

LEARNING DIFFERENCES: SEX-ROLE STEREOTYPING IN SINGLE-SEX PUBLIC EDUCATION

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INTRODUCTION

In the United States today, a movement for single-sex public education is rapidly gaining momentum, propelled by a new educational paradigm which grounds demands for gender-sensitive school reforms in an insistence on the pedagogical significance of biological sex differences. Over the past decade, the number of primary and secondary public schools in the United States offering single-sex educational opportunities has risen dramatically, from a reported eleven single-sex public schools in 2002 to more than ninety today, with hundreds more schools providing single-sex classrooms within co-educational institutions.¹ In the coming years, the number of K-12 single-sex public schools is expected to surge, a development that is being en-

¹ See Greg Toppo, *Government Seeks Single-Sex Schools*, ASSOCIATED PRESS ONLINE, Sept. 16, 2002 (discussing the high demand for the eleven single-sex public schools nationwide in 2002); Nat’l Ass’n for Single Sex Pub. Educ., *Single-Sex Schools/Schools with Single-Sex Classrooms/What’s the Difference?*, <http://www.singlesexschools.org/schools-schools.htm> (last visited Mar. 3, 2010) (“In March 2002, when NASSPE was founded, only about a dozen public schools offered single-gender classrooms. As of February 2010, there are at least 540 public schools in the United States offering single-sex educational opportunities.”). The Department of Education does not officially track the number of single-sex schools nationwide; nor does it provide data on how many public schools are entirely single-sex or just have separate classes for boys and girls.

couraged by the Department of Education, which has recently amended its regulations to promote greater experimentation with this approach.²

The modern movement for single-sex public education has its origins in the late 1980s, when sex segregation first garnered national attention as a promising antidote to a widely reported epidemic of violence, psychological disturbance, and academic underachievement reported to be afflicting a generation of boys and young men.³ Emphasizing the acute challenges facing at-risk youth—particularly economically disadvantaged African-American boys living in the nation's faltering urban centers—sex segregation was introduced in public schools in the late 1980s in the context of more comprehensive reform measures, including most notably the creation of Afrocentric "academies" which identified racial and economic inequalities as primary causes of the failure of boys to thrive.⁴ In the face of mounting legal challenges, however, the campaign for single-sex public education began to shift course in the mid-1990s. Over the next several years, once prominent claims concerning class and race-based discrimination were increasingly subordinated in public debates to assertions of "natural," "hard-wired," "genetic," and "biological" sex differences.⁵ Today, single-sex education is being promoted to educators, policymakers, and parents on the grounds that boys and girls learn differently due to underlying biological factors, includ-

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,529, 62,530 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106) [hereinafter *Single-Sex Rules Final Notice*].

³ Claims that boys are falling behind girls in school have played a central role in the boy-crisis literature and in the rise of single-sex public education. See, e.g., MICHAEL GURIAN & KATHY STEVENS, *THE MINDS OF BOYS: SAVING OUR SONS FROM FALLING BEHIND IN SCHOOL AND LIFE* 21–22 (2005) [hereinafter *THE MINDS OF BOYS*] ("Yes, we're sorry to say, there really is a crisis. . . . [P]arents and professionals are frightened. . . . Boys get the majority of the D's and F's in most schools . . . our sons are an average of a year to a year and a half behind girls in reading and writing skills.").

⁴ See AMY J. BINDER, *CONTENTIOUS CURRICULA: AFROCENTRISM AND CREATIONISM IN AMERICAN PUBLIC SCHOOLS* 53–103 (2002) (discussing the controversy over the implementation of Afrocentric curricula in Atlanta, Washington, D.C., and New York public schools in the late 1980s); ROSEMARY C. SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING* 129 (2003) ("In the late 1980s urban school officials and community leaders became increasingly alarmed over the apparent failure of public education to raise the educational achievement and social well-being of minority students. They were particularly concerned with the plight of African-American males . . .").

⁵ See, e.g., SALOMONE, *supra* note 4, at 138, 227–29. Salomone describes the retreat from Afrocentric curricula following the controversy of Detroit's plan to open three Afrocentric academies for at-risk boys. She notes that "at the same time [of the failure of the Detroit plan], and in an unconnected way, the general concept of separating students by sex was gaining new currency . . ." *Id.* at 138. She further describes the emergence of the "constitutional approach" to single-sex public education, which California implemented in 1997. *Id.* at 227–28. In these schools, sex-segregation was not accompanied by a social justice message or intentionally sex-differentiated pedagogies. *Id.* at 228–29; see also Elizabeth Weil, *Teaching to the Testosterone*, N.Y. TIMES MAG., Mar. 2, 2008, at 40–41 (describing the rise to prominence of the "essential-differences" view of single-sex education over the past decade).

ing hormone levels, neurological function, and even hearing ability.⁶ While there continues to be lively debate among proponents of single-sex public education about the pedagogical significance of biology, the sex difference approach now informs single-sex pedagogy in hundreds of public schools across the country.⁷

As the sex difference approach has gained in popularity, opponents have sought recourse in the law, charging that this model rests not on hard scientific facts, but rather on outmoded stereotypes about girls and boys. This Article considers how proponents of the sex difference approach have responded to these accusations, an inquiry which is critical in understanding why the movement has been so successful in its efforts to overcome legal prohibitions on sex-role stereotyping. Tracing the way proponents of the sex difference approach have navigated the legal environment, this Article explores two key strategies that have been deployed to rebut claims that single-sex public education encourages gender stereotypes. First, the rhetoric of science has been foregrounded as the basis for segregationist policies. In claiming a scientific basis for sex-segregation in K-12 public schools, proponents of single-sex education have adroitly circumnavigated constitutional anti-stereotyping norms by rallying purported facts of nature to argue for judicial reconsideration of where the line between a stereotype and legitimate generalization about males and females should be drawn. Second, proponents of the sex difference approach maintain that a categorical distinction must be drawn between race and sex discrimination. This contention has proven essential in building the claim that feminist legal organizations have pursued the principle of formal equality at the expense of economically disadvantaged students of color who desperately need educational alternatives to a catastrophically inadequate *status quo*. In this way, claims about racial and economic disadvantage have been skillfully leveraged to displace con-

⁶ See, e.g., MICHAEL GURIAN, *BOYS AND GIRLS LEARN DIFFERENTLY!: A GUIDE FOR TEACHERS AND PARENTS* 13–68 (2001) [hereinafter *BOYS AND GIRLS LEARN DIFFERENTLY!*]; MICHAEL GURIAN, *THE WONDER OF GIRLS: UNDERSTANDING THE HIDDEN NATURE OF OUR DAUGHTERS* 28–33 (2002) [hereinafter *THE WONDER OF GIRLS*]; GURIAN & STEVENS, *THE MINDS OF BOYS*, *supra* note 3, at 40–64; MICHAEL GURIAN, KATHY STEVENS & PEGGY DANIELS, *SUCCESSFUL SINGLE-SEX CLASSROOMS: A PRACTICAL GUIDE TO TEACHING BOYS AND GIRLS SEPARATELY* 21–39 (2009) [hereinafter *SUCCESSFUL SINGLE-SEX CLASSROOMS*]; ABIGAIL NORFLEET JAMES, *TEACHING THE MALE BRAIN: HOW BOYS THINK, FEEL, AND LEARN IN SCHOOL* 13–82 (2007); LEONARD SAX, *WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES* 11–38 (2005). The biological case for single-sex public education builds on recent works in popular neuroscience, including SIMON BARON-COHEN, *THE ESSENTIAL DIFFERENCE: MALE AND FEMALE BRAINS AND THE TRUTH ABOUT AUTISM* (2003); DEBORAH BLUM, *SEX ON THE BRAIN: THE BIOLOGICAL DIFFERENCES BETWEEN MEN AND WOMEN* (1997); and ANNE MOIR & DAVID JESSEL, *BRAIN SEX: THE REAL DIFFERENCE BETWEEN MEN AND WOMEN* (1989).

⁷ See Weil, *supra* note 5, at 42 (quoting Leonard Sax’s estimate that over eighty percent of the U.S. public schools using sex segregation are “coming at this from a neuroscience basis.”).

cerns about the potential for the sex difference approach to promote sexist gender norms.

I. THE “EMERGING SCIENCE” OF SEX DIFFERENCES

Leonard Sax, a firm believer in what he calls “the emerging science of sex differences,” has become the most visible media spokesman of the single-sex public education movement.⁸ On his website, Sax explains:

Since the mid-1970s, educators have made a virtue of ignoring gender differences. The assumption was that by teaching girls and boys the same subjects in the same way at the same age, gender gaps in achievement would be eradicated. That approach has failed.⁹

Michael Gurian, founder of a professional development organization that trains teachers and school administrators in “nature-based learning differences” between boys and girls, issues a similar call to renounce feminist dogma:

[W]e have discovered that feminist theory is able to take into account neither the hard sciences, like neurobiology, nor the sheer variety of emotional, moral, and spiritual needs girls have. Girls’ lives are far more about the four-million-year human history than they are about the few decades, or even centuries, of social life that feminism helps us understand.¹⁰

In both accounts, feminism is blamed for producing an educational culture that is said to privilege the distinctive needs, aptitudes, and interests of girls over boys under the guise of promoting equality.¹¹ This, the authors suggest,

⁸ See SAX, *supra* note 6.

⁹ Why Gender Matters, <http://www.whygendermatters.com> (last visited Mar. 10, 2010).

¹⁰ GURIAN, *THE WONDER OF GIRLS*, *supra* note 6, at 23.

¹¹ See also CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN* 14 (2000) (contending that “misinformation” about boys has been propagated by “girl-partisan” books, pamphlets, and research popularized by women’s groups and feminist scholars). In 1992, the American Association of University Women reported that girls still had not achieved full equality with boys in the educational realm. THE AM. ASS’N OF UNIV. WOMEN EDUC. FOUND., *HOW SCHOOLS SHORTCHANGE GIRLS: A STUDY OF MAJOR FINDINGS ON GIRLS AND EDUCATION* (1992). At the same time, reports began to circulate of studies demonstrating that boys were “falling behind” girls on many measures of academic achievement, ranging from reading proficiency to high school graduation rates. See SALOMONE, *supra* note 4, at 76–80. These reports led to a backlash against “girl crisis” claims, as a growing number of academics and activists began highlighting “girls’ achievement and challenging their continuing image as victims.” See *id.* While some attribute the “boy crisis” to a failure of the education system to accommodate the distinctive way in which boys are “hard-wired” to learn, other commentators insist that it is the culture of masculinity that trains boys in failure. See, e.g., DAN KINDLON & MICHAEL THOMPSON, *RAISING CAIN: PROTECTING THE EMO-*

has produced an epidemic of underachievement among boys.¹² Reacting to social constructionist perspectives that encourage the transformation of gender norms, proponents of the sex difference approach defend biologized accounts of masculinity and femininity, positing gender as largely prescribed by nature.¹³ As this perspective has gained popularity, the “boy crisis” discourse has shifted away from a concern with poverty, racism, and other social ills to center instead on claims about the failure of educators to understand and accommodate the distinctive nature of boys.¹⁴

TIONAL LIFE OF BOYS 240 (2000) (“What boys need, first and foremost, is to be seen through a different lens than tradition prescribes. Individually, and as a culture, we must discard the distorted view of boys that ignores or denies their capacity for feeling . . .”); WILLIAM POLLACK, *REAL BOYS: RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD* XXI, XXIV (1998) (attributing the “desperate crisis” facing boys today to “outmoded ideas about masculinity and about what it takes for a boy to become a man.”). In recent years, the empirical basis for the “boy crisis” has been challenged by researchers who note that, while boys may be “falling behind” girls in terms of scholastic achievement, overall both boys and girls have made impressive educational gains in the past two decades. *See, e.g.*, SARA MEAD, EDUC. SECTOR, *EVIDENCE SUGGESTS OTHERWISE: THE TRUTH ABOUT BOYS AND GIRLS* 3 (2006), available at http://www.educationsector.org/research/research_show.htm?doc_id=378705.

[W]ith a few exceptions, American boys are scoring higher and achieving more than they ever have before. But girls have just improved their performance on some measures even faster. As a result, girls have narrowed or even closed some academic gaps that previously favored boys, while other long-standing gaps that favored girls have widened, leading to the belief that boys are falling behind.

Id.; *see also* AM. ASS’N OF UNIV. WOMEN, AAUW’S POSITION ON SINGLE-SEX EDUCATION 2 (2009), available at http://www.aauw.org/advocacy/issue_advocacy/actionpages/single_sex.cfm (“As girls and women continue to make gains in education, it is important to remember that these successes do not come at the expense of boys and men. Unfortunately, that is the insidious implication underlying much of the recent assaults on Title IX that are in turn fueling erroneous notions of a ‘boy crisis.’”).

¹² *See, e.g.*, SOMMERS, *supra* note 11, at 23–27.

How do boys fit into the “tragedy” of America’s “shortchanged” girls? Inevitably, boys are resented, being seen both as the unfairly privileged gender and as obstacles on the path to gender justice for girls. . . . If we disregard the girl advocates and look objectively at the relative condition of boys and girls in *this* country, we find that it is boys, not girls, who are languishing academically.

Id.

¹³ *See, e.g.*, SAX, *supra* note 6, at 9.

[M]any educators and policymakers stubbornly cling to the dogma of “social constructionism,” the belief that differences between girls and boys derive exclusively from social expectations with no input from biology. Stuck in a mentality that refuses to recognize innate, biologically programmed differences between girls and boys, many administrators and teachers don’t fully appreciate that girls and boys enter the classroom with different needs, different abilities, and different goals.

Id.

¹⁴ *See supra* note 5; GURIAN & STEVENS, *THE MINDS OF BOYS*, *supra* note 6, at 38–39 (“[W]e’ll take a close and multi-faceted look at how boys actually learn—what’s happening inside the minds of boys—in order to discover our boys’ *natural* learning style. This discovery helps both parents and teachers alter teaching and mentoring methods to meet boys’ specific needs.”).

A. *Putting the Science of Sex Difference into Practice*

Proponents of the sex difference paradigm emphasize the critical role that hormones play in brain development, urging educators to “teach to the testosterone” and to resist pathologizing boys for fixed biological endowments.¹⁵ Advocates insist that educators must adopt sex-differentiated pedagogies that reflect the differing brain structure and hormonal chemistry of boys and girls, suggesting, for example, that boys by their very nature are less capable than girls of enduring the long hours at a desk typical of the public school day.¹⁶ Asserting that “gender difference in brain organization has clear implications for education,” Sax’s book, *Why Gender Matters*, is replete with suggestions about how to contour educational environments, classroom pedagogy, and parenting practices to meet the brain-specific needs of boys and girls.¹⁷ For instance, Sax contends that “questions of the form ‘How would you feel if. . .’ don’t work well for most boys. That question requires boys to link emotional information in the amygdala with language information in the cerebral cortex. It’s like trying to recite poetry and juggle bowling pins at the same time.”¹⁸ Elsewhere Sax warns that the “confrontational, in-your-face approach” is “precisely the *wrong* approach to use with most girls,” because “there are innate differences in how females and males respond to stress.”¹⁹ A recent news report attributes to Sax the view that “while stress can threaten a girl’s ability to learn, it enhances learning for boys.”²⁰ David Chadwell, the Director of Single-Gender Initiatives for the South Carolina Department of Education and an NASSPE advisory board member, also emphasizes the biological basis of gendered learning styles. Chadwell advises teachers of boys that “[y]ou need to get them up and moving. That’s based on the nervous system, that’s based on eyes, that’s based upon volume and the use of volume with the boys.”²¹ For girls, Chadwell recommends attention to:

[T]he connections girls have (a) with the content, (b) with each other and (c) with the teacher. If you try to stop girls from talking to one another, that’s not successful. So you do a lot of meeting in

¹⁵ See Weil, *supra* note 5, at 38–39.

¹⁶ See David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 *IND. L.J.* 135, 158–61 (2009) (reviewing claims in the single-sex literature concerning boys’ purportedly higher need for “activity”).

¹⁷ SAX, *supra* note 6, at 106 (emphasis omitted).

¹⁸ *Id.*

¹⁹ *Id.* at 89–90.

²⁰ Holly Prestidge, *Single-Sex Classes Crop Up in Richmond Area*, *RICH. TIMES DISPATCH*, Oct. 16, 2008, at B-1 (discussing Sax’s research).

²¹ Weil, *supra* note 5, at 42–43 (quoting Chadwell).

circles, where every girl can share something from her own life that relates to the content in class.²²

In *The Wonder of Girls*, Gurian suggests that girls' inherent need for connection and relationship emanates from the much higher levels of oxytocin generally present in the brains of females: "The imperative to intimacy in your daughter's brain is unmistakable. When people refer to the 'maternal instinct,' they are speaking, in part, of oxytocin. Among males, oxytocin changes are minimal in comparison."²³ Gurian also offers neurobiological justifications for his assertions that effective "boy teachers" will "[e]mploy movement activities"; "[i]nclude adequate recess and PE"; "[p]rovide for regular hydration"; and "[i]nclude competition in the classroom."²⁴ In contrast, Gurian recommends these "girl-friendly" educational objectives and strategies: "[b]uild self-esteem and confidence"; "[d]iscourage pessimistic attitudes"; "[u]se cooperative learning"; and "[u]se teachable moments for both instruction and emotional care."²⁵

Many of these recommendations hardly would attract controversy were it not for the implication that these innovations somehow hold sex-specific benefits. Don't girls need to be adequately hydrated? And shouldn't pessimism be discouraged in boys, too? In foregrounding the discourse of biological sex differences as the guiding principle for education reform, however, the movement for single-sex public education has evoked vehement opposition. Noting the paucity of solid research evidence demonstrating the effectiveness of single-sex education, critics see a dubious "emerging science" being invoked to supply crucial legitimacy to segregationist practices that resuscitate stereotypical gender assumptions and reinforce existing inequalities.²⁶ The specific concern is that claims about neurobiology are being used to justify educational arrangements in which boys and girls are trained to conform to sex-role stereotypes rather than to challenge them.²⁷ When an educational environment is designed in accor-

²² *Id.* at 43. Under Chadwell's direction, South Carolina has emerged as the nation's leader in single-sex public education, with some 200 schools offering single-sex classes. See Nat'l Ass'n for Single Sex Pub. Educ., *supra* note 1.

²³ GURIAN, *THE WONDER OF GIRLS*, *supra* note 6, at 60–61.

²⁴ GURIAN, STEVENS & DANIELS, *SUCCESSFUL SINGLE-SEX CLASSROOMS*, *supra* note 6, at 112, 114.

²⁵ *Id.* at 143.

²⁶ In 2005, the Department of Education issued a report based on a systematic review of the published research evidence on the effectiveness of single-sex education. After an "exhaustive search" of the literature, the pool of studies was whittled down from over 2,200 to fewer than 90 quantitative studies worthy of evaluation. Just four qualitative studies were judged appropriate for analysis. Not surprisingly, a major finding of the report is that "[t]here is a dearth of quality studies . . . across all outcomes." See FRED MAEL, ALEX ALONSO, DOUG GIBSON, KELLY ROGERS & MARK SMITH, U.S. DEP'T OF EDUC., *SINGLE-SEX VERSUS COEDUCATIONAL SCHOOLING: A SYSTEMATIC REVIEW* x–xi, xvii (2005), available at www.ed.gov/rschstat/eval/other/single-sex/single-sex.pdf.

²⁷ See, e.g., AMANDA DATNOW, LEA HUBBARD & ELISABETH WOODY, *IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR? LESSONS FROM CALIFORNIA'S PILOT PROGRAM 7* (2001) (analyzing California's single gender education experiment undertaken in

dance with purported scientific facts concerning the relative ability of girls and boys to sit still, work collaboratively, or tolerate stress, the end result may be classrooms which equip boys with the skills for professional success in the adult world (exposure to “fact-based” materials and emphasis on competition), while girls are relegated to classrooms that subordinate formal instruction to the purported biological need of females to talk amongst themselves. Even the most ardent proponents of single-sex education acknowledge the risk of sex-role stereotyping in single-sex classrooms. For this reason, advocates like Sax insist on the importance of proper teacher training.²⁸ Otherwise, Sax warns, “teachers start teaching algebra to girls with shopping analogies, and algebra to boys with sports analogies, and that reinforces stereotypes.”²⁹

Despite cognizance of the risk of sex-stereotyping in the new generation of single-sex public schools, recent news reports suggest that this is exactly what is happening, as largely unsupervised single-sex experiments are being undertaken across the United States. In many of these schools, “brain-based research” is cited to justify sex-differentiated pedagogies premised on generalizations about the different learning styles of boys and girls. At the recently opened Young Oak Kim Academy in Los Angeles, girls-only classes are organized on the principle that girls prefer a “collaborative atmosphere” while boys require more “management.”³⁰ At a school in St.

1997 and finding that “traditional gender stereotypes were often reinforced in the single gender academies.”); Kathryn Herr & Emily Arms, *Accountability and Single-Sex Schooling: A Collision of Reform Agendas*, 41 AM. EDUC. RES. J. 527, 549 (2004) (finding that single-sex classes failed to challenge “stereotypical gendered lenses on the part of teachers and students.”); Lenora M. Lapidus & Emily J. Martin, *Antiquated Gender Stereotypes Underlie Radical Experiments in Sex-Segregated Education*, HUFFINGTON POST, Mar. 4, 2008, http://www.huffingtonpost.com/lenora-m-lapidus-and-emily-j-martin/antiquated-gender-stereot_b_89859.html (“Girls lose when their education is based on the notion that their brains leave them unqualified for abstract thought or risk-taking, just as boys lose when teachers assume that their brains leave them unable to empathize or to nurture. This is how gender stereotypes get perpetuated, and why gender-based discrimination continues.”); Am. Civ. Liberties Union, *Sex-Segregated Schools: Separate and Unequal*, <http://www.aclu.org/womens-rights/sex-segregated-schools-separate-and-unequal> (last visited Mar. 10, 2010) (explaining that “sex-segregated academic programs . . . are often based on questionable science about how girls’ and boys’ brains develop and on disturbing gender stereotypes.”).

²⁸ See, e.g., THE GURIAN INSTITUTE, HELPING BOYS AND GIRLS REACH THEIR POTENTIAL IN SINGLE-SEX CLASSROOMS, SCHOOLS, AND PROGRAMS 2, available at www.gurianinstitute.com/SingleSexSchoolsMarketing.pdf (“[R]esearch . . . clearly shows that for the successful implementation of single-sex classes, teachers, administrators and parents need to be trained and supported in strategic implementation of curriculum.”); Nat’l Ass’n for Single Sex Pub. Educ., *Single-Sex Education*, <http://www.singlesexschools.org/home.php> (last visited Mar. 10, 2010) (“We now have good evidence that single-sex classrooms CAN break down gender stereotypes, particularly when teachers have appropriate professional development. . . . Boys in single-gender classrooms—led by teachers with training in how to lead such classrooms—are much more likely to pursue interests in art, music, drama, and foreign languages.”).

²⁹ Amina Khan, *Single-Sex Campus Aims to Divide and Conquer*, L.A. TIMES, Nov. 30, 2009, at A12 (quoting Sax).

³⁰ *Id.*

Louis, teachers report that “boys seem to learn better if they are presented a concept first, then allowed to experience it before coming back as a group to discuss it. Girls, they say, learn better if they talk about the concept first and then attack an activity on their own.”³¹ Other “brain-based” teaching innovations include placing girls face-to-face under bright lights for group work, while boys sit in dimly lit rooms with side-by-side desks so they do not face one another.³² After reading books by Sax and Gurian, teachers at a public school in Michigan concluded that “boys are likely to do well with hands-on, active lessons, such as learning the alphabet while throwing a ball back and forth. Meanwhile, the girls might prefer flash cards and games at their desks.”³³ In Florida, a principal returned from the Gurian Institute summer training and decided to decorate the all-girls classrooms in pastels to provide “cozy” learning areas, while all-boys rooms were painted in primary colors and equipped with rafts and tents.³⁴ Convinced that “boys thrive on competition,” they are given timed quizzes, whereas in girls’ classrooms, teachers call upon students by their first names to ease tension and create a more relaxed environment.³⁵ Boys’ classrooms are provided with books about “cars, snakes and dinosaurs,” whereas girls’ rooms are supplied with “fairy tales and stuffed animals.”³⁶ Meanwhile, at a new single-sex school in Virginia, girls sit in flower-adorned classrooms while working in pairs or small groups, while boys sit in “sprawling seating arrangement[s]” and move around during lessons.³⁷

Given the acknowledged danger of sex-stereotyping in single-sex classrooms, a risk recognized even by those who champion single-sex education,³⁸ it is striking that legal challenges to sex-segregation in K-12 public schools have not proven more effective in stemming the rising tide of sex-segregation.³⁹ The resurgence of single-sex public education is especially

³¹ Valerie Schremp Hahn, *Dividing Boys, Girls Grow Exponentially*, ST. LOUIS POST-DISPATCH, Feb. 20, 2009, at A1.

³² See *Single-Sex Education Spreads*, USA TODAY, Oct. 13, 2008, at 12A.

³³ *Dick and Jane Read—Just Not Together*, GRAND RAPIDS PRESS, Sept. 2, 2008, at A1.

³⁴ *Separating Sexes for Better Learning*, ST. PETERSBURG TIMES, Sept. 1, 2008, at 3.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Michael Alison Chandler & Maria Glod, *More Schools Trying Separation of the Sexes*, THE WASH. POST, June 15, 2008, at A1.

³⁸ See *supra* note 28.

³⁹ Opponents of single-sex public education have had some victories. In 2006, the Livingston Parish School Board in Louisiana agreed to abandon its plan to segregate students on the basis of sex following the filing of a lawsuit by the ACLU on behalf of an eighth-grade female student. See Am. Civ. Liberties Union, *ACLU Wins Major Lawsuit Against Sex-Segregated School in Louisiana*, Aug. 3, 2006, <http://www.aclu.org/womens-rights/aclu-wins-major-lawsuit-against-sex-segregated-school-louisiana>. The ACLU is also involved in pending litigation challenging a Kentucky school district’s policy of sex segregation. For a copy of the complaint in the Kentucky case, see Am. Civ. Liberties Union, *A.N.A. v. U.S. Department of Education—First Amended Complaint*, May 19, 2008, <http://www.aclu.org/womens-rights/ana-v-us-department-education-first-amended-complaint>.

perplexing in the wake of the Supreme Court's decision in *United States v. Virginia* ("VMI"), which mandated the admission of women to the historically all-male military academy.⁴⁰ In Part II, I consider why existing constitutional and statutory prohibitions on sex-role stereotyping have not proven more effective in limiting public education programs that promote gender essentialism.

II. SEX-STEREOTYPING AND THE LAW

Experimentation with single-sex education in K-12 public schools remains a risky endeavor, given persistent uncertainty about what kinds of programs and policies the law allows. Reflecting on this ambiguity, Justice Scalia has likened the situation facing educators and local school officials to a game of "Supreme Court peek-a-boo."⁴¹ Responding to increasingly urgent demands for clarification of the legality of sex segregation in the public school classroom, the Department of Education unveiled long-awaited revisions to its Title IX regulations in 2006 with the hope of encouraging more experimentation with all-boys and all-girls formats.⁴² Despite the new rules, however, the single-sex public education movement continues to be stymied by lingering ambiguity concerning the scope and reach of constitutional equal protection analysis as it applies to K-12 public schools. Assessing the legal landscape of single-sex K-12 public education, David Cohen observes that "the Supreme Court has not had a *Brown v. Board of Education* 'separate is inherently unequal' (or even the opposite, 'separate is equal') moment for single-sex education."⁴³ Indeed, post-*Brown* equality jurisprudence has been marked by an insistence that sex classifications be distinguished from race classifications on the grounds that while beliefs about racial differences are rooted in social prejudice, sex differences have a solid basis in biological reality.⁴⁴

⁴⁰ *United States v. Virginia (VMI)*, 518 U.S. 515 (1996). For a full discussion of *VMI*, see *infra* Part II.A.

⁴¹ *VMI*, 518 U.S. at 574 (Scalia, J., dissenting). Less colorfully, Serena Mayeri suggests that "[t]wenty-first-century constitutional sex equality jurisprudence is replete with apparent contradictions." *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 757 (2004).

⁴² See Single-Sex Rules Final Notice, 71 Fed. Reg. 62,529, 62,530 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106).

⁴³ Cohen, *supra* note 16, at 145 (citation omitted).

⁴⁴ See, e.g., SALOMONE, *supra* note 4, at 120 ("There are fundamental differences between race and sex. Race is a social construct; sex is irreducibly biological with an overlay of social considerations that define gender. . . . The Supreme Court has recognized these differences. . . . The Court, therefore, holds sex classifications to a somewhat lesser standard of scrutiny than race classifications . . ."). *But see* Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789 (2008) (exploring shifting ideas about the relationship between sex discrimination and race discrimination in the post-*Brown* era).

A. *Single-Sex Public Education and the Law*

Even in the absence of an explicit constitutional prohibition against sex-segregation in public schools, single-sex K-12 public education was virtually non-existent by the early 1990s.⁴⁵ Over the course of the twentieth century, most historically sex-segregated schools had integrated. At the same time, the costly litigation that threatened to ensnare any school district intrepid enough to introduce sex-segregation discouraged new single-sex schools from opening.⁴⁶ In 1976, the Supreme Court seemed poised to resolve decisively the question of the constitutionality of single-sex public education in *Vorchheimer v. School District of Philadelphia*. The case was brought on behalf of a student named Susan Vorchheimer, who had been denied admission to Central High School for Boys on the basis of sex.⁴⁷ A district court finding in Vorchheimer's favor was reversed by the Third Circuit.⁴⁸ The appeals court determined that attendance at both the all-male and all-female single-sex schools in Philadelphia was "voluntary" and that the educational opportunities at both schools were "essentially equal."⁴⁹ Hence, the Third Circuit held that it was not a violation of the federal equal protection clause to deny Vorchheimer admission to Central High.⁵⁰ In the end, the Supreme Court affirmed per curiam by a 4-4 vote.⁵¹

While the Supreme Court has remained silent on the question of the constitutionality of K-12 single-sex education since the *Vorchheimer* decision, the issue has been addressed at the lower court level.⁵² *Garrett v. Board of Education of the School District of Detroit*, a well-publicized 1991 district court decision concerning the constitutionality of three all-boys academies in Detroit organized around an Afrocentric curriculum, dealt a significant blow to the movement for single-sex public education.⁵³ The court granted the plaintiff's preliminary injunction motion, ruling that the all-male academies violated both the federal Equal Protection Clause and the Title IX

⁴⁵ See SALOMONE, *supra* note 4, at 7 ("[T]he sweeping tide of coeducation [beginning in the 1960s] dealt a fatal blow to single-sex schools nationwide. That inescapable movement dramatically transformed the landscape of large city school systems [by the mid-1980s] where single-sex schools had been the most numerous.").

⁴⁶ See, e.g., SALOMONE, *supra* note 4, at 139 (explaining that "in the aftermath of Detroit . . . [e]ach new program invited threatening noises from civil rights groups who refused to budge from the position they had taken in Philadelphia and Detroit.").

⁴⁷ *Vorchheimer v. Sch. Dist. Of Philadelphia*, 532 F.2d 880, 881 (3d Cir. 1976).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Vorchheimer v. Sch. Dist. of Philadelphia*, 430 U.S. 703 (1977) (per curiam).

⁵² In 1983, a Pennsylvania state court held that denying girls admission to Central High was a violation of the state constitution's equal rights amendment and the Fourteenth Amendment of the U.S. Constitution. The Court therefore ordered that girls be admitted to Central High. See *Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C.3d 682 (1983).

⁵³ *Garrett v. Bd. of Educ. of the Sch. Dist. of Detroit*, 775 F. Supp. 1004 (E.D. Mich. 1991).

prohibition against sex discrimination in educational programs that receive federal funds.⁵⁴ While the case clearly had a “chilling” effect on single-sex experimentation,⁵⁵ the decision nonetheless left open the possibility that a plan to offer a comparable single-sex opportunity to girls could pass constitutional muster.

While maintaining its silence on the specific question of K-12 single-sex education, two Supreme Court decisions concerning postsecondary education have played a significant role in contouring the contemporary legal landscape for primary and secondary schools seeking to segregate students on the basis of sex. In *Mississippi v. Hogan*, the Supreme Court declared unconstitutional a female-only admissions policy at the state university’s nursing school.⁵⁶ Writing for the majority, Justice O’Connor warned that single-sex educational programs cannot be instituted to advance “archaic or stereotypic notions” about men and women.⁵⁷ Referencing a long history of public policies in the United States premised on assumptions about the natural unfitness of women for work in a wide range of professions (including the law), Justice O’Connor insisted that justifications for sex-based classifications be assessed “through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”⁵⁸ While narrowly tailored “gender-based classification[s]” may be allowed “in limited circumstances,”⁵⁹ the majority found that “[r]ather than compensate for discriminatory barriers faced by women, [Mississippi University for Women’s] policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job.”⁶⁰ Declaring the state’s justification for the admissions policy to have fallen short of an “exceedingly persuasive justification,” the Court struck down the admissions policy as unconstitutional.⁶¹

While taking a strong stand against sex-role stereotyping, *Mississippi v. Hogan* begs the question of how exactly to distinguish stereotypical from legitimate claims about sex differences. In *VMI*, Virginia sought to defend

⁵⁴ See *id.* at 1006–10; see also Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006). For more information on the publicity surrounding *Garrett*, see *U.S. Judge Blocks Plan for All-Male Public Schools in Detroit*, N.Y. TIMES, Aug. 15, 1991, at A10.

⁵⁵ See SALOMONE, *supra* note 4, at 136 (“[T]he political impact of the Detroit decision has been overwhelmingly disproportionate to its legal importance. . . . [I]t has given symbolic force to the opponents of single-sex education who have wielded the decision against school systems considering similar programs for males or females alike.”); Verna L. Williams, *Reform or Retrenchment?: Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 18 (2004) (“[The Detroit] case served as a cautionary tale, chilling the creation of new single-sex public schools . . .”).

⁵⁶ See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 718 (1982).

⁵⁷ *Id.* at 725.

⁵⁸ *Id.* at 726 (citation omitted).

⁵⁹ *Id.* at 728.

⁶⁰ *Id.* at 729 (citation omitted).

⁶¹ *Id.* at 731.

the exclusionary admissions policy at the historically all-male Virginia Military Institute on the grounds that VMI's hallmark "adversative method" of training was unsuitable for women.⁶² Writing for the majority, Justice Ginsburg emphasized that justifications for sex-based classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."⁶³ Furthermore, "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."⁶⁴

Justice Ginsburg's *VMI* opinion represents an exemplary statement of an anti-stereotyping norm that has emerged from judicial application of the intermediate scrutiny standard.⁶⁵ To satisfy the demands of equal protection analysis, a sex-based classification must be "substantially related to achievement of [important governmental] objectives."⁶⁶ The Court has consistently emphasized that "archaic and overbroad generalizations" about the inherent nature, talents, capacities, or appropriate social roles of the sexes will not be tolerated.⁶⁷ The prevailing juridical conception of stereotyping centers upon the connection between generalizing and discrimination. The basic idea is that when overbroad generalizations are made, individuals who fall outside the classification are denied opportunities. Of course, stereotypes may produce other harms to the individual besides the denial of opportunity, such as subjecting individual members of the stereotyped class to stigma or limiting their self-expression.⁶⁸ As Valorie Vojdik notes, "[b]y concentrating on stereotypes, the Court's equality jurisprudence has tended to focus on gender as a category of classification rather than as a system of subordination."⁶⁹

⁶² See *United States v. Virginia*, 518 U.S. 515, 520 (1996).

⁶³ *Id.* at 533.

⁶⁴ *Id.* at 550.

⁶⁵ See Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 307 (2005) ("Courts have rejected two types of stereotypes: descriptive stereotypes, which purport to describe the presumed abilities and interests of women, and normative stereotypes, which specify the appropriate roles of men and women in our society.") (citation omitted).

⁶⁶ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁶⁷ *Id.* at 198–99 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1974)); see also *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 130–31 (1994) ("Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."); Mary Ann Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000) (asserting that constitutional sex equality analysis turns on the question of whether a "sex-respecting rule" rests on a stereotype).

⁶⁸ See Linda Nicholson, *Interpreting Gender*, 20 SIGNS: J. WOMEN IN CULTURE & SOC'Y 79 (1994) (reviewing feminist debates about the nature and harms of gender essentialism).

⁶⁹ Vojdik, *supra* note 65, at 307. For a discussion of antisubordination approaches to inequality, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1477 (2004) (tracing understandings of antisubordination values since *Brown* and concluding that "an-

While antisubordination analysis suggests that the *VMI* majority does not go nearly far enough, Justice Scalia's caustic dissent underscores the stakes of the majority's endorsement of the anti-stereotyping norm, declaring the decision to have rendered single-sex public education "functionally dead."⁷⁰ However, this pronouncement has proven premature. Indeed, it would appear that the *VMI* decision revitalized the movement for single-sex K-12 public education by precipitating a shift in strategy away from the pursuit of a judicial resolution and toward efforts to win legislative and regulatory victories.

In 2001, advocates for single-sex public education won a decisive victory when the No Child Left Behind Act of 2001 ("NCLB") was passed with a provision to fund "innovative assistance programs," including those programs that would "provide same-gender schools and classrooms."⁷¹ Even with this mandate, however, the specter of lawsuits deterred districts from implementing single-sex education programs, and increasing pressure was brought to bear on the Department of Education to clarify the circumstances under which sex-segregation would be permitted.⁷² In 2004, the Department announced its intention to amend the Title IX regulations to create "additional flexibility in providing single-sex classes, extracurricular activities, and schools in elementary and secondary education" in a nondiscriminatory manner.⁷³ From the outset, the Department evinced an acute sensitivity to the legal implications of stereotyping, acknowledging ongoing

tisubordination values live at the root of the anticlassification principle—endlessly contested, sometimes bounded, often muzzled. Antisubordination values are not foreign to the modern equal protection tradition, but a founding part of it, deeply tempered by other values").

⁷⁰ *United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting).

⁷¹ *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 5131, 115 Stat. 1425, 1781-82 (2002) (codified as amended at 20 U.S.C. § 7215(a)) [hereinafter NCLB]. The provision was sponsored by Senator Kay Bailey Hutchison (R-TX), and joined by Senator Hillary Rodham Clinton (D-NY) among others. *See* SALOMONE, *supra* note 4, at 173-74; *see also* 147 CONG. REC. 10,179-80 (2001). During the proceedings, Senator Hutchison thanked Senator Clinton for her efforts in helping to "come up with a solution to a problem that we have seen over many years; that is, obstacles put in place against public schools being able to offer single-sex classrooms and single-sex schools." 147 CONG. REC. 10,179. In support of the provision, Senator Clinton stated, "I believe public school choice should be expanded and as broadly as possible. Certainly, there should not be any obstacle to providing single-sex choice within the public school system." *Id.* at 10,180. In 1994, Senator John Danforth (R-MO) began working to lift "the cloud of lawsuits" threatening single-sex experiments in K-12 public schools by waiving Title IX restrictions. *See* 140 CONG. REC. 18,739 (1994).

⁷² *See* SALOMONE, *supra* note 4, at 174 ("[Department of Education Office of Civil Rights] staff members themselves had come to realize that something had to be done [sic] to bring the Title IX regulations in tune with the times or at the very least to resolve the ambiguities within the law. The congressional mandate to issue guidelines for implementing the new funding program [for single-sex education] forced the issue."). NCLB included a requirement that the Secretary of Education issue guidelines within 120 days of the Act's enactment, which would cover the implementation of single-sex classrooms and schools. *See* NCLB, *supra* note 71, § 5131(c).

⁷³ Single Sex Rules Final Notice, 71 Fed. Reg. 62,529, 62,530 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106). Title IX prohibits sex discrimination in educational pro-

concerns about “outdated notions regarding the limitations or limited goals of members of one sex.”⁷⁴

Announced in 2006, the new regulations provide a roadmap to litigation avoidance.⁷⁵ The amended regulations mandate that single-sex educational programs serve at least one of two “important objective[s]”: to “improve educational achievement of its students through a[n] overall established policy, to provide diverse educational opportunities,” or “to meet the particular, identified needs of its students.”⁷⁶ The regulations require that implementation of such programs be “evenhanded” and “completely voluntary.”⁷⁷ Explaining the new regulations, the Department of Education acknowledges concerns that “single-sex education might result in a reversion to sex-based stereotypes or roles,” and reiterates unequivocally that “overly broad sex-based generalizations in connection with offering single-sex education would be sex discrimination.”⁷⁸ Having rehearsed the objections, however, the Department confidently avers that the new requirements will prove sufficient to “ensure nondiscrimination,” emphasizing that the stated objective of the program must be “genuine and cannot be based on overly broad generalizations about the different talents, capacities, or preferences of either sex.”⁷⁹

B. Sexual Realism and the Limitations of Intermediate Scrutiny Analysis

The 2006 regulations highlight—and skillfully exploit—the limitations of intermediate scrutiny analysis as a prohibition on sex-role stereotyping.⁸⁰ *VMI* affirms that the appropriate test in cases concerning a sex classification is intermediate scrutiny, requiring that a sex-based classification be “substantially related” to an “important governmental objective.”⁸¹ The 2006 regulations identify only two qualifying objectives: increasing the diversity of educational options available to students and serving the particular needs of its students. Significantly, neither of these objectives requires school officials to make explicit claims about inherent sex differences in justifying seg-

grams receiving federal support. See Title IX of the Education Amendments of 1972, *supra* note 54.

⁷⁴ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 31,098, 31,098 (May 8, 2002) (to be codified at 34 C.F.R. pt. 106).

⁷⁵ Single Sex Rules Final Notice, 71 Fed. Reg. 62,529.

⁷⁶ *Id.* at 62,531, 62,535.

⁷⁷ *Id.* at 62,536–37.

⁷⁸ *Id.* at 62,533–34.

⁷⁹ *Id.* at 62,532, 62,535.

⁸⁰ See Single Sex Rules Final Notice, 71 Fed. Reg. 62,529.

⁸¹ *United States v. Virginia*, 518 U.S. 515, 516 (1996). Following the decision, some scholars suggested that Justice Ginsburg raised the bar in intermediate scrutiny challenges by treating the “exceedingly persuasive justification” burden as an independent standard rather than a restatement of the standard test. See, e.g., SALOMONE, *supra* note 4, at 161 (“By emphasizing this last requirement [of an “exceedingly persuasive justification”] and reinforcing it with stronger language than used in previous Court decisions, she seemed to give it more teeth.”).

regation—claims which might create vulnerability in litigation should an allegation of unconstitutional sex-role stereotyping be raised. In this way, the 2006 regulations push the discourse of biological sex differences below the radar of constitutional review, shifting the emphasis in challenges to single-sex programs to questions that concern the persuasiveness of the “diversity” objective. This standard has proven all too easy to meet, for as Justice Ginsburg points out in the *VMI* decision, the “diversity” objective is self-validating and reveals a gaping loophole in the very logic of the intermediate scrutiny test.⁸²

To opponents of single-sex public education, it may be tempting to characterize the limited reach of intermediate scrutiny analysis as a flaw. But the restricted impact of intermediate scrutiny is by design, for at the heart of sex equality jurisprudence lies an insistence that sex differences are rooted in biological reality, and not cultural bias. Hence, room must be made for policies that might seek to accommodate or otherwise address these differences. In *VMI*, Justice Ginsburg expresses skepticism about assertions of “supposed ‘inherent differences’” between men and women, but she does not deny that “inherent differences” exist. Instead, she reassuringly proclaims “[i]nherent differences’ between men and women . . . remain cause for celebration.”⁸³

Katherine Franke characterizes this prevailing juridical account of sex difference as a kind of “sexual realism,”⁸⁴ explaining that in constitutional jurisprudence, “the wrong of sex discrimination is premised upon a right of sexual differentiation, that is, a fundamental belief in the truth of biological sexual difference.”⁸⁵ From this perspective, “[d]iscrimination occurs when false or stereotypical differences are mistaken for real differences.”⁸⁶ Sexual realism allows contest over the characterization but not the “truth” of sex differences.

Sexual realism has played a pivotal role in cabining the reach of the anti-stereotyping norm as it applies to single-sex public education. On the one hand, sexual realism has proven critical in enabling proponents of sin-

⁸² See *VMI*, 518 U.S. at 529 (“The [appeals] court recognized that, as it analyzed the case, means merged into end,” effectively “bypass[ing] any equal protection scrutiny.”). The circularity problem is also considered in the Single-Sex Rules Final Notice, 71 Fed. Reg. at 62,534:

Some commenters stated that there is not an important governmental interest in a sex-based educational option as a diverse option without a requirement that the recipient demonstrate that the single-sex option advances educational goals, because otherwise the single-sex nature of the class would always be justified as substantially related to achievement of the objective, which is circular.

Id.

⁸³ *VMI*, 518 U.S. at 533.

⁸⁴ Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 12–13 (1995).

⁸⁵ *Id.* at 4.

⁸⁶ *Id.* at 12.

gle-sex education to parry analogies between sex segregation in the present and racially segregationist policies of the past. As Rosemary Salomone, a leading legal expert on single-sex public education, contends, “[t]here . . . are fundamental differences between race and sex. Race is a social construct; sex is irreducibly biological with an overlay of social considerations that define gender.”⁸⁷ In other words, because sex differences are real, they deserve—and even demand—public accommodation, whereas racial differences are mere social figments rooted in prejudice.

While fending off a potentially fatal analogy with racial discrimination, sexual realism also has incited the post-*VMI* scientific turn in the single-sex public education debates. *VMI*'s conceptualization of sex-role stereotyping presumes a categorical distinction between those generalizations about the sexes based on physiological differences that are understood to be incontrovertibly “real” and those generalizations that are based on social assumptions. Understood in this way, evidence that a sex difference is rooted in “irreducibly biological” factors appears sufficient to rebut a charge of stereotyping. Sax, Gurian, and other proponents of the sex difference approach exploit this solicitude for biological sex differences rooted in nature by incorporating a scientific rhetoric of “evidence,” “facts” and “data” in their defense of single-sex education. Sax mockingly notes that “[d]uring the ‘Dark Ages’—that period from the mid-1960s to the mid-1990s during which it was politically incorrect to suggest that there were innate differences in how girls and boys learn and play—most experts insisted that children’s toy preferences are socially constructed.”⁸⁸ Concluding that the social constructivist account of gender “doesn’t fit the facts,” he then reiterates that “girls and boys behave differently because their brains are wired differently.”⁸⁹

The Gurian Institute markets “Just the Facts” flashcards (in English and Spanish) to popularize knowledge about sex differences.⁹⁰ Fact #7: “Movement seems to help boys stimulate their brains and also helps manage and relieve impulsive behavior.” Fact #9: “Boys get bored more easily than girls, requiring more varied stimulation to keep them attentive.” Fact #21: “Males can store trivia (like sports statistics) better than females, and for a longer period of time.” Fact #27: “Boys generally have more development in certain areas of the right hemisphere, providing them with better spatial skills—map reading, mechanical skills, measuring.” Fact #28: “The male brain may process serotonin less effectively, making males generally more

⁸⁷ SALOMONE, *supra* note 4, at 120.

⁸⁸ SAX, *supra* note 6, at 26.

⁸⁹ *Id.* at 27–28.

⁹⁰ “Just the Facts” flashcards (on file with author). Michael Gurian markets the “Just the Facts” flashcards on his website, advertising that “[t]hese cards make a great start-up activity for faculty meetings, parent education sessions, or district wide sessions where you want to introduce the topic.” See The Gurian Institute, Gurian Institute Products, <http://www.gurianinstitute.com/otherProducts.php>.

impulsive and fidgety.” Fact #44: “There are actual physical structural differences in the male and female brain.”

Many commentators remain skeptical of the “facts” of sex difference as reported by leading proponents of single-sex public education.⁹¹ In order for the anti-stereotyping norm to have real teeth, however, courts must engage these debates rather than sidestepping them. While the law appears to take a strong stand against sex-role stereotyping, the reach of this prohibition is being severely limited today by the expansive naturalization of sex difference—that is, by a failure to engage the way in which physical differences are given meaning by dominant conceptions of masculinity and femininity.

Advocates for single-sex public education today seek not just to comply with the anti-stereotyping norm, but to re-conceptualize it. Mary Ann Case suggests that the courts generally have taken the view that a “sex-respecting rule must be true of either all women or no women or all men or no men; there must be a zero or a hundred on one side of the sex equation or the other.”⁹² Proponents of single-sex education are now seeking to slacken the “perfect proxy” rule by pushing a less rigid version of biological determinism, which allows for gender nonconformity.⁹³ Thus, Sax acknowledges “gender-atypical” children and, in particular, “anomalous males” who “represent a distinct physiological type.”⁹⁴ The National Association for Single-Sex Public Education website stresses that “advocates of single-sex education do NOT believe that ‘all girls learn one way and all boys learn another way.’”⁹⁵ Nonetheless, Sax is equally adamant that “essentially all of the differences I will tell you about apply equally” to gender-typical and atypical children.⁹⁶ Michael Gurian uses the term “bridge brain” to refer to

⁹¹ See, e.g., LISE ELIOT, *PINK BRAIN, BLUE BRAIN: HOW SMALL DIFFERENCES GROW INTO TROUBLESOME GAPS—AND WHAT WE CAN DO ABOUT IT* 9 (2009) (“Ignoring the fundamental plasticity by which the brain learns anything, several popular authors [including Michael Gurian and Leonard Sax] confuse *brain* with *nature*, promoting the view that differences between the sexes are fixed, hard-wired, and predetermined biological facts.”); Janet Shibley Hyde, *The Gender Similarities Hypothesis*, 60 *AM. PSYCHOL.* 581, 581 (2005) (reviewing research on psychological gender differences and concluding that “men and women, as well as boys and girls, are more alike than they are different.”); Weil, *supra* note 5, at 41 (explaining that Salomone worked with the Department of Education to ease the Title IX regulations, and she acknowledged that “[e]very time I hear of school officials selling single-sex programs to parents based on brain research, my heart sinks.”).

⁹² Case, *supra* note 68, at 1449–50 (citation omitted).

⁹³ *Id.* at 1449.

⁹⁴ SAX, *supra* note 6, at 34, 225.

⁹⁵ Nat’l Ass’n for Single-Sex Pub. Educ., *supra* note 27.

⁹⁶ SAX, *supra* note 6, at 34. In the case of “anomalous males,” Sax recommends that parents “adopt and maintain a firm disciplinary style” and “encourage competitive sports.” *Id.* at 227–28. Sax also cites Jerome Kagan, who argues that “parenting style is a critical factor in determining whether a boy outgrows his fearful, withdrawn tendencies or whether he remains stuck in that mode.” *Id.* In the case of non-normatively gendered sons, Sax departs from his usual insistence on the primacy of biology and encourages parents to challenge rather than validate a biological predisposition. *Id.* Sax justifies this advice on the grounds that an “anomalous son is heading for a special kind of trouble” at

males whose brain function falls on the female side of the gender “spectrum” and vice versa, citing research which suggests that one in seven boys and one in five girls fall into this category.⁹⁷

By acknowledging gender outliers, Sax and Gurian issue a subtle challenge to the “perfect proxy” test as the standard by which the overbreadth of a classification is determined.⁹⁸ In rhetorically conceding that gender is a spectrum, proponents of the sex difference approach push back against the idea that a generalization must account for one hundred percent of the cases in order to be valid. In this way, the proposition that gender essentialism allows for some variance challenges the prevailing constitutional standard and threatens to further diminish the impact of application of the anti-stereotyping principle by providing a scientific explanation for imperfect proxies.⁹⁹

III. SEX DIFFERENCE AND SOCIAL DISADVANTAGE

Proponents of single-sex education generally (and the sex difference approach in particular) have benefited from the limited capacity of intermediate scrutiny analysis to challenge sex-role stereotypes. This constrained reach of constitutional equal protection analysis has created an opening for pedagogies to reinforce longstanding generalizations about the character and aptitudes of boys and girls. Sexual realism has proven critical in carving out a space not simply for sex-segregation in public primary and secondary schools, but for educational programs which claim the authority of science for practices that re-inscribe traditional views about male and female sex-roles, behaviors, and aptitudes. However, as I suggested above, the language of biological sex difference largely has been absent from the legal, legislative, and regulatory record. Instead, the official rhetoric used to promote single-sex K-12 public education has foregrounded disadvantaged children, particularly those from African-American and Latino backgrounds. In this way, proponents of single-sex public education have taken advantage of the greater leeway afforded to programs that claim to ameliorate social dis-

puberty when he will lose his friendships with girls and find that “life is empty.” *Id.* at 226.

⁹⁷ GURIAN, *BOYS AND GIRLS LEARN DIFFERENTLY!*, *supra* note 6, at 16 (“Brain development is best understood as a spectrum of development rather than two poles, male and female,” but “[m]ainly, your girls lean toward the female and boys towards the male”); *see also* GURIAN & STEVENS, *THE MINDS OF BOYS*, *supra* note 6, at 286 (“The sensitive boy, or bridge brain, is one who may show lower testosterone levels in the blood as well as higher oxytocin levels.”); MICHAEL GURIAN, KATHY STEVENS & KELLEY KING, *STRATEGIES FOR TEACHING BOYS & GIRLS: SECONDARY LEVEL 14* (2008) (citing Simon Baron-Cohen’s research on the number of gender-atypical children).

⁹⁸ *See Case*, *supra* note 67, at 1449 (“For a sex-respecting rule to withstand constitutional scrutiny by the Court, it seems to be at least necessary and usually sufficient that it embody some perfect proxy.”) (citation omitted).

⁹⁹ Note that Leonard Sax eschews the label “gender essentialist,” because he believes it is a “derogatory” term. *See Weil*, *supra* note 5, at 43 (quoting Sax).

advantages rooted in past discrimination. At the same time, the logic of intersectionality has been skillfully exploited to divide potential allies and to delegitimize critics of sex-role stereotyping by equating opposition to single-sex public education with indifference to the critical lack of educational opportunities available to economically disadvantaged students.¹⁰⁰ Ironically, then, poor children of color have emerged as the public face of a movement that has marginalized attention to racial and economic disadvantage in explaining educational outcomes and in developing new educational interventions.

A. *Leveraging Disadvantage*

Since its emergence in the late 1980s, the movement for single-sex public education has placed the needs of disadvantaged children at its rhetorical center.¹⁰¹ Some advocates have pointed to studies which suggest that single-sex education may produce its most significant results with children from low-income and minority backgrounds.¹⁰² For some parents, however, the catastrophic failure of the educational *status quo* may be proof enough that an alternative—any alternative—is worth trying. While the “boy crisis” discourse implies that all boys—regardless of class or race—have been disadvantaged vis-à-vis their female counterparts in recent years, poor and minority children commonly are invoked to illustrate the dire consequences.¹⁰³ Even with the popularization of a biological rhetoric of sex differences—differences proclaimed to exist regardless of race, class, and even sexuality—the debate over single-sex public education continues to center around narratives of racial and economic disadvantage.

In the legal arena, as well, a perception that public schools have failed to serve the least well-off students may bolster the credibility of claims that a worthy objective is being served by sex-segregation. Following the suspen-

¹⁰⁰ See Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS: J. WOMEN IN CULTURE & SOC'Y 1771, 1771 (2005) (defining “intersectionality” as a feminist category of analysis which centers “the relationships among multiple dimensions and modalities of social relations and subject formations.”).

¹⁰¹ See Williams, *supra* note 55, at 19 (“The fact that so much of the discourse surrounding single-sex education is about Black children in troubled urban school districts is cause for concern.”) (citation omitted); see also SALOMONE, *supra* note 4, at 129–30.

¹⁰² See Lea Hubbard & Amanda Datnow, *Do Single-Sex Schools Improve the Education of Low-Income and Minority Students? An Investigation of California's Public Single-Gender Academies*, 36 ANTHROPOLOGY AND EDUC. Q. 115, 116 (2005) (“Studies specifically focused on single-sex schooling claim that such schools benefit students academically, especially males from low-income and minority backgrounds.”) (citation omitted).

¹⁰³ As proclamations of the “boy crisis” proliferated throughout the 1990s, a movement to create single-sex schools for girls also gained traction amidst an insistence that, despite enormous strides, girls still were not achieving their full academic potential, particularly in the areas of math and science. As in the case of boys, girls from low-income and minority backgrounds have been portrayed as among those at the greatest disadvantage. See Williams, *supra* note 101, at 24.

sion of the Detroit experiment with all-boys Afrocentric academies in the early 1990s, former Republican Senator John Danforth of Missouri proposed waiving Title IX enforcement so that local school officials could experiment with single-sex education programs.¹⁰⁴ The bill was presented as a desperately needed intervention for a generation of economically disadvantaged black and Hispanic children.¹⁰⁵ Implicitly recognizing the force of claims about the potential remedial value of single-sex initiatives such as those set forth in Danforth's proposal, the *VMI* majority endeavors to maintain a distinction between generalizations about the sexes that reflect pernicious purposes and those that serve ameliorative purposes. Justice Ginsburg endorses the use of classifications "to compensate women 'for particular economic disabilities [they have] suffered,' . . . to 'promote equal employment opportunity,' and . . . to advance the full development of the talent and capacities" of all persons.¹⁰⁶ Sex-based classifications are prohibited only if they are invoked "to create or perpetuate the legal, social, and economic inferiority of women."¹⁰⁷ In placing the emphasis on the normative valence of a generalization rather than its validity, *VMI* invites the defense of a generalization on the grounds that it is non-stigmatizing.

Proponents of single-sex public education have eagerly taken on this challenge. Salomone, for example, insists that contemporary single-sex experiments should not be confused with the "first generation of elite single-sex institutions," many of which were premised on blatantly stereotypical assumptions about the inferiority of the excluded group.¹⁰⁸ Because contemporary single-sex programs are affirmative rather than exclusionary in nature, and because they are not premised on archaic stereotypes, these programs deserve to be evaluated on their own merits.¹⁰⁹ Salomone emphasizes that while single-sex programs in the past were based on old-fashioned stereotypes concerning the inherent aptitudes and capacities of boys and girls, current single-sex initiatives rest on valid observations about sex-based learning differences.¹¹⁰

¹⁰⁴ See 140 CONG. REC. 18,739 (1994). Danforth's proposal would have amended the Elementary and Secondary Education Act.

¹⁰⁵ See SALOMONE, *supra* note 4, at 139–40 ("Citing grim statistics of academic failure among black and Hispanic young people—high dropout rates, low literacy rates, and high retention rates amid widespread poverty—[Senator Danforth] made an impassioned plea to his colleagues" on behalf of his proposed plan to "waive Title IX enforcement and permit local school officials to voluntarily establish such programs for low-income educationally disadvantaged students.").

¹⁰⁶ *VMI*, 518 U.S. at 533–34 (citations omitted).

¹⁰⁷ *Id.* at 534.

¹⁰⁸ SALOMONE, *supra* note 4, at 177.

¹⁰⁹ See *id.* at 176–78.

¹¹⁰ See *id.* at 177 (explaining that single-sex programs today "undeniably rely, to some degree, on generalizations about females and males. Some of the generalizations, however, are not necessarily 'overbroad' but are increasingly gaining ground in scientific research. . . . These generalizations are not intended to exclude such girls from the fabric of society, but ultimately to weave them into that fabric without restricting opportunities for men.").

Proponents of single-sex public education stress its potentially remedial effects for those who have suffered a range of social disadvantages, including poverty and a lack of gender-appropriate role models.¹¹¹ However, appeals to redress injustices suffered by boys invite critical scrutiny of the claim to disadvantage in the first place. This is particularly true in cases that portray the included group as a subordinated class, whether it is boys who have been harmed by an acceleration of the primary school curriculum, or girls who lack role models in math and sciences. Whereas equal protection analysis typically considers whether a classification stigmatizes members of excluded classes, in single-sex education cases it may be necessary to flip the analysis and ask whether the excluded group is being falsely positioned as advantaged.¹¹² Is there really a “boy crisis” or rather a public education crisis with a disproportionate impact in poor communities and communities of color? This is the critical question to ask in order to ensure that all disadvantaged children continue to get assistance, not just those in a select class—male or female.

While in the past greater latitude for experimentation has been extended to single-sex initiatives undertaken for “remedial or affirmative action,” the 2006 regulations apply to all schools, whether or not they are serving disadvantaged students.¹¹³ Nonetheless, in detailing how a school might establish that its objective is “to meet the particular, identified educational needs of its students,” the Department of Education explains that the range of acceptable “needs” includes not just educational but “social” ones as well, including “pregnancy, discipline problems, drug or alcohol abuse, delinquency, and criminal activity.”¹¹⁴ Written in this way, the regulations likely make underprivileged children the safest population, from a legal standpoint, upon which to experiment with single-sex education.

¹¹¹ See Williams, *supra* note 55, at 21–22.

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 models . . . who simply can teach them how to be men—that is, providers and husbands. Providing these role models thus becomes an imperative . . . which places Black males at the center of the struggle for equal rights in education

Id. (citations omitted).

¹¹² See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (finding that separating students “solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

¹¹³ See *Single-Sex Classes and Schools: Guidelines on Title IX Requirements*, 67 Fed. Reg. 31,102, 31,102 (May 8, 2002) (to be codified at 34 C.F.R. pt. 106) (explaining that it has generally been the policy to require that a comparable single-sex school be made available for members of the excluded sex, but an exception can be made if the provision of a single-sex school for only one sex “constitutes remedial or affirmative action.”).

¹¹⁴ *Single-Sex Rules Final Notice*, 71 Fed. Reg. 62,529, 62,536 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106).

B. Intersectionality and the Politics of Difference

The issue of single-sex education has created unlikely bedfellows, including former Senators Hillary Rodham Clinton and Kay Bailey Hutchinson, who banded together in 2001 behind legislation that allowed greater latitude for sex-segregation in primary and secondary public schools.¹¹⁵ In framing single-sex public education as an intervention meant to serve the needs of disadvantaged children, the debate has also created unlikely antagonists, pitting prominent feminist legal organizations, including Legal Momentum (formerly known as NOW Legal Defense), The Feminist Majority Foundation, and the ACLU's Women's Rights Project against community activists advocating on behalf of poor children of color.¹¹⁶ Legal challenges to sex segregation in public schools have prompted accusations that mainstream feminist organizations prioritize the abstract principle of formal equality over the urgent need to expand the educational opportunities available to the nation's most needy children.¹¹⁷

In dividing feminist lawyers from advocates for disadvantaged children, the single-sex public education debate exemplifies the logic of intersectionality as it was first described in two seminal law review articles by Kimberlé Crenshaw.¹¹⁸ Highlighting a longstanding pattern of erasure of the interests and experiences of black women in areas ranging from employment law to violence against women of color, Crenshaw insists that "the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimension of those exper-

¹¹⁵ See *supra* note 71.

¹¹⁶ See, e.g., SALOMONE, *supra* note 4, at 133 (discussing how the "sharply divided" debate over the Detroit single-sex academies pitted "African-American mothers" against the American Civil Liberties Union of Michigan and the National Organization for Women Legal Defense and Education Fund).

¹¹⁷ This narrative has obscured the role that anti-racist organizations, such as the NAACP, have played in opposing single-sex initiatives. See, e.g., *id.* at 117–87.

¹¹⁸ 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, 139–40 [hereinafter *Demarginalizing*] (explaining that intersectional analysis demonstrates how "single-axis analysis" tends to "undermine efforts to broaden feminist and antiracist analyses"); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STANFORD L. REV. 1241, 1252 (1991) [hereinafter *Mapping the Margins*] ("The failure of feminism to interrogate race means that the resistance strategies of feminism will often replicate and reinforce the subordination of people of color, and the failure of antiracism to interrogate patriarchy means that antiracism will frequently reproduce the subordination of women."). Today, "intersectionality" has come to circulate broadly with little attention paid to the distinctive articulations presented by various theorists. For example, one scholar dismissively argues that Crenshaw "recycles black feminism without demonstrating what new tools it brings to black feminism to help it fashion a more complex theory of identity." Jennifer C. Nash, *Re-Thinking Intersectionality*, 89 FEMINIST REV. 1, 9 (2008) (citation omitted). This assessment overlooks the elaborate and nuanced account Crenshaw provides of the operation of intersectional logic in the fields of law, politics, community organizing, and popular culture.

iences separately.”¹¹⁹ As a critical perspective, intersectionality has come to be understood as a corrective to forms of identity politics that, in proceeding on the basis of a “single-axis analysis,” produce marginalizations from within by ignoring intra-group differences.¹²⁰ In the two decades since Crenshaw first introduced her argument, the term intersectionality has come to circulate broadly and is now often used simply to designate research concerned with groups subject to multiple forms of identity-based marginalization and discrimination.¹²¹ Too often lost in the popularization of the intersectionality analytic, however, has been attention to Crenshaw’s focus on the mobilization of monolithic notions of identity as a strategy—deployed both by social movement actors and the state—to preempt or divide coalitions pursuing shared social justice commitments.¹²² Crenshaw issues a powerful if uncomfortable reminder that even progressive social movements may reinforce relations of subordination when operating within a “single-axis” framework of analysis.¹²³ The crux of her argument lies not in a celebration of the multiplicity of identity, but rather in understanding how this multiplicity enables the continued subordination of multiply-marginalized subjects. Crenshaw’s articulation of intersectionality highlights, then, the relationship between the recognition of identity and the regulation of political and legal subjects.

Intersectionality provides a particularly helpful framework for understanding the political effects of framing the debate over single-sex public education as a contest between advocates for disadvantaged children on the one hand and establishment feminists on the other. In making feminists the enemy, proponents of single-sex public education position themselves as champions of underserved children despite a paradoxical insistence that is-

¹¹⁹ Crenshaw, *Mapping the Margins*, *supra* note 118, at 1244.

¹²⁰ *Id.* at 1242 (“The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite—that it frequently conflates or ignores intragroup differences.”); *see also* Nash, *supra* note 118, at 2 (“[I]ntersectionality rejects the ‘single-axis framework’ often embraced by both feminist and anti-racist scholars . . .”).

¹²¹ *See, e.g.*, Ange-Marie Hancock, *When Multiplication Doesn’t Equal Quick Addition: Examining Intersectionality as a Research Paradigm*, 5 *PERSP. ON POL.* 63, 64 (2007) (discussing the implications of “[t]he current turn towards discussion of intersectionality as a research paradigm rather than a content specialization in populations with intersecting marginalized identities . . .”); *see also* McCall, *supra* note 100, at 1771 (reviewing use of intersectionality as a “major paradigm of research in women’s studies and elsewhere.”); Evelyn M. Simien, *Doing Intersectionality Research: From Conceptual Issues to Practical Examples*, 3 *POL. & GENDER* 264, 265 (2007) (arguing that intersectionality “places special emphasis on the simultaneity of oppression”).

¹²² *See* Crenshaw, *Demarginalizing*, *supra* note 118, at 166–67 (arguing that “the failure to embrace the complexities of compoundedness is not simply a matter of political will, but is also due to the influence of a way of thinking about discrimination which structures politics so that struggles are categorized as singular issues.”); Crenshaw, *Mapping the Margins*, *supra* note 118, at 1251–52 (describing “political intersectionality” as arising from “the fact that women of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas.”).

¹²³ *See* Crenshaw, *Mapping the Margins*, *supra* note 118, at 1242.

sues of race and class are subordinate to biological sex in determining a child's learning style. What has emerged, then, is a bait-and-switch strategy whereby biological sex differences become the scapegoat for the failures of a system that perpetuates injustices emanating from racial and economic inequalities. Neither Sax nor Gurian addresses race or poverty to any significant degree in his work or teacher training sessions. This is hardly surprising, of course, for to do so would threaten to undermine both the universalism and the salience of sex difference. What this means, however, is that children from poor and minority backgrounds now provide a core constituency and a public justification for a pedagogy that undermines claims about the educational significance of racial and economic disadvantages.¹²⁴ And while the preponderance of children participating in single-sex public school experiments in the early years have been non-white students from economically disadvantaged backgrounds,¹²⁵ this fact attests more to the ease of "experimentation" with unproven education innovations among those with the least educational opportunities than it does to the ambitions of those leading the movement. Sax, Gurian, and their followers are pushing hard for single-sex education everywhere.

CONCLUSION

This article has considered how proponents of the sex difference approach have negotiated anti-stereotyping norms, highlighting the use of scientific rhetoric to affirm the reality of sex differences. At the same time, discourses of racial and economic disadvantage have been mustered to undermine potential coalitions between anti-racist and feminist activists. In formulating a response, the anti-stereotyping principle cannot simply be reiterated, but it also must be reconceived to address the social construction of sex. Resistance to the biologization of masculinity must be formulated in the context of an awareness of the political mobilization of identities articulated through multiple modes of subordination.

¹²⁴ See Williams, *supra* note 55, at 25–26 (“[T]he discourse centers on sex and the presumably benign nature of separating boys and girls in education, 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.”) (citations omitted).

¹²⁵ See CORNELIUS RIORDAN ET AL., U.S. DEP'T OF EDUC., EARLY IMPLEMENTATION OF PUBLIC SINGLE-SEX SCHOOLS: PERCEPTIONS AND CHARACTERISTICS XV (2008), available at <http://www2.ed.gov/rschstat/eval/other/single-sex/characteristics/index.html> (“The survey and observational studies found that public single-sex schools served primarily non-white, high-poverty students in urban areas.”).

