

## The USA Legal Framework for Single-Sex Education

Zhou li

School of Law, Yangtze University, Jingzhou 434000 China

### Abstract

**The U.S. Supreme Court's June 1996 decision in *United States v. Virginia*, holding that the exclusion of women from admission to the Virginia Military Institute (VMI) was a violation of the "equal protection" clause of the 14th Amendment to the U.S. Constitution, makes it clear that any categorical exclusion of members of one sex from a public educational institution or program will be met with "skeptical scrutiny" under the Constitution—scrutiny that VMI was unable to withstand. The Constitution requires such skepticism, the Court held, because, as in the VMI case, such sex-based distinctions often work an injustice on deserving individuals and perpetuate harmful stereotypes. In addition to the constitutional limits on public institutions, Title IX of the Education Amendments of 1972 prohibits sex discrimination in public and private institutions that receive federal financial assistance. However, both the Constitution and Title IX recognize that there are limited circumstances in which single-sex educational opportunities may be justified.**

### Keywords

**Legal Framework, Single-Sex Education, opportunities.**

### 1. Introduction

For over 150 years, the doors of VMI were closed to women, and the Commonwealth of Virginia offered VMI's unique educational experience exclusively to men. As a justification for the exclusion of women, VMI argued that the school's rigorous "adversative" method of training was not suitable for women. On June 26, 1996, the Supreme Court held that VMI's exclusion of women was a violation of the Constitution's guarantee of "equal protection."

Citing an earlier decision in which the Court had struck down the exclusion of men from a state-run nursing school, *Mississippi University for Women v. Hogan*, the Court noted that gender-based government action requires an "exceedingly persuasive justification" and may not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." Emphasizing that "official action denying rights or opportunities based on sex" requires "skeptical scrutiny" under the Constitution, the Court held that Virginia had failed to sustain its burden of justifying the wholesale exclusion of women from VMI. The Court also held that the creation of a separate all-women's program, which was admittedly unequal to VMI in both tangible and intangible benefits, was not an adequate remedy for the constitutional violation of withholding VMI's opportunities and advantages (including its unique approach to education, the valuable credential of a VMI degree, and access to its extensive alumni networks after graduation) from women "who want a VMI education and can make the grade." VMI subsequently announced that it would accept applications from women.

### 2. A Remedy for Discrimination

The VMI decision did not foreclose all single-sex education. First, because VMI is a government-run institution (and not just one receiving government funds), constitutional principles of equal protection apply to it that do not apply to private institutions. In fact, 26 private women's colleges filed a brief in the VMI case urging the Supreme Court to rule against VMI but arguing at the same time that such a decision would not affect their ability to remain single-sex institutions.

Moreover, in the VMI decision the Supreme Court left room even for public single-sex education that serves to remedy discrimination. Although ruling out programs that serve to "perpetuate the legal, social, and economic inferiority of women," it also explicitly ruled that sex classifications are permissible if used "to compensate women for particular economic disabilities they have suffered . . . to promote equal employment opportunity . . . to advance full development of the talent and capacities of our Nation's people." Indeed, quoting approvingly from the brief of the 26 private women's colleges, the Court noted that "it is the mission of some single-sex schools 'to dissipate, rather than perpetuate, traditional gender classifications.'" In this respect, the Court suggested a basis for distinguishing all-female from all-male education, namely that the latter, much like all-white education, reinforces a long-standing message branding the excluded group as inferior.

This analysis is consistent with the Court's earlier decision in *Mississippi University for Women v. Hogan*, in which the Court stated that "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." In that case the Court determined that an all-female public nursing school was unconstitutional because it served no compensatory purpose, since it could hardly be said that women had been deprived of opportunities in nursing. In fact, the Court held that excluding men reinforced a stereotype that nursing was a profession only for women—which actually hurt women. It is thus clear that a public school or program that excludes all members of one sex may pass constitutional muster only if the school demonstrates persuasively that it truly serves the objective of compensating for discrimination and eliminating arbitrary barriers to advancement. For example, an all-girls math program may be sustainable if its proponents can demonstrate that it substantially furthers the goal of remedying past or present discriminatory practices that have discouraged girls from pursuing an interest in math. If, however, such a program lacks a compensatory justification, and instead teaches math in a diluted form based on stereotypes that girls are "bad with numbers," it would not withstand a constitutional challenge.

### 3. Title IX

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational institutions that receive federal financial assistance. Unlike the Constitution, Title IX thus applies to many private institutions. Like the Constitution, however, Title IX does not categorically prohibit single-sex education in institutions it covers.

As the original Senate sponsor explained, this measure was designed to be "a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." Consequently, Title IX prohibits the institutions it covers from operating sex-segregated programs or activities—whether academic programs, extracurricular activities, or occupational training<sup>4</sup>—unless specific exceptions apply.

The regulations issued under Title IX do contain certain exceptions that permit specified programs separated by gender. For example, although institutions covered by Title IX may not generally offer sex-segregated courses in physical education, they may do so if the classes involve contact sports.<sup>5</sup> Portions of classes in elementary and secondary schools that deal exclusively with human sexuality may also be conducted in separate sessions for boys and girls.<sup>6</sup> Institutions may also make requirements based on vocal range or quality that result in a chorus of one or predominantly one sex.<sup>7</sup> In addition, financial aid may be targeted at members of one sex as long as the overall award of financial aid is not discriminatory;<sup>8</sup> separate single-sex programs may be offered in competitive athletics;<sup>9</sup> separate housing may be made available for male and female students as long as it is comparable;<sup>10</sup> and separate schools and programs may be offered for pregnant girls, if they meet requirements of voluntariness and comparability.

In addition, as is true under the Constitution, the Title IX regulations permit remedial and affirmative action. They provide as follows:

(a) Remedial action. If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

(b) Affirmative action. In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.

#### **4. Admissions**

Finally, Title IX has limited application to admissions. The statute provides that with respect to admissions, it covers institutions of vocational education, professional education, and graduate higher education, and public institutions of undergraduate higher education, except those that have traditionally maintained a policy of single-sex admission. Thus, Title IX does not explicitly cover admissions policies in traditionally single-sex public institutions of undergraduate education, in private institutions of undergraduate higher education, or in elementary and secondary institutions (at least those that were single-sex before Title IX was enacted). These institutions therefore are not barred by Title IX from maintaining a single-sex admissions policy.

#### **5. Policy Considerations**

Historically, single-sex education has often hurt girls and women by depriving them of educational opportunities critical to their advancement in society. Even where parallel programs have been established for girls, they have tended to be distinctly unequal, with fewer resources and inferior offerings. As a result, both the Constitution and Title IX, as discussed above, place strict limits on the availability of single-sex education, while at the same time explicitly allowing for single-sex programs that are carefully constructed to remedy discrimination where it still exists or where the effects of past discrimination still linger.

There is not now, and never has been, a level playing field for girls and women in education. Equality did not exist in 1972 when Title IX was enacted, and although many improvements have been made since that time, much still remains to be accomplished before real equity is achieved. Among the many ongoing problems are (1) discrimination against pregnant girls and young mothers, combined with wholly inadequate educational opportunities for these students that exacerbate high dropout rates and foster economic dependence, with all of its attendant problems; (2) the rampant nature of sexual harassment; (3) substantial underrepresentation of females in math, science, and other technology programs; (4) significantly lower scores by female students on a wide variety of standardized tests; (5) prejudices against girls' participation in the classroom; (6) biased curricula; (7) predominantly sex-segregated vocational education programs, with females overwhelmingly directed into training programs for historically female—and traditionally low-wage—jobs; (8) the exclusion of female students from many athletic opportunities, including athletic scholarships worth hundreds of millions of dollars; and (9) the exclusion of women from consideration by entire classes of other scholarships, many for study in fields in which men already have a participation advantage.

Single-sex programs can in some instances perform a valuable role in combating these inequities. For example, to remedy the persistent effects of discrimination, federal, state, local and private entities have developed a considerable network of gender-based scholarships and financial assistance aimed at supporting women seeking to enter historically male-dominated fields. Some institutions have also created outreach programs, such as summer residential math and science "institutes" for girls on college campuses aimed at encouraging female high school and junior high school students to encourage them to consider engineering and other nontraditional career options. In light of the history of discrimination against women in education and the barriers that female students continue to face based on their gender, such programs have a legitimate place.

There are, however, several good reasons for the law to make public and federally assisted single-sex education the exception rather than the rule.

By definition, educational opportunities that are limited to one sex deprive each and every member of the excluded gender—historically, girls and women—of the benefits of those opportunities, regardless of the number of individual students who might stand to gain from them. Such blanket exclusions are unfair not just to those specific students but because they perpetuate existing inequities between the sexes. For example, the lower court in the VMI case found that some women are capable of all of the activities required of VMI cadets, yet the 347 women who had requested applications for admission in the two years preceding the lawsuit had received no response to their inquiries. Those women who wanted to attend VMI and could have made the grade thus never had the chance—and will forever lack the VMI education and degree that will profit their male peers for a lifetime.

When the design of single-sex schools or programs is premised on fixed notions about what women as a group are like, or what women as a group are capable of, it tends to reinforce limiting stereotypes that create barriers to women's advancement. Virginia's exclusion of women from VMI, for example, was based in part on its belief that, compared with men, women are more emotional, less aggressive, and less able to withstand stress. Similar stereotypes have been used historically to block women from a variety of pursuits, such as the practice of law, and still today lead to the tracking of women into vocational training in lower-paying "pink collar" fields, such as nursing and cosmetology, even as men continue to be directed into fields that provide higher wages and greater opportunities for upward mobility.

Even where parallel single-sex programs are set up for both sexes, history has shown that there is a serious risk of unequal allocation of resources—invariably to the detriment of the girls' program. For years, Philadelphia justified its exclusion of girls from a boys' magnet school based on the existence of a separate program for girls. Finally, in 1983, a state court struck down the exclusion of girls based on an examination of the facts, which showed the superiority of the boys' school in everything from faculty credentials to computer and library access. VMI's creation of an alternative program for women also vividly illustrates this danger. The Virginia Women's Leadership Institute has significantly inferior facilities, a less advanced curriculum (it offers no courses in engineering and no bachelor of science degree), a small fraction of the endowment, fewer highly trained faculty, and none of the prestige or alumni connections of VMI; it is, as a dissenting lower court judge put it, a "pale shadow" of VMI. On a broader scale, over 20 years after the enactment of Title IX, male athletic programs across the country, from elementary school through college, continue to receive a far greater share of resources and institutional commitment than do female athletic programs.

Particularly with respect to boys, the benefits of single-sex education claimed by some of its proponents have not been demonstrated. As the Office of Educational Research and Improvement of the U.S. Department of Education (OERI), after canvassing the research, reported, "Results of the studies are inconclusive as to whether one type of school [i.e., single-sex or coed] is more effective in promoting higher academic achievement and psychosocial development." OERI did note, however, that several studies indicate that girls enrolled in single-sex schools perform better on a variety of measures than their peers in coeducational schools; that boys may perform better in coeducational settings; and that other studies suggesting different outcomes for boys in single-sex Catholic high schools can be explained by differences in family background and initial ability.

Some experts have advocated special programs for inner-city male youths to enhance their educational opportunities, but the educational crisis confronting disadvantaged communities is gender-neutral. As the Court noted in *Garrett v. Board of Education of Detroit*, the educational system is failing its females as much as its males. This crisis is a result of many complex factors and cannot be resolved by the simple expedient of segregating groups of students from one another. A number of experts in the *Garrett* case testified that sex segregation in the public schools is counterproductive for African American boys, for whom it can create an expectation of privilege based on gender. Moreover, by failing to teach them how to learn and achieve together in a climate of mutual respect, segregating the sexes in this manner can undermine the preparation of students for success in a mixed-gender society. Better alternatives exist, including effective targeting of federal assistance to the poorest school districts and children; vigorous outreach efforts to increase the diversity of

teachers (in particular, to increase the number of males and people of color); and support for community-based mentoring and after-school programs and for innovative academic programs that will engage and enrich all students.

## 6. Conclusion

Both the Constitution and Title IX set strict limits on single-sex education—the Constitution because its guarantee of equal protection requires "skeptical scrutiny" of any gender classification by a public institution or in a public program, and Title IX because it prohibits sex discrimination by educational institutions that receive federal funds. Underlying both constitutional and statutory law is the recognition that it is critical to strike down gender classifications that create unfair barriers to advancement for talented individuals and serve to perpetuate inferior opportunities for women.

At the same time, neither the Constitution nor Title IX prohibits all public single-sex education, let alone all single-sex education. The Supreme Court has made it clear that public single-sex education does not violate the guarantee of equal protection as long as the proponents of a single-sex program or institution are able to demonstrate persuasively that it substantially furthers the goal of remedying past or present discrimination. Title IX also permits single-sex programs in a number of specific circumstances, such as remedying discrimination or overcoming the effects of sex-based barriers to participation. The law thus recognizes that there are circumstances in which properly designed and implemented single-sex education can play an important role in combating discrimination and dissipating traditional gender classifications. But in light of the dangers of categorical sex-based classifications, the law properly places a clear burden of proof on those seeking to justify such educational programs.

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