SINGLE-SEX SCHOOLS AND THE ANTISEGREGATION PRINCIPLE

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In *United States v. Virginia*, which declared unconstitutional the exclusion of women from the state's premier military training academy, Justice Scalia in dissent pronounced single-sex public education "functionally dead."[1] Despite this prediction, single-sex schools across the country have continued to operate and, indeed, have even flourished. A renewed "experiment" in single-sex public education at the elementary and secondary level began to find footing in the early nineties, following the release of a study by the American Association of University Women ("AAUW") showing that girls lagged significantly behind boys in key areas, such as self-esteem and achievement in math and science.[2] In response, local school districts across the country began to establish single-sex public high schools and elementary schools; schools were launched in Chicago, Philadelphia, California, Detroit, and New York.[3] The opportunities single-sex schools seem to offer, and the popular notion that they lead to increased levels of achievement, have reinforced the belief that they present an effective response to the problem of sex inequality in coeducation. Against the backdrop of a growing crisis in public education that has left low-income communities hungry for better options for their children, many educators and parents have come to view single-sex education as a potential remedy not only to achievement gaps between girls and boys, but also to a whole host of social problems such as poor educational performance, teen pregnancy, delinquency, and high drop-out and incarceration rates, particularly among urban youth.[4]

Politicians at the national level have embraced the trend toward single-sex

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1. 518 U.S. 515, 596 (1996) (Scalia, J., dissenting).

2. AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS 1 (1992) [hereinafter HOW SCHOOLS SHORTCHANGE GIRLS].

3. *See* Tamar Lewin, *In California, Wider Test of Same-Sex Schools*, N.Y. TIMES, Oct. 9, 1997, at A1; Jesse McKinley, *New Jersey Daily Briefing; Single-Sex Classes Start*, N.Y. TIMES, Sept. 9, 1997, at B1; Mary B.W. Tabor, *Planners of a New Public School for Girls Look to Two Other Cities*, N.Y. TIMES, July 22, 1996, at B1. According to the National Association for Single Sex Public Education, thirty-four single-sex schools were in operation for the 2004–2005 school year, with an additional 115 schools offering single-sex classes. National Association for Single Sex Public Education, *Single Sex Public Schools in the United States*, *at* http://www.singlesexschools.org/schools-schools.htm (last visited Oct. 5, 2005).

4. *See* Isabel Wilkerson, *Detroit's Boys-Only Schools Facing Bias Lawsuit*, N.Y. TIMES, Aug. 14, 1991, at A1.

education as well. In 2001, as part of the measure popularly known as the "No Child Left Behind Act,"[5] Congress included a provision explicitly authorizing public school systems to seek "innovative assistance programs" for establishing "same-gender schools and classrooms."[6] The Bush administration has strongly endorsed this trend, and in 2002 announced its intention to reinterpret the rules implementing Title IX in order to "provide more flexibility for educators to establish single-sex classes and schools at the elementary and secondary levels."[7] The proposed regulations, which were released for comment in May 2004,[8] have garnered thousands of responses and are currently under consideration by the Department of Education.[9]

Single-sex public education is controversial, to put it mildly. Educational experts and social commentators have questioned the causal link between single-sex environments and improved achievement, and have argued that sex segregation reinforces stereotypical notions of difference.[10] On a doctrinal level, opponents claim that segregation of students on the basis of sex violates statutory and constitutional mandates.[11] In contrast, proponents of single-sex education claim that under an antisubordination analysis—one that evaluates the

5. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

6. 20 U.S.C. § 7215(a)(23) (2000 & Supp. 1 2001).

7. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 31098 (proposed May 8, 2002) (to be codified at 34 C.F.R. § 106). *See* Diana Jean Schemo, *White House Proposes New View of Education Law to Encourage Single-Sex Schools*, N.Y. TIMES, May 9, 2002, at A26. Because Congress has expressly granted the Department of Education authority to issue interpretive rules and enforce the statute's provisions, *see* Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974), the agency's interpretation of the statute would be granted substantial deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843–44 (1984). *See also* Neal v. Bd. of Trs. of Cal. State Univ., 198 F.3d 763, 770–71 (9th Cir. 1999); Cohen v. Brown Univ. 101 F.3d 155, 173 (1st Cir. 1996); Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 406 (5th Cir. 1996); Kelley v. Bd. of Trs. of Univ. of Ill., 35 F.3d 265, 271 (7th Cir. 1994).

8. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11276 (proposed Mar. 9, 2004) (to be codified at 34 C.F.R. § 106) [hereinafter Proposed Regulations].

9. Interview with Sandra G. Battle, Program Legal Group Director, Senior Counsel, United States Department of Education, Office of Civil Rights (July 2004).

10. *See* AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, SEPARATED BY SEX (1998) [hereinafter SEPARATED BY SEX] (collecting and evaluating current empirical research); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 503–05 (1999); Bernice R. Sandler, *Publicly Supported Single-Sex Schools and Policy Issues*, 14 N.Y.L SCH. J. HUM. RTS. 61, 62 (1997).

11. *See* Anne Conners, *Symposium*, 14 N.Y.L. SCH. J. HUM. RTS. 33, 41–42 (1997); Cynthia Fuchs Epstein, *The Myths and Justifications of Sex Segregation in Higher Education: VMI and the Citadel*, 4 DUKE J. GENDER L. & POL'Y 101, 101 (1997); Lucinda M. Finley, *Sex-Blind, Separate But Equal, or Anti-Subordination? The Uneasy Legacy of* Plessy v. Ferguson *for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1122 (1996); Cynthia Lewis, Plessy *Revived: The Separate but Equal Doctrine and Sex-Segregated Education*, 12 HARV. C.R.-C.L. L. REV. 585, 625 (1977); Valorie K. Vojdik, *Girls' Schools after VMI: Do they Make the Grade?*, 4 DUKE J. GENDER L. & POL'Y 69, 86, 95 (1997).

permissibility of sex- or race-based classifications in light of their effect on systems of dominance and subordination[12]—such schools should be understood as legally permissible and socially valuable. Although many of these proponents object to programs like the Virginia Military Institute ("VMI") that *exclude* women and girls, they support all-girls' schools, emphasizing their potential as a remedial measure to promote equal opportunity for young women.[13] Furthermore, supporters point out, because many experimental single-sex schools are located in predominantly minority neighborhoods, they have the potential to remedy disadvantages related not only to sex, but to race and class as well.[14] Justifications for single-sex education thus have a decided flavor of affirmative action.[15]

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12. *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007–08 (1986); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). Antisubordination theory is discussed further *infra* at text accompanying notes 171–79.

13. *See, e.g.*, Carrie Corcoran, *Single-Sex Education After* VMI*: Equal Protection and East Harlem's Young Women's Leadership School*, 145 U. PA. L. REV. 987, 1032, 1033 (1997) (examining the constitutionality of the Young Women's Leadership School under the Fourteenth Amendment, and concluding that "only girls schools motivated by remedial purpose and tailored to achieve that purpose" will pass constitutional muster under *VMI* and *Hogan* "because rather than serving to perpetuate inequality, [they] aim to ensure girls 'equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities'"); 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, 96–97 (1997) (using an antisubordination framework to conclude that the Constitution and Title IX should not obstruct single-sex education in public schools); Amy H. Nemko, *Single-Sex Public Education After* VMI*: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 23 (1998) (concluding "that it is soundly within a state's interest to permit a public single-sex school for women, even in a world in which an all-male VMI is unconstitutional"); Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?* 105 HARV. L. REV. 1741, 1741 (1992) (arguing that race and sex segregation are distinct, and using an antisubordination framework to argue that egalitarian single-sex schools "should not be rejected out of hand as constitutionally impermissible"). Some scholars, like Gilligan and Finley, seem opposed to single-sex education on principle, but remain open to the concept of remedial all-girls' schools. *See* Finley, *supra* note 11, at 1127 ("Not all single-sex institutions will automatically fall under an anti-subordination analysis. Those that seek to encourage and empower the traditionally subordinate, to give them a safe space to flourish, may actually foster the anti-subordination principle."); Brief of Amici Curiae Professor Carol Gilligan and the Program on Gender, Science and the Law, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-1941), *reprinted in* 16 WOMEN'S RTS. L. REP. 1, 14 (1994) ("Programs designed for women and girls are justifiable, if at all, on the ground that they are necessary to counteract the consequences of the discrimination many females experience.").

14. *See* Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 791 (2002) (discussing the notion that sex segregation will "elevate communities traditionally denied elite status and privilege"); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2076–77 (2002) (noting that the *New York Times* estimated that two-thirds of charter schools are located in cities); Note, *Inner-City Single-Sex Schools*, *supra* note 13 (noting problems of urban poverty that single-sex schools are aimed at addressing).

15. By "affirmative action," I mean measures targeted at counteracting discrimination against disadvantaged groups, by attempting both to remedy past discrimination and to prevent present and future discrimination. *See, e.g.*, 29 C.F.R. § 1608.1 (2004) (defining affirmative action in the employment context as "those actions appropriate to overcome the effects of past or present

It is not surprising, then, that the debate has deepened a racial fault line, sending tremors from the halls of the academy to the streets of America's cities. Mainstream, primarily white feminist and civil rights organizations like the National Organization for Women (NOW) and the American Civil Liberties Union (ACLU) argue that sex segregation in education violates principles of equal protection,[16] while members of groups such as the Black Radical Congress emphasize its benefits for low-income communities, particularly for Black and Latina girls.[17] What is perhaps more surprising is that community proponents of single-sex schools have aligned with the priorities of Republicans like George Bush and conservative think-tanks like the Manhattan Institute,[18] not normally supporters of affirmative action, while progressive groups, normally champions of affirmative action, have aligned against them.[19]

This tension merits further inquiry. Although much has been written on the

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practices, policies, or other barriers to equal employment opportunity"); 34 C.F.R. § 106.3 (2004) ("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.").

16. *See* Conners, *supra* note 11, at 35; Norman Siegel, *Symposium*, 14 N.Y.L. SCH. J. HUM. RTS. 49 (1997). This article focuses on NOW and the ACLU because those organizations were the most prominent critics of single-sex education in the mid-1990s, and the controversy around the Young Women's Leadership School in Harlem was heavily covered in the news media. I was also involved with the New York City chapter of NOW at various points during the relevant time period. Other national feminist groups opposing single-sex education include the Feminist Majority, the AAUW, and the National Women's Law Center. *See* AAUW, *Single Sex Education* (March 2004), *at* http://www.aauw.org/takeaction/policyissues/pdfs/SingleSexEducation.pdf; National Women's Law Center, Letter to Kenneth L. Marcus, U.S. Dep't of Educ., from Marcia D. Greenberger & Jocelyn Samuels, re: Single-Sex Proposed Regulations Comments (April 22, 2004), *at* http://www.nwlc.org/pdf/FinalSingleSexComments_4-22-04.pdf; Feminist Majority Foundation, Letter to Kenneth L. Marcus, U.S. Dep't of Educ., from Eleanor Smeal re: Single-Sex Proposed Regulations Comments (April 23, 2004), *at* http://www.ncwge.org/documents/comments-FMF.pdf.

17. *See, e.g.*, e-mail from Black Radical Congress to Action Alert list, *Separate but Equal in America: Sex Segregated Schools* (Nov. 19, 2000) (on file with author). One exception in the racial division is the New York Civil Rights Coalition, which joined in the complaint against the Young Women's Leadership School with NOW-NYC and the NYCLU. The Coalition was established by the NYCLU and other groups to serve as an umbrella group for other civil rights groups in New York City, and was headed at the time by Michael Meyers, who is African American. *See* Executive Director, New York Civil Rights Coalition, *at* http://www.nycivilrights.org/about/director.jsp (last visited Oct. 5, 2005); Beginnings, New York Civil Rights Coalition, *at* http://www.nycivilrights.org/about/begin.jsp (last visited Oct. 5, 2005).

18. *See* KAREN STABINER, ALL GIRLS: SINGLE-SEX EDUCATION AND WHY IT MATTERS 37–42 (2002) (documenting the involvement of philanthropist Ann Rubenstein Tisch and the Manhattan Institute in the founding of the Young Women's Leadership School in Harlem); Vojdik, *supra* note 11, at 95 ("The move to reinstitute single-sex education in New York City did not originate with elected officials, but with a well funded, conservative thinktank with a political agenda of privatizing schools."); Anemona Hartocollis, *Classy Idea for Girls: A Tisch Wish*, N.Y. DAILY NEWS, July 17, 1996, at 14 .

19. *See* Susan Estrich, *Sometimes, Single-Sex Schools Educate Best*, DENV. POST, Sept. 24, 1997, at B-07 (arguing that feminist opposition to classification on the basis of sex "is especially curious because virtually everyone who opposes the New York school supports affirmative action for minorities").

constitutionality and advisability of single-sex public schools, there has been almost no analysis of the public discourse that has emerged around the issue, either at the level of theory and policy or at the level of community activism. The possibility that such schools may become even more widespread in the near future demands a reevaluation of the arguments for and against single-sex public schools—but perhaps more importantly, it presents an opportunity to shift the debate in a less divisive direction.

The purpose of this article is therefore to turn a critical eye to both sides of the theoretical and popular discourse that has arisen around single-sex public schools, and around all-girls' schools in particular, and to analyze the polarization that has surrounded the issue. In doing so, I will draw from an intersectional framework, or one that focuses on the intersecting forces of race- and sex-based discrimination.[20] Examination of the discourse through this lens reveals troubling dynamics behind a deepening racial divide. Critics of single-sex education, many of whom are part of the mainstream feminist movement,[21] have been prone to assumptions and omissions that marginalize the experiences of communities of color, both reflecting and reinforcing the racial divide within the women's movement. Supporters, who justify single-sex education as an affirmative action measure, have failed to assess critically the possible negative effects of sex segregation.[22] Ultimately, the central argument against single-sex education—that segregation on the basis of sex in the education system perpetuates gender oppression—should not be too easily dismissed; analysis of the effects of segregation from a more historically grounded and community-specific standpoint brings to light the dangers in resorting to segregation as a solution to existing inequalities.

Constitutional and statutory prohibitions on discrimination in educational settings have formed the legal and normative background against which the discourse about single-sex schools has played out, and will continue to shape the direction in which the debate moves. Accordingly, I provide in part I a brief sketch of the constitutional, statutory, and regulatory framework within which both public and private schools operate,[23] as well as a summary of the regulatory

20. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139 (1989).

21. I recognize that there are feminists, as well as people of color, on both sides of this debate; however, opposition to single-sex schools has been more commonly associated with white mainstream feminists, and support of them with African Americans.

22. *See* Hasday, *supra* note 14.

23. The Fourteenth Amendment only prohibits discrimination by state actors. Gilmore v. City of Montgomery, 417 U.S. 556, 565 (1974). However, Title IX, the primary governing statute, was enacted under the Spending Clause and thus reaches both private and public entities in receipt of federal funds. *See* 20 U.S.C. § 1681 (2000). In addition, some have argued that the state actor doctrine may apply to some private schools that are heavily dependent on federal funds. *Compare* Christopher H. Pyle, *Women's Colleges: Is Segregation By Sex Still Justifiable After* United States v. Virginia?, 77 B.U. L. REV. 209, 221 (1997) (assuming that because most private women's colleges "cannot compete effectively without tax exemptions and other government subsidies, the

changes proposed by the Bush administration. Then, in part II, I discuss the current prospect of single-sex public schools surviving constitutional challenge. In part III I shift to an analysis of the emerging discourse, focusing primarily on the controversy surrounding the Young Women's Leadership School ("YWLS") in Harlem. In examining both sides of the debate, it becomes clear that opposition to single-sex schools can be explained by a fundamental but undertheorized difference in their respective visions of the effects of segregation by sex. While I conclude that sex segregation is not an acceptable solution to the problems of gender inequality in the school system, the justification for this position must be radically reconceived to better take into account the lives of most urban families today. To that end, I present in part IV an alternative "anti-segregation" approach to gender inequality in the public school system that attempts to place the concerns of low-income girls at the center of the analysis.

I.
EQUAL PROTECTION AND STATUTORY PROHIBITIONS ON SEGREGATION

A. The Constitutional Landscape

The realm of education has been one of the chief battlegrounds in the struggle for racial equality. It was, of course, in *Brown v. Board of Education* that the Supreme Court issued its evocative and now-famous description of the effect of segregation on the psychology of African-American children: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[24] *Brown* was followed by a long line of cases holding racial segregation in both public and private schools unconstitutional,[25] causing repercussions that reached far beyond the realm of education.

Brown's outright rejection of racial segregation, however, has never been

protection offered by the public-private wall may not be as great as it appears," and that private women's colleges could not provide sufficient justification to withstand constitutional challenge), *and* United States v. Virginia, 518 U.S. 515, 569–70 (1996) (Scalia, J., dissenting) (arguing that the decision will jeopardize federal funding to all single-sex institutions), *with* Jennifer R. Cowan, *Distinguishing Private Women's Colleges from the VMI Decision*, 30 COLUM. J.L. & SOC. PROBS. 137, 168–70 (1997) (concluding that women's colleges do not constitute state actors covered by the Constitution because they receive insufficient federal funds and because standards differ for segregation by sex and race), *and* Allison Herren Lee, *Title IX, Equal Protection, and the Richter Scale: Will VMI's Vibrations Topple Single-Sex Education*, 7 TEX. J. WOMEN & L. 37, 53 (1997).

24. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

25. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 593–95 (1983) ("An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals . . . . Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education.").

extended explicitly to sex discrimination. In fact, the Court's ruling in *United States v. Virginia*[26] ("VMI") striking down the Virginia Military Institute's all-male admissions policy, specifically reserved the question of the constitutionality of single-sex public schools.[27] The failure of the *Brown* antisegregation norm to reach deeply into the realm of sex segregation in education is a result of the Court's more deferential approach to sex-based classifications—which, I will argue, is itself a reflection of the greater normative acceptance of sex differentiation and segregation in general.[28]

In order to understand this disparity, it is necessary to examine the constitutional developments leading to *Brown* and *VMI*.. I do not intend to argue prescriptively that race and sex discrimination should be treated identically under the Equal Protection doctrine, or that they share an identical historical or social meaning; the dangers of such arguments are discussed further in part II, below. Rather, my objective is to look descriptively at the different positions adopted by the Court with respect to race and sex discrimination, and to attempt to draw conclusions from the comparison that ultimately can be used to analyze discourse surrounding single-sex education.[29]

1. Race Discrimination in Education

Almost thirty years after the passage of the Fourteenth Amendment, in a stark reflection of the wholesale abandonment of Reconstruction, the Supreme Court upheld state sponsored segregation of railway cars in *Plessy v. Ferguson*.[30] Thus the doctrine of "separate but equal" was born, and the Equal Protection Clause of the Fourteenth Amendment was rendered almost completely ineffectual.[31] A half a century later, in the midst of a burgeoning

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26. 518 U.S. 515 (1996).

27. *See id.* at 534 n.7 ("We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as 'unique,' . . . an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college.").

28. *See infra* notes 69–70 and accompanying text.

29. *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 373 (1991) (describing dangers of analogizing from race to sex, but noting that "[c]onsidering actual or apparent differences between race and gender may lead to important insights, which in turn may assist in conceptualizing new approaches to challenging oppression based on either").

30. 163 U.S. 537 (1896).

31. Under the highly deferential standard of review adopted in *Plessy* and the Equal Protection cases that followed it over the next sixty years, a body of doctrine developed in which the burden imposed on the state to justify distinctions among different categories of citizens was practically insignificant. As the test was finally fully articulated, the government needed only to establish that the goal of the classification was "legitimate" (as opposed to illegitimate), and that the classification bore a "rational" (as opposed to irrational) relationship to that goal. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). *See also* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."); GEOFFREY R. STONE, LOUIS SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET,

civil rights movement, the Court began, step by step, to repudiate its reasoning. In *Missouri ex rel. Gaines v. Canada*, the first step in this progression, the Court held that the state university law school was required to provide "substantially equal" facilities for its black and white students.[32] Although this decision represented progress toward access to higher education for Blacks, the Court persisted in its refusal to order desegregation of all-white institutions.[33]

It was not until 1950 in *Sweatt v. Painter* that the Court took that additional, if limited, step.[34] *Sweatt* concerned the segregated admissions policy of the University of Texas Law School, which had established a new facility specifically for Blacks pursuant to a court order to offer legal education to African-American students. Following *Gaines*'s "substantially equal" framework, the Court held the parallel institution insufficient to meet that standard and ordered the Black plaintiff's admission to the all-white school.[35] In reaching its determination, the Court looked not only at factors such as number of faculty, variety of courses, and size of the library, but also to "those qualities which are incapable of objective measurement but which make for greatness in a law school . . . [including] reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige."[36] This laundry list, both detailed and difficult to quantify, represented not so much a departure from *Plessy*'s "separate but equal" standard as a willingness to take a much sharper look at the meaning of "equality" in its application. Once it had adopted this framework, however, the Court would have more trouble fitting its rulings comfortably within it, particularly in the harsh context of the segregated south.[37] It was this shift that ultimately enabled the Court to abandon its holding in *Plessy* and declare in *Brown*: "in the field of public education, the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal."[38]

Since then, the Court has developed its now doctrinally entrenched "strict scrutiny" standard for race-based classifications, which views all racial classifications skeptically and subjects the state to an extremely high burden of

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CONSTITUTIONAL LAW 570 (3d ed. 1996) (discussing various formulations of the "rational basis" test).

32. 305 U.S. 337 (1938).

33. *See* Sipuel v. Bd. of Regents, 332 U.S. 631 (1948) (upholding *Gaines* and refusing to order admission of the excluded student to the all-white law school after the State attempted under court order to establish hastily a separate and inferior facility).

34. 339 U.S. 629, 636 (1950).

35. *Id.*

36. *Id.* at 634.

37. *See* STONE, SEIDMAN, SUNSTEIN & TUSHNET, *supra* note 31, at 521 ("This was true not only because there were difficulties in finding a principled way for courts to evaluate the equality of different facilities, but also because the task of performing the evaluation, in the context of thousands of separate facilities each of which had countless different variables to compare, was unmanageable.").

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

justification.[39] The Court has applied *Brown*'s antidiscrimination principle in a variety of circumstances related to education, upholding an IRS ruling denying tax-exempt status to Bob Jones University because of its discriminatory policies on interracial dating and admissions for African Americans,[40] refusing to allow state funding for textbooks in racially segregated private schools,[41] and prohibiting racial discrimination in admissions in private schools,[42] to name just a few.

Yet despite its stated commitment to eliminating racial segregation, the Court's actions have failed to bring about meaningful integration within the public school system.[43] Among the myriad causes of this failure, two have particular relevance here. First, the Court has never been willing to accord the same scrutiny to unequal treatment based on wealth as it has to racial discrimination.[44] There is a close correlation between wealth and minority status, so the racialized results of income disparities, in education and elsewhere, move beneath the constitutional radar, with the same or similar effects as an overt racial classification.[45] Second, the Supreme Court has taken an unduly narrow approach to affirmative action, which has had tremendous impact on access to higher education for minority students. In adapting Equal Protection doctrine to affirmative action cases, the Court has failed to distinguish between classifications made for remedial purposes and those made for discriminatory purposes, and has viewed all distinctions based on race as inherently suspect no matter whether their intended result is segregation or integration.[46] As a result, until recently, few affirmative action programs that have reached the Court have survived.

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39. Even though the Court in *Brown* and earlier desegregation cases did not use the language that came to be known as "strict scrutiny," *see* Korematsu v. United States, 323 U.S. 214, 216 (1944), the Court's more distrustful relationship with race-based action by the state provided the backdrop against which the Court's desegregation decisions were played out. Under the new, more exacting standard of strict scrutiny, a state had to demonstrate that race-based classifications were narrowly tailored to serve a compelling government interest, a test that race-based classifications had little chance of surviving. STONE, SEIDMAN, SUNSTEIN & TUSHNET, *supra* note 31, at 601.

40. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

41. *See* Norwood v. Harrison, 413 U.S. 455 (1973).

42. *See* Runyon v. McCrary, 427 U.S. 160 (1976). This case was decided under 42 U.S.C. § 1981 (2000), and under Congress's power under the Thirteenth Amendment.

43. *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARV. UNIV., BROWN *AT 50: KING'S DREAM OR* PLESSY'S *NIGHTMARE?* 14, 17 (2004), *at* http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf.

44. *See* Harris v. McRae, 448 U.S. 297, 323 (1980) ("this Court has held repeatedly that poverty, standing alone, is not a suspect classification"); Maher v. Roe, 432 U.S. 464, 471 (1973) (holding that poverty is not a "suspect class" for purposes of Equal Protection analysis); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages").

45. These effects are discussed further *infra* at text accompanying notes 200–202.

46. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

The Supreme Court's recent decision in *Grutter v. Bollinger*[47] represents a break from this trend, and presents the clearest articulation of the status of race-conscious admissions in education. In that much-anticipated decision, the Supreme Court upheld the University of Michigan Law School's use of race in admissions decisions, and endorsed the view, first articulated by Justice Powell's plurality decision in *Regents of California v. Bakke*,[48] that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[49] The Court recognized that ensuring the admission of a "critical mass"[50] of minority students was "at the heart of the Law School's proper institutional mission,"[51] and emphasized that the benefits of diversity are "substantial": "[T]he Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races."[52] In endorsing these objectives, the Court noted that the program "did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination."[53] In this way, the decision was not grounded on "affirmative action" principles at all.[54] Nonetheless, the opinion arguably indicates a new receptiveness on the part of the majority to race-conscious admissions programs, at least where the focus is on benefits to the entire student body, rather than to individual minority groups.[55]

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47. 539 U.S. 306 (2003).

48. 438 U.S. 265 (1978).

49. 539 U.S at 325.

50. The law school defined "critical mass" as "meaningful numbers" or "a number that encourages the underrepresented minority students to participate in the classroom and not feel isolated." *Id.* at 318.

51. *Id.* at 329.

52. *Id.* at 330 (internal quotations omitted).

53. *Id.* at 319.

54. Significantly, the Court also explicitly disavowed the notion, expressed in the past by some dissenting Justices, that strict scrutiny is "'strict in theory, but fatal in fact.'" *Id.* at 326 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)). "Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Id.* at 327. However, the majority was careful to emphasize that its "scrutiny of the interest asserted by the law school is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." *Id.* at 328.

55. The Court's willingness to permit race-conscious policies so long as they benefit the broader student population supports Derrick Bell's early theory that the unifying principle underlying the Court's antidiscrimination jurisprudence is that of "interest convergence." According to Bell, "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). However, even thus understood, the Court's newfound acceptance of race-conscious admissions has its limits, as evidenced by the companion case to *Grutter*, *Gratz v. Bollinger*, 539 U.S. 244 (2003), which held unconstitutional the University's undergraduate admissions policy.

However, like most of the affirmative action cases that have reached the Supreme Court thus far, *Grutter* deals with race, rather than gender, and does so in the setting of higher education rather than secondary education.[56] Thus, it does not speak precisely to the constitutionality of single-sex secondary schools that have a remedial purpose. Moreover, as I demonstrate in the next section, the Court's strict interpretation of the Fourteenth Amendment with respect to race discrimination in education, which refuses to acknowledge the remedial purpose of affirmative action programs, has not been applied with equal force in the context of educational segregation by sex. This doctrinal distinction has implications for the ability of single-sex schools to survive constitutional scrutiny.

2. *Gender Classifications and the Rise of "Skeptical Scrutiny"*

Despite the neutral terms and apparent flexibility of the Fourteenth Amendment,[57] its scope was limited for over a hundred years to a prohibition against discrimination based on race.[58] As a result, until 1971, the Court subjected sex-based distinctions to only the weakest scrutiny, upholding a host of laws applying differential treatment based upon sex, including statutes prohibiting women from practicing law,[59] working hours equivalent to those worked by men,[60] and tending bar,[61] and statutes requiring men but not women to serve on juries.[62] However, confronted with an increasingly powerful women's movement and escalating Equal Protection challenges, the potential flexibility inherent in the Fourteenth Amendment became more and more difficult for the Court to ignore.[63] Against this backdrop, the Court finally recognized the

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56. *Grutter*, 539 U.S. 306.

57. The Fourteenth Amendment prohibits a state from denying "*to any person* within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

58. For this reason, the Court, until very recently, refused to apply Fourteenth Amendment protections to women, pointing to the fact that prohibiting sex discrimination was not the original intent of the framers of either the Constitution or the Civil War Amendments. On this point, the Court was undoubtedly correct. As Justice Ginsburg pointed out in a 1973 article, the Fourteenth Amendment actually "placed in the Constitution for the first time the word 'male'" in conjunction with the word "citizen." Ruth Bader Ginsburg, *The Need for the Equal Rights Amendment*, 59 AM. BAR ASS'N J. 1013, 1013 (1973).

59. Bradwell v. Illinois, 83 U.S. 130, 141 (1873).

60. Muller v. Oregon, 208 U.S. 412, 423 (1908).

61. Goesaert v. Cleary, 335 U.S. 464, 467 (1948).

62. Hoyt v. Florida, 368 U.S. 57, 62 (1961). For an analysis of the development of heightened scrutiny for sex discrimination, and the bases on which the Court tends to uphold or strike down sex-based classifications, *see generally* Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN'S RTS. L. REP. 151 (1992) (arguing that the Court's decisions subscribe to and reinforce gender roles of men as aggressors and women as nurturers).

63. This was due in large part to a crucial early strategy of the women's movement to draw parallels between the arguments for equal rights for women and for Blacks. Pauli Murray, one of NOW's founders, was one of the first to articulate this argument, and one of the strongest proponents of a Fourteenth Amendment–based approach to achieving legal equality for women. *See* Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*,

application of the Equal Protection Clause to gender.[64] It even went so far as to flirt with applying strict scrutiny to sex-based classifications[65] before settling on the compromise of "intermediate scrutiny": "[C]lassifications by gender must serve important government objectives and must be substantially related to achievement of those objectives."[66]

This compromise reflects a judgment about the potential validity of sex-based classifications. Such classifications, unlike those based on race, are not considered "inherently suspect." Rather, in the eyes of the Court, "[t]he two sexes are not fungible":[67] differences between the sexes are real, and may sometimes justify different treatment. As the Court commented in *VMI*, "[i]nherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[68] Practically speaking, this of course means that sex-based classifications have a better chance than racial classifications of surviving constitutional review.[69] With respect to

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34 GEO. WASH. L. REV. 232, 237–38 (1965) (pointing out "the failure of the courts to isolate and analyze the discriminatory aspect of differential treatment based on sex" and arguing that although the Court had never up to that time struck down a law distinguishing on the basis of sex as a violation of Equal Protection, the Fourteenth Amendment "may nevertheless be applicable to sex discrimination"). *See also* Serena Mayeri, *"A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1070–73 (2001) (arguing that Murray used the race-sex analogy "to legitimate women's rights, link antiracist and feminist movements when their interests threatened to diverge, emphasize the interconnections as well as the parallels between race and sex discrimination, and expand the universe of available legal remedies for sex-based inequality").

64. Reed v. Reed, 404 U.S. 71 (1971). When the Court did finally recognize that the Equal Protection Clause might apply to a sex-based classification in *Reed*, it did not remark on the overruling of Supreme Court precedent as recent as 1961 holding that the clause did not apply, *Hoyt*, 368 U.S. at 62, or on the equally remarkable invalidation of a statute under the normally toothless rational basis standard. Perhaps this was because "what the Supreme Court did was simply to recognize that the real world outside the courtroom had already changed." Williams, *supra* note 62, at 155.

65. Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (concluding that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny").

66. Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that a statute prohibiting the sale of "nonintoxicating" beer to males under twenty-one and females under eighteen violated the Equal Protection Clause).

67. Ballard v. United States, 329 U.S. 187, 193 (1946).

68. United States v. Virginia, 518 U.S. 515, 533 (1996).

69. *See, e.g.*, Nguyen v. I.N.S., 533 U.S. 53 (2001) (upholding Immigration and Naturalization Service regulation requiring different procedures for males and females to establish paternity or maternity for citizenship purposes); Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981) (upholding statutory rape law criminalizing male but not female conduct). For a discussion of when classifications based on sex are upheld and when they are struck down, see Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (arguing that the Court views reproduction, unlike other necessary functions like eating, as strictly physical rather than social in nature and thus fails to closely scrutinize regulations concerning women's reproductive role); Williams, *supra* note 62, at 165, (arguing that the Court chose to place pregnancy, "the essential

affirmative action, this has led to the perverse result that "the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves."[70]

The Court addressed the precise question of the constitutionality of single-sex schools for the first time in *Mississippi University of Women v. Hogan*.[71] In this case, the Court faced a challenge by a male applicant to a state nursing school that was reserved exclusively for women. In striking down the policy and ordering the plaintiff's admission, the Court applied intermediate scrutiny, emphasizing that the fact that the object of the discrimination was male "does not exempt it from scrutiny or reduce the standard of review."[72] The Court also rejected the State's argument that the policy served a remedial purpose. Although the Court conceded 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," it found that Mississippi had made no showing of discrimination against women in the nursing profession.[73] On the contrary, because the field had been primarily occupied by women, "[Mississippi University of Women's] policy of excluding males from admission . . . tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."[74] In sum, the Court made clear that single-sex programs would be subject to the same standard of review as any gender-based classification, but indicated that a program might pass constitutional muster if it served a demonstrated remedial purpose.

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feature of women's separate sphere," outside the realm of sex discrimination, requiring only rational basis review, not intermediate scrutiny).

70. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 247 (1995). It also means that "[w]hite men receive greater constitutional protection from race-conscious affirmative action plans, however benignly intended, than women receive from sex discrimination." Brief of Amici Curiae National Women's Law Center at 2, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-1941). Lower courts have reached inconsistent results with respect to non-traditional fields like construction contracting, where remedial programs often consider both race and sex. For example, in Associated General Contractors of California, Inc. v. San Francisco, 813 F.2d 922, 941 (9th Cir. 1987), the Ninth Circuit struck down the race-based provisions under strict scrutiny, but applied intermediate scrutiny to uphold those aimed at benefiting women. The court, however, did not rule out future challenges to the sex-based components of the program based on charges of over-inclusiveness, i.e., that it covered industries in which women were not, in fact, disadvantaged. *Id.* at 942. Some courts have applied strict scrutiny to gender based affirmative action plans. *See, e.g.*, Brunet v. City of Columbus, 1 F.3d 390, 409 (6th Cir. 1993) (invalidating an affirmative action plan benefiting female firefighters under strict scrutiny because "the discriminatory policy against women in the Columbus fire department prior to 1975 is too remote to support a compelling governmental interest to justify the affirmative action plan embodied in the consent decree"). However, it is unlikely that these cases remain good law.

71. 458 U.S. 718, 733 (1982).

72. *Id.* at 723.

73. *Id.* at 728–29.

74. *Id.* at 729.

When confronted with the issue almost fifteen years later in *VMI*, this time in the context of a challenge to an all-male institution, the Court reached a similar result.[75] Pointing to the State's long practice of intentionally excluding women from institutions of higher learning and to the historical belief that education was harmful to women's health, the Court instead determined that the exclusion of women from VMI was "deliberate."[76] Noting that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action,"[77] the Court concluded that the State had failed to meet its burden of justifying that exclusion. The Court rejected as "notably circular" the State's argument that its purpose was simply to provide single-sex education. By arguing that VMI served this purpose, the State had confused means and ends: the provision of single-sex education itself could not serve as an "important governmental objective."[78] Ultimately, the case indicates that exclusion for exclusion's sake is not permissible within the context of single-sex education.[79]

VMI's true purpose, the Court determined, was educating "citizen-soldiers."[80] The exclusion of women did not substantially further this goal. The Court showed little patience for the argument that admitting women would destroy VMI's notorious "adversative" method of teaching because it was inappropriate for women, or because it would ruin the experience for men. The latter argument was dismissed as a vestige of the historical justifications for the exclusion of women from male preserves of power and privilege.[81] As for the former argument, the Court rejected the use of statistics measuring average

75. United States v. Virginia, 518 U.S. 515, 533 (1996).

76. *Id.* at 533–55, 538.

77. *Id.* at 531 (citing J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 136 (1994), and Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). Justice Ginsburg, writing for the majority, rejected petitioners' argument that the Court should elevate the level of scrutiny accorded to gender-based classifications to strict scrutiny, and applied the intermediate standard. The formulation demanding "an exceedingly persuasive justification," however, arguably has a more stringent focus. Chief Justice Rehnquist, concurring, commented that this language "introduces an element of uncertainty respecting the appropriate test." *Id.* at 559 (Rehnquist, C.J., concurring). *See also id.* at 573–74 (Scalia, J., dissenting) (opining that the majority's language was "amorphous," "irresponsible," and "calculated to destabilize current law"). For discussions of whether and to what degree this formulation of intermediate scrutiny elevated the standard of review for gender-based classifications, see Karen Lazarus Kupetz, *Equal Benefits, Equal Burdens: "Skeptical Scrutiny" for Gender Classifications After United States v. Virginia*, 30 LOY. L.A. L. REV. 1333, 1335 (1997); Kathryn A. Lee, *Intermediate Review "With Teeth" in Gender Discrimination Cases: The New Standard in United States v. Virginia*, 7 TEMP. POL. & CIV. RTS. L. REV. 221 (1997).

78. *Id.* at 545.

79. This decision thus invalidated the Fourth Circuit's holding in *Faulkner v. Jones*, the case challenging the all-male admissions policy at South Carolina's The Citadel, in which the court had concluded that single-sex education itself was an important government objective. 51 F.3d 440, 444 (4th Cir. 1995).

80. United States v. Virginia, 518 U.S. at 545.

81. As an example, the Court cited Columbia Law School's refusal to admit women for fear that all of the best male students would go to Harvard. *Id.* at 543–44.

abilities as the basis for exclusion. At trial, the State had agreed that there were some women who could meet VMI's physical, pedagogical, and academic requirements; the fact that such women exist constituted sufficient grounds to require their admission to the school.[82] According to the Court, "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talents and capacity place them outside the average description."[83]

Proponents of the Mary Baldwin program proposed by Virginia as a parallel program for young women excluded from VMI explicitly cast it as remedial in character. Claiming to respond to "the documented shortchanging of females in coeducational settings" and "a developmental pattern observed in many young women, in whom self-confidence often drops during adolescence," the school would offer "an extraordinary educational opportunity for women."[84] Structured to encourage women to excel in the male-dominated fields of science and math, the Mary Baldwin program promised a "bonding experience within the context of the cohort of women" and "a unique and valuable opportunity rather than a superficial equality."[85]

The Court did not endorse this characterization. A "remedial decree," in the Court's view, "must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination."[86] Although it recognized that "[s]ingle-sex education affords pedagogical benefits to at least some students," the Court declined to approve the notion that women required a different educational model than men.[87] On the contrary, the Court emphasized that some women would prefer the adversative method, and insisted that such women could not constitutionally be denied admission based on generalizations about women's modes of learning.[88] By establishing an institution that explicitly rejected VMI's trademark adversative method as inappropriate for young women, the State was relying on the same stereotypes that it had used to justify their impermissible exclusion in the first place.

The Court thus did not focus on the *independent* merits of the Mary Baldwin program or the educational theories on which it was founded, but rather on its comparability to what was offered at VMI. The Court relied upon the "substantially equal" test, which was first established in *Sweatt v. Painter*.[89] Under this analysis, the *VMI* Court determined, the Mary Baldwin program

82. *Id.* at 541.

83. *Id.* at 550.

84. Brief of Amici Curiae Kenneth Clark at 3, 4, 9, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-1941) [hereinafter Clark Amicus].

85. *Id.* at 4, 6, 7.

86. United States v. Virginia, 518 U.S. at 547 (citation omitted).

87. *Id.* at 535, 550.

88. *Id.* at 550.

89. 339 U.S. 629, 634–35 (1950); *see also supra* text accompanying notes 34–38.

suffered from a failure to achieve substantial equality in a "myriad" of respects, including inferiority in its range of curricular choices, physical facilities, endowment, and alumni networks.[90] It was these deficiencies that led the court to conclude that the parallel program was a "pale shadow" of VMI.[91] Because the fundamental flaw was not the establishment of a separate program, but the denial to women of access to VMI's superior benefits, the Court's analysis leaves open the possibility that exclusion might be acceptable should a suitable parallel program for women also exist.

The Court's reliance on *Sweatt*'s substantial equality framework rather than the standard established in *Brown* has significant ramifications for analysis of the Court's jurisprudence around race- versus sex-based classifications. In *Brown*, the court took the step it had been unprepared to take before by declaring that racial segregation in education was unacceptable on any terms, "substantially equal" or not.[92] *Brown*'s emphasis on the inherent dignitary harms of racial segregation seemed to preclude further application of *Sweatt*'s substantial equality framework, at least in the educational context. By contrast, the Court's willingness to entertain the use of a substantial equality framework in *VMI* underscores that it does not view the absolute prohibition of racial segregation articulated in *Brown* and its progeny as controlling on questions of sex segregation. Indeed, the Court did not even cite *Brown*. Rather, the Court was careful to emphasize that the situation it confronted was "unique"; it was "not faced with the question of whether the state can provide 'separate but equal' undergraduate institutions for males and females" in general.[93] This statement is a far cry from the Court's strong insistence, made in the context of racial segregation but stated in general terms, that "[s]tate support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws."[94] The reappearance of the substantially equal test in *VMI* and the notable absence of *Brown* thus indicates that the separate but equal standard, "long banished from race jurisprudence, retains vitality when it comes to sexual segregation."[95]

This, of course, begs the question of what such a substantially equal system might look like.[96] Before confronting this question, however, it is necessary to

90. United States v. Virginia, 518 U.S. at 551.

91. *Id.* at 553 (citation omitted).

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

93. United States v. Virginia, 518 U.S. at 534 n.7 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 720 n.1).

94. Cooper v. Aaron, 358 U.S. 1, 19 (1958); *accord* Norwood v. Harrison, 413 U.S. 455, 463 n.6 (1973).

95. Finley, *supra* note 11, at 1103.

96. *See* United States v. Virginia, 518 U.S. at 563 (Rehnquist, C.J., concurring) (noting that it would likely be impossible for Virginia, given VMI's long history, to set up a comparable institution under the standard of "substantial equality" articulated by the majority). Indeed, in recognition of the difficulties presented by such a requirement, the state of South Carolina made

consider briefly the two primary statutory provisions that govern discrimination in education: the Equal Education Opportunity Act ("EEOA") and Title IX of the Civil Rights Act.

B. The Statutory Scheme

1. The EEOA

The EEOA,[97] which Congress passed in response to deep resistance to desegregation in the wake of *Brown*, is aimed explicitly at ending discrimination in elementary and secondary schools by prohibiting assignment of students to segregated schools.[98] Although better known as an antidiscrimination act that deals with race rather than sex, the EEOA actually contains a statement that comes the closest of any federal law to applying *Brown*'s prohibition on educational segregation to sex, proclaiming that "the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment."[99]

Although the EEOA's congressional findings explicitly define sex segregation as a violation of the guarantee of equal protection, the statute contains conflicting provisions that cast into doubt its operative scope with respect to segregation by sex. Section 1703 of the Act provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by (a) the deliberate segregation by an educational agency of students on the basis of *race, color, or national origin*

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immediate preparations to admit women to VMI's "brother" institution, The Citadel, following the Supreme Court's ruling in *VMI* and the Fourth Circuit's ruling in *Faulkner v. Jones*, 51 F.3d 440, 448 (4th Cir. 1995). *See* Mike Allen, *Defiant VMI to Admit Women, But Will Not Ease Rules for Them*, N.Y. TIMES, Sept. 22, 1996, at A1.

97. 20 U.S.C. § 1702 (2000).

98. Sex segregation was commonly used after *Brown* to separate Black boys from white girls. *See* Verna L. Williams, *Reform or Retrenchment?: Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 61–65 (2004). Scholars have posited that this was what motivated the inclusion of sex in the EEOA. *See* Caren Dubnoff, *Does Gender Equality Always Imply Gender Blindness?: The Status of Single-Sex Education for Women*, 86 W. VA. L. REV. 295, 308 n.72 (1983). *See also* Note, *Inner-City Single-Sex Schools*, *supra* note 13, at 1755 (arguing that the EEOA would appear to support the establishment of single-sex schools as long as "the separation of the sexes is not a smokescreen used to disguise some other illegal motivation").

99. 20 U.S.C. § 1702 (2000). The statute also defines segregation as "the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of *race, color, sex, or national origin* or within a school on the basis of race, color, or national origin." 20 U.S.C. § 1720(c) (2000) (emphasis added). The statute's legislative history provides no clues to the meaning of this inconsistency: the word sex had been included in a prior version of the bill, but was removed from later versions without explanation or discussion. *See* 120 CONG. REC. H. 2165–77 (Mar. 26, 1974). This contradiction led one lower court to remark that the statute was "an anomaly" with regard to its application to sex segregation. Vorchheimer v. Sch. Dist. of Philadelphia, 532 F.2d 880, 884 (3d Cir. 1976).

among or within schools."[100] The omission of sex from this list is unexplained in the statute. By contrast, a later subsection of section 1703 prohibits "the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence . . . if the assignment results in a greater degree of segregation of students on the basis of *race, color, sex, or national origin* . . . than would result if such student were assigned to the school closest to his or her place of residence."[101] The one appellate case that has directly interpreted this language, *United States v. Hinds County School Board*, held that the permanent segregation of an entire Mississippi school district by sex, carried out in the context of a desegregation order, violated the EEOA.[102] However, the Supreme Court has never reached this question, and the statutory language is markedly ambiguous on the question of whether segregation by sex is actually prohibited under its terms.

Despite the statute's ambiguity with respect to sex-segregated schools, there are several points on which it is clear. First, the EEOA only applies to situations in which students are *assigned* to segregated schools; it does *not* apply to systems of voluntary enrollment. Therefore, unless a school district were to mandate assignment of students—either particular students, or the entire class of school-age children—to sex-segregated schools, the EEOA would be inapplicable.[103] In addition, while the statute's definition of "segregation" includes the category of sex, it explicitly confines itself to assignment to *schools*, rather than classrooms or subjects, within larger institutions.[104] The statute thus does not apply to situations in which students in a particular school are segregated by sex for the purpose of specific *classes*.[105] Enrollment in recently-established single-sex schools has been entirely elective.[106] Regardless of its

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100. 20 U.S.C. § 1703 (2000) (emphasis added).

101. *Id.* at § 1703(c) (emphasis added).

102. 560 F.2d 619, 624 (5th Cir. 1977). By contrast, the Third Circuit has suggested in dicta that the EEOA does not apply to sex segregation. *Vorchheimer*, 532 F.2d at 884.

103. *See* Proposed Regulations, *supra* note 8, at 11281. *See also Hinds*, 560 F.2d at 624.

104. 42 U.S.C. § 1720(c) (2000). The EEOA does prohibit segregation "within a school on the basis of *race, color, or national origin*." *Id.* at § 1703(a) (emphasis added).

105. In a dissenting opinion in *Vorchheimer*, Judge Gibbons pointed out that where there is disparity in quality of education offered between single-sex schools of voluntary enrollment and the rest of the public education system, actual choice may be illusory. 532 F.2d at 889 (Gibbons, J., dissenting). However, a recent Supreme Court decision seems to reject this line of reasoning. In *Zelman v. Simmons-Harris*, the Court upheld against establishment clause challenge a voucher program that permitted parents the option to send their children to participating private schools, the vast majority of which were religious institutions. 536 U.S. 639 (2002). The Court rejected the dissent's argument that the "choice" of the parents was meaningless in light of the fact that close to ninety-seven percent of the voucher funds went to religious schools. *Id.* at 707 (Souter, J., dissenting). While it is uncertain whether the same reasoning would hold true under a Fourteenth Amendment analysis with respect to sex segregation, this decision does indicate that the approach taken by the majority of the Court to the meaning of educational choice is likely to be more formal than functional.

106. *See, e.g.*, Rene Sanchez, *In East Harlem, a School Without Boys; Experiment with All-Girl Classes Taps New Mood in Public Education*, WASH. POST, Sept. 22, 1996, at A1 (quoting

ambiguous application to sex discrimination, the EEOA may limit the scope of experiments in single-sex public education to voluntary programs.[107]

2. Title IX

Title IX of the 1964 Civil Rights Act, passed in 1972,[108] may be viewed as the culmination of the long struggle for educational equality for girls in this country. Best known for its application to the arena of women's athletic programs, Title IX decrees that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[109] By conditioning federal funding on a discrimination-free educational environment, the statute promised to be a powerful tool for proponents of educational equity.[110]

The statute prohibits discrimination across the board in most educational institutions, at all levels, that receive federal funds.[111] However, as far as *admissions* are concerned, the statute notably does not cover either private undergraduate institutions or schools below the undergraduate level, like public secondary schools.[112] The statute also makes an exemption for "any public institution of undergraduate higher education [that] traditionally and continually from its establishment has had a policy of admitting only students of one sex."[113]

Diane Ravitch, a public education scholar who served in the Department of Education during George H.W. Bush's administration, as saying that schools were "looking for some *voluntary* ways to address" the "real differences between boys and girls") (emphasis added). One exception was the program that was struck down in *United States v. Hinds County Sch. Bd.*, 560 F.2d 619, 625 (5th Cir. 1977). *See supra* text accompanying note 102.

107. *Cf.* Note, *Inner-City Single-Sex Schools*, *supra* note 13, at 1755 (arguing that the EEOA would appear to support the establishment of single-sex schools as long as they were egalitarian and voluntary, and "the separation of the sexes is not a smokescreen used to disguise some other illegal motivation").

108. Pub. L. 92-318, Title IX, § 901 (June 23, 1972), 20 U.S.C. § 1681(a) (2000). The statute was authored by the late Patsy Mink, one of the first women of color to join Congress, who passed away in 2002. *See* Elissa Gootman, *Patsy Mink, Veteran Hawaii Congressmember, Dies at 74*, N.Y. TIMES, Sept. 30, 2002, at B10.

109. 20 U.S.C. § 1681(a) (2000).

110. As noted above, Title IX reaches both public and private entities in receipt of federal funds. *See supra* note 23.

111. 20 U.S.C. § 1681(c) (2000) (defining "educational institution" as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education . . .").

112. *Id.* § 1681(a)(1) (2000) (limiting application of admissions provision to "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education"). Because the focus of this article is on elementary and secondary schools, a consideration of how Title IX's affirmative action exception might apply to single-sex colleges or professional schools is beyond its scope. *See* 34 C.F.R. § 106.3 (2003).

113. 20 U.S.C. § 1681(a)(5) (2000). The statute also makes explicit exemptions for religious organizations and military training institutions (like VMI). *Id.* at § 1681(a)(3)–(a)(4). The House version of the bill had applied broadly to all educational institutions, including secondary schools, but this provision was narrowed in the Senate. As Senator Birch Bayh, the sponsor of the limiting

Thus, a statute that was intended to serve as a prohibition against sex discrimination is inapplicable to one of the situations in which overt sex-based exclusion is most prevalent.[114] This omission has played a large part in enabling the current trend in experimentation with single-sex schools.

Nonetheless, the statute's continued application to discrimination on the basis of sex within coeducational institutions, along with the passage of the No Child Left Behind Act, which explicitly authorized experimentation with "same-gender schools and classrooms (consistent with applicable law),"[115] has left considerable confusion as to the permissibility of both single-sex schools and single-sex classes within coed schools.

C. Present (and Future?) Regulatory Requirements

The Department of Education's Office of Civil Rights ("OCR") is the agency charged with administering and interpreting Title IX. Because Title IX does not cover admission to non-vocational secondary and elementary schools,[116] the current regulations do not prohibit the operation of such schools on a single-sex basis. However, they do specify that if recipients operate such schools, they must also provide a single-sex school for the excluded sex.[117] With respect to single-sex *classes*, which the statute does cover, the existing regulations prohibit them except in exceptional and narrowly specified circumstances.[118] The conflict between current regulations and the purpose of Congress in the No Child Left Behind Act to promote experimentation with single-sex schools and classes may have provided the impetus for the Department of Education's

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amendment, explained on the floor, "no one even knows how many single-sex schools exist on the elementary and secondary levels or what special qualities of the schools might argue for a continued single-sex status." 118 CONG. REC. 5803, 5804 (Feb. 28, 1972) (statement of Senator Bayh). According to Bayh, further study and debate was needed before Congress should make such a sweeping change. *Id.*

114. One lower court has held that this omission was intended only to exclude *existing* single-sex schools from the statute's coverage—under this reasoning, new proposals to found single-sex schools would be prohibited. Garrett v. Bd. of Educ., 775 F. Supp. 1004, 1005–06, 1008–11 (E.D. Mich. 1991) (granting injunction preventing Detroit Board of Education from opening three urban all-male secondary academies under Title IX's regulations). However, in *Vorchheimer v. School District of Philadelphia* (a decision predating *Garrett*), the Supreme Court summarily affirmed a Third Circuit holding that the statute excluded sex-segregated secondary schools from its coverage. Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880, 883 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977). The consensus seems to be that Title IX does not cover exclusion in admissions on the basis of sex at the elementary or secondary levels. *See* Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31102 (May 8, 2002) [hereinafter Title IX Guidelines].

115. 20 U.S.C. § 7215(a)(23) (2000).

116. *See supra* note 112 and accompanying text.

117. Title IX Guidelines, *supra* note 114, at 31103.

118. The exceptions are for (1) certain physical education classes; (2) contact sports; (3) classes dealing exclusively with human sexuality; or (4) choruses based on vocal range or quality. 34 C.F.R. §§ 106.34(b), (c), (e), (f) (2004).

current proposal to reinterpret the regulations implementing Title IX.[119]

The new regulations proposed by the Bush administration appear to track the language of the Supreme Court in *VMI* closely. Like the existing regulations, the proposed regulations provide that once a recipient of federal funds decides to establish a single-sex institution, it must also offer a "substantially equal" opportunity for the other sex.[120] However, the proposed regulations would alter the current scheme by specifying that it is acceptable to offer either a single-sex school for students of the other sex *or* a coeducational school.[121] Substantial equality, the proposed regulation specifies, does not mean that the schools must be identical; rather, whether two schools are substantially equal "involves an assessment in the aggregate of the educational benefits provided by each school as a whole."[122] Notably, however, the proposed regulation would exempt many single-sex charter schools from the requirement of establishing a parallel institution at all.[123]

The proposed regulations alter the existing scheme most radically by providing wide latitude for the establishment of single-sex classes, provided that the school "implement[s] its objective in an evenhanded manner."[124] The proposal offers two possible justifications for the establishment of such classes: they may serve

> (1) [T]o provide a diversity of educational options to students and parents, provided that the single-sex nature of the class is substantially related to achievement of that objective; or (2) to meet the particular, identified educational needs of its students, provided that the single-sex nature of the class is substantially related to meeting those needs.[125]

The regulations also state that recipients "may be required" to offer a "substantially equal single-sex class for the excluded sex,"[126] although they may decide to provide different single-sex classes for girls than they do for boys, and again, the standard for substantial equality does not require that the classes be

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119. *See supra* text accompanying notes 7–9.

120. Proposed Regulations, *supra* note 8, at 11281.

121. Substantial equality for schools is evaluated by reference to: educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology; quality and range of extra-curricular offerings; qualifications of faculty and staff; geographic accessibility; and quality, accessibility, and availability of facilities and resources. *Id.* at 11282 (citations omitted).

122. *Id.* at 11285.

123. *Id.* at 11282 (exempting single LEA charter schools from requirement of establishing parallel substantially equal opportunity for students of excluded sex).

124. *Id.* at 11285.

125. *Id.* at 11284.

126. Substantial equality for classes is evaluated by reference to: admissions policies and criteria; educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology; qualifications of faculty and staff; and quality, accessibility, and availability of facilities and resources provided for the class. *Id.* at 11285.

identical.[127] Nonetheless, the regulations warn that recipients are always required to provide substantially equal coed classes, or else "enrollment in a single-sex class is not voluntary."[128]

By largely tracking the language of the Court in *VMI*, the proposed regulations attempt to remove current regulatory barriers to the establishment of single-sex classes and to provide guidance to recipients of federal funds operating single-sex schools.[129] But of course the regulations, like the underlying statute, are still subject to constitutional constraints and may face challenge despite attempts to remain within constitutional limits.[130] Section 5 of the Fourteenth Amendment, which gave Congress authority to promulgate Title IX, does not allow Congress to "restrict, abrogate, or dilute" constitutional Equal Protection guarantees, for "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."[131] The legal viability of public single-sex education thus hinges on the ability of each institution to survive constitutional challenge.

II.
CONSTITUTIONAL VIABILITY OF SEX SEGREGATION

As the foregoing discussion demonstrates, Justice Scalia's prediction of the death of all single-sex public education[132] has proven premature. Instead, the success of any particular program will depend in large part upon the state's justification for the program, and the way the program is structured to achieve its stated goals. The most common justification rests on affirmative action principles, i.e., that single-sex schools present the best means to address gender inequalities in education. This is not, however, the only possible justification, and proponents are turning increasingly to the notion that single-sex education

127. *Id.* at 11279.

128. *Id.* With respect to admission to single-sex schools, the preamble to the proposed regulations recognizes that although Title IX does not cover admission to nonvocational elementary and secondary schools, "assigning students to single-sex schools—rather than allowing students to voluntarily select between those schools and substantially equal coeducational schools—could violate the Constitution and the requirements of the [EEOA]." *Id.* at 11281.

129. *See id.* at 11280 (requiring periodic evaluations for single-sex classes, but not for single-sex schools, "to ensure that single-sex classes are based upon genuine justifications and do not rely on overly broad generalizations about the different talents or capacities of male and female students" and to ensure that "any single-sex classes are substantially related to achievement of the objective for the classes"). These evaluations required by the statute may be based on "district or school-based data including standardized test scores; class grades; attendance; suspension and expulsion rates; incidence of pregnancy; and low levels of participation among members of one sex in certain curriculum areas." *Id.* The preamble also mentions social science research "if it is reliable and applicable to the recipient's circumstances." *Id.* In addition, "the recipient may conduct its own district or school-based research [or use] other reliable evidence such as teacher, parental, or student feedback." *Id.*

130. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982).

131. *Id.* at 732–33 (citation omitted).

132. United States v. Virginia, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting).

might offer a more focused learning environment outside of any effect on gender inequalities. The Court's receptiveness in *Grutter* to nonremedial justifications for race-conscious admissions suggests that such arguments might be persuasive as applied to sex-based admissions programs.

This section will evaluate several potential justifications for such schools, and consider for each whether (a) it would likely be deemed sufficiently "persuasive" to justify sex-based classifications in education, and (b) the means of separating students by sex would be considered sufficiently related to its achievement.

A. Means and Ends

1. Different Learning Styles

Perhaps the most prevalent justification for single-sex education is the supposed difference between boys' and girls' learning styles. This justification was, of course, considered and rejected in *VMI*. The State of Virginia relied on theories put forward by such scholars as Carol Gilligan on differences in relational styles and psychological development between men and women.[133] The majority, however, stated unequivocally that the use of "overbroad generalizations about the different talents, capacities, or preferences of males and females" to exclude women from the program was impermissible.[134] Ultimately, the Court was unpersuaded that the need to address these differences represented an interest important enough in itself to justify sex segregation.

Scholars have criticized the use of such justifications to support single-sex education. An amicus brief submitted to the Court in *VMI* by a group of educational experts disputed the use of Carol Gilligan's early research and writing on differences in psychological development between men and women, stating that "[t]he fact that [Gilligan] observed certain differences that are associated with (but not caused by) gender . . . does not support the conclusion that men should be separated from women for educational purposes."[135] Gilligan herself signed on to the brief, as did other notable scholars including Valerie Lee, upon whose studies the State of Virginia had also relied. Lee has called the single-sex solution "misguided" and repudiated the use of her research for that end, stating "I do not think the research on single-sex schooling (my own and others') should be interpreted as favoring the separation of girls and boys for their education."[136] It is therefore likely that single-sex schools utilizing

133. *See id.* at 540–41. *See also* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: MEN AND WOMEN IN CONVERSATION (1990).

134. United States v. Virginia, 518 U.S. at 533.

135. Brief of Amici Curiae in Support of Petitioner, American Association of University Professors at 23–28, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-1941).

136. Valerie E. Lee, *Is Single-Sex Secondary Schooling A Solution to the Problem of Gender*

different methodologies, justified on the basis of data on girls' different learning or relational styles, would be vulnerable to a similar critique as that advanced by the majority and amici in *VMI*.

However, there is a chance that such a justification might enjoy greater success in circumstances less extreme than those presented in *VMI*. Indeed, the regulations proposed by the Department of Education for establishing single-sex classes were clearly drafted in anticipation of this possibility, and attempt to avoid raising the concerns of scholars critical of single-sex classes justified on the basis of sex-based differences. The preamble specifies that "a recipient may, using reliable information and sound educational judgment, determine that a single-sex class in a given subject is likely to provide *some students* educational benefits."[137] In limiting the necessary finding to only those students who, based on "reliable information and sound educational judgment," would benefit from the single-sex class, and requiring that a "substantially equal" coeducational (or single-sex) opportunity be provided to the others, the regulation attempts to mitigate any concerns a reviewing court might have regarding the use of sex as a proxy for determining aptitude, educational needs, or learning style. Although the regulations only require such a justification in the case of the establishment of classes, and not schools, recipients of federal funds wishing to establish single-sex schools could adopt this reasoning in an effort to meet constitutional requirements.

The success of such an effort depends in part on whether the requirement of "substantial equality" has any real teeth in protecting against discrimination. Recall that the difficulty of evaluating segregation of individual schools, under a multifactor analysis and on a case-by-case basis, was likely a motivating factor underlying the court's abandonment in *Brown* of the standard set by *Sweatt*.[138] The Court abandoned this standard in favor of an absolute prohibition on racial segregation, finding "substantial equality" a practical impossibility in the context of the segregated South.[139] It remains to be seen whether the standard will be any easier to apply in the context of sex segregation today. Certainly, whether "separate" can ever be "equal" in either a substantial or an absolute sense is the subject of heated debate, discussed in more detail in the next part of this article.

2. *Remedial Justifications*

In *VMI*, the Court commented that remedial measures might be justified in order "to compensate women 'for particular economic disabilities [they have]

Inequity?, *in* SEPARATED BY SEX, *supra* note 10, at 41, 50.

137. Proposed Regulations, *supra* note 8, at 11279 (emphasis added).

138. *See* Sandler, *supra* note 10, at 72–73 (discussing potential problems in measuring equality and pointing out that Title IX regulations list more than sixty factors used to evaluate equality of programs receiving federal funds); *supra* text accompanying notes 34–38.

139. *See supra* text accompanying notes 36–39.

suffered,'"[140] indicating that the Court might be open to considering affirmative action to remedy broad-based discrimination against women in particular fields. The possibility remains that should such a particularized showing of disadvantage or exclusion be made, the Court might deem it sufficiently persuasive to justify a remedial single-sex program. In the context of single-sex education at the secondary level, such a showing might include the gap in academic achievement and self-esteem between girls and boys in science and math, as well as such social issues as high rates of pregnancy, eating disorders, and suicide attempts noted in teenaged girls, which courts would likely deem an important government interest.

3. Improving Academic Achievement

Improving academic achievement generally, for girls and boys alike, is an exceedingly persuasive justification. Indeed, it is a constant aspiration of our public school system. However, the difficulty here lies primarily in the means-end fit. In *Garrett v. Board of Education*, the Federal District Court for the Eastern District of Michigan confronted the legality of a proposed urban public school for boys justified on this ground.[141] Decided after *Hogan* but prior to *VMI*, *Garrett* applied intermediate scrutiny to invalidate the school based on the lack of correlation between the state-identified objective and the use of sex-segregated schools to achieve it.[142] The Detroit Board of Education had proposed the all-boys' schools as an effort to reduce "high homicide, unemployment, and drop-out rates" in inner-city schools.[143] Although the court recognized this as an important governmental interest, it held that the Board had failed to show that the exclusionary policy was substantially related to that interest.[144]

Judge Woods pinpointed several problems with common remedial justifications for sex segregation. The first was that the correlation between higher success rates in single-sex settings and the fact that the school is single-sex has been cast into serious doubt. In granting the injunction requested by plaintiffs, the court concluded that the Board was unlikely to succeed on its constitutional argument because there was "no evidence that the educational system is failing urban males because females attend schools with males."[145]

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140. United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Califano v. Webster, 430 U.S. 313, 320 (1977)) (alterations in original).

141. Garrett v. Bd. of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991).

142. *Id.* at 1007. *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), is the only other federal case dealing with the permissibility of single-sex secondary education under the Equal Protection Clause. The case, which was decided before *Hogan* or *VMI*, rejected the application of *Sweatt v. Painter* to sex segregation—an application that was later specifically approved by the Supreme Court in *VMI*. Instead, the court relied heavily upon *Williams v. McNair*, a case decided prior to the adoption of intermediate scrutiny for gender-based classifications in *Reed v. Reed*. *See id.* at 887.

143. *Garrett*, 775 F. Supp. at 1007.

144. *Id.* at 1008.

145. *Id.*

The court further cautioned that it would be "dangerous" to accept the Board's rationale, because "should the male academies proceed and succeed, success would be equated with the absence of girls rather than any of the educational factors that more probably caused the outcome."[146] The court emphasized the failure of the single-sex solution to address problems in the coeducational school system as a whole, observing that the system in question was also failing to meet the needs of female students.[147] Absent a particularized showing of discrimination within the school system specific to boys, and causally related to the presence of girls in the classroom, the court could not find that the program was substantially related to the purpose it had been proposed to serve.

This ruling speaks to a more general problem with remedial justifications for single-sex schools. In evaluating other affirmative action programs, the Supreme Court has insisted upon a particularized showing of discrimination within the setting or institution in question, and has rejected generalized statistical data about industry-wide discrimination.[148] This requirement applies even under the "relaxed" scrutiny of the intermediate test for gender discrimination.[149] Technically, existing women's schools like that in *Hogan*—or all-boys' academies like those in *Garrett*—have not themselves perpetuated discrimination in the past against the sex that they are aimed at serving. Therefore, there is no discrimination *within the school* upon which the institution could base an argument for the need for remedial measures.

Newly established or proposed single-sex schools are arguably intended to remedy discrimination within the particular school district or the school system as a whole. However, it is unclear whether such a showing would be held sufficient, given the level of specificity that appears to be required under the Court's affirmative action doctrine. At the very least, single-sex schools claiming a remedial purpose for one sex would be required to document through concrete statistical evidence a localized gap in achievement correlated with sex. Schools asserting that their purpose is overall improvement in academic achievement (for both boys and girls) would have to demonstrate that the lack of achievement was causally connected to the presence of the opposite sex. In addition, they would be required to produce evidence that these data formed the actual basis for the schools' founding, or risk a finding that the justification had been generated "*post hoc* in response to litigation."[150]

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146. *Id.* at 1007.

147. *Id.* at 1008.

148. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989). *See also* Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000) (striking down university affirmative action program).

149. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982).

150. United States v. Virginia, 518 U.S. 515, 533 (1996). This requirement could pose a serious problem for schools like YWLS. YWLS was founded without any demonstrated showing of bias against girls in either the district or the New York City school system as a whole. It was justified, rather, on the basis of generalized studies of girls' drop in achievement. *See* Vojdik, *supra* note 11, at 96–97 (remarking that the school was justified as a remedial measure only after the filing of an administrative complaint by NOW and the ACLU, and that "the hearing [on the

The most difficult hurdle facing supporters of single-sex education is to establish a causal relationship between single-sex schools and educational improvement. As the Department of Education itself has recognized, "there is presently a debate among researchers and educators regarding the effectiveness of single-sex education."[151] Although early studies seemed to indicate educational benefits associated with separating the sexes, more recent scholarship casts significant doubt on the methodology and accuracy of these studies. For example, Nancy Levit has pointed out that early studies on which claims of the beneficial effects of sex segregation were based "failed to control for the critical factors of students' academic and socioeconomic backgrounds and institutional selectivity and recruitment."[152] Instead, success rates in single-sex schools may have more to do with other characteristics of the school, such as small class size, superior facilities and materials, and more highly qualified teachers. She concluded based on a survey of the current literature that the "'general consensus' about positive education and socialization effects of single-sex education simply does not exist . . . . [W]hen those important variables were controlled, the differences between single-sex and coeducational institutions disappear."[153]

A few years after its preliminary study demonstrating girls' lag in academic achievement, the American Association of University Women released a second study that supports Levit's argument. In a roundtable convening top educational experts to compare data and analyze policy issues surrounding single-sex education, the consensus was that although "[s]ingle-sex educational programs produce positive results for some students in some settings," generalized conclusions were difficult to draw, long-term impacts were unknown, and the single-sex solution was not itself a guarantee of a non-sexist environment.[154] The factors that had led to superior achievement in single-sex schools were shown to be unrelated to the schools' single-sex status, and, moreover, would undoubtedly benefit all students in all schools.[155] The report concludes, "There

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school] was held just days after the plans became public, with scant time to meaningfully assess the need or desirability for a public girls' program"). *See also* Conners, *supra* note 11, at 38–39; Siegel, *supra* note 16, at 55. Indeed, according to one account of the school's founding, approval for the school was given by the schools chancellor at a private cocktail party that Tisch threw for him. *See* STABINER, *supra* note 18, at 41–42.

151. Proposed Regulations, *supra* note 8, at 11276 n.3.

152. Levit, *supra* note 10, at 503. *See also* Epstein, *supra* note 11, at 113 ("because of the way in which these studies were conducted, and because of the historical period in which they occurred, the resultant data cannot be relied upon to assert that segregated education today would necessarily produce successful women").

153. Levit, *supra* note 10, at 503.

154. SEPARATED BY SEX, *supra* note 10, at 2–3. Valerie E. Lee, an educational researcher, noted that the research indicating benefits of single-sex education may be overstated due to the "file drawer problem"; studies finding statistical difference in performance outcomes between students in single-sex and coeducational settings would more easily be published, while those finding no difference would less easily find a market. *Id.* at 42–43.

155. *See, e.g.*, *id.* at 4–5 (citing "organizational and administrative characteristics" as

is no evidence that single-sex education in general 'works' or is 'better' than coeducation."[156]

These are but a few examples of the empirical data challenging the notion that single-sex education is pedagogically necessary, or even substantially related to academic improvement. Of course, statistics can be found to support both sides of the debate,[157] but the weight of the current research indicates no statistically demonstrated causal connection.[158] It would thus be difficult for public schools to demonstrate, based on any existing data, that single-sex education was substantially related to the goal of academic success.

4. Increasing Educational Options

The recent recognition in *Grutter v. Bollinger* of student body diversity as a justification for race-conscious admissions raises the possibility that non-remedial arguments may enjoy greater success before the current Court than will more traditional affirmative action justifications.[159] The Court's emphasis in *Grutter* on benefits to members of an institution as a whole, rather than to particular individuals, arguably shifts the focus away from remedying past wrongs against particular groups and toward providing benefits to society and its institutions as a whole.

One such non-remedial justification is the goal of diversifying educational options for public school children. Although this justification was raised and rejected in *VMI*, the Court did not rule that it could never be regarded as an important government interest[160]—on the contrary, it acknowledged that "diversity among public educational institutions can serve the public good."[161] This leaves open the possibility that such a justification might be more successful in a less extreme context than that presented in *VMI*.

However, the Court's openness toward the educational diversity justification in *VMI* should not be confused with its recognition of "diversity" as a compelling government interest in *Grutter*. In the context of affirmative action, diversity, as it is commonly understood and has historically been used by the Court, stands for a pluralism of identities or backgrounds within a particular

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accounting for the "success" of single-sex schools).

156. *Id.* at 2.

157. *See, e.g.*, Cornelius Riordan, *The Future of Single Sex Schools*, *in* AAUW, SEPARATED BY SEX, *supra* note 10, at 53–62; ROSEMARY C. SALOMONE, SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING 188–236 (2003) (summarizing research).

158. Levit, *supra* note 10, at 503–05 (collecting and evaluating current empirical research).

159. *Cf.* Pherabe Kolb, *Reaching for the Silver Lining: Constructing a Nonremedial Yet "Exceedingly Persuasive" Rationale for Single-Sex Educational Programs in Public Schools*, 96 NW. U. L. REV. 367 (2001) (anticipating that non-remedial justifications might have the best potential for justifying single-sex schools and suggesting several such justifications).

160. United States v. Virginia, 518 U.S. 515, 533–35 (1996) (holding that diversifying educational options was not the true goal of the state of Virginia in establishing VMI, but was instead a justification invented "*post hoc* in response to litigation").

161. *Id.* at 535.

context.[162] The goal of increasing the types of educational institutions available to the public, with which Virginia justified its exclusion of women from VMI, is thus distinct from the goal of increasing the diversity of the student body within a single institution, with which Michigan justified its admissions program in *Grutter*.

The use of the term "diversity" to justify single-sex education raises several difficulties, and has quite understandably given civil rights proponents pause.[163] *VMI* directly held that the provision of *single-sex education* is not itself a sufficient justification for exclusion on the basis of sex. The Court stated emphatically that single-sex education represents the means, not the ends, under the framework of intermediate scrutiny.[164] Indeed, the Court found in *VMI* that the goal "to advance an array of educational options . . . is not served by VMI's historic and constant plan—a plan to afford a unique educational benefit only to males."[165] It is uncertain whether the Court would recognize that a single-sex institution that failed to provide a substantially equal option for the excluded sex could ever be deemed legitimate based on the goal of diversification of educational options. Some civil rights advocates argue that "far from furthering this compelling interest in educational diversity, [such programs] invite recipients to diminish classroom diversity by excluding students of the other sex."[166] *Grutter*'s emphasis on the benefits of diversity to the student body as a whole thus suggests that sex-based admissions programs might now meet with even greater skepticism than before.

The adoption of this justification in the proposed regulations for Title IX does little to allay such concerns. The regulations would allow "a recipient [to] determine that students and parents would prefer the option of single-sex classes because they believe they would provide a benefit not available in coeducational classes," or because "it has reliable information that single-sex classes would meet its educational objective."[167] Grounding the goal of providing a diversity of educational options in parent and student preference highlights the problems with this justification: no doubt white students and parents in the segregated

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162. *See, e.g.*, *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312–20 (1978).

163. *See, e.g.*, Robert N. Davis, *Diversity: The Emerging Modern Separate But Equal Doctrine*, 1 WM. & MARY J. WOMEN & L. 11, 54 (1994) (arguing that the expansion of the definition of "diversity" in the Court's discourse has taken place "in an unprincipled fashion without explanation as to whether the articulated benefits actually derived were consistent with diversity as we had come to understand it"). *See also* Levit, *supra* note 10, at 455 (noting that the focus on increasing "diversity of educational choice" has the flip side of "simply mean[ing] something other than coeducation within the classroom—in other words, it means sameness on the basis of sex").

164. United States v. Virginia, 518 U.S. at 545–46. *See also supra* notes 78–79 and accompanying text.

165. United States v. Virginia, 518 U.S. at 539–40 (citations omitted).

166. Letter from Laura W. Murphy, Director, ACLU Washington Legislative Office, to Kenneth L. Marcus, U.S. Department of Education (Apr. 23, 2004), *at* http://www.aclu.org/WomensRights/WomensRights.cfm?ID=15534&c=174.

167. Proposed Regulations, *supra* note 8, at 11278.

south "preferred" all-white schools and believed that Jim Crow laws provided "educational benefits not available" in integrated classrooms. In this light, "providing educational options" begins to look a lot like giving public effect to private bias. The legitimacy of this new, non-remedial justification for single-sex schools is therefore not as clear-cut as the proposed regulations would have it.

B. Overall Prospects

Each of the justifications discussed above presents its own set of challenges. The Court has shown skepticism about the legality of establishing single-sex education solely to address different learning styles, though perhaps it would be more open to such a justification if the alternative provided met the "substantial equality" standard. Remedial justifications for single-sex education have also been difficult to sustain in the past, and appear to be increasingly out of favor. And there are significant doubts as to whether there is a correlation between single-sex schools and improved academic achievement. Finally, the justification of increasing diversity of educational options is in doubt in light of *VMI*, and itself raises issues about exclusion and bias. In the end, significant questions remain as to whether sex segregation may permissibly (or effectively) be used to accomplish any of these goals. The constitutional foundation supporting single-sex schools is hardly firm.

On the other hand, *Grutter* may signal a renewed deference to the stated priorities of educational institutions. In upholding the law school's race-conscious admissions policy, the Court relied on its "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits" and proclaimed that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"[168] This position is hard to square with the previous application of strict scrutiny in education or with the *VMI* requirement that the state demonstrate an "exceedingly persuasive justification" for classifications based on sex. How this tension will be resolved remains to be seen, but it does suggest a shift in the legal landscape, at least with respect to race-conscious classifications in education. This new deference arguably lays the groundwork for a more permissive approach to the question of sex-based admissions, especially in light of the potential that a "substantially equal" institution might allay concerns over exclusion.[169]

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168. Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003) (citations omitted). *See also* Kolb, *supra* note 159, at 398–400 (suggesting that deference to the expertise of local school boards is one potential justification for allowing single-sex schools).

169. Practically speaking, the outcome will likely be determined more by politics than by precedent. The hostility of the Court's current conservative majority to affirmative action seems to militate against a finding for a single-sex school justified as a remedial measure. On the other hand, Justice Scalia's scathing dissent in *VMI* (and the Chief Justice's grudging concurrence) suggest that the more traditional norms underlying single-sex education might appeal to conservatives on the Court. The vote in *VMI* was 6-1-1, with Justices Ginsburg, Stevens,

Regardless of the doctrinal uncertainties, descriptive analysis of the constitutional framework sheds light on the normative forces underlying the discourse around single-sex schools. The doctrine makes clear that while segregation by race is condemned as a matter of social policy in almost every context (even though it is far from eradicated), segregation by sex does not occupy the same unequivocal position. The best evidence of this disparity is that while education was one of the first areas in which racial segregation was abandoned as a matter of policy, it remains a last holdout for sex segregation.[170] This reality, and the lack of doctrinal clarity on the issue, reflects a deep ambivalence in social attitudes toward classifications made on the basis of sex. Accordingly, part III will explore how the debate over single-sex education has played out in popular and academic discourse, and the reasons that sex segregation in education is such a highly contested issue.

III.
FAILURES OF THE DISCOURSE

Many defenders of single-sex schools have explicitly adopted what has been labeled in academic literature an "antisubordination analysis."[171] The antisubordination approach, which was developed in response to the Supreme Court's "color-blind" constitutional approach to race-based affirmative action programs,[172] insists that classifications based on sex or race should be deemed impermissible only if they reinforce existing systems of dominance and subordination.[173] As Ruth Colker has explained, antisubordination analysis

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O'Connor, Kennedy, Souter and Breyer joining in the majority opinion; Chief Justice Rehnquist concurring; Justice Scalia dissenting; and Justice Thomas taking no part in the decision. United States v. Virginia, 518 U.S. at 518. Justice O'Connor authored *Hogan* and *Grutter* and joined in the majority opinion in *VMI*.

170. That this disparity in social attitudes is reflected in (and reinforced by) law can also be seen in the different treatment of race- versus sex-based classifications in employment law. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, which prohibits discrimination in employment, contains an exception to its prohibition on hiring discrimination for situations in which the sex of the applicant is a "bona fide occupational qualification" (BFOQ). 42 U.S.C. § 2000e-2(e)(1) (2000). *See also* Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding that employer's exclusion of women from prison guard positions met requirements of BFOQ).

171. *See supra* note 13.

172. *See* Michael C. Dorf, *A Partial Defense of an Anti-Discrimination Principle*, ISSUES IN LEGAL SCHOLARSHIP, 2–4 (2002), *at* http://www.bepress.com/ils/iss2/art2; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 43–44 (1991).

173. *See* Colker, *supra* note 12; Fiss, *supra* note 12; *see also* CATHERINE MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 40–45 (1987) (arguing that the difference/sameness paradigm should be replaced with one that puts questions of dominance and hierarchy first); MARTHA MINOW, MAKING ALL THE DIFFERENCE 112 (1990) (proposing a "social-relations" approach in which legal "attributions of difference should be sustained only if they do not express or confirm the distribution of power in ways that harm the less powerful and benefit the more powerful"); Finley, *supra* note 11, at 1122 (defining antisubordination analysis as "a contextual effort to analyze power dynamics, systems, attitudes, and practices that operate explicitly or implicitly to maintain social, economic, and political dominance by one group over another").

"seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities. From an antisubordination perspective, both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy."[174]

However, the antisubordination approach does not yield a clear-cut solution to the problem of single-sex schools. Supporters of single-sex schools who have adopted an antisubordination approach accuse critics of subscribing to a notion of "formal equality" in which *all* group-based distinctions are deemed harmful, and of failing to recognize real differences in the educational needs of boys and girls.[175] And yet, the argument most critics have put forward is not that *all* sex-based classification is harmful, but that in the context of education, sex *segregation* (as opposed to classification) may perniciously reinforce gender oppression. Many critics argue that sex-segregated schools fail to address or challenge stereotypes because they deprive boys and girls of the opportunity to learn more about each other, and prepare them poorly for social interactions later in life.[176] Such critics further note that sex segregation locates the source of students' problems in students themselves (for example, in girls' "different" learning styles or boys' disruptive behavior) rather than in an educational setting that perpetuates such gendered problems.[177] With respect to all-girls' schools, they argue that removing girls from the classroom reinforces the notion that it is the girls themselves that need special treatment.[178] A position that emphasizes the possible pernicious effects of sex segregation thus can also fairly be characterized as an "antisubordination" position, demonstrating that supporters

174. Colker, *supra* note 12, at 1007–08.

175. *See, e.g.*, Estrich, *supra* note 19 (arguing that feminist opposition to single-sex schools "rejects the possibility that any line could be drawn based on gender that is not somehow intentionally and inevitably going to benefit men and disadvantage women" and that "[t]here is a presumption of bad faith by the men who make the rules, tempered only by vigilance to absolute neutrality").

176. *See, e.g.*, Epstein, *supra* note 11, at 118 ("Without regular contact in early schooling, men and women may easily categorize and stereotype each other and be ill-prepared for the public life in which they will need to interact. The few advantages women receive from the social assignments that confine, isolate, and shelter them are no consolation for the overwhelming disadvantages they suffer from being designated second-class citizens.").

177. Research seeking to explain girls' loss in self-esteem and achievement, including the AAUW study that triggered the current single-sex education trend, suggests that girls' lower self-esteem and achievement are traceable to problems such as curricula that do not reflect women's accomplishments, teachers who call more on boys and fail to listen to girls, and sexual harassment. HOW SCHOOLS SHORTCHANGE GIRLS, *supra* note 2, at 2–3, 6.

178. *See, e.g.*, Conners, *supra* note 11, at 41–42 (arguing that sex segregation reinforces stereotypes that girls are academically inferior); Vojdik, *supra* note 11, at 94 ("[T]o segregate girls is to give up on them and to send the message that the responsible adults in society are unable (or unwilling) to prevent discrimination in our public schools."). Conners and others point out that in the parallel case of workplace discrimination, no one would suggest that women move to all-female workplaces. Rather, the solution must be to address the source of the problem within the integrated work environment. Conners, *supra* note 11, at 42.

of single-sex schools have not cornered the market on the term.[179] It is therefore crucial to give content to terms like "antisubordination" from a less formalistic and more pragmatic perspective.

Prominent advocates on both sides of the debate have failed to recognize this ambiguity. Many critics of single-sex education fail to take into account the context in which single-sex schools have been established, and therefore fail to recognize the benefits that such schools offer parents and children. In so doing, they have driven the wedge even further between the two sides of the debate by, among other things, uncritically analogizing sex discrimination to race discrimination, restricting their criticisms to public schools, and conflating the issue of single-sex education with that of school choice more generally. In their turn, many supporters of single-sex schools have clung to the remedial justification for single-sex education, acknowledging neither the empirical research that calls into question the cause of the benefits that have been associated with it, nor the possible ramifications of adopting a remedy that hinges on segregation. The rhetoric adopted by supporters and the troubling evidence about the effects of single-sex schooling reveal the dangers in adopting sex segregation as a solution to inequalities within the school system.

A. Critics

1. Reasoning by Analogy

Most criticism of single-sex schools is rooted in the notion that sex segregation is harmful because it reinforces and naturalizes social constructions of gender difference. My purpose is not to refute this notion, but to examine the way in which its proponents have arrived at their position.

In arguing that sex segregation is wrong, many critics have adopted the reasoning, exemplified in *Brown v. Board of Education*, that segregation is invidious on its face. They have likened single-sex education to the institutions of the pre-*Brown* racially segregated South, suggesting that sex segregation is a product of the same disingenuous logic that spawned that era's "separate but equal" facilities. Analogizing sex segregation to "separate but equal" racial segregation is in some ways a natural consequence of the impulse to argue by analogy, and of the doctrinal structure established by the Court. However, the analogy obscures the fact that the phrase "separate but equal" has meant different things to different groups of people and at different times. An exploration of the ways in which the intersection of race- and sex-based segregation in education

179. Michael Dorf makes a similar point, arguing that neither the antidiscrimination norm nor the antisubordination norm necessarily leads to an inevitable result in Equal Protection jurisprudence; rather, both positions can support multiple conclusions. Dorf, *supra* note 172, at 6–10. *See also* Hasday, *supra* note 14, at 774.

have impacted women of color has been, up until quite recently, almost entirely absent from the analysis.[180]

For example, a recent NOW policy statement to the Department of Education Office of Civil Rights claims that the same principles adopted in *Brown* "apply to any plan for single-sex education in the public schools . . . [P]ublicly sponsored segregation threatens to impose a badge of inferiority on historically disadvantaged groups."[181] In the same vein, a recent action alert from NOW-NYC warned that "[s]eparation of the sexes in public schools would bring America back to the disgraceful and discredited model of 'separate but equal' which became a euphemism for legalized discrimination against African Americans."[182] This argument is apparent in academic literature as well; when discussing the effects of single-sex schools, critics have repeatedly and blatantly conflated race and sex segregation.[183]

Black feminists and critical race theorists have highlighted the harms of analogizing uncritically from race to sex, even if the goal is to further equality. As bell hooks has pointed out, white women who adopt analogies to race-based oppression in the name of women's rights ignore the history and experiences of black women, and "use black people as metaphors."[184] Such analogizing also has the effect of spotlighting the concerns of gender oppression while eclipsing other forms of oppression:

> When socially-subordinated groups are lumped together, oppression begins to look like a uniform problem and one may neglect the varying

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180. Two recent exceptions to this trend include Jill Elaine Hasday and Verna Williams, who provide textured sketches of the changing and variable meanings of sex segregation in education over time. *See* Hasday, *supra* note 14; Williams, *supra* note 98. *See also* Conners, *supra* note 11 (grounding objections to single-sex schools in the history of sex segregation in education and maintaining awareness of racial differences); *infra* text accompanying notes 253–255 (discussing Hasday's and Williams's conclusions).

181. Nat'l Org. for Women, *Comments on the Department of Education's Notice of Intent to Regulate on Single-Sex Education*, *at* http://www.now.org/issues/education/single-sex-education-comments.html (last visited Oct. 5, 2005) [hereinafter NOW, *Comments*].

182. Flier, NOW-NYC, Recreating "Separate but Equal" in America: Sex-Segregated Schools (2002) (on file with author).

183. *See, e.g.*, Conners, *supra* note 11, at 35 (arguing that "educators and politicians and parents want to turn the clock back to a time of separate but equal"); Davis, *supra* note 163, at 30 (arguing that the Supreme Court should close the door to the reemergence of the separate but equal doctrine); Finley, *supra* note 11, at 1103–04 ("Just as with separation along racial lines, separate never really means equal."); Levit, *supra* note 10, at 451; Lewis, *supra* note 11, at 586 ("the parallels between race- and sex-segregated facilities are so close, that the unconstitutionality of those facilities in the former context compels the same conclusion in the latter"); Siegel, *supra* note 16, at 50 ("As a society, we have rejected segregation in favor of integration. Whether in a restaurant, on a bus, or in the classroom, we have decided, as a society, that people should not be separated by virtue of immutable traits, such as race, gender, and national origin."); Vojdik, *supra* note 11, at 71 ("To reinforce the doctrine of separate but equal is to further entrench the cultural myth of difference that renders distinctions and discrimination against women as natural and essential.").

184. BELL HOOKS, AIN'T I A WOMAN 141 (1981).

> and complex contexts of the different groups being addressed. If oppression is all the same, then we are all equally able to discuss each oppression, and there is no felt need for us to listen and to learn from other socially-subordinated groups.[185]

By contrast, "[c]onsidering actual or apparent differences between race and gender may lead to important insights, which in turn may assist in conceptualizing new approaches to challenging oppression based on either."[186]

The term "separate but equal" does not have the same immediacy or historical meaning for white girls as it does for girls of color. African Americans were excluded from education altogether, often by law, until Reconstruction.[187] Although women and girls were excluded from many private institutions of higher learning up until the 1970s, the public secondary school system was largely integrated by sex significantly before racial integration actually occurred.[188] Most African-American girls therefore did not benefit—even on paper—from the sex-integration of public schools until sometime after desegregation took effect. Sex segregation itself, as historically practiced, was used in part as a tool to prevent white girls from associating with black boys, in order "to express and enforce a (gendered) message of white supremacy and African-American inferiority."[189] Moreover, for African Americans and other minorities, the crucial reality is that even once racial integration officially occurred after *Brown*, the public school system remained largely segregated.[190] The historical and cultural meanings of segregation by race and sex are therefore distinct, and the meaning of integration itself may vary depending on the historical period and the community in question.[191]

Some critics have also focused on the similarities between justifications for single-sex schools, past and present, and notions of romantic paternalism (also

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185. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397, 404 (1991).

186. Caldwell, *supra* note 29, at 373. Analogizing uncritically from race to sex may have doctrinal as well as social consequences. Catherine MacKinnon argues that by adopting an Aristotelian model established in cases of race discrimination, in which different groups must be similarly situated in order for Equal Protection principles to apply, the Court has effaced the experiences of women of color and failed to account for forms of sex discrimination that arise out of women's biological differences. Catherine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

187. Williams, *supra* note 98, at 39–40.

188. Hasday, *supra* note 14, at 802.

189. *Id.* at 788. *See also supra* note 98 (discussing this point within the context of EEOA).

190. Ryan & Heise, *supra* note 14, at 2095.

191. To provide another example, the history of integrated public schooling for Native Americans has amounted to a form of cultural genocide, a situation for which there is no corollary in the history of sex segregation. Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 822–26 (2001).

called benign protectionism)[192] which were relied upon to uphold "protective" labor laws.[193] Just as such laws were used to "protect women out" of higher paying jobs and exclude them from traditionally male preserves of power,[194] separation by sex in schools was used to limit women's education to skills within their prescribed sphere and to reinforce notions of their inferiority.[195] However, this criticism once again fails to account for the fact that women of color have not historically been the intended objects of such protectionist impulses, either with respect to legislation or education. On the contrary, their experience under slavery could not be termed benign or romantic in any respect, and any education they did receive was focused on preparing them for a life of hard labor and subservience.[196] So, while protectionist measures may have excluded white women from the paid labor force and equal educational opportunities, first slavery and then de jure or de facto racial segregation *always* excluded women of color from all but the lowest rungs of the paid work force and the most rudimentary educational options. Benign protectionism therefore has little historical relevance to women of color.

Critics' use of "separate but equal" language and their outcry against benign protectionism emphasize their removal from the real-world context of contemporary single-sex schools, which so often serve predominantly minority communities. Some experimental single-sex schools have been more than "equal" to the remainder of the school system—they have far surpassed it. The Young Women's Leadership School (YWLS) in Harlem, for example, has resources superior to the rest of the public school system: class size is limited, students wear uniforms, and libraries are stocked with the students' individual book requests.[197] How meaningful is it to appeal to the history of racial segregation to denigrate an educational opportunity that would not otherwise be available to members of minority groups in low-income communities, or to complain that granting access to such benefits is paternalistic?

Certainly there is a place for historical arguments, but such arguments must be grounded in the particular history of the group being discussed, and should not impute the experience of white middle-class women to *all* women.[198]

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192. *See, e.g.*, Levit, *supra* note 10, at 525 (arguing that sex-segregated education "harkens back to a protectionist model of putting girls in a safe place, away from the male terrors").

193. *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937) (upholding minimum wage law for women enacted "in the exercise of the state's protective power").

194. *See* Frontiero v. Richardson, 411 U.S. 677, 684 (1973); MacKinnon, *supra* note 186, at 32, 38.

195. *See* United States v. Virginia, 518 U.S. 515, 531 (1996); Epstein, *supra* note 11, at 101, 117; Hasday, *supra* note 14, at 779–83, 795–800; Williams, *supra* note 98, at 53–60.

196. Williams, *supra* note 98, at 39–53.

197. Sanchez, *supra* note 106, at A1; Jacques Steinberg, *Just Girls, and That's Fine With Them: At a New School, No Boys, Less Fussing, and a Freer Spirit*, N.Y. TIMES, Feb. 1, 1997, at A21.

198. *Cf.* AUDRE LORDE, *An Open Letter to Mary Daly*, *in* SISTER OUTSIDER 66–70 (1984) (criticizing the white frame of reference that Mary Daly applies to third-world women's experience

Historical arguments must strive to reveal the particularities among different members of the group, not to obscure them.

2. Protecting the Private Sphere

Another problematic tactic of many opponents of single-sex education is that they confine their criticism to the public school system, failing to confront the issue of private all-girls' schools. In partial defense of these critics, it should be said that at the level of constitutional challenges, this focus largely follows from the fact that the Fourteenth Amendment applies only to state, not private, actors. However, on closer examination, the defense appears thin. First of all, Title IX reaches private actors as long as they receive federal funds; statutory arguments would therefore be equally applicable to the vast majority of private colleges and professional schools.[199] Second, many of the central arguments against single-sex schools (for example, that they are of questionable educational benefit and reinforce gender stereotypes) are as applicable to private as they are to public institutions. In this light, it appears disingenuous for critics to avoid addressing the private realm altogether.

The continuing de facto segregation of the public school system makes the lack of criticism of private single-sex schools all the more troubling. In the public school system, educational opportunity is inextricably tied to wealth—which is, of course, tied to race—both through the local property-tax-based system of school funding and the availability of private schools as an option for wealthy parents.[200] As James Ryan and Michael Heise have noted, "[t]he largest school choice 'program,' of course, is not formalized at all, but rather occurs when parents select where to live based on the quality of public schools in a residential area."[201] This has led to ever-increasing levels of segregation by wealth among school districts, as wealthy urban parents whisk their children off to elite private schools and as middle-class families flee to the suburbs where higher property taxes result in better school financing, leaving urban public

in her book, *Gyn/Ecology*); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (arguing against gender essentialism in the context of violence against women, and pointing out that the history of rape experienced by African-American women in slavery differs from that of white women in free society). A new generation of scholars is beginning to apply a more nuanced analysis to the question of single-sex education. *See* Hasday, *supra* note 14; Williams, *supra* note 98; *infra* text accompanying notes 253–255.

199. *See supra* note 23 (discussing application of state actor doctrine to private women's colleges).

200. The Supreme Court long ago upheld the right of parents to send their children to private schools. *See* Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1924). In the 1970s, the Court rejected challenges to the property-tax-based system for financing public education, finding that discrimination on the basis of wealth was not a suspect classification for Equal Protection purposes, and that adequate education is not a "fundamental right" under the Constitution. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–37 (1972).

201. Ryan & Heise, *supra* note 14, at 2063–64.

schools populated almost exclusively by poor urban families.[202]

Against this backdrop, the fact that many critics have confined their arguments against single-sex schools to the public school system should raise serious concern. Of course, as the Supreme Court emphasized in *Brown*, there are undoubtedly issues that arise specifically as incident to *state*-sponsored educational segregation. But feminist groups have objected strenuously to exclusionary practices in other private contexts—for example, all-male clubs or the anti-gay policies of the Boy Scouts.[203] In this light, the hands-off approach to private schools creates the appearance that critics are simply unwilling to challenge those single-sex schools serving primarily white children from wealthy families. It also suggests that this reluctance stems from a fear of alienating graduates of private single-sex institutions such as women's colleges, a group that is heavily represented among mainstream feminists. This inconsistency rightfully leads supporters of single-sex education to question the sincerity of critics' objections.[204] Critics should confront this logical inconsistency and take a principled position against single-sex schools in both the public *and* the private realms.

3. *Conflating the Issues*

In addition, critics have conflated their objections to single-sex schools with objections more properly aimed at the issue of school choice generally, or the movement to increase the options of public school children through programs including vouchers and charter schools.[205] Many critics have relied heavily on the argument that single-sex public schools only help a small number of students, and that these schools fail to address the broader problem of sexism and lack of educational opportunity in the public education system in general.[206] For example, a 1996 press release announcing NOW-NYC's opposition to the founding of the Young Women's Leadership School in Harlem states:

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202. *Id.*

203. *See* Elizabeth Liu, *Supreme Court Shows Vulnerability with Close Decisions*, NAT'L NOW TIMES (Summer 2000), *at* http://www.now.org/nnt/summer-2000/supreme.html; Nat'l Org. for Women, *Augusta National Golf Club Announces Plans to Continue Discrimination Against Women* (Nov. 12, 2002), *at* http://www.now.org/issues/wfw/111202augusta.html; Nat'l Council of Women's Orgs., Press Release, The Augusta National Golf Club Story: 2005 (April 7, 2005), *at* http://www.womensorganizations.org/pages.cfm?ID=210. It would be interesting to analyze if there is any pattern determining when mainstream feminist groups choose to challenge private institutions: Boy Scouts aside, many have criticized that it is mainly when white women, primarily, stand to gain.

204. *See, e.g.*, e-mail from Black Radical Congress, *supra* note 17.

205. *See generally* Ryan & Heise, *supra* note 14 (discussing school choice movement).

206. *See, e.g.*, Sandler, *supra* note 10, at 76 ("Single-sex schools for girls are essentially an individual strategy which helps a small number of individuals, rather than a systemic attempt to help all students."); Vojdik, *supra* note 11, at 100 (arguing that the Young Women's Leadership School is designed less like a remedial program aimed at girls than like "a highly selective school on the Upper East Side of Manhattan").

> Creating this separate *public* school... flies in the face of public education's mandate to develop a literate population able to transcend historical barriers based on race and gender in society and in the workforce. It does not teach or promote tolerance, multiculturalism or sex equity in schools or in society. A much sounder idea would be to work towards a system-wide establishment of bias-free education in all public schools.... Though proposed as such, [YWLS] is not a solution, but a "Band-Aid" approach to educational equity for girls. In fact, it deflects attention and energies from improving the school system for all girls.[207]

Although it is not clear from this passage, the objectors' official position was never that the school should be closed, or that *no* students in the community should have access to the superior educational opportunities that the school unquestionably provided, but rather that access to such opportunities should not be based on sex—the school should be open to boys as well.[208] By this logic—with its focus on the program's "Band-Aid" nature and failure to eradicate gender bias in the public school system—we should oppose *any* program that provides increased opportunities to a small number of children without instituting systemic change. The misguided public articulation of the critics' position has resulted in the conflation of the larger school choice debate with the question of the benefits of *single-sex* education in particular.

Such conflation fails to take account of one of the principal motivations behind support for single-sex schools: the severe lack of educational opportunity in the public school system and the perceived need to establish experimental schools that can serve as laboratories for new educational techniques.[209] Given that the public school system is failing and highly segregated,[210] "[m]any people, especially those in poorer communities, perceive government schools as disasters, failing the members of the population most in need of educational opportunities to lift them out of their desperate circumstances."[211] While it is certainly not true that *all* people of color support vouchers or charter schools, most are eager for new options that might increase educational opportunities for their children.[212] The support for school

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207. Press Release, NOW-NYC, NOW-NYC Not In Favor of All-Girls School (1996) (on file with author). *See also* NOW, *Comments*, *supra* note 181 ("Only a small portion of girls would likely participate in same-sex programs, and those girls who remain in the coeducational environment would be even more likely to suffer from harassment and discrimination as a result of the schools' failure to address those problems head-on.").

208. Conners, *supra* note 11, at 43–44; Siegel, *supra* note 16, at 55–56.

209. *See* Ryan & Heise, *supra* note 14, at 2077.

210. *See id. See also* Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163 (2003).

211. Fried, *supra* note 210, at 170.

212. *See* Ryan & Heise, *supra* note 14, at 2082–83. For an example of opposition to vouchers from a Black perspective, see Makani N. Themba, *School "Choice" and Other White Lies* (May 17, 2001), *at* http://www.seeingblack.com/x051701/vouchers.shtml.

choice among many in these communities is understandable.[213]

Commentators on the issue of school choice have noted a disconnect between the positions of large advocacy groups like the NAACP and the views of their poor, African-American constituents.[214] Doubtless, this is in part a reflection of the commitment on the part of groups like the NAACP and the ACLU to the possibilities that public education holds, and the public values for which it stands.[215] Regardless of the source, however, this divergence demonstrates a gap between these groups and the priorities of the people whose interests they claim to serve.

This is not to say that vouchers or charter schools are necessarily the answer. On the contrary, recent data evaluating the success of charter schools relative to traditional public schools show disappointing results which, at the least, demonstrate that they are hardly a magic bullet.[216] These reports have fueled the already prevalent skepticism over school choice. Because "school choice is often proposed as an alternative to increasing expenditures in predominantly poor schools, and it often entails providing students less funding rather than more,"[217] such programs have been challenged by many scholars. For example, Ryan and Heise argue that the interests of suburban constituencies have substantially restricted the potential success of school choice.[218] Because of the limitations imposed by this powerful constituency, school choice has generally been confined to the poorest urban school districts and, as a result, has led to "at best, limited academic improvement, little to no gain in racial and socioeconomic integration, and little productive competition among schools."[219] Given these realities, there are serious concerns that the "attention and resources devoted to school choice will divert attention and resources that otherwise would have been directed at the entire population of students in failing school systems."[220]

Notwithstanding these legitimate concerns, critics opposing single-sex schools have failed to address these issues explicitly. While many have emphasized that single-sex schools offer increased opportunity to only a few students, few have addressed the school choice debate. The vast majority have focused on doctrinal and social-policy questions of gender, without taking into

213. Ryan & Heise, *supra* note 14, at 2083.

214. *See id.* at 2089–90.

215. It may also be due to the power of teachers' unions within groups on the left. *See id.*

216. NAT'L ASSESSMENT OF EDUC. PROGRESS, DEP'T OF EDUC. INST. OF EDUC. SCIENCES, AMERICA'S CHARTER SCHOOLS: RESULTS FROM THE NAEP 2003 PILOT STUDY (2004), *at* http://nces.ed.gov/nationsreportcard/pdf/studies/2005456.pdf; Diana Jean Schemo, *A Second Report Shows Charter School Students Not Performing as Well as Other Students*, N.Y. TIMES, Dec. 16, 2004, at A1; Diana Jean Schemo, *Charter Schools Trail in Results, U.S. Data Reveals*, N.Y. TIMES, Aug. 17, 2004, at A1.

217. Ryan & Heise, *supra* note 14, at 2108.

218. *Id.* at 2116–17.

219. *Id.* at 2048.

220. *Id.* at 2123.

account the problem of educational inequality along lines of race or class,[221] or incorporating a broader criticism of the legal doctrine and systemic structures that have helped to create and perpetuate educational inequality. This omission in the academic literature is mirrored in the popular response to the issue. For example, NOW's recent comments to the Department of Education in response to the proposed re-interpretation of Title IX do not even mention the severe lack of educational opportunities in communities of color, or address the need to find alternative solutions.[222] In fact, they do not mention race at all.[223]

This omission appears even more problematic in light of the considerable success that some single-sex experimental schools have achieved in increasing the opportunities available to minority girls. For example, in the case of the Young Women's Leadership School, NOW and the NYCLU failed to adjust their public message once the school was up and running. This public opposition appeared more and more callous as the students apparently thrived.[224] Critics of the school failed to take account of demonstrated successes, a rigidness of position that has been poorly received, to say the least.[225] It would not be inconsistent with opposition to single-sex schools to acknowledge that these particular schools have been successful. One can acknowledge the need for experimentation, better facilities, and smaller schools, as well as the benefits that some of these schools have obviously conferred on individual students, while still insisting that educational reform need not rely on sex segregation. Although some critics may oppose *both* charter schools and single-sex schools, the two arguments are analytically distinct. At the very least, in order to be convincing, any argument that challenges the single-sex aspect of such schools must take into account the broader context of inequality in the public schools along lines other than sex.

In Patricia Williams' scathing parable "The Brass Ring and the Deep Blue Sea," critical legal studies scholars are portrayed as priests turned pilgrims, set sail in search of the postmodern "brass ring" of deconstruction.[226] Meanwhile, "[a]t the bottom of the Deep Blue Sea, drowning mortals reached silently and

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221. *See supra* notes 10–11. *But see* Sara Mandelbaum, *Symposium*, 14 N.Y.L. SCH. J. HUM. RTS. 81, 85 ("[A] little experimentation, within limits, does not seem to be such a terrible idea, and, as a lawyer, I would want to think long and hard about mounting a vigorous challenge to a school like YWLS, where primarily Hispanic students are getting something that has been available to wealthy white students for a long time."); *supra* note 198.

222. *See generally* NOW, *Comments*, *supra* note 181. *Cf.* Ryan & Heise, *supra* note 14, at 2089 (observing that the NAACP has teamed up with People for the American Way to oppose vouchers, and that "[t]he partnership's main activity. . . appears to be fighting against vouchers rather than offering much in the way of new programs generally or new ideas for increasing integration in particular.").

223. NOW, *Comments*, *supra* note 181.

224. *See supra* note 197 and accompanying text.

225. *See, e.g.*, e-mail from Black Radical Congress, *supra* note 17 (implying NOW and ACLU position against YWLS is racist).

226. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, *in* FEMINIST LEGAL THEORY 496 (D. Kelly Weisberg ed., 1993).

desperately for drifting anchors dangling from short chains far, far overhead, which they thought were life-lines meant for them."[227] Like the priests in Williams' parable, critics of single-sex schools have focused so strictly on theory that they have missed the reality of oppression on the ground below.

B. Supporters

1. Conflating the Issues

While critics' tactics and reasoning may be flawed, the concerns they raise problematize the notion that sex segregation is unequivocally justified on antisubordination grounds. Like critics of single-sex education, supporters, too, have conflated the issues of school choice and single-sex schools. They have failed to examine whether the single-sex aspect of the schools leads to their success and instead have focused on the need to provide opportunities to students in educationally deprived communities by any means necessary.

For example, an action alert from the Black Radical Congress excoriating NOW for its position against single-sex schools opined that the fact that students at YWLS "are all black and Hispanic girls, has really pissed off NOW and some civil liberties groups, as if black girls were not ever deserving of superior opportunities."[228] This statement mischaracterizes the position of the schools' opponents, who have repeatedly emphasized the need for improvements for *all* girls in the public school system as a whole, as well as the injustice of denying benefits to low-income boys. Certainly, critics have opened the door to such statements by conflating objections to single-sex schools with broader objections to solutions that benefit small groups of students.[229] Nonetheless, supporters have failed to articulate why a single-sex environment is necessary in order to provide superior opportunities to minority girls.

In addition, supporters have for the most part failed to explore the racialized elements of the discourse used to justify many single-sex schools. These schools have been intentionally located in urban, low-income environments and touted as a solution to issues like teen pregnancy and single-parent families that are commonly viewed as problems by mainstream society. As Verna Williams has noted, this focus echoes stereotyped notions of black women's sexuality, as well as discredited social theories blaming single mothers for a variety of social ills.[230] Indeed, Williams suggests that the focus on low-income districts should raise red flags:

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227. *Id.* at 496–97.

228. E-mail from Black Radical Congress, *supra* note 17. *See also* STABINER, *supra* note 18, at 17 (presuming that opponents "hoped that TYWLS would never reach that first graduation day").

229. *See supra* part III.A.3.

230. Williams, *supra* note 98, at 21–24. *See also* Conners, *supra* note 11, at 39.

> If sex segregation were the silver bullet that its proponents suggest, one might expect more school districts across the board to jump on the bandwagon. But that is not the case. Sex segregation appears to be the remedy for what ails public schools peopled for the most part by low-income students of color.[231]

Centering the discourse on sex segregation, which just happens to be implemented almost solely in minority neighborhoods, masks the racialized aspect of the decision to sex-segregate.

2. Resistance to Questioning the Efficacy of Single-Sex Schools

Supporters' blindness to these arguments is certainly understandable in light of the problems with critics' tactics, discussed above. Yet supporters' resistance to questioning the causal link between single-sex schools and improved achievement merits further examination, especially in light of significant empirical research calling such a link into doubt.[232] Perhaps the most obvious explanation for this resistance is that it seems counterproductive to question an arrangement that seems to be working. Once experimental single-sex schools were founded and students showed improvement, who cared if it wasn't strictly *because* of the single-sex environment? This impulse is strengthened by the pressing need for *any* educational opportunities in low-income communities, no matter whence derived.[233] Accordingly, policymakers proposing single-sex schools in low-income districts are virtually guaranteed to meet with little or no *local* resistance.[234]

Another reason for resistance is the messengers—for the most part, mainstream feminists and liberal civil libertarians. Given the history of racism and alienation between these groups and communities of color, it is hardly surprising that communication around this issue has posed difficulties. This history reinforces "the ambivalence among Black women about the degree of political and social capital that ought to be expended toward challenging gender barriers, particularly when the challenges might conflict with the antiracism agenda."[235] Women of color may view questions about the effects of sex segregation as subordinate not only to the immediate gains of individual

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231. Williams, *supra* note 98, at 20.

232. *See* SEPARATED BY SEX, *supra* note 10, at 2; *supra* notes 151–158 and accompanying text.

233. *See supra* text accompanying notes 209–213.

234. Indeed, the NYCLU and NOW were unable to find a plaintiff to challenge the Young Women's Leadership School, resulting in their filing an administrative complaint with OCR instead. *See* Rachel P. Kovner, *Education Dept. Readies Rules to Support Single-Sex Schools*, N.Y. SUN, May 1, 2002, at 1.

235. Crenshaw, *supra* note 20, at 161. *See also* Alma M. Garcia, *The Development of Chicana Feminist Discourse, 1970–1980*, 3 GENDER & SOC'Y 217, 227 (1989) ("[M]any Chicano males were convinced that Chicana feminism was a divisive ideology incompatible with Chicano cultural nationalism.").

students, but also to the advancement of equal educational opportunity on the basis of race more generally.

Thus, critics' approach to the issue of single-sex schools, the broader history of racism within the feminist movement, and the need for increased educational opportunity in low-income communities go a long way toward explaining supporters' reluctance to relinquish their claim to antisubordination analysis or to look too closely at the cause of academic improvement in single-sex environments. However, as I argue in part IV of this article, it is possible to develop a position that centralizes both gender equity and the need to increase opportunities in the public school system, without conceding that sex segregation is an acceptable cost for such opportunities.

IV.
TOWARDS AN INTEGRATED SOLUTION

In this section, I attempt to articulate an antisegregation position on single-sex schools that takes into account race, sex, and poverty, and thus places women of color at the center of the debate. A precondition for the legitimacy of such a position, however, is a complete reframing of the background assumptions against which it is made. As Kimberlé Crenshaw has written, "[a]n effort to develop an ideological explanation of gender domination in the Black community should proceed from an understanding of how crosscutting forces establish gender norms and how the conditions of Black subordination wholly frustrate access to these norms."[236] This position does not presuppose a pat answer to questions about the effects of segregation by sex on systems of dominance and subordination. Nonetheless, it recognizes that at its core, criticism of single-sex schools contains a strong normative argument that the specific history of sex segregation in America, taken together with research and anecdotal evidence casting doubt on the benefits of sex segregation,[237] militates against single-sex education as a solution to inequality. Given the historical meanings of sex and race segregation, the risks may be too great and the benefits too uncertain to resort to segregation as a solution to sex-based inequalities in the school system.

A. Equality Not Yet Achieved

As the sketch of the constitutional background at the beginning of this article revealed, the Supreme Court has left open the possibility that where separation of the sexes is concerned, separate may well be considered "substantially equal." Against this legal backdrop, conservative forces long opposed to affirmative action have joined in an unlikely coalition with progressives who support the notion that some girls may benefit from single-sex

236. Crenshaw, *supra* note 20, at 155–56.

237. *See supra* text accompanying notes 151–158.

learning environments. Such consensus is rare in the political realm, and hardliners on both sides should resist the urge to reject the notion outright merely because of its source.

Nonetheless, there are several arguments advanced by the new left-right coalition for single-sex education that should concern critics and supporters alike. One is the view, advanced by the Bush administration and others, that we have nothing to fear from sex segregation today because discrimination against girls in educational institutions has largely been eradicated. This position is exemplified in the preamble to the Bush administration's 2004 regulatory proposal to enable single-sex schools and classes:

> When Title IX was enacted in 1972 and when the current regulations were issued in 1975, discrimination against female students was widespread at all levels of education, including elementary and secondary education. Since then, the educational opportunities for young women and girls, and the commitment of educators to those opportunities, have increased.
>
> Thus, at the time that the current regulations were issued, it was not unreasonable to base the regulations on a presumption that, if recipients were permitted to provide single-sex classes beyond the most limited of circumstances, discriminatory practices would likely continue.
>
> Over the past 30 years, the situation has changed dramatically. While there are still more gains to be made, schools are now far more equitable in their treatment of female students. Those changes are due in no small measure to Title IX and our regulations . . . When the current regulations were issued, it may have been appropriate to provide limited flexibility for single-sex educational opportunities, as discriminatory practices were still prevalent. However, given the current environment, we believe that additional flexibility is warranted, and that this flexibility will not compromise equal educational opportunities for male and female students.[238]

As this passage reveals, the proposal presumes that gender discrimination in education is no longer a real threat, and that the playing field is now more or less even.

Although opportunities for girls have undoubtedly "increased" and treatment is "more equitable," problems of sex equality in education, like those in society as a whole, are far from resolved.[239] Critics worry that sex

238. Proposed Regulations, *supra* note 8, at 11276–77.

239. *See, e.g.*, HOW SCHOOLS SHORTCHANGE GIRLS, *supra* note 2; NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX ATHLETICS POLICIES: ISSUES AND DATA FOR EDUCATION DECISION MAKERS (2002), *available at* http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/914.pdf (documenting continued gap in athletics participation and funding for boys and girls). *See also*, SALOMONE, *supra* note 157, at 85–115

segregation, implemented in a context of continued inequality, will result in the establishment of an inferior education system for girls, and they are rightly skeptical of a position that refuses to acknowledge this possibility. Even some proponents of single-sex schools acknowledge this problem. As Karen Stabiner puts it,

> My memory of math class is that things were either equal or not equal. Modifiers were out of place, because equal was absolute. The federal government seems to think otherwise at the moment, and the notion of interpretive equality has to chill the heart of every woman who still earns less than her male counterpart.[240]

Evidence of persistent inequality aside, the position that the sexes are on substantially equal footing in education makes little sense on its face: if educational equality were the rule rather than the exception, why would single-sex schools be necessary at all? The conditions of inequality that, by many proponents' logic, necessitate sex segregation are the same conditions that make its implementation so troubling. This skepticism is strengthened by the frank admission by some supporters that single-sex schools are *intended* to foster differences between the sexes,[241] and that they believe that biology determines gender differences in aptitude.[242] Such claims of biological determinism have been strongly disputed by feminists across the academic spectrum.[243]

Preliminary evidence suggests that critics' concerns about the impact of single-sex schooling may be justified. In a recent study of a two-year single-sex

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(2003) (acknowledging continued achievement gap for girls in certain areas).

240. Karen Stabiner, Editorial, *Can Separate Ever Be Equal? For Girls, Answer Isn't Simple*, L.A. TIMES, Mar. 14, 2004, at M2. Despite acknowledging the difficulties in justifying her position, Stabiner concludes that "the old Title IX was comforting in its absolutism but too rigid for these times." *Id.*

241. *See* Clark Amicus, *supra* note 84, at 3.

242. *See, e.g.*, Stabiner, *supra* note 240 (opining that "[t]here's a reason girls don't get called on first in math, and it's the same reason their grandmothers recover from strokes more successfully than their grandfathers do. Our brains are not politically correct; in many ways, they develop differently. And single-sex public schools that take these things into account may be good for some girls."); e-mail newsletter from Leonard Sax, National Association for Single Sex Public Education, Leonardsax@prodigy.net, to Leonard_sax@singlesexschools.org (Sept. 13, 2004) (copy on file with author).

243. *See generally* ANNE FAUSTO STERLING, MYTHS OF GENDER (2d ed. 1992) (contesting biological theories of gender difference); JOHN MONEY, GENDERMAPS (1995) (discussing different theories of gender difference but disputing that biology plays no role); SALOMONE, *supra* note 157, at 115 (concluding that "[g]enes do not dictate our destiny but rather define a range of possibilities," and that "educational programming can mediate to a significant degree between [biological sex] differences and the equally powerful forces of sociological conditioning"); Finley, *supra* note 11, at 1091 (discussing essentialism, or "the conflation of biological, or anatomical or physiological, difference with the legal and social construction of and meaning assigned to presumed difference"). The furor ignited by the recent comments of Lawrence Summers, president of Harvard University, suggesting that biology might be a cause of women's failure to excel in math and science professions demonstrates the ongoing controversy over theories of innate difference. *See* Sam Dillon, *Harvard Chief Defends His Talk on Women*, N.Y. TIMES, Jan. 18, 2005, at A16.

education experiment in California, independent researchers found that girls and boys were taught in different, and highly gendered, styles that reinforced the notion that girls were "good" and boys "bad." Teachers emphasized home-making skills, dress, and appearance for girls, and financial responsibility for boys, and some boys in the program were ridiculed with homophobic epithets.[244] Such findings "confirm some of the worst fears" of critics—that single-sex environments only serve to reinforce and magnify gender stereotypes.[245]

Popular news coverage of single-sex schools, which frequently depicts scenes in which gendered norms are enacted in single-sex classrooms, supports the picture painted by this study. For example, the *San Francisco Chronicle* described a sex-segregated pilot program in the Bay Area:

> When the Principal walked into Mr. Burik's seventh-grade class the other day, 30 students quieted down almost instantly. Some even sat up straight and clasped their hands. When the principal crossed the hall to Ms. Perry's class, students hooted and smirked. Some bobbed their heads incessantly and tapped their pencils against their teeth. Good kids vs. bad? Nah. Mr. Burik had the girls, and Ms. Perry had the boys.[246]

Another news report documented the use of "furry stuffed bears" in the girls' classrooms and *Sports Illustrated* magazines in the boys'.[247] *The Washington Post* reported that YWLS has pink walls and plays classical music in the hallways,[248] summoning the image of a ladies' finishing school.

And yet, the way these gendered environments reinforce difference has gone largely unremarked. Popular media tend to treat perceived differences between boys and girls as a justification for their separation, rather than its product. Media often use positive quotes from children about their experiences with single-sex classrooms as support for this position. One report quoted a

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244. Elisabeth L. Woody, *Constructions of Masculinity in California's Single-Gender Academies*, *in* GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING 280–303 (Amanda Datnow & Lea Hubbard eds., 2002).

245. SALOMONE, *supra* note 157, at 229–30. Salomone attempts to minimize the significance of these findings, hypothesizing that "the schools were perhaps trying to address some of the social deficiencies of these students and acculturate them into the accepted norms of the larger society." *Id.* at 230. But her justification is itself informed by racialized stereotypes. For example, she states that "[p]erhaps a man's financial responsibility toward his family was not part of the value system of these particular boys," and that perhaps the girls did not "comprehend[] the importance of clothing and appearance and how they create a certain impression of one's intellectual and professional seriousness." *Id.* Such assumptions play into racialized stereotypes that "construct 'true' masculinity and femininity as white, while constructing Black masculinity and femininity as deviant." Williams, *supra* note 98, at 78.

246. Nanette Asimov, *Single-Sex Schools in SF: Pioneering Academy to be Closely Watched*, S. F. CHRON., Sept. 12, 1997, at A19.

247. Richard Lee Colvin, *Single-Sex Classes a First for State's Schools*, L.A. TIMES, Aug. 29, 1997, at A29.

248. Sanchez, *supra* note 106, at A1.

sixth-grade girl as saying boys were "kind of bossy";[249] another quoted a girl as complaining that boys "dominated most of the classes";[250] a third noted a student's preference for all-girls' classes where "[t]he teacher doesn't have to spend the whole time disciplining [boys]."[251] Another report noted approvingly that girls in sex-segregated classrooms were "unembarrassed to squeal at a spider and the boys [were] free to bang their fists into baseball mitts during class."[252] These reports identify observed differences in boys' and girls' behaviors and real problems that girls face in coeducational settings. Yet the news stories fail to question the source of these problems, or the impact that separation might have on the replication of sex difference and on students' perceptions of gender. The blind spots in such reports give credence to concerns that differences in sex-segregated settings may not only reflect, but also reproduce, gendered norms of behavior. If achieving sex equality is truly one of the goals of our educational system, then these concerns cannot easily be dismissed.

B. Equality from the Outside In

The threshold step in creating an intersectional approach to educational reform is recognition that the social meanings of segregation by race and sex are not fungible. Critics must clearly articulate an argument that the history of sex segregation, and its current incarnation in single-sex schools, is relevant to the lives of girls and boys in minority communities today. A new generation of scholars, including Verna Williams and Jill Elaine Hasday, has begun to focus on these types of questions, grounding examination of single-sex schools in a nuanced contextual analysis of the history of segregation by race and sex, and how these segregations have impacted different groups of women.[253] Both Williams and Hasday demonstrate that sex segregation has historically been used as a tool to confine women to particular roles that corresponded to the dominant society's image of what was appropriate for women of their station in life, and to perpetuate race- and sex-based systems of inequality.[254]

Critics must expand on this historical approach to articulate a solution that contextualizes objections to sex segregation *within* the communities affected by these schools today.[255] What are the needs of the specific communities in which

249. Asimov, *supra* note 246.

250. Sanchez, *supra* note 106, at A1.

251. Steinberg, *supra* note 197, at 25.

252. Jane Gross, *A Coed School Offers Boys and Girls Separate Classes in Grades 6–8*, N.Y. TIMES, May 31, 2004, at B1.

253. Hasday, *supra* note 14; Williams, *supra* note 98.

254. Hasday, *supra* note 14; Williams, *supra* note 98. *But see* Hasday, *supra* note 14, at 807 (arguing that coeducational institutions hold as much potential to reinforce the inferiority of women as do single-sex schools).

255. Williams's article represents a first step in this direction, analyzing single-sex schools today against a historical backdrop and concluding that single-sex education continues to be used to perpetuate racial and sexual stereotypes. Williams, *supra* note 98, at 78–79. Jill Hasday does

single-sex schools have been located, and what effects have these schools had there? Have they been beneficial, or pernicious, or both? How have the harms weighed, on balance, against the opportunities they have offered? Were *single-sex* schools the only means to obtain those opportunities, and if not, what other alternatives might be available? Further research is necessary to understand fully the answers to these questions, but if both supporters and critics are open to asking them, the debate may be steered in a more productive direction.

Critics must expand their focus beyond sex to include educational improvements for all students and the abolition of economic segregation in the educational system. For the sake of consistency and legitimacy, they must challenge sex segregation not solely in the public school system, but in private schools as well. The educational crisis has reached emergency proportions[256] and is fueling many communities' acceptance of single-sex schools. Critics must therefore drop their emphasis on objections to so-called "Band-Aid" solutions that benefit small numbers of students, distinguish their arguments in opposition to single-sex schools from arguments against school choice more generally, and accept a "one step at a time" approach that recognizes the need for innovative educational solutions in underprivileged communities. In short, they must adopt a gender equity approach to education that addresses the full range of the problems confronting girls: inequality based on gender, race, and economic class within the educational system as a whole.

C. Equality from the Inside Out

There is little question that girls within the public school system face difficulties such as low self-confidence and achievement, depression, and sexual harassment and assault; however, there is little doubt that boys face severe disadvantages as well, the drop-out and incarceration rates of young men of color being the most striking indications.[257] An antisegregation approach would emphasize that it is not necessary, or even advisable, to segregate students by sex or to provide educational opportunities to one sex but not the other. It would also stress that it is possible to address differences in boys' and girls' educational needs within coeducational schools without reinforcing the conditions that create those differences. Given that the causal link between single-sex environments

not go quite as far, as her focus is primarily on determining whether single-sex schools would meet the standard articulated in *VMI* that single-sex schools may not perpetuate women's "legal, social, and economic inferiority." Hasday, *supra* note 14, at 756–59. The relevant question, she proposes, is whether or not the institution perpetuates "sex role confinement," a question that applies equally to coeducational institutions. *Id.* at 792–93.

256. *See* LEADERSHIP CONFERENCE ON CIVIL RIGHTS AND LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND, NATIONAL REPORT CARD ON EDUCATION AND EQUAL OPPORTUNITY, *at* http://www.civilrights.org/campaigns/brown/national_scorecard.html (last visited Oct. 5, 2005) ("[F]or African American, Hispanic, Native American and disabled students, graduation rates are catastrophically low and appear to be getting worse.").

257. *See* SALOMONE, *supra* note 157, at 85–107.

and improved education is at best questionable, the focus of the debate should shift to how we can recognize the improvements that *have* been enjoyed and translate them into a coeducational setting.

This, of course, means that existing single-sex schools should be integrated. However, the opportunities they have offered and the lessons they have taught need not be lost or forgotten. Perhaps the most important benefit of all-girls' schools has been the creation of high-quality educational opportunities for disadvantaged students in a setting aimed at fostering equality.[258] For this reason, some researchers see existing single-sex schools as "'laboratories' that may inform and improve the coeducational environment."[259] Where successful, such schools may serve as models for the development of integrated egalitarian learning environments, in which issues of power and oppression are addressed, girls' needs and talents are given equal weight to those of boys, and the focus is on academic excellence.[260] Where single-sex schools have failed, the dynamics that have caused such failures should be examined, so that mistakes can be avoided in the future. Most importantly, the academic opportunities single-sex schools have offered must not be extinguished. Communities and educators must insist that where single-sex schools once operated, the integrated institutions that replace them must be academically comparable, if not superior.

A full discussion of what such a school system would look like is well beyond the scope of this article. Nonetheless, since some researchers on the gender-equality front have already set out along this path, it is useful to indicate briefly the direction in which they are heading. A crucial component of this approach is educating students and faculty on issues of "gender and power"—an

258. *See generally* STABINER, *supra* note 18 (following students at two all-girls' schools, YWLS and the Marlborough School in California, for a year, and recounting the unique academic opportunities the schools offer).

259. Pamela Haag, *Single-Sex Education in Grades K–12: What Does the Research Tell Us?*, *in* SEPARATED BY SEX, *supra* note 10, at 15 (quoting the research of Valerie Lee).

260. Principal among the criticisms that may meet this proposal is that an equity (or feminist) focus in education would lead to a distortion of sound academic principles. *See, e.g.*, Christopher H. Pyle, *Women's Colleges: Is Segregation By Sex Still Justifiable After* United States v. Virginia?, 77 B.U.L. REV. 209, 270 (1997) ("At such institutions, scholarship would be subordinate to a political cause: to combat sexism, patriarchy, pornography and other forms of male oppression. . . . [S]cholars would not be content to pursue ideas wherever they may lead, but would function as the academic arsenal of the women's movement."). In light of the modest goal of giving girls and women the tools to "take themselves seriously as agents in the creation of a more balanced culture," ADRIENNE RICH, *Towards a Woman-Centered University*, *in* ON LIES, SECRETS, AND SILENCE 125, 126–27 (1979), critiques such as Pyle's are vulnerable on a number of fronts. First, in proposing this approach today, it is important to emphasize that the core concept is not one of separatism but of integration. Furthermore, the gender-equity approach to education does not entail any "core set of values" other than providing equality in opportunity to young women—hardly a radical notion. Finally, the gender-equity approach questions the neutrality of existing educational discourse and exposes the underlying biases that currently disadvantage girls of all races and ethnicities. This proposal is thus no more value-laden than the system it seeks to correct and replace.

area that the first AAUW report labeled "the most evaded of all topics in schools."[261] The report went on to note:

> As girls mature they confront a culture that both idealizes and exploits the sexuality of young women while assigning them roles that are clearly less valued than male roles. If we do not begin to discuss more openly the ways in which ascribed power—whether on the basis of race, sex, class, sexual orientation, or religion—affects individual lives, we cannot truly prepare our students for responsible citizenship.[262]

This issue was once again evaded by educators and policymakers, who instead used the report to justify sex segregation. Sex segregation is a "quick fix" that has allowed policymakers to avoid fundamental issues of inequality.[263] Even so, although instituting single-sex schools "does not mean that the environment will be free of sexism,"[264] such schools have filled a tremendous gap in the education system by promising a space where girls' needs and talents, too often ignored, are made central.

As for how immediately this change should be effectuated, I hesitate to say that it should be accomplished with "all deliberate speed."[265] The transition must be made in such a way that the schools and surrounding communities have sufficient time to prepare and adjust. Educational policymakers must, as the AAUW suggested, build in systems of accountability on issues of gender equity and academic excellence that will allow ongoing evaluation of reform efforts.[266] Such a focus could benefit both boys and girls, and ultimately, society as a whole.

CONCLUSION

The achievement of equality in education, either in terms of sex or race, has thus far eluded us as a society. Particularly on the issue of sex segregation, there is neither social consensus nor doctrinal clarity. One thing the Supreme Court *has* made clear, however, is that it is unprepared to apply the same expansive framework it has adopted for race discrimination to issues of sex segregation. This suggests an implicit recognition that wholesale application of the race discrimination framework to sex segregation is neither historically nor doctrinally appropriate. While the Court has left the legality of sex segregation an open question, it has also arguably avoided the errors made by feminist popular and academic critics who have treated sex and race discrimination as fungible.

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261. HOW SCHOOLS SHORTCHANGE GIRLS, *supra* note 2, at 3.
262. *Id.*
263. *Id.* at 5.
264. SEPARATED BY SEX, *supra* note 10, at 6. *See* Hasday, *supra* note 14, at 792–95.
265. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).
266. HOW SCHOOLS SHORTCHANGE GIRLS, *supra* note 2, at 6–8.

The corollary, however, is that the Court is in danger of underestimating the possible harms of sex segregation. This is where the policy framework outlined in this article can be most useful: the ambiguities that remain in the Court's doctrine around sex segregation present an opportunity to reexamine what has worked in the race model, and to reject what has not. Although analogizing uncritically from race to sex may have grave doctrinal and social consequences, *Brown* does raise legitimate questions as to whether segregation can or should be used as a tool to achieve equality. Courts should approach the question of single-sex schools in a history- and context-specific manner; they should analyze the background conditions of communities in which such schools are situated, as well as the possible benefits that have been demonstrated. Yet, in light of the courts' historic position at the vanguard of securing rights, they should also sharply question the fit between the means of sex segregation and the ends of equality. Ultimately, this means that courts must resist pat answers to questions about what constitutes "subordination" and strive instead to entertain a notion of justice that is both more far-sighted and more historically grounded.

Even if the questions raised here are never definitively answered in a court of law, background legal norms reflect and constitute the lived reality of social distinctions. As these persistent legal uncertainties indicate, debate will continue over how best to achieve equality at the level of either law or policy. In the realms of academic theory and popular culture, it will take a great deal of effort, self-examination, and communication to repair the rift that has developed between critics and supporters of single-sex education within the feminist movement and beyond. As a threshold matter, both sides of the debate must realize that their position is not the only outcome of an antisubordination approach, and move in a direction that is more nuanced, grounded in context and history, and faithful to the reality of persistent inequality along a multitude of axes.

If critics hope to be taken seriously, they must go beyond platitudes about instituting gender equity in the public school system as a whole and take a hard look at exactly how that school system currently operates. Critics must recognize the biases that have plagued their efforts in the past, and adopt a more expansive approach to educational reform that addresses inequality both within the school environment and in the outside structures that create race- and class-based inequality. They must also acknowledge the benefits enjoyed by students in small, experimental single-sex schools in underserved communities, and commit themselves to ensuring that these benefits are not lost. In return, communities that support single-sex education as a remedial, antisubordination measure should examine more closely the historical impact of segregation on students and question whether it is too high a cost to pay for improving educational opportunities for underprivileged children. A rigorous commitment on the part of policymakers and educators to weaving gender equality into the fabric of the public school system would go a long way toward bringing the ideal closer to reality.

The alternative approach proposed in this article suggests that we need not

resort to exclusion to obtain equality. It allows for both experimentation tailored to the needs of students in low-income communities and integration of the benefits enjoyed in existing single-sex schools into a coeducational setting. It may be too late for some supporters to take concerns about the possible pernicious effects of sex segregation seriously—antagonisms, already severe, have been exacerbated by the approach critics have taken thus far. But it is not too late for critics, especially those who identify as feminists, to examine their own approach for racial bias and adjust it accordingly. Regardless of whether such self-examination will change the outcome, it is vital in a movement that professes to make fighting racism a priority.