single-sex experiences need to articulate and defend an "exceedingly persuasive justification"[42] to depart from the default constitutional presumption of coeducation. Such a legal

38. 347 U.S. 383, 494 n.11 (1954). To be sure, courts' use of social-science evidence predates *Brown*. For a discussion, see generally PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE (1972).

39. *See* Heise, *Equal Education by the Numbers*, *supra* note 10, at 1310. *But see* Ryan, *The Limited Influence of Social Science Evidence*, *supra* note 10 (arguing that social science evidence has not overly influenced school desegregation litigation).

40. Existing research considers the equal educational opportunity question from such perspectives as school finance and choice. Emerging work in this genre evidences increased empirical sophistication.

41. Then again, such a topic warrants a full-length book treatment on its own.

42. United States v. Virginia, 518 U.S. 515, 534 (1996).

standard essentially begs for empirical confirmation of single-sex education's asserted benefits. Empirical uncertainty hamstrings the single-sex school context, however, and Salomone acknowledges as much (p. 235). Amid this general ambiguity, Salomone cautiously advances three "reasonable and useful conclusions" (p. 235). First, schoolchildren are not harmed by single-sex schooling, especially as it would be volitional in any context contemplated by Salomone. 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. Presumably tuition-paying families have concluded that private single-sex schools generate real (or 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 "reasonable and useful conclusions") 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 uncertainty. Salomone implicitly grabs for the benefit of the doubt and implies that in the absence of any clear harms single-sex schooling experiments should be legally accommodated (p. 235). Moreover, 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. The benefit of the social-scientific doubt could just as easily go the other direction, however, especially on matters as contentious as gender equity in education. More specifically, *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."[43] In contrast, if opponents must demonstrate that single-sex schools degrade educational equity, single-sex schools will prevail. Regrettably, Salomone does not discuss the implications of the various ways courts might structure the placement of the evidentiary burden as fully as the topic warrants.

43. *Virginia*, 518 U.S. at 530.

III. THE FUTURE OF SINGLE-SEX SCHOOLING

Professor Salomone notes "growing popular support for single-sex schooling" despite an "overwhelming cultural preference for coeducation" (p. 237). 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 educational schools fail utterly in their duty to provide educational services. Such failures are more common in schools that serve low-income schoolchildren.[44] 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.

A. *Equal Educational Opportunity Doctrine in Context: From Race, to Resources, and to Gender*

The evolution of American education's "Holy Grail" — the equal educational opportunity doctrine — persists. It is a dynamic doctrine that has changed profoundly in the past decades. During these years, a focus on resources has displaced an initial focus on race as the equal educational opportunity doctrine's principal mooring.[45] Though perhaps not by design, *Equal, Same, Different* makes a strong (albeit implicit) case that gender warrants a rightful place at the equal educational opportunity doctrine table.

In *Brown*, a unanimous Supreme Court with nothing less than powerful elegance described providing education as a state and local government's most important function.[46] Since then courts have consistently echoed a similar theme. Almost twenty years after *Brown*, the Court in *San Antonio Independent School District v. Rodriguez*[47]

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44. For a summary of data on educational outcomes, especially in schools that serve low-income and minority students, see James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2102-08 (2002).

45. For a fuller account of this point see Michael Heise, *Choosing Equal Educational Opportunity: School Reform, Law, and Public Policy*, 68 U. CHI. L. REV. 1113, 1134-35 (2001).

46.

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Bd. of Educ., 347 U.S. 383, 493 (1954).

47. 411 U.S. 1 (1972).

reaffirmed its "historic dedication to public education,"[48] noting that " 'the grave significance of education both to the individual and to our society' cannot be doubted."[49] Such sentiments are consistent with the Court's perception of widely shared public values: "American people have always regarded education and its acquisition of knowledge as matters of supreme importance."[50] Indeed, the Court's recognition of such values emerges in many Court opinions, even some that predate *Brown*.[51]

That said, a general judicial commitment to the equal educational opportunity project in earnest does not itself identify an organizing principle or unifying theme. Since the mid-twentieth century's civil rights movement, race provided the organizing principle. After *Brown*, many legal and policy discussions about equal educational opportunity have been shaped by the lens of race and expressed through school desegregation litigation.[52] Although it is difficult, if not impossible, to overstate *Brown*'s impact on our nation's schools,[53] conventional wisdom today suggests that the importance of race in debates over educational reform is waning.[54] The generation-long struggle either assigned to or assumed by the courts over what equal educational

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48. *Id.* at 30.

49. *Id.* (citing Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 283 (1971)).

50. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

51. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (majority opinion authored by Burger, C.J.), 237, 238-39 (White, J., concurring); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J.); McCullum v. Bd. of Educ., 333 U.S. 203, 212 (1952) (Frankfurter, J.); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); *Meyer*, 262 U.S. at 400. However, it remains important to note that although the Court has repeatedly recognized education's key role in our society, the right to education has not been deemed fundamental by the Court for Equal Protection Clause purposes. *See, e.g.*, *Rodriguez*, 411 U.S. at 30. *But see id.* at 98-110 (Marshall, J., dissenting).

52. The literature on equal educational opportunity and school desegregation, already considerable, continues to grow. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); COLEMAN, *supra* note 33; LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); GARY ORFIELD, MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY (1978); Paul Gerwitz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983). The fortieth anniversary of *Brown* gave rise to another round of scholarly attention. For special symposia law review issues, see, for example, 4 TEMP. POL. & CIV. RTS. L. REV. (1995); 20 S. ILL. U. L.J. (1995).

53. For example, Professor Salomone characterizes the *Brown* decision as "cataclysmic." *See* ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW 3 (1986); *cf.* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

54. To be fair, important exceptions endure. For example, Professor Gary Orfield's work in the educational opportunity area retains a focus on race as well as, to a growing degree, ethnicity. *See, e.g.*, http://www.civilrightsproject.harvard.edu/aboutus/bios/orfield.php (last accessed July 30, 2004) (recounting Orfield's major works).

opportunity means in terms of race has broadened to include other concerns and alternative organizing principles.

During the past few decades, an emerging focus on resources and educational quality — as reflected by student and school achievement — has eclipsed the equal educational opportunity doctrine's prior focus on race. Two related though distinct factors help explain the equal educational opportunity doctrine's broadening to encompass more than race. One factor is the emergence of school finance litigation which began in earnest when many civil rights activists were growing increasingly frustrated with the slow and uneven pace of school desegregation efforts. Interestingly, like their school desegregation predecessors, school-finance activists advanced a tying strategy designed to enhance equal education. Whereas school desegregation activists would tie the fate of white and black students together by placing them in the same schools, school-finance activists sought to tie the fate of poor and wealthy public schools by striving for equal access to educational resources.[55] Prior to 1989, litigants challenging school funding programs primarily sought greater equalization in per-pupil spending.[56] Since 1989, however, adequacy-based theories have displaced equity theories. Presently, most school-finance litigants argue not that all students are entitled to equalized per-pupil spending, but rather, that all students deserve the funds necessary to support an adequate education.[57] Not surprisingly, perhaps, the legal pursuit of educational opportunity by seeking to extract additional resources for schools from school-finance adequacy litigation is strikingly similar in form and structure to the earlier struggles over educational equity forged in terms of race.[58]

A second factor is that a shift in the education reform movement broadened the equal educational opportunity doctrine's focus to include educational excellence and quality. Since the mid-1980s equal educational opportunity has increasingly been construed in terms of outputs (e.g., student and school academic achievement) rather than the traditional inputs (e.g., racial composition of schools and per-pupil spending). Much of the current shift is traceable to the 1983 publication of the report, *A Nation At Risk: The Imperative For*

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55. *See* Ryan & Heise, *supra* note 44, at 2059 & n.67.

56. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 121-40 (1995); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152-53 (1995).

57. *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 268-69 (1999) (describing the shift in school finance litigation theory).

58. *See generally* Michael Heise, *The Courts vs. Educational Standards*, 120 PUB. INT. 55 (1995) (arguing that the legal construction of equal educational opportunity is in transition). For a helpful account of the shift in litigation focus from race to wealth for many civil rights organizations, see, for example, Enrich, *supra* note 56, at 122-28.

Educational Reform.[59] The report did not mince words when it came to describing the scope of the problem confronting American education: "[T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people."[60] The report immediately broadened subsequent education-policy reform initiatives' focus to include such issues as student and school accountability for increased academic success. In response, many states began the arduous process of launching efforts to articulate educational standards for their students and schools as well as assessment mechanisms designed to assess progress toward the articulated standards.[61] As well, recent federal school reform activity evidences a similar shift. In 1994 President Clinton signed into law the "Goals 2000: Educate America Act,"[62] and, more recently, President Bush signed into law the "No Child Left Behind Act."[63] Although some praise and others criticize these new federal forays into educational policymaking terrain, few dispute that they reflect a decidedly new and different posture for the federal government.[64]

B. *The Increasing Relevance of Gender for Equal Educational Opportunity*

The reorientation of the equal educational opportunity doctrine's focus from inputs to outputs helped generate renewed attention to gender. The emerging transformation of gender's role within equal educational opportunity doctrine's evolution follows a well-established path forged by both school desegregation and finance litigation and theory. Indeed, Salomone's insertion of gender into the equal educational opportunity mix due to the purported academic benefits from single-sex schooling both comports with and fuels a

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59. *See* NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983) [hereinafter NATION AT RISK].

60. *Id.* at 5.

61. For a brief description of two states' efforts, see Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633 (2002) (describing New York and North Carolina's developments of education standards and assessments).

62. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (2000) (codified at 20 U.S.C. § 5801 (2000)).

63. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1001, 115 Stat. 1425 (2001).

64. *See, e.g.*, Michael Heise, Goals 2000: Educate America Act: *The Federalization and Legalization of Educational Policy*, 63 FORDHAM L. REV. 345 (1994); James S. Liebman & Charles F. Sabel, *The Federal* No Child Left Behind Act *and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703 (2003).

broadening of what the equal educational opportunity doctrine can mean.

To be sure, gender and the equal educational opportunity doctrine are far from strangers. Since the 1970s gender has been at the forefront of those seeking greater educational opportunity for girls and women. As Salomone makes clear, initial legal assaults were typically cast in terms of demands for coeducation or, for already coeducational environments, greater resources for girls and women. The passage of Title IX and the *VMI* decision reflect how gender-equity orientation in education was pursued legally and evidence its process-based, inputs-oriented conception of equal education.

Once formal access was secured in terms of process and inputs, new legal theories had to evolve to accomplish more subtle, though equally important, substantive objectives. Again, the school desegregation and finance litigation contexts supply helpful perspective. In the desegregation context, after *Milliken v. Bradley*[65] and in light of enduring racial residential segregation, courts increasingly turned more broadly to efforts designed to improve African American student achievement and away from the narrow perspective of increasing classroom integration.[66] Similarly, school-finance litigants witnessed a change from equity to adequacy theory.[67] Both contexts evidence an increased willingness to construe equal educational opportunity from the perspective of outputs, here, in terms of student academic achievement. Here, the public controversy surrounding New York City's Young Women's Leadership School in Harlem neatly captures an emerging perspective oriented around girls' academic success rather than access to coeducational opportunities. Thus, Salomone's juxtaposing of these two events (pp. 1-4) captures the book's themes: the concurrent evolution (and potential collision) of feminist theory and equal educational opportunity doctrine as well as these events' consequence.

Although Salomone advocates something quite different from the traditional perspective of gender equity in the education setting — single-sex schooling — she embeds her argument in a similarly evolving conception of equal educational opportunity grounds. Thus, decidedly unlike the feminists before her, who struggled for gender equity in education by ensuring mere access for girls and women to educational opportunities previously reserved for boys and men,

65. 418 U.S. 717 (1974).

66. *See* Milliken v. Bradley, 433 U.S. 267 (1977) (holding that compensatory and remedial programs can be included as part of a court-ordered desegregation decree) [hereinafter *Milliken II*]; James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 436-37 & n.18 (1999) (noting the substitution of money for an integrated educational environment facilitated by *Milliken II*).

67. *See supra* notes 56-57 and accompanying text.

Salomone argues for sex-exclusion rather than inclusion. Decidedly similar to equal educational opportunists before her, however, Salomone advances her argument in a deeper conception of the equal education doctrine. It goes without saying that many will not find Salomone's argument persuasive, but, even the unpersuaded should be struck by the dynamicism of the equal educational opportunity doctrine.

C. *Factors Informing Single-Sex Schooling's Future*

Private single-sex schooling will continue to inform the future of public single-sex schooling. Unlike most other scholarly treatments of single-sex schooling, Professor Salomone understands that public and private school markets do not operate in isolation and that 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.[68] During a single school year (1998-99), enrollment in all-girls elementary and secondary schools rose by 4.4% (p. 5). During the course of a single decade, applications to all-girls schools increased by 37%, and enrollment by 29%. In New York City, with its high concentration of private schools, application to all-girls schools increased by 69%. All-boys schools enjoyed a similar, though less dramatic, surge, rising by more than 16% (p. 5). The implication of the recent growth in interest in single-sex private schools on the public single-sex schooling debate is 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?

In addition to accommodating individual preferences for single-sex schooling, problems with public school systems will also inform debates about single-sex schooling. A growing crisis of confidence continues to hamstring too many public school districts. In some districts, particularly those serving minority children from low-income households, confidence crises gave way long ago to educational meltdowns.[69] Data from the 1989-90 school year in Detroit paint a distressing yet hauntingly familiar picture. Single mothers raise 70% of

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68. Despite legal uncertainty, the number of public single-sex schools (or classroom experiences) continues to rise as well. *See supra* note 8 and accompanying text.

69. For a fuller discussion see, for example, Ryan & Heise, *supra* note 44.

Detroit's public schoolchildren. More than one half of the African-American boys, as compared to 45% of the girls, dropped out of school. Among those students that persevered to graduation, only 39% were boys. African American boys also accounted for more than 66% of the district's short-term suspensions and 67% of those who received special services for substance abuse, mental health problems, or special education services (p. 132). Although the situation in Detroit might be especially dire, it remains emblematic of many urban school districts' struggles.[70] Thus, whatever one may think about the merits of the Detroit School Board's proposal to establish all-boy, all-African American schools, it is difficult to challenge the Board's and public's legitimate sense that an educational disaster has arrived in Detroit and that drastic steps are both warranted and necessary to solve the problem. Economic circumstances preclude private school options of any variety for most families zoned for Detroit's public schools. For these kids and their families, public schools are their only alternative. Consequently, the public response to the single-sex (and single-race) schooling initiative was "overwhelming," as the district received more than twice the number of applications than they could accommodate (p. 132).

Present efforts to reform schools and restructure education will also inform single-sex education. Of particular note is that 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.[71] Efforts to reform public schooling now embrace market forces to a degree unheard of even twenty years ago.[72] Specifically, 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"[73] continue to mount. Thus, Salomone's argument that single-sex schools contribute to the overall diversity of educational offerings and enhance school choice parallels a broader push for reform seeking to diversify the educational system and make

70. For a fuller discussion see Ryan & Heise, *supra* note 44, at 2103-08.

71. *See* Ryan & Heise, *supra* note 44, at 2050-51 (noting the three substantial efforts to reform education and increase educational opportunity include school desegregation, finance, and choice).

72. *See* Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 261-62 (1999) (discussing the explosion of an array of school choice options such as magnet and charter schools).

73. *See generally* DAVID B. TYACK, THE ONE BEST SYSTEM (1974).

it more responsive to the heterogeneous needs of the increasingly heterogeneous population it serves.[74]

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.[75] The No Child Left Behind Act contains a provision targeted toward experimentation in single-sex classes as well as single-sex schools.[76] 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.[77] Such legislative initiatives 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 needed, in part, to generate data upon which a legal defense for single-sex schooling can 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.[78] Data that exist do not provide definitive answers. Federal research funding targeted at single-sex schooling could supplement the research foundation that could, in turn, inform legal analyses of single-sex schooling.

CONCLUSION

It is with no absence of irony that the fate of boys' education may shape the future of single-sex schooling generally and, therefore, influence the fate of all-girls' schools. Although the clear thrust of the modern single-sex schooling movement dwells on girls and all-girls schools, Salomone notes a growing concern with the challenges boys confront in school. Part of the increased attention to boys' educational needs is due to boys' unique circumstances. Another part of the story is comparative. Specifically, emerging data now suggest that girls and

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74. Professor Salomone notes (and implicitly supports) the Department of Education's Office for Civil Rights' recent Notice of Proposed Rulemaking seeking comment upon the policy question considering whether single-sex schooling can encourage local innovation, expand parental (school) choice, increase educational diversity, and promote equal educational opportunity (p. 175).

75. *See supra* Part III.A.

76. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1001, 115 Stat. 1425 (2001).

77. *See* Diana J. Schemo, *White House Proposes New View of Education Law to Encourage Single-Sex Schools*, N.Y. TIMES, May 9, 2002, at A26.

78. *See supra* Part II.A.

women are beginning to outperform boys and men in academic areas where males held a long advantage.[79] Of course, one explanation for this trend is that rather than a decrease in male academic performance, 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 schooling might be able to assist.

The possibility that boys' educational fates might drive the legal and policy efficacy of all-girls schools risks playing into some feminists' deepest fears: 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.[80] On the other hand, perhaps it is of some consolation that feminists supporting all-girls schools can cast their interest across genders and leverage interest in all-boys schools to their benefit. Whether such a result ameliorates or, paradoxically, deepens the gender paradox remains unclear. Such a bittersweet pill for feminists principally concerned with the educational fate of girls and women and the possibility that their educations continue to be shortchanged in traditional coeducation settings might be a necessary cost along the way. But if the political cost of securing legal protection for all-girls schooling is the simultaneous creation of all-boys schools, given that the realization of our children's full academic potential is at stake, the cost is probably worthwhile.

79. Two recent developments illustrate. First, in many industrialized nations, women are beginning to graduate from post-secondary institutions in numbers that exceed men. *See* Alaina S. Potrikus, Knight-Ridder Washington Bureau, *Report Shows Academic Achievement Gap Between Girls, Boys* (Sept. 19, 2003), *at* http://www.thatsracin.com/mld/krwashington/news/nation/6814183.htm. At the post-graduate level, for the first time in history women applicants to American medical schools exceeded male applicants. *See More Women Aspiring to be Doctors* (Dec. 8, 2003), *at* http://www.cnn.com/2003/EDUCATION/12/08/medical.school.ap/index.html.

80. As previously discussed, the empirical evidence of potential benefits flowing from single-sex schooling is murky at best. However, Salomone is careful to note that the weight of existing evidence provides some basic support for three general propositions. First, single-sex schooling does not appear to harm students. Second, on balance, girls more than boys appear to benefit from single-sex schooling. Third, benefits to boys from single-sex schooling are more likely for boys from minority and low-income households (p. 235).