

# Sex Segregation in Public Schools: Separate But Equal?

Lily A. Saffer

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## SEX SEGREGATION IN PUBLIC SCHOOLS: SEPARATE BUT EQUAL?

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### INTRODUCTION

In the past fifteen years single-gender education, a model long advocated by Jesuit schools,<sup>1</sup> has been on the rise in public institutions. Since the mid-1990s the number of single-sex public schools in the United States has gone from two to over 500 in the forty states with such offerings.<sup>2</sup> This increase has been in large part a result of a change in regulations under the No Child Left Behind Act,<sup>3</sup> which allows for, and even advocates, single-sex education.<sup>4</sup> But how can separation based on gender be permissible in a country where segregation by protected classes such as race or gender has been deemed constitutionally impermissible?

While many point to various psychological and pedagogical rationalizations for single-gender education,<sup>5</sup> the legal answer can be found in the 1996 Supreme Court case *United States v. Virginia*.<sup>6</sup> This seminal education case held that a publicly funded male college had

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1. Carol Zimmermann, *Single-Sex Schools: Public Schools Branch into Catholic School Domain*, CATHOLIC NEWS SERVICE, Nov. 22, 2006, <http://www.catholicnews.com/data/stories/cns/0606692.htm>.

2. Tamar Lewin, *Single-Sex Education Is Assailed in Report*, N.Y. TIMES, Sept. 23, 2011, at A19. This number includes both schools that offer single-sex classes and those that accept students of only one gender.

3. Amy Novotney, *Coed Versus Single-Sex Ed*, 42 MONITOR ON PSYCHOL. 58 (Feb. 2011).

4. *The Legal Status of Single-Sex Public Education*, NAT'L ASS'N FOR SINGLE SEX PUB. EDUC., <http://www.singlesexschools.org/policy-legalstatus.htm> (last visited Jan. 18, 2013).

5. See *infra* notes 98–123 and accompanying text.

6. 518 U.S. 515 (1996).

violated the Equal Protection Clause of the Fourteenth Amendment by denying admission to women.<sup>7</sup> But the key conclusion many have taken from this case is not that the denial of admission to women was in itself unconstitutional.<sup>8</sup> Rather, it was the failure of the institution to provide a separate program for women with the same offerings, endowment, and general rigor of the male program.<sup>9</sup> In essence, the case held that separate-but-equal educational facilities for different genders are constitutionally permissible.<sup>10</sup>

The language of this conclusion should look familiar. The “separate-but-equal” doctrine was first espoused in *Plessy v. Ferguson*,<sup>11</sup> the famous 1896 case upholding a Louisiana statute forcing white and non-white passengers to ride in separate railway cars.<sup>12</sup> The 1954 Supreme Court decision in *Brown v. Board of Education* expressly overruled *Plessy*’s holding in the education context.<sup>13</sup> This celebrated case held that separate schools for children of different races were functionally unequal because such separation created a “feeling of inferiority.”<sup>14</sup> The question is, then, whether this separate-but-equal doctrine, abolished in the context of race, is permissible in the context of gender. Surprisingly, there have been virtually no challenges to the *United States v. Virginia* holding, but as single-sex education in public schools becomes more pervasive, we are likely to see judicial action on the subject.<sup>15</sup>

This Note will proceed in six parts. Part I will examine the background of *United States v. Virginia* and the Court’s rationale for the separate-but-equal holding. Part II will explore the ruling in *Plessy v. Ferguson* and explain why it was overruled by *Brown*. Part III will look at arguments both for and against single-sex education, examining whether gender is subject to the same problems as race with regard to segregation in education. Part IV will map out the current legal climate and recent related judicial challenges. Part V will present my hypothesis of how the Court may review its holding in *United States v. Virginia*, and how it should ultimately rule. Finally, this Note will conclude with a look forward at the interaction between the Constitution and the national struggle to create a viable and successful educational system.

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7. *Id.* at 554.

8. *Id.*

9. *Id.*

10. *Id.* at 547–48.

11. *Plessy v. Ferguson*, 163 U.S. 537, 548–49 (1896).

12. *Id.* at 540, 552.

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

14. *Id.* at 494.

15. *See Lewin, supra note 2.*

I. *UNITED STATES V. VIRGINIA*

The Virginia Military Institute (VMI) was founded in 1839, and by the time the Court heard this case in 1996, VMI had a long and treasured history of rigorous training for future male leaders.<sup>16</sup> Although many of Virginia's higher learning institutions began as either all-male or all-female, by this time VMI was the only remaining single-sex public college.<sup>17</sup> VMI remained financially supported in part by, and thus under the control of, the Virginia General Assembly, and it was therefore considered a state actor.<sup>18</sup>

It was on the basis of this state action that the United States government filed suit in 1990 against Virginia and VMI on behalf of a female high school student seeking admission to the school.<sup>19</sup> The United States alleged that the male-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment, which provides in relevant part that:

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>20</sup>

The District Court for the Western District of Virginia undertook a factual inquiry into VMI's operations. The court found that some women would want to attend the school if given the opportunity;<sup>21</sup> that with recruitment VMI could achieve a ten percent female student body;<sup>22</sup> and that some women would be capable of all the activities required of VMI students.<sup>23</sup> The opinion also cited the Supreme Court's holding in *Mississippi University for Women v. Hogan*, which concluded that a government classification based on sex requires an "exceedingly persuasive justification."<sup>24</sup> The District Court found, however, that VMI and Virginia had established such a justification by showing that VMI added to the diversity of Virginia's institutions, and that admission of women would seriously alter the school's "distinctive method."<sup>25</sup>

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

17. *Id.* at 536–38.

18. *Id.* at 520–21.

19. *Id.* at 523.

20. U.S. CONST. amend. XIV, § 1.

21. *United States v. Virginia*, 766 F. Supp. 1407, 1414 (W.D. Va. 1994).

22. *See id.* at 1437.

23. *Id.* at 1412.

24. *Id.* at 1410 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

25. *Id.* at 1413.

The Court of Appeals for the Fourth Circuit disagreed with this analysis, finding that such diversity was not a sufficient state policy justification.<sup>26</sup> In particular, the Court of Appeals pointed to the fact that all the other public institutions of higher learning in Virginia had become coeducational.<sup>27</sup> Rather than ordering a change in VMI's admissions policy, the Court of Appeals recognized the changes that would have to be made to the unique program as a result of admitting women.<sup>28</sup> They gave VMI three options: they could admit women, establish a parallel institution or program for women, or abandon their financial support from the state.<sup>29</sup>

VMI chose to pursue the second option. Under the court's direction, it established a parallel program at the nearby Mary Baldwin College, a private, all-female, liberal arts college.<sup>30</sup> This program, however, differed significantly from the male program at VMI. At VMI, the program strove to produce "citizen-soldiers" using the "adversative, or doubting, model of education," including "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of desirable values."<sup>31</sup> The program at Mary Baldwin, on the other hand, favored a "cooperative" method of education; rather than participating in rigorous military-like training, the students would participate in ROTC programs and a "largely ceremonial" Corps of Cadets.<sup>32</sup>

The two programs also differed significantly in resources. The academic quality of Mary Baldwin was lower than that of VMI, with the average SAT of incoming freshman 100 points lower and with significantly fewer Ph.D.s among the faculty.<sup>33</sup> Mary Baldwin offered degrees only in the liberal arts, while VMI had academic opportunities in the sciences and engineering.<sup>34</sup> The difference in the financial resources between the two schools was "pronounced," as were the employment opportunities after graduation since the VMI students had a large network of distinguished alumni at their disposal.<sup>35</sup>

The District Court found this parallel program to satisfy the Equal Protection Clause, holding that Virginia and VMI were not

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26. See *United States v. Virginia*, 976 F.2d 890, 900 (4th Cir. 1992).

27. *Id.* at 899.

28. *Id.* at 896-97.

29. *Id.* at 900.

30. *United States v. Virginia*, 518 U.S. 515, 526 (1996).

31. *Id.* at 522 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)).

32. *Id.* at 527.

33. *Id.* at 526.

34. *Id.*

35. *Id.* at 552.

legally required to “provide a mirror image VMI for women.”<sup>36</sup> The court colorfully concluded that though the male program “marches to the beat of a drum,” and the women’s program “marches to the melody of a fife,” it was the end of the journey that mattered, where “both will have arrived at the same destination.”<sup>37</sup> The Court of Appeals, though divided, affirmed the decision of the District Court.<sup>38</sup> It rested its decision on the conclusions that the option of single-sex education was legitimate and important; the state’s action was “not pernicious” and designed to exclude; it would be impossible to maintain the VMI program with women integrated; and the educational opportunities in each program were “sufficiently comparable.”<sup>39</sup> The Fourth Circuit denied rehearing en banc.<sup>40</sup>

It was at this point that the Supreme Court granted certiorari. Justice Ginsburg wrote for the majority, holding that there were two questions at issue in the case.<sup>41</sup> The first was whether VMI’s exclusion of women denied Fourteenth Amendment Equal Protection to those women capable of completing VMI’s program.<sup>42</sup> The standard used required the State to show that the classification served important governmental objectives and that the discriminatory means were substantially related to those objectives.<sup>43</sup> Furthermore, the justification could not be hypothesized or invented in response to litigation.<sup>44</sup>

Under this standard, the Court found VMI’s justifications unconvincing. Justice Ginsburg dismissed Virginia’s argument based on “inherent differences” between men and women, holding that these are no longer accepted as justifications for classification based on race or national origin.<sup>45</sup> She did acknowledge the “enduring” physical differences between men and women,<sup>46</sup> but the Court held that these are not an excuse for “denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”<sup>47</sup> As for Virginia’s argument based on VMI’s contribution to the diversity of its educational system, the Court claimed that the State had “not shown that VMI . . . has been maintained, with a view to diversifying, by its

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36. *United States v. Virginia*, 852 F. Supp. 471, 481 (W.D. Va. 1994).

37. *Id.* at 484.

38. *United States v. Virginia*, 44 F.3d 1229, 1232 (4th Cir. 1995).

39. *Id.* at 1238–41.

40. *United States v. Virginia*, 52 F.3d 90, 91 (4th Cir. 1995).

41. *United States v. Virginia*, 518 U.S. 515, 530–31 (1996).

42. *Id.* at 530.

43. *Id.* at 533.

44. *Id.*

45. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

46. *Id.*

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

categorical exclusion of women, educational opportunities.”<sup>48</sup> The Court reiterated its standard of review, that the justification “must describe actual state purposes” and not be based on “rationalizations” invented after the onset of litigation.<sup>49</sup> Under this lens of scrutiny, the Court found nothing in the record indicating that VMI was founded, and its all-male admissions policy perpetuated, in the “alleged pursuit of diversity.”<sup>50</sup>

Virginia’s claim that VMI’s educational method could not be made available to women in an unmodified form was also unconvincing.<sup>51</sup> Pointing to the factual record from the first District Court proceeding, particularly that “the VMI methodology could be used to educate women” and “some women” were capable of all of VMI’s physical activities,<sup>52</sup> the Court held that a school “may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’”<sup>53</sup> Again, the Court was particularly dismissive of gender-based stereotypes, pointing out that similar concerns about female tendencies had long proven false for women in the legal and medical professions, as well as in military academies and military forces.<sup>54</sup> The Court especially found distasteful the concept that women could not share in VMI’s mission of creating individuals valuing education, leadership, public service, and democracy, declaring, “[s]urely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men.”<sup>55</sup>

Having determined that a Fourteenth Amendment violation had occurred, the Court turned to the second question in dispute: “what is the remedial requirement?”<sup>56</sup> The Court found that the creation of the parallel program at Mary Baldwin was insufficient since it was “different in kind from VMI and unequal in tangible and intangible facilities.”<sup>57</sup> The Court relied on the factual findings of the lower courts to determine, as outlined above, that the Mary Baldwin program differed from VMI in academic opportunities, facilities, resources, and educational design.<sup>58</sup> In this area, the Court found that

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48. *Id.* at 535.

49. *Id.*

50. *Id.* at 536.

51. *Id.* at 540.

52. *Id.* at 540–41 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1412, 1414 (W.D. Va. 1991)).

53. *United States v. Virginia*, 518 U.S. 515, 541 (1996) (quoting *Miss. Univ. for Women*, 458 U.S. 718, 725 (1982)).

54. *Id.* at 543–45.

55. *Id.* at 545.

56. *Id.* at 531.

57. *Id.* at 547.

58. *Id.* at 551–52.

the Fourth Circuit had erred in their analysis of the different programs, explaining that “‘all gender-based classifications today’ warrant ‘heightened scrutiny.’”<sup>59</sup>

The Court’s focus on the actual inequalities in the facilities, rather than those inherent in them, produced the separate-but-equal doctrine that has been the major takeaway from the case.<sup>60</sup> But despite the prior declaration of this doctrine’s unconstitutionality in the context of race, the *United States v. Virginia* opinion itself makes a direct link to separation based on race, citing *Sweatt v. Painter*.<sup>61</sup> This 1950 case held it impermissible for a Texas law school to create a separate facility, with much fewer resources, for African-American students.<sup>62</sup> The *Sweatt* case predates *Brown*, but the question is whether its mention here indicates that gender shares key qualities with race under constitutional analysis and whether these shared qualities make *Virginia*’s separate-but-equal gender doctrine untenable under *Brown*’s framework.

## II. PLESSY V. FERGUSON AND BROWN V. BOARD OF EDUCATION

In 1892, Plessy, a man of one-eighth African heritage, purchased a first class ticket on a train traveling from one Louisiana city to another.<sup>63</sup> He selected a seat in a coach reserved for white passengers under a Louisiana state statute requiring passenger trains to provide separate cars for different races; passengers were to comply with this separation on penalty of fine or imprisonment.<sup>64</sup> The conductor ordered Plessy to move to a car reserved for “colored” passengers, and when he refused he was “forcibly ejected” from the train and arrested.<sup>65</sup> After his arrest, Plessy challenged the constitutionality of the Louisiana statute on the basis of both the Thirteenth and Fourteenth Amendments.<sup>66</sup>

Under its Fourteenth Amendment analysis, the Court’s majority found that this Amendment’s purpose was “political equality,” not “social” equality or “a commingling of the two races upon terms unsatisfactory to either.”<sup>67</sup> The Court drew a firm distinction between

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59. *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quoting *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136 (1994)).

60. *See id.* at 518.

61. *Id.* at 553.

62. *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950).

63. *Plessy v. Ferguson*, 163 U.S. 537, 538 (1896).

64. *Id.* at 540–41.

65. *Id.* at 541–42.

66. *Id.* at 542.

67. *Id.* at 544.

such “political” equality, including the right to sit on a jury, and “social” separation in areas such as “schools, theatres and railway carriages.”<sup>68</sup> As a justification for perpetuating this social segregation, the Court held that “[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.”<sup>69</sup> In short, the Court held that neither it nor the legislature of Louisiana could “eradicate racial instincts,” and “[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”<sup>70</sup>

In a much-celebrated dissent, Justice Harlan disagreed vehemently with the majority’s interpretation of the Thirteenth and Fourteenth Amendments.<sup>71</sup> Harlan concluded that these Amendments were created not just to remove involuntary servitude and legal inequalities, but “the imposition of any burdens or disabilities that constitute badges of slavery or servitude.”<sup>72</sup> To show that the railway car segregation constituted such a “badge,” Harlan argued that the separation could not truly be equal, because the Louisiana statute was not, as the majority assumed, “applicable alike to white and colored citizens.”<sup>73</sup> This was because the statute’s purpose was not, according to Harlan, “to exclude white persons from railroad cars occupied by blacks,” but rather “to exclude colored people from coaches occupied by or assigned to white persons.”<sup>74</sup> Because of this underlying purpose, and the fundamental inequality of the separation, Harlan regarded the provision of “equal accommodations” to be no more than a “guise” masking a threat to liberty and equality.<sup>75</sup>

As for the majority’s argument that the government could not force races to comingle when they socially did not wish to do so, Harlan looked at the other side of the coin, stating that “[i]f a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.”<sup>76</sup> Harlan dismissed the majority’s suggestion that “social equality cannot exist between the white and black races in this country,” pointing out that two races sitting

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68. *Id.* at 544–45.

69. *Plessy*, 163 U.S. at 551.

70. *Id.* at 551–52.

71. *Id.* at 555 (Harlan, J., dissenting).

72. *Id.*

73. *Id.* at 557.

74. *Id.*

75. *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

76. *Id.*

together in a railway car was not significantly different from two races sitting in a jury box together or two races voting in the same room.<sup>77</sup> Rather, Harlan famously held that “[o]ur Constitution is color-blind,” and no State legislation could “place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community.”<sup>78</sup>

Harlan’s dissent, however, was before its time, and the doctrine applied to racial segregation in social institutions after this case became the majority’s “separate-but-equal” analysis.<sup>79</sup> For more than a half century, courts held racial segregation in public places, including schools, permissible as long as the separate facilities were determined to be equal or substantially equal by the reviewing court. The majority in *Plessy* had specifically mentioned schools as an example of a social arena in which segregation had long been permissible, holding that “[t]he most common instance of [laws permitting separation] is connected with the establishment of separate schools for white and colored children.”<sup>80</sup> Other than to determine the actual equality of separate institutions, the Court did not examine the question of school segregation until *Brown*.

In 1954, four cases from four different states—Kansas, South Carolina, Delaware, and Virginia—came before the Court under the heading of *Brown v. Board of Education*.<sup>81</sup> In each of these cases, African-American children had sought admission to schools in their districts reserved for white children.<sup>82</sup> The petitioners argued that the laws in their states permitting racial segregation violated the Equal Protection Clause of the Fourteenth Amendment.<sup>83</sup> As for *Plessy*’s “separate but equal” rationale, the petitioners argued that such separation was “not ‘equal’ and cannot be made ‘equal.’”<sup>84</sup>

In a unanimous and concise opinion, the Court agreed with the petitioners and overruled *Plessy*.<sup>85</sup> The Court found that the “tangible factors” of the separate school facilities had been equalized. Therefore, the question presented was not whether the schools were tangibly equal, but whether the “segregation of children in public schools solely on the basis of race, even though the physical facilities and

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77. *Id.* at 561.

78. *Id.* at 559, 563.

79. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (invalidating the separate but equal doctrine in the context of education).

80. *Plessy*, 163 U.S. at 544.

81. *Brown*, 347 U.S. at 486.

82. *Id.* at 487–88.

83. *Id.* at 488.

84. *Id.*

85. *Id.* at 495.

other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities[.]”<sup>86</sup>

In a conclusion reminiscent of Harlan's dissent in *Plessy*, the Court held that “in the field of public education the doctrine of ‘separate but equal’ has no place.”<sup>87</sup> It explained that while the facilities of the schools might be equal, such separation based “solely” on 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.”<sup>88</sup> The Court therefore abolished racial segregation in public schools as “inherently unequal” and violative of the Equal Protection Clause of the Fourteenth Amendment.<sup>89</sup>

If “‘separate but equal’ has no place” in the “field of public education” under the ruling in *Brown*,<sup>90</sup> then why is such a standard permissible in the category of gender under the ruling of *United States v. Virginia* more than forty years later?<sup>91</sup> It is true that differences between the races are not exactly akin to differences between gender. Sexual characteristics, for instance, are very obviously distinguished between males and females. But the decision in *Brown*, and Harlan's dissent in *Plessy*, did not rest on the absence of actual physical differences between citizens. They were based instead upon the “badge” or “feeling of inferiority”<sup>92</sup> created by separation based solely on the classification.<sup>93</sup> Can separation by gender, like separation by race, generate such a “badge” that any permitted segregation should be outlawed under the ruling in *Brown*? The next section attempts to answer this question by examining the different arguments for and against single-gender education.

### III. IS GENDER SEPARATION SUBJECT TO THE SAME PROBLEMS AS RACE SEPARATION?

The legal arguments for and against gender segregation in schools have their counterparts in historical, psychological, pedagogical and social science arguments. Some of these non-legal arguments relate directly to the concepts of “feeling of inferiority” and “inheren[t] unequal[ity]” pointed to in the *Brown* decision.<sup>94</sup> Arguments on both sides are persuasive, but advocates both for and

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86. *Id.* at 493.

87. *Brown*, 347 U.S. at 495.

88. *Id.* at 494.

89. *Id.* at 495.

90. *Id.*

91. *See United States v. Virginia*, 518 U.S. 515, 533–34 (1996).

92. *See Brown*, 347 U.S. at 494; *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

93. *Brown*, 347 U.S. at 494.

94. *See id.* at 494–95.

against single-sex education have become more vociferous in recent years as this education model becomes more common and permissible.<sup>95</sup> This section will examine non-legal rationalizations both for and against this segregation.

#### *A. Arguments in Favor of Single-Gender Education*

Some proponents of single-sex education argue that, apart from obvious physical differences between the sexes, there are important differences in the ways that boys and girls learn.<sup>96</sup> In some cases these differences require different general approaches to teaching.<sup>97</sup> Dr. Sax of the National Association of Single Sex Public Education has claimed that boys require “energetic, confrontational classrooms,” whereas girls require “a gentler touch.”<sup>98</sup> He is not alone in this claim; his pronouncement reflects a common theme in this “gender differences” argument.<sup>99</sup> Under this sort of “Mars vs. Venus” analysis, girls are warm, agreeable, passive, and neurotic, but boys are aggressive, assertive, and physical.<sup>100</sup> The general acceptance of these sex differences has led many to develop and advocate different approaches to educating and disciplining boys and girls, such as giving girls more essay tests and giving boys more opportunities to move around.<sup>101</sup>

Other advocates argue that these gender differences need not be so generalized, and in fact there are very specific, measurable gender differences in learning.<sup>102</sup> There have long been recognized sex differences in hearing due to differences in prenatal development of the auditory cortex.<sup>103</sup> Dr. Sax has argued that these physical distinctions

95. Kristina Gupta, *Neurosexism and Single-Sex Education (or Support Your Local ACLU)*, NEUROETHICS BLOG (July 24, 2012, 8:58 AM), <http://www.theneuroethicsblog.com/2012/07/neurosexism-and-single-sex-education-or.html>.

96. Leonard Sax, *Six Degrees of Separation: What Teachers Need to Know About the Emerging Science of Sex Differences*, 84 EDUC. HORIZONS 190, 195 (2006).

97. *E.g.*, Galen Sherwin, “Science” Says No to Single-Sex Education, ACLU: BLOG OF RIGHTS (Sept. 26, 2011, 1:04 PM), <http://www.aclu.org/blog/womens-rights/science-says-no-single-sex-education>.

98. Lewin, *supra* note 2, at A19.

99. *See, e.g.*, Sax, *supra* note 96, at 194–95 (describing the difference in the way teachers speak to their all-female classes versus their all-male ones).

100. *E.g.*, Paul T. Costa, Jr. et al., *Gender Differences in Personality Traits Across Cultures: Robust and Surprising Findings*, 81 J. PERSONALITY & SOC. PSYCHOL. 322, 328 (2001).

101. *E.g.*, *Gender Differences Impact Learning and Post-School Success*, COUNCIL FOR EXCEPTIONAL CHILDREN, <http://www.cec.sped.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6270> (last updated 2011).

102. *See, e.g.*, Dennis McFadden, *Sex Differences in the Auditory System*, 14 DEVELOPMENTAL NEUROPSYCHOLOGY 261, 261 (1998) (noting that sex differences in the auditory system are largely controlled by hormones).

103. *See id.* at 280–81.

require different effective teaching strategies, specifically that boys' teachers speak more loudly and that girls' teachers eliminate background noise.<sup>104</sup> Similarly, studies have shown that men and women rely on vision differently,<sup>105</sup> leading to the argument that boys typically require more visual learning than girls.<sup>106</sup> Some even go so far as to suggest that different genders learn best at different temperatures, because scientific studies have shown that the "ideal ambient temperature," for adolescent males and females tends to vary by about six degrees.<sup>107</sup>

Outside of the realm of physical science, some advocates claim that single-gender education is necessary to produce advantages specific to girls. This affirmative-action-style argument points out that girls are more likely to speak up outside of the presence of boys and will not feel pressured to fulfill gender expectations of being timid or retiring. One study has found that, in general, girls are far more critical of their academic performance, and boys tend to inflate their performance and accomplishments.<sup>108</sup> Data like this has presented what many have seen as a need to build the academic confidence of girls across the board, and single-sex education seems to do just that.<sup>109</sup> A report commissioned by the National Coalition of Girls Schools has shown that single-sex education makes a statistically significant impact on girls' "self-confidence, political and social activism, life goals, and career orientation," as well as academic confidence and confidence in traditionally male-dominated subjects such as math and computer science.<sup>110</sup> This study looked only at girls from different educational backgrounds as they prepared to enter college, not afterwards.<sup>111</sup> But many have made similar arguments regarding all-female higher education leading to greater confidence and success in adult life.<sup>112</sup>

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104. Leonard Sax, *Sex Differences in Hearing: Implications for Best Practice in the Classroom*, 2 *ADVANCES IN GENDER AND EDUC.* 13, 15–16 (2010).

105. *E.g.*, Karen Chipman et al., *A Sex Difference in Reliance on Vision During Manual Sequencing Tasks*, 40 *NEUROPSYCHOLOGIA* 910, 915 (2002).

106. *E.g.*, *Gender Differences Impact Learning and Post-School Success*, *supra* note 101 (recommending supplementing visual aids in the classroom to effectively teach male students).

107. Sax, *supra* note 96, at 193–94.

108. Eva M. Pomerantz et al., *Making the Grade but Feeling Distressed: Gender Differences in Academic Performance and Internal Distress*, 94 *J. EDUC. PSYCHOL.* 396, 399, 402 (2002).

109. LINDA J. SAX ET AL., EXECUTIVE SUMMARY: WOMEN GRADUATES OF SINGLE-SEX AND COEDUCATIONAL HIGH SCHOOLS: DIFFERENCES IN THEIR CHARACTERISTICS AND THE TRANSITION TO COLLEGE 4 (2009).

110. *Id.* at 3.

111. *Id.* at 2.

112. *See, e.g.*, H. Kim Bottomly, Letter to the Editor, *Same-Sex Education*, *N.Y. TIMES*, Oct. 4, 2011, at A24. Bottomly is the current President of Wellesley College, one of the

Some claim that this sort of “affirmative action” has already achieved its goal and girls are no longer in need of this advantage.<sup>113</sup> But rather than advocating for coeducational classes, some of these education specialists continue to argue for single-sex education; their claim is that boys require education tailored to them in order to catch back up to the nation’s girls.<sup>114</sup> This argument relies on recent research showing that girls receive higher grades than boys; that boys are more likely than girls to be referred for special education or diagnosed with learning disabilities; and that girls have been closing the gender gap in math and science while boys remain far behind in reading and writing.<sup>115</sup> Educational programs tailored to boys, just as those tailored to girls, could help close these academic gender gaps.<sup>116</sup>

Finally, some argue that separating the genders, particularly in middle school and high school, takes sex out of the equation, making learning a higher priority than wooing those of the opposite gender in class. This is a justification that causes many parents to seek single-sex placement for their children, particularly those of certain faiths.<sup>117</sup> This aspect of single-gender education has been shown to have a particularly strong effect on girls, though not quite the convent-like effect one might assume. One study found that young women in single-gender schools, while less likely to become pregnant than their co-educated counterparts,<sup>118</sup> were more likely to be involved in heterosexual romantic relationships.<sup>119</sup> According to one explanation, heterosexual relationships in coeducational schools are more about fulfilling roles in a social hierarchy than forming truly intimate relationships.<sup>120</sup> This social hierarchy, and the expectations that come with it, seem to exist far less prevalently in single-gender schools.<sup>121</sup>

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nation’s most famous and most successful all-female private colleges. Here, she claims that “women’s colleges are a vital and vibrant part of the educational landscape and should be offered to all young women as a choice.” *Id.*

113. See Richard Whitmire, *Missed Opportunity*, INSIDE HIGHER ED. (Apr. 22, 2011), [http://www.insidehighered.com/views/2011/04/22/essay\\_criticizing\\_end\\_of\\_inquiry\\_into\\_possible\\_bias\\_against\\_female\\_applicants\\_to\\_colleges](http://www.insidehighered.com/views/2011/04/22/essay_criticizing_end_of_inquiry_into_possible_bias_against_female_applicants_to_colleges).

114. See, e.g., MICHAEL GURIAN, *THE WONDER OF BOYS* 76–79 (1996).

115. See *Gender Differences Impact Learning and Post-School Success*, *supra* note 101.

116. *Id.*

117. See, e.g., Kim Thomas, *In a Class of Their Own*, NEW STATESMAN, Sept. 5, 1997, at 27.

118. *Advantages for Girls*, NAT’L ASS’N FOR SINGLE SEX PUB. EDUC., <http://www.singlesexschools.org/research-forgirls.htm> (last visited Jan. 18, 2013).

119. But see Neville W. Bruce & Katherine A. Sanders, *Incidence and Duration of Romantic Attraction in Students Progressing from Secondary to Tertiary Education*, 33 J. BIOSOCIAL SCI. 173, 183 (2001).

120. See A.D. Pellegrini, *Bullying, Victimization, and Sexual Harassment During the Transition to Middle School*, 37 EDUC. PSYCHOLOGIST 151, 156 (2002).

121. *Advantages for Girls*, *supra* note 118.

Essentially, it is easier for girls from a single-sex environment to say “no.”<sup>122</sup> Beyond the predictable problems with romantic relationships, girls in various surveys have reported that they feel generally more comfortable in their single-sex environments, because they are not distracted by boys or the need to “worry about how [they] look.”<sup>123</sup>

### *B. Arguments Against Single-Gender Education*

On the opposing side, some argue that single-sex education has a negative effect because it reduces opportunities for boys and girls to work together.<sup>124</sup> Men and women must work together in the adult world, these opponents argue, and boys and girls who have only been in single-gender education will be unprepared for this cross-gender interaction.<sup>125</sup> The issue is that boys and girls will not only lack experience dealing with the opposite sex, but they will also lack the experience necessary to treat the opposite sex equally.<sup>126</sup> This says something not only about these students’ future ease of interaction and success, but also about the reinforcement of gender stereotypes in adulthood and the workplace.

In the same vein, some argue that rather than allowing girls to be more assertive or boys to be more passive, single-gender education actually reinforces gender stereotypes in children.<sup>127</sup> Specifically, “[b]oys who spend more time with other boys become increasingly aggressive,” and “girls who spend more time with other girls become more sex-typed” as feminine.<sup>128</sup> One study found that when more gender-typing was done, such as having children line up separately or use separate educational tools, children showed a greater gender preference toward each other and the activities.<sup>129</sup> This is not to say that no model of single-sex education can work to reduce or eliminate gender stereotypes, but research has shown that single-sex education only works in this way if designed with “explicit gender transformational objectives.”<sup>130</sup>

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122. *Id.*

123. Kibuchi Banfield & Elizabeth Negron, *Single-Sex School Focuses Students on Books, Not Image, Girls Say*, N.Y. AMSTERDAM NEWS, Dec. 9–15, 2004, at 22.

124. Diane F. Halpern et al., *The Pseudoscience of Single-Sex Schooling*, 333 SCIENCE 1706, 1707 (2011).

125. Novotney, *supra* note 3, at 58.

126. *Id.*

127. Halpern et al., *supra* note 124, at 1706.

128. *Id.* at 1707.

129. *Id.*

130. See NELLY P. STROMQUIST, *THE GENDER SOCIALIZATION PROCESS IN SCHOOLS: A CROSS-NATIONAL COMPARISON 2* (2007); see also Lewin, *supra* note 2, at A19 (reviewing recent research on single-sex schooling and its impact on the debate).

In an argument parallel to those for race integration, many argue that different genders do not learn any more differently as groups than children of different races do. Neuroscientists have found very little differences between post-natal female and male brains; what differences they have found are not related to educational needs.<sup>131</sup> Supporters of single-sex education continue to argue, as outlined above, that data reflects the academic advantages of single-sex environments. But the response is that these supposed advantages actually reflect the fact that most single-sex schools are private, with ostensibly better programs than most public schools, and many even require high performance on an academic test prior to admission.<sup>132</sup>

As far as the argument that girls need a sort of “affirmative action” educational leg-up, some opponents argue that this is no longer necessary. The “pendulum ha[s] swung,”<sup>133</sup> they claim, and now boys are performing worse than their female counterparts, as addressed in the section above.<sup>134</sup> Particularly in the area of higher education, there are now substantially more women than men in college and graduate school.<sup>135</sup>

The extent of these arguments boils down to a single inquiry: whether the differences between girls and boys in our society merit, and in fact encourage, gender segregation in schools; or whether these differences are a fallacy that, subject to the dangers mounted in *Plessy’s* dissent and *Brown*, should be struck from our legal and constitutional allowances. We will turn next to the current legal environment for single-gender education, where the pedagogical and scientific arguments often come into play.

#### IV. THE PRESENT LEGAL CLIMATE

In 2001, Congress enacted the so-called No Child Left Behind Act in an effort to improve America’s failing public schools through

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131. Halpern et al., *supra* note 124, at 1706.

132. *Id.*

133. See Lewin, *supra* note 2, at A19.

134. See *supra* notes 114–15 and accompanying text.

135. In 2006, two-thirds of colleges reported receiving more female than male applicants, and 56% of American undergraduates were women. Jennifer Delahunty Britz, Op-Ed., *To All the Girls I’ve Rejected*, N.Y. TIMES, Mar. 23, 2006, [http://www.nytimes.com/2006/03/23/opinion/23britz.html?\\_r=3](http://www.nytimes.com/2006/03/23/opinion/23britz.html?_r=3). By 2011 this statistic had remained steady, if increasing somewhat, with 57% of four-year degrees going to women; by this time, many colleges had basically instituted affirmative action programs to enroll more men. See Whitmire, *supra* note 113. In 2010 more women were earning bachelor’s degrees (by 7%), associate’s degrees (28%), and master’s degrees (18%); more women were even graduating from high school (3%). However, 43% more men were earning doctoral degrees. *Educational Attainment in the United States: 2010—Detailed Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/socdemo/education/data/cps/2010/tables.html> (last updated Apr. 26, 2011) (utilized in calculating the cited figures).

a system of accountability and assessment.<sup>136</sup> That same year, an amendment sponsored by primarily female senators, including Hillary Rodham Clinton, added the provision that “[f]unds made available to local educational agencies under section 7211a of this title shall be used for . . . [p]rograms to provide same-gender schools and classrooms (consistent with applicable law).”<sup>137</sup> This amendment was approved and added to the final law, along with a provision stating that “[n]ot later than 120 days after” the No Child Left Behind Act was enacted, the Secretary of Education would issue “guidelines” for local agencies seeking funding for such programs.<sup>138</sup> These amendments legislatively codified the legal go-ahead for single-gender public education that had been judicially declared five years earlier in *United States v. Virginia*.<sup>139</sup>

While the Act required the Department of Education to create regulations for single-gender education within 120 days of the Act’s enactment,<sup>140</sup> the Department did not issue these proposed regulations until March 9, 2004.<sup>141</sup> They were then amended and released on October 25, 2006,<sup>142</sup> and these regulations added new exceptions and flexibility to single-sex classrooms, extracurricular activities, and elementary and secondary schools.<sup>143</sup> It is these 2006 regulations, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” (hereinafter CFR), which continue to govern single-gender education in public and publicly funded schools today.<sup>144</sup>

Under the CFR, schools are permitted to offer single-sex classrooms as long as they fulfill three requirements.<sup>145</sup> First, they must provide a rationale for offering only one gender a particular course.<sup>146</sup> Many rationales are acceptable, including a dearth of a particular gender in an interest area.<sup>147</sup> For instance, a school could offer a computer science course for just girls based on the fact that so few girls

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136. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1001, 115 Stat. 1425, 1439–40 (2002) (codified in scattered sections of 20 U.S.C.).

137. 20 U.S.C. § 7215(a) (2006).

138. *Id.* § 7215(c).

139. *See* 518 U.S. 515, 547 (1996).

140. 20 U.S.C. § 7215(c) (2006).

141. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276 (Mar. 9, 2004) (to be codified at 34 C.F.R. § 106).

142. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.34 (2008).

143. 34 C.F.R. pt. 106.34.

144. *Id.*

145. *Id.*

146. *Id.*

147. *See The Legal Status of Single-Sex Public Education*, *supra* note 4.

had taken computer science in the past.<sup>148</sup> Secondly, the school must provide a comparable class in a coeducational setting at a location with “geographic accessibility.”<sup>149</sup> Thirdly, the school must conduct a review every two years to ensure that the single-sex offering is still necessary for whatever purpose that first prompted them.<sup>150</sup>

The requirements for entirely single-sex public schools are even less stringent, arguably creating an incentive for single-gender education to be school-wide rather than just in particular classrooms.<sup>151</sup> Districts providing a single-sex school need only ensure that “‘substantially equal’ courses, services, and facilities” are offered at another school within the district.<sup>152</sup> These equal offerings, however, do not necessarily need to be either coeducational or for the opposite gender.<sup>153</sup> A district could therefore have an all-girls high school and a coeducational high school with no all-boys offering, for example, or an all-boys elementary school and an all-girls elementary school with no coeducational offering.<sup>154</sup>

Districts providing entirely single-gender schools also do not need to provide any rationale for their offerings.<sup>155</sup> It is apparently considered sufficient that an entirely single-sex program is generally beneficial, as outlined in some of the arguments in the above section.<sup>156</sup> Districts providing entirely single-gender schools are also not required, as are schools providing single-gender education in only some classes, to conduct any kind of periodic review clarifying their rationalization and purpose.<sup>157</sup>

This is the point at which single-gender education in the public schools now stands: under *United States v. Virginia* and the CFR, schools and classrooms can be single-sex as long as the excluded gender has a comparable, or “separate but equal,” offering in the same district. But as we have seen in the legal doctrine of *Brown* and the non-legal arguments of many educational experts and academics, this rationalization cannot stand unchallenged. This section will now examine three different directions of attack on this doctrine—academic, extracurricular, and admissions—and the successes and failures seen by the few challenges in these areas in the years since *United States v. Virginia* and the No Child Left Behind Act.

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148. *Id.*

149. 34 C.F.R. § 106.34 (2008).

150. *Id.*

151. See *The Legal Status of Single-Sex Public Education*, *supra* note 4.

152. *Id.*

153. 34 C.F.R. § 106.34.

154. See *The Legal Status of Single-Sex Public Education*, *supra* note 4.

155. 34 C.F.R. § 106.34.

156. See *supra* Part III.A.

157. 34 C.F.R. § 106.34.

### A. Academic Challenges

Over the last year, the American Civil Liberties Union (ACLU) has instituted many challenges against proposed single-sex schools throughout the country. It seems they have been inspired, at least in part, by the *Science* article cited above, which found scientific and social arguments for single-sex education to be “misguided.”<sup>158</sup> Due to settlements and agreements, none of the ACLU’s challenges, which have been resolved in three separate states, have reached a court. These outcomes, however, can indicate the likely success similar challenges would have before a judge.

Early in 2011, the ACLU filed suit against the school board in Vermillion Parish, Louisiana, based on a middle school program that split genders into different core curricular classes.<sup>159</sup> The ACLU alleged that the parish’s Rene A. Rost Middle School, in addition to violating the Equal Protection Clause of the Fourteenth Amendment, relied on “flawed data” and “gender stereotypes” and “had no positive effect on academic performance.”<sup>160</sup> In their settlement with the ACLU, Vermillion Parish agreed to halt the program until at least 2017 and not to institute any other single-sex programs for just as long.<sup>161</sup>

A district in Wisconsin similarly put a halt to a single-sex proposal after hearing from the ACLU.<sup>162</sup> This proposed school in Madison would have been a charter school exclusively for boys.<sup>163</sup> At first, the school board simply asked proponents to give them “scientifically based evidence showing that separating boys and girls will get educational results.”<sup>164</sup> The main opposition, however, seemed to be that a similar option was not available for girls, and the school board permitted a new proposal for a school admitting both sexes but then segregating them.<sup>165</sup> The ACLU has called on the board again to halt the new proposal until the school is entirely integrated.<sup>166</sup>

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158. Sherwin, *supra* note 97.

159. *Louisiana School Board to Halt Single-Sex Classes After ACLU Intervention*, ACLU (Oct. 13, 2011), <http://www.aclu.org/womens-rights/louisiana-school-board-halt-single-sex-classes-after-aclu-intervention>.

160. *Id.*

161. *Id.*

162. Sara Rose & Sue Frietsche, *Following ACLU Demands Pittsburgh Ditches Single-Sex School Plans*, ACLU: BLOG OF RIGHTS (Nov. 11, 2011, 4:00 PM), <http://www.aclu.org/blog/womens-rights/following-aclu-demands-pittsburgh-ditches-single-sex-school-plans>.

163. *Id.*

164. *See* Sherwin, *supra* note 97.

165. Rose & Frietsche, *supra* note 162.

166. *Id.*

The ACLU's most successful challenge yet has been in Pittsburgh, Pennsylvania, where the school district agreed to drop gender-segregated classes at a school for grades six through twelve.<sup>167</sup> Because it claimed the school's model "promote[d] harmful sex stereotypes," the ACLU had threatened to file a complaint with the Department of Education Office for Civil Rights.<sup>168</sup> The gendered notions in this program apparently went beyond those explored in the above section on educational differences. For instance, the school's program included, according to the ACLU, boys' lessons that built "characteristics of warrior, protector, and provider," and girls' activities including "applying and doing make-up [and] hair."<sup>169</sup> The school district dropped the program before the ACLU had a chance to file their proposed complaint.<sup>170</sup>

While none of these challenges reached a courtroom, and while many of these schools may have acquiesced because they could not afford an expensive law suit, the nature of the ACLU's complaints illustrates possible challenges based on the academic programming in single-sex education.<sup>171</sup> These challenges are based primarily, as the ACLU has illustrated, on conflicting scientific, sociological, and psychological evidence for "gendered" learning examined in the previous section.<sup>172</sup> The focus has been, therefore, not on the potential "inherent" differences that segregation could create, or the "badges" of inferiority Harlan predicted in *Plessy v. Ferguson*,<sup>173</sup> but on the debate over actual differences.

### *B. Extracurricular Challenges*

The CFR discussed above permits public schools to provide single-gender extracurricular activities on the same terms that it can provide single-gender classes.<sup>174</sup> In no activity has this practice been more contentious than in sports.<sup>175</sup> As female athletics have become more respected and acceptable in the past several decades, the physical differences between men and women have come to the

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167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Rose & Frietsche, *supra* note 162.

172. See *supra* notes 98–135 and accompanying text.

173. *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J. dissenting).

174. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 CFR § 106(b) (2008).

175. See, e.g., Rocio de Lourdes Cordoba, *In Search of a Level Playing Field: Baca v. City of Los Angeles as a Step Toward Gender Equity in Girls' Sports Beyond Title IX*, 24 HARV. WOMEN'S L.J. 139, 144 (2001).

forefront in equal protection analysis.<sup>176</sup> Several challenges have recently been brought reporting the failure of schools to accommodate women's athletics.<sup>177</sup> In most part the courts here held in favor of the athletes against the school.<sup>178</sup> However, the doctrine of "separate-but-equal" is by far the most prevalent in this area where the entire inquiry revolves around the physical performance and capabilities of each gender.

In 2007, three female athletes who had attended the University of California at Davis brought suit against the University for failure to provide equal athletic opportunities in the area of wrestling.<sup>179</sup> The court granted summary judgment for the University, the plaintiffs appealed, and the Court of Appeals reversed and remanded.<sup>180</sup> On remand, the district court followed the state jurisprudence in holding that there is no equal protection right for one gender to join the sports team of the other gender.<sup>181</sup> Rather, it merely held that overall opportunities must be equal.<sup>182</sup> However, it pointed to federal and state cases declaring that there is a right to try out for a men's team if there is not a comparable women's team, though this is no guarantee of making the team.<sup>183</sup> The court held the University liable for not continuing the process it had begun in the 1970s of expanding their athletic program to accommodate women such as the plaintiffs.<sup>184</sup>

In other athletics cases, the issue rested not on the obvious lack of a women's program, but rather on smaller inhibitions to women's teams.<sup>185</sup> The paradigm of this type of case is *Communities for Equity v. Michigan High School Athletic Association*, a dispute decided in the Sixth Circuit Court of Appeals.<sup>186</sup> This was a class action suit

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176. See Meghan M. Gavin, *Leveling the Playing Field: Sex Equality in Athletics*, 35 MCGEORGE L. REV. 445, 446 (2004).

177. *Gender Equity in Athletics and Sports*, FEMINIST MAJORITY FOUND., <http://feminist.org/sports/titleIXb.asp> (last visited Jan. 18, 2013).

178. See, e.g., *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 974 (9th Cir. 2010); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 693 (6th Cir. 2006).

179. *Mansourian*, 602 F.3d at 961–62.

180. *Id.* at 962–63.

181. *Id.* at 970–71.

182. *Id.*

183. *Id.* at 970, n. 18.

184. *Id.* at 974.

185. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 679 (6th Cir. 2006).

186. *Id.* The Supreme Court granted certiorari for this case in 2005, then remanded without opinion for proceedings consistent with a recent ruling. *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005). A recent ruling, which related to telecommunications, clarified a plaintiff's means of redress under 42 U.S. § 1983. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005). The plaintiff in *Cmtys. for Equity* reapplied for certiorari after the ruling discussed in the text above and was denied. *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 549 U.S. 1322, 1322 (2007).

brought against the state's high school athletic association for scheduling their high school sports seasons in a manner discriminatory towards female athletes.<sup>187</sup> On remand, the court found that the athletic association had violated the Equal Protection Clause by scheduling girls' sports seasons during nontraditional and less advantageous times of the academic year than those for boys.<sup>188</sup> Applying a standard of heightened scrutiny, the court failed to find that the gender-based qualification served important state objectives and that the means were substantially related to those objectives.<sup>189</sup>

In the context of athletics, the separate-but-equal doctrine is to be expected. If pedagogical arguments pointing to physical differences between boys and girls are acceptable, then such arguments in an area relying on physical performance certainly are as well. The issue here relates more to the equal footings onto which these programs are placed. As seen above, the courts do not often face, or they side-step, the issue of integrating athletics for both genders. However, a great deal of attention is paid to the existence of actual equality of programs, perhaps because the area of athletics is one in which women continue to be markedly disadvantaged as compared to their male peers.

### *C. Admissions Challenges*

There is very little jurisprudence relating to school admission for a particular gender. However, as we have seen throughout the cases on educational integration, the arguments against gender segregation are highly connected to those against race segregation. The most famous challenges to admissions practices based on protected classifications have related to race, particularly addressing issues raised by "affirmative action" in college admissions.<sup>190</sup>

The Supreme Court addressed this topic only a few years ago in *Grutter v. Bollinger*.<sup>191</sup> This case determined that, while public colleges may not create a point system in order to increase the number of minority students admitted, they may take race into account during the admissions process.<sup>192</sup> The Court at the time believed this decision would last another twenty-five years; this was the time estimated it would take minority students to "catch up" sufficiently with

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187. *Cmtys. for Equity*, 459 F.3d at 679.

188. *Id.*

189. *Id.* at 693.

190. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

191. *Id.* at 306.

192. *Id.* at 343.

their white peers so that taking race into account for admissions would not be necessary to promote diversity in higher education.<sup>193</sup>

Now, only nine years later, the Supreme Court stands poised to address this issue again. The Court granted certiorari to the case of Abigail Fisher, a white student who claims that the University of Texas denied her admission due to her race.<sup>194</sup> Fisher appeals from the Fifth Circuit Court of Appeals, which affirmed a district court ruling in favor of the University.<sup>195</sup> The state policy Fisher challenges automatically admits the top ten percent of high school students into the state universities.<sup>196</sup> For the remainder of admissions, the process allows race to play a role in the university's decisions, as permitted by *Grutter v. Bollinger*.<sup>197</sup> Fisher, who was not in the top ten percent of her class and to whom the University of Texas denied admission, argues that Texas cannot sustain both a race-neutral admissions standard and a race-conscious one.<sup>198</sup>

In finding for the University, the Fifth Circuit Court of Appeals specifically upheld the ruling in *Grutter*, finding that racial diversity in universities served state educational objectives of “[i]ncreased [p]erspectives,”<sup>199</sup> “[p]rofessionalism,”<sup>200</sup> and “[c]ivic [e]ngagement.”<sup>201</sup> Recalling *Grutter*'s need for a “sunset provision[,]” a periodic review to determine if such diversity initiatives were still timely, the Court of Appeals held that the University of Texas policies had not yet proven unnecessary.<sup>202</sup> In fact, the majority opinion posited that Justice O'Connor's twenty-five-year prediction in *Grutter* “may prove to be more aspirational than predictive.”<sup>203</sup>

The Supreme Court, on the other hand, seems to disagree, as it stands poised to overrule *Grutter* by hearing Fisher's case.<sup>204</sup> The Court did, in fact, find a racial classification impermissible in determining school admissions as recently as 2007, though it did not at that time overrule *Grutter*.<sup>205</sup> With *Grutter* overruled, the final bastion

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193. Adam Liptak, *Justices Take Up Race as a Factor in College Entry*, N.Y. TIMES, Feb. 21, 2012, at A1.

194. *Id.* at A13.

195. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 213–14 (5th Cir. 2011).

196. *Id.* at 216.

197. *Id.* at 216–17.

198. Liptak, *supra* note 193, at A13.

199. *Fisher*, 631 F.3d at 219.

200. *Id.*

201. *Id.* at 220.

202. *Id.* at 221.

203. *Id.* at 222.

204. Liptak, *supra* note 193, at A1.

205. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007). This case dealt with assigning children to different schools based on race in order to promote cross-neighborhood diversity. The Court held that *Grutter* did not govern this case,

of taking race into account for public education purposes would be removed.<sup>206</sup> It would only be a matter of time, then, for the Court to move on to the next integration challenge facing public education: gender.

## V. THE NEXT CHALLENGE

As we have seen in the above section, challenges to single-sex education have involved academic, extracurricular, and admissions aspects of the programs. But as these single-gender programs become more prevalent based on their supposed academic credentials,<sup>207</sup> I believe the next challenge the Supreme Court addresses will be academic. Most likely, this challenge will relate to the permissibility of single-gender education set out in the CFR, and it will come from a civil rights organization such as the ACLU. The Court, when this challenge comes before it, should write an opinion overturning the separate-but-equal doctrine in *United States v. Virginia*, putting into place a better and more accurate understanding of the ruling in that case.

As we have seen in *United States v. Virginia*, the standard the Court applies to gender classifications is that of heightened scrutiny.<sup>208</sup> This requires the state to show what has been called an “exceedingly persuasive justification.”<sup>209</sup> The state must show that the classification “serves ‘important governmental objectives,’” and the means used are substantially related to those objectives.<sup>210</sup> The Court should find the state objectives in this hypothetical case lacking.

The state objectives put forth here would relate to providing an effective educational system for their students. The state could argue the many pedagogical and scientific arguments supporting better academic outcomes for students in single-sex environments.<sup>211</sup> These arguments, however, are likely to fall flat, as the challenger can easily counter with conflicting expert evidence as to the educational effectiveness of these methods.<sup>212</sup> Having likely just overruled *Grutter v. Bollinger*,<sup>213</sup> the Court will not be keen to accept even those arguments

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and instead reaffirmed *Brown* by finding such calculations based on race impermissible. *Id.* at 707.

206. At the time that this Note went to print, the Supreme Court had not yet rendered an opinion in *Fisher v. University of Texas at Austin*.

207. See *supra* notes 2, 98–123 and accompanying text.

208. *United States v. Virginia*, 518 U.S. 515, 518 (1996).

209. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)).

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

211. See *supra* notes 98–123 and accompanying text.

212. See *supra* notes 124–35 and accompanying text.

213. See *supra* note 186 and accompanying text.

that one or the other gender needs a “leg-up,” since the genders are arguably more equalized in American society than members of different races. The state could also argue that single-gender offerings contribute to the diversity of offerings within the system, but *United States v. Virginia* specifically rejected that justification.<sup>214</sup>

The state could then argue that these programs provide equal though separate opportunities to students of different genders, following the Court’s ruling in *United States v. Virginia*. The challenger could respond to this assertion in two ways. First, they could argue that, in many cases, the offerings are not actually equal, and part of their supposed pedagogical effectiveness is based on them not being equal.<sup>215</sup> For instance, they can point to programs such as that squashed by the ACLU in Pennsylvania, which focused on teaching boys to be a “warrior” and teaching girls important topics such as “make-up.”<sup>216</sup> In addition, the CFR seems almost to encourage this kind of abuse by providing for a very wide range of justifications in their regulations, in some cases requiring no justification at all.<sup>217</sup>

Alternatively, the challenger can argue that the tangible equality does not make a difference under *Brown*’s analysis, because such separation of girls and boys is inherently unequal.<sup>218</sup> The dissent in *Plessy* pointed out that separation of two groups for the benefit of both was just a “guise,” because it was indeed for the benefit of just one.<sup>219</sup> Most persuasively for the challenger, the unanimous opinion in *Brown* held that “[t]he ‘separate but equal’ doctrine . . . has no place in the field of public education.”<sup>220</sup> It does not matter which particular group is being disenfranchised, and it should not require an inquiry into the status of each gender in American society; the danger is the potential for a “feeling of inferiority” to develop on either side of the equation, making these school opportunities inherently unequal.<sup>221</sup>

Taking its prior rulings and the appropriate standard of scrutiny into account, the Court should find in favor of the challenger. The Court should reaffirm its celebrated opinion in *Brown*, and rather than overruling its opinion in *United States v. Virginia*, it should clarify it. In that case, the Court really meant that men and women, boys

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214. *United States v. Virginia*, 518 U.S. 515, 539 (1996).

215. See *supra* notes 98–107 and accompanying text.

216. Rose & Frietsche, *supra* note 162.

217. See *The Legal Status of Single-Sex Public Education*, *supra* note 4.

218. Michael Heise, *Are Single-Sex Schools Inherently Unequal?*, 102 MICH. L. REV. 1219, 1223 (2004) (reviewing ROSEMARY C. SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING* (2003)).

219. See *Plessy v. Ferguson*, 163 U.S. 537, 557 (1886) (Harlan, J., dissenting).

220. *Brown v. Board of Educ.*, 347 U.S. 483, 483 (1954).

221. *Id.* at 494.

and girls, are capable of the same educational achievements, and they should not be denied the opportunity to achieve them.<sup>222</sup> Contrary to its popular understanding, *United States v. Virginia* revived *Brown* rather than *Plessy* in the context of gender. The separate-but-equal doctrine for gender in public education should be abolished, and the CFR regulations altered in order to require the most “exceedingly persuasive” justification for such separation in any form.<sup>223</sup>

### CONCLUSION

Much of the debate surrounding single-gender education has rested upon the differences between the genders themselves. This seems to place this question within the larger framework that has consumed the nation for decades, and especially the past several months: the question of how men and women are equal, and how they could be so unequal as to justify a difference in political intrusions and civil rights. With political discourse remaining steadily vitriolic in the areas of abortion, contraception, and women serving in the military, there are vociferous arguments on both sides of the controversial idea that “[b]iology is destiny.”<sup>224</sup>

But this issue in public schools is less about the current political gender climate and more about what we need to do for our education system. In its challenges to single-sex programs, the ACLU has focused on the idea that this gender segregation is nothing more than “quick-fix gimmicks,” or a “misguided experiment.”<sup>225</sup> While understanding that there is a “critical need for better educational options,” the ACLU believes, and it is not alone, that single-sex programs are not among them.<sup>226</sup> Here, the ACLU is getting at the root problem beneath the wide-spread implementation of single-sex programs in recent years: the American educational system is in desperate need of some kind of solution. With public education in its current state,<sup>227</sup>

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222. See *United States v. Virginia*, 518 U.S. 515, 543–45 (1996).

223. *Miss. Univ. For Women v. Hogan*, 458 U.S. 718, 723 (1982).

224. This statement was made famous, and stirred debate, when declared by Fox News correspondent Liz Trotta earlier this year, relating to comments she had made discouraging participation of women in the military. Rebecca Shapiro, *Fox News’ Liz Trotta Doubles Down on Statements About Rape in the Military (VIDEO)*, THE HUFFINGTON POST (Feb. 20, 2012, 10:24 AM), [http://www.huffingtonpost.com/2012/02/20/fox-news-liz-trotta-rape-military\\_n\\_1288769.html](http://www.huffingtonpost.com/2012/02/20/fox-news-liz-trotta-rape-military_n_1288769.html). The sentiment, however, has resonance in an even greater range of gendered politics.

225. *Louisiana School Board to Halt Single-Sex Class After ACLU Intervention*, *supra* note 159.

226. Rose & Frietsche, *supra* note 162.

227. Lymari Morales, *Near Record-Low Confidence in U.S. Public Schools*, GALLUP POLITICS (July 29, 2011), <http://www.gallup.com/poll/148724/near-record-low-confidence-public-schools.aspx>.

it is no wonder that schools are looking for some new program—any program—to better prepare their students. The science supposedly behind single-sex education seems to provide this. With this tool, educators might hope to prove that the poor academic showing of American students is based, not on a broken system, but on the failure of individual educators to provide gender-tailored teaching. Jesuit and other private schools have, after all, been using this pedagogy for many years with notable success.

As the ACLU points out, however, these higher-performing private schools have many other distinctions from public schools that can explain their students' higher performance: "extra resources, smaller class size, and an academically focused curriculum" among them.<sup>228</sup> There can be no debate that these school attributes lead to excellent educational results. These modifications in the public schools would produce uncontroverted academic improvements for every kind of child, and they do not present any constitutional problems.

This is not to say that single-sex education does not have its merits. I myself attended an all-girls high school and an all-women's college, and I found the experience extremely rewarding and beneficial. But the program is not for everyone, and in its current incarnations it is not constitutionally permissible as a public school option. There is too much risk of abuse; there is too much danger that "badges" of inferiority will develop, regardless of which gender bears the brunt of the blow.<sup>229</sup> Public schools seeking solutions should look to other successful modeling—programs that apply equally to both genders—in order to improve upon a struggling system.

LILY A. SAFFER\*

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228. Sherwin, *supra* note 97.

229. *See also* Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting) (referring to the burdens of inferiority conferred by the badges of slavery and servitude).

\* J.D. Candidate 2013, William & Mary Law School; B.A., Political Science and English, *cum laude*, Wellesley College. This Note is dedicated to the author's parents, Dennis Saffer and Cynthia Streltzov, and to her grandmother Paula Nelson ("Granny G"), for their unwavering love and support. Eternal thanks also to Sister Kathleen Sullivan and Forest Ridge School of the Sacred Heart for introducing the author to new educational opportunities.