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Reform or Retrenchment: Single Sex Education and the Construction of Race and Gender

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ARTICLES

REFORM OR RETRENCHMENT? SINGLE-SEX EDUCATION AND THE CONSTRUCTION OF RACE AND GENDER

VERNA L. WILLIAMS*

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INTRODUCTION

*Desperate over the wasted lives of its young black men, Detroit is about to open the nation's first public schools for inner-city boys . . . [T]he plan is seen not as a fashionable education theory to be tested, but as an experiment with lives at stake, a last chance to save families and, ultimately, the city itself. . . . Opponents call the schools a discriminatory throwback. Race is not the issue, because 90 percent of Detroit's public school students are black.*¹

Desperate. Wasted. Last chance. These words signify crisis. Without question, the condition of urban school districts across the nation is dire.² With so few resources, so many challenges, and so few prospects for meaningful reform, it is hardly surprising that parents are quick to grasp at anything that remotely promises to lead their children to college and careers rather than to the streets, prison, or the cemetery. It is hardly surprising that single-sex³ education, which conjures up images of elite institutions such as Wellesley College and the success sure to follow would seem to be a godsend. Why *not* try single-sex schools?

*It's not about sex, it is about black men and black people [and] their right to self-determination.*⁴

The Detroit Board of Education (the "Board"), with the support of many of the school district's parents, decided to try its hand at single-

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

2. For example, the New York Court of Appeals recently found that the state failed to provide New York City students—eighty-four percent of whom are racial minorities—with a "sound basic education" as required under the state constitution. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 329 (N.Y. 2003). The court found that significant disparities in per-pupil expenditures had resulted in "tens of thousands of students [being] placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment. The number of children in these straits is large enough to represent a systemic failure." *Id.* at 336; see also JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 2-3 (1991) (discussing similar conditions in urban school districts throughout the nation).

3. In this Article, "sex" refers to the biological categories of male and female; "gender" refers to the social construction of masculinity and femininity. See, e.g., Katherine M. Frankc, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 1 (1995) (explaining that the term "gender" refers to a "function of culture" and society assigned an individual, while "sex" refers to "a product of nature").

4. *Nightline: Detroit Black "Male Academies" Ruled Unfair* (ABC News television broadcast, Aug. 15, 1991) (transcript on file with author).

sex education, creating three all-male academies for students in grades six through eight.⁵ These schools would be the balm for high dropout rates, low achievement, and hopelessness confronting their community.⁶

However, for Shawn Garrett, a Detroit mother and plaintiff in the *Garrett v. Board of Education* litigation, an important question was unanswered. What about her daughter, Crystal? Crystal was also part of a class that was more likely to quit school than graduate, more and more likely to be incarcerated or murdered.⁷ Garrett wanted the Board to help her daughter, too. But these new schools were for boys. For female students, three schools for pregnant girls were the only single-sex option.⁸ Joined by another parent of a girl and the National Organization for Women Legal Defense and Education Fund, and represented by the American Civil Liberties Union (ACLU), Garrett sued the Board to make this opportunity available to her daughter and other girls like her. These plaintiffs sought to block the all-male academies from opening.⁹

However, by the time the district court heard arguments on the motion for preliminary injunction, Garrett was no longer a party to the action.¹⁰ Her decision to challenge the single-sex academies with two predominately white, legal-advocacy organizations¹¹ was met with

5. See *All-Girl Schools: Detroit Counters Lawsuit*, DAILY REPORT CARD, Aug. 8, 1991, available at LEXIS; see also *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1006 (E.D. Mich. 1991).

6. See *All-Girl Schools: Detroit Counters Lawsuit*, *supra* note 5; see also *Garrett*, 775 F. Supp. at 1007.

7. See, e.g., PAULA C. JOHNSON, *INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON* 34 (2003) (noting that overall “women [are] the fastest-growing segment of the prison population . . . African American women are the largest percentage of incarcerated women”); Joseph R. Biden, Jr., *What About the Girls? The Role of the Federal Government in Addressing the Rise in Female Juvenile Offenders*, 14 STAN. L. & POL’Y REV. 29, 32, 34 (2003) (noting that between 1989 and 1998, the female juvenile delinquency rate rose 83%; that between 1989 and 1993, the arrest rate for female juveniles increased 55% compared to only 33% for males during that period; and that between 1988 and 1997, the number of cases in the juvenile justice system increased 106% for African American girls); Ossai Miadzad, *The Gender Gap: Treatment of Girls in the United States Juvenile Justice System*, 10 HUM. RTS. BR. 10, 10 (2002) (“Between 1988 and 1997, girls’ rate of detention increased more than twice that of boys.”).

8. Laurel Shaper Walters, *The Plight of Black Male Schools*, CHRISTIAN SCI. MONITOR, Sept. 9, 1991, at 8.

9. *Garrett*, 775 F. Supp. at 1009.

10. *Id.* at 1005 n.1. In fact, Garrett dropped out of the litigation thirty minutes before the hearing began. See *id.*; see also *U.S. Judge Blocks Plan for All-Male Public Schools in Detroit*, N.Y. TIMES, Aug. 16, 1991, at A10.

11. While not a party to the litigation, the NAACP Legal Defense and Educational Fund made its voice heard on the issue, concluding that a similar Milwaukee plan represented “a threat to an integrated society . . . posed a real danger of racial resegregation . . . [and] undermined efforts to eliminate the pervasive isolation of black

hostility and suspicion from the community.¹² After being the target of harassing and threatening phone calls, Garrett bowed out leaving an anonymous plaintiff to proceed alone.¹³

The district court granted the preliminary injunction motion, ruling that the academies violated the Constitution's guarantee of equal protection¹⁴ and Title IX,¹⁵ the federal law prohibiting sex discrimination in education.¹⁶ According to the district court, the plan was well intentioned but seriously flawed: while the Board created the academies to respond to "the crisis facing African-American males manifested by high homicide, unemployment, and drop-out rates . . . [these justifications and the supporting data] fall short of demonstrating that excluding girls is substantially related to the achievement of the board's objectives."¹⁷ The court noted that in creating the all-male academies, the Board "ignor[ed] the plight of urban females, institutionalize[d] inequality and perpetuate[d] the myth that females are doing well in the current system."¹⁸ The Board ultimately opened the academies to female students, who enrolled over community objection and a boycott.¹⁹ Initially, only a few girls signed up, but in the years that followed, many more became students of these schools.²⁰

This case served as a cautionary tale, chilling the creation of new single-sex public schools²¹ until 1996. In that year, the New York City Schools opened the Young Women's Leadership School ("TYWLS") in East Harlem,²² the legal status of which appears to be in limbo because of an administrative complaint pending at the Department of Education's

males." ROSEMARY C. SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING* 130-31 & n.28 (2003) (citing NAACP LEGAL DEF. & EDUC. FUND, *REFLECTIONS ON PROPOSALS FOR SEPARATE SCHOOLS FOR AFRICAN-AMERICAN MALE PUPILS* 9 (1990)).

12. *Id.* at 134.

13. *Garrett*, 775 F. Supp. at 1005 nn.1-2.

14. *Id.* at 1008.

15. *Id.* Plaintiffs relied on Title IX of the Education Act Amendments of 1972 and its implementing regulations, which prohibit educational programs receiving federal funds from treating students differently based on sex. *Id.* (relying on 20 U.S.C. § 1681 (1990); 24 C.F.R. § 106 (1990)).

16. *Id.* at 1009-10.

17. *Id.* at 1007.

18. *Id.*

19. See SALOMONE, *supra* note 11, at 135.

20. *Id.* (noting that a balance of boys and girls now are enrolled in these academies).

21. See *id.* at 131.

22. Ann Rubenstein Tisch, a white philanthropist and former broadcaster, put this effort in motion working with Seymour Fleigel, a senior fellow at the Manhattan Institute, which is a conservative think tank. Somini Sengupta, *East Harlem District is Considering an All-Boys Public School*, N.Y. TIMES, Dec. 12, 1996, at B9.

Office for Civil Rights.²³ The George W. Bush Administration, seeking to lift the “legal cloud”²⁴ surrounding single-sex education, has signaled its intention to give TYWLS the green light and allow New York City and other school districts the flexibility to create single-sex schools.²⁵ For many educators and parents in urban schools, this news was like a tall glass of ice water after traversing the desert—a promise that, at long last, no child would be left behind.²⁶ But that optimism is premature.

The fact that so much of the discourse surrounding single-sex education is about Black²⁷ children in troubled urban school districts is cause for concern.²⁸ Put another way, there generally is no concomitant

23. Like the Detroit schools, TYWLS also faced a legal challenge: this time by the New York Civil Liberties Union (NYCLU) and the National Organization for Women (NOW). But instead of filing suit in federal district court, these litigants went to the Department of Education’s Office for Civil Rights, which has the authority to enforce Title IX and other civil rights laws. The NYCLU and NOW argued that TYWLS violated Title IX. *See* NOW v. Bd. of Educ. (U.S. Dep’t Educ., Off. Civil Rights Aug. 22, 1996) (admin. compl.) (on file with author). At this writing, the complaint is still pending.

24. *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 (quoting Tom Carroll, president of the Brighter Choice Foundation, which supports sex-segregated schools, praising the Bush proposal as representing the “first time we see the legal cloud lifted from single-sex schools”).

25. *See infra* notes 84–106 and accompanying text.

26. The recent federal effort to promote single-sex schools, discussion *infra* Part I, is pursuant to the enactment of a provision in the No Child Left Behind Act of 2001 that allows schools districts to use certain federal monies to create single-sex schools. Pub. L. No. 107-110, § 1, 115 Stat. 1425 (Jan. 8, 2002) (codifying and amending 20 U.S.C.A. §§ 6301-7941 (West 2003)); *see also infra* notes 59–61 and accompanying text.

27. In this Article, I use the terms “Black” and “African American” to express that “Blacks like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

28. It should be noted that some research suggests that single-sex education benefits students of color. *See, e.g.,* Cornelius Riordan, *What Do We Know About the Effects of Single-Sex Schools in the Private Sector?: Implications for Public Schools*, in GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING 10, 13 (Amanda Datnow & Lea Hubbard eds., 2002) (arguing that “the research is ‘exceedingly persuasive’ in demonstrating that single-sex schools are effective in terms of providing both greater equality and greater achievement, especially for low-income and working-class students, most particularly for African-American and Hispanic-American boys and girls”). However, even Riordan acknowledges that factors beyond the mere separation by sex account for the effectiveness of single-sex schooling. For example, smaller school size, an emphasis on academic subjects and achievement, and, significantly, the fact that parents and students alike choose such schooling because they want an enhanced educational experience all play a role. *Id.* at 18–19. For purposes of this Article, however, I will focus on the rhetoric concerning African American students and the attendant legal and social implications, recognizing, of

rush to segregate public schoolchildren based on sex in predominately white Grosse Pointe, Michigan, a suburb of Detroit, or Nebraska, for example.²⁹ If sex segregation were the silver bullet that its proponents suggest,³⁰ 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.³¹

course, that the issues and challenges identified may not apply wholesale to other students of color in urban schools.

29. See, e.g., Judith Nygren, *Same-Sex Public Schools? Not Here*, OMAHA WORLD-HERALD, May 10, 2002, at 1A (noting that “[s]ingle-gender schools have been, and are expected to remain, the domain of private education [and not public education] in Nebraska”). Notably, however, in the metropolitan Omaha area, single-sex schools have been proposed for African American boys “because that is what people in the community said was most needed.” *Id.*

30. See, e.g., KAREN STABINER, *ALL GIRLS: SINGLE-SEX EDUCATION AND WHY IT MATTERS* 315 (2002) (“Single-sex schools got results, while cries for a general overhaul went begging . . .”).

31. At this writing, there are twenty-five single-sex public schools in the nation, including five schools that have yet to open. Sixty-three other schools offer single-sex classrooms. See Nat’l Ass’n for Single Sex Pub. Educ., *Single Sex Public Schools in the United States*, at <http://www.singlesexschools.org/schools.html> (last visited Apr. 15, 2004) (on file with author). A few schools on the list, such as Baltimore’s Western High School, have long histories of being single-sex institutions and only recently have become predominately minority. Most of the schools on this list were created within the last few years as part of the school reform movement. The vast majority of them primarily serve students of color:

SCHOOL AND LOCATION	PERCENTAGE MINORITY STUDENTS
<i>Charter School of San Diego</i> San Diego, Cal. (Ed. Note: not on list)	60%
<i>Fox Middle School</i> Hartford, Conn. (Ed. Note: not on list)	90%
<i>Jefferson Leadership Academies</i> Long Beach, Cal.	91%
<i>Lincoln Elementary School</i> Toledo, Ohio	98%
<i>Mitchell Elementary School</i> Denver, Colo.	98%
<i>Moten Elementary School</i> Washington, D.C.	100%
<i>Paducah Middle School</i> Paducah, Ky.	53%
<i>Pepper George Middle School</i> Philadelphia, Pa.	95%

Sex segregation has been deemed particularly necessary for African American males because they are an “endangered species . . . target[ed] by this system for destruction and extermination.”³² In this connection, arguments for single-sex education focus on the myriad issues confronting Black male students, such as high rates of incarceration and homicide.³³ The rhetoric suggests that sex segregation addresses these problems because it compensates for the primary deficiency of many Black males: the fact that they are being raised in female-headed households. According to this argument, because Black males are surrounded by women, they lack appropriate role models³⁴

<i>Philadelphia High School for Girls</i> Philadelphia, Pa.	77%
<i>Rhodes E. Washington Middle School</i> Philadelphia, Pa.	99%
<i>The San Francisco 49ers Academies</i> Palo Alto, Cal.	87%
<i>Southern Middle School</i> Louisville, Ky.	55%
<i>Stewart Elementary School</i> Toledo, Ohio	99%
<i>Thurgood Marshall Elementary</i> Seattle, Wash.	94%
<i>Western High School</i> Baltimore, Md.	82%
<i>Withrow High School</i> Cincinnati, Ohio	91%
<i>Young Women's Leadership Charter School</i> Chicago, Ill.	87%
<i>The Young Women's Leadership High School</i> New York, N.Y.	92%

Nat'l Center for Educ. Stat., at http://nces.ed.gov/schoolsearch/school_detail.asp? (last visited Aug. 1, 2003) (on file with author).

32. *Nightline*, *supra* note 4; see also Pamela J. Smith, Comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2004 (1992) (observing that African American males are endangered because of “[g]ang fights, vendettas, drug battles, accidents, drive-by shootings, . . . malnutrition, poor education, drug or alcohol addition, the collapse of families, [and] series of medical problems linked to poverty, lifestyle, and heredity” (citation omitted)).

33. See Wilkerson, *supra* note 1, at A1.

34. See, e.g., Dennis Kelly, *Detroit Academies Develop Black Males*, USA TODAY, Jan. 15, 1992, at 7A (quoting a Detroit fifth-grade teacher, who notes that “[m]any of the boys don’t have a father at home”); Richard Rothstein, *Single-Sex*

who “exemplify[] the value of education,”³⁵ or who simply can teach them how to be men—that is, providers and husbands.³⁶ Providing these role models thus becomes an imperative, a way to “save families” and communities,³⁷ which places Black males at the center of the struggle for equal rights in education,³⁸ and makes Black mothers the locus of the many problems afflicting urban African American communities. This rhetoric echoes conclusions of long-discredited³⁹ social science theories propounded by former Senator Daniel Patrick Moynihan in *The Negro Family: The Case for National Action*,⁴⁰ which attributed much of the

Schools: Why Ruin Good Experiments with Politics, L.A. TIMES, Jan. 21, 1996, at 6 (suggesting that “elementary-school boys from low-income, single-parent homes in African American communities with few successful male role models require tough male-authority figures as teachers”); Smith, *supra* note 32, at 2031 (arguing that because “many African-American [single] mothers fail to develop their boys into men,” boys need male role models); Wilkerson, *supra* note 1, at A1 (“Often having no fathers at home and seeing that the only men with any money in the neighborhood are drug dealers, the boys hunger for male direction.”).

35. Nygren, *supra* note 29, at 1A.

36. Patrice M. Jones, *A Place All Their Own: Detroit Uses Special Academies to Help Black Boys Overcome Challenges*, PLAIN DEALER (Cleveland, Ohio), Apr. 23, 1996, at 1A (quoting a parent who believes “[t]his school will make my son into a provider, a responsible man”); *Nightline*, *supra* note 4 (stating that the male academies mean that his “daughters will be able to have some positive African-American males to choose from when they get married”).

37. See Wilkerson, *supra* note 1, at A1.

38. See Devon W. Carbado, *Men in Black*, 3 J. GENDER RACE & JUST. 427, 434 (2000) (noting that “[t]he social meaning of [Black male schools] is that, whatever the status of Black girls, it is Black boys, members of the first sex, who have the potential to become *strong Black men*, the potential to save themselves and thus the Black community”).

39. See, e.g., William Ryan, *Savage Discovery: The Moynihan Report*, in *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 457, 458 (Lee Rainwater & William L. Yancey eds., 1967). William Ryan, in an article originally published in *The Nation*, criticized the Moynihan Report, stating that:

[the Report] draws dangerously inexact conclusions from weak and insufficient data; encourages (no doubt unintentionally) a new form of subtle racism that might be termed “Savage Discovery,” and seduces the reader into believing that it is not racism and discrimination but the weaknesses and defects of the Negro himself that account for the present status of inequality between Negro and white.

Id.

40. DANIEL P. MOYNIHAN, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (Greenwood Press 1981) (1965). The Moynihan Report sought to highlight the problems confronting African Americans in order to support strong enforcement of the Civil Rights Act of 1964. The Moynihan Report attempted to understand the issues and challenges confronting African Americans by examining their history. In this regard, the Moynihan Report identified several “pathologies” common among poor African American families: first and foremost among them was “matriarchy.”

[T]he Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of the American society, seriously

“pathologies” affecting Black Americans to the shortcomings of the Black family, particularly the preponderance of female-headed households. Similarly, the overarching theme of today’s discourse is that single-sex education is necessary to build Black men.

With respect to African American girls, the rhetoric focuses on preventing pregnancy. Specifically, advocates have argued that girls in a sex-segregated environment will be less distracted by boys and feel less pressure to become sexually active.⁴¹ One commentator praised TYWLS as a place where girls could be “free from the social distractions and sexual pressures that too often reach *dangerous* proportions in urban public schools.”⁴² In fact, one of the touted virtues of TYWLS is that “pregnancy [among its students] is the stark exception.”⁴³

retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well.

There is, presumably, no special reason why a society in which males are dominant in family relationships is to be preferred to a matriarchal arrangement. However, it is clearly a disadvantage for a minority group to be operating on one principle, while the great majority of the population, and the one with the most advantages to begin with, is operating on another.

Id. at 29. Thus, according to the Moynihan Report, “Negro husbands have unusually low power,” unlike the majority of white families, which, the Moynihan Report claimed “are equalitarian.” *Id.* at 30–31.

The dominance of wives in Black marriages was one of the fruits of slavery—a time when slaves were prohibited from marrying. *Id.* at 16. The Moynihan Report further argued that this pattern became entrenched during the post-Reconstruction era:

When Jim Crow made its appearance towards the end of the 19th century, it may be speculated that it was the Negro male who was most humiliated thereby; the male was more likely to use public facilities, which rapidly became segregated once the process began, and just as important, segregation, and the submissiveness it exacts, is surely more destructive to the male than to the female personality. Keeping the Negro “in his place” can be translated as keeping the Negro male in his place: the female was not a threat to anyone.

Unquestionably, these events worked against the emergence of a strong father figure.

Id. In this respect, the Moynihan Report argued that slavery and the Jim Crow era enabled, indeed required, African American women to take the lead in family affairs. By modern times, Black women were the customary heads of households with their husbands playing a subservient role. The Moynihan Report suggested that this pattern of female dominance in the home perpetuated itself because of the tendency of African American females to attain higher levels of education than their male counterparts, which, in turn helped to perpetuate the low achievement levels and high rates of delinquency and crime among Black youth, particularly the males. *See id.* at 31, 36–38.

41. *See* Nygren, *supra* note 29, at 1A.

42. SALOMONE, *supra* note 11, at 18 (emphasis added).

43. Karen Stabiner, *Boys Here, Girls There: Sure, if Equality is the Goal*, WASH. POST, May 12, 2002, at B1; *see also* Alex Chadwick, *Morning Edition: Harlem All-Girls School Scrutinized After VMI Ruling* (NPR broadcast, Aug. 21, 1996),

In the same breath, this commentator observed that the benefit of a private, predominately white girls' school was that the girls "perceive themselves as more competent, more willing to pursue advanced work in fields such as math and science."⁴⁴ So much of the rhetoric regarding Black girls in education is about their sexuality,⁴⁵ suggesting that by just sitting in the same classroom with male students, there is a risk of pregnancy. Implicit in this discourse is a concern about single motherhood, which, as discussed above, has been blamed for poverty, juvenile delinquency, and other problems.⁴⁶ This rhetoric reflects what some have identified as the devaluation of Black motherhood,⁴⁷ a related "deep suspicion of black women's sexuality and an intense desire to control their 'excessive' promiscuity and fecundity."⁴⁸ While it is certainly true that premature motherhood has serious implications for an

available at LEXIS ("[T]hese girls are moving on with their lives, they're taking charge of their lives—and it's not about having babies, it's not about getting stuck . . .").

44. Stabiner, *supra* note 43, at B1.

45. It should be noted that the suggestion that removing the other sex from the classroom eliminates sexual *distractions* is heterosexist in that it presumes that there are no gay, lesbian, or bisexual students who may be so distracted even without the other sex in the classroom.

46. See *supra* notes 34–40 and accompanying text; see also Martha Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 275. In this regard, the arguments supporting single-sex schools might be seen as an effort to reestablish patriarchy. The emphasis on the need for a male role model in the home asserts the primacy of the traditional family. This account is incomplete for several reasons. First, it fails to recognize that a father may indeed be present even if he is not married to the mother. See Fineman, *supra*, at 275. Additionally, such a focus presumes that married fathers are present in meaningful ways, which is not always the case. See *id.* Despite these shortcomings, these arguments are prominent and suggest that single-sex education policies promote the construct of the traditional nuclear family. Fineman argues that policymakers are drawn to this kind of policy because single motherhood is a "practice of resistance to patriarchal ideology, particularly because it represents a 'deliberate choice' in a world with birth control and abortion. . . . [Therefore, it] threatens the hold of the dominant [patriarchal] ideology." See *id.* at 290.

47. See, e.g., Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U.J. GENDER & L. 1, 10–11 (1993). Roberts argues that patriarchy requires and rewards white motherhood, "but it denies to Black women even this modicum of value. Black women are deemed not even worthy of the dignity of childbearing." *Id.* at 11.

48. Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 555. Austin criticizes the decision of the U.S. Court of Appeals for the Eighth Circuit in *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987), which affirmed the Girls Club's dismissal of an instructor because she was pregnant, unmarried, and therefore a negative role model for Black teenage girls. "The Club and the courts conceivably subscribe to a theory of reproduction, that can only be termed 'primitive,' which posits that simply seeing an unmarried pregnant woman can have such a powerful impact on adolescent females that they will be moved to imitate her by becoming pregnant themselves." *Id.* Similarly, advocates for single-sex schooling suggest that merely removing males from females in classes will prove to be an effective strategy against teenage pregnancy.

uneducated teenager and her child, it is true for white teenagers as well as Black.⁴⁹ Yet such concerns typically have not arisen as justifications for all-female schools for white girls. The disparity suggests that underlying this concern is the desire to control Black female reproduction, which Dorothy Roberts has described as “a means of subordinating the entire race.”⁵⁰

Finally, the rhetoric regarding single-sex education for Black girls is unique in its emphasis on providing safety. For example, the principal of Philadelphia High School for Girls, which is almost eighty percent students of color,⁵¹ has praised the school because there is “‘less sexual harassment’” and more “‘safety in an urban environment.’”⁵² Similar comments have been made about other all-female schools in inner cities.⁵³ This rhetoric suggests that merely by removing Black males from the environment, these schools become safer even though they remain in urban settings where security is an issue for students and nonstudents alike.

The foregoing suggests that this effort is very much about race. But race is invisible when the players—students, parents, and educators—are people of color, which is the case here. Instead, the discourse centers on sex⁵⁴ and the presumably benign nature of

49. The United States has the highest rate of teen pregnancy in the industrialized world. Annie E. Casey Found., *When Kids Have Sex: Issues and Trends*, at <http://www.aecf.org/kidscount/teen/overview.htm> (last visited Apr. 15, 2004) (on file with author). It should be noted that the rates of teen pregnancy in this nation have been on the decline for both white and Black females, with rates for Black teens diminishing at a greater rate than that of white teens. JACQUELINE E. DARROCH & SUSHEELA SINGH, WHY IS TEENAGE PREGNANCY DECLINING? THE ROLES OF ABSTINENCE, SEXUAL ACTIVITY, AND CONTRACEPTIVE USE 6–7 (Alan Guttmacher Inst., Occasional Rep. 1, Dec. 1999), available at http://www.guttmacher.org/pubs/or_tecn_preg_decline.pdf (on file with author).

50. Roberts, *supra* note 47, at 11.

51. See *supra* note 31.

52. Ingrid Shaffer, *Single-sex Schools are Proving Their Worth*, PATRIOT LEDGER (Boston, Mass.), June 5, 2002, at 11.

53. For example, Baltimore’s Western High School is known “not only for its academic reputation but also for its physically safe environment.” SALOMONE, *supra* note 11, at 32. Salomone also has described TYWLS as a “physically and emotionally safe haven for . . . girls.” *Id.* at 18.

54. See, e.g., William Henry Hurd, *Gone with the Wind? VMI’s Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POL’Y 27 (1997) (arguing that the Supreme Court decision in *United States v. Virginia*, 518 U.S. 515 (1996) (*VMI*), should not necessarily foreclose creation of single-sex schools); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 454 (1999) (examining “empirical evidence about single-sex schools in the larger context of sociological evidence regarding the construction of gender roles”); Denise C. Morgan, *Anti-Subordination Analysis after United States v. Virginia: Evaluating the Constitutionality of K–12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 384 (identifying the “circumstances

separating boys and girls in education,⁵⁵ which is not surprising since uttering *race* and *segregation* in the same breath is a combustible mix that evokes much higher scrutiny and greater skepticism. However, this single-axis analysis focusing on sex alone is incomplete.

Because much of the effort to implement single-sex schooling centers on the nation's inner-city school systems, it has the potential to affect students of color greatly.⁵⁶ In addition, this nation's sad history with respect to educating students of color—particularly Black students—strongly counsels that any analysis of sex segregation must consider not only sex but also race, at the very least⁵⁷ to determine whether this reform strategy will liberate or subordinate Black children.

[under which single-sex public schools can] survive an anti-subordination challenge”); Amy H. Nemko, *Single-Sex Public Education After VMI: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 22 (1998) (arguing single-sex public education is not per se unconstitutional); Carolyn B. Ramsey, *Subtracting Sexism from the Classroom: Law and Policy in the Debate Over All-Female Math and Science Classes in Public Schools*, 8 TEX. J. WOMEN & L. 1, 4 (1998) (arguing that all-female math and science classes do not presumptively violate the equal protection clause); Walteen Grady Truely & Martha F. Davis, *Public Education Programs for African-American Males: A Gender Equity Perspective*, 21 N.Y.U. REV. L. & SOC. CHANGE 725, 728 (1995) (examining the Black all-male academies “from a women's educational equity perspective”); Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make the Grade?*, 4 DUKE J. GENDER L. & POL'Y 69, 70 (1997) (arguing that all-girls schools are unconstitutional); Kristin S. Caplice, Article, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227, 229 (1994) (“advocat[ing] public single-sex education as an alternative to coeducation”); Jennifer R. Cowan, Note, *Distinguishing Private Women's Colleges from the VMI Decision*, 30 COLUM. J.L. & SOC. PROBS. 137, 138 (1996) (providing a “blueprint for defending [women's] colleges against [legal] challenges”). *But 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, 758 (2002) (arguing that “sex role confinement” can occur in single-sex or coeducational schooling to perpetuate inequities based on sex, race, and class); Smith, *supra* note 32, at 2030 (arguing that sex segregation in predominately Black schools should be subject to intermediate scrutiny).

55. *See, e.g.*, Neal Conan, *Talk of the Nation: Single-Sex Public Schools* (NPR broadcast, May 13, 2002), available at LEXIS (transcript on file with author) (“A lot of the single-sex schools we're talking about now . . . are ones that clearly don't have their history in any kind of discriminatory path . . .”).

56. This Article takes no position on the efficacy of single-sex education for improving educational outcomes for students.

57. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 145 (stating that the failure to analyze such issues using a multiple axis “defeats efforts to restructure the distribution of opportunity and limits remedial relief to minor adjustments within an established hierarchy”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (criticizing feminist legal scholars for failing to consider how race intersects with sex).

Accordingly, this Article argues that such an intersectional analysis⁵⁸ is essential to ensuring that current efforts to segregate students by sex actually effect reform and not retrenchment of discrimination.

Part I of this Article examines the legal doctrine applicable to single-sex education and the Bush proposal to ease legal scrutiny of single-sex programming. Part II explores the overlapping histories of racial and sex-based segregation in education and the legal regime supporting it, as well as the concomitant raced and gendered hierarchy this system of education helped create. As a result, Part III concludes that any new effort to create single-sex schools or classes necessarily must be informed by an intersectional analysis and applies such a framework to *Garrett*.

I. LEGALLY CLOUDY OR CLEAR?: THE LAW REGARDING SINGLE-SEX EDUCATION AND THE BUSH PROPOSAL TO MODIFY IT

In the wake of the *Garrett* decision and the ambiguous status of TYWLS, interest has grown in making single-sex education an option for school districts, as has anxiety about the attendant risk of legal exposure. In this connection, the Bush Administration has proposed new regulations meant to assist school districts' education reform efforts. Accordingly, a critical examination of sex segregation with an eye toward the students most likely to be affected is warranted. This Part examines the current state of the law and the Bush Administration proposal to modify it.

By signing into law the No Child Left Behind Act of 2001 ("NCLBA"),⁵⁹ President George W. Bush triggered a little-known provision⁶⁰ that could lead to the proliferation of single-sex education

58. See *supra* note 57; see also Dwight A. McBride, *Can the Queen Speak? Racial Essentialism, Sexuality, and the Problem of Authority*, in BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 253, 272 (Devon Carbado ed., 1999) (noting that "if I am thinking about race, I should already be thinking about gender, class, and sexuality"); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 297 (2001) (advocating an examination of the interactions between the myriad forms of oppression).

59. Pub. L. No. 107-110, 115 Stat. 1425 (codifying and amending 20 U.S.C.A. §§ 6301-7941) (authorizing funding programs for schools serving low-income children and enacting provisions designed to hold schools accountable for student outcomes).

60. 20 U.S.C.A. § 7215(a)(23). This provision makes available federal funds for "innovative assistance programs," including those that would provide "same-gender schools and classrooms." *Id.* Texas Senator Kay Bailey Hutchison (R-Tex.) sponsored the measure, joined by Senators Hillary Rodham Clinton (D-N.Y.), Ted Kennedy (D-Mass.), and others. 147 CONG. REC. S5943 (daily ed. June 7, 2001).

throughout the nation's public schools. Namely, under the NCLBA, local education agencies may dedicate certain funds to create single-sex schools and classes, provided that they do so "consistent with applicable law."⁶¹ "Applicable law" in this area refers primarily to Title IX⁶² and the Fourteenth Amendment of the Constitution.⁶³

Enactment of this provision culminated an effort started by former Senator John Danforth (R-Mo.) in 1993. Danforth proposed a measure that would have waived Title IX liability for a limited number of school districts to allow them to experiment with sex segregation without the threat of litigation. Such waivers were essential, according to Danforth, to provide school districts with the flexibility to innovate in this area.

In school districts in Milwaukee and Detroit and Miami and Baltimore and Philadelphia, there have been at least some schools in those districts that have come to the conclusion that[,] for at least on a trial basis[,] they should have the opportunity[,] they should make the attempt to find out if for some of those kids, single-sex education works. However[,] the bad news is that they have been under the cloud of lawsuits when they have made that decision. They have been threatened and, in some cases, they have been sued. . . .

In the inner cities in particular, there have been attempts at same gender schooling in the form of classes to address the poor academic performance of the kids in those schools. However[,] legal opposition[,] particularly legal opposition that has been precipitated by the American Civil Liberties Union and by the National Organization of Women, have [sic] chilled those decisions.

140 CONG. REC. S10,165 (daily ed. Aug. 1, 1994).

While Danforth saw the proposed exemptions to Title IX as lifting a cloud, others viewed his proposal as signaling a retrenchment in civil rights and a return to exclusionary educational policies. Kennedy opposed the measure because he was concerned about the precedent of waiving civil rights laws. Kennedy noted that the history of sex segregation was not entirely benign, which had troubling implications for the future: "we have seen in this country, when . . . boys are in one area and the girls are in another, history has demonstrated time in and time out that [the girls] are the ones that have been left out and left behind." *Id.* at S10,170. The vast majority of senators disagreed, approving the measure by a strong margin of sixty-six to thirty-three. *Id.* at S10,163. When members of the Senate and the House of Representatives met to consider their respective versions of the Improving America's Schools Act ("IASA"), however, several members of the conference committee objected to the amendment because of "concerns about waiving civil rights laws to carry out the pilot programs." *See Conferees Inch Forward on Education Reauthorization Bill*, CONGRESS DAILY, Sept. 22, 1994. The provision ultimately was dropped from the final iteration of the IASA. *See* H.R. REP. NO. 103-761, at 649-50 (1994).

61. 20 U.S.C.A. § 7215(a)(23).

62. 20 U.S.C. §§ 1681-1688 (2000).

63. U.S. CONST. amend. XIV. The Equal Educational Opportunities Act of 1974 ("EEOA"), Pub. L. No. 93-380, 88 Stat. 514 (codified at 20 U.S.C. §§ 1701-1758), and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, may have some applicability here as well. The EEOA requires states to "remove the vestiges of a dual school system." 20 U.S.C. § 1703(b). The EEOA also outlaws assigning students to schools based on sex, among other categories, "if the assignment results in a greater degree of segregation . . . than would result if such student were assigned to the school closest to his or her place of residence." *Id.* § 1703(c). Title VI, for its part, provides: "No person in the United States shall, on the ground of race, color, or national origin,

Title IX broadly prohibits sex discrimination in any federally funded education program or activity.⁶⁴ Importantly, it does not proscribe single-sex education outright.⁶⁵ For example, Title IX does

be excluded from, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. This Article focuses primarily on the Equal Protection Clause of the Fourteenth Amendment and Title IX, which are most commonly at issue with respect to single-sex schools.

64. Title IX states in relevant part: “No 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.” 20 U.S.C. § 1681(a).

65. Congress never intended to outlaw single-sex education with the passage of Title IX. In fact, early versions of the statute explicitly exempted single-sex institutions, in part because they were not deemed to be discriminatory. *See* 117 CONG. REC. 39,252 (daily ed. Nov. 4, 1971). Other members sought to exclude single-sex colleges and universities so they would not be unduly burdened by integrating on the basis of sex. *Id.* at 39,251. Just as today, supporters of single-sex education cited diversity of educational offerings as a rationale for exempting such institutions from Title IX’s coverage. *Id.* at 39,253. There also was considerable debate about whether single-sex education really was pedagogically sound. For example, in debates about the House version, lawmakers discussed the fact that single-sex colleges were on the decline and that there was a “legitimate controversy . . . over the merits of single-sex versus coeducational institutions.” *Id.* at 39,255. Ultimately, the version that passed in the House exempted undergraduate admissions. *Id.* at 39,364.

The Senate took a different approach. When former Senator Birch Bayh (D-Ind.) introduced his version of the Title IX in August 1971, this version provided a phase-in period for single-sex institutions. 117 CONG. REC. S30,399 (daily ed. Aug. 6, 1971). Under Bayh’s amendment, VMI and the Citadel would have had to integrate based on sex, as would have women’s colleges. *Id.* at S30,412. Other lawmakers who believed that colleges and universities should be free to determine the composition of their student body opposed this amendment. As one explained, some institutions may “feel that their own university . . . would provide better educational opportunities . . . if it kept that ratio [sixty percent men to forty percent women] than if it had a different mix.” *Id.* at 30,406. This view prevailed and ultimately, Bayh’s amendment failed.

The next year, Bayh offered a new version of his antidiscrimination measure, which exempted undergraduate admissions, as well as military academies from coverage. 118 CONG. REC. 5803 (daily ed. Feb. 28, 1972). Bayh justified these exceptions by asserting that coverage would “be disruptive both in terms of the academic program and in terms of psychological and financial alumni support.” *Id.* at 5807. As for the military exception, Bayh explained candidly that it was intended to increase the odds of passage. He stated that “there are a few isolated instances where a girl might want to get into a military school.” *Id.* at 5813. The amendment also exempted admissions at the elementary and secondary school level. *Id.* at 5812. But it would apply to admissions in vocational education, professional education, graduate education, and public undergraduate institutions. *Id.* at 5803.

Not satisfied with the balance Bayh tried to strike, former Senator Lloyd Bentsen (D-Tex.) offered an amendment that excluded historically single-sex colleges and universities from coverage under the bill. *Id.* at 5814. Four such institutions existed at the time, one of which was Texas Woman’s University (“TWU”). *Id.* Bentsen argued that students should have the choice to attend a sex-segregated institution. *Id.* Former Senator John Tower (R-Tex.) supported this amendment, arguing that coeducational

not apply to admissions in nonvocational elementary and secondary schools,⁶⁶ which are the very schools that are at issue. In addition, the statute does not apply to certain sex-segregated activities, such as “any Boys State conference, Boys Nation conference, Girls State conference or Girls Nation conference.”⁶⁷ The statute does not apply to “father-son or mother-daughter activities at an educational institution.”⁶⁸ Each of these activities may be sex segregated as long as “reasonably comparable activities” are provided for the excluded sex.⁶⁹ At present, Title IX’s implementing regulations make clear that single-sex classes also are permissible in physical education classes “involv[ing] bodily contact” or in other classes dealing with “human sexuality.”⁷⁰ Additionally, the regulations allow school districts to create single-sex classes for remedial or affirmative action purposes.⁷¹

institutions were not preparing women adequately. He claimed that TWU “remed[ified] this oversight.” *Id.* at 5814–15.

Bayh agreed to this amendment based on his belief that women’s institutions did not contribute to discrimination against women in education. *Id.* at 5815. Bayh’s measure passed with this amendment. 118 CONG. REC. 6277 (daily ed. Mar. 1, 1972).

When members of the Senate and House convened to reconcile their respective bills, House sponsor Edith Green (D–Or.) stated that she supported an exemption for single-sex schools because she feared that proponents of such schools would torpedo the bill without one. 118 CONG. REC. S18,437–38 (daily ed. May 23, 1972). As a matter of personal opinion, however, Green was equivocal, stating that she had not “resolved this in [her] own mind. But in those schools that do admit both men and women . . . I think there ought to be an end to discrimination.” *Id.* at S18,438. Green took a single axis view of discrimination in this context, limiting her stated concern to bias confronting white women in education. Specifically, Green argued that “in many places women are required to have a higher grade point average and greater ability, but in terms of minority groups we lower the admission standards in order to have more numerically.” *Id.* at S18,437. She added that “I just do not understand how the Congress, which has been concerned about minority groups not being in the apprenticeship program can let year after year go by with only token participation by girls.” *Id.* at S18,438. Green thus not only accorded primacy to white women in the effort for gender equality in education, she established a *minorities versus white women* paradigm apparently as a strategic matter to promote passage of Title IX. By inserting race into the debate in this manner, Green suggested that deserving white women had been excluded from the regime of civil rights laws that existed at the time. In addition, her use of race ironically evoked the construction of white womanhood of requiring protection. See *infra* notes 181–86 and accompanying text.

66. 20 U.S.C. § 1681(a)(1). *But see* *Garrett*, 775 F. Supp. at 1009 (holding that the exemption for elementary and secondary school admissions applies only to “historically pre-existing single sex schools; it is not viewed as authorization to establish new single sex schools”). To date, this is the only decision interpreting Title IX regulations in this manner.

67. 20 U.S.C. § 1681(a)(7)(B).

68. *Id.* § 1681(a)(8).

69. *Id.*

70. 34 C.F.R. § 106.34(c), (e) (2003).

71. *Id.* § 106.3.

The Constitution also allows for sex segregation in education under limited circumstances. Any effort to separate students based on sex is subject to heightened scrutiny, which places the burden on the state to provide an “exceedingly persuasive justification”⁷² for classifying students based on sex. In *Mississippi University for Women v. Hogan*,⁷³ the Supreme Court explained that this “burden is met only by showing at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”⁷⁴ In other words, the stated rationale supporting sex-based admissions policies must be grounded in reality and not on fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. “Thus, if the statutory objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.”⁷⁵

The Court applied this test to the all-female admissions policy at the Mississippi University for Women School of Nursing, which had rejected the plaintiff’s application because of his sex. According to the state, the admissions policy was necessary to “compensate[] for discrimination against women”; therefore, it was a form of “educational affirmative action.”⁷⁶ The Court rejected this justification because the state failed to adduce evidence of historical barriers to nursing for women.⁷⁷ In so doing, the Court explained that a state may “evoke a

72. Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 273 (1979); see also *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)).

73. 458 U.S. at 718.

74. *Id.* at 724 (citation omitted).

75. *Id.* at 725 (citation omitted).

76. *Id.* at 727.

77. *Id.* at 729. However, it must be noted that the field of nursing has a raced and gendered hierarchy that has limited opportunities for women and men of color. See Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, SIGNS: J. WOMEN CULTURE & SOC. 1, 23 (1992). Registered nurses (RNs) are at the top of this hierarchy. They “perform[] medical tasks and patient care as delegated by physicians and enforc[e] hospital rules . . . [they] are overwhelming female and disproportionately white.” *Id.* At the next level are licensed practical nurses (LPNs), whom the RNs supervise: they are “female but disproportionately women of color.” *Id.* Further down the ladder are the “nurse’s aides, predominantly women of color; and orderlies, . . . primarily men of color.” *Id.* Access to the top positions means a higher salary, greater career options, and, as a result, potentially better quality of life:

Unlike the lower ranks, registered nursing offers a career ladder. Starting as a staff nurse, a hospital RN can rise to head nurse, nursing supervisor, and finally, director of nursing. In 1980 [two years before the Court decided *Hogan*], whites were 86.7 percent of RNs even though they were only 76.7

compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification.”⁷⁸

The Court further explicated the standard for sex-segregated education in *United States v. Virginia (VMI)*.⁷⁹ In this case, the Court characterized the level of scrutiny to be applied as “skeptical,”⁸⁰ noting that such an analysis is the necessary “respon[se] to volumes of history”⁸¹ of discrimination against women. Notwithstanding its skepticism respecting sex-based classifications, however, the Court also reiterated that equal protection does not forbid all such classifications:

Inherent 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. Sex classifications

percent of the population. . . . Racial-ethnic workers constituted 23.4 percent of LPNs, with Blacks, who were 11.7 percent of the population, making up fully 17.9 percent. . . . Among nurse’s aides, 34.6 percent were minorities, with Blacks making up 27.0 percent of all aides.

Id. at 24. The underrepresentation of Blacks in nursing is directly related to discrimination. Specifically, “[n]ursing schools in the South excluded Blacks altogether, while northern schools maintained strict quotas.” *Id.* at 25. The few Blacks who were able to get training to become nurses were restricted to racially segregated courses that allowed them to treat only Black patients, even in the racially integrated northern hospitals. *Id.* at 25–26. The social construction of Black women as immoral justified excluding them from this career path.

[An administrator from Grady Hospital in Atlanta] declared that Negro women under her supervision had no morals: “They are such liars. . . . They shift responsibility whenever they can. . . . They quarrel constantly among themselves and will cut up each other’s clothes for spite. . . . Unless they are constantly watched, they will steal anything in sight.”

Id. at 26. Presented with a one-dimensional view of nursing—that is, one that examined only the gendered nature of the profession—the Supreme Court limited its analysis to the single axis of sex. *Hogan*, 458 U.S. at 729. However, had it been presented with an intersectional rendering of the justification for the admissions policy—assuming, of course, that the State actually was trying to remedy the historical exclusion of women and men of color—a different outcome might have resulted.

78. *Hogan*, 458 U.S. at 728.

79. 518 U.S. at 515.

80. *Id.* at 531. By invoking “skeptical scrutiny” and the phrase “exceedingly persuasive justification,” the Court prompted speculation as to whether it had increased the level of scrutiny afforded to sex-based classifications to something akin to strict scrutiny. See *id.*; see also *id.* at 574 (Scalia, J., dissenting) (asserting that the Court had “*de facto* abandon[ed] . . . intermediate scrutiny that has been our standard for sex-based classifications for some two decades”); Morgan, *surpa* note 54 at 383 (noting that the Court had not, in fact, increased the level of scrutiny).

81. *VMI*, 518 U.S. at 531.

may be used to compensate women for particular economic disabilities [they have] suffered to promote equal employment opportunity, to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were to create or perpetuate the legal, social, and economic inferiority of women.⁸²

Thus, the Court held that single-sex education does not offend equal protection if it compensates for past discrimination or provides opportunities to overcome systemic subordination.⁸³

Although Title IX and the Constitution already permit limited forms of sex segregation, the Bush Administration is planning to amend Title IX's implementing regulations to create additional latitude for school districts to create such programming, according to a recently published Notice of Proposed Rulemaking ("Notice").⁸⁴ This process⁸⁵ likely will result in a significant change in the Department of Education's (the "Department") policy on single-sex education and in Title IX's implementing regulations, which were promulgated almost thirty years ago.⁸⁶ The Department has justified this shift by pointing to the progress that has been made respecting gender equality in education since Title IX's enactment:

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. . . .

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.

82. *Id.* at 533-34 (citations omitted) (footnotes omitted) (quotations omitted).

83. *Id.*

84. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276 (proposed Mar. 9, 2004) (to be codified at 34 C.F.R. pt. 106.34(b)(1)(i)). The Department signaled its intention to regulate in this area in May 2002 in a Notice of Intent to Regulate ("NOIR"). *See* 67 Fed. Reg. 31,098 (May 8, 2002).

85. The NOIR was "intended to begin the process of public input on [this issue]," prior to the Department's issuance of modified regulations. 67 Fed. Reg. at 31,098. Pursuant to the NOIR, the Department received 170 comments. 69 Fed. Reg. at 11,277.

86. *See* 67 Fed. Reg. at 31,098 n.1 (observing that the existing regulations were issued after the Department received and reviewed almost 10,000 comments from the public).

Over the past 30 years, the situation has changed dramatically.⁸⁷

In this connection, the Department has determined that the proposed regulations must meet school districts' need for "flexibility,"⁸⁸ suggesting that the progress toward gender equity in education, due in large part to Title IX, justifies relaxing the current regulatory scheme.

The proposed regulations would permit school districts to create single-sex classes⁸⁹ in order to fulfill an "important governmental [or educational] objective," which mirrors the constitutional standard.⁹⁰ In this context, the Department has identified two such objectives: "provid[ing] a diversity of educational options to students and parents . . . or . . . meet[ing] the particular, identified educational needs of its students."⁹¹ To be permissible under the proposed regulations, single-sex classes also must be "substantially related to meeting"⁹² each of those goals. The proposed regulations further require that recipients provide "substantially equal"⁹³ opportunities to the excluded sex and that they provide single-sex opportunities in an "evenhanded"⁹⁴ manner.

87. 69 Fed. Reg. at 11,276.

88. "[G]iven 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." *Id.* at 11,277.

89. The proposed amendments would not apply to classes in vocational schools. *Id.* at 11,278. The Notice also reiterated that Title IX does not apply to admissions policies in nonvocational elementary and secondary schools. *Id.* at 11,281. The proposed regulations therefore would be inapplicable to such policies. *Id.*

90. *See, e.g., VMI*, 518 U.S. at 533.

91. 69 Fed. Reg. at 11,278.

92. *Id.*

93. *See id.* This proposed requirement departs from a suggestion made in the NOIR that such recipients need only provide "comparable" opportunities for the excluded sex, consistent with the existing regulations. 67 Fed. Reg. at 31,098-99. Rejecting that standard was appropriate.

An examination of *Vorchheimer v. School District of Philadelphia*, 400 F. Supp. 326, 334 (E.D. Pa. 1975), demonstrates not only the sheer inadequacy of the "comparability" standard, but also how gendered presumptions can dominate the equality analysis of sex-segregated programming and, in so doing, reinforce subordination. In resolving the issue of whether all-male Central High School violated the Equal Protection Clause, the district court concluded that the school was "comparable" to its all-female counterpart, Girls High. *Id.* at 329. But the facts suggested otherwise. *See id.* at 328-29.

Central, founded in 1836 as the first public high school in Philadelphia, boasted of illustrious alumni and prodigious resources. Its graduates included "[m]any men who are currently prominent in the professional, political, and cultural life of [the] city and state . . . [and the school] has a deserved reputation for training men who will become local and national leaders in all fields of endeavor." *Id.* at 328. The success of its graduates further was reflected in alumni contributions—tangible and intangible—that equaled those of college alumni. *Id.* at 329. Additionally, because of Central's history and tradition of excellence the school "attracted the attention of national leaders

While the proposed regulations reflect the constitutional standard articulated in the Supreme Court's *VMI* decision, the proposed regulations depart from the antisubordination principles that animated the case in significant ways. For example, *VMI* noted that the Court's jurisprudence concerning gender-based classifications "reveals a strong presumption that [they] are invalid."⁹⁵ Instead, the Department's regulations proceed from the premise that such skepticism is no longer necessary because "educational opportunities for young women and girls, and the commitment of educators to those opportunities have increased."⁹⁶ In addition, *VMI* made clear that sex-based classifications "must be genuine, not hypothesized or invented *post hoc* in response to litigation [nor] . . . rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."⁹⁷ In contrast, the proposed regulations would permit the creation of single-sex classes based on such ambiguous factors as "reliable information" and "sound

throughout [its] history," among them: former Presidents James Polk and Theodore Roosevelt, former Attorney General Robert Kennedy, and former Vice President Hubert Humphrey. *Id.* at 328–29. "The visits of the latter two . . . were arranged through the auspices of the Barnwell Foundation, which was established by a Central alumnus." *Id.* at 329. Central had a "substantial private endowment," the only city high school to be so fortunate. *Id.*

In contrast, Girls High was founded in 1848 to train teachers—male and female alike—for the city's public schools. *Id.* at 328. The leaders among Girls High alumnae were neither as numerous nor as accomplished as were Central graduates. "Among the current community leaders who have graduated from Girls are three judges of the Court of Common Pleas of Philadelphia and the first vice-president of the American Medical Association." *Id.* at 329. Similarly, Girls High alumnae apparently had not demonstrated the same "dedication and loyalty" to their alma mater in terms of financial contributions, since no mention is made of such. Notwithstanding the reputation of the school, there apparently was no record of former presidents or cabinet members visiting the campus to address students. However, despite all these disparities, the only difference the court observed between the two institutions was that the "scientific facilities" at Central were "superior." *Id.*

The fact that male students had access to greater resources, greater prestige, and greater opportunities to learn science was of no moment to the court because those were the students best able to make use of the social and economic advantages bound to follow from these experiences when they graduated. In other words, the disparity between Central and Girls High reflected the gender-based roles that male and female students would play upon reaching adulthood and therefore did not signal inequality. *See infra* notes 180–205 and accompanying text.

While the U.S. Court of Appeals for the Third Circuit vacated the district court's decision, 532 F.2d 880 (3d Cir. 1976), and affirmed by an "equally divided" Supreme Court, 430 U.S. 703 (1977), a state court ultimately struck down the all-male policy as violative of its state constitution. *See generally* *Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C.3d 682 (1983).

94. 67 Fed. Reg. at 31,098–99.

95. 518 U.S. at 532.

96. 69 Fed. Reg. at 11,276.

97. 518 U.S. at 533.

educational judgment”⁹⁸ to “meet the particular, identified educational needs of the recipient’s students.”⁹⁹

In this regard, it should be noted that Virginia attempted to justify the all-female alternative to VMI, the Virginia Women’s Institute for Leadership (“VWIL”) by relying on such rationales. For example, the fact that VWIL students neither received the same military training as VMI students nor “experience[d] the ‘barracks’ life ‘crucial to the VMI experience,’”¹⁰⁰ was based on “pedagogical”¹⁰¹ reasons—that is, the presumably sound educational judgment of a specially created task force that had determined that “a military model and, especially VMI’s adversative method, would be wholly inappropriate for educating and training *most women*.”¹⁰² By evoking the constitutional standard, but simultaneously providing recipients with the leeway to avoid their obligations, the proposed regulations very likely will lead to the very gender-based stereotyping Title IX was enacted to combat.

Skepticism concerning the Department’s approach is especially warranted given its conclusion that single-sex education is a beneficial pedagogical tool,¹⁰³ notwithstanding the long-standing and ongoing controversy regarding the merits or disadvantages of sex segregation.¹⁰⁴ Based on this determination, the proposed regulations do not require recipients to obtain Department approval before creating single-sex programming,¹⁰⁵ suggesting that a school district’s decision to create such programming should be considered presumptively valid. In this

98. 69 Fed. Reg. at 11,279.

99. *Id.*

100. *VMI*, 518 U.S. at 548.

101. *Id.* at 549–50.

102. *Id.* at 550 (emphasis added).

103. “[E]ducational research has suggested that in certain circumstances, single-sex education provides educational benefits for some students.” 69 Fed. Reg. at 11,276. An accompanying footnote acknowledges that “there is presently a debate . . . regarding the effectiveness of single sex education.” *Id.* at 11,276 n.3. The fact that the Department has deemed it necessary to promote single-sex education by modifying long-standing regulations, suggests that Department officials have determined that sex segregation is an educational policy worth pursuing irrespective of the ongoing debate.

104. See, e.g., Levit, *supra* note 54, at 451 (examining the conflicting empirical evidence regarding single-sex education); see also Patricia B. Campbell & Joe Sanders, *Challenging the System: Assumptions and Data Behind the Push for Single-Sex Schooling*, in *GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING* 31, 32 (Amanda Datnow & Lea Hubbard eds., 2002) (noting that “[t]here has been no national comprehensive controlled study of academic performance for U.S. students in public and private K–12 single-sex and coed schooling”). In fact, two weeks after the Department released the proposed regulations, *Education Week* reported that Department officials had commissioned Providence College Professor Cornelius Riordan to study single-sex education in the nation’s public elementary and secondary schools. Michelle R. Davis, *Federal Study Examining Single-Sex Public Schools*, *EDUC. WEEK*, Mar. 24, 2004, at 24.

105. 69 Fed. Reg. at 11,277.

regard, the proposed amendments send school districts the green light to try single-sex education with little consideration given to the implications for gender equality in schools. The Department suggests that such a message is appropriate presumably because it has determined that sex discrimination is a problem of the past and that sex segregation is not only benign but also beneficial. Thus, the Office for Civil Rights can now turn its attentions to promoting “flexibility”¹⁰⁶ through the proposed regulations.

This proposal is at odds with long-established law and has serious implications for the children who supposedly will benefit from this approach, who primarily are students of color.¹⁰⁷ As the next Part will demonstrate, segregated education—race-based and sex-based—has played a major role in the subordination of white women and people of color in different but overlapping ways. This history suggests that sex segregation in education has the very real potential to retrench raced and gendered stereotypes, to the detriment of the very students these policies purport to serve. Here, it makes sense to examine the history of educating Blacks, white men, and white women in the United States to comprehend fully what is at stake with today’s versions of single-sex schooling.

II. LOOKING BACKWARD TO LOOK AHEAD: RACE- AND SEX-BASED SEGREGATION IN EDUCATION

Without question, educational institutions inform the social roles that young people will assume as adults.¹⁰⁸ In this connection, separating students based on sex takes on great importance as a means of constructing masculinity and femininity in this society.¹⁰⁹ When further examined within the context of state-sanctioned, state-enforced racial segregation, separating the sexes for educational purposes takes on additional significance as a means of constructing the social meaning of race. History suggests that sex segregation has promoted a raced and gendered hierarchy that identifies white males and white females as the prototypes of masculinity and femininity and relegates Black men and Black women to a subordinated position because they fail to conform to

106. “[T]he benefit of the proposed regulations is the expanded flexibility to provide single sex schools or classes” *Id.* at 11,283.

107. *See supra* note 31.

108. Among the lessons that children learn in school is about their proper place in society. *See, e.g.,* Cynthia Hudley, *Schools as Contexts for Socialization, in RACE AND EDUCATION: THE ROLES OF HISTORY AND SOCIETY IN EDUCATING AFRICAN AMERICAN STUDENTS* 225–29 (William Watkins et al. eds., 2001).

109. An examination of women’s colleges might suggest otherwise; however, a full examination of those institutions is beyond the scope of this Article.

those norms.¹¹⁰ As a result, sex segregation historically has been a key element of the hidden curriculum,¹¹¹ which reinforces gendered and raced expectations for students, limits their educational opportunities, and ultimately constrains their life opportunities.

While the past does not necessarily predict the future, examining the history of sex segregation with respect to sex and race provides a strong foundation for understanding current efforts to resuscitate single-sex schooling. As Reva Siegel has observed, examining the past demonstrates how the legal system has supported race- and gender-based hierarchies.¹¹² With this understanding, Siegel argues we can also determine whether reforms in the law actually dismantle such subordination or whether they merely allow it to take another form.¹¹³ In this context, then, one must ask the following: if we acknowledge that the rationales justifying sex segregation may have evolved over the past one hundred years or so, then will single-sex schooling in its “new” form deliver the promised reforms so necessary for students of color, or will it merely perpetuate race- and gender-based subordination?¹¹⁴ Guided by this inquiry, the next Section examines sex segregation within the context of the nation’s history of racial segregation.¹¹⁵

110. See, e.g., Crenshaw, *supra* note 57, at 156 n.43. Crenshaw writes: [W]omen, who often fail to conform to “appropriate” sex roles, have been pictured as, and made to feel, inadequate—even though as women, they possess traits recognized as positive when held by men in the wider society. Such women are stigmatized because their lack of adherence to expected gender roles is seen as a threat to the value system.

Id. (internal quotes omitted).

111. See, e.g., Hudley, *supra* note 108, at 226–27.

112. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111, 1116, 1119 (1997) (“In gender, race, and class relationships, the legal system continued to allocate privileges and entitlements in a manner that perpetuated former systems of express hierarchy . . . [in this respect] the process of dismantling an entrenched system of status relations may well transform the regime without abolishing it.” Siegel terms this “reform dynamic . . . ‘preservation-through-transformation.’” (footnote omitted)).

113. *Id.*

114. *Id.* at 1116; see also 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, 779 (2002) (positing that “even a brief review of the historical record of sex-segregated public education demonstrates that a practice’s role in promoting unequal citizenship and legalized inferiority can evolve and shift”). In other words, will the new sex segregation “be used as [it] once [was] to create or perpetuate the legal, social, and economic inferiority” of students of color? See *VMI*, 518 U.S. at 534 (citation omitted).

115. The history that follows is abbreviated because a full exploration of the history of race- and sex-based segregation clearly is beyond the scope of this Article.

A. *The History of Educating African Americans:
Segregation Constructing Race and Gender*

For much of its history, the nation's system of educating its young excluded African Americans. Because of slavery, questions persisted regarding the propriety and wisdom of educating Blacks. Prior to 1835, ad hoc efforts to educate Blacks existed, promoted by "masters who desired to increase the economic efficiency of their labor supply; . . . sympathetic persons who wished to help the oppressed; and . . . zealous missionaries who . . . taught slaves the English language that they might learn the principles of the Christian religion."¹¹⁶ As slavery became the engine propelling the nation's economy, however, opposition to educating Blacks grew, particularly in the South. Historian Carter G. Woodson explained that this hostility was rooted in the desire to increase that region's ability to compete in

the worldwide industrial movement. It so revolutionized spinning and weaving that the resulting increased demand for cotton fiber gave rise to the plantation system of the South, which required a larger number of slaves. Becoming too numerous to be considered as included in the body politic . . . the slaves were generally doomed to live without any enlightenment whatsoever. Thereafter, rich planters not only thought it unwise to educate men thus destined to live on a plane with beasts, but considered it more profitable to work a slave to death during seven years and buy another in his stead, than to teach and humanize him with a view to increasing his efficiency.¹¹⁷

Accordingly, states passed laws prohibiting the education of slaves as early as 1740. The majority of such laws appeared, however, in the first half of the nineteenth century.¹¹⁸ Woodson reports that in a few instances, slave masters ignored these laws because they had valuable slaves capable of "bookkeeping [and] printing." However,

[t]he majority of the people in the South [believed] that, as intellectual elevation unfits men for servitude and renders it impossible to retain them in this condition, it should be interdicted. In other words, the more you cultivate the minds

116. Carter G. Woodson, *The Education of the African-Americans Prior to 1861*, in FOUNDATIONS OF AFRICAN-AMERICAN EDUCATION 5 (Julie Kehrwald ed., 1998).

117. *Id.* at 6-7.

118. *Id.* at 7.

of slaves, the more unserviceable you make them; you give them a higher relish for those privileges which they cannot attain and turn what you intend for a blessing into a curse. If they are to remain in slavery, then they should be kept in the lowest state of ignorance and degradation. The nearer you bring them to the condition of brutes, the better chance they have to retain their apathy.¹¹⁹

A literate slave was dangerous to the institution of slavery. Recognizing the important role schooling could play in their lives, however, some slaves risked being sold away from their families or worse to learn to read and write.¹²⁰

With the approach of the Civil War, more northerners took up the cause of education for African Americans as a way of dismantling the Confederacy.¹²¹

The logic was simple: an educated ex-slave would be forever “ruined” for any future slavocracy usage. To facilitate this ruination, the government of Abraham Lincoln immediately arranged to transport hundreds of abolitionist educators, both Black and White, from the north to these areas for the purpose of setting up and staffing . . . schools [for Blacks].¹²²

After the Civil War and the abolition of slavery, doors to educational opportunities slowly began to open for Blacks. The Freedmen’s Bureau, which Congress established in 1866 to help the newly freed slaves,¹²³ provided the first public schooling for Blacks, as

119. *Id.*

120. Historians estimate that about five percent of the slave population surreptitiously learned to read before the end of the Civil War. See REMEMBERING SLAVERY: AFRICAN AMERICANS TALK ABOUT THEIR PERSONAL EXPERIENCES OF SLAVERY AND FREEDOM 206 (Ira Berlin et al. eds., 1998). For example, Mandy Jones, who was a slave in Mississippi, explained how slaves received a rudimentary education in “pit schools” from other slaves who had been taught secretly by white children. *Id.* She stated:

Slaves would slip out o’ de Quarters at night, an go to dese pits [holes dug in the ground by other slaves], an some niggah dat had some learnin’ would have a school. De way de cullud folks would learn to read was from de white chilluns . . . [who would] slip off somewhere an’ learns de culled chilluns . . . what deir teacher has jes’ learned dem.

Id.

121. See Darryle J. Gatlin, *The Education of African Americans Since 1861*, in FOUNDATIONS OF AFRICAN-AMERICAN EDUCATION 15 (Julie Kehrwald ed., 1998).

122. *Id.*

123. With passage of the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981, Congress created the Freedmen’s Bureau and granted it the authority albeit without any appropriations to establish—among other things—public schools for the

well as for whites in the South.¹²⁴ However, a serious question arose as to what sort of education was most appropriate for the newly freed slaves, given the “political realities”¹²⁵ of the day: classical or industrial education.

1. RACIALIZED REALITIES: DETERMINING THE BEST EDUCATIONAL FIT FOR BLACKS

Central to this debate was the issue of the role free Blacks should have in society: specifically, whether Blacks should be free to pursue educational paths that would allow them to determine their own destinies and attain rights and privileges equal to those of whites, or whether Blacks should acquire training to permit continued service to whites, which would lead to white approbation and as a consequence peaceful coexistence between the races. W.E.B. DuBois, Anna Julia Cooper,¹²⁶ missionary philanthropists, and others¹²⁷ advocated educating Blacks to

newly freed slaves. See, e.g., W.E.B. DuBois, *The Freedman's Bureau* (1901), reprinted in DUBOIS ON EDUCATION 102 (Eugene F. Provenzo, Jr. ed., 2002).

124. See *id.* at 105; see also BEVERLY GUY-SHEFTALL, DAUGHTERS OF SORROW: ATTITUDES TOWARD BLACK WOMEN, 1880–1920, at 94 (1990). The Freedmen's Bureau's educational efforts added to existing schools created by missionaries, churches, and other private parties. See William H. Watkins, *Blacks and the Curriculum: From Accommodation to Contestation and Beyond*, in RACE AND EDUCATION: THE ROLES OF HISTORY AND SOCIETY IN EDUCATING AFRICAN AMERICAN STUDENTS 41–42 (William Watkins et al. eds., 2001) [hereinafter Watkins, *Blacks and the Curriculum*].

125. Watkins, *Blacks and the Curriculum*, *supra* note 124, at 42.

126. Cooper has been called “a foundational figure among black feminists in America.” Charles Lemert, *Anna Julia Cooper: The Colored Woman's Office*, in THE VOICE OF ANNA JULIA COOPER 1 (Charles Lemert & Esme Bhan eds., 1998). She believed strongly in DuBois' notions of the “talented tenth.” As a principal of the all-Black M Street High School in Washington, D.C., from 1901 to 1906, she put those ideas to work by “strengthen[ing] its curriculum in classical subjects [so much] that a markedly greater number of its graduates were accepted to elite colleges like Harvard.” *Id.* at 9. Her loyalty to DuBois ultimately cost her that position; the school board fired her after she completed her fifth year of service. “[Booker T.] Washington's Tuskegee Machine, as it was known by its opponents, worked hard to exercise its control wherever in the nation the industrial education strategy was opposed” *Id.* at 10. Tuskegee targeted Cooper with hostility, not only because of her strong commitments to the industrial education program at M Street but also “because she was herself so obviously well educated and [provided an] effective a model to her pupils.” *Id.*

127. Southern Black leaders and educators associated attainment of quality education with progress for African Americans after the Civil War:

The quest for self-determination . . . demanded knowledge of society, citizenship, and vocation. The cultivation of teachers, leaders, ministers, managers, and skilled tradesmen were objectives of early black education. Many black educators were attracted to the New England-styled classical liberal curriculum . . . as it promised participation in the social life of the new America.

Watkins, *Blacks and the Curriculum*, *supra* note 124, at 41.

facilitate the African American struggle for equal rights.¹²⁸ For example, DuBois argued that, in order for African Americans to progress, a “talented tenth” of the Black population should receive higher education to “rise[] and pull[] all that are worth saving up to their vantage ground.”¹²⁹ DuBois urged that this “best and most capable [group should] be schooled in the colleges and universities of the land,” so they, in turn, might teach other Blacks formally in the classroom and informally as role models in their communities.¹³⁰ Similarly, “missionary philanthropists basically egalitarian in their views of civil rights and race relations [considered and supported] black higher education as a means to produce a college-bred black leadership that would lead the black masses in their struggle for equal rights.”¹³¹ Under this view, higher education was key to Black liberation after the Civil War.

In contrast, northern industrial philanthropists believed that Blacks should be educated in a manner consistent with “the existing racial and social class structure of the South. . . . The tasks of the northern hegemonists and their southern supporters were to reconcile the growing black demand for education with the political realities of peonage and oppression.”¹³² This group was willing to accommodate Blacks’ interest

128. Gatlin, *supra* note 121, at 21.

129. W.E.B. DuBois, *The Talented Tenth* (1903), reprinted in DUBOIS ON EDUCATION 80 (Eugene F. Provenzo, Jr. ed., 2002) [hereinafter DuBois, *The Talented Tenth*]. It should be noted, however that DuBois’ vision was gender-specific:

The Negro race, like all races, is going to be saved by its exceptional men. . . . Men we shall have only as we make manhood the object of the work of the schools—intelligence, broad sympathy, knowledge of the world that was and is, and of the relation of men to it—this is the curriculum of that Higher Education which must underlie true life.

Id. at 76. DuBois also recognized that Black women played an important role in the African American struggle for equality and argued specifically for their liberation from constraining stereotypes. He stated:

The future woman must have a life work and economic independence. She must have knowledge. She must have the right of motherhood at her own discretion.

. . . .
To no modern race does its women mean so much as to the Negro nor come so near to the fulfilment of its meaning.

. . . .
As I look about me today in this veiled world of mine, despite the noisier and more spectacular advance of my brothers, I instinctively feel and know that it is the five million women of my race who really count.

W.E.B. DuBois, *The Damnation of Women*, in DARKWATER: VOICES FROM WITHIN THE VEIL 164, 173, 179 (1920).

130. DuBois, *The Talented Tenth*, *supra* note 129, at 80, 86.

131. Watkins, *Blacks and the Curriculum*, *supra* note 124, at 42 (citation omitted).

132. *See id.*

in education, but only to the extent that it did not create a large educated elite class that might foment rebellion. "Containment and subjugation became the objective of imposed Negro education."¹³³

One of the proponents of industrial education, which was consistent with the "containment" strategy, was Booker T. Washington, a former slave and a chief architect of Tuskegee Institute's industrial education program. Washington believed that the true ticket to emancipation and white acceptance for African Americans lay in developing practical skills:

Some time ago, when we decided to make tailoring a part of our training at the Tuskegee Institute, I was amazed to find that it was almost impossible to find in the whole country an educated coloured man who could teach the making of clothing. We could find them by the score who could teach astronomy, theology, grammar, or Latin, but almost none who could instruct in the making of clothing, something that has to be used by every one of us every day in the year.

. . . .

It is time to make up, as soon as possible, for this mistake . . . time for both races to acknowledge it and go forth on the course that, it seems to me, all must now see to be the right one . . . industrial education.¹³⁴

In Washington's view, industrial education would impart practical skills that were sorely needed among Blacks. With such training, African Americans would prove they could contribute to society, which, in turn, would reduce the racial animosity that existed between Blacks and Whites. Washington posited that:

The history of the world proves that trade, commerce, is the forerunner of peace and civilisation as between races and nations. The Jew, who was once in about the same position that the Negro is to-day, has now recognition, because he has entwined himself about America in a business and industrial sense. Say or think what we will, it is the tangible or visible element that is going to tell largely during the next twenty years in the solution of the race problem.¹³⁵

133. *Id.* at 43.

134. BOOKER T. WASHINGTON, *THE FUTURE OF THE AMERICAN NEGRO* 50, 57 (Haskell House 1968) (1899).

135. *Id.* at 65-66.

Thus, according to Washington, industrial education would enable Blacks to obtain the few opportunities available to them within the racist infrastructure, while simultaneously casting doubt on the racist ideology that constrained African Americans.

Despite their differences, Washington and DuBois both struggled against the prevalent view that limited educational opportunities for Blacks simply made sense because of their purportedly limited capacity to learn. At this time, the popular and scientific discourse concerning African Americans was decidedly negative. For example, Columbia University published a report that provided ample “evidence” of the intellectual deficiencies of Blacks, finding that:

In both boys and girls among the Negroes the highest brightness seems to be thirteen years; the highest ability for boys was found to be eight years and for the girls nine years. With white children ability increases and brightness decreases with age. As a rule, after Negro children become older than ten or twelve years, their development is physical rather than mental.¹³⁶

In addition, this report claimed that Blacks were morally deficient and weak of character:

The Negro has few ideals and perhaps no lasting adherence to an aspiration toward real worth. He has little conception of the meaning of virtue, truth, honor, manhood, integrity. He is shiftless, untidy, and indolent The Negro shirks details and difficult tasks The Negro is improvident and extravagant; lazy rather than industrious¹³⁷

According to this report, these failings of intellect and character meant that African Americans’ had a limited capacity to succeed educationally; therefore, schooling for Blacks should be focused in “agricultural and mechanical schools,” military schools, and other settings that would facilitate “manual dexterity” as early as possible.¹³⁸ Any additional schooling was not only unnecessary but ill-advised as a policy matter:

[I]t seems that the whole current of mental improvement has reached unhappy results.

136. HOWARD W. ODUM, *SOCIAL AND MENTAL TRAITS OF THE NEGRO: RESEARCH INTO THE CONDITIONS OF THE NEGRO RACE IN SOUTHERN TOWNS: A STUDY IN RACE TRAITS, TENDENCIES AND PROSPECTS* 38 (1910).

137. *Id.* at 39.

138. *Id.* at 44.

The young educated Negroes are not a force for good in the community but for evil. The Negro quickly outgrows the influence and control of his instructors These young Negroes are not in sympathy with their parents; they appear to neglect them more than those who are not 'educated.' They feel that manual labor is beneath their dignity; they are fitted to do no other. They sneer at the idea of work, and they thus spread dissatisfaction among the members of their race.¹³⁹

These notions of intellectual and moral inferiority, and the desire to keep Blacks satisfied with their subordinate status informed the public debate concerning education for African Americans. For example, Samuel Armstrong, founder of Hampton University, the model for Tuskegee Institute, believed that "the Negro could acquire knowledge but not digest it"; therefore, "the Negro could best be morally and socially uplifted through labor and character training."¹⁴⁰ Armed with this racist assessment of Black Americans, Armstrong met with other prominent white educators of the time at the Lake Mohonk Conferences in 1890 and 1891 to discuss the Negro Question to carve out a "suitable" educational strategy for Blacks. A majority agreed that industrial education was the best course of action for Black men *and* Black women alike because "Blacks were genetically inferior, capable of rudimentary vocational education, and urgently in need of 'character building.'"¹⁴¹ Significantly, as educators determined what type of education was most appropriate for Blacks, there was little discussion regarding whether training should be limited to Black men or whether to separate African Americans by sex. The tenor of these discussions would shift, however, as gender conformity—and conformity to the patriarchal order—gained status as a strategy for Black assimilation.¹⁴²

2. GENDER REALITIES: AN EVOLVING ROLE FOR SEX

When considered in light of the nation's recent experience with slavery, the lack of concern regarding Black males and Black females learning together in the post-Reconstruction era is not surprising. During slavery, Black women and Black men routinely worked side-by-side, performing tasks that ordinarily would be considered "man's work." Jacqueline Jones explains that males and females shared many of the same difficult jobs:

139. *Id.* at 41.

140. Watkins, *Blacks and the Curriculum*, *supra* note 124, at 43.

141. *Id.* at 44.

142. *See infra* notes 161–80 and accompanying text.

Together with their fathers, husbands, brothers, and sons, black women spent up to fourteen hours a day toiling out of doors, often under a blazing sun. In the Cotton Belt they plowed fields; dropped seed; and hoed, picked, ginned, sorted, and moted cotton. On farms in Virginia, North Carolina, Kentucky, and Tennessee, women hoed tobacco; laid worm fences; and threshed, raked, and bound wheat.

Stated simply, most women spent a good deal of their lives plowing, hoeing, and picking cotton. In the fields the notion of a distinctive "women's work" vanished as slaveholders realized that "women can do plowing very well [and] full well with the hoes and [are] equal to men at picking."¹⁴³

The absence of gendered roles was apparent even among Black slave children, who dressed alike in "'split-tail shirt[s]' . . . knee-length snock[s] slit up the sides," handled similar chores on the plantation,¹⁴⁴ and played in non-gender specific ways.¹⁴⁵ Starting from a young age, Black females could not aspire—nor were expected—to become "true women."¹⁴⁶ Similarly, Black males were not true men.¹⁴⁷

143. JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT 15-16* (1985) (footnote omitted). It is important to note, however, that female slaves differed from their male counterparts in one very significant aspect: the ability to procreate. As a result, female slaves were valued not only for their ability to work in the fields but also for their reproductive capacity, which would increase the slave population and thus enhance their master's wealth. Significantly, however, this distinction did not exempt Black women from plantation work. Pregnant women still were expected to pick cotton, albeit a reduced amount. Upon giving birth, nursing mothers carried their babies to work with them, as described by a former slave: "'When [the baby] get hungry, she just slip it around in front and feed it and go right on picking or hoeing.'" *Id.* at 14; *see also* DEBORAH GRAY WHITE, *AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 67-69* (1985).

144. *See* JONES, *supra* note 143, at 23 (noting that "[o]n smaller holdings especially, the demands of housework, like cotton cultivation, admitted no finely honed division of labor").

145. WHITE, *supra* note 143, at 92-93.

146. The term "true women" refers to the prototype of white femininity that emerged during the industrial revolution. BARBARA WELTER, *DIMITY CONVICTIONS: THE AMERICAN WOMAN IN THE NINETEENTH CENTURY 21* (1976). Specifically, the "true" woman's place was in the home and on a pedestal. *Id.*

The attributes of True Womanhood, by which a woman judged herself and was judged by her husband, her neighbors and society, could be divided into four cardinal virtues—piety, purity, submissiveness and domesticity. Put them all together and they spelled inother, daughter, sister, wife—woman. Without them, no matter whether there was fame, achievement or wealth, all was ashes. With them she was promised happiness and power.

Still, even without being considered “true women,” Black women confronted gendered and raced expectations about their role in society as females, which in turn informed the educational opportunities available to them. For example, with the success of the Freedmen’s Bureau in providing educational opportunities in the post-Reconstruction period came a growing demand for schooling. With this demand for schooling, came an increased need for teachers to provide the most basic level of education to illiterate former slaves. Black women, by virtue of their sex, were deemed the likeliest of candidates to do the teaching,¹⁴⁸ in light of the fact that they held significant childcare responsibilities for their masters’ and their own families.

The confluence of raced and gendered stereotypes about Black women also resulted in the creation of educational opportunities that addressed their perceived intellectual and moral shortcomings. For instance, because many southerners thought Black women were unintelligent, they argued that education should be limited to teaching Black women to serve white people.¹⁴⁹ Northerners, on the other hand, believed that Black women were educable but lacking in morality and virtues; therefore, their schooling should emphasize character development.¹⁵⁰ Beverly Guy-Sheftall presents a compelling example of how white stereotypes of Black women informed their educational opportunities in her description of the founding of Spelman College.¹⁵¹

Id. But see Crenshaw, *supra* note 57, at 156 (observing that true womanhood was not available to Black women).

147. See, e.g., Derrick Bell, *The Sexual Diversion: The Black Man/Black Woman Debate in Context*, in *BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER* 239–40 (Devon Carbado ed., 1999) (arguing that slavery controlled and humiliated Black men by limiting access to their wives and “forc[ing them] to stand by powerless and unable to protect black women from sexual access by white men,” among other things).

148. WHITE, *supra* note 143, at 94.

149. GUY-SHEFTALL, *supra* note 124, at 130.

150. *Id.* at 131.

151. *Id.* at 132–37. It should be noted that, despite origins based on raced and gendered stereotypes, Spelman College and its historically Black counterparts, have emerged as leading institutions for educating African Americans.

Despite a shameful history of state-enforced segregation, [historically black colleges] have survived and flourished. Indeed, they have expanded as opportunities for blacks to enter historically white institutions have expanded. . . .

The colleges founded for Negroes are both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of higher learning for their children. They have exercised leadership in developing educational opportunities for young blacks at all levels of instruction, and especially in the South, they are still regarded as key institutions for enhancing the general quality of the lives of black Americans.

In 1883, Sophia Packard and Harriet Giles, two white female missionaries from New England, ventured south upon learning that Dr. Henry Morehouse, a field secretary of the American Baptist Home Missionary Society, had planned to establish a coeducational institution for Blacks in Atlanta.¹⁵² Not unlike many white educators of the time, Giles and Packard believed in separate schooling for women;¹⁵³ they were unique in promoting this form of education for Black women. Accordingly, Giles and Packard approached Morehouse and the Missionary Society and urged that some property in Atlanta be set aside to establish an institution dedicated to educating Black women and preparing them to assume their appropriate role in the post-Reconstruction society.¹⁵⁴ Giles and Packard were

preoccup[ied] with industrial and practical education . . . set[ting Spelman] apart from the white female seminary tradition that concentrated, for the most part, on academic subjects. . . . Ever mindful of the peculiar history of black women in America and the realities of their everyday lives, Packard and Giles' primary aim was to provide training for teachers, nurses, missionaries, and church workers—areas of employment open to black women.¹⁵⁵

Giles and Packard believed in “true womanhood,”¹⁵⁶ and part of their mission was to inculcate Black women with this norm—but in a modified fashion. They recognized that the traditional “separate spheres”¹⁵⁷ ideology informing the “classical” education that white women received¹⁵⁸ did not apply to Black women. Accordingly, Giles and Packard designed a curriculum that would prepare Black women to work outside their own homes and support their families by “imparting . . . practical skills that would make black women good homemakers and mothers” and provide them with the training to go into domestic service.¹⁵⁹ In addition, because Giles and Packard were not

United States v. Fordice, 505 U.S. 717, 748 (1992) (Thomas, J., concurring) (citations omitted) (quotations omitted). In this regard, historically Black colleges and universities might be seen as transcending their histories as agents of state-sanctioned and state-enforced subordination to become sources of empowerment for African Americans. This Article questions whether the current versions of single-sex education will be able to do the same, particularly lacking an emphasis on gender equality. *See infra* Part III.

152. GUY-SHEFTALL, *supra* note 124, at 132.

153. *See infra* notes 194–218 and accompanying text.

154. GUY-SHEFTALL, *supra* note 124, at 132–33.

155. *Id.* at 133.

156. *See supra* note 146.

157. *See infra* notes 180–94 and accompanying text.

158. *See infra* notes 206–08 and accompanying text.

159. GUY-SHEFTALL, *supra* note 124, at 134.

immune to the stereotypes regarding Black women, particularly their purported lack of morals, a key part of Spelman's training included "molding of Christian character and the eradication of those traits that were a carry-over from slavery—dishonesty, tardiness, drunkenness, idleness, immorality, and irresponsibility."¹⁶⁰ Thus, Giles and Packard sought to provide Black women with a unique learning opportunity, informed by the intersection of racial and gender stereotypes.

Black educators also adopted a strategy of providing African American women with training that had both moral and practical aims. For example, educator Mary McCleod Bethune believed that industrial training was necessary to assist African American efforts to become fully integrated into the nation's fabric. Bethune focused her initial efforts on young women in founding the Daytona Literary and Industrial Training School for Negro Girls (the "Daytona School") in 1904.¹⁶¹ The Daytona School provided students with a mix of academic and vocational coursework to "develop Christian character, to send forth women who [would] be rounded home-makers and Christian leaders . . . a trained mind, heart and hand being [Bethune's and her supporters'] idea of a complete education."¹⁶² Separate education for Black girls was necessary because

of the unique responsibilities of Black girls in the world today. The challenge to the Negro home is one which dares the Negro to develop the initiative to solve his own problems, to work out his own problems, to work out his difficulties in a superior fashion, and to finally come into his right as an American Citizen because he is tolerated. This is the moral responsibility of the education of the Negro girl; It must become a part of her thinking; her activities must lead her into such endeavors early in her educational life; this training must be inculcated into the school curricula so that the result may be a natural expression born into her children. Such is the natural endowment when her education must make it possible for her to bequeath to the future of the Negro race.¹⁶³

Bethune's educational mission was to prepare Black women to participate in the larger effort to uplift the race. In this connection, because Black women were to be the primary caregivers of children,

160. *Id.* at 136.

161. Mary McCleod Bethune, *Sixth Annual Catalogue and Industrial Training School for Negro Girls [abridged] (1910-1911)*, in MARY MCLEOD BETHUNE: BUILDING A BETTER WORLD 67 (Audrey Thomas McCluskey & Elaine M. Smith eds., 1999).

162. *Id.* at 77-78.

163. *Id.* at 85.

they, in turn, would be responsible for passing down to the next generation the tools necessary to realize the promise of national citizenship implicit in emancipation. Bethune eventually expanded her efforts to include Black males in 1924 when in her words, “[t]he circumstances of growth and maintenance within the prevalent pattern of our young Negro institutions dictated union with Cookman Institute.”¹⁶⁴ Thus, the all-female Daytona School evolved into the coeducational Bethune-Cookman College,¹⁶⁵ which remains in existence today.

Another leading educator who focused on educating young African American women to fulfill their particular roles in a constrained society was Nannie Helen Burroughs, founder of the National Training School for Women and Girls (“NTS”) in 1909. NTS’s mission was

1. To train women for missionary work in this and other lands,
2. To prepare women as teachers of the Word of God in our Sunday Schools,
3. To train women to become better homemakers, and
4. To train women to give better domestic service.¹⁶⁶

Nicknamed the “School of the Three Bs,” for its emphasis on the Bible, the bathtub, and the broom,¹⁶⁷ NTS sought to ensure its students had a firm moral foundation, along with the skills necessary to maintain a household, just as was true for Spelman College and the Daytona School.

The aim of the School is to give a training of head, hand, and heart and develop a definite and active social interest in the spiritual and moral forces that make for human welfare.

To accomplish this purpose we have: An atmosphere that is Christian; a spirit that is aggressive, unostentatious but happy; surroundings that are clean; personal ideals that are simple; academic and trade courses that are of high standards.¹⁶⁸

164. *Id.* at 118.

165. It should be noted, however, that even with this development, Bethune apparently continued to believe that single-sex education was important for Black girls and their particular educational needs—that is, educating them to fulfill their obligation to promote the advancement of Black families. Additionally, sex segregation, in Bethune’s view, also allowed for “the development of a morale and fellow-feeling among [those] students unconfused by the disturbances of adolescence.” *Id.* at 120.

166. *OPAL V. EASTER, NANNIE HELEN BURROUGHS* 58 (1995) (citation omitted).

167. *Id.* at 63.

168. *Id.* at 64 (citations omitted).

Students at NTS received training in academic subjects, such as Latin and English literature, and domestic matters, such as dressmaking and housekeeping. In addition, NTS provided training in various trades, such as typesetting and salvaging.¹⁶⁹ Burroughs believed that the trades were of especial importance to Black women—even those with a college education—to enable them to find employment in the likely event of discrimination. As an NTS brochure explained:

Not many of the colored graduates from normal schools or colleges are accepted in the public school system, as teachers, in the North. . . . A Trade School will open new avenues of employment to girls who are shut out of teaching in public schools because they live in sections where colored teacher[s] are not generally employed.¹⁷⁰

Educating women to enter the trades made NTS unique by providing its students training that most assuredly was nontraditional for females and deviating far from the “true woman” construct, which proved to be very risky. Specifically, prominent members of the National Baptist Convention (“NBC”), a primarily male organization that supported NTS economically “were concerned that the women and girls enrolled in the trades were being trained as ‘breadwinners.’ For these reasons, the men of the NBC neglected to support the School”¹⁷¹ and successfully persuaded the organization to withdraw its financial support.¹⁷²

The controversy sparked by the addition of the trades to the curriculum at the NTS suggests that sex segregation for Black women was acceptable as long as it conformed with the program of reconstructing Black femininity and Black masculinity consistent with prevailing societal norms. By replicating white patriarchy, African Americans arguably could overcome the legacy of slavery that had rendered them less than true men and true women and stigmatized them as inadequate. In this regard, by providing Black female students with the opportunity to enter professions that would enable them to support their future families even without a mate, NTS subverted efforts to construct the Black family as patriarchal and had to be corrected in the view of its backers.

Examination of other efforts to educate Black women further demonstrates how sex segregation sought to replicate gendered norms as a strategy for gaining white respect, and presumably greater

169. *See id.* at 64–66.

170. *Id.* at 66 (citation omitted).

171. *Id.* at 68.

172. *Id.* at 68–69.

opportunities for African Americans. For example, Samuel Harris, principal of the Athens Colored High School in Georgia and an advocate for industrial education, believed that increasing training in domestic services was particularly important for Black female students.¹⁷³ As a result, Harris worked in concert with other Black men in his community to establish an evening industrial school that “would train young blacks in domestic skills and moral attitudes that were generally associated with ‘old black mammy’ in the south.”¹⁷⁴ Harris justified his school by asserting that there was a need for a new generation of Blacks who represented, in his view, the exemplary characteristics of the Black mammy: “unselfishness, honesty, personal affection, industrial stability and skills.”¹⁷⁵ Harris and his supporters decided to work with whites to “establish ‘The Black Mammy Memorial Institute,’” of which Harris became the principal.¹⁷⁶ Through this Institute, Harris reportedly sought to capitalize on white nostalgia for the Black mammy and advance his own agenda to create additional opportunities for Black students to obtain industrial training.¹⁷⁷

Booker T. Washington similarly justified Tuskegee’s efforts to train Black women for domestic service. Washington asserted that creation of a skilled cadre of domestic workers was essential for improving race relations.

In the average white family of the South . . . the white child spends a large proportion of his life in the arms . . . of a Negro woman . . . It is mighty important . . . for the civilization, for the happiness, for the health of the Southern white people that the colored nurse shall be intelligent, that she shall be clean, that she shall be morally fit to come in contact with that pure and innocent child.¹⁷⁸

With this appeal to whites to support the Tuskegee Institute, Washington suggested that well-trained domestic servants might help improve relationships between African Americans and whites. In addition, Washington believed domestic skills would enhance African American women’s ability to help support their families and demonstrate their usefulness to society, which would in turn reduce racial animosity.

173. June O. Patton, *Moonlight and Magnolias in Southern Education: The Black Mammy Memorial Institute*, 65 J. NEGRO HIST. 149, 149–50 (1980).

174. *Id.* at 150.

175. *Id.* at 154 n.7.

176. *Id.* at 150.

177. *Id.*

178. GUY-SHEFTALL, *supra* note 124, at 147 (citing SELECTED SPEECHES OF BOOKER T. WASHINGTON 174 (E. Davidson Washington ed., 1932)).

These rationales supported Tuskegee's program of "Industries for Girls," which trained women in "dress making, millinery, horticulture, printing, broom making, mattress making, upholstery, cooking (required) and basketry. Like girls at Spelman, they were taught housekeeping and other aspects of domestic science, such as shopping and the planning of meals."¹⁷⁹ This gender-specific education was linked to improving Black self-sufficiency and, in so doing, proving that African Americans could be valuable members of society.

B. Sex Segregation and White Students: Preparing for Different Life Paths

Similar to African American women, white women were subjected to limited educational opportunities under the guise of preparing them to enter their separate sphere in society.¹⁸⁰ Sex segregation was one way of readying white females for that path, which, as will be discussed in this Section, stood in stark contrast to the world that would await Black women. In this connection, white femininity was constructed through the separate spheres ideology, separate schooling for females, and the separate world that was carved out for these students on account of their race and sex.

1. SEPARATE SPHERES

Industrialization propelled the notion that there were two spheres to which white men and white women belonged: the cold, hard workplace was for men, while the warmth of home and hearth was for women.¹⁸¹

179. *Id.* at 148.

180. *See, e.g.,* *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (upholding denial of a license to practice law for a female applicant and explaining that part of the justification of keeping women out of the legal profession was based on the notion that "[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood").

181. Barbara Welter vividly describes the concept of separate spheres based on materials in popular culture during the early nineteenth century.

The nineteenth-century American man was a busy builder of bridges and railroads, at work long hours in a materialistic society. The religious values of his forebears were neglected in practice if not in intent, and he occasionally felt some guilt that he had turned his new land, this temple of the chosen people, into one vast countinghouse. But he could salve his conscience by reflecting that he had left behind a hostage, not only to fortune, but to all the values which he held so dear and treated so lightly. Woman, in the cult of True Womanhood . . . was the hostage in the home. . . . If anyone, male or female, dared to tamper with the complex virtues which made up True Womanhood, he was damned immediately as an enemy of God, of civilization and of the Republic. It was a fearful

The expectation that a woman's place is in the home was so ingrained that even the Supreme Court took judicial notice of that "fact."¹⁸² For example, in *Mueller v. Oregon*, the Court upheld an Oregon statute that prohibited women from working more than ten hours in a day.¹⁸³ Starting from the premise that the differences between the sexes could support distinctions in labor laws, the Court cited approvingly to other state and foreign statutes that had similar proscriptions.¹⁸⁴ In this connection, the Court noted that these authorities were "significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."¹⁸⁵ The Court detailed those characteristics of women, which it deemed "obvious," that made protective legislation a matter of common sense, a legitimate exercise of police power, and thus constitutional:

by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.¹⁸⁶

Protective legislation thus was essential to assuring the health of women, their offspring, and the well-being of "the race," likely a deliberate word since this law and others like it typically excluded work performed primarily by women of color, such as domestic service.¹⁸⁷

Domestic work generally was considered to be the preserve of Black women: "domestic service bore an indelible badge of racial inferiority. It was stigmatized as 'nigger's work,' a form of voluntary

obligation, a solemn responsibility, the nineteenth-century American woman had—to uphold the pillars of the temple with her frail white hand.

WELTER, *supra* note 146, at 21 (emphasis added) (footnotes omitted).

182. *Mueller v. Oregon*, 208 U.S. 412, 421 (1908) ("Still again, history discloses the fact that woman has always been dependent upon man.")

183. *Id.* at 416. The statute applied to women working in "any mechanical establishment, or factory, or laundry" in Oregon. *Id.*

184. *Id.* at 419 n.1 (citing brief filed by Louis Brandeis, who was then counsel for the defendant).

185. *Id.* at 420.

186. *Id.* at 421; see also *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring) (noting that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life").

187. See generally Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race and Agendas of Reform*, 48 AM. U.L. REV. 851 (1999). See also Ritchie v. People, 40 N.E. 454, 457 (Ill. 1895) (noting that domestic work was excluded from protectionist legislation).

slavery or wage slavery that was incompatible with the values of democracy.”¹⁸⁸ The white women who were domestic servants typically were newly arrived immigrants who worked until they could secure jobs in the developing industrial arena, positions that were off-limits to Blacks.¹⁸⁹

Unlike the women working in the Oregon laundries at issue in *Mueller* and other similar locales,¹⁹⁰ domestic workers typically spent thirteen hours a day and upwards of seventy to eighty hours a week on the job.¹⁹¹ Efforts to reduce hours for these workers only commenced out of a concern that the pool of white workers was diminishing, not to protect the health and well-being of the workers or their offspring.¹⁹² Black women, who historically had proven to be sufficiently sturdy to take on tasks normally deemed as men’s work,¹⁹³ did not need protectionist laws, were not subject to them, and were expected to work in conditions that would be considered risky for white women. Not surprisingly, educational institutions reflected these norms through the manner in which they trained students. Accordingly, white female students received training to prepare them to take their rightful places as the lady of the house. Sex segregation was one of the tools used to construct this gendered and raced identity.¹⁹⁴

In fact, proponents of sex segregation frequently argued that separating the sexes was necessary to preserve the differences between males and females, and in doing so to ensure the perpetuation of “the race.” Coeducation was problematic because it would “in some way destroy feminine sensibility” and more specifically, the feminine ability to reproduce. For example, Thomas Woody, in his scholarship

188. Smith, *supra* note 187, at 877 (footnotes omitted).

189. *Id.* at 866.

190. See *Mueller*, 208 U.S. at 419 n.1 (citing similar statutes).

191. Smith, *supra* note 187, at 870.

192. *Id.* at 881–82. Peggie Smith notes that: resolution of the servant problem depended upon the transformation of the relationship between maid and mistress from ‘a position of status to one of contract.’ . . . For reformers, such a shift was about restructuring domestic service in explicitly economic terms that conformed with modern industry, thus enabling middle-class households to compete successfully for workers.

Id. (footnotes omitted).

193. See *supra* notes 143–46 and accompanying text.

194. See, e.g., Hasday, *supra* note 114, at 779–80 (arguing that sex segregation in schools and courses played a significant role in subordinating women). Schools long have been in the business of enforcing gender and racial stratification in society by constructing maleness and femaleness. For example, athletics appeared in public schools “out of a desire to inculcate masculinity in males. Schools created athletic programs in response to concerns that boys were becoming ‘feminized’ by the increasing absence of fathers from the home during the industrial revolution.” Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 92 (2001) (footnotes omitted).

examining the history of women's education, cites an 1885 publication that warns that the "'greatest evil in the [coeducational] high school was the risk of injury to the health of girls.'"¹⁹⁵ Woody continues, noting that experts have found that:

Coeducation in the middle teens tends to sexual precocity. This is very bad; in fact, it is one of the subtlest dangers that can befall civilization. There are momentous changes in boys at the age of fourteen. Adolescence is a crisis in their lives. The first danger to a woman is over-brainwork. It affects that part of her organism which is sacred to heredity. This danger is seen in the diminishing number of marriages. The postponement of marriage is very unfortunate in its influence upon civilization.¹⁹⁶

Thus, by exposing young women to adolescent males and, at the same time to the rigors of intellectual pursuits best suited to males,¹⁹⁷ coeducation would impede women's ability to procreate, and in so doing, destabilize the institution of marriage. Woody's report reflected longheld views on education for women. Fifty years before, Dr. E.H. Clarke, a professor at Harvard University, elaborated on the physical harms of coeducation to women in his book, *Sex in Education*. He stated:

"Identical education, or identical co-education, of the sexes defrauds one sex or the other, or perhaps both. . . . A combination of the two methods of education, a compromise between them, would probably yield an average result, excluding the best of both. It would give a fair chance neither to a boy nor a girl. Of all compromises, such a physiological one is the worst. It cultivates mediocrity, and cheats the future of its rightful legacy of lofty manhood and womanhood. It emasculates boys [and] stunts girls" ¹⁹⁸

Other scientists asserted that women who pursued education would not be able to nurse their children, or would develop a "'nervous

195. THOMAS WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 273 (1929).

196. *Id.* at 274 (footnote omitted).

197. A related argument against coeducation or otherwise limiting women's educational opportunities was that the presence of women would lower the intellectual quality of the institutions "since [the] woman was the 'weaker vessel.'" *Id.* at 271 (footnote omitted).

198. *Id.* at 275-76 (quoting EDWARD H. CLARKE, *SEX IN EDUCATION* 127-29 (1874)).

temperament.”¹⁹⁹ In fact, some argued, that the push to educate women left them “‘physically unfit for her duties as woman She is not fairly up to what Nature asks from her as a wife and mother.’”²⁰⁰

There was no similar concern for Black women’s fertility, which was rooted in stereotypes about their fecundity and lack of morality. Scholars such as Kimberlé Williams Crenshaw have noted “there has been absolutely no institutional effort to regulate Black female chastity.”²⁰¹ For example, the legal system failed to recognize the rape of female slaves.²⁰² Similarly, Black motherhood has not been revered; instead it has been condemned as evidence of Black women’s uncontrollable sexuality or irresponsibility.²⁰³ Dorothy Roberts explains that “[o]ur society views childbearing by white women as desirable. . . . Procreation by Black mothers, on the other hand, is devalued and discouraged.”²⁰⁴ This devaluation is evidenced by the “welfare system’s disproportionate denial of Black mothers’ parental rights,”²⁰⁵ among other things. This disparity in the social construction between Black women and white women is evident in the educational opportunities available. The disparity in the social construct of Black and white womanhood was stark. The distinctions and normative judgments concerning each filtered into the educational opportunities made available. Thus, unlike Black women, who learned to work and support their families, white females received education to prepare them for becoming “true women.”

2. TRAINING FOR “TRUE WOMANHOOD”

Protectionist ideology justified limiting white female students’ access to education and supported steering them to sex-segregated institutions and courses that would prepare them for the separate sphere of the home, even in coeducational settings.²⁰⁶ For example, girls from working class families who were expected to work before marriage attended schools that prepared them for female-dominated occupations such as

199. *Id.* at 278.

200. *Id.*

201. Crenshaw, *supra* note 57, at 157.

202. *Id.* at 158 n.49.

203. Roberts, *supra* note 47, at 11-12.

204. *Id.* at 11.

205. *Id.* at 13.

206. See Hasday, *supra* note 114, at 803 (noting that “coeducational public schools formally segregated a portion of their classes or programs along sex lines as a way of directing students to life paths associated with their sex (or their sex and race)”).

public school teaching lunch-room management, [and] catering.

Sometimes, moreover, women's public schools just trained women for marriage itself. [For example,] Louisville's Female High School . . . did not offer the college preparatory classes available to the city's white male high school students. But it did supplement its class in vocational cooking with courses in household cooking, drawing, sewing, and millinery.²⁰⁷

Several states established institutions to provide white females with this type of training.²⁰⁸

Courts typically upheld admissions policies at such institutions because the coursework they provided was deemed appropriate for white women because it would presumably fulfill their educational needs and desires. Thus, for example, a court asked to strike down the admissions policy at the all-male Agricultural and Mechanical College of Texas refused to do so, in part because it doubted that any women in the entire state, absent the plaintiffs, would have a sincere interest in the college's curriculum, which included such subjects as history, government, and architecture.²⁰⁹ The court noted that "there is no proof that any other woman in Texas, save and except [the plaintiff], desires to obtain a degree . . . in [another course available at the institution]."²¹⁰

207. *Id.* at 796-97 (footnotes omitted).

208. *See, e.g.*, 1893 Ala. Acts 1002, 1004 (establishing an "industrial school for the education of white girls in Alabama" to provide training in "kindergarten instruction and music; also a knowledge of telegraphy, stenography, photography and phonography, type-writing . . . drawing, sewing, dress-making, millinery, cooking, laundry, house, sign and fresco painting . . ."); 1889 Ga. Laws 10, 10, 13 (establishing the "Normal and Industrial College as a branch of the State University, for the education of white girls"; the training included courses in "domestic economy, cutting and making dresses, printing, industrial and decorative art in its practical application, and such other practical industries as may tend to fit and prepare girls for occupations which are consistent with feminine refinement and modesty"); 1884 Miss. Laws 50, 52 (creating the Mississippi "Industrial Institute and College for the education of white girls of the State of Mississippi in the arts and sciences," which would train students in "telegraphy, stenography and photography; also a knowledge of drawing, painting, designing and engraving in their industrial application; also a knowledge of fancy, practical and general needle-work"); 1891 N.C. Session Laws 126, 126-127 (establishing a "normal and industrial school for white girls" that would "fit them for teaching . . . instruct[] young women in drawing, telegraphy, type-writing, stenography, and such other industrial arts as may be suitable to their sex and conducive to their support and usefulness").

209. *Allred v. Heaton*, 336 S.W.2d 251, 259 (Tex. App. 1960).

210. *Id.*

Similarly, an appeals court upheld the single-sex policy at all-female Winthrop College in South Carolina in *Williams v. McNair*.²¹¹ Several male students sued the state of South Carolina to enjoin enforcement of the statute barring their admission to Winthrop, which, according to the court, was the all-female counterpart to the Citadel, the all-male military college.²¹² The court held that with respect to these institutions, sex segregation was based on historical reasons: by designating the Citadel as a military school, “apparently, the Legislature deemed it appropriate for that reason to provide for an all-male student body.”²¹³ On the other hand, the legislature established Winthrop expressly as a school for white “young ladies.”²¹⁴

The South Carolina statute authorizing the college’s founding called for “[t]he establishment, conduct and maintenance of a first-class institution for the thorough education of the white girls of this State.”²¹⁵ As such, Winthrop offered courses that would be “specially helpful to female students,”²¹⁶ such as “teaching . . . stenography, typewriting, telegraphy, bookkeeping, drawing, . . . designing, engraving, sewing, dressmaking, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex and conducive to their support and usefulness.”²¹⁷ Using this circular reasoning, the court concluded that excluding males from Winthrop was permissible because the institution was established for women only to prepare them for their particular sphere in life. The Supreme Court affirmed this ruling without an opinion.²¹⁸

3. SEX SEGREGATION TO SAFEGUARD “TRUE WOMANHOOD”

Sex segregation also “protected” white femininity during the struggle to desegregate southern schools²¹⁹ in the wake of the Supreme

211. 316 F. Supp. 134, 138 (D.S.C. 1970).

212. *Id.* at 135–36.

213. *Id.* at 136.

214. *Id.*

215. *Id.* at 136 n.3.

216. *Id.* at 136.

217. *Id.* at 136 n.3.

218. *Williams v. McNair*, 401 U.S. 951 (1971).

219. See, e.g., GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 586 (Harper & Row 1962) (1942) (observing that segregation in education, as well in other areas, supported the notion of “no social equality,” which embodied a concern for “preserv[ing] ‘the purity of the white race’”). Myrdal notes that the effort to preserve white purity “is focused on white women,” as represented by the response of the typical “[s]outhern [white] man . . . to any plea for social equality: ‘Would you like to have your daughter marry a Negro?’” *Id.* at 586–87. Thus, as Myrdal describes it, protection of white women is a cover for preserving white supremacy. See *id.* at 586.

Court's decision in *Brown v. Board of Education*, which declared racial segregation in public schools to be unconstitutional.²²⁰ To remedy the violation, the Court remanded the underlying cases to district courts, ordering them to "require that the defendants make a prompt and reasonable start toward full compliance"²²¹ with the original *Brown* ruling and to proceed "with all deliberate speed"²²² to integrate their school districts. Fifteen years later, after steadfast resistance on the part of defendant school districts to dismantling dual educational systems,²²³ the Court concluded that the "standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. . . . [T]he obligation of every school district is to terminate dual school systems *at once* and to operate *now and hereafter* only unitary schools."²²⁴ To comply with this mandate, several southern school districts turned to sex segregation as a way of easing into racial desegregation.

Leading the way in this effort was the Tennessee, which enacted legislation in 1957²²⁵ that allowed for separating the sexes to "dull the edge"²²⁶ of the Court's ruling. Seven years later, Mississippi enacted a similar law that authorized the trustees of the state's school boards to separate students on the basis of sex in schools or classes "when such board, in its discretion, determines such separation will promote or preserve the public peace, order, or tranquility of the school district, or the health morals or education of the students."²²⁷ Pupil assignment laws, which were designed to slow down the pace of desegregation,²²⁸ also allowed school districts to take sex into consideration when

220. 347 U.S. 483, 495 (1954).

221. *Brown v. Bd. of Educ.* ("*Brown II*"), 349 U.S. 294, 300 (1955).

222. *Id.* at 301.

223. *See, e.g., Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 255 (1964) (holding that shutting down the public school system rather than integrating the schools violated the Equal Protection Clause).

224. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (emphasis added).

225. Act of March 5, 1957, ch. 98, § 1, 1957 Tenn. Acts 323 (codified at TENN. CODE ANN. § 49-2-108 (2002)). This measure authorized school boards of the counties, municipalities and special school districts of the State . . . to provide separate schools for persons of the male sex and persons of the female sex; the determination of the necessity for such separate schools is hereby vested in the exclusive discretion of the school board of each county, municipality and special school district.

Id.

226. Patrick E. McCauley, "*Be It Enacted*": *The Legislative Record*, in WITH ALL DELIBERATE SPEED: SEGREGATION-DESEGREGATION IN SOUTHERN SCHOOLS 141 (Don Shoemaker ed., 1957).

227. 1964 Miss. Laws 57, ch. 25, § 1.

228. McCauley, *supra* note 226, at 132 (noting that three years after the Court decided *Brown*, at least eight states enacted pupil enrollment laws to "control, if not to restrain, desegregation").

determining whether a student, usually African American, could transfer to a white school. Under these laws, rather than assigning students to school districts based on their residence, (which had been the custom even under a dual system in which there were two sets of zoning laws),²²⁹ school officials had the discretion to examine a variety of factors before deciding whether the transfer should take place. Thus, a student seeking a transfer would petition the local school board, which could consider factors such as

the sociological, psychological and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socio-economic class consciousness among the pupils . . . the sex, morals, conduct, health and personal standards of the pupil . . . together with any and all other factors which the board may consider pertinent.²³⁰

Sex was a factor to be considered in the pupil assignment laws for Alabama, Louisiana, Tennessee, and Texas.²³¹ By allowing school boards to decide the mix of Black and white males and females, among other things, pupil enrollment laws succeeded in delaying the integration of southern schools. Eight years after *Brown*, “only 7.6% of the Negro pupils in 17 Southern and Border states and the District of Columbia were attending desegregated schools,”²³² the majority of whom were located in states that did not have pupil enrollment laws.²³³

Still other school districts used sex segregation as part of their efforts to comply in “all deliberate speed”²³⁴ with the mandate of *Brown*, even without their legislature’s assistance. For example, the Amite County School District in Mississippi included separate boys’ and girls’ schools as part of its desegregation plan created in response to court order in 1969.²³⁵ The court approved this aspect of the plan, understanding it to be an “interim emergency measure to stabilize the education process,”²³⁶ suggesting that separating the sexes was imperative to helping alleviate the discomfort of the district’s students and parents with integration. The next year, the district sought to continue with the sex-segregated aspect of the plan, which the court

229. *Id.*

230. McCauley, *supra* note 226, at 137.

231. See Notes, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 1448, 1478 (1962).

232. *Id.* at 1453 n.28.

233. *See id.*

234. *See supra* notes 220–21 and accompanying text.

235. *See United States v. Hinds County Sch. Bd.*, 560 F.2d 619, 621 (5th Cir. 1977).

236. *Id.*

approved and “conclud[ed] that ‘the separation by sex plan stems from sound educational purposes as distinguished from racially discriminatory purposes.’”²³⁷ Black parents in the district opposed the plan, unsuccessfully seeking review by the U.S. Court of Appeals for the Fifth Circuit.²³⁸

Four years later, when the “temporary” sex separation plan was still in force, the United States challenged this plan under the then-newly passed EEOA,²³⁹ which seeks to ensure that children are able to attend schools in their own neighborhoods.²⁴⁰ By the time the court addressed this issue, Black parents had boycotted the Amite County schools to protest sex segregation because, in the words of the only Black member of the school board at that time, “[the Board] never had any idea of changing the [sex segregation plan]. ‘The idea is to keep the black boys from having any contact with the white girls—pure and simple.’”²⁴¹ In fact, the Board itself admitted as much, arguing in defense of sex segregation that “whites will leave the public school system if sex-desegregation is implemented.”²⁴² The president of the Board stated that before 1969, when the district finally desegregated the schools, “[b]oys and girls could attend school together . . . because ‘we had one school for whites and another school for coloreds.’”²⁴³ The court rejected this rationale as “impermissible”²⁴⁴ and agreed with the United States that it violated the EEOA as a practice the act specifically proscribed.²⁴⁵ In so holding, the court noted that the EEOA

goes beyond the rights guaranteed to school children under the Fourteenth Amendment prior to the EEOA’s adoption and incorporates a judgment that a sex-segregated school district is a dual rather than a unitary school system and results in a similar if not equivalent injury to school children as would occur if a racially segregated school system were imposed.²⁴⁶

237. *Id.*

238. *Id.* at 621 & n.4.

239. 20 U.S.C. §§ 1701–1758; *see also supra* note 63 (explaining the EEOA’s purpose and relevant provisions).

240. *Hinds County*, 560 F.2d at 623.

241. Merrill Sheils, *Segregation by Sex*, NEWSWEEK, Sept. 19, 1977, at 97.

242. *Hinds County*, 560 F.2d at 624.

243. Sheils, *supra* note 241, at 97.

244. *Hinds County*, 560 F.2d at 624.

245. *Id.* at 624 (noting that “[b]y Congressional definition ‘segregation’ means ‘the operation of a school system in which students are wholly or substantially separated among the schools . . . on the basis of race, color, sex, or national origin’”).

246. *Id.* at 623. The court of appeals came to this conclusion because, among the findings of the EEOA is the statement “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

Other school districts were not as transparent regarding their decisions to segregate students based on sex. Faced with the order to integrate, these districts typically argued that separate schooling based on sex was best as a pedagogical matter, without accounting for the fact that sex segregation had not been among the educational options available in the public school system prior to the Supreme Court's mandate that they desegregate immediately. For example, Concordia Parish in Louisiana proposed separate schools for boys and girls apparently under court-ordered pressure to desegregate.²⁴⁷ During a hearing on the plan, the superintendent of schools testified "that the coeducational system in effect in Concordia was educationally sound as long as the schools are racially segregated," but sex segregation is "'most educationally sound'" under an integrated system,²⁴⁸ providing a more politic—but remarkably similar—explanation as that offered by the Amite County School Board President, which was discussed above.²⁴⁹

fourteenth amendment." *Id.* (internal quotations omitted). Recent Supreme Court decisions suggest that the Fifth Circuit's assessment of the reach of the EEOA may be erroneous. See *City of Boerne v. Flores*, 521 U.S. 507, 515, 519 (1997) (invalidating the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb, which prohibited the "[g]overnment from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability"). The Court held that Congress exceeded its authority under § 5 of the Fourteenth Amendment in passing the RFRA because the Act substantively redefined the scope of protection afforded by the Amendment:

Congress' power under § 5 . . . extends only to "enforc[ing]" the provisions of the Fourteenth Amendment[] . . . Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

Id. at 519. This reasoning suggests that the Fifth Circuit's holding is likely erroneous because Congress does not have the power to declare all sex-based classifications in education unconstitutional. See *VMI*, 518 U.S. at 533–34 (noting that "[s]ex classifications may be used to compensate women 'for particular economic disability [they have] suffered' . . . to 'promot[e] equal employment opportunity' . . . to advance full development of the talent and capacities of our Nation's people").

247. See *Singleton v. Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211, 1220 (5th Cir. 1969). The *Singleton* litigation consolidated numerous appeals and incorporated the appeals into this single litigation, but the court provided independent decisions for each case. In this instance, I will cite the above *Singleton* decision to discuss several decisions included in the *Singleton* matter, such as *Smith v. Concordia Parish School Board*, 419 F.2d 1211, 1220 (5th Cir. 1969).

248. Brief for Appellants at 9, *Smith*, 419 F.2d 1211 (No. 28342) (on file with author). For its part, the school board argued that considering sex segregation for the first time made sense because under *forced integration* the district was going to make many changes to all the schools. *Id.* at 6–7. The court did not decide whether the sex segregation aspect of the plan violated the Constitution because the plan as a whole failed to create a unitary system. See *Smith*, 419 F.2d at 1220.

249. See *supra* note 243 and accompanying text.

Similarly, officials in Louisiana's Ascension Parish turned to separate schools based on sex under orders to dismantle its racially segregated school system.²⁵⁰ In support of this plan, the school board submitted an article by the superintendent of St. Bernard Parish, which had adopted single-sex schools. The superintendent wrote that "[i]t would be less than honest not to add that . . . we felt that certain problems which might arise in newly integrated schools would be lessened if the sexes were separated."²⁵¹ Similarly, a school board in Georgia²⁵² argued that sex segregation was necessary to avoid disciplinary problems:

It is common knowledge that disciplinary problems ordinarily increase in the racially integrated school. Many black citizens question the ability of any white teacher to relate to, discipline, or properly teach black children who are the product [sic] of black rather than white middle class culture. Is it not reasonable to assume that local school officials, faced with massive racial integration, *desiring that it work* and that meaningful public education be maintained, seize upon the device of separation by sex as a means of reducing disciplinary problems?²⁵³

In this respect, the state admitted that race played a part in its decision to segregate based on sex and responded to such charges leveled by the United States with a terse, "so what!"²⁵⁴ For its part, the United States argued that sex segregation perpetuated racial segregation.

Despite this conversion to sex-separation in the schools, Taylor County continued to racially segregate students on buses with white boys and girls being transported by white drivers and black boys and girls being transported by black drivers. . . . In some instances, black girls were assigned to separate seats within a bus by the white drivers.²⁵⁵

250. See *Charles v. Ascension Parish Sch. Bd.*, 421 F.2d 656, 656-57 (5th Cir. 1969).

251. Brief for Appellant at 105, *Charles*, 421 F.2d 656 (No. 28573) (on file with author). Here again, the court did not rule on the constitutionality of sex segregation, since the rest of the plan failed to create a unitary school district. *Charles*, 421 F.2d at 657.

252. See *United States v. Georgia*, 466 F.2d 197, 199-200 (5th Cir. 1972).

253. Brief for the State of Georgia et al. at 17, *Georgia*, 466 F.2d 197 (No. 71-2563).

254. See *id.* ("[E]ven assuming . . . that the separation by sex was 'racially motivated,' the proper response is so what! This is what the federal courts require.").

255. Brief for the United States at 19, *Georgia*, 466 F.2d 197 (No. 71-2563).

Confronted with this aspect of the county's plan, which the district court had approved without even holding hearings concerning its validity, the Fifth Circuit reversed the ruling below and ordered the district court to hold a full hearing to determine whether the planned sex segregation was, in fact, racially motivated.²⁵⁶

As the foregoing demonstrates, the confluence of sex and race segregation supported racial and gender hierarchies and the attendant subordination of African Americans and white women. By separating students based on sex and race, the nation's educational system constructed a gendered and raced hierarchy that privileged white masculinity and white femininity. To the extent that sex segregation was deemed appropriate and necessary for Black students, it was for purposes of replicating and thus reinforcing white patriarchy, thereby ensuring that African Americans would remain at the bottom rungs of the social strata. Needless to say, these hierarchies persist in our society. Accordingly, the question for today's versions of single-sex education is whether they will provide the needed reforms to begin dismantling ingrained patterns of discrimination that limit opportunities for inner-city children or merely provide cover for continued subjugation of these students. Part III demonstrates how an intersectional analysis can assist in that inquiry.

III. WHAT THE PAST MEANS FOR TODAY'S SINGLE-SEX SCHOOLS

For much of its history, single-sex schooling has occurred within a larger context of racial segregation in the schools, working to reinforce the racial and gender hierarchies that permitted and indeed sanctioned continued subordination of African Americans.²⁵⁷ Today's versions of sex segregation similarly occur against a backdrop of racially segregated urban schools—albeit *de facto* rather than *de jure*.²⁵⁸ As a result, and given the nation's history, any analysis of proposed single-sex education must consider, at the bare minimum, the interaction of race and gender. Under such an intersectional analysis, we can determine whether new efforts will in fact provide for new and expanded life paths for Black students or whether these new schools merely will support the retrenchment of racist and sexist norms.

256. *Georgia*, 466 F.2d at 200.

257. *See supra* Part II.

258. *See* Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* (Harvard Civil Rights Project, July 2001), at http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf.

A. *Through an Intersectional Looking Glass: Raced and Gendered Social Roles*

Examining single-sex education relationally—that is, as it relates to racial segregation—demonstrates how integral sex segregation has been to racializing gender roles and sexualizing race.²⁵⁹ The first step necessary to understanding current single-sex schooling proposals' potential for perpetuating gender and racial stratification is to explain how sex segregation's past supported racism and patriarchy.

Under a single-sex schooling regime, white females learned that they were destined to become “true women,” the keeper of home, hearth, and the holder of the future for the race. Schools for “white girls”²⁶⁰ protected their charges' weak constitutions and trained them to take their *rightful* places in their husband's castles, through acquiring such *useful* skills as cooking, sewing, and millinery.²⁶¹ White males, on the other hand, expected to become providers for their families, obtained the rigorous education necessary to prepare them for this role and thus had access to a wide range of educational opportunities.²⁶² This framework stood in stark contrast to the education provided to African Americans.

The education system prepared Blacks—male and female alike—to work, consistent with the almost genderless manner in which slavery constructed African Americans—from dressing boys and girls alike, to requiring men and women to perform virtually identical physical labor.²⁶³ After slavery and Reconstruction, some gendered distinctions emerged, which only further constrained African Americans. Thus, for example, the educational system ensured that Black women could take care of white families, rather than or at the expense of their own²⁶⁴ and provided them with training to compensate for their perceived moral failings.²⁶⁵

The primary mission of single-sex education was to prepare Black females to take their *rightful* positions in the workplace, often in the homes of white people, or in other low-paying occupations,²⁶⁶ which, in turn, constructed Black women as “true workers.” In so doing, the educational system also supported the construction of Black men as “true laborers.” As a result, rather than provide and preside over the household as “true men,” Black men were expected to need help

259. *Supra* Part II.

260. *See supra* note 208 and accompanying text.

261. *See supra* notes 206–18 and accompanying text.

262. *See supra* note 194 and accompanying text.

263. *See supra* notes 143–47 and accompanying text.

264. *See supra* notes 149–54 and accompanying text.

265. *See supra* note 160 and accompanying text.

266. *See supra* note 159 and accompanying text.

supporting their families financially, largely because they were denied access to the educational opportunities that would guarantee economic independence.²⁶⁷ In this sense, sex segregation among whites contributed to consigning Black males and females to raced and gendered roles that diverged from those of the majority, which in turn were held up as proof of Black inferiority.

African American efforts at self-help sought to combat these images and constraints, with the hope of demonstrating that Blacks deserved equal rights in society. However, the manner in which some of these efforts were carried out relied overtly on patriarchy in order to privilege Black males, holding them out to be the hope for racial equality. Thus, for example, DuBois' vision of a "talented tenth" would have constructed a class of classically educated elite African American men. These men, through their superior education, would uplift the entire Black race, facilitating their agency and liberation from discrimination.²⁶⁸ In DuBois' view, Black women—while hugely important to the Black race—did not have the central role with respect to this plan. Therefore, he advocated "knowledge" for African American women but did not count them as making up a large percentage of the talented tenth.²⁶⁹ Booker T. Washington, for his part, used the Tuskegee Machine to replicate traditional gender roles, providing a separate program of "Industries for Girls," to assure white society that African Americans were capable of assimilation.²⁷⁰ Thus, even according to the leading schools of thought regarding Black education, allegiance to patriarchy played a role in strategies for improving the lot of Black people.

As a result, when Nannie Helen Burroughs provided her female students with training in the trades—nontraditional work for women—she was met with great opposition.²⁷¹ The specter of young women attaining the skills that would enable them, *alone*, to provide for their families threatened the notion of the Black male as the provider that Washington and others were trying so carefully to establish.²⁷² Burroughs was forced to abandon that program for lack of financial and political support.²⁷³ Thus, even in the context of Black-provided education, the construction of a gendered hierarchy that identified Black males as protectors for the race emerged as a key strategy.

267. See *supra* note 165 and accompanying text.

268. See *supra* notes 129–31 and accompanying text.

269. See *supra* note 129 and accompanying text.

270. See *supra* notes 178–79 and accompanying text.

271. See *supra* notes 170–72 and accompanying text.

272. See *supra* notes 171–72 and accompanying text.

273. See *supra* note 172 and accompanying text.

In today's world, the discourse around single-sex education focuses once again on making sure Black males learn how to become men,²⁷⁴ and, in a less direct way, to ensure that Black females grow into "real women" who support their men.²⁷⁵ The goal essentially is to replicate the roles exemplified by whites and, in so doing, establish the "proper patriarchal balance"²⁷⁶ between Black women and Black men, without determining whether that goal is workable or desirable for African Americans.²⁷⁷

Thus, in the rhetoric, Black females continue to stand apart from their white counterparts. For example, single-sex education helps white females become more confident and empowered, more likely to engage in the fields of science and mathematics.²⁷⁸ For Black girls, on the other hand, single-sex education means they are less likely to get pregnant or to engage in sexual activity at "dangerous proportions."²⁷⁹ White femininity remains prized for its virtue and its delicacy; single-sex education is a means of empowering their flagging confidence. Black femininity, on the other hand, is marked by hypersexuality and fecundity.

The deviance of Black femininity is further underscored in the larger debates regarding the justifications for sex segregation in the nation's inner cities. Specifically, by suggesting that single-sex education will compensate for the proliferation of female-headed households among Black families, current single-sex efforts support the construction of Black motherhood as abnormal and blameworthy for social problems as broad and divergent as juvenile delinquency and poverty.²⁸⁰

These depictions of Black femininity also have implications for the construction of Black masculinity. Here again, Black males are posited as irresponsible and undependable—that is, if they were "true men" they would take care of their own families and not expect the government to do so. Similarly, the trope of the oversexed Black male, which supported racially segregated schools,²⁸¹ persists. In this connection,

274. See *supra* notes 34–38 and accompanying text.

275. See *supra* note 36 and accompanying text.

276. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 395 (1991).

277. Cf. BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 113 (1992) (urging Black men and Black women to "break the life-threatening choke-hold patriarchal masculinity imposes on black men and create life sustaining visions of a reconstructed black masculinity that can provide black men ways to save their lives and the lives of their brothers and sisters in struggle").

278. See *supra* note 44 and accompanying text.

279. See SALOMONE, *supra* note 11, at 18.

280. See *supra* note 40 and accompanying text.

281. See *supra* notes 219–56 and accompanying text.

single-sex education will help stop Black males from impregnating so many females. The discourse further posits Black males as dangerous and threatening, just as was true in the post-*Brown* era, when proponents for single-sex education argued that just having African American males in the classroom would disrupt the environment and make desegregation less likely to work.²⁸² In the present day, the absence of Black males is enough to proclaim a school a safe haven for girls.²⁸³

A brief examination of California's recent experiment in single-sex education²⁸⁴ is illustrative. In 1997, California provided funding to create single-sex academies for boys and girls, with an eye toward, in the words of former Governor Pete Wilson, helping "at-risk boys"—that is, low-income, African American and Latino boys.²⁸⁵ With this goal in mind, six districts—four of which were predominately minority—established single-sex academies that were either schools on their own, or single-sex schools within a coed school.²⁸⁶ Researchers studied these academies, in part to determine whether they would provide some insight into the potential for sex segregation to reform public education, particularly in light of the lack of "systematic research" in this area.²⁸⁷ Among the many findings, the researchers noted that because the state had established the schools with an emphasis on helping "at-risk boys," there was a concomitant emphasis on gender, which manifested itself in preconceived notions regarding what type of curriculum was most appropriate, among other things. Thus, the schooling emphasized "discipline for boys and curriculum opportunities for girls."²⁸⁸ For instance, at one academy, researchers "found that the boys' classes were

282. See *supra* note 253 and accompanying text.

283. See *supra* notes 51–53 and accompanying text.

284. See generally AMANDA DATNOW ET AL., IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR? LESSONS FROM CALIFORNIA'S PILOT PROGRAM (2001), available at <http://www.oise.utoronto.ca/depts/tps/adatnow/final.pdf> (on file with author).

285. One commentator has explained the troubling "significance" of the "at-risk" label as follows:

It was no coincidence that the at-risk- boys targeted for the academies were primarily lower-class, African-American and Latin-American students. . . . The modal category for African American boys is at-risk. . . . The concept of at-riskness is central to a discourse about the contemporary crisis in urban schools in America that explains children's failure as largely the consequence of their attitudes and behaviors.

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 286 (Amanda Datnow & Lea Hubbard eds., 2002) [hereinafter Woody, *Constructions of Masculinity*] (quotations omitted).

286. DATNOW, *supra* note 284, at 20.

287. *Id.* at 5 (noting that "little is known about [the schools'] motivations, design, or outcomes with respect to students, teachers, and school systems").

288. *Id.* at 41.

in a 'lock down' status and no one was allowed to enter or leave the classroom."²⁸⁹ The terminology used suggests a penal institution, rather than an educational one. Indeed, some educators believed that the academies could not provide the "at-risk" boys with enough discipline²⁹⁰ and

expressed the belief that their at-risk population of boys were difficult and would have in retrospect benefited more from an "academic boot camp," which would ideally be taught by male teachers. . . . The tone and approach of discipline for boys was often quite harsh and usually meant that their classes were "very regimented."²⁹¹

Girls, in contrast, were not subject to the same level or degree of discipline as were the boys, prompting students to "talk[] about discipline as a gendered practice . . . [where] boys felt they were singled out and presumed to behave poorly."²⁹²

Girls had their own curricular choices that were deemed suitable. For example:

In [one district's] girls' academy, the students chose to read *Pride and Prejudice*. In the boys' academy, the students chose to read *All Quiet on the Western Front*. One teacher explained: "[t]he girls tend to choose the romantic spiel . . . and the guys tend to go for the action."

When students in [another] district's academies were studying the early history of the United States and the migration of settlers to the West, boys took a survival skills class from a young male teacher and the girls studied quilting and sewing, taught by middle-aged women teachers. . . . At another school, a male teacher said he used sports to clarify or simplify ideas for his male students because "guys can kind of relate to that." . . . In sum it appears that when teachers geared the curriculum to respond to students' interest, they perhaps unintentionally reinforced traditional gender roles. Significantly, in most cases, teachers did little to change student choices by suggesting alternative book choices or topics that might potentially challenge gendered dispositions.²⁹³

289. *Id.* at 42.

290. *Id.* Significantly, however, the researchers noted that as the level of discipline increased, so too did the problems. For example, by the last time they visited one of the schools, "police were on campus because students had written gang graffiti on the walls." *Id.*

291. *Id.* at 42.

292. *Id.* at 43.

293. *Id.* at 40.

Researchers found that even with a stated concern for “neutrality,”²⁹⁴ teachers approached students with gendered expectations and that gendered curricula resulted even when students were allowed to *choose*²⁹⁵ for themselves.

The overt and covert curricula in California’s experiment reinforced existing social constructions of femininity and masculinity based on race, sex, and class. For girls of color, that meant focusing on romance and developing practical skills for the home rather than on building capacity in academic subjects. Similarly, for males, the academies reinforced a vision of masculinity that focused on disruptive behavior, athleticism, and being “bad,” such that when confronted with disciplinary action, the boys would proclaim, “Ooh, I’m the man.”²⁹⁶

Significantly, while these raced and gendered lessons were occurring, there was much less emphasis on the preparation that would truly advance life opportunities for these students. For example, none of the single-sex academies offered students Advanced Placement courses,²⁹⁷ which suggests that for all the talk about reform and increasing educational opportunity for “at-risk” students, these schools were not deemed college preparatory in function. In fact, the researchers concluded that based on California’s experience, single-sex schooling has great potential to create a new low-educational track for students labeled as “at risk.”²⁹⁸

In addition, by supporting traditional gender roles, with all the concomitant racial implications, the academies fostered an environment that reinforced existing limiting conceptions of gender roles for students.

294. See *id.* at 39 (noting that the teachers “attempted to make the curriculum ‘gender neutral.’ In practice, this sometimes meant that the curriculum was oriented toward the males, as teachers were very concerned about maintaining order in the all boys classes”); cf. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 163 (1989) (observing that the “foundation for [the law’s] neutrality is the pervasive assumption that conditions that pertain among men on the basis of gender apply to women as well”). As MacKinnon argues, if neutrality assumes masculinity as the norm, then it is hardly surprising that with an unexamined emphasis on “gender neutrality” the California educators unwittingly took an approach to learning that was geared toward the boys.

295. Cf. Vicki Shultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1756 (1990) (arguing that women’s choices in employment are shaped in large part by employers’ cultural expectations, among other things).

296. Woody, *Constructions of Masculinity*, *supra* note 285, at 290 (internal quotations omitted).

297. DATNOW, *supra* note 284, at 67.

298. *Id.* at 73 (cautioning that single-sex schooling could become “a new form of tracking or resegregation”).

For example, in some instances, the academies fostered a hypermasculinized environment that led:

[g]irls [at one] academy [where discipline of males was particularly harsh] . . . to express fears and frustration about persistent sexual harassment from their male peers. Likewise, as researchers, we experienced discomfort and disrespect, including foul language and sexual innuendos, in interviews with boys at this school that were never experienced anywhere else throughout the project. If anything, strict discipline at this school instilled a strong sense of male privilege and authority. Men were either positioned as the protector and provider or as the predator, and women were either in need of assistance or in a position of sexual objectification.²⁹⁹

Researchers also found that while there was some flexibility for the girls to go beyond traditional gender roles notwithstanding the other messages they received,³⁰⁰ there was little if any flexibility concerning what it meant to be "male."³⁰¹ The researchers found that, as a result, the boys enforced the gender code in a variety of ways, including through the use of insults:

Boys set the rules of masculinity through the uses of insults such as sissy or fag to describe peers who did not fit their norm of boyhood. Crossing the lines of gender, as in acting like a girl, or sexuality were considered suspect. Students used homophobic teasing as a means to enforce the rules of masculinity and femininity.³⁰²

In this connection, the intersection of race, gender, and class combined to reinforce a construct of femininity and masculinity that was limiting for students and perpetuated subordination based on those characteristics. California's experience is likely to be replicated under the current Bush proposal, which would establish few constraints on the creation of single-sex schools and classes.³⁰³

299. Woody, *Constructions of Masculinity*, *supra* note 285, at 288.

300. *Id.* at 295 (observing that "girls were well-versed in the notion that they could 'do anything'").

301. *Id.* (noting that "[b]oys expressed stricter expectations to be strong and support a family, upheld in part by institutional messages that boys should be more disciplined").

302. *Id.* at 295-96 (internal quotations omitted).

303. *See supra* notes 84-106 and accompanying text.

Just as in California, the Bush effort is not motivated by or rooted in a desire to promote gender equality,³⁰⁴ which necessarily would entail questioning and challenging traditional gendered and raced norms. Instead, as articulated in the Notice, the proposal is intended to enhance public education agencies' flexibility³⁰⁵ to experiment in this way, based on the misinformed assumption that single-sex education is benign.³⁰⁶ Moreover, the Notice indicates that no consideration will be given to the fact that students of color will likely be most affected if Title IX regulations are modified to permit the spread of sex segregation. Lacking even the basic understanding of gender, much less the racial implications of the proposed policy, the Department fails to conduct the searching inquiry necessary to ensure that single-sex education really improves educational outcomes for students of color. The next Section will demonstrate how an intersectional approach might be used in cases to make that determination.

B. Intersectionality Applied

*Garrett*³⁰⁷ illustrates the importance of considering sex and race. In *Garrett*, the court assumed erroneously that race was not an issue because all the students involved were Black, as were the parents and the school board that ultimately decided to create the all-male academies.³⁰⁸ However, as this Section demonstrates, consideration of race is essential to determining the plan's validity as a legal matter and advisability as a public-policy matter.

Garrett became emblematic of certain aspects of school reform in the inner cities, which were characterized by parents who were fed up with the failure of public schools to educate their children, sympathetic educators who were willing to experiment in order to find something that works, and civil rights advocates who were fearful of losing the little ground that has been attained post-*Brown*. These conflicting interests came to a head before a federal judge, who at the urging of advocates seen as interlopers,³⁰⁹ invalidated the academies.³¹⁰ The decision itself, while not a final determination on the merits after a

304. DATNOW, *supra* note 284, at 5 ("Instead of seeing the single gender academies as primarily an opportunity to address gender inequities for girls and boys (as one might predict) most educators saw the \$500,000 state grant as a way to help address the more pressing educational and social problems of low achieving students.").

305. *See supra* note 81 and accompanying text.

306. *See supra* Part II.

307. 775 F. Supp. at 1004; *see supra* notes 5–20 and accompanying text.

308. *Nightline*, *supra* note 4.

309. *See supra* note 11 and accompanying text.

310. *Garrett*, 775 F. Supp. at 1008.

trial,³¹¹ became the authoritative word on the impermissibility of single-sex education in the public schools,³¹² and sparked a series of national efforts to *fix* the situation.³¹³ Now, the legal landscape apparently is about to shift³¹⁴ to provide school districts such as Detroit greater flexibility³¹⁵ to segregate students based on sex, if the Bush Administration has its way. But as the foregoing demonstrates, the history of sex segregation demands more questions, not fewer, and greater protections, not less, to ensure that the new single-sex schools and classes do not create yet another dead-end academic track for Black children.³¹⁶

The primary plaintiff in *Garrett* challenged her daughter's exclusion from three planned all-male academies, alleging that the admissions policy violated the federal Constitution, Title IX, and other laws.³¹⁷ The Board created these academies for Black males, who, in the Board's estimation, were in need of particular assistance because of their high dropout rates, involvement in the drug trade, and incarceration.³¹⁸ In this regard, the academies were to offer special programs designed to meet these boys' needs, including: "Rites of Passage"; preparation for twenty-first century careers; mentors; and "male responsibility."³¹⁹ The Board also recognized that Black females faced a crisis of their own, which the Board argued it already was addressing through pregnancy-related programs.³²⁰

Assuming that the case presented only the issue of sex-based exclusion, the court applied heightened scrutiny,³²¹ concluding that while the stated purpose of assisting troubled African American males was an important governmental purpose, the means proposed were not closely related to that purpose.³²² Specifically, the court found that "there [was] no showing that it [was] the co-educational factor that result[ed] in failure" of the schools to serve Black males appropriately.³²³ The court also suggested that had the Board established a similar program for

311. The matter came before the court on a motion for a preliminary injunction. *Id.* at 1006.

312. SALOMONE, *supra* note 11, at 131.

313. *See supra* note 60.

314. *See supra* note 84 and accompanying text.

315. *See supra* note 84 and accompanying text.

316. *See supra* note 298 and accompanying text.

317. *Garrett*, 775 F. Supp. at 1005.

318. *Id.* at 1007.

319. *Id.* at 1006-07.

320. *Id.* at 1007.

321. *See id.* at 1006-07; *see also Hogan*, 458 U.S. at 723-24 (discussing heightened levels of scrutiny applicable in gender cases).

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

323. *Id.*

Black females, the academies might have survived,³²⁴ indicating that a formal equality approach might have remedied the violations of equal protection and Title IX. But this reasoning is inadequate.

The question for courts, as well as policymakers for that matter, is whether sex segregation will perpetuate race- and gender-based subordination of African American students, irrespective of whether *equal* resources are available. While advocating for an antisubordination inquiry is not a new approach,³²⁵ this Article suggests that the inquiry should focus not only on the students who would benefit from sex segregation but also on the students who are excluded. Thus, *Garrett* raises the issue of whether the proposed academies would subordinate the Black boys who attend them, as well as the Black girls who cannot. Specifically, based on the potential for single-sex education to perpetuate racism and patriarchy, at a minimum, the following questions should be addressed: do the academies perpetuate racialized gender roles, and do they contribute to sexualizing race? When applied to *Garrett*, the inquiry demonstrates that rather than representing a progressive reform strategy, the proposed academies actually supported retrenchment of the very subordination that its proponents wanted to attack.

1. PERPETUATING RACIALIZED GENDER ROLES

As proposed, the academies at issue in *Garrett* would have constructed masculinity in a traditional manner and thus supported white patriarchy.³²⁶ Consider the rhetoric justifying their creation. Namely, the academies were going to help Black males overcome the handicap of being raised in female-headed households by providing them with role models.³²⁷ While it is well documented that households that are headed by single women, including single Black women, are more likely to be poor,³²⁸ it is doubtful that providing masculine role models for boys will improve the economic status of their families or create a plethora of two-parent households. In fact, suggesting that the problems of African Americans can be solved by teaching Black boys to be men is precisely

324. See *id.* at 1009 (noting that the “[p]laintiffs’ claims . . . do not rest solely on the denial of admission; [they also seek to vindicate] their right to the same benefits and services”); *id.* at 1006 n.4 (noting that the court was “not presented with the question of whether the Board can provide separate but equal public school institutions for boys and girls”).

325. See generally Morgan, *supra* note 80.

326. See *supra* notes 34–38 and accompanying text.

327. See *supra* note 40.

328. BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-219, POVERTY IN THE UNITED STATES: 2001, at 16 (2002) (noting that the poverty rate for female-headed households is 28.6%).

the same racist and sexist rhetoric that has cast Black women as deviant and Black families as matriarchal and therefore pathological.³²⁹

Additionally, in proposing to emphasize traditional male behavior and coping strategies,³³⁰ the academies would have reinforced a construct of “hegemonic masculinit[y]”³³¹ that is both limiting to the boys who seek to replicate it and threatening to those who fail to conform to its standards.³³² As the California example illustrated, the emphasis on traditional “male” behavior, particularly in the context of educating “at-risk boys,” resulted in the belief that strict discipline was necessary. This emphasis in turn resulted in the boys acting out with overly aggressive or “stereotypically male” behavior.³³³ In addition, this vision of maleness excludes and alienates students who do not conform to the traditional gender stereotype,³³⁴ which typically leads to physical and psychological violence intended to force the boys to become *men*, for example.³³⁵ In this connection, the emphasis on the traditional gender roles has the potential to subordinate students who identify themselves as gay, lesbian, bisexual, transgendered, or undecided.

Finally, the Board’s emphasis on saving boys in this context privileged Black males as the racial victims,³³⁶ which is a limiting strategy upon which to build a liberation movement.³³⁷ As the court

329. See generally Ryan, *supra* note 39.

330. Garrett, 775 F. Supp. at 1006–07 (outlining proposed programs, including programs designed to help boys control their emotions).

331. See Woody, *Constructions of Masculinity*, *supra* note 285, at 296; see also *supra* notes 268–87 and accompanying text.

332. See *supra* note 302 and accompanying text.

333. See DATNOW, *supra* note 284, at 50; see also *supra* notes 268–76 and accompanying text.

334. See, e.g., Deborah Brake, *The Cruellest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX*, 1 GEO. J. GENDER & L. 37, 92 (1999) (“Students can be the cruelest of the gender police. Gender role conformity is particularly important as a source of security and confidence in childhood and adolescence.”). In light of Black Americans’ perceived failure to conform to traditional gender norms, the pressure for young African Americans to do so may be particularly intense. Cf. Benoit Denizet-Lewis, *Double Lives on the Down Low*, N.Y. TIMES MAG., Aug. 3, 2003, at 28, 31 (describing cultural strictures that discourage Black gay men from being open about their sexuality). One interview subject noted “[i]f you’re white, you can come out as an openly gay skier or actor or whatever. It might hurt you some, but it’s not like if you’re black and gay, because then it’s like you’ve let down the whole black community, black women, black history, black pride.” *Id.* at 31.

335. See Brake, *supra* note 334, at 92–93 (noting that sexual harassment frequently is the means used “to punish gender outliers . . . and to reinforce the boundaries of gender by bolstering the sex stereotypes associated with maleness and femaleness”).

336. See Carbado, *supra* note 38, at 434.

337. See *id.* at 434–35.

correctly noted, the focus on Black boys rendered the problems affecting Black females invisible and perpetuated the myth that females are doing just fine³³⁸ without addressing their problems meaningfully. Indeed, any student of color who did not match the profile of Black males was excluded from this effort, which sent the message that those students were not worth saving.

2. SEXUALIZING RACE

Similarly, the plan in *Garrett* was flawed because it contributed to sexualizing Blacks. Specifically, when confronted with its failure to provide any special programming for Black girls, the Board responded that such programming was available in the form of pregnancy-related courses.³³⁹ While there is no doubt that the rate of teen pregnancy for Black girls is too high,³⁴⁰ the Board's strategy fed into the construction of Black females as overly fecund and hypersexual by suggesting that the only program they needed was one focusing on child-bearing, not on math or science, for example, which have been characterized as fostering a sense of competence, at least with respect to middle-income white females.³⁴¹ In this context, emphasizing the development of essential academic skills likely would prove more effective at discouraging teen pregnancy by providing the tools for higher education or meaningful employment—true disincentives for premature child-bearing.³⁴² Such an alternative was unavailable and not even under consideration.

Thus, by according primacy to Black males and reinforcing the construction of traditional masculinity with the end of replicating patriarchy, the Board's plan in *Garrett* was, in fact, regressive. The effect of the plan would be to support the very systems that have subordinated African Americans since the nation's founding.

338. See *Garrett*, 775 F. Supp. at 1007–08.

339. See *id.* at 1007.

340. See Annie E. Casey Found., *supra* note 49.

341. See Stabiner, *supra* note 43, at B1 (contrasting white females at a suburban, private, single-sex institution with Black females attending New York's TYWLS).

342. See Austin, *supra* note 48, at 558 (arguing that “[b]lame for black teenage pregnancy must be shared by an educational system that fails to provide black youngsters with either the desire or the chance to attend college”).

IV. CONCLUSION

*It cannot be denied that the wisest plan of education for any people should take cognizance of past and present environment, should note the forces against which they must contend, or in unison with which they must labor in the civilization of which they form a part.*³⁴³

As we evaluate strategies designed to reform today's inner-city schools today, we must examine and comprehend fully the past. Thus, as the debate concerning single-sex education moves forward, we must first recognize the role sex segregation in schools has played in reifying limiting race and gender roles that have contributed to the subordination of African Americans and women. Only by reckoning with the past can we fully evaluate the potential for sex segregation to provide the academic reform so necessary for students to succeed in the future. Such an analysis requires examining the intersection of race and sex, at a minimum, to assess the likely effect of single-sex education on students of color today. Unfortunately, that history and its legacy suggest that single-sex schools may not be the progressive reform strategies for public schools its proponents hope.

When viewed within the context of race- and sex-based discrimination in education, sex segregation emerges as a means of supporting patriarchy and white supremacy. Single-sex schools helped construct "true" masculinity and femininity as white,³⁴⁴ while constructing Black masculinity and femininity as deviant.³⁴⁵ History also shows that, at times, African Americans have adopted single-sex schooling as a strategy to gain white acceptance and equal access to opportunities in society. However, even in this context, single-sex education continued to reinforce raced and gendered norms to support the patriarchal framework that has subordinated Blacks.³⁴⁶

The legacy of this history is evident in today's discourse regarding single-sex education. Arguments that separating the sexes in inner-city schools will promote safety and prevent pregnancy echo long-standing, constraining stereotypes concerning students of color. For example, the California experiment with single-sex education, which was not grounded in efforts to achieve equality, reflected those stereotypes³⁴⁷ by

343. Anna Julia Cooper, *On Education*, in *THE VOICE OF ANNA JULIA COOPER* 248, 250 (Charles Lemer & Esme Bhan eds., 1998).

344. See *supra* notes 194–206 and accompanying text.

345. See *supra* notes 138–47 and accompanying text.

346. See *supra* notes 170–79 and accompanying text.

347. See *supra* notes 288–302 and accompanying text.

subjecting male students of color primarily to discipline,³⁴⁸ while exposing female students of color to romance and homemaking skills.³⁴⁹ Significantly, sex segregation in that setting did not provide the promised academic opportunities and lead researchers to conclude that single-sex education had the potential to be a new dead-end track for low-income students of color.³⁵⁰

It is worth noting that, just as was true in the case of California, the Department's current proposal lacks a focus on gender equality. In fact, the Department has gone so far as to suggest that such an emphasis is unnecessary.³⁵¹ Given the lessons of the past, the failure to consider the race and gender-norming likely to occur means the proposed policy changes will likely result in no reform whatsoever. Real change in our public schools will come only when we recognize the manner in which educational institutions have entrenched race- and sex-based subordination in the past, and the implications of that past for today. Then we must commit our best efforts to devising new strategies to dismantle that legacy and establish a new track of equality of opportunity for all our sons and our daughters.

348. *See supra* note 288 and accompanying text.

349. *See supra* notes 293-96 and accompanying text.

350. *See supra* note 298 and accompanying text.

351. *See supra* notes 87-88 and accompanying text.

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