

EMBRACING SEGREGATION: THE JURISPRUDENCE OF CHOICE AND DIVERSITY IN RACE AND SEX SEPARATISM IN SCHOOLS

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*In this article, Professor Levit studies the growing impulse toward resegregation in education. She traces the history of the judicial move away from court-ordered desegregation in the name of “choice” and a “diversity of options,” and she describes the educational system’s parallel increase in experimentation with single-sex schools and classes, also in the name of choice and diversity. In both movements, courts and commentators have been resistant to use empirical data when considering the constitutionality of single-sex and resegregated schools. Professor Levit contends that the primary arguments used to support separatism—choice and diversity—are flawed. The concepts of choice and diversity in the separatist educational movements are vastly different from the constitutionally endorsed concept of diversity in school admissions or affirmative action cases. The article returns to the message of *Brown* that “separate educational facilities are inherently unequal”—that official endorsement of segregation based on identity characteristics creates inequality. Embracing Segregation presents empirical evidence from the social sciences, as well as international experiences with gender and racial apartheid, that government-sponsored separatism tends to stigmatize citizens, even under conditions of relative equality. Finally, Professor Levit urges local schools and communities to experiment with less-segregative methods of education. She also encourages courts and commentators to consider empirical literature that studies the effects and cultural meanings of segregative educational practices.*

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I. THE RUSH TOWARD SEGREGATION

Any student of history is familiar with the timeline in the half century since *Brown v. Board of Education*:¹ the massive resistance and foot dragging through the 1970s, particularly on the part of southern states, the desegregation orders stemming from *Brown*, and the still-reluctant compliance with those orders by school districts into the 1990s.² In the past decade, the judiciary has shivered away from the promise of *Brown*, with a surge of federal district courts declaring the school districts under their supervision to have achieved “unitary status.”³

Courts have ended, or soon plan to end, desegregation suits in at least three dozen school districts, many in major metropolitan areas such as Boston, Buffalo, Charlotte, Cleveland, Dallas, Denver, Kansas City, Little Rock, Miami, Norfolk, Oklahoma City, Savannah, San Diego, and Wilmington.⁴ Since 1974, when Congress passed antibusing legislation, it has been the official policy of the U.S. government to have students attend neighborhood schools.⁵ State legislatures are joining the effort toward resegregation by passing “Neighborhood Schools Acts,” which encourage or require students to attend the public schools closest to their homes.⁶ A study by the Harvard Civil Rights Project shows that when desegregation orders end and schools retreat from integration efforts, school districts rapidly resegregate.⁷

1. 347 U.S. 483 (1954).

2. See GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION, THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 7–19 (1996); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 46–47 (2000).

3. The number of jurisdictions under desegregation orders is dwindling: “The Justice Department reports it is monitoring 395 school districts still covered by desegregation orders, down from a high point of 504. But many of those cases are so old as to have been almost forgotten.” Kim Cobb, *After Desegregation*, HOUS. CHRON., June 2, 2002, at 1. Courts are stepping up the pace of ending their oversight: “The U.S. Justice Department reports 10 school districts across the country have been declared unitary—free of all vestiges of past discrimination—in the past five months alone.” *Id.*

4. Tresa Baldas, *Saying Goodbye to Desegregation Plans*, NAT’L L.J., June 16, 2003, at 4; Cobb, *supra* note 3, at 1; David M. Engstrom, *Civil Rights Paradox? Lawyers and Educational Equity*, 10 J.L. & POL’Y 387, 415 n.100 (2002); Sara Hebel, *Federal Court Upholds Plan to Settle Mississippi Desegregation Case*, CHRON. HIGHER EDUC., Feb. 6, 2004, at A22; Scott Shepard, *End of the Road*, ATLANTA J. & CONST., May 3, 1998, at 2; Greg Winter, *Segregation Back in Southern Schools, Study Says*, INT’L HERALD TRIB., Jan. 22, 2003, at 4.

5. Congressional anti-busing legislation passed in 1974 declares that it is the official “policy of the United States that . . . the neighborhood is the appropriate basis for determining public school assignments.” 20 U.S.C. § 1701(a)(2) (2000).

6. DEL. CODE ANN. tit. 14, § 223 (Supp. 2002). For discussion of this law, see Robert L. Hayman, Jr., *Neutral Principles and the Resegregation Decisions*, 9 WIDENER L. SYMP. J. 129, 131–32 (2002). See also OKLA. STAT. ANN. tit. 70, § 1210.203 (West 1998) (mandating that “[i]nsofar as practicable, each pupil shall be assigned to the school nearest his residence”); Bruce Smith, *Law Boosts Neighborhood Schools*, THESTATE.COM, at <http://www.thestate.com/mld/thestate/news/local/6321110.htm> (July 17, 2003) (describing a new South Carolina law promoting the construction of more neighborhood schools).

7. Erica Frankenberg et al., The Civil Rights Project, Harvard University, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf> (2003) (noting the rapid resegregation of schools as federal law on desegregation has changed in the last twenty years); Gary Orfield, *The Civil Rights Pro-*

In the context of race, both the judiciary and the legislature seem to agree with former President Ronald Reagan that desegregation is a “failed ‘social experiment that nobody wants.’”⁸ Law professor Mark Tushnet aptly called it the “‘we’ve done enough’ theory of school desegregation.”⁹ The country may have just heard the incipient echo of this theme from the law school affirmative action case, *Grutter v. Bollinger*,¹⁰ in the U.S. Supreme Court’s statement, “We expect that 25 years from now, the use of racial preferences will no longer be necessary.”¹¹

The parallels between the return to racial segregation and the welcoming of sex segregation seem to be going largely unnoticed.¹² Across the country, individual public schools and public school districts show increasing interest in single-sex education.¹³ “Eight years ago only four public schools in the United States offered single-sex educational opportunities.”¹⁴ In the 2004–05 school year, 156 public schools across the

ject, Harvard University, *Schools More Separate: Consequences of a Decade of Resegregation*, at http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf (2001) (commenting that the 1970s represented the last real attempts to desegregate schools, and since then, most states have shut down the machinery of integration); see also Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597, 1598 (2003) (explaining how Supreme Court decisions have contributed to resegregation); Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990–2000*, 81 N.C. L. REV. 1563, 1585–86 (2003) (finding that current patterns of resegregation may be caused by residential changes, enrollment in private schools, and the changes in public school policies).

8. Tom Wicker, *Advantages of School Busing*, S.F. CHRON., June 11, 1985, at 39.

9. Mark V. Tushnet, *The “We’ve Done Enough” Theory of School Desegregation*, 39 HOW. L.J. 767, 767 (1996).

10. 539 U.S. 306, 343 (2003).

11. *Id.* at 310. The statement is certainly open to multiple characterizations: Was that just a hope that affirmative action will not be needed in a quarter of a century, or was that a statute of limitations?

12. A notable exception is Richard Thompson Ford, *Brown’s Ghost*, 117 HARV. L. REV. 1305 (2004).

Any comparison of treatment based on facets of identity comes with caveats: Gender and race are different in important ways—not just in the constitutional test but also in the flavor of discrimination historically directed toward the two groups (benign paternalism compared to more virulent oppression). Important epistemological differences surface too: We have too little race consciousness—whites are not particularly conscious of being white and are woefully ignorant of the continued manifestations of racial inequality, see generally CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997)—and perhaps too much gender consciousness—politicians, academics, judges, and the popular media often unduly stress natural differences between males and females in ways that outstrip the biological realities and that imbue real physiological differences with magnified social significance. See NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN AND THE LAW* 15–63 (1998). But it is the commonalities between the treatment of these two facets of identity that I want to stress in this context of schooling, and the increasing acceptance, in somewhat different ways, of the idea that segregation based on race and sex is beneficial.

13. Melissa Slager, *The Academic Tables Appear to Be Turning: Girls Are Better than Boys*, GRAND RAPIDS PRESS, June 8, 2003, at A1 (“[T]here are 17 single-sex public schools in the country, according to the National Association for Single-Sex Public Education.”); Karen Uhlenhuth, *Girls and Boys Learn Differently, So It Makes Sense to Segregate Them in School, Proponents Say*, KAN. CITY STAR, Dec. 8, 2002, available at 2002 WL 101928600 (“[A] year ago 20 public schools offered single-sex classrooms for selected grades and subjects, compared with 32 this year.”).

14. *Single-Sex Public Schools in the United States*, at <http://www.singlesexschools.org/schools.html> (last visited Sept. 29, 2004); *Number of Public Single-Sex Schools Jumps 50 Percent as Bush Ad-*

country are either completely single-sex or have single-sex classes for some subjects.¹⁵ Single-sex classes, particularly for math or science, are also on the rise.¹⁶ This grouping by sex draws on very weak evidence of biological differences between boys and girls¹⁷ and administrative concerns of teachers who would like to remove the gonadal distractions of opposite-sex students in a single classroom.¹⁸

Single-sex education received new support in 2002, when the President signed into law the No Child Left Behind Act.¹⁹ The purpose of the Act is “[t]o close the achievement gap with accountability, flexibility, and choice, so that no child is left behind.”²⁰ The Act not only expressly promotes single-sex schools and classes in public schools, as long as comparable opportunities are provided for both sexes, it also provides \$450 million in federal funds for experiments such as single-sex education.²¹ The government now officially sponsors “experiments” in sex segregation just as it rushes to declare the “experiment” over in the case of racial desegregation orders.

Educators have also begun using identity characteristics other than race and sex to segregate public education. In the fall of 2003 the New York City school system opened Harvey Milk High School, the nation’s first public high school for lesbian, gay, bisexual, and transgendered (LGBT) students.²² The Harvey Milk High School is being defended in part along the same rationale as that advanced in single-sex school cases: since students are choosing to segregate themselves, the Constitution should not be offended.²³ Both single-sex and LGBT schools rely on the force of arguments made in the larger school choice movement: the fact of “choice” averts constitutional concerns. Stereotypic facets of its curriculum—an “academically rigorous school that [will] specialize in computer technology, arts and a culinary program”²⁴—aside, the school is in-

ministration Prepares to Make Title IX More Flexible, at http://www.brighterchoice.org/news/single_sex_jump.htm (Aug. 29, 2002) (“[T]he number of public single-sex schools around the nation is jumping by 50 percent this Fall with the opening of a new round of single-sex schools. This is the largest single annual increase since Title IX was adopted in 1972”).

15. *Single-Sex Public Schools in the United States*, *supra* note 14.

16. *Single-Sex Classrooms*, at <http://www.singlesexschools.org/classrooms.html> (last visited Sept. 29, 2004).

17. See *infra* text accompanying note 285.

18. See, e.g., Kathy Blackwell, *Girls School Students Explore Science, Music and Even Piracy*, AUSTIN AM.-STATESMAN, Apr. 27, 2003, at B1; Mark O’Keefe, *Single-Sex School Debate Rekindled*, CHI. TRIB., Oct. 13, 2002, at 9A; Peter Simon & Mary Pasciak, *Gender Gap Among Grads Favors the Girls*, BUFF. NEWS, Apr. 11, 2003, at A1.

19. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 501, 115 Stat. 1425 (codified as amended at 20 U.S.C. §§ 7201–7283g (2002)).

20. *Id.*

21. 20 U.S.C. § 7215 (2002).

22. *NYC To Open Public Gay High School*, CHI. TRIB., July 29, 2003, at 3.

23. See, e.g., Steve Chapman, Editorial, *Separating Boys and Girls in the Classroom*, CHI. TRIB., Oct. 3, 1999, at 21.

24. Carl Campanile, *School’s ‘Out’—City Is Launching First HS for Gay Teens*, N.Y. POST, July 28, 2003, at 3.

tended as a safe haven for 170 LGBT New York students who face bullying and physical violence in regular school settings.

However, LGBT teenagers do suffer extraordinary levels of vicious physical and mental abuse, high drop-out rates, depression, and suicide.²⁵ Given the unsafe environment for LGBT students in regular public schools, segregated education on the basis of sexual orientation has a better remedial justification than segregation based on race or sex. But, it is of a piece with the separatism on the basis of identity characteristics seen in the context of desegregation retrenchment and the promotions of single-sex schools. It shares the same flawed remedial approach: rather than confront discriminatory practices in coeducational schools nationwide, this approach cordons off a small enclave, segregates students into it based on one aspect of identity, and makes that offering available to a select few.

This article explores the growing national impulse toward resegregation in education on the basis of identity characteristics. The segregationist movement stems from a peculiar alliance of conservative forces who have long believed that separation of the races and sexes is natural and appropriate and liberal groups who, recently and particularly with respect to gender, see separatism either as a tool of liberation or as the lesser of bad alternatives compared to a flawed coeducational system.²⁶

25. The Gay, Lesbian and Straight Education Network conducted a national survey of lesbian, gay, bisexual, and transgender students. It showed that 84% of the respondents heard anti-gay remarks at school “frequently or often,” 31% had “missed at least one entire day of school in the past month because they felt unsafe based on sexual orientation,” 83.2% reported being verbally harassed, 31% physically harassed, and 21% physically assaulted because of their sexual orientation. GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, THE 2001 NATIONAL SCHOOL CLIMATE SURVEY: LESBIAN, GAY, BISEXUAL AND TRANSGENDER STUDENTS AND THEIR EXPERIENCES IN SCHOOLS 2, at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/185-1.pdf (2001); see also Kimberly Atkins, *Festival Will Highlight Identity Issues*, BOSTON GLOBE, May 9, 2002, at 4 (“According to the Massachusetts Youth Risk Behavior Survey of high school students in the state, nearly one-third of students who identify themselves as gay, lesbian, or bisexual attempted suicide in the past year, as compared with about 7 percent of other students. . . . The survey, as well as other studies [show] that gay, lesbian, bisexual, and transgendered youths suffer disproportionately from drug and alcohol addiction, depression, and feelings of alienation.”); John Hildebrand, *Strength in Numbers for Gay, Straight Teens*, NEWSDAY, Mar. 26, 2002, at A42 (“More than 80 percent of gay students report verbal harassment in schools, according to national surveys. Even the word ‘gay’ has become synonymous with ‘bizarre,’ as in the teenage expression ‘That’s so gay!’ Gay youths are two to three times as likely as heterosexuals to attempt suicide.”); Mary Pasciak, *School Alliance Against Gay Harassment; Posts a Message of Tolerance for All*, BUFF. NEWS, Feb. 22, 2003, at B1 (“Gay and lesbian students in many communities frequently find themselves the target of verbal abuse. A study by the Massachusetts Department of Education found that gay students hear homophobic comments more than 25 times a day—and faculty intervene only about 3 percent of the time.”); Robert Tomsho, *Schools’ Efforts to Protect Gays Face Opposition*, WALL ST. J., Feb. 20, 2003, at B1. (“Researchers say harassment of gay students is rampant. Human Rights Watch, a New York-based group, estimates that two million U.S. students a year are bullied because they are, or are thought to be, homosexuals. Meanwhile, more than half of teens surveyed last year by the National Mental Health Association said classmates use terms such as ‘fag’ and ‘dyke’ on a daily basis.”).

26. See, e.g., Robyn E. Blumner, *Single-sex Education Won’t Help Students in the Real World*, ST. PETERSBURG TIMES, May 26, 2002, at 6D (“In 1991, the Paul Robeson Academy in Detroit opened for black males only because black activists claimed the answer to the education crisis in their community was not integration but rigid segregation by both race and sex—as if African-American boys were in-

Part II of this article examines the parallels between the movement to end racial desegregation and the current welcoming of sex segregation in schools as a matter of official government policy. What is striking in both the race and gender contexts is the anti-empiricism of courts and commentators to the phenomenon of segregation itself.²⁷ In the desegregation context, some activist conservative courts have rushed to end their supervisory jurisdiction over desegregation cases. They rely in part on the doctrinal urgings of the Supreme Court to return school districts to local control and partly on selective and politicized reception of the empirical evidence submitted in the individual cases. In their hurry to declare that districts have attained unitary status, courts ignore available evidence, disparage or diminish the value of social science evidence, and narrowly limit their inquiries to ignore how segregation operates and the consequences that flow from it.

Courts have decided very few cases of single-sex schools under the current form of heightened constitutional scrutiny. At present, the single-sex education issue is playing out in the court of public opinion; however, commentators' evaluation of the social science evidence regarding sex-exclusive schooling suffers from the same methodological flaws as courts' evaluation of sociological evidence in desegregation cases: reliance on selected studies or pieces of anecdotal information to support preexisting positions; incomplete attention to the cumulative wealth of evidence; and an unwillingness to correlate the developing body of social science research with the legal or doctrinal tests.

capable of learning in a normal classroom environment.”); *Boys and Girls at School*, WALL ST. J., May 6, 2002, at A20 (discussing the alliance of liberal New York Senator Hillary Rodham Clinton and conservative Texas Senator Kay Bailey Hutchison on single-sex schools); Marc Fisher, *A Revolutionary Idea: Flexibility in the Schools*, WASH. POST, May 14, 2002, at B1 (“Fern Marx, a Wellesley College Researcher who worked on the 1992 study on shortchanged girls, sounded sheepish about supporting any Bush initiative, but embraced the idea: ‘There are many girls and boys that would benefit from this. It’s not for everyone. And it’s not just a Bush idea.’”); Etelka Lehoczky, *Redux: Schools for Girls; Politics and Post-Feminism Help Heat Up the Debate over Single-Sex Education*, CHI. TRIB., Nov. 6, 2002, at C3 (noting the odd coalitional politics in the single-sex education movement); Stacy Smith, *Voluntary Segregation: Gender and Race as Legitimate Grounds for Differential Treatment and Freedom of Association*, 1996 PHILOSOPHY OF EDUCATION Y.B., available at http://www.ed.uiuc.edu/EPS/PES-yearbook/96_docs/smith_s.html (“A desire for cultural distinctiveness requires that children be educated as members of their particular cultural group. Presumably culture, like religion, plays a primary role in generating shared values among a group of persons. Likewise, cultural groups have a stake in perpetuating shared values among their members to ensure cultural survival. Separate educational institutions allow parents to select schools for their children based on shared values or interests, including similar ideas about what constitutes a good life and a good education.”).

27. By anti-empiricism, I mean both ignoring existing research from the social sciences about the consequences of segregation and integration, as well as selective or unscientific interpretation of the existing studies regarding desegregation and single-sex schools. When advocates selectively present research findings, offer arguments not supported by the empirical literature, and fail to acknowledge contrary research, they are acting in anti-empirical ways. See Gerald W. Barrett & Scott B. Morris, *The American Psychological Association’s Amicus Curiae Brief in Price Waterhouse v. Hopkins: The Values of Science Versus the Values of the Law*, 17 LAW & HUM. BEHAV. 201, 204–07 (1993) (discussing examples cited in the brief); see also Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 834 (1999) (concluding legal scholarship would be greatly enhanced by the use of more empirical evidence).

Another similarity in these movements toward separation based on identity characteristics is the rhetoric used by its proponents. Supporters of single-sex schools and those who favor ending desegregation both use the language of “choice” and “natural differences.” Parents, the argument goes, should be able to have “choices” about their children’s education: they should be able to “choose” neighborhood schools or single-sex classrooms.²⁸ “Natural” gender differences between boys and girls necessitate single-sex schools.²⁹ People of different races want to be “among others just like themselves.”³⁰ The language is chillingly reminiscent of the Dixiecrat segregationists of the 1940s and 1950s, whose banner stated the platform they supported: “the segregation of the races and the racial integrity of each race; the constitutional right to *choose* one’s associ-

28. See, e.g., *Diversity Dialogue*, NEWS & OBSERVER (Raleigh, NC), Feb. 25, 2003, at A10 (“The goal of the group Assignment By Choice—formed last year after the school system decided to stop the flight of suburban families from six elementary schools—has been to end busing meant to increase enrollment diversity and let families choose where their children will attend.”); Jadwiga S. Sebrechts, *Single-sex Education: Expecting More, and Getting It*, SEATTLE POST-INTELLIGENCER, July 21, 2002, at E1 (Sebrechts, President of the Women’s College Coalition, claims, “The single-sex learning environment . . . offers students a different set of expectations about academic choices and about their own performance.”); Cynthia Tyson, *Females Blossom at Single Sex Schools*, RICH. TIMES-DISPATCH, Oct. 6, 2002, at F1 (Tyson, the President of Mary Baldwin College, states, “Some of us are committed to meeting that demand [for single-sex education]. We stand for choice, the right choice for many young people.”).

29. See, e.g., Anne Marie Owens, *Boys’ Brains Are from Mars*, NAT’L POST, May 10, 2003, at A22 (reporting on a lecture, *The Case for Boys’ Schools*, at a National Association of Independent Schools conference by “Leonard Sax, a pediatrician smitten by the single-sex schools movement [who] was talking about how boys are hard-wired in so many ways for qualities that are not typically valued by schools or teachers: action, directness and loudness”). Sax, the founder of the National Association for Single Sex Public Education, also:

implores teachers to raise their voices when dealing with boys (and points to the studies that show girls hear two to four times better than boys); suggests they will get nowhere if they insist on assigning boys school work that asks them to describe feelings (and points to the studies on the different ways the sexes process and intellectualize emotions); and has suggested in one of his journal articles that boys should be held back a year before starting kindergarten, because of charted differences in brain development between boys and girls.

Id. His web site contains “evidence” of the differences between boys’ and girls’ brains. See National Association for Single-sex Education, *Are There Actually Significant Differences Between a Girl’s Brain and a Boy’s Brain?*, at <http://www.singlesexschools.org/brain.html> (last visited Sept. 29, 2004); see also Stephen Chapman, *Sex Education*, PORTLAND OREGONIAN, Aug. 10, 1997, at G4 (“Boys and girls tend to have different styles of learning. Boys often dominate the classroom by competing to flaunt their knowledge or by creating disruptions. Girls sometimes feel more comfortable with cooperative learning than individual competition. . . . Both boys and girls spend more time worrying about their appearance when the opposite sex is present. And anything that stimulates the hormones can addle the brain. Separate the sexes, and you largely eliminate these problems.”); Kathleen Parker, *Class Struggle: Yahoos vs. Single Sex Courses*, ORLANDO SENTINEL, Feb. 28, 1996, at E1 (claiming that in “public schools . . . educators are experimenting with separate learning environments for boys and girls, who, owing to biological—not sociological—differences, learn in different ways”).

30. *Acting Locally*, NEWS & OBSERVER (Raleigh, NC), Sept. 7, 2002, at A16; see also Scott Suterlin, *Fence Post*, CHI. DAILY HERALD, Mar. 14, 2002, at 19 (the author, a candidate for the Republican nomination in the 25th Illinois Senate District, proclaims: “As a matter of fact, most people do prefer to live among their own kind, which is why de facto segregation continues to flourish in housing patterns, despite laws and court decrees to the contrary. It is simply hypocritical to pretend otherwise.”).

ates.”³¹ It also resembles the terminology used by the early- to mid-nineteenth-century anatomists, eugenicists, and physical anthropologists of race who believed in the importance of race as a biological construct, a natural ordering of races, the natural superiority of the white race, and the belief that the races were—by nature—incompatible.³²

Part III of the article evaluates the philosophical underpinnings of the segregationist movements in education. It analyzes the jurisprudence of “choice” and “diversity”—the theoretical and constitutional meaning of the primary arguments used to support separatism. Proponents of single-sex and neighborhood schools have made a curious plea for tolerance of segregation as a matter of choice. Regarding single-sex education, the proposed choice model is essentially an option play idea: parents should have the choice of single-sex or coeducational schools. In the desegregation area, the argument is that courts should end forced integration and thus restore parental selection of schools in their chosen residential neighborhoods. This choice, for supporters of single-sex schools, provides a “diversity” of educational options; this choice, for opponents of desegregation, revives parents’ unfettered autonomy with respect to their children’s schooling.

The separatist educational movement mistakenly advances a concept of choice that masquerades as the constitutionally endorsed concept of diversity. The choice of single-sex, or what amounts in many cases to single-race education, has nothing in common with the diversity rationale advanced in school admissions or affirmative action cases. The constitutional concept of diversity focuses on affording students a group of fellow travelers who are heterogeneous along multiple dimensions—race, sex, ethnicity, national origin, experiences, and talents. The segregationist concept of “diversity” demands homogeneity along the only dimension of identity that is being measured—race or sex. This section concludes that it is a painful irony for “diversity” to be used in the service of segregation on the basis of identity characteristics.

Courts and the public seem to recognize that integration is a good thing, but collective memory seems to have lapsed that segregation is a bad thing. We seem to be forgetting why segregation is socially, morally, and instrumentally wrong. This section of the article returns to the holding of *Brown* that inequality is produced by government endorsement of

31. Jim Morrill & Henry Eichel, *Strom Thurmond, 1902–2003*, ORLANDO SENTINEL, June 27, 2003, at A1 (emphasis added).

32. ROBERT L. HAYMAN, JR., *THE SMART CULTURE* 99–166 (1998).
The science of race developed in Western Europe roughly between 1790 and 1840. Physical anthropologists purported to identify naturally discrete classes of people; biologists then debated their origins and natural compatibilities; cultural anthropologists matched the peoples to distinct civilizations. Of course, these were not merely “racial differences” that were being discovered; the science of race, rather, was defining “superior” and “inferior” races.
Id. at 118; see also Robert L. Hayman, Jr. & Nancy Levit, *Un-Natural Things: Constructions of Race, Gender, and Disability*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 159, 162 (Francisco Valdes et al. eds., 2002).

segregation based on identity characteristics.³³ It asks whether the reasoning in *Brown* regarding stigmatic injury applies to separatism under conditions of equality. This section considers available empirical evidence—the state of research in educational and social psychology—about government sponsorship of separatism. It examines the public discourse regarding issues of choice and diversity and assesses whether the media’s portrayal of “experiments” in separatist schooling corresponds with performance results of more systematic studies. It also assesses international and comparative data about experiences of intentional separation based on race and gender. Those data suggest that cultural equality is not possible under conditions of government-sponsored separatism. Part III also explores the tension between the principles of equality and associational rights and evaluates whether separatism based on identity characteristics for beneficent purposes can avoid the stigmatic injury. It concludes that this country has insufficient distance from illicit segregation to reinvest practices of apartheid with new meaning.

Part IV suggests that the fate of schools segregated on the basis of identity characteristics may rest less with judges ruling on their constitutionality than with individual teachers and school administrators creating “experimental” classes and local politicians responding to media reports on these trial runs. It also calls for attention to media portrayals of racial resegregation, single-sex schools, and the private choice rhetoric that is used to support them. Those opposed to segregation need to develop new communications strategies to persuade the court of public opinion that segregation based on race and gender reinforces damaging stereotypes.

The national mood regarding race and gender inequities in public schools is one of despair—the problems seem intractable. School administrators and politicians are grasping for any novel solution that seems to have educational benefits, and many of them demonstrate a much greater willingness to try something new than to think about the moral implications or empirically evaluate the longer-term consequences of segregation. That single-sex and single-race schooling fit with the conservative agenda and that at least the former can command public funding are features providing the political and economic capital to implement the projects. In these desperation moves, those promoting single-sex schools and the dismantling of desegregation are simply not taking seriously the harms of segregation. The article concludes by urging attention to the empirical literature regarding the actual academic effects of education that is segregated based on race and sex, as well as the cultural meanings that segregative practices create.

33. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

II. ANTI-EMPIRICISM AND THE TRIUMPH OF APARTHEID

In the context of both race and gender, courts and commentators frequently take an unscientific approach to the phenomenon of segregation. On the part of the courts, some of the empirical myopia has to do with the way Supreme Court precedent has developed. Prevailing doctrinal law, particularly in the desegregation area (since the single-sex schools area is relatively uncharted judicial terrain), limits the admissibility and relevance of sociological and psychological research, evidence of social context, as well as evidence about the social consequences of segregation.

A. Doctrinal Constraints

1. Desegregation

One reason for the anti-empiricism in the desegregation context is that the doctrinal law that has developed there sharply curtails inquiry outside certain limited areas. *Brown v. Board of Education (Brown II)*³⁴ required lower federal courts to assert jurisdiction over segregated school systems until the school district had eliminated all vestiges of state-imposed segregation.³⁵ In 1968, in *Green v. County School Board*,³⁶ the Supreme Court held that district courts should retain their supervisory jurisdiction until the school district achieved “a unitary, nonracial system of public education.”³⁷ The *Green* Court provided six criteria for determining when the vestiges of past discrimination have been sufficiently eliminated: the composition of the student body; faculty hiring and placement; staff assignments; student transportation, the provision of extracurricular activities; and the physical facilities and resources of the school.³⁸

Two decades later, in *Board of Education v. Dowell*,³⁹ the Supreme Court diluted the *Green* mandate that school districts “take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”⁴⁰ Instead, the *Dowell* Court urged that desegregation decrees be dissolved as long as local authorities had “complied in good faith with the desegregation decree since it was entered” and as soon as the school districts had eliminated the vestiges of prior de jure segregation “to the extent practicable.”⁴¹ Numerous lower courts accepted the *Dowell* invitation and held

34. 349 U.S. 294 (1955).

35. *Id.* at 301.

36. 391 U.S. 430 (1968).

37. *Id.* at 436.

38. *Id.* at 435.

39. 498 U.S. 237 (1991).

40. *Green*, 391 U.S. at 437–38.

41. 498 U.S. at 249–50.

that desegregation had been attained “to the extent practicable” as long as the school district made good faith efforts, even if desegregation actually had not been accomplished.⁴²

In *Freeman v. Pitts*,⁴³ the Court echoed the impatience it had expressed a year earlier with the specter of “never-ending supervision by the courts of school districts simply because they were once de jure segregated.”⁴⁴ The Court endorsed the concept of partial unitary status, which encouraged lower courts to end supervision of school districts “in incremental stages, before full compliance has been achieved in every area of school operations.”⁴⁵

Four years later, in *Missouri v. Jenkins*,⁴⁶ the Supreme Court again limited school districts’ obligations to desegregate. Until *Jenkins*, school districts under desegregation orders were responsible for explaining persistent racial disparities.⁴⁷ The *Jenkins* majority may have subtly effected a burden shift by saying that when district courts consider whether school districts have desegregated “to the extent practicable,” they must specifically identify “the incremental effect that segregation has had on minority student achievement or the specific goals of the quality education programs.”⁴⁸ In other words, the plaintiff essentially has to prove causation twice—once during the liability phase and again, under a much higher standard, on the defendant’s motion for a finding of unitary status. Even after a court has identified a constitutional violation on the part of a school district, the obligation to establish the need for continuing supervisory jurisdiction now rests with the plaintiff, who must carefully trace the residual effects of segregation that are attributable to the defendant.⁴⁹ The *Jenkins* Court also made a special effort to remind

42. See, e.g., *NAACP v. Duval County Sch.*, 273 F.3d 960, 965 (11th Cir. 2001) (affirming the district court’s holding that “the Board had fulfilled its constitutional obligation to eliminate the vestiges of *de jure* segregation and to desegregate Duval County’s schools in good faith and to the extent practicable”); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 312, 324, 326 (4th Cir. 2001) (repeatedly intoning the “to the extent practicable” language); *Liddell v. Special Sch. Dist.*, 149 F.3d 862, 867 (8th Cir. 1998) (“This Court’s supervision of the local school system is a ‘temporary measure to remedy past discrimination.’ The desegregation decree should thus be dissolved after the local authorities have achieved ‘unitary status’ by complying ‘in good faith’ with the decree for ‘a reasonable period of time,’ and by eliminating ‘the vestiges of past discrimination to the extent practicable.’” (quoting *Bd. of Educ. v. Dowell*, 498 U.S. 237, 245–50 (1991))); *Hoots v. Pennsylvania*, 272 F. Supp. 2d 539, 551–52 (W.D. Pa. 2003) (citing *Dowell* and remarking on the school district’s good faith compliance); *Tasby v. Moses*, 265 F. Supp. 2d 757, 763 (N.D. Tex. 2003) (accepting the directive of *Dowell* that courts should return schools to local control “‘at the earliest practicable date’”).

43. 503 U.S. 467 (1992).

44. *Id.* at 495.

45. *Id.* at 490.

46. 515 U.S. 70 (1995).

47. See Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1172–73 (2000); Reardon & Yun, *supra* note 7, at 1566 n.7.

48. 515 U.S. at 101. This may be a departure from *Freeman*’s holding that once the plaintiff establishes a constitutional violation, the defendant “bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation.” *Freeman*, 503 U.S. at 494.

49. James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1673 (2003) (“Gone is the presumption that all disparities in achievement

lower federal courts of their obligation “to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.”⁵⁰

Cumulatively, *Dowell*, *Freeman*, and *Jenkins*—what Professor Leland Ware has aptly named the “resegregation trilogy”⁵¹—created “a three-fold shift from an affirmative duty to eliminate all vestiges of segregation to acquiescence to resegregation.”⁵² The message of this trilogy is that it is time to end the experiment of desegregation,⁵³ and the standard for unitary status is now one that “virtually every school district can satisfy.”⁵⁴

The *Green* factors of student, staff, and faculty composition, transportation, extracurricular activities, and facilities have become a “check-list” that invites numeric computation “of black to white students and faculty and concrete comparisons of activities and facilities.”⁵⁵ They have also become an artificial way of limiting inquiry into the principal issue in the desegregation context: whether the vestiges of past segregation remain. *Freeman*’s approval of the incremental withdrawal of judicial supervision confines the district court’s later investigation to considerations of whether the school district has complied in the specified areas:

The implication of *Freeman*, therefore, is that, once a school district has incrementally desegregated each articulated area, the district court may declare the system unitary even if the school district remains segregated as measured by other criteria. As a result, actual vestiges of the discriminatory system not captured by the enumerated *Green* areas may persist even after the school district is declared unitary and the litigation is dismissed.⁵⁶

are the result of prior segregation; courts now are charged with identifying the causes of those disparities and apportioning responsibility accordingly. . . . [T]his seems to require that plaintiffs, not the school district, establish the incremental effect of prior segregation on current levels of achievement.”). For an example of the point, see *Coalition to Save Our Children v. State Board of Education*, 90 F.3d 752, 777 (3d Cir. 1996) (allocating the burden to the plaintiff to establish that performance disparities were the result of de jure segregation). *But see* NAACP v. Duval County Sch., 273 F.3d 960, 968 (11th Cir. 2001) (applying a presumption that continued racial imbalances in a school district result from prior de jure segregation) (citing *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208–09 (1973)).

50. 515 U.S. at 102 (quoting *Freeman*, 503 U.S. at 489).

51. Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 63 (2002).

52. *Id.* at 65.

53. Chemerinsky, *supra* note 7, at 1618 (“The three cases—*Dowell*, *Freeman*, and *Jenkins*—together have given a clear signal to lower courts: the time has come to end desegregation orders, even when the effect could be resegregation. Lower courts have followed this lead. Indeed, it is striking how many lower courts have ended desegregation orders in the last decade, even when provided with clear evidence that the result will be increased segregation of the public schools.”).

54. Ware, *supra* note 51, at 70.

55. William L. Christopher, Note, *Ignoring the Soul of Brown: Board of Education v. Dowell*, 70 N.C. L. REV. 615, 635 (1992).

56. Bradley W. Joondeph, Note, *Killing Brown Softly: The Subtle Undermining of Effective Desegregation in Freeman v. Pitts*, 46 STAN. L. REV. 147, 160 (1993) (“Once a district court articulates its criteria for measuring a school district’s progress toward unitary status—even if it selects other criteria in addition to the traditional *Green* factors—its inquiry is necessarily limited to the chosen factors.

Despite language in *Freeman* specifically approving the district court's consideration of "an additional factor that is not named in *Green*—the quality of education being offered to the white and black student populations"⁵⁷—for most lower federal courts, demonstration of the vestiges of past segregative policies is strictly limited to the *Green* factors.⁵⁸

*Capacchione v. Charlotte-Mecklenburg Schools*⁵⁹ is a good example of this cramped interpretation of Supreme Court desegregation precedent. It is also emblematic of the demise of desegregation. In *Capacchione*, the U.S. District Court for the Western District of North Carolina approved a finding of unitary status for the Charlotte school system and dissolved a thirty-year-old desegregation decree, despite increased segregation in both the elementary and secondary schools during the final decade of the desegregation order.⁶⁰ Even though the court acknowledged that "there has been more imbalance in recent years than at any time since the desegregation orders have been in place," it attributed the widening racial imbalance to "independent demographic forces and private choice."⁶¹ Despite evidence of "recurrent racial problems in pupil assignment [that were] hangovers from previous active discrimination," the court found that the "defendants are actively and intelligently addressing these problems without court intervention."⁶²

The court relied primarily on the *Green* factors and rejected the "laundry list of quality of education concerns" raised by the plaintiffs.⁶³ These "ancillary considerations" that the court discarded included: comparative evidence of teacher competence and experience; disparities in elective course offerings; measures of student achievement that included

From that point forward, unitary status, by definition, equals the school district's satisfying its affirmative duty to desegregate each selected area Achieving compliance in each *Green* area essentially becomes an end in itself rather than a measure of overall compliance.").

57. *Freeman v. Pitts*, 503 U.S. 467, 492 (1992) ("It was an appropriate exercise of its discretion for the District Court to address the elements of a unitary system discussed in *Green*, to inquire whether other elements ought to be identified, and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to ensure full compliance with the court's decree.").

58. See, e.g., *United States v. Georgia*, 171 F.3d 1333, 1338 (11th Cir. 1999); *Dowell v. Bd. of Educ.*, 8 F.3d 1501, 1514 (10th Cir. 1993); *Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228, 233 (W.D.N.C. 1999), *aff'd in part and rev'd in part en banc sub nom. Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001). But see *United States v. City of Yonkers*, 197 F.3d 41, 50 (2d Cir. 1999); *Wessman v. Gittens*, 160 F.3d 790, 801 (1st Cir. 1998); *Lockett v. Bd. of Educ.*, 92 F.3d 1092, 1101 (11th Cir. 1996); *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 760 (3d Cir. 1996); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 237 F. Supp. 2d 988, 1028 (E.D. Ark. 2002).

59. 57 F. Supp. 2d 228.

60. Intriguingly, the school district and the plaintiff class were allied by the remedial phase of the litigation, both resisting the motion of plaintiff-intervenors, the parents of some other children in the district who were complaining that the desegregation order was being used as a "pretext to pursue race-conscious, diversity-enhancing policies in perpetuity." *Id.* at 232.

61. *Id.* at 250, 255.

62. *Id.* at 236 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 67 F.R.D. 648, 649 (W.D.N.C. 1975)).

63. *Id.* at 244–70.

“racial disparities in student test scores;” survey data of student treatment; an expert’s conclusion that the district permitted a “hierarchically differentiated system of instructional delivery, commonly known as ‘tracking’”; and differential rates of discipline and suspension by race.⁶⁴ The district court pronounced it “totally unforeseeable that CMS would return to an intentionally-segregative system.”⁶⁵ The U.S. Court of Appeals for the Fourth Circuit upheld the district court’s ruling, and the Supreme Court denied certiorari.⁶⁶ The new student assignment plan, adopted in 2001, did not consider race.⁶⁷

The consequences flowing from the *Capacchione* ruling were swift and dramatic: in the 2002–2003 school year, the number of Charlotte-Mecklenburg schools with minority enrollment of 91% to 100% more than doubled from the previous year—from seven elementary schools in 2001–2002 to sixteen in 2002–2003, and from two middle schools to four.⁶⁸

The irony of the outcome in *Capacchione* is that the case was originally part of the remedial phase of *Swann v. Charlotte-Mecklenburg*,⁶⁹ where the Supreme Court had held in 1971—during the height of a national commitment to desegregation—that the central issue in determining the constitutionality of a remedial plan was its “effectiveness” in dismantling segregation.⁷⁰

In assessing whether school districts have achieved unitary status, some lower federal courts have, particularly in the 1970s and 1980s, considered factors other than those identified in *Green*. In approving unitary status, courts have looked favorably on minority school board representation,⁷¹ the absence of white flight,⁷² and indications of community

64. *Id.* at 269–81 (citations omitted). A more complete critique of the reasoning in *Capacchione* can be found in Melva L. Ware, *School Desegregation in the New Millennium: The Racial Balance Standard Is an Inadequate Approach to Achieving Equality in Education*, 18 ST. LOUIS U. PUB. L. REV. 465, 478–80 (1999); see also Luke Largess, *Public School Resegregation in Charlotte*, NCATL TRIAL BRIEFS MAG., Nov. 1999, available at 1999 WL 33504636.

65. 57 F. Supp. 2d at 284.

66. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 335 (4th Cir. 2001) (including almost boilerplate language: “After more than three decades of federal court supervision, [Charlotte-Mecklenburg Schools] have complied in good faith with the mandate of *Brown* embodied in the district court’s desegregation orders to achieve a unitary school system. The dual system has been dismantled and the vestiges of prior discrimination have been eliminated to the extent practicable.”).

67. See Jennifer Wing Rothacker & Celeste Smith, *Board Oks Assignment Plan for 2002–03; Method Does Not Include Using Race; Boundaries Expected Next Week*, CHARLOTTE OBSERVER, Aug. 1, 2001, at 1A.

68. John Charles Boger, *Education’s “Perfect Storm”? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1395 (2003).

69. 402 U.S. 1 (1971).

70. *Id.* at 25. The *Swann* Court also recognized that the judiciary needed to invoke a range of equitable remedies to eliminate the vestiges of discrimination, even though they “may be administratively awkward, inconvenient, and even bizarre in some situations.” *Id.* at 28.

71. See, e.g., *Riddick v. Sch. Bd.*, 784 F.2d 521, 528 (4th Cir. 1986) (considering the number of black superintendents and school board members).

72. See, e.g., *United States v. Corinth Mun. Separate Sch. Dist.*, 414 F. Supp. 1336, 1339 (N.D. Miss. 1976).

acceptance of desegregation.⁷³ Other courts, in evaluating the progress of desegregation efforts, have also looked more broadly at social context—determining that the culturally biased content of the curriculum⁷⁴ or a hostile racial atmosphere⁷⁵ were continued vestiges of de jure segregation. Conversely, in the 1990s, lower federal courts refused to examine some of the most important indicia of integration in considering requests to retain supervisory jurisdiction. For example, although a positive community reception of desegregation efforts is a factor for some courts in lifting a judicial order, many courts in unitary status hearings find that new evidence of community resistance or new evidence of other constitutional violations is irrelevant.⁷⁶

One indication of whether a school district has dismantled a dual system of racially identifiable schools is the quality of education its students are receiving. This is not one of the factors enumerated in *Green*. Although the *Freeman* Court permitted examination of the educational quality in assessing unitary status,⁷⁷ three years later in *Missouri v. Jenkins*,⁷⁸ the Supreme Court held that courts “should sharply limit, if not dispense with” considerations of the quality of minority student education or measures of minority student achievement.⁷⁹ The vast majority of lower courts have accepted this directive.⁸⁰ In assessing unitary status,

73. *Id.*

74. See *United States v. City of Yonkers*, 833 F. Supp. 214, 218–19 (S.D.N.Y. 1993) (finding that a “curriculum that is neither multicultural nor aligned to the goals and objectives of the desegregating school system” is a product of segregation); *United States v. Bd. of Sch. Comm’rs*, 506 F. Supp. 657, 672 (S.D. Ind. 1979) (demonstrating sensitivity toward the need to include historical contributions of racial and ethnic minorities).

75. *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1092–94 (D. Md. 1993).

76. For instance, on remand from the U.S. Supreme Court with a directive to determine whether the district had attained unitary status, the district court in *Dowell* “decided to permit no new evidence and to close the record retroactively to a point several years earlier.” Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, in *LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 39, 60 (Jay P. Heubert ed., 1999). This resulted in findings by the court of good faith on the part of local authorities as evidenced by the existence of an oversight committee that would ensure racial equality in educational opportunities. *Dowell v. Bd. of Educ.*, 778 F. Supp. 1144, 1157–58 (W.D. Okla. 1991). The judge, however, “did not know, because he permitted no evidence, that the committee had been dissolved two years earlier.” Orfield, *supra*, at 60.

One of the rare cases that did consider community opposition was *Hoots v. Pennsylvania*, 118 F. Supp. 2d 577, 580 n.2 (W.D. Pa. 2000) (approving partial but not full unitary status, and observing, “The strong resistance [sic] from many in the predominately white communities in the New District continued through much of this time, and certainly made it more difficult for the School Board to comply with the Court’s orders.”).

77. *Freeman v. Pitts*, 503 U.S. 467, 492 (1992).

78. 515 U.S. 70 (1995).

79. *Id.* at 101–02.

80. See Dora W. Klein, *Beyond Brown v. Board of Education: The Need to Remedy the Achievement Gap*, 31 J.L. & EDUC. 431, 442 (2002) (“Given that disparate achievement is a factor identified neither in *Green* nor in most desegregation decrees, most courts today will all but refuse to consider the possibility that an achievement gap is a vestige of de jure segregation.”) (citing *United States v. City of Yonkers*, 197 F.3d 41, 54–55 (2d Cir. 1999)); see also, e.g., *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 366 & n.16 (W.D. Ky. 2000) (“The Supreme Court has discouraged assessing relative student achievement in a dissolution decision for the very reason that it is so difficult to discern its root causes. . . . But by ‘quality of education’ the lower courts in *Freeman*

most courts do not consider dimensions of educational opportunities outside the *Green* factors, such as academic performance differences, overrepresentation of minority students in special education and their underrepresentation in gifted and talented programs, racial gaps in student test scores and drop-out rates, or harsher discipline received by minority students.⁸¹ For instance, in *Belk v. Charlotte-Mecklenburg Board of Education*,⁸² in a school district where forty-two percent of the students were black, two-thirds of all the students disciplined were African American.⁸³ The Fourth Circuit Court of Appeals nevertheless approved the district court's conclusion that a pattern of continuing racial disparities in discipline was unrelated to de jure segregation.⁸⁴

Freeman and *Jenkins* curtailed the remedial authority of courts in another extremely important way. In *Dowell*, the Supreme Court had cautioned the district court on remand to ascertain whether current residential segregation was a result of economics and personal preferences but seemed to leave open the possibility that residential segregation

meant merely distribution of educational resources, and never required elimination of an achievement gap among the races."); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537–38 (7th Cir. 1997); *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 776–78 (3d Cir. 1996); *Capachione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228, 272 (W.D.N.C. 1999); *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274, 1282 (D. Colo. 1995).

Curiously, in *Jenkins* itself on remand, the Eighth Circuit approved the district court evaluation of persistent adverse effects on student achievement as a measure of unitary status. *Jenkins v. Missouri*, 216 F.3d 720, 725 n.4 (8th Cir. 2000) ("Segregation has caused a system wide reduction in student achievement in the schools of the KCMUSD.") (quoting *Jenkins v. Missouri*, 122 F.3d 588, 594 (8th Cir. 1997)). Three dissenters in *Jenkins* maintained that the majority erred because "not only does *Green v. County School Board of New Kent County* omit student achievement as a factor for consideration for unitary status, *Jenkins III* specifically excludes this factor because it is controlled, as the Supreme Court noted, by circumstances wholly independent of unlawful discrimination." *Id.* at 736 n.16 (Beam, J., dissenting) (citations omitted). The dissent noted that "[e]very other circuit asked to consider any manifestation of scholastic achievement as a vestige factor has agreed with this interpretation of *Jenkins III* and rejected the proposition." *Id.* But see *Mills v. Freeman*, 942 F. Supp. 1449, 1461 (N.D. Ga. 1996) ("Quality of Education" is, admittedly, an amorphous concept. The inability to precisely articulate a definition for this concept, though, should in no way diminish its importance as the fundamental concern in this or any other desegregation case.").

81. See, e.g., *People Who Care*, 111 F.3d at 535–37 (reversing in part the lower court's remedial decree that had required a reduction of the racial gap in test scores and that had abolished ability grouping which had racially segregated students); *Coalition to Save Our Children*, 90 F.3d at 776–78 (finding that although the 1978 district court order had required consideration of "ancillary remedial measures" such as providing a plan to avoid discriminatory discipline and reviewing the curriculum, current student performance disparities were the result of "socioeconomic factors"); *Keyes*, 902 F. Supp. at 1299–1300 (finding that despite "disturbing," "longstanding and seemingly intractable" racial differences in participation in gifted and talented programs, as well as differences in drop out rates, student achievement, and discipline, "[t]he mere existence of such differences does not identify them as vestiges from the dual system existing twenty-five years ago [because] there are too many variables, including societal and socio-economic factors, to infer causation from prior unconstitutional conduct."). But see *United States v. Yonkers Bd. of Educ.*, 984 F. Supp. 687, 694 (S.D.N.Y. 1997) (referring to the school board's own educational improvement plan, adopted in 1986, which had promised to "address areas such as racial attitudes, student discipline procedures, academic achievement and performance goals, teaching in a diverse racial/ethnic environment, and integration goals").

82. 269 F.3d 305 (4th Cir. 2001).

83. *Id.* at 320, 332.

84. *Id.* at 332.

could be a “vestige of former school segregation.”⁸⁵ The *Freeman* Court upheld the district court finding that the present racial imbalance in schools was caused not by the school district but by “independent factors,” such as the “private choices” that produce “massive demographic shifts.”⁸⁶ In *Jenkins*, the Court flatly stated that “external factors [that] are not the result of segregation . . . do not figure in the remedial calculus.”⁸⁷ The *Jenkins* Court specifically rejected the district court’s reliance on “white flight” as a justification for its interdistrict program of magnet schools and added its own speculation that court-ordered desegregation itself—rather than the lingering effects of de jure segregation—may have caused the white departure to the suburbs.⁸⁸ The burden now became the plaintiff’s to tie existing residential segregation to de jure segregation. Unsurprisingly, since *Jenkins*, it is the rare case that considers residential segregation a vestige of prior de jure segregation.⁸⁹

85. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 n.2 (1991). On remand, the federal district court determined that “[c]urrent residential segregation in Oklahoma City . . . is caused by the private choices of blacks and whites, based on such factors as economic status, housing affordability, job location, personal preferences, and social and neighborhood relationships.” *Dowell v. Bd. of Educ.*, 778 F. Supp. 1144, 1167 (W.D. Okla. 1991).

86. *Freeman*, 503 U.S. at 494–95.

87. *Jenkins*, 515 U.S. at 102.

88. *Id.* at 94–96; *see also* William D. Henderson, *Demography and Desegregation in the Cleveland Public Schools: Toward a Comprehensive Theory of Educational Failure and Success*, 26 N.Y.U. REV. L. & SOC. CHANGE 457, 474 (2000–01) (refuting the Supreme Court’s conjecture that causation ran from the desegregation order to white flight: “In *Jenkins*, two decades of white outmigration to the suburbs already had left the Kansas City, Missouri school district 65% black when the desegregation litigation commenced in 1976. When the creation of the magnet schools was ordered in 1985, after an eight-year period of mandatory student reassignments, the black enrollment had only increased to 68.3%.”) (citations omitted); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 827 (1996) (criticizing courts for blaming white flight on desegregation and “using this as a basis for ending desegregation orders. The courts have not considered, however, the possibility that their own limited remedies may have made lasting desegregation impossible.”).

89. Compare some of the earlier desegregation decisions to cases in the latter 1990s. *Compare, e.g.*, *Riddick v. School Bd.*, 784 F.2d 521, 539–40 (4th Cir. 1986) (approving the school board’s consideration of “white flight” in the development of a voluntary integration plan), *and Johnson v. Bd. of Educ.*, 604 F.2d 504, 516–17 (7th Cir. 1979) (holding that voluntary state action taken to avert resegregation through white flight was constitutional), *and Parent Ass’n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 720 (2d Cir. 1979) (“[W]e may in the limited circumstances of purely voluntary action, accept the probability of white flight as a factor which the Board was entitled to take into account in the integration equation.”), *and Higgins v. Bd. of Educ. of the City of Grand Rapids*, 508 F.2d 779, 794 (6th Cir. 1974) (“[T]here is a valid distinction between using the defense of white flight as a smokescreen to avoid integration and realistically considering and dealing with the practical problems involved in making voluntary efforts to achieve integration.”), *with NAACP v. Duvall County Sch.*, 273 F.3d 960, 970–71 (11th Cir. 2001) (finding that although twenty-six identifiably black schools persisted in the county, this was the result of “white flight” and “present-day choices by parents”), *and Manning v. School Bd.*, 244 F.3d 927, 937–38 (11th Cir. 2001) (finding that “shifting demographics was a substantial cause of the racial imbalances in Appellants’ student assignments and that Appellants did not deliberately cause the racial imbalances”), *and Reed v. Rhodes*, 179 F.3d 453, 467 (6th Cir. 1999) (declaring unitary status and finding that “[t]he demographics of recent years have reflected rapid population shifts within the city that were not caused by or attributable to the Cleveland School District. These demographic dynamics were inevitable as a result of suburbanization and socioeconomic conditions.” Finding also “[n]o evidence has been developed in these proceedings to support a conclusion that the effect of the Cleveland School District’s previous unconstitutional conduct may have con-

Although changing societal attitudes takes time—perhaps measured in generations⁹⁰—the Supreme Court, lower federal courts, and even commentators have expressed their impatience with the duration of desegregation orders.⁹¹ Indeed, the Supreme Court has issued specific language limiting the anticipated duration of federal court supervisory jurisdiction.⁹² In the past decade, the Supreme Court has introduced each of its desegregation opinions by commenting on the duration of the suit, “despite the longevity of the violation and the usual delays in ordering and implementing the remedy.”⁹³ An important indicator of the viability of integration is whether it will last: whether state-sponsored racially divisive attitudes have indeed been altered. Yet courts have made findings of unitary status after school districts have been under desegregation orders for only a few years,⁹⁴ and most courts in unitary status hearings reject arguments regarding the threat of resegregation.⁹⁵

tributed to the residential segregation of the community.”), and *Lockett v. Bd. of Educ.*, 111 F.3d 839, 843 (11th Cir. 1997) (finding that current student racial imbalances and even imbalances dating back to the 1980s were not the result of de jure segregation but of “dramatic demographic changes” in the county, “such as an increase in the number of black school-age children and a decrease in the number of white school-age children” due to “factors over which the school board had no control, such as a decrease in the white fertility rate, a difference in purchasing power between white and black families, a preference of white and black families to live in neighborhoods composed of families of a similar race, and the location of housing projects”). New York has found that its housing authority perpetuated segregation. See *United States v. City of Yonkers*, 96 F.3d 600, 622 (2d Cir. 1996); *United States v. Yonkers Bd. of Educ.*, 30 F. Supp. 2d 650, 651 (S.D.N.Y. 1998).

90. Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 793 (1986) (“A period of sustained compliance, perhaps an entire generation, is needed for public perceptions about the racial character of the schools to be transformed.”) (citations omitted).

91. In *Board of Education v. Dowell*, 498 U.S. 237 (1991), the Supreme Court loosened the requirements for attaining “unitary status,” stating that school desegregation decrees “are not intended to operate in perpetuity.” *Id.* at 248; see also *Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782, 820 (6th Cir. 1980) (Weick, J., concurring in part and dissenting in part) (“I agree with much of the well written majority opinion which details at great length the history of this small school desegregation case over a period of nine years which is all too long and I think it is about time to write finis to it.”); *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring) (“Necessary concern for the important values of local control of public school systems dictates that a federal court’s regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.”); Monika L. Moore, Note, *Unclear Standards Create an Unclear Future: Developing a Better Definition of Unitary Status*, 112 YALE L.J. 311, 313 (2002) (proposing a “twelve-year plan” that would only require “a school to remain under court supervision until all of the students who had standing in the desegregation suit have a chance to graduate”). These, of course, may be examples not of a loss of patience but of an abandonment of the original purpose.

92. *Dowell*, 498 U.S. at 248 (desegregation decrees may be dissolved after a school district has complied for a “reasonable period of time”).

93. Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 548 (1999).

94. See, e.g., *Stell v. Bd. of Pub. Educ.*, 860 F. Supp. 1563, 1584–85 (S.D. Ga. 1994) (terminating court supervision after the school district operated for six years under a voluntary plan); Moore, *supra* note 91, at 317 (reporting that “[o]ne Mississippi district court released a school district from its desegregation order after the district had complied with the order for seven years. Another district court in Oklahoma removed a school district from supervision after it had met the requirements of the desegregation plan for only five years.”).

95. See, e.g., *Stell*, 860 F. Supp. at 1583 (rejecting fears of resegregation).

Although desegregation plaintiffs now have the burden to demonstrate the vestiges of segregation attributable to defendants, the law artificially constrains the evidence they can introduce. The Supreme Court has issued essentially a “checklist” of factors that define whether a school system has attained unitary status, along with repeated urgings for lower federal courts to dissolve desegregation orders as quickly as possible.⁹⁶ Many lower courts have heeded this call. Numerous desegregation decisions, particularly in the last decade, seem to be a product of a judiciary that repeatedly expresses impatience with desegregation,⁹⁷ looks selectively at empirical evidence about whether desegregation remedies have been effective,⁹⁸ and considers resegregation noncontroversial and unrelated to de jure segregation.⁹⁹ As Gary Orfield, Professor of Education and Co-Director of the Harvard Project on Civil Rights, laments, “Some of the same courts that provided all deliberation and no speed in desegregation have been engaged in an unseemly rush to resegregate.”¹⁰⁰

2. *Single-Sex Schools*

Single-sex school cases do not have the wealth of precedent that exists in the desegregation context. What they do have is the 2002 congressional enactment of the No Child Left Behind Act,¹⁰¹ which encourages “same-gender schools and classrooms” by providing federal funds for innovations in same-sex education.¹⁰² The No Child Left Behind Act reverses thirty years of federal policy opposing segregation based on sex.¹⁰³ Civil rights groups are contemplating challenges to the Act, but none have been filed to date.¹⁰⁴ While ultimately litigation may occur under Title IX,¹⁰⁵ the Equal Educational Opportunities Act,¹⁰⁶ or equal educational opportunities provisions in state constitutions,¹⁰⁷ the most important suits must address the constitutionality of single-sex public school education.

96. See, e.g., *Dowell*, 498 U.S. at 248.

97. See, e.g., *Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782, 820 (6th Cir. 1980); *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979).

98. See, e.g., *People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 111 F.3d 528, 535 (7th Cir. 1997); *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 777 (3d Cir. 1996); *Keyes v. Cong. of Hispanic Educators*, 902 F.Supp. 1274, 1299–1300 (D. Colo. 1995).

99. See, e.g., *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 322 (4th Cir. 2001).

100. Orfield, *supra* note 76, at 54.

101. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended at 20 U.S.C. §§ 7201–7283(g) (2002)).

102. 20 U.S.C. § 7215(a)(23) (2002).

103. Michael A. Fletcher, *Single-Sex Education Gets Boost*, WASH. POST, May 9, 2002, at A1.

104. Telephone interview with Emily Martin, Women’s Rights Project, American Civil Liberties Union Foundation (Dec. 3, 2003).

105. See, e.g., *Garrett v. Bd. of Educ.*, 775 F.Supp. 1004, 1008–10 (E.D. Mich. 1991).

106. 20 U.S.C. §§ 1701–1722 (1997). See, e.g., *United States v. Hinds County Sch. Bd.*, 560 F.2d 619 (5th Cir. 1977) (holding that single-sex schools violate the Act).

107. See, e.g., *Garrett*, 775 F.Supp. at 1010–11 (holding in an injunction hearing that Michigan’s Elliott-Larsen Act would likely prohibit the establishment of a public school that excluded one sex).

Of the few existing lower court opinions on single-sex education, most were developed before the contemporary intermediate scrutiny standard.¹⁰⁸ In 1970, a Virginia federal district court struck the male-only program of the University of Virginia at Charlottesville.¹⁰⁹ Even without any elevated scrutiny, the court held that the state could not discriminate on the basis of sex in providing educational opportunities at that university.¹¹⁰ That same year, a South Carolina federal district court held in *Williams v. McNair*¹¹¹ that sex-exclusive admissions policies of “girls” colleges in that state could not be “wholly wanting in reason.”¹¹² Reasoning that South Carolina provided the Citadel as an all-male military institute, the *Williams* court spoke approvingly of Winthrop, the “school for young ladies,” as offering “courses . . . specially helpful to female students,” such as “sewing, dressmaking, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex.”¹¹³ The reasoning in *Williams*, applauding traditional social roles, makes it something of an antique for purposes of the present debate.

In 1976, the Third Circuit Court of Appeals in *Vorchheimer v. School District of Philadelphia*¹¹⁴ rejected the constitutional challenge of a female high school student who sought admission to the public all-male Central High School in Philadelphia for academically gifted students because the district had provided the “essentially equal” all-female Philadelphia High School for Girls.¹¹⁵ The court held that the “controverted, but respected theory that adolescents may study more effectively in single-sex schools” did bear a substantial relationship to the district’s goal of providing a quality education.¹¹⁶

The federal district court in *Vorchheimer* sharply questioned the logic of the school district’s position that it was trying to protect girls from the adverse effects of coeducation: “[I]f coeducation is detrimental to girls, all the public schools should be sex-segregated; if it is not, then there is no ‘fair and substantial’ relationship between sex-segregation and the educational goals of the School Board.”¹¹⁷ Although the Third Circuit’s decision provides some support for those favoring single-sex education, the precedential value of *Vorchheimer* is limited. The federal district court considered two pieces of evidence introduced by the Board: one slice relating to the work conducted by Professor M. Elizabeth Tidball on the correlation between attendance at a women’s college between 1910 and 1950 and later career success; the other concerning a single

108. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 (1982).

109. *Kirstein v. Rector and Visitors*, 309 F. Supp. 184, 188 (E.D. Va. 1970).

110. *Id.* at 187.

111. 316 F. Supp. 134 (D.S.C. 1970).

112. *Id.* at 137.

113. *Id.* at 136, 136 n.3.

114. 532 F.2d 880 (3d Cir. 1976).

115. *Id.* at 881.

116. *Id.* at 888.

117. *Vorchheimer v. Sch. Dist.*, 400 F. Supp. 326, 342 (E.D. Pa. 1975).

study that compared the values of students in New Zealand who attended single-sex high schools with those who attended coeducational institutions, where the author of the study, as a defendant's expert, admitted he was "reluctant to apply the conclusions of the New Zealand study to American single-sex schools for academically superior students."¹¹⁸ The district court found both these pieces of evidence of limited applicability to the case,¹¹⁹ yet the court of appeals referred to them approvingly.¹²⁰

*Garrett v. Board of Education of Detroit*¹²¹ blended single-sex and single-race education as a remedial idea. Female plaintiffs in *Garrett* challenged Detroit's scheduled opening of all-male academies for elementary and middle school African American males.¹²² The boys-only schools—with a specialized Afrocentric curriculum, individual counselors and mentors, career education, and Saturday and extended weekday classes—had the objective of addressing "the high unemployment rates, school dropout levels and homicide among urban males."¹²³ The court determined that the defendants had presented no evidence that it was the presence of girls that accounted for the educational hurdles faced by urban males or "that excluding girls is substantially related to the achievement of the Board's objectives."¹²⁴

Since Detroit provided no comparable educational opportunities for girls, *Garrett* left open the viability of single-sex education where a school district offers comparable alternatives.¹²⁵ The reasoning in *Garrett*, though, is similar to that employed under the contemporary equal protection standard—requiring an "exceedingly persuasive justification" for sex exclusivity.¹²⁶ The *Garrett* court seemed to require quantitative evidence tracing improved academic performance to the exclusion of one sex:

Although co-educational programs have failed, there is no showing that it is the co-educational factor that results in failure. Even more dangerous is the prospect that should the male academies proceed and succeed, success would be equated with the absence of girls

118. *Id.* at 329–31.

119. *Id.* at 333.

120. 532 F.2d at 882, 882 n.2.

121. 775 F. Supp. 1004 (E.D. Mich. 1991).

122. *Id.* at 1005.

123. *Id.* at 1006.

124. *Id.* at 1007. "In fact, the Board's characterization of its pedagogical choice as an experiment that was necessary because nothing else had been successful made that choice seem more like an expression of desperation than an exercise of professional judgment." Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K–12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 456.

125. The court specifically noted: "Urban girls drop out of school, suffer loss of self esteem and become involved in criminal activity. Ignoring the plight of urban females institutionalizes inequality and perpetuates the myth that females are doing well in the current system." 775 F. Supp. at 1007.

126. See *infra* text accompanying notes 128, 212.

rather than any of the educational factors that more probably caused the outcome.¹²⁷

The contemporary constitutional threshold is higher now than it was thirty years ago. In assessing whether single-sex education is supported by an “exceedingly persuasive justification,” the standard enunciated in *United States v. Virginia*,¹²⁸ courts will need to consider both theoretical justifications and available empirical evidence. The Third Circuit in *Vorchheimer* was willing to assume the accuracy of a “controverted” theory and then extrapolated—based on extremely weak empirical evidence—that the theory had a substantial relationship to the objective of a quality education.¹²⁹ Current Supreme Court precedent compels a more searching inquiry regarding the fit between the state’s objective and the means chosen to reach it.¹³⁰ Current precedent also demands inquiry into the history and meaning of institutions that have been segregated on the basis of identity characteristics.¹³¹ The *Vorchheimer* court found that sex-segregated education had “a long history and world-wide acceptance.”¹³² Unfortunately, that history of widespread acceptance, both in this culture and in others, is a history of the exclusion of females from opportunities available to males.¹³³

The Supreme Court has addressed single-sex educational programs twice—both concerning advanced education and both in the context of an absence of comparable programs for the excluded sex. In *Mississippi University for Women v. Hogan*,¹³⁴ the Supreme Court held that a publicly funded women’s nursing college could not exclude men from its program.¹³⁵ Because Mississippi provided no other single-sex educational opportunity for men, the Court specifically left open whether a state could establish separate but equal public educational institutions.¹³⁶ While the Court touched on the historic exclusion of women from public spheres, it ultimately viewed that history as unrelated to the school’s justification of the single-sex nursing program as “educational affirmative action.”¹³⁷ The Court in *Hogan* found no specific legislative intent that

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

128. 518 U.S. 515, 531 (1996).

129. *Vorchheimer v. Sch. Dist.*, 532 F. 2d 880, 888 (3d Cir. 1976).

130. See *United States v. Virginia*, 518 U.S. at 535–36.

131. *Id.* at 536–37, 542 (considering the historical exclusion of women from institutions of higher education and requiring the consideration of whether present classifications “perpetuate historical patterns of discrimination”) (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994)); see also *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728–29 (2003).

132. 532 F.2d at 882.

133. *United States v. Virginia*, 518 U.S. at 531–32; see also Jill Elaine Hasday, *The Principle and Practice of Women’s “Full Citizenship”: A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 766–68 (2002) (explaining that the history of sex-segregated education has been anything but benign).

134. 458 U.S. 718 (1982).

135. *Id.* at 733.

136. *Id.* at 720 n.1.

137. *Id.* at 725 n.10, 726 n.12, 727.

the single-sex admissions policy was to act as compensation for any present discrimination, and it cautioned that classifications cannot be based on “archaic and overbroad generalizations about women.”¹³⁸

*United States v. Virginia (VMI)*¹³⁹ was not specifically about single-sex elementary or secondary schools.¹⁴⁰ In *VMI*, a female high school student sought admission to the all-male Virginia Military Institute (VMI).¹⁴¹ The Supreme Court found VMI’s male-only admissions policy unconstitutional.¹⁴² It also rejected Virginia’s attempt to create a parallel female-only, but mostly ceremonial, corps of cadets at Virginia Women’s Institute for Leadership as a “pale shadow” of the educational choices, funding, facilities, alumni influence, and prestige available to men at VMI.¹⁴³

Virginia had argued that the admission of women to VMI would undermine the adversative training program used to produce “citizen soldiers.”¹⁴⁴ This adversarial training program consisted of an honor code (“The Code of a Gentleman”), spartan barracks living, a hierarchical class system, a “rat line” in which entering cadets are subjected to strenuous physical exercise, continuous and minute regulation of behavior and boot camp conditions, a “dyke” system of upperclassmen advising freshmen, and military training that emphasized “[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.”¹⁴⁵ The Commonwealth contended that this training would have to be modified since it was not appropriate for “most women,” who would learn better through a “cooperative method which reinforces self-esteem.”¹⁴⁶ The Supreme Court rejected this justification, holding that a state must “not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”¹⁴⁷ Stereotypes “about typically

138. *Id.* at 730 n.16.

139. 518 U.S. 515 (1996).

140. Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 SW. U. L. REV. 189, 197 (2003) (stating that “the VMI case was not really about the military. Nor did the Court question the value of single-sex schools. Instead, VMI was about a State that invested heavily in a college designed to produce business and civic leaders, that for generations succeeded admirably in the endeavor, and that strictly limited this unparalleled opportunity to men.”).

141. *United States v. Virginia*, 518 U.S. at 523.

142. *Id.* at 519, 557–58.

143. *Id.* at 550–53.

144. *Id.* at 540.

145. *United States v. Virginia*, 766 F. Supp. 1407, 1421–24 (W.D. Va. 1991).

146. *United States v. Virginia*, 518 U.S. at 526–35, 548 (quoting *United States v. Virginia*, 852 F. Supp. at 476).

147. *Id.* at 533. The Court emphasized that the “question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.” *Id.* at 542. In concurrence, Justice Rehnquist underscored the point that “the State should avoid assuming demand based on stereotypes.” *Id.* at 565 (Rehnquist, J., concurring).

male or typically female ‘tendencies’” are insufficient to support the searching inquiry.¹⁴⁸

The Commonwealth also claimed a legitimate state interest in providing single-sex education as a diverse educational opportunity.¹⁴⁹ The Court rejected this as an *ex post facto* rationalization, noting that “Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth.”¹⁵⁰ In a footnote, the VMI majority left open the possibility of a state “evenhandedly” supporting “diverse educational opportunities,” observing that “it is the mission of some single-sex schools ‘to dissipate, rather than perpetuate, traditional gender classifications.’”¹⁵¹

In neither *Hogan* nor *VMI* did the Court address whether government-sponsored separatism is inherently unequal. Indeed, neither case directly addressed the message sent by sex exclusivity itself. Both cases, however, offer important methodological suggestions for courts evaluating the constitutionality of single-sex public education, whether the proffered justification is a diversity rationale or a remedial rationale. In the later section on segregated education for remedial purposes, this article returns to the Supreme Court’s guidelines to assess the constitutionality of single-sex and single-race education.¹⁵²

B. Courts and Commentators Mishandle the Sociological Data

When addressing segregation cases, courts show an obvious discomfort with empirical data.¹⁵³ Their unease is not unique to issues of education or identity. Judges grapple with scientific and social science information and expert testimony in many kinds of cases.¹⁵⁴ They have exhibited a lack of familiarity regarding the use of empirical data, applied diverse standards regarding the admission of such data, and relied on parties—who have widely varying abilities and resources—to find or produce that research.¹⁵⁵ These limitations regarding the provision, admission, and interpretation of data (as well as the limits of the data themselves) are almost universally present.

148. *Id.* at 541.

149. *Id.* at 535.

150. *Id.*

151. *Id.* at 534 n.7 (citations omitted).

152. *See infra* Part III.C.4.

153. *See infra* text accompanying notes 156–93.

154. *See, e.g.*, Erica Beecher-Monas, *The Heuristics of Intellectual Due Process: A Primer for Triers of Science*, 75 N.Y.U. L. REV. 1563, 1566 (2000); Shubha Ghosh, *Federal and State Resolutions of the Problem of Daubert and “Technical or Other Specialized Knowledge,”* 22 AM. J. TRIAL ADVOC. 237, 242 (1998); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 564–65 (1987).

155. Kenneth S. Abraham & Richard A. Merrill, *Scientific Uncertainty in the Courts*, 2 ISSUES IN SCI. & TECH. 93 (1986).

In the desegregation and single-sex schools contexts, however, courts and commentators exhibit particular idiosyncrasies and exceptionally unscientific methods regarding the acceptance and admission of scientific research. Courts assessing whether school districts have attained unitary status have shown a specific reluctance to consider social science evidence regarding the causes or consequences of segregation. In the context of single-sex schools cases, most commentators seem willing to consider sociological evidence but often do so in extremely selective ways.

1. *Desegregation*

Part of the courts' unwillingness to consider social science evidence in the desegregation context stems directly from the constraints of the *Green* template that limits the admissibility of evidence regarding factors other than staff and faculty, facilities, transportation, and extracurricular activities:

[I]t is important to notice what is *not* factored into the decision as to whether decrees should be dissolved. There is no consideration of whether black or white students are currently benefiting from the desegregation plan at issue. Studies about the benefits of integrated education are thus formally irrelevant to the determination of unitary status. In addition, there is little consideration of the impact that lifting the decree will have on students. It is irrelevant that schools might become reseggregated once decrees are lifted and districts reinstitute neighborhood school policies, and it is irrelevant that minority students might suffer if remedial programs are discontinued. Right from the start, then, the bulk of social science studies concerning the costs and benefits of racially integrated schools are relegated to the sidelines of the unitary status inquiry.¹⁵⁶

In the last decade, federal and state courts have moved increasingly toward the incorporation of information from numerous disciplines outside law—economics, history, medicine, literature, sociology, political theory, and so on—in a variety of cases.¹⁵⁷ This tendency toward interdisciplinary exploration is much less pronounced in more recent cases regarding the fate of desegregation orders. Courts in the liability phase of

156. Ryan, *supra* note 49, at 1670 (footnote omitted).

157. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (consulting the European Court of Human Rights and the views of other nations on the subject of consensual sodomy); *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (considering amicus briefs and expert opinion regarding “educational benefits that flow from student body diversity”); *United States v. Virginia*, 518 U.S. 515, 542–46 (1996) (recounting the history of women’s entrance into the professions regarding the meaning of the state’s exclusion of women from a contemporary military school); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 288–91 (1990) (O’Connor, J., concurring) (relying on opinions of medical ethicists regarding patients’ interests in refusing unwanted medical treatment).

desegregation cases seemed more open to considering social science evidence before the 1990s than courts have in the past decade.¹⁵⁸

Consider as an example the Kansas City, Missouri desegregation case, *Missouri v. Jenkins*.¹⁵⁹ The trial court had specifically found that de jure segregation “caused a system wide *reduction* in student achievement” in the Kansas City, Missouri schools and developed a remedial plan.¹⁶⁰ The Eighth Circuit upheld the district court’s later decision denying the school district’s motion for a finding of unitary status.¹⁶¹ Dissenting to the denial of a request for rehearing en banc and objecting to the district court’s establishment of a student achievement goal, gauged by results from standardized tests, Judge Arlen Beam wrote, “In my view, this case as it now proceeds, involves an exercise in pedagogical sociology, not constitutional adjudication.”¹⁶²

This cynicism about tracing the gap in student achievement to the prior dual system was echoed by the Supreme Court in *Jenkins*, when it ordered the district court to “sharply limit, if not dispense with, its reliance on” student achievement as measured by test scores.¹⁶³ The Court’s anti-empiricism was most starkly on display in *Jenkins* when it ignored the district court findings regarding white flight being attributable to the prior constitutional violation and substituted instead its own “supposition” that white flight resulted not from segregation, but from demographic shifts and the desegregation order itself.¹⁶⁴ (On remand, the district court conducted hearings, carefully evaluated expert multiple regression analyses, and made extensive findings of fact, ultimately holding that this evidence indicated that a specific portion of the achievement gap was causally related to prior de jure segregation.¹⁶⁵)

158. Many early desegregation cases involved the use of experts as masters to assist in the development and oversight of remedial plans. See, e.g., *Morgan v. Kerrigan*, 530 F.2d 401, 430 (1st Cir. 1976) (noting that although the trial court gave the appointed experts “an unusual, if brief, amount of power, it was justified by the School Committee’s actual violations of the court’s substantive and procedural orders, and its unwarranted delay in the face of the urgent necessity of finalizing these decisions”); *S.F. NAACP v. S.F. Unified Sch. Dist.*, 576 F. Supp. 34, 39 (N.D. Cal. 1983) (commenting on the appointment of eight experts on school desegregation and education policy who assisted in arriving at the parties’ negotiated settlement in a school desegregation case); *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699, 758–68 (E.D.N.Y. 1974) (approving appointment of master who specialized in housing laws and educational administration to assist in developing integration plan); DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 13 (1995) (reporting that expert studies “became commonplace in desegregation cases during the late 1970s”); DAVISON M. DOUGLAS, *READING, WRITING AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS* 173–89 (1995) (describing the trial judge’s reliance on expert witnesses in developing a remedial plan in the early 1970s in the *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), litigation).

159. 515 U.S. 70 (1995).

160. *Jenkins v. Missouri*, 639 F. Supp. 19, 24 (W.D. Mo. 1985).

161. *Jenkins v. Missouri*, 11 F.3d 755, 762–63 (8th Cir. 1994).

162. *Jenkins v. Missouri*, 19 F.3d 393, 404 (8th Cir. 1994) (Beam, J., dissenting).

163. 515 U.S. at 101.

164. *Id.* at 95, 102.

165. The Court finds that Dr. Trent’s test is reliable and accurately identifies the incremental portion attributable to the prior de jure discrimination. Race, by itself, reduces a black student’s test score by 4% to 9%. Low expectations increase the achievement gap by 2% to 4%. Combining these in-

That skepticism surfaced again in *Little Rock School District v. Pulasaki County Special School District No. 1*,¹⁶⁶ where the district court held (in a section of its opinion entitled “The Metaphysics of Using the ‘Achievement Gap’ as a Factor in Deciding Unitary Status”) that plaintiffs had not come forward with evidence to attribute the achievement gap to unconstitutional conduct of the school board.¹⁶⁷ The court mused:

How does a trial court go about determining with *any* degree of precision, the percentage of the achievement gap (assuming there is any) that is causally related to de jure segregation (which ended many decades earlier)—after somehow excluding the host of other socioeconomic factors that are universally recognized as also contributing to the achievement gap?¹⁶⁸

The court proceeded to revisit with suspicion the specific findings of the district court on remand in *Jenkins*, using phrases such as “largely speculative conclusion,” “the appearance that the trial court pulled a number from thin air,” and an expert “guessing in his testimony that attempted to calculate—nay, divine—the percentage of the KCMSD achievement gap.”¹⁶⁹

Some of the judicial evasion of social science data may be an unwillingness on the part of courts to impute any characteristics as a matter of group belonging.¹⁷⁰ Judges also may be somewhat cynical about information coming from the soft sciences.¹⁷¹ This cynicism was evidenced in

cremental portions, using the high end of the range for both factors—race and teacher efficacy—the total “race effect” amounts to 13% of the achievement gap.

Further, the *increase* in the gap needs consideration. While minority school children arrive at school without the necessary skills for high achievement, the gap between blacks and whites increases while they are students within the KCMSD. As the Court discussed earlier, this gap grows from as little as three and a half to as large as ten NCEs [normalized curve equivalents]. The Court cannot say for certain that the same factors that play a role in the original gap do not influence the increase in the gap as well. It seems reasonable to this Court that the “race effect” plays just as substantial a role in the increase that it did in creating the original gap.

Therefore, to sum up, the original gap between black and white test scores is approximately ten NCEs. The increase in the achievement gap at the high end is approximately ten NCEs. The Court has found that 13% of the initial gap and 13% of the increase in the gap may be traced to the prior discrimination within the KCMSD.

Jenkins v. Missouri, 959 F. Supp. 1151, 1164–65 (W.D. Mo. 1997).

166. 237 F. Supp. 2d 988 (E.D. Ark. 2002).

167. *Id.* at 1040.

168. *Id.* at 1037.

169. *Id.* at 1037–38 (quotations omitted).

170. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 646–47 (1993) (refusing in a redistricting case to presume political ideology based on race).

171. *See, e.g.,* Phoebe C. Ellsworth & Julius G. Getman, *Social Science in Legal Decision-Making*, in *LAW AND THE SOCIAL SCIENCES* 592 (Leon Lipson & Stanton Wheeler eds., 1986). They may think that sociologists come in with a political agenda in ways that a physicist who is calculating the coefficient of friction would not. Another concern is that knowledge is constantly changing in the social sciences. Criticizing the Supreme Court’s reliance on social science evidence in *Brown v. Board of Education*, legal philosopher Edmund Cahn observed, “since the behavioral sciences are so very young, imprecise, and changeful, their findings have an uncertain expectancy of life. Today’s sanguine asseveration may be cancelled by tomorrow’s new revelation—or new technical fad.” Edmund Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955). However, the Supreme Court has recently applied the factors from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to the assessment

Davis v. School District of Pontiac,¹⁷² where the court ended its supervisory jurisdiction and released a school district from a desegregation order.¹⁷³ In *Davis*, the court dismissively waved off the information value of social science evidence:

Even now, with the perspective of almost three decades, historians, sociologists and legal scholars vigorously disagree over the socio-economic, demographic and educational impact busing has had on our communities. As in so many areas of debate, current perspectives on the impact of busing appear divided along the lines of the old adage, "Where you come in is where you go out."¹⁷⁴

Like Justice Thomas in *Jenkins*, the *Davis* court also sweepingly assumed that "larger social forces" of population demographics could be the "real source of racial imbalance."¹⁷⁵ Few other courts go as far as *Davis* in the studied avoidance of existing knowledge, but a number of other decisions disparage the value of social science evidence, particularly when deciding whether to lift desegregation orders.¹⁷⁶

2. *Single-Sex Schools*

Like the later desegregation cases, single-sex schools cases and commentary are marked by inattention to social science data, dismissal or devaluation of expert testimony, reluctance to expand inquiry into social context, selective inclusion of research, and the slanted presentation of evidence. Few single-sex schools cases have been decided by courts.¹⁷⁷ Fewer still have relied on expert testimony or social science evidence.¹⁷⁸

of "technical" information as well as "scientific" knowledge. See *Kumho Tire v. Carmichael*, 526 U.S. 137, 147–49 (1999) (engineering testimony).

172. 95 F. Supp. 2d 688 (E.D. Mich. 2000).

173. *Id.* at 698.

174. *Id.* at 695 (citation omitted).

175. *Id.* at 697 (quoting *Missouri v. Jenkins*, 515 U.S. 70, 117 (Thomas, J., concurring)).

176. See, e.g., *Wessmann v. Gittens*, 160 F.3d 790, 804–08 (1st Cir. 1998) (reviewing critically several experts' testimony, dismissing all of their conclusions as methodologically unfounded, and ultimately holding that a race-conscious admissions policy was not justified by the history of de jure segregation, all after expressing its own ineptitude with the statistical information in the case: "We do not propose that the achievement gap bears no relation to some form of prior discrimination. We posit only that it is fallacious to maintain that an endless gaze at any set of raw numbers permits a court to arrive at a valid etiology of complex social phenomena."). A sharp difference exists between critiquing methodology or results and dismissing expert testimony outright while substituting subjective conclusions unsupported by research.

177. See *supra* text accompanying notes 108–50.

178. The trial court in *Vorchheimer v. School District of Philadelphia*, 400 F. Supp. 326 (E.D. Pa. 1975), did refer to the research of Dr. Elizabeth Tidball regarding successes of women's college graduates but questioned its applicability to an all-male high school: "The analysis performed by Dr. Tidball does not show that males who attend a single-sex school are more likely to be career achievers than those who attend coed schools. It is extremely doubtful that Dr. Tidball's conclusions concerning the correlation between all women's colleges and career successful women can be applied to women at an academic high school such as Central." *Id.* at 333. The Third Circuit determined that the separate boys and girls schools did not constitute an equal protection violation. *Vorchheimer*, 532 F.2d at 888. That decision did not rely directly on any social science research but did defer to the school board's interpretation of the "controversial, but respected theory that adolescents may study more effectively

Many of the reports in the popular education literature are partisan opinion pieces or anecdotal reviews of experiences in a single “experimental” classroom.¹⁷⁹ Thus, the principal evaluation of social science research regarding single-sex education has come through media commentary.

Consider reports of the successes at the Young Women’s Leadership School in New York (TYWLS). TYWLS, a small public high school whose budget is supplemented by private grant money, opened in East Harlem in the fall of 1996 with a seventh grade class of fifty girls.¹⁸⁰ The school has nearly 400 students in grades seven through twelve,¹⁸¹ ninety-nine percent of the students are racial minorities.¹⁸² Even amid fairly good evidence of some performance differences relative to other schools in New York City,¹⁸³ the key question—whether the results are attributable to the sex-exclusive nature of the schooling—is unanswered. Worse, it is unexplored.

The school reported high standardized test scores compared to citywide averages¹⁸⁴ and proclaimed that 100% of the thirty-two seniors in its first graduating class were accepted at four-year colleges.¹⁸⁵ The numbers are just tabulations, with no controls for other influential variables. In fact, the numbers themselves are rarely analyzed. The entering

in single-sex schools.” *Id.* The trial judge in *VMI* embraced some rigid stereotypes about male and female learning styles, *United States v. Virginia*, 766 F. Supp. 1407, 1432–34 (W.D. Va. 1991), but the Supreme Court specifically rejected these findings as the basis for state-sponsored single-sex education: “The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court’s turning point decision in *Reed v. Reed*, 404 U.S. 71 (1971), we have cautioned reviewing courts to take a ‘hard look’ at generalizations or ‘tendencies’ of the kind pressed by Virginia, and relied upon by the District Court. State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’” *United States v. Virginia*, 518 U.S. 515, 541–42 (1996) (citations omitted).

179. See, e.g., Kathleen Hudson & John Stiles, *Single-sex Classes: A Plus for Preadolescent Girls*, 78 PRINCIPAL 57 (Nov. 1998) (reporting on a single-sex high school math class in Maine, a middle school single-sex experiment in San Francisco, and a series of all girls workshops in math and science in Silver Springs, Maryland); Karen Stabiner, *No Boys Allowed*, 82 PRINCIPAL 72 (Nov./Dec. 2002) (reporting on TYWLS and observing, “In an urban school system where half the high school students fail to graduate on time and a third never graduate at all, every TYWLS graduate has gone on to a four-year college . . .”—without any comparative reportage of the TYWLS graduation rate); Sandra L. Swain & Douglas M. Harvey, *Single-Sex Computer Classes: An Effective Alternative*, 46 TECH TRENDS 17 (Nov./Dec. 2002) (covering individual classroom results of computer instruction in all-girl settings which avoid boys’ “aggressive and domineering behavior within the coeducational classroom”).

180. *Girls Only?*, CHRISTIAN SCI. MONITOR, Sept. 5, 1996, at 20.

181. Tanyanika Samuels, *Women’s Foundation Reveals Grant Recipients*, KAN. CITY STAR, Dec. 4, 2002, available at 2002 WL 101928308.

182. National Association for Single-Sex Public Education, *Single-Sex Schools*, at <http://www.singlesexschools.org/schools.html> (last visited Sept 7, 2004).

183. ROSEMARY C. SALOMONE, SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING 24 (2003).

184. “More than 80 percent of the seventh to 12th graders here read at or above grade level. The citywide level is less than 50 percent. Standardized test scores for students from the Young Women’s Leadership School also stand out. Last year, everyone who took the mandatory test for English passed. The citywide average for girls was 42 percent.” *NBC Nightly News: All-Girl Public School in New York City Celebrates Successes* (NBC television broadcast, June 30, 2001).

185. See Nick Chiles, *Going First Class*, NEWSDAY, June 27, 2001, at A3.

class that graduated in 2001 actually had fifty students in it.¹⁸⁶ Thus, it seems that eighteen of the original group were lost, which is a thirty-six percent attrition rate—roughly comparable to the attrition or transfer rate of other city schools.¹⁸⁷ This is the sort of information that is hard to ferret out; it is certainly not featured in news stories lauding the successes of the single-sex program at TYWLS.

The reported success rate may also be influenced in other, even less visible ways. The Leadership School has an extremely selective admissions process: “For the 2002–03 year there were more than 550 applications for the 60 openings in the seventh grade and a waiting list of 1,200 for 3 ninth-grade slots.”¹⁸⁸ Student performance is demanded, and parental involvement commanded: “At TYWLS, Principal Celenia Chevere makes each family come to school for goal-setting conferences. . . . Students must be the best they can be at TYWLS, any girl who cannot or will not do the work will be asked to leave the school so a more deserving student can take her place.”¹⁸⁹

If the lessons of prior single-sex research are any indication, once other variables are controlled, the effects attributable to sex exclusivity will likely disappear. At TYWLS, it is not at all clear that the successes were due to the fact of sex segregation and not the infusion of economic resources (the Harlem school even provides tea and muffins in the morning for its students),¹⁹⁰ the curriculum, class size,¹⁹¹ academic counselors who meet with each student every single day,¹⁹² the self-selectivity of the students and parents (the very fact of attendance means a parent who, by and large, is more interested in the child’s learning), or the Hawthorne effect,¹⁹³ resulting from the high expectations. Was it really the presence of boys in the classroom that had been impairing the academic performance of these girls at TYWLS? This level of student and parent engagement questions not only whether the results at TWYLS can be extrapolated, but importantly, whether the results are attributable to pre-selection of girls who will succeed, weeding out of those who will not, an

186. SALOMONE, *supra* note 183, at 13.

187. Karen Stabiner, *The Pros and Cons of Single-Sex Schools*, MILWAUKEE J. & SENTINEL, May 20, 2002, at 11A (noting that “almost a third” of New York high school students fail to graduate).

188. SALOMONE, *supra* note 183, at 21.

189. Ellie McGrath, *Separate but Better? An Exploration of Single-Sex Education that Misses the Mark*, CHI. TRIB., Nov. 24, 2002, at 1.

190. See Tamara Henry, *A New Push for Girls-Only Public Schools*, U.S.A. TODAY, Sept. 18, 1996, at 1D; Jacques Steinberg, *All-Girls School Opens To Muffins and Media*, N.Y. TIMES, Sept. 5, 1996, at 6, available at 1996 WL 7522297.

191. Blumner, *supra* note 26 (“While the Harlem academy claims significantly better test scores for its female students relative to the rest of the school district, the achievement is easily understood without considering the chromosome makeup of its student body. The school has tiny class sizes (originally the goal was no more than 10 students per class), top-notch faculty and girls with interested, involved parents.”).

192. SALOMONE, *supra* note 183, at 21.

193. “Decades of research have shown that people may change their behavior if they know they are participating in a research study.” Daniel H. Klepinger et al., *Effects of Unemployment Insurance Work-Search Requirements: The Maryland Experiment*, 56 INDUS. & LAB. REL. REV. 3, 12 (2002).

infusion of resources, the commitment of supportive families, and the learning environment of small classes.

The popular media touting of celebrated single-sex experiments is at odds with the cumulative evidence emerging from studies in the sociology of education. While some early studies indicated advantages for women in single-sex colleges,¹⁹⁴ those studies from the 1960s flatly “did not control for socio-economic status.”¹⁹⁵ The popularly accepted notion that single-sex education is “better for girls” is not supported by more recent studies and those with careful methodological controls.¹⁹⁶ Female students in all-girl classes or schools certainly have more participation opportunities in activities, since there is only one sex in the class or school. Anecdotal and self-reporting studies indicate somewhat higher measures of self-esteem and student satisfaction with the warmth or friendliness of an all-girl environment.¹⁹⁷

While single-sex classes may promote some self-assurance in girls, this does not necessarily translate into analytic or academic advantages. The American Association of University Women captured the findings of numerous studies: “Whereas girls perceive the classrooms in many cases to be superior, and may register gains in confidence, these benefits have not translated into measured improvements in achievement.”¹⁹⁸ When studies control for student background differences (such as prior academic achievements, test scores, race, socioeconomic status, and educational aspirations), school selectivity, reputation, class sizes, curriculum, and resources, the studies show *no* consistent advantages in *educational quality* in single-sex schools or classes.¹⁹⁹ Indeed, once conflating

194. See, e.g., M. Elizabeth Tidball, *Perspective on Academic Women and Affirmative Action*, 54 *EDUC. RES.* 130, 132 (1973).

195. Beth Willinger, *Single Gender Education and the Constitution*, 40 *LOY. L. REV.* 253, 268 (1994) (describing M. Elizabeth Tidball’s studies of women “achievers,” defined solely by inclusion in *Who’s Who of American Women*, and based on women’s experiences at the Seven Sisters colleges, noting that these women “came from privileged backgrounds, had tremendous resources, and . . . were going to succeed no matter where they went”).

196. *Id.* at 269.

197. ALEXANDER W. ASTIN, *WHAT MATTERS IN COLLEGE?: FOUR CRITICAL YEARS REVISITED* 324 (1993). Other studies have found no overall satisfaction differences. See Daryl G. Smith, *Women’s Colleges and Coed Colleges: Is There a Difference for Women?*, 61 *J. HIGHER EDUC.* 181, 191–92 (1990); see also Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 *J. HIGHER EDUC.* 641, 645 (1995) (using national CIRP student data surveys from students at thirty-four women’s colleges and female students at 274 coeducational schools and finding that students at women’s colleges had a more positive social self-confidence but less confidence in their job preparation skills and abilities).

198. Pamela Haag, *Single-Sex Education in Grades K–12: What Does the Research Tell Us?*, in *SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS* 13, 22 (American Ass’n Univ. Women Educ. Found. ed., 1998) [hereinafter *SEPARATED BY SEX*].

199. See Richard Harker, *Achievement, Gender and the Single-Sex / Coed Debate*, 21 *BRIT. J. SOC. EDUC.* 203, 216 (June 2000) (reporting that a comparative longitudinal study of 5300 students at thirty-seven single-sex and coeducational secondary schools in New Zealand, which controlled for differences in prior student achievement and background, showed no differences between the two types of school in all of the subjects evaluated); Valerie E. Lee, *Is Single-Sex Secondary Schooling a Solution to the Problem of Gender Inequity*, in *SEPARATED BY SEX*, *supra* note 198, at 41, 43 (offering a meta-analysis of research on private schools and finding that it demonstrates “no consistent pattern of effects

variables are controlled, performance differences between coeducational schools and single-sex schools *entirely disappear*.²⁰⁰

While some researchers have found that single-sex education may have some advantages for minority-race boys,²⁰¹ the general consensus is that males do not flourish in single-sex environments.²⁰² Providing separate classes for boys is either a neutral or negative along dimensions of socialization and academic quality.²⁰³ For both sexes, but particularly for boys, placement in sex-segregated classes is associated with the development of attitudes that favor traditional, even stereotypic, views of gender roles.²⁰⁴ Recent research shows discrepancies between the perceptions of teachers and students about the academic benefits of single-sex schools and actual performance results—the myth that single-sex education is beneficial for girls persists, despite the absence of supporting empirical data.²⁰⁵

for attending either single-sex or coeducational independent schools for either boys or girls”); Herbert W. Marsh, *Effects of Attending Single-Sex and Coeducational High Schools on Achievement, Attitudes, Behaviors, and Sex Differences*, 81 J. EDUC. PSYCHOL. 70, 71 (1989) (“Once preexisting characteristics such as intelligence, prior academic achievement, motivation, and social class are controlled, however, the differences tend to be much smaller or nonsignificant.”); Pamela Robinson & Alan Smithers, *Should the Sexes Be Separated for Secondary Education—Comparisons of Single-Sex and Coeducational Schools?*, 14 RES. PAPERS EDUC. 23, 23 (1999) (“When, as far as possible, like is compared with like, the apparent academic differences between single-sex and co-educational schools largely disappear.”); Judith L. Stoecker & Ernest T. Pascarella, *Women’s Colleges and Women’s Career Attainments Revisited*, 62 J. HIGHER EDUC. 394, 403 (1991) (“[T]he career attainments previously linked to attendance at a women’s college may be attributable more to differential student recruitment than to the socialization occurring in a distinctive institutional environment.”).

200. Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 500 (1999).

201. Providence College sociology professor Cornelius Riordan suggests that minority race sex segregation for economically disadvantaged students—segregation essentially by race and sex and class—may be academically beneficial. See CORNELIUS RIORDAN, *GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE?* 61 (1990); Cornelius Riordan, *The Future of Single-Sex Schools, in SEPARATED BY SEX*, supra note 198, at 53, 54; Cornelius Riordan, *Single-Gender Schools: Outcomes for African and Hispanic Americans*, 10 RES. SOC. EDUC. & SOCIALIZATION 177, 192–202 (1994). Riordan’s 1990 studies of minority race males and females, however, were conducted in Catholic and private schools, which are environments with aspects, from religious constraints to rigid discipline to economic advantages, that make them unrepresentative of public education.

202. See Cornelius Riordan, *The Case of Single-sex Schools, in SINGLE-SEX SCHOOLING: PROPONENTS SPEAK* 43, 44 (Debra K. Hollinger & Rebecca Adamson eds., 1993) (admitting that for males in “single-sex secondary or post-secondary schools” the attitudinal “results for males . . . are generally null or negative”).

203. See, e.g., Lee, supra note 199, at 43; Valerie E. Lee & Marlaine E. Lockheed, *The Effects of Single-Sex Schooling on Achievement and Attitudes in Nigeria*, 34 COMP. EDUC. REV. 209, 225 (1990); Paul C. LePore & John Robert Warren, *A Comparison of Single-Sex and Coeducational Catholic Secondary Schooling: Evidence from the National Educational Longitudinal Study of 1988*, 34 AM. EDUC. RES. J. 485, 505 (1997).

204. See, e.g., Herbert W. Marsh & Kenneth J. Rowe, *The Effects of Single-Sex and Mixed-Sex Mathematics Classes Within a Coeducational School: A Reanalysis and Comment*, 40 AUSTL. J. EDUC. 147, 153 (1996); Lesley H. Parker & Léonie J. Rennie, *Teachers’ Perceptions of the Implementation of Single-Sex Classes in Coeducational Schools*, 41 AUSTL. J. EDUC. 119, 124–25 (1997); Margaret L. Signorella et al., *Single-Sex Versus Mixed-Sex Classes and Gender Schemata in Children and Adolescents: A Longitudinal Comparison*, 20 PSYCHOL. WOMEN Q. 599, 599, 606 (1996).

205. For instance, one ten-year longitudinal study of Australian secondary schools showed that “[w]hile no advantage was found for either single-sex or co-educational school in terms of actual

The concern that segregation based on sex can reinforce gender stereotypes is supported by a study of the experimental California academies. In 1997, as a pilot project, California provided five million dollars to institute ten public single-sex academies, equal down to the number of pencils.²⁰⁶ A study conducted by researchers from the University of Toronto and the University of California at San Diego, and sponsored by both the Ford and Spencer Foundations, evaluated the academies between 1998 and 2000, interviewing over 300 students, parents, teachers, and administrators, and observing classes.²⁰⁷ One of the researchers' findings was that administrators viewed the state grant as a means of assisting at-risk students (which, the researchers acknowledged, may conflate other findings).²⁰⁸ An important finding was that although the California administrators insisted on equal resources, assumptions about the different educational needs of boys and girls caused the educators to explicitly reinforce traditional gender stereotypes.²⁰⁹ As one example, during a unit on frontier exploration, the boys' schools learned survival skills, and the girls' schools learned how to quilt and sew.²¹⁰ The researchers concluded that overall "[b]oys tended to be taught in a more regimented, traditional, and individualistic fashion, and girls in more nurturing, cooperative, and open environments."²¹¹

When courts do begin to assess the recent empirical evidence about single-sex schools, they will need to evaluate whether segregation is supported by an "exceedingly persuasive justification."²¹² It can only be hoped that they will look at the wealth of evidence, not just selected anecdotal reports or "studies" without adequate methodological controls. Empirical inquiry needs to be systematic and searching. To comport with principles of scientific method, this inquiry should look for cumulative, comprehensive, and converging evidence, and employ consistency in

achievement, the teachers believed that single-sex schools were better for girls' academic performance." Carolyn Jackson & Ian David Smith, *Poles Apart? An Exploration of Single-Sex and Mixed-Sex Educational Environments in Australia and England*, 26 *EDUC. STUDIES* 409, 414 (2000).

206. See Jonathan N. Reiter, *California Single-Gender Academies Pilot Program: Separate But Really Equal*, 72 *S. CAL. L. REV.* 1401, 1405-06 (1999).

207. Amanda Datnow et al., *Is Single Gender Schooling Viable in the Public Sector? Lessons from California's Pilot Program*, at <http://www.oise.utoronto.ca/depts/tps/adatnow/final.pdf> (May 20, 2001).

208. *Id.* at 5.

209. Amanda Datnow, *Single-Sex Schooling: Critique of Report Relies on 'Disturbing Overgeneralization'*, *EDUC. WK.*, Oct. 17, 2001, at 36, available at 2001 WL 12047039 ("Our study suggests that the way in which educators viewed significant differences between males and females informed their notions about classroom practice with respect to curriculum, pedagogy, and discipline; the structure and practices of the single-gender academies often contributed to the belief that boys and girls are different, to the point of ignoring the commonalities.").

210. Datnow et al., *supra* note 207, at 40; see also Heather Sokoloff, *Single-sex Schools Reinforce Gender Stereotypes; Study: Experiment in Public Education Fails*, *NAT'L POST*, May 25, 2001, at A13.

211. Datnow et al., *supra* note 207, at 7; see also Jesse J. Logan, *Separate and Unequal? Multiple Problems in Single-Sex Schools*, *PSYCHOL. TODAY*, Nov. 1, 2001, at 28 (quoting Datnow as saying, "The tendency was to teach according to presumptions that girls are cooperative or boys are competitive.").

212. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

exploratory methods.²¹³ Hopefully, courts will carefully evaluate whether the claimed benefits from single-sex classes are attributable to sex segregation or instead to other variables, such as the experimental nature of the program, religious school influences, better student-teacher ratios, smaller class size, more experienced teachers, novelty, or additional resources.

C. *Media Reporting About Segregation and Integration*

With respect to both race and sex segregation, news reports provide little systematic information about studies regarding government-sponsored separatism or research regarding the benefits of integration. Newspaper articles reduce complex and nuanced studies of single-sex education to simplistic and favorable blurbs.²¹⁴ They report the latest trial run or episodic result at a single school and make glossy pronouncements about the general state of research.²¹⁵ These experiments in single schools or classes are reported simply as successes with no consideration given to other variables that might have affected the trial.²¹⁶ Most people have little training in statistics; if they had that training, they might discount reports on an individual study or experience because it is unrepresentative.²¹⁷ Work in the field of heuristics, however, demonstrates that “people are overly influenced by single-case information.”²¹⁸

Articles in the popular media often focus on human interest stories. This focus feeds the ways people like to receive information. In the

213. See Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 *FORDHAM L. REV.* 263, 266–72 (1989).

214. See, e.g., Brian Dickerson, *Single-Sex Classes Are Worth a Look*, *DET. FREE PRESS*, Feb. 10, 2003, available at 2003 WL 2542316 (“No one I’m aware of has produced any evidence that single-sex instruction hurts students of either gender.”); Walter Sidney, *Solving Coed Conundrum*, *DENV. POST*, June 13, 2003, at B7 (“[T]hree decades of research on the effects of single-sex secondary schools on student achievement and attitudes consistently show that single-sex schools offer innumerable benefits to both girls and boys.”). While the media tilt is extraordinarily more favorable than the cumulative research results in the academic literature, in fairness it is important to note that individual reporters make sweeping pronouncements in both directions. See, e.g., Jennifer Mrozowski, *School Tries Single-Gender Classes to Boost Learning*, *CINCINNATI ENQUIRER*, Nov. 12, 2002, available at 2002 WL 101822522 (offering various opinions by students, teachers, and education experts, some of whom support and others who oppose single-sex classrooms).

215. See, e.g., Denise Barnes, *Single-sex Classes Showing Results; Pupils’ Achievement Rises at Anacostia Elementary School*, *WASH. TIMES*, Nov. 29, 2002, at B1 (“Mr. Smitherman said research also showed girls performed better in single-sex classrooms, but his concerns centered on the boys.”); Dickerson, *supra* note 214 (“It’s too early to tell how the same-sex students’ grades stack up against those of their co-ed classroom peers. But Williams says his teachers report that both boys and girls in the single-sex classes are flourishing.”).

216. See Uhlenhuth, *supra* note 13 (“[T]he principal [of Moten Elementary School in Washington, D.C.] decided in September 2001 to experiment with sex-segregated classrooms and a couple of other innovations. The next spring the principal got a call from the district office: The school’s test scores had catapulted from the bottom to the top of the heap.”).

217. Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing*, 14 *LAW & HUM. BEHAV.* 451, 453 (1990).

218. *Id.*; see also Daniel Kahneman & Amos Tversky, *On the Reality of Cognitive Illusions*, 103 *PSYCHOL. REV.* 582 (1996).

“everybody loves a winner” tradition, newspaper and popular press articles report the success stories: satisfying experiences of girls in single-sex classes and women in single-sex colleges.²¹⁹ Additionally, much newspaper reporting is event-based. Programs that do not work—single-sex schools that close, for example—tend to be nonevents: their demise is not proclaimed; instead, they die quiet deaths. Compare the much-heralded opening of the California all-boy and all-girl academies with the absence of reports on the closing of all but two of the schools.²²⁰ Newspaper articles written well after the results of the Ford Foundation-sponsored study of the California academies continue to ignore the study’s results and offer instead vague political or economic excuses for the closing of the schools.²²¹ Some newspaper articles do not even mention that any of the California pilot schools closed.²²²

It is much harder to say nothing or to publish reports about the null hypothesis. In *Dinosaur in a Haystack*, evolutionary biologist Stephen Jay Gould wrote of “Cordelia’s Dilemma”—in *King Lear*, Cordelia’s quandary whether to keep silent in the face of her sisters’ false protestations of love for their father, and Lear’s demand that Cordelia too pro-

219. See, e.g., Uhlenhuth, *supra* note 13.

220. Compare Chapman, *supra* note 23, and V. Dion Haynes, *Boys and Girls in a Class Apart*, CHI. TRIB., Sep. 30, 1999, at 1, and Tamar Lewin, *A Class of Their Own an Old Idea—Single-Sex Education—Is in the Midst of a Renaissance*, CHI. TRIB., Dec. 14, 1997, available at 1997 WL 16802838, and Hannah Miller & Jack Leonard, *Same-Sex Classes to Be Offered at Long Beach Middle School*, L.A. TIMES, Mar. 5, 1999, at B1, and *Single-Sex Education* (National Public Radio broadcast, May 9, 1998) available at 1998 WL 6284884 (“[T]he most ambitious experiment is underway in California which has approved 12 single-sex schools. Much of the impetus for all this comes from concerns that girls fall behind boys in high school, especially in math and science.”), with Samuel Autman, *Single Gender Academies Failing*, S.D. UNION-TRIB., May 24, 2001, at A3, and Massie Ritsch, *Single-Gender Schools Gaining Favor, Success Education*, L.A. TIMES, May 28, 2002, at A1. At its inception, many newspaper articles praised the virtues of the California program that had yet to be implemented. See, e.g., *Equality Is the Key To Single-Sex Schools*, S.F. CHRON., July 15, 1997 at A20 (“[Governor Wilson’s] pilot program for single-sex middle and high schools is a smart and innovative approach to public education that offers parents another option for their children. With a first-year cost of \$5 million, it is a modestly priced test to determine if many boys and girls do better in school without the distractions and stresses that naturally occur in mixed-gender classrooms.”).

221. See Rob Hotakainen, *Single-Sex Schools Are Separate, But Not Always Equal*, STAR TRIB. (Minneapolis-St. Paul), June 9, 2002, available at 2002 WL 5376477 (“Experiments have been conducted with single-sex schools across the country, with varying results. In California, then-Gov. Pete Wilson started a 12-school pilot program in 1997, but it lacked political support and was terminated when he left office.”); Ritsch, *supra* note 220 (“California attracted much attention in the late 1990s for its experiment with separate academies for boys and girls. When the state funding ran out, all but one of the six schools closed. Students at the remaining San Francisco 49ers Academies in East Palo Alto have improved their grades and behavior and are less likely to skip school or drop out, the school reports.”).

222. See Marc Fisher, *One Gender Schools Would Offer Flexibility*, CONTRA COSTA TIMES (Walnut Creek, CA) May 19, 2002, available at 2002 WL 21118930 (“In recent years, a few brave schools responded by separating boys and girls. California set up single gender academies, largely to boost girls’ performance in math and science.”). Indeed, most of the connections drawn between the Ford Foundation’s study and the closing of the California pilot schools come from newspaper articles written overseas. See *Boys Will Be Boys—Educating Children Separately*, THE ECONOMIST (London), May 11, 2002, available at 2002 WL 7246076.

claim her love for him.²²³ The King's failure to recognize that "silence—overt nothing—can embody the deepest and most important meaning" ultimately leads to his "blinding, madness, and death."²²⁴

Negative results are, of course, vital to the process of scientific discovery. Scientists actively try to prove the null hypothesis to dispute a scientific theorem. The difficulty with proving nothingness, as Gould points out, is that it is flatly uninteresting.²²⁵ Cordelia's dilemma encompasses "the all too wonderfully human love of a good tale—and our simple and utterly reasonable tendency to shun the inconclusive and the boring."²²⁶ Proof of a negative does not command publication opportunities. Research results showing *no* differences between single-sex and coeducation, for example, reside in file cabinets across the country.²²⁷ The media, although happy to report on numerous variations of men being from Mars and women from Venus, fail to report that, in actuality, men and women are both from Earth.

Of course, this is the point where the empirical evidence is most strongly supportive. Newspaper articles focus on participation in extra-curricular activities or single-measure performance results without examining the larger body of evidence regarding educational consequences of single-sex education along multiple dimensions.²²⁸ Sadly, many reports regarding segregation in schools are prone to hyperbole and are presented without reference to the larger body of social science data showing an absence of academic improvement attributable to sex segregation itself.²²⁹

Reports on desegregation are equally lacking in context. News accounts of improvements made under desegregation orders are often tied to reports of requests for the lifting of those orders, rarely linked to the racial isolation, achievement gaps, and inequalities in educational opportunities that remain.²³⁰ Although the Harvard Civil Rights Project

223. STEPHEN JAY GOULD, *DINOSAUR IN A HAYSTACK: REFLECTIONS IN NATURAL HISTORY* 123 (1995). Lear cuts Cordelia out of any inheritance, saying, "Nothing will come of nothing. Speak again." WILLIAM SHAKESPEARE, *KING LEAR* act I, sc. 1, l. 90.

224. GOULD, *supra* note 223, at 123.

225. *Id.* at 124.

226. *Id.*

227. Lee, *supra* note 199, at 42 (quoting ROBERT ROSENTHAL & RALPH L. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH: METHODS AND DATA ANALYSIS* 379 (1984)) ("[T]he journals are filled with the 5 percent of studies that show Type I errors [in which differences are statistically significant at probabilities below .05], while the file drawers back at the lab are filled with the 95 percent of the studies that show nonsignificant ($p > .05$) results.").

228. See, e.g., Walter Sidney, *Solving Coed Conundrum*, *DENV. POST*, June 13, 2003, at B7 ("[S]tudies have shown that single-sex education allows students to explore a variety of activities without worrying about looking foolish or showing off for members of the opposite sex. Boys join school choirs more readily, for example, and girls form science clubs.").

229. See *supra* text at notes 179, 214–16, 219–22; see also Levit, *supra* note 200, at 503–05, 521–22.

230. See, e.g., Tawnell D. Hobbs, *Dallas Public Schools Present Case on Desegregation Order*, *KNIGHT-RIDDER TRIB. BUS. NEWS*, Mar. 29, 2003, available at 2003 WL 17485439; Emily Peters, *Progress & Challenge*, *ALEXANDRIA DAILY TOWN TALK*, Nov. 5, 2002, at 10, available at 2002 WL

study—which concluded that most of the gains made during the 1960s and 1970s under desegregation orders had been turned back in the past decade—did receive some press,²³¹ the coverage is not balanced.

An enormous amount of coverage is given to school districts' requests to be "free" from court orders requiring desegregation,²³² parents' desires for neighborhood schools, and the failures of busing.²³³ Very little interest exists in the contemporary or complete racial picture.²³⁴ While some reports lament resegregation after the lifting of desegregation orders, many others proclaim the failures of desegregation and counterpoise integration and academic quality.²³⁵ Newspaper articles largely ignore successful integration, choosing to focus instead on perceived failures such as integration programs that have been discarded in favor of neighborhood schools.²³⁶ They tout the benefits of school choice using vague, unsubstantiated theories and state the belief that neighborhood schools will improve education and parental involvement without any supporting research.²³⁷ Articles on single-sex schools and classes usually

102478629; Angela Simoneaux, *Lafayette Schools Closer to Unitary Status in Teacher, Staff Assignments*, BATON ROUGE ADVOC., Oct. 2, 2002, at 4B.

231. Megan Tench, *Reversal in School Diversity Is Cited*, BOSTON GLOBE, Jan. 19, 2003, at A18; Anand Vaishnav, *Racial Inequality Is Seen at School*, BOSTON GLOBE, July 18, 2001, at B2.

232. See, e.g., Tresa Baldas, *Saying Goodbye to Desegregation Plans*, NAT'L L.J., June 16, 2003, at 4 ("A Texas judge has ended a 33-year-old school desegregation case in Dallas, adding to the list of large American cities that have recently gained freedom from court-supervised desegregation efforts."); Melanie Markley, *District Seeks Freedom from Court's Mandate*, HOUS. CHRON., Sept. 21, 2002, at 1.

233. See, e.g., Joseph H. Brown, *Racial Indexes Do Little To Aid Education*, TAMPA TRIB., Sept. 1, 2002, at 6 ("After three decades of forced busing, parents and students of all races were sick of it, preferring neighborhood schools regardless of racial percentages."); Tim Simmons, *Where Do We Go From Here?*, NEWS & OBSERVER (Raleigh, NC), Feb. 25, 2001, at A23 ("Other educators, citing strong support in the black community for neighborhood schools and charter schools, say some African-American families apparently have given up hope that the traditional model of integration will ever work completely."); see also Jennifer Booth Reed, *School Choice: Part 2 of 3*, NEWS-PRESS (Fort Meyers, FL), June 10, 2002, at 6A.

234. Kristen King, *School Faculties Reflect Students' Racial Make-Up; Analysis Shows Lack of Diversity in Classrooms*, VIRGINIAN-PILOT & LEDGER STAR, June 8, 2003, at B1.

235. Kim Cobb & James Kimberly, *After Desegregation; Civil Rights Group Split as Priorities Are Changed*, HOUS. CHRON., June 3, 2002, at 9 ("A 1998 survey by the Public Agenda Foundation showed that 80 percent of black parents and 88 percent of white parents believe raising academic standards and achievement is more important for schools than integration.").

236. See, e.g., Maureen Downey, *Black Schools White Schools With Court-Ordered Busing Fading and Races Choosing to Live Separately*, ATLANTA J.-CONST., June 22, 2003, at E1 ("A pairing plan had been suggested in response to the declining enrollments in Decatur's mainly African-American schools. In the race-conscious debate that ensued, white parents succeeded in preserving 'neighborhood' schools, even though the partner school was a mere 1.08 miles down the road."); Simmons, *supra* note 233 (noting that some black parents are choosing "a caring but substandard school over an academically successful program" and that they "have given up hope that the traditional model of integration will ever work completely," thus "feeding a desire to re-create the all-black schools of yesteryear").

237. See, e.g., Reed, *supra* note 233, at 6A ("There are several arguments about the academic benefits of School Choice. Among them, a theory that children will perform better and parents will be more involved in schools they have picked . . . [N]eighborhood schools could help teachers and administrators respond to the needs of particular communities. An example: Schools could reach out to populations where parent involvement and early, at-home learning is minimal. In many cases, the par-

ignore the issue of official government sponsorship of segregation and instead focus on the ability of a school or a parent to choose a single-sex alternative.²³⁸ The parallel is unmistakable: for both race and sex, the popular press trumpets separatism, and the meaning of “choice” is not evaluated.

III. THE JURISPRUDENCE OF “CHOICE” AND “DIVERSITY”

A. *School Choice as Diversity*

One point at which the constitutional justification for considerations of race and sex directly intersect is the diversity rationale. Proponents of single-sex education draw on the diversity concept from admissions cases to argue that single-sex education provides experiential diversity. Virginia, for example, argued that its all-male military institute contributed to a diversity of educational opportunities.²³⁹ While the *VMI* Court found that this explanation was an ex post facto rationalization on the part of Virginia,²⁴⁰ other supporters of single-sex education have embarked on single-sex school projects claiming that the distinctive pedagogical methods used will make legitimate contributions to educational diversity.²⁴¹ Some supporters make the argument that diversity exists in the specialized educational needs of individual students, although without any supporting empirical data that single-sex education matches those needs.²⁴²

ents simply don't know how to improve their children's learning. . . . Besides, parents are more likely to support schools in their own neighborhoods . . .”).

238. See, e.g., Jane Eisner, *Single-sex Schools Are Valid Choice for Today*, PHILA. INQUIRER, May 19, 2002, at C1 (“Choice is the fundamental byword in education today, and there's no reason such schools as Girls High can't be among the choices—because of its tradition and in spite of it. For that reason, the Bush administration's shift on single-sex education in public schools is welcome.”); Murray Light, *Same-Sex Schools Aren't a Good Idea*, BUFF. NEWS, May 26, 2002, at H5 (“The Education Department said the change gives school districts greater flexibility and gives parents more choices.”); Karen Stabner, *Boys Here, Girls There: Sure, If Equality's the Goal*, WASH. POST, May 12, 2002, at B1 (“Single-sex public schools and classes, as odd as it may sound, are about inclusion; any school district that wants one can have one and everyone can learn from the experience.”).

239. See *United States v. Virginia*, 766 F. Supp. 1407, 1413 (W.D. Va. 1991). On certiorari, the amicus brief of a coalition of women's colleges echoed this argument. See *United States v. Virginia*, 518 U.S. 515, 534 n.7 (quoting Brief of Amici Curiae Twenty-six Private Women's Colleges, at 5, *Virginia* (Nos. 94-1941, 94-2107)).

240. 518 U.S. at 533.

241. They attribute the success of single-sex schools to the fact that segregation allows teachers to respond more effectively to sex-specific developmental and educational needs. Indeed, the recent resurgence of interest in single-sex education is, in part, the result of an effort to address concerns about the efficacy of responding to the educational needs of male and female students with the same pedagogical approaches.

Morgan, *supra* note 124, at 399.

242. See, e.g., Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 830 (2000) (making the argument that diversity should include “diversity within status groups, including those boys and girls within various racial groups who prefer or might benefit from single-sex education”); Kimberly M. Schulz, *Rethinking Educational Equity: Sometimes, Different Can Be an Acceptable Substitute for Equal*, 1999 U. CHI. LEGAL F. 461, 482 (suggesting that “a country as diverse as the United States should be able to allow some

The primary argument advanced is that diversity is promoted by the availability of various alternatives in a school system—that “[a] state which offers a single-sex option, in addition to its variety of coeducational institutions, has dramatically expanded the diversity of its entire system, and consequently has provided new opportunities for students to select the type of education most closely-tailored to his or her [sic] own developmental and learning needs.”²⁴³

The choice argument itself is rarely critically evaluated by those championing citizens’ rights to choose neighborhood or single-sex schools. “Choice” is advanced as an unfettered good, with little or no thought given to the impact of choice on equality;²⁴⁴ however, in the context of neighborhood schools, choices are based on votes of dollars in the housing market.²⁴⁵ Thus, those who might want integrated schools or better schools often do not have the power to make other “choices.” If the government steps into the business of promoting choice at the expense of equality, many students—those unwillingly attending segregated schools and unable to move to a different district—will have no “choice” for options of a better school or a school that offers diversity.

Moreover, the choice argument is rarely contextualized. The options are presented in stark, dichotomous fashion: either busing *or* neighborhood schools, either coeducation rife with inequalities *or* single-sex schools. Little attention is given to moderate alternatives: perhaps a more integrated school, one with greater resources, nearby but not in the neighborhood; or perhaps the possibility of coeducation without the microinequities. In short, supporters of segregation sidestep issues of context, power, and equality.

If diversity is viewed as providing a wider choice among schooling alternatives, it is a concept without constitutional support. Decisions upholding school vouchers, for instance, have done so *despite* their friendliness to parochial education, not *because* of it. In *Zelman v. Simmons-Harris*,²⁴⁶ school vouchers were constitutionally permissible because they were intended primarily to provide poor children with a quality education, rather than providing direct government aid to religious schools.²⁴⁷

unique educational settings that address the specific needs of students—male or female”). Even if those data exist, *see infra* text accompanying note 244, query whether this fits under the diversity or remedial rationale since the argument seems to be that some students have a particularized need for homogeneous environment.

243. Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL’Y 227, 252 (1994).

244. John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 672 (2001).

245. See Meredith Lee Bryant, *Combating School Resegregation Through Housing: A Need for a Reconceptualization of American Democracy and the Rights It Protects*, 13 HARV. BLACKLETTER L.J. 127, 162 (1997); John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 780 (1996).

246. 536 U.S. 639 (2002).

247. See *id.* at 653.

Diversity, if viewed as “choice,” is an instrumental concept. Diversity itself is not inherently good. Many things—ways of dying, a proliferation of new viruses, methods of execution (the rack, the gas chamber, the firing squad), a wide selection of terrorist targets, parenting styles (teaching children to finger-paint or make moonshine)—can be diverse without being good. As Professor Denise Morgan writes:

[E]mploying a diverse array of educational approaches within a single school system . . . is a quantitative change which does not necessarily result in the same qualitative educational improvement produced by interaction among students from diverse backgrounds. Greater choice is only beneficial to the extent that the additional pedagogical choices are themselves desirable. Therefore, the diversity which single-sex schools add to public education systems is good for students *only if* the schools themselves are educationally beneficial.²⁴⁸

Choice, in the sense of self-determination, is generally a good thing,²⁴⁹ as long as it does not intrude on other people’s self-determination or on other equally important communitarian values. Segregation as a choice, however, is empowering to some, but disempowering to others and harmful to society as a whole.

In the single-sex and single-race schools context, advocates are conflating diversity and choice. Diversity in the equal protection sense is not about markets, but choice is. A society might want a broad menu of options or experiments regarding products—some good, some questionable—so that consumers’ choices will separate the good from the bad, letting some options thrive and others eventually disappear. This kind of “choice” is sometimes linked with the “diversity of ideas,” as in the free speech arena, where the metaphor of a marketplace of ideas promises to reward good ideas and kill bad ones.²⁵⁰

But diversity in the equal protection sense is not about market choice. We do not advocate a broad spectrum of races, for example, so that through competition the best races will rise and the worst will fall.²⁵¹ Indeed, we do not believe any identity-based category is better than another; we mean for them all to thrive. Diversity in the equal protection sense is not at all about choice. Choice is about the liberal value of self-determination; diversity is about a communitarian goal.²⁵² To the extent that the diversity argument is one of curricular innovation or sex-conscious pedagogy, no literature explains why the allegedly distinctive

248. Morgan, *supra* note 124, at 398–99.

249. *But see* Barry Schwartz, *The Tyranny of Choice*, CHRON. HIGHER EDUC., Jan. 23, 2004, at B6 (pointing to research in the psycho-social literature showing that an overabundance of choices leads to psychological distress).

250. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

251. This actually was the premise of an Edgar Rice Burroughs science fiction book, JOHN CARTER OF MARS (1940).

252. *See* AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 123–33 (1993).

methods of cooperative education or a supportive, encouraging classroom atmosphere could not be applied to males as well as females.

Use of the diversity argument in the single-sex schools context to mean variety rests on flawed logic: it is an argument that is labeled as diversity but one that is premised foundationally on a choice among alternatives. The assertion is that parents should have a choice between single-sex and coeducational schooling for their girls, and that the state provision of this choice affords a diversity of educational offerings. The diversity resides in the choice among educational options, not the experiences of the students.

What if the Supreme Court accepts the “option play” concept of diversity? The argument here is that diversity means an assortment of educational offerings. By this logic, single-race schools would provide a diversity of educational experiences. On the other hand, a school district composed entirely of single-sex schools would not be constitutional. It would be odd to have the constitutionality of a state-funded educational program depend on the rarity with which it is offered.

B. *The Constitutional Meaning of Diversity*

The greatest flaw in the diversity-as-choice position is that it does not share the reasons why the Supreme Court considered educational diversity in admissions to qualify as a compelling state interest. The real meaning and purpose of diversity as a justification for government action providing differential treatment based on identity characteristics is illuminated in the university admissions cases. In his plurality opinion in *Regents of the University of California v. Bakke*,²⁵³ Justice Powell stated that “the attainment of a diverse student body” is a “constitutionally permissible goal.”²⁵⁴ Race was “only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”²⁵⁵ This understanding of diversity was amplified by the recent decision in *Grutter v. Bollinger*,²⁵⁶ where the Supreme Court held that the attainment of a diverse student body “is a compelling state interest that can justify the use of race in university admissions.”²⁵⁷

The diversity to which the Court referred was “student body diversity,”²⁵⁸ a diversity among students of interests, backgrounds, and identity characteristics. The *Grutter* Court repeatedly referred to interactions among students of different races as part of the training for students to

253. 438 U.S. 265 (1978).

254. *Id.* at 311–12 (Powell, J., plurality opinion).

255. *Id.* at 314.

256. 539 U.S. 306 (2003).

257. *Id.* at 325.

258. *Id.*; see also *Jones v. Bd. of Educ.*, 632 F. Supp. 1319, 1324 (E.D.N.Y. 1986) (holding that the conversion of an all-girl public high school to a coeducational one was supported by the state interest in “providing an educational environment that mirrors the diversity of modern society”).

effectively navigate in “our heterogeneous society.”²⁵⁹ Reports of experts cited approvingly by the Supreme Court in *Grutter* refer to the educational benefits of students interacting with other students of different races.²⁶⁰ One expert testified, for example, that interactions among students of different races cause “racial stereotypes [to] lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”²⁶¹ Student body diversity, according to the American Educational Research Association et al. amicus brief quoted by the Court, “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”²⁶² The diversity benefits did not flow from the ability to choose one’s school companions but from the “exposure to widely diverse people, cultures, ideas, and viewpoints.”²⁶³

Notice, though, where diversity in single-sex schooling occurs—not within the classroom, not in society,²⁶⁴ not at the individual student’s experiential level—but only at the school district level. In fact, within the school or classroom, the students experience only homogeneity with respect to the only facet of identity that is considered.²⁶⁵ “Diversity” in the single-sex schools context simply means a choice between two educational options: attendance at either a single-sex or coeducational school. Government-sponsored sex separation thus cannot legitimately claim the mantle of *Bakke’s* or *Grutter’s* diversity rationale, which was to afford students exposure to other students *different* from themselves based on a variety of identity characteristics.²⁶⁶ Indeed the logic of *Grutter* was that the University of Michigan’s law school program was constitutional in large part because race was not the only way that diversity was being measured.²⁶⁷ It would sharply twist the meaning of *Grutter* for single-sex proponents to use the diversity argument to uphold segregation on the basis of an identity characteristic when sex is the only facet of identity that is being measured, and the educational objective is to have all students in the class or school be absolutely the *same* on the basis of sex.

259. *Grutter*, 539 U.S. at 332.

260. *Id.* at 330.

261. *Id.* at 320 (citation omitted).

262. *Id.* at 330.

263. *Id.*

264. Since sex segregation is pervasive in society, see LEVIT, *supra* note 12, at 15–63, further separation on the basis of sex within schools does not provide a varied social experience.

265. Levit, *supra* note 200, at 520 (“Diversity in this context means only sameness along the only dimension (gender) that is examined. The logic of the diversity argument becomes Orwellian in its implicit contradictions: sameness is diversity.”).

266. See *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 312–13 (2003).

267. *Grutter*, 539 U.S. at 335–37.

C. *Segregation as Diversity*

Lower courts have mentioned the goal of fostering integration as a compelling state interest.²⁶⁸ The Supreme Court recently endorsed diversity in support of an integrative ideal in *Grutter*.²⁶⁹ In the context of both single-sex schools and the movement away from desegregated schools, the segregative alternatives are being advanced as just additional “options” in the melting pot.²⁷⁰ In short, we have lost the understanding of what makes government-sponsored segregation based on identity characteristics wrong.

1. *Separation Under Conditions of Equality*

Fifty years ago, the Court in *Brown v. Board of Education*²⁷¹ said unequivocally that state-sponsored racial segregation stigmatizes black Americans: “To separate [grade and high school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²⁷² The question for the neighborhood and single-sex schools debates is whether separation can exist without inferiority—whether stigmatization would result from government separation based on identity characteristics under conditions of equality.

Regarding resources, in the case of single-sex schools, presumably the tangible features of education would be equal. The experimental California academies, for example, insisted on equality in the boys and girls schools down to the number of pencils.²⁷³ This assumption is not accurate in the case of neighborhood schools. As schools resegregate based on race—which is often intertwined with a resurfacing of economic inequalities—the schools suffer marked disparities in resources.²⁷⁴ Minority students in predominantly single-race neighborhood schools suffer “substandard and deteriorating facilities, racial isolation, and concentrated poverty.”²⁷⁵ Resegregation affects the educational environment in

268. See, e.g., *Johnson v. Bd. of Educ.*, 604 F.2d 504, 518 (7th Cir. 1979); *Parent Ass’n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 720 (2d Cir. 1979).

269. *Grutter*, 539 U.S. at 348; see also *supra* text accompanying notes 256–63.

270. See, e.g., Kay Bailey Hutchison, *The Lesson of Single-Sex Public Education: Both Successful and Constitutional*, 50 AM. U. L. REV. 1075, 1076 (2001); Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 851–52 (1999); Alan Breed, *1-Race Schools Gain New Champions: Advocates Look Back, Say Desegregation Proved to Be a Failure*, CHARLOTTE OBSERVER, Jan. 2, 2002, at 5B.

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

272. *Id.* at 494.

273. See Richard Lee Colvin, *Genders Apart at California School*, AUSTIN AM.-STATESMAN, Sept. 1, 1997, at A32.

274. Gary Orfield, *supra* note 7.

275. Leland Ware, *Redlining Learners: Delaware’s Neighborhood Schools Act*, 20 DEL. LAW. 14, 16 (2002).

many ways, including academically inferior programs, racial differences in performance on standardized tests, drop-out rates, rates of college attendance, and other inequities in the distribution of educational opportunities and performance outcomes.²⁷⁶ “Racially segregated schools more often rely upon transitory teachers and have curricula with greater emphasis on remedial courses, higher rates of tardiness and unexcused absence, and lower rates of extracurricular involvement. As a result, educational achievement is highly racialized.”²⁷⁷ Racial isolation has long-term detrimental effects on intergroup social relations, as well as human capital effects in terms of mentoring, social networks, and job references.²⁷⁸ These consequences of resegregation have tremendous effects on the future income potential of students, the absence of minority employees from positions of standing in professions, and ultimately, the reinforcement of sharp racial and socioeconomic divisions in society.²⁷⁹

But even if the tangible aspects of the educational program are equal, the intangible message of the separatism itself was at the heart of *Brown*.²⁸⁰ The stigmatic harm in *Brown* did not result from inferior educational facilities. To squarely present the separate but equal issue in *Brown*, the plaintiffs stipulated that the tangible aspects of education—“with respect to buildings, curricula, qualifications and salaries of teachers” and other factors—were equal.²⁸¹ While people knew at the time that the economically deprived black schools often did provide an inferior education, that was not the injury the *Brown* Court addressed. The Court spoke to the inequality inherent in the fact of separation and the implicit message as to the social status of black Americans that would be sent by government approval of racial separation as a matter of official policy.²⁸²

Separatism under conditions of equality still stigmatizes, since the message produced by government sponsorship of separatism remains one

276. Children who attend schools that become resegregated face “substantially higher risk of poor academic performance—whatever their personal academic potential—simply because of the ‘school composition’ effects from the schools they attend.” Boger, *supra* note 68, at 1423; see also Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1543–56 (2003); Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More Than Just a Tort*, 96 NW. U. L. REV. 99, 123–24 (2001).

277. John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 188, 199 (2003) (citation omitted).

278. See, e.g., Clark D. Cunningham et al., *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 GEO. L.J. 835, 841 (2002) (“[L]abor market discrimination, even several generations in the past, when combined with ongoing segregated social structure can perpetuate indefinitely huge differences in social capital between ethnic communities.”).

279. See, e.g., R. George Wright, *Cumulative Case Legal Arguments and the Justification of Academic Affirmative Action*, 23 PACE L. REV. 1, 28 (2002).

280. 347 U.S. 483, 493–94 (1954).

281. *Id.* at 492.

282. *Id.* at 494–95.

of denigration.²⁸³ For many supporters, the segregative alternative is premised on a foundational idea of inherent or natural differences.²⁸⁴ The concept of race as an inherent biological phenomenon has been thoroughly discredited by genetic anthropologists, psychologists, ethnographers, and evolutionary biologists.²⁸⁵ Sociologists, historians, and legal theorists have demonstrated the ways in which race is socially constructed and historically and culturally contingent.²⁸⁶ Increasingly, evidence indicates that gender differences once presumed to be innate or natural have a much larger cultural component than previously thought.²⁸⁷ The importance of the differences that do exist rests primarily on the social consequences society chooses to attach to these features of identity. In Martha Minow's words, the significance we give to the race and gender differences that do exist is what "make[s] all the difference."²⁸⁸ The Supreme Court, for its part, has consistently refused to accept socially constructed differences as supportive of inequalities in education and employment.²⁸⁹ In short, the idea of natural differences, in

283. See Cahn, *Jurisprudence*, *supra* note 171, at 158–59 (“[S]egregation under government auspices inevitably inflicts humiliation, and . . . humiliation of innocent, law-abiding citizens is psychologically injurious and morally evil.”); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 439 (“*Brown* held that segregation is unconstitutional not simply because the physical separation of black and white children is bad or because resources were distributed unequally among black and white schools. *Brown* held that segregated schools were unconstitutional primarily because of the message segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children.”) (footnotes omitted).

284. “Social and religious conservatives . . . view single-sex schooling as a means to accommodate what they consider the inherently different capabilities, tendencies, and preferences of women and men.” SALOMONE, *supra* note 183, at 39; see also Mike Allen, “Separate” No Stigma for Some: Black, Women’s Schools Growing, RICH. TIMES-DISPATCH, June 30, 1996, at A1 (quoting former Virginia Governor L. Douglas Wilder regarding historically black colleges as saying, “There will always be the natural inclination for consciousness of kind to assert itself. . . . For that reason I would not be opposed to people going to school where they feel most comfortable. That is usually the case with whites.”).

285. See, e.g., HAYMAN, *supra* note 32 at 128 (1997) (“There are . . . about 150 different genetically coded proteins that have been identified and examined; 75 percent of these are monomorphic, that is, they are identical in all individuals. Just 25 percent, then are polymorphic, that is, they vary among individuals. . . . The smallest proportion of variation—just 7 percent (of, remember, the polymorphic genes, which are in turn just 25 percent of the overall pool)—is between groups that have conventionally been considered ‘races.’ Significantly, no polymorphic gene perfectly discriminates among the traditionally classified racial groups.”).

286. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 74–87 (Fawcett Publ’ns 1961) (1953); R.C. LEWONTIN ET AL., NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE 121–27 (1984); Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, in “RACE,” WRITING, AND DIFFERENCE 21, 23–25 (Henry L. Gates ed., 1985); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 28 (1991); Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473, 1477–1506 (2003).

287. See, e.g., LEVIT, *supra* note 12, at 18–28 (referring to declining differences between males and females in SAT scores and running times, as well as cross-cultural studies regarding the development of aggression in girls); Carolyn B. Ramsey, *Subtracting Sexism from the Classroom: Law and Policy in the Debate Over All-Female Math and Science Classes in Public Schools*, 8 TEX. J. WOMEN & L. 1, 9 (1998) (“Sex differences in math and science achievement seem to derive from socialization rather than from inherent disparities in intelligence or spatial skills.”).

288. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 16 (1990).

289. See, e.g., *United States v. Virginia*, 518 U.S. 515, 531–33, 537–38, 543–45 (1996).

either race or sex, has been repeatedly repudiated.²⁹⁰ A concept of diversity that rests foundationally on supposed congenital or natural differences fosters some of the worst stereotypes of all.

Even though the current segregation (in the single-sex schools area) is not forced, and even under conditions of equality, consider the implicit statement: government sponsorship of segregation says that different races or opposite sexes do not belong in a classroom together. The argument is presented more starkly in the single-sex schools cases—it is that some sort of contamination will occur through the intermingling of boys and girls. The argument is made with some stealth in the desegregation context—that parents should be able to choose neighborhood schools so students can attend schools closer to home with other, like-minded (read: same-race) students.²⁹¹ Supporters of neighborhood schools and single-sex education make a sort of revived *Plessy* argument that the use of race and gender classifications to segregate does not imply inferiority.²⁹²

2. *The Historical Meaning of Segregation by Race and Sex*

Proponents of single-sex education and those who advocate turning to neighborhood schools advance the ideas as fresh, novel solutions to problems of gender inequities or inconveniences of busing.²⁹³ Both of these types of educational arrangements rely on the assumption that segregation can be invested with new meaning. Yet supporters never address that assumption or its difficulties—the problematics of context, time, and history. Contemporary separatism is presented without history, without context, as if a beneficent purpose—the good will of a school district or the parental motive of keeping children close to home—somehow sterilizes the current proposals. But segregation based on identity cannot be divorced from history or social meaning. Given the historical treatment of women and minority races, in the not-too-distant

290. See LEVIT, *supra* note 12, at 18–28; Hayman & Levit, *supra* note 32, at 162–65.

291. See, e.g., Patrick James McQuillan & Kerry Suzanne Englert, *The Return to Neighborhood Schools, Concentrated Poverty, and Educational Opportunity: An Agenda for Reform*, 28 HASTINGS CONST. L.Q. 739, 742–45 (2001) (discussing the appeal of neighborhood schools).

292. Compare *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (segregation does not “necessarily imply the inferiority of either race to the other”) with McQuillan & Englert, *supra* note 291, at 744 (referring to Justice Clarence Thomas’ line of reasoning that integration efforts imply black inferiority, and thus resegregation into neighborhood schools is a way of reclaiming equality through separatism), and Hutchison, *supra* note 270, at 1079–80 (arguing that single sex education is not “per se inferior” as long as “the two institutions offered the same quality of education and were of the same overall caliber”) (quoting *United States v. Virginia*, 518 U.S. 515, 565 (1996) (Rehnquist, C.J., concurring)).

293. See, e.g., Hutchison, *supra* note 270, at 1076–78 (discussing how single-sex education may be one option to better fit the needs of children); McQuillan & Englert, *supra* note 291, at 742–45 (discussing how neighborhood schools may solve inconveniences of busing).

past, the segregation itself marks those separated with a badge of inferiority.²⁹⁴

The national history of public education includes state mandates for racially segregated schools, inferior educational opportunities for women and minorities, resistance to the integration of both females and racial minorities, and the only relatively recent admission of women and minorities to professional schools in significant numbers.²⁹⁵ The history of public education rigidly segregated by race and sex is inextricably linked to the “legalized inequality” of women and racial minorities.²⁹⁶ It is a history tied to beliefs about innate differences between the races and between men and women,²⁹⁷ and a past wedded to the exclusion of women and racial minorities from lucrative employment opportunities.

294. Cf. Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 250–51 (2000) (applying the concept to the separatist idea of domestic partnership arrangements as a substitute for marriage).

295. See RONALD CHESTER, *UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA* 3, 49–50 (1985); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 287–314 (1977); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 5–6, 26–28 (1987). It has been less than a quarter of a century since the last of the elite private colleges opened their doors to women. Cynthia Fuchs Epstein, *The Myths and Justifications of Sex Segregation in Higher Education: VMI and the Citadel*, 4 DUKE J. GENDER L. & POL'Y 101, 118 n.11 (1997); see also Joan Gershen Marek, *The Practice and Ally McBeal: A New Image for Women Lawyers on Television?*, 22 J. AM. CULTURE 77, 77 (1999) (noting that the Association of American Law Schools did not prohibit sex discrimination in admissions policies of its member schools until 1970). Although women now enroll in law schools in numbers close to those of men, the percentages are still not equal. The statistics reflect steadily increasing percentages of women enrolled in law schools, from 5% in 1967 to 20% in 1974 to 40% in 1985, but topping out at 49% in both 2001 and 2002. American Bar Association, *First Year Enrollment in ABA Approved Law Schools 1947–2002 (Percentage of Women)*, at <http://www.abanet.org/legaled/statistics/femstats.html> (last visited Mar. 21, 2005) [hereinafter *Percentage of Women*]. In 2003, “[m]ales comprise 51.3% of the J.D. enrollment . . . while females comprise 48.7%.” American Bar Association, *Fall 2003 Enrollment Statistics* (mem. from David Rosenlieb, Data Specialist, to Deans of ABA-Approved Law Schools), at <http://www.abanet.org/legaled/statistics/enrollment2003statistics.pdf> (Jan. 14, 2004) [hereinafter *Fall 2003 Enrollment Statistics*]. The history of the enrollment of racial minorities in law schools has not been as dramatic as that of women. In 1971, the percentage of all law students who were minorities was 5.9% in 1971, while in 2002, that percentage was 19.33%. These percentages are derived from a comparison of the total figures of all minorities in 1971 (5568) and 2002 (27,175), American Bar Association, *Minority Enrollment 1971–2002*, at <http://www.abanet.org/legaled/statistics/minstats.html> (last visited Mar. 21, 2005), with the grand total enrollment numbers from 1971 (94,468) and 2002 (140,612). *Percentage of Women, supra*. Moreover, the rate of minority enrollment is not rocketing upward. In 2001 “minorities comprised 21.2% of first year enrollment.” *Fall 2003 Enrollment Statistics, supra*. The 2002 figure dipped to 21.1%, and the percentage inched up to 21.6% in 2003. *Id.*

296. Jill Elaine Hasday, *The Principle and Practice of Women's “Full Citizenship”: A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 768 (2002).

297. Maurice E.R. Munroe, *Unamerican Tail: Of Segregation and Multicultural Education*, 64 ALB. L. REV. 241, 268 n.192 (2000) (noting that segregated schools were the product of a belief that blacks were inherently intellectually inferior); Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make The Grade?*, 4 DUKE J. GENDER L. & POL'Y 69, 84 (1997) (“[H]igher education was considered by leading experts of the time to be dangerous and inappropriate for women. Experts claimed that scientific evidence established that women were physically and temperamentally not suited to the rigors of the academy. . . . Separate education for men and women paralleled the separate spheres that each was expected to occupy.”).

Consider just how recent the requirement of integrated education is in this country's history of public education. As Justice Ginsburg has observed, "higher education" in the early- to mid-nineteenth century "was considered dangerous for women."²⁹⁸ Administrators opposed the admission of women to the premier colleges for men "because they believed that women would be distracting, men would be uncomfortable with women in their midst, women would weaken the colleges' reputations for scholarship, and admission of women would undermine the founders' plans."²⁹⁹ When women's colleges began to be established in the mid- to late-nineteenth century, they were inferior in many ways to colleges for men.³⁰⁰ Many elite private colleges did not even become co-educational until the 1960s and 1970s.³⁰¹ The history of sex segregated elementary and secondary education followed a similar pattern: "It was not until the latter part of the 19th century that almost all public elementary schools admitted both boys and girls."³⁰² The efforts of civil rights and feminist movements in the half century since *Brown* have been toward trying to further break down the walls of segregation. In short, official educational segregation based on race and sex are phenomena not far removed in time.

Brown, of course, does not mark a point in time when segregation ceased. Opposition to integrated education continued, particularly in the South, for decades after *Brown*.³⁰³ Across the country, forms of segregation continue today, even within "desegregated" schools.³⁰⁴ Moreover, prejudice is tenacious—the stereotypes and generalizations about racial groups that have shaped American institutions and infected the national consciousness did not lapse with the passage of the Civil Rights Act.³⁰⁵ Prejudice persists among whites, as unconscious behavior, negative generalizations and expectations, and discomfort in associations with members of minority groups.³⁰⁶ Pervasive patterns of economic and political

298. *United States v. Virginia*, 518 U.S. 515, 536 (1996).

299. Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established by Women for Women*, 47 AM. U. L. REV. 613, 637 (1998).

300. ELENE WILSON FARELLO, A HISTORY OF THE EDUCATION OF WOMEN IN THE UNITED STATES 163–83 (1970).

301. Fuchs Epstein, *supra* note 295, at 118 n.11.

302. Morrison Torrey, *Thirty Years*, 22 WOMEN'S RTS. L. REP. 147, 151 (2001).

303. See U.S. COMM'N ON CIVIL RIGHTS, WITH ALL DELIBERATE SPEED 11–17 (1981).

304. See Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 55 (1992); Pamela J. Smith, *Reliance on the Kindness of Strangers: The Myth of Transracial Affinity Versus the Realities of Transracial Educational Pedism*, 52 RUTGERS L. REV. 1, 66 n.289 (1999) (citing numerous instances of intra-school segregated activities, such as separate proms and black and white class officers).

305. See Munroe, *supra* note 297, at 256 ("[G]iven the relative continuity of American social life and its institutions over the last 100 years, and given the longevity of racial prejudice and its intensity during even the 1960s, such a complete break with the past is difficult to imagine.").

306. See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–93 (1995); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987).

domination create structural inequalities—and achieve normative legitimacy—that lasts for decades, perhaps centuries. This country does not have sufficient distance, in time or in segregative practices, from the days of flatly unconstitutional single-sex and single-race educational customs and traditions.

3. *International Experiences with Apartheid*

The international experience with gender and racial apartheid illustrates the horrors that often accompany institutionalized segregation. The racial apartheid regime in South Africa encompassed atrocities of detention without trial, forced labor, routine disappearances, gross human rights violations, rape, torture, murder, and genocidal activities such as forced sterilization.³⁰⁷ The lingering effects of separatist policies are rampant—visible in the patterns of persistently inhumane treatment, harassment, and discrimination, the deep educational inequities, the continued assaults, arson, and the malnutrition and starvation.³⁰⁸ The world saw equally, if not more, horrific consequences of race labeling and separation in Rwanda, Bosnia-Herzegovina, and Nazi Germany.

Comparable forms of gender discrimination exist throughout the world and share many of the same premises about inherent differences—but are often treated as much more innocuous.³⁰⁹ Indeed, “sexual apartheid”—the separation of women, domestically, physically, educationally, and economically—is frequently considered part of the natural ordering.³¹⁰ The cultural practices of countries where sharp sex segregation exists include rampant domestic violence, female infanticide, and sexual slavery.³¹¹ Women are veiled, raped, mutilated, and tortured.³¹² They lack political and economic rights, and they are barred from public

307. SOUTH AFRICAN TRUTH AND RECONCILIATION COMM’N, THE REPORT OF THE TRUTH AND RECONCILIATION COMM’N (1998). Also available on unofficial website: www.truth.org.za.

308. See generally Alfreda A. Sellers Diamond, *Constitutional Comparisons and Converging Histories: Historical Developments in Equal Educational Opportunity Under the Fourteenth Amendment of the United States Constitution and the New South African Constitution*, 26 HASTINGS CONST. L.Q. 853 (1999) (discussing the separatist policies and educational inequities of apartheid South Africa).

309. See Ann Elizabeth Mayer, *A “Benign” Apartheid: How Gender Apartheid Has Been Rationalized*, 5 UCLA J. INT’L L. & FOREIGN AFF. 237, 247 (2000–01).

310. See REBECCA J. COOK, THE ELIMINATION OF SEXUAL APARTHEID: PROSPECTS FOR THE FOURTH WORLD CONFERENCE ON WOMEN 3 (American Society of International Law Issue Papers on World Conferences No. 5, 1995); Guglielmo Verdirame, *Testing the Effectiveness of International Norms: UN Humanitarian Assistance and Sexual Apartheid in Afghanistan*, 23 HUM. RTS. Q. 733, 781–84 (2001).

311. See, e.g., Hillary Charlesworth, *What Are “Women’s International Human Rights?”*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 58, 71 (Rebecca J. Cook ed., 1994); see also Aurora Javate-DeDios, *Progress Toward the Elimination of Violence Against Women—The Philippine Experience*, MANILLA BULL., DEC. 10, 2003, at 1, available at 2003 WL 70982083.

312. See, e.g., Joan Fitzpatrick, *The Use of International Human Rights Norms to Combat Violence Against Women*, in HUMAN RIGHTS OF WOMEN, *supra* note 311, at 540; see also Susan Milligan, *Fear of Rape, Murder Diminishes Role of Women, Females Back to Wearing Veils for Safety*, BOSTON GLOBE, Aug. 31, 2003, available at 2003 WL 62327931.

employment, educational, and religious participation.³¹³ Apartheid of both gender and race rests foundationally on long-discredited premises of the presumed inherent superiority of one sex or race and are linked to the harshest forms of government oppression. Countries where women are spatially segregated from men are almost universally those in which women are shunted into traditional gender roles and away from full civic and economic participation.³¹⁴ In short, cross-cultural evidence indicates that state sponsored segregation exists in an inverse relationship with emancipation. It is linked to social and economic stratification as well as rigid and hierarchical gender roles.

4. *The Concept of Remedial Segregation*

The focus of this article is on the “choice” and “diversity” rationales for segregation in education, but a few notes on the remedial purpose rationale for sex and race segregation are warranted. A number of thoughtful commentators have made the argument that separatism in education is needed under an affirmative action rationale. Professor Denise Morgan and Professor Rosemary Salomone, for example, suggest that single-sex education, particularly for minority race girls, may be anti-subordinating.³¹⁵ Professor Kevin Brown recently considered whether an Afrocentric curriculum could promote a sense of cultural identity but noted the constitutional difficulties with a curriculum that endorsed segregation.³¹⁶

Policies of racial separatism, even for reasons of affirmative action, are tested constitutionally with a strict scrutiny standard.³¹⁷ If single-sex education is justified by an affirmative action rationale, the *Hogan* Court held that remedial, gender-based classifications can be supported only if “members of the gender benefited by the classification actually suffer a disadvantage related to the classification.”³¹⁸ The Court also stated that the government cannot “exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap.”³¹⁹ A court evaluating sex segregated educational offerings will need to test not whether the exclusion of one sex provides some pedagogical benefits, but

313. See, e.g., HUMAN RIGHTS OF WOMEN, *supra* note 311, at 551–53; Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 305 (1994); Berta Esperanza Hernández-Truyol, *Women's Rights As Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 613–14 (1996).

314. See, e.g., DAPHNE SPAIN, GENDERED SPACES 248–51 (1992); Shahla Haeri, *Women, Law, and Social Change in Iran*, in WOMEN IN CONTEMPORARY MUSLIM SOCIETIES 209, 216 (Jane I. Smith ed., 1980).

315. SALOMONE, *supra* note 183, at 41; Morgan, *supra* note 124, at 426.

316. Kevin D. Brown, *Reexamination of the Benefit of Publicly Funded Private Education for African-American Students in a Post-Desegregation Era*, 36 IND. L. REV. 477, 488–89, 490 n.53 (2003).

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

318. *Miss. Univ. for Women v. Hogan*, 450 U.S. 718, 728 (1982).

319. *Id.* at 725.

whether the benefits of that segregation, when compared to its detriments, provides an exceedingly persuasive justification.

After *VMI*, the constitutional threshold for sex-based exclusion from state programs is skeptical scrutiny, which the court has defined as requiring the government to demonstrate an “exceedingly persuasive justification” for its actions.³²⁰ Both *VMI* and *Hogan* offer some indications about the strength of the evidence required to justify the fit of intermediate scrutiny. The *VMI* Court’s assessment of the empirical validity of Virginia’s claims about adversative versus cooperative training methods indicates that gender-based differentiation must be based on real “physical” or “inherent” differences between the sexes³²¹ because behavioral differences are influenced by stereotypes and social structure. Categorical sex-based assumptions require substantial empirical support and cannot rest on stereotypic generalizations about the interests or abilities of either sex.³²² In considering whether the empirical support is “exceedingly persuasive,” it must consist of more than hypotheses, cannot “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females,”³²³ and should be founded on a wealth of scientific and statistical evidence, not just selected snippets of information.³²⁴

According to the logic of both *VMI* and *Hogan*, this “exceedingly persuasive justification” test is a contextual inquiry. In evaluating the strength of the justification for a policy excluding one sex, *Hogan* indicates that courts must consider the social meaning of segregation itself.³²⁵ In *Hogan*, the Court held that “MUW’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.”³²⁶ That social meaning is defined in part by history. It is doubtful whether race- and sex-based classifications in the context of education can be divorced from their history of subordinating racial minorities and women—particularly given the recency of their exclusion from public higher education.³²⁷

320. United States v. Virginia, 518 U.S. 515, 531, 534 (1996).

321. *Id.* at 533.

322. See *supra* text accompanying notes 146–48. Prior Supreme Court cases decided under the intermediate scrutiny standard also suggest that something much more than modest empirical support is necessary for a categorical sex-based exclusion. See, e.g., *Weinberger v. Weisenfeld*, 420 U.S. 636, 645 (1975) (determining that differences in social security benefits based on sex are unconstitutional despite “empirical support” that men likely to be breadwinners); *Frontiero v. Richardson*, 411 U.S. 677, 688–89 (1973) (holding unconstitutional the armed services policy of requiring dependent spouses of female service members to prove their dependency, despite “empirical” fact that “wives in our society frequently are dependent on their husbands, while husbands rarely are dependent on their wives”).

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

324. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 138 n.9 (1994) (finding that despite “quasi-empirical claim that women and men may have different attitudes about certain issues justifying the use of gender as a proxy for bias,” peremptory strikes based on sex are unconstitutional).

325. *Miss. Univ. for Women v. Hogan*, 450 U.S. 718, 724–25 (1982).

326. *Id.* at 729.

327. See *supra* text accompanying notes 281–94.

Furthermore, it is not only state-sponsored exclusions rooted in a history of discrimination that are unconstitutional, but also those arrangements that may feed archaic or stereotypic views of the role or abilities of males and females. Thus, courts need to assess the subordinating effects of single-sex policies on the social identity of men and women. Part of the context that must be considered is whether shielding girls from the domination of boys in the classroom promotes stereotypic thinking about the roles and abilities of the sexes.³²⁸

Similarly, courts need to assess the social meaning of separatist treatment of racial minorities toward nonintegrative goals. A clear difference exists between consideration of identity characteristics for purposes of integrative remedies, like affirmative action in the employment and educational admissions contexts, and segregative remedies, like separatist enclaves of education. This difference exists not just as a matter of constitutional theory,³²⁹ but also as a matter of sociological and behavioral research³³⁰ and educational practices.³³¹

Perhaps benefits can be attributed to school “choice” along racial lines or to the fact of sex separation in schools in specific contexts,³³² but we must be aware of the great dangers that inhere in the very fact of state-sponsored separatism in many, probably most, contexts. Perhaps something is distinctive about the situation of inner city schools in pre-

328. *United States v. Virginia*, 518 U.S. at 534 (gender based “classifications may not be used as they once were, to create or perpetuate the legal, social, and economic inferiority of women”) (citation omitted).

329. See Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1196–97 (2002).

330. Numerous studies have documented the advantages of integrated education, in terms of academic achievements for both white and minority race students, social learning, overcoming prejudiced, access to employment, and later community-building. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 53–90, 118–92, 218–55 (1998); Jomills Henry Braddock, II, et al., *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT’L J. CONTEMP. SOC. 273, 281–82 (1994); Michael Kurlavender & John T. Yun, *The Impact of Racial and Ethnic Diversity on Educational Outcomes*, at http://www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.php (Jan. 29, 2002); john a. powell, *supra* note 245, at 788–93 (1996); William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. NEGRO EDUC. 255, 256–57 (1997); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 552 (1994).

331. True integration addresses the issues of achievement, opportunity, community, and relevancy at a systemic level. Through a transformative process, the school system becomes a place of learning and growth for students and teachers through innovative curriculum, technology, teaching practices, and administration, as well as a broad cultural understanding and application of that understanding. These instrumental advances then create a grounding for the more far-reaching goals of the radical integrationist, who seeks to build upon the transformation of the school setting to the recreation of a truly democratic society.

At the site of curricular reform, true integration requires a multicultural curriculum that is incorporated into daily work, and not merely added on or reserved for study during a special month, such as Black History Month.

powell, *supra* note 244, at 695.

332. The wealth of empirical evidence, though, suggests that favorable results are usually attributable to other factors. See *supra* text accompanying notes 183–209.

dominantly minority race districts that makes the fact of sex segregation less unequal; however, in a context marked by hierarchy, in a context of oppression—in our society, in other words—the mere fact of race or sex segregation is likely to bring with it a countervailing inequality.

IV. CONCLUSION: REINTRODUCING KNOWLEDGE AND RECLAIMING THE DISCOURSE

While the jurisprudential and constitutional understandings of choice and diversity are significant, the ways the media interprets these ideas for popular consumption are equally important. Decisions about “neighborhood” and single-sex schools are being made, in the first instance, at the grassroots level: by school boards, teachers, principals, parents, and legislatures. The interpretation of media reports regarding these intersections between race and sex in schools and the law is important because the fate of decisions about desegregation and single-sex schools may not be in the hands of judges. What may be of more consequence in the desegregation and single-sex schools areas is the court of public opinion. The kinds of “experiments” that occur in individual classes (separating boys and girls for math class, for example) are unlikely to result in litigation. The patterns of residential segregation that occur on the race side seem almost untouchable under current legal doctrines.³³³ For both race and sex segregation, the more promising, or at least the more immediate, path for change may lie in a different realm: speaking to the American people.

Media reporting strongly shapes public understanding of legal issues.³³⁴ The ways that issues are recounted have deep effects on public opinions and attitudes. The slanted coverage of single-sex education has had a powerful impact on the increase in such experiments across the country.³³⁵ Similarly, stories and news accounts that pronounce the failure of desegregation efforts sift into the public consciousness.³³⁶

333. Regarding racial desegregation, the doctrinal avenue seems concentrated on voluntary integration plans. See John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1768–91 (2000). The doctrinal law in the desegregation context is fairly settled, while the empirical question in the single sex schools context will be factually complex, but not legally complicated—does the existing research regarding single-sex education present an exceedingly persuasive justification for government-sponsored segregation? Litigation is needed, and amicus briefs will need to question whether an exceedingly persuasive justification exists for single-sex schools.

334. The public depends almost exclusively on the news media for legal information. “[T]he average citizen reads no court opinions, watches few court proceedings in court, studies no law review articles, has no regular contact with judges or attorneys, and handles no legal problems himself. The press is his law reporter.” Richard Stack, *The Uneasy Alliance of Attorney and Reporter, or When Perry Mason Meets Lois Lane*, CHAMPION, July 2003, at 22 (quoting LYLE W. DENNISTON, *THE REPORTER AND THE LAW: TECHNIQUES FOR COVERING THE COURTS* xx (1980) (alteration in original)).

335. See, e.g., Annie Gowen, *Same-Sex Classes a Growing Trend—But Not All Teachers Are Sold on Concept*, STAR-LEDGER (Newark, NJ), Sept. 29, 2002, available at 2002 WL 100695403 (“Collins [an elementary school principal] said that she was inspired to try a class for boys after reading a U.S.

The left has relied on the media, with a certain amount of complacency, assuming that the media is left of center and that the truth will emerge, and trusting that journalists will be Woodward and Bernstein-like government watchdogs. Depending on whom you believe, the media systematically favors the left—or the right.³³⁷ Conservatives charge that the media has a strong liberal bias,³³⁸ and they claim to have been wronged by newsrooms staffed with liberal ideologues who promote their social agendas in lieu of objective news reporting.³³⁹ Liberals make the parallel argument that the right-wing favoritism and limited exposure for left-wing commentators on mainstream television and talk radio mean the slant is toward the right.³⁴⁰ Concentration of ownership means conservative voices are louder, heard more often, and dominate the shrinkingly available bandwidth.³⁴¹ Liberals also note that conservatives have been brilliant in using the folklore of liberal media bias to their advantage.³⁴²

The debate about media tilt seems misguided at best, dangerous at worst. Evidence exists for leanings in both directions. (The debate itself is almost a policy Rorschach—it tells much more about the political beliefs of the person arguing than the political contours of the media inkblot.) The best evidence indicates the media is increasingly corporate, increasingly profit-driven,³⁴³ and unflinchingly interested in sensational stories, sound bites, audience numbers, and ratings.³⁴⁴ The media like controversy and may have little time or space for substance. Perhaps deadline frenzy prohibits deeper treatment, but reporters should be encouraged to put studies in context. Reporters may need some assistance

News and World Report Article last year—headlined ‘Are Boys the Weaker Sex?’—that explored how differences in body chemistry between boys and girls may affect learning.”).

336. See Simmons, *supra* note 233 (“Other educators, citing strong support in the black community for neighborhood schools and charter schools, say some African-American families apparently have given up hope that the traditional model of integration will ever work completely.”).

337. See generally ERIC ALTERMAN, WHAT LIBERAL MEDIA?: THE TRUTH ABOUT ‘BIAS’ AND THE NEWS (2003) (maintaining that the media has a conservative bias); ANN COULTER, SLANDER: LIBERAL LIES ABOUT THE AMERICAN RIGHT (2002) (arguing that the media is unabashedly liberal); BERNARD GOLDBERG, BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS (2001) (same).

338. Cathy Young, *New Ammo in the War over Media Bias*, BOSTON GLOBE, June 9, 2003, at A15.

339. *Id.*

340. ALTERMAN, *supra* note 337, at 28–44, 70–74.

341. Thane Peterson, *The Faint, Fading Voice of the Left*, BUS. WEEK, May 20, 2003, available at 2003 WL 6952380 (“At this point, the left’s most influential representatives consist of small journals like *The Nation*, a handful of newspaper commentators such as Paul Krugman and Frank Rich at *The New York Times*, and syndicated columnist Molly Ivins.”).

342. *Think Political News Is Biased? If You’re a Republican, It Depends Who You Ask*, ASCRIBE NEWS, Apr. 6, 2003, available at 2003 WL 5500376 (“The individuals charging bias may have an agenda that leads them to make such claims in order to coerce more favorable coverage from a press that prides itself on objectivity.”).

343. Tom Puleo, *The Right Cries ‘Liberal,’ Even as News Media Leans Its Way*, PITTSBURGH POST-GAZETTE, May 11, 2003, at B5.

344. STEPHEN L. CARTER, INTEGRITY 12 (1996).

to avoid the assumption that complex understandings are the stuff of academic journals.

The left is confident in the power of ideas to sift into the public consciousness; the right knows better. Conservative pundits are particularly adept at linguistic spin. Indeed, the rhetorical strategies of the political right prompt a curious mixture of admiration and revulsion in the observant reader. Consider the efforts of Frank Luntz, the Republican pollster and communications consultant who wrote a 222-page manifesto for Republicans in Congress, “Language of the 21st Century,” in which he told Congress people how to rename issues to push the conservative agenda.³⁴⁵ For instance, he warns to avoid the alarmist term “global warming”—that makes people think there might be a problem; instead, he advises using the term “climate change.”³⁴⁶ When people think about “climates,” they think of places they would enjoy visiting, like Hawaii or Colorado.³⁴⁷ He has since distilled his book into a handy seventy-five-page pocket pamphlet, entitled “Conservatively Speaking.”³⁴⁸ It advises, “Talk about COMMON SENSE. . . . When talking about ‘common sense values,’ you are all things to all people.”³⁴⁹ “Sentences that work particularly well,” Luntz writes, include: “All children deserve a chance at a quality education.”³⁵⁰

The idea of “spin” is often repulsive to thoughtful liberals, who want deep and nuanced reflection on ideas.³⁵¹ But if the communications tactics of the left are ineffective and if people opposed to segregation are losing in the war of words to unexplored terms such as “choice” and “natural” and “neighborhood,” those approaches need rethinking. One example of the point is occurring in the environmental justice area. The Center for Progressive Regulation (CPR), a nonprofit group of academics committed to promoting public understanding of legal, scientific, and economic issues regarding health and environmental issues, has developed a progressive agenda that moves away from negative attacks on law and economics or complaints about anemic efforts at pollution regulation.³⁵² CPR just wrote *The New Progressive Agenda: Repaying Our*

345. Luntz Research Companies, STRAIGHT TALK, THE ENVIRONMENT: A CLEANER, SAFER, HEALTHIER AMERICA 142, available at <http://www.luntzspeak.com/graphics/LuntzResearch.Memo.pdf> (last visited Mar. 21, 2005).

346. Lenore Skenazy, *Spin City Cuts Both Ways*, N.Y. DAILY NEWS, Mar. 9, 2003, at 41; see also Luntz Research Companies, *supra* note 345 (“‘Climate change’ is less frightening than ‘global warming’ . . . While global warming has catastrophic connotations attached to it, climate change suggests a more controllable and less emotional challenge.”).

347. See *id.*; see also, e.g., *Hawaii: Treasure of Islands with Perfect Climate*, KOREA TIMES, July 6, 2000, available at 2000 WL 82343325.

348. FRANK LUNTZ, CONSERVATIVELY SPEAKING 2 (1997).

349. *Id.* at 8.

350. *Id.* at 26.

351. See Susan Delacourt, *Winning Spinners in a Difficult Year*, NAT’L POST, Dec. 28, 2002, at A10.

352. CENTER FOR PROGRESSIVE REGULATION, THE NEW PROGRESSIVE AGENDA: REPAYING OUR DEBT TO THE FUTURE (2004) (on file with author).

Debt to the Future, as a response to the pervasive and unthinkingly accepted cost-benefit ideas in the environmental regulatory area.³⁵³ The chapter headings offer good examples of positive ideas packaged into digestible and readable text: “Shift the Focus” (to what the public actually desires), “Safety First,” “Fair Distribution” (to avoid, for instance, geographic inequalities in pollution), and “Democracy Demands Disclosure.”³⁵⁴ Academics need to develop more such conscious rhetorical strategies to reach the public.³⁵⁵

In addition to considering wordsmithing³⁵⁶ and communications strategies, attention needs to be given to the substance of segregation critiques. One substantive matter is to disseminate existing empirical information about the consequences of education in racially segregated or sex segregated environments.³⁵⁷ Another is to point out that, at present, at least with respect to single-sex education, a sharp disjunction exists between media portrayal of single-sex school outcomes and actual performance results.³⁵⁸ Finally, opponents of segregation need to consider how to address the ideological issues for a public audience—how, for example, to make the critique of choice one that resonates with the public.

It is curious that the Supreme Court rejected a Virginia county’s “freedom of choice” plan thirty-five years ago in *Green v. County School Board*,³⁵⁹ with the recognition that “choice” would perpetuate segrega-

353. *Id.* at 29–30.

354. *Id.* at 39, 49, 68, 99.

355. One such additional strategy is to consider more active publication of opinion and editorial pieces. Of course, op-ed pieces do not have the scholarly cachet of law review articles, compare Erwin Chemerinsky & Catherine Fisk, *In Defense of the Big Tent: The Importance of Recognizing the Many Audiences for Legal Scholarship*, 34 TULSA L.J. 667, 674 (1999) (“Imagine that a tenure candidate comes forward with a long list of op-ed pieces in newspapers and popular press magazine articles, all of which do an excellent job of explaining legal issues to a mass audience. Should these be counted as legal scholarship and deemed sufficient for tenure? . . . While there is no doubt that such writings have value and faculty members should be encouraged to write them, we would argue that they should not be regarded as legal scholarship in the promotion and tenure process. Legal scholarship should be regarded as writings that make an original contribution to the analysis and understanding of those engaged in the field of law.”) with Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1928 (1993) (“But where is it written that all legal scholarship shall be in the service of the legal profession? Perhaps the ultimate criterion of all scholarship is utility, but it need not be utility to a particular audience.”). It does not, however, require a significant additional investment of time to condense some ideas from an article into an accessible form for a popular audience.

356. Could liberals package ideas in shorter sound bites without losing meaning too? Take as just one example in the single-sex schools area: “Government sponsorship of segregation is wrong.” Or on the desegregation side, “When some people choose, others lose.” See, e.g., WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE (Bruce Fuller & Richard F. Elmore eds., 1996).

357. See *supra* text accompanying notes 183–209.

358. John Burns, *Irish Girls Aim Higher at School*, TIMES NEWSPAPERS LIMITED, May 18, 2003, at 6, available at 2003 WL 20229647 (revealing that a study of secondary schools in Ireland “found that gender differences in academic performance are not as great as portrayed in the media”); Debra Videro, *Evidence on Single-Sex Schooling Is Mixed*, EDUC. WK., June 12, 2002, at 8 (“Despite the political and media hype that has surrounded single-gender schooling, studies on the idea are mixed, according to experts.”).

359. 391 U.S. 430, 441–42 (1968).

tion, and yet the language of choice has resurfaced as an abstract but unqualified good. Some excellent academic treatments exist documenting that “choice” exacerbates segregation and undermines educational opportunities; particularly for economically disadvantaged students of color, “choice” is not universally available, and the value of “choice” often conflicts with other values such as justice.³⁶⁰

The philosophical debates should also include an exploration of whether sameness—homogeneity of gender or race—really promotes the constitutional concept of diversity. Another issue regarding the wisdom of segregation has to do with the nature of experimentation. The embrace of “experimentalism” in the case of single-sex schools and the hurry to declare the “experiment” over in the desegregation context demands inquiry into how courts should approach educational experimentation. Other, less segregated, experiments are available. For example, target specific academic concerns, such as gender-inclusivity in mixed-sex classrooms.³⁶¹ Try a coed TWYLS. Approach poor academic performance with intensive instruction, small class size, and academic rigor. Implement instructional methods that directly address problems of gender domination. Schools should first try experiments that are more likely to be successful and less likely to be unconstitutional.

In assessing the empirical case for segregative alternatives as opposed to integrative options, it is important to keep in mind the lessons of history as well as the principles of the scientific method. As courts contemplate the constitutionality of state-sponsored segregation based on identity characteristics, they should study the large body of empirical research that has been conducted in the social and behavioral sciences.³⁶² The evaluation of the justifications for government-endorsed separatism

360. See, e.g., Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFF. L. REV. 127, 174–75 (2003) (“Perhaps more significant is the fact that some social science studies show that the ‘private choice’ rhetoric hides social inequalities.”); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1240–41 (2003) (“[T]he new injection of market-style language and concepts into sectors such as education, social services, and prisons assumes that competition and choice are pertinent, effective, and better than governance by democratic and constitutional values.”); Powell, *supra* note 244, at 680 (“We must reject a model of choice advocated by many reformists that mischaracterizes choice as unfettered, that conceives of choice being exercised by the individual, and that envisions only distributive goals for participants. A new model of choice would view education as a public good. It would be constructed around choice as a matter not just in the abstract, but in reality and as relational. Specifically, a new model would conceive of choice in terms of ability to participate, not only in terms of social resources but also in terms of the constitution of our society and ourselves. If all families are provided a list of schools that they can send their children to, but only half of those families in fact have the capability of accessing those schools, the model is unjust. However, if the model contemplates capability to exercise choice, it will move us closer to a just result.”); John R. Logan, *Choosing Segregation: Racial Imbalance in American Public Schools, 1990–2000*, Lewis Mumford Center for Comparative Urban and Regional Research, University at Albany, at <http://mumford1.dyndns.org/cen2000/SchoolPop/SPReport/page1.html> (last revised Mar. 29, 2002).

361. See, e.g., Lesley H. Parker & Léonie J. Rennie, *Teachers’ Implementation of Gender-Inclusive Instructional Strategies in Single-Sex and Mixed-Sex Science Classrooms*, 24 INT’L J. SCI. EDUC. 881, 893–94 (2002).

362. See generally Levit, *supra* note 200.

in education should also include international experience with identity-based segregation, empirical evidence of student achievement, educational quality, and longitudinal social outcomes attached to race and gender resegregation in schools, and the possible stigmatic messages the segregation would send. Attempts to imbue segregation based on identity characteristics with sudden legitimacy must fail when viewed in light of their historical and social meaning.

Fifty years ago, in *Brown v. Board of Education*, the Supreme Court recognized that “[s]eparate educational facilities are inherently unequal.”³⁶³ The message is simple: official endorsement of segregation based on identity characteristics creates inequality. This country has insufficient distance from its segregative past and the ravages of those practices to vest separatism with new meaning. If the nation’s past offers any lesson, surely it is that government separation of equals will recreate the very inequality that so many have fought so hard to overcome.

363. 347 U.S. 483, 495 (1954).