

## SINGLE SEX SCHOOLS AND THE EQUAL RIGHTS AMENDMENT

Most information on the merits of single-sex schools comes from lobbying organizations on behalf of women's and girls' schools. Although few in number,<sup>1</sup> these schools represent an investment of financial and human resources and a substantial constituency to support the single-sex concept. It is also an influential constituency, since wealthy conservative and liberal men have traditionally supported girls' schools.<sup>2</sup> Studies comparing results of coeducational and single-sex schools are inconclusive, but critics note that alumnae of single sex schools historically represent social and economic privilege and at least some academic selectivity, all of which are a boost to success.

### Constitutional Status of Single-Sex Schools

Constitutional standards for education were set by the 1954 *Brown v. Board of Education* decision prohibiting racial segregation in public schools as "inherently unequal" under the 14th Amendment and by the 1983 *Bob Jones University* decision denying tax exempt status to private schools that discriminate on the basis of race on religious or other pretexts.

If the ERA applied the same standards to sex classification in education, single-sex public schools would be prohibited and single-sex private schools would be ineligible for tax exemptions, publicly funded scholarships or other government benefits. Any exception to this requirement would modify the ERA accordingly, establishing a lesser nondiscrimination standard for sex than for race.

Lacking a constitutional ban on sex discrimination, courts have not declared single sex schools to be contrary to government policy, although women have sued their way into a number of previously men-only public secondary schools and colleges. Supreme Court decisions deliver a mixed message. In 1982, the Court compelled a state-supported women's university to admit a man to its nursing school (*Mississippi U. v. Hogan* 1982), but let the university's other departments remain women-only. (The subsequent decision to integrate was made by the school's board of trustees.) Also, courts in Boston and Philadelphia ordered elite public high schools for boys to admit girls, but kept the girls' high schools open too (*Newburg* 1984), keeping the single sex school concept valid.

Legal challenges to admit women to two state-funded men's military colleges -- Virginia Military Institute (VMI) and The Citadel -- were strongly resisted. Several private women's colleges supported VMI's case against sex integration to protect their own tax-exempt status. One set up a court-approved alternative "leadership" program for women to allow VMI to remain men-only, a remedy that undermines *Brown's* rejection of the separate but equal rationale for race segregation. Although the Supreme Court's decision (6/26/96) opened VMI to women and prompted The Citadel to do the same, we should not overlook the Court's refusal to apply strict scrutiny to classification by sex. Far from declaring sex discrimination unconstitutional, Justice Ruth Bader Ginsburg's opinion for the court merely said that VMI had failed to establish "the exceedingly persuasive justification that must be the solid base for any gender-defined classification." (*United States v. Virginia et al.*, No. 94-1941 at 29). Under the Clinton and Bush administrations, single sex classes for both sexes and "leadership" schools for girls are being created around the country. Title IX has been modified to permit them to be publicly funded.

What about private schools? Historically black private colleges such as Morehouse and Spelman retain their tax exempt status by not discriminating against applicants on the basis of race but continue to do so on the basis of sex. Under a strong ERA, single sex private schools would become integrated, if only as nominally as Morehouse is multi-racial, or could forgo tax benefits to continue a single-sex admissions policy.

### Legislative History

Although the single sex school issue was not featured in the 1972 ERA debates, advocates' reluctance to deal with it signaled an opening for harassment, which was fully exploited by ERA foe Senator Orrin Hatch in the 1983 ERA hearings. By grilling proponents, he exposed the absurdity of using

affirmative action, designed to achieve defined goals of work-force and professional school integration, as an excuse for indefinitely protecting sex segregation in schools.

### "Benign Discrimination"

Some defend single sex schools as "benign" discrimination to remedy the effects of sex discrimination (instead of ending it). Once accepted, the "benign" rationale is used to validate discrimination elsewhere.<sup>3</sup> For example, women-only schools have been cited to justify inner city "academies" for boys or girls as well as sex-divided pricing in insurance, both of which are opposed by the National Organization for Women.

Arguing both for and against integration of the sexes is a no-win situation. Agreeing that segregation can be used on a selective basis opens ERA advocates to criticism as hypocrites who reject equality when inequality promises a better payoff at the same time that they are accused of hurting women by spurning the alleged benefits of benign discrimination for the sake of equality.

### Why the ERA Legislative History Should Oppose Tax Benefits For Single-Sex Schools

Coeducation is the prevailing practice in American education and the one most consistent with the ideal of a society in which men and women coexist in equality and mutual respect. Single-sex schools represent the opposite premise. They perpetuate sex discrimination by parting the stream of academically and/or economically advantaged girls, forcing them to choose between affirming a stereotyped womanhood or competing for the best mainline education, a choice white boys need not make. The result is fewer students and parents with clout to demand equal opportunity for girls in coed schools.<sup>4</sup>

The legal history and current backlash over single-sex schools show that institutionalized division by sex is invidious in intent and effect, contrary to claims that such divisions benefit women. This fact calls for an uncompromised constitutional standard to support women's right to equal opportunity and equal treatment in education, and to back enforcement of laws upholding that right. Without it, excuses will always be found to justify difference-mongering, and women will always be pressured to choose institutionalized self-segregation as if it were the only alternative to putting up with sex harassment and discrimination in integrated settings.<sup>5</sup>

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<sup>1</sup> About 1% of 24.5 million girls in U.S. schools (K-12) attend private schools, many of which have single-sex admissions policies and are affiliated with religious organizations. There are at least two public high schools for girls and at least one public high school for lesbian and gay students. There are three public women's colleges and about 90 private women's colleges, half of which are affiliated with religious organizations. There are three private colleges and two state-supported military colleges for men. Data from Natl. Center for Educ. Statistics (Fall, 1992), Women's College Coalition (1990), National Coalition for Girls Schools (1994).

<sup>2</sup> Susan Gluck Mezey, *In Pursuit of Equality: Women, Public Policy, and the Federal Courts*, New York: St. Martin's Press, 1992, 148.

<sup>3</sup> Judge Guido Calabresi, former dean of the Yale Law School, noted: "*It is not surprising that many women might seek to do away with all such distinctions, including those that seem on the surface to favor them. This is especially true if...the favorable distinctions themselves have been viewed in society as symbols of differences between men and women that have been used to support discriminatory practices against women.*" 69 *Iowa Law Review* 833, 844 n.33 (1984).

<sup>4</sup> In their critique of sexism in education, professors Myra and David Sadker urged: "For the past two decades, teachers, parents, and students across the country have taken steps to confront gender bias head-on in the coed school. And even those piecemeal, part-time efforts have reaped benefits...And what would happen if...people across the nation focused on eradicating sexism in schools? We can only imagine the stunning gains girls would then achieve." Myra Sadker and David Sadker, *Failing at Fairness*, New York, Charles Scribner's Sons, 1994, 250.

<sup>5</sup> Sarah E. Burns, "Apologia for the Status Quo," review of *Gender Justice* by D. Kirp, et al., 74 *Georgetown L.J.*, 1791, 1793 & 1800 (1986). "Behind the authors' endorsement of certain approved legal policies and outcomes are assumptions that defeat, rather than aid, equal choice for women. [One is that] 'benign' motivation behind sex-based actions generally excuses the harms that these actions cause." Burns critically examines the authors' chief illustration, single sex schools.