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Is "Different but Equal" the New "Separate but Equal"? NCLB's Single-Sex Schooling Option Signals New Horizons for Some While Challenging Equal Education Convictions for Others

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Is “Different but Equal” the New “Separate but Equal”?¹ NCLB’s Single-Sex Schooling Option Signals New Horizons for Some While Challenging Equal Education Convictions for Others

By Elaine Ekpo*

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¹In the spirit of giving credit where credit is due, Michelle Chen, Is Single-Sex Education the New Separate-But-Equal?, MS. MAGAZINE BLOG (Oct. 12, 2010), http://msmagazine.com/blog/blog/2010/10/12/is-single-sex-education-the-new-separate-but-equal/, was the inspiration for this comment title.
I. INTRODUCTION

What are little boys made of?
Snips and snails, and puppy dog tails,
That’s what little boys are made of.

What are little girls made of?
Sugar and spice, and everything nice,
That’s what little girls are made of.

Although the beloved Mother Goose and her nursery rhymes evoke a curious sense of nostalgia in the hearts of those familiar with these childhood verses, an unsurprising number of these same reminiscing individuals would likely oppose having their local, state, or national government adopt the above poem as an appropriate—or even marginally passable—framework for America’s modern public education system. Be that as it may, recent changes in the federal government’s involvement with education just might allow for the real-life manifestation of Mother Goose’s gender-partitioned rhyme.

America’s current public school system is fraught with an abundance of difficulties, including but certainly not limited to, funding issues, overcrowding, bullying and a lack of discipline, and subpar academic curricula. On top of all of these issues hovers the

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2 What Are Little Boys Made Of?, NURSERY-RHYMES.ORG, http://www.nursery-rhymes.org/nursery-rhymes/what-are-little-boys-made-of.html (last visited Nov. 17, 2010). In Blanche Fisher Wright’s Real Mother Goose, first printed in 1916, the expression was “snaps and snails, and puppy click tails.” Id. In the United Kingdom, the phrase is usually “slugs and snails, and puppy dogs tails.” Id. Other popular variants include: “snakes and snails,” “frogs and snails,” or “sugar and spice, and all matters good.” Id.

3 See Josephine Mazzuca, Americans List Biggest Challenges of U.S. Schools, GALLUP POLL. (Dec. 3, 2002), http://www.gallup.com/poll/7327/americans-list-biggest-challenges-us-schools.aspx. When Gallup and Phi Delta Kappa polled Americans on the most serious issues facing public schools in their community, the
most pressing concern: poor scholastic achievement. Former President George W. Bush’s No Child Left Behind Act of 2001 ("NCLB") is the most recent, large-scale federal effort to reform America’s deteriorating school system. While initial reception of NCLB from “respected educational and social advocates” leaned more toward the positive, according to Adam Urbanski, the President of the Rochester (New York) Teachers Association, a majority of

results showed the following: 23% believed it to be a lack of financial support; 17% a lack of discipline; another 17% identified overcrowding as a serious problem; 13% pointed to the use of drugs in schools; 9% cited the prevalence of fighting and violence; and 8% believed it to be a difficulty in securing qualified teachers. See id.

4 See NAT’L CTR. FOR EDUC. STATISTICS, STATE COMPARISONS OF EDUCATION STATISTICS: 1969-70 TO 1996-97, 5, 8 (1998), available at http://nces.ed.gov/pubs98/98018.pdf (providing state comparisons of education statistics, which for example, revealed that West Virginia (34%), Kentucky (35.4%), and Mississippi (35.7%) had some of the highest percentages of persons twenty-five and older in 1990 with less than a high school diploma, and also that Nevada (14.9%) and the District of Columbia (19.1%) had the highest dropout rates amongst 16 to 19-year-olds). See, e.g., Hitt, infra note 137 (“A 2008 report from Mayor Tim Davlin’s office suggested that Springfield’s black high school graduation rate might be as low as 40 percent.”); Jeremy P. Meyer, Colorado’s First All-Girls Public School Coming to Denver, DENVER POST, Dec. 31, 2009, http://www.denverpost.com/ci_14098041 (“In Denver, gaps range from 5 to 11 points between boys and girls in fourth-, eighth- and 10th-grade scores on reading and writing on the 2009 Colorado Student Assessment Program . . . . In 2008, 54.3 percent of Denver girls graduated, compared with 43.3 percent of boys.”); Rex, infra note 105, at 1-2 (“In South Carolina, as in many states . . . boys and girls in grades 3 through 8 . . . have scored below basic competency in English language arts and mathematics on our annual state assessment over the last four years.”).

teachers and the general public opposes this Act. Moreover, recent amendments to the Title IX single-sex regulations have sparked a heated debate over the alleged benefits, detriments, and consequences of sex segregation in the public school system.

This comment will analyze arguments raised by both sides of the debate and the social, educational, and constitutional impact of both isolated and widespread implementation of this policy. In a day and age when Americans take pride in the strides we have made pertaining to gender equality, it should be of no surprise that a large majority of the opponents of NCLB’s single-sex education provision argues it flies in the face of vital, immutable constitutional rights. Thus, when educators across America consider whether or not to offer single-sex courses, extracurricular activities, or schools at the elementary and secondary education levels, they must first ask

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6 Adam Urbanski, *Foreword* to WILLIAM HAYES, *NO CHILD LEFT BEHIND: PAST, PRESENT, AND FUTURE*, at vii-viii, (Roman & Littlefield Educ. 2008). Despite such “overwhelming bipartisan support from Congress,” the controversy surrounding NCLB has only increased with time. *Id* at 23. Criticism and opposition of NCLB stemmed from concerns over several terms of NCLB deemed to be “unfair” or “ineffective,” such as: “over-emphasizing standardized testing; narrowing curriculum and instruction to focus on test preparation rather than richer academic learning; over-identifying schools in need of improvement; using sanctions that do not improve schools; inappropriately excluding low-scoring children in order to boost test results; and inadequate funding.” Joint Organizational Statement on No Child Left Behind (NCLB) Act, FAIRTEST.ORG, http://www.fairtest.org/node/30 (last updated June 1, 2009).

7 See Rosemary Salomone, *Rich Kids, Poor Kids, and the Single-Sex Education Debate*, 34 AKRON L. REV. 177, 177 (2000) available at http://www.uakron.edu/law/lawreview/v34/docs/salomone341.pdf (concluding that the “legal cloud” lingering over the single-sex education must be lifted in order to allow public school officials enough flexibility to build diverse programs that give poor children access to the benefits of a free-choice method typically reserved for the wealthy); GreatSchools Staff, *Single-Sex Education: The Pros and Cons*, GREATSCHOOLS.ORG, http://www.greatschools.org/find-a-school/defining-your-ideal/single-sex-education-the-pros-and-cons.gs?content=1139&page=all (outlining and explaining the arguments raised by the opposite camps of the single-sex education debate for parents who wish to have a better grasp on the issue); Blue, *supra* note 5, at 98 (determining that while research seems to support harmonizing teaching methods with the needs of students to better aid all students regardless of gender, the “jury is still out” on the impact of single-sex education on academic success).
themselves a difficult question: has “different, but equal” become the new “separate, but equal”?\(^8\)

II. HISTORY

A. General History

Before delving into a discussion of gender and education, it is important to provide the historical social, legal, and educational context for this debate. Sex discrimination\(^9\) in America traces back to the very beginning of the history of our nation—and continues on even further back than that.\(^10\) However, a period of social reform and subsequent legislative action made great strides to equalize the sexes, including the nineteenth and twentieth-century women’s rights movements, the passage of the 19th Amendment, and the push for strong female representation in the American workforce throughout the twentieth century.\(^11\)

Feminists and women abolitionists of the late nineteenth century attacked the long-established tradition that men and women ought to operate in separate spheres.\(^12\) These women, along with their supporters, insisted there be a major upheaval of the ideology and laws that dictated cross-gender relationships, and predictably, their

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\(^8\) Plessy v. Ferguson, 163 U.S. 537 (1896), first introduced the phrase “separate, but equal” in its notorious decision, where the Court upheld the constitutionality of state laws requiring racial segregation in private businesses, under this doctrine. \textit{Id.} Although later overruled by Brown v. Board of Education, 347 U.S. 483 (1954), some fifty-eight years later, this infamous turn-of-phrase by the Court still lives on today as a rather euphemistic expression for discrimination. \textit{See also} Chen, \textit{supra} note 1.

\(^9\) \textsc{Black’s Law Dictionary} (9th ed. 2009) defines “sex discrimination” (also known as “gender discrimination”) as “discrimination based on gender, especially against women.”

\(^10\) For space and relevancy’s sake, however, I will not go back further than nineteenth-century American history.

\(^11\) \textit{See infra} notes 13-14, 16 and accompanying text.

\(^12\) \textit{See William Henry Chafe, The American Woman: Her Changing Social, Economic, and Political Roles, 1920-1970} 4 (1972). The concept of a woman’s “proper place” (re: the hearth and home) dominated the expectations of larger society during this period, and women were legally powerless to do the following: “hold title to property, establish businesses, or sign papers as witnesses.” \textit{Id.} at 3, 5.
initial efforts were met with much scorn.\textsuperscript{13} However, the woman's movement progressed from an "isolated fringe group" to a "moderate reform coalition" in the early twentieth century, with suffrage as the foremost cause.\textsuperscript{14} Though championing for the same cause as their radical predecessors, the female activists of the twentieth century marched to a more nuanced beat, allowing them to amplify their influence on important social and political matters.\textsuperscript{15} Concurrent with and subsequent to the momentous suffrage movement was the progressive increase of women in the labor sphere.\textsuperscript{16} While the lack of women in the workforce aided in the promotion of the mid-

\textsuperscript{13} See id. at 4. In addressing the utter lack of legal rights women had at the time, early activists ultimately concluded that they would be hard-pressed to find an area where "man had not consciously endeavored to 'destroy woman's confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.'" Id. Women's rights leaders advocated for the removal of all barriers segregating the operations of the two genders, demanding that henceforth any and all laws constraining a woman's freedom or situating her in a position inferior to man have "no force or authority." Id. Holding such radical notions meant activists were often treated with contempt in their communities. See id. at 3. Since it was "common knowledge" that women were not to depart from "their domain"—let alone engage in activity as radical as speaking in public or circulating petitions—they were castigated for doing so. See id.

\textsuperscript{14} See id. at 4. With the arrival of Progressivism, which Dr. Chafe defines as a more general spirit of reform representing an effort to crackdown on the most blatant sources of corruption, disease, and poverty, suffragists identified their own "reform" with the larger efforts and ideals of Progressivism. Id. at 15. Suffragists' characterization of the franchise as a way of "humanizing government" aided in the passage of the Nineteenth Amendment in 1920, see id., officially giving women the right to vote nearly seventy-five years after the initial stirrings of early female mutineers. See id. at 20.

\textsuperscript{15} See id. at 12.

\textsuperscript{16} See Steven M. Buechler, Women's Movements in the United States: Woman Suffrage, Equal Rights, and Beyond 23 (1990). The numbers show that from 1900 to 1920, women comprised about twenty percent of America's labor force. See id. In 1940, they made up thirty percent of the workforce, and in 1980, forty-five percent. See id. However, what speaks more than the numerical trend is the composition of the women within the workforce: while more than three-fourths of working women in the 1920s were single, today sixty percent of working women are married. See id. Even more telling is that nearly half of all mothers with kids under the age of five are working and over forty percent of women with infant children under the age of one are in the workforce, as well. See id.
nineteenth century women’s movement, the increased presence of
women in the workforce helped promote the modern Women’s
Liberation Movement of the late twentieth century, paving the way
for a high number of diverse achievements by women.

The achievements made by women’s rights activists throughout
the nineteenth and twentieth centuries established a strong foundation
for today’s modern female. Women—and even men—across all
walks of life bounded together to fight for what they steadfastly
believed to be a huge injustice: that women were denied fundamental
rights established by the Constitution. The efforts of these various
movements not only served to reform the sex discrimination that ran
rampant throughout America, they also paved the way for a future
where one sex is not seen as inferior to the other, but both are
acknowledged as comprising equally essential components of
society’s foundation.

The advancement of women’s liberties and legal rights was not
only evident in the social and economic spheres. Case law played a
major role in remedying sex discrimination and clear
progress was made in the legal field over the past couple of
centuries. Responsible for such famed, landmark decisions as Roe

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17 See Buechler, supra note 16.
18 See id. at 218. Some of these achievements include: federal approval of the
birth control pill for contraceptive use in the 1960s; the exponential increase of
women in the U.S. military; the keynote speech of the Democratic National
Convention given by a black Congresswoman; the proliferation of ordained female
priests, ministers, and rabbis; and—most relevant to this comment—the strides
made by the National Organization of Women (“NOW”) in rallying women to fight
for legal reforms to end sex discrimination in education. See Carol Hymowitz &
Micheale Weissman, A History of Women in America 342, 371 (Bantams Books
1978).
19 See Donald G. Mathews & Jane Sherron De Hart, Sex, Gender, and
Amendment, the Yale article said, offered a broad re-examination and redefinition
of woman’s place . . . . The Equal Rights Amendment was so well received by
millions of American women because it seemed to be addressed so precisely to
their own experience of restrictive gender definition.”) (internal quotation marks
omitted).
20 See id. at 151.
21 For instance, the Supreme Court’s decision in Kirchberg v. Feenstra, 450
U.S. 455 (1981), was a far cry from Goeaert v. Cleary, a 1948 case where a six-
to-three majority of the Court upheld a Michigan law that said no women could
v. Wade, the judiciary was also not to be left dilatory as the modern women’s rights movement continued to gain momentum and take America’s already-modulating society by storm. 22

Just as important in understanding the progression of women’s roles in society is obtaining a historical context for the role of the federal government in the public education system. Prior to twentieth and twenty-first century laws and regulations, U.S. education administration lay chiefly in the hands of state and local governments, and as a consequence, U.S. education had chiefly been conducted as a decentralized, local system. 23 The federal government played a limited role by providing supplemental finances and categorical programs in the 1950s and 1960s, 24 but the federal role

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acquire a bartender’s license unless she was the “wife or daughter of the male owner” of a liquor-licensed business. 335 U.S. 464, 465 (1948). The Kirchberg ruling succeeded in abolishing a Louisiana statute that named a husband the “head and master” with unilateral authority to do what he pleased with property owned jointly with his wife. 450 U.S. at 456.

The Court’s decisions between Kirchberg and Goesaert touched other facets of society where the law treated the sexes unequally, and women increasingly gained ground on the judicial front. See, e.g., Reed v. Reed, 404 U.S. 71 (1971) (ruling an Idaho statute, preferring men over women as estate administrators simply because they were male, in violation of the Equal Protection Clause); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that a federal law requiring different qualification conditions for male and female military spousal dependency violated female members’ Fifth Amendment Due Process rights); Stanton v. Stanton, 421 U.S. 7 (1975) (determining that a Utah law denied women equal protection under the law because it set the child support-determinative age of majority for females at eighteen and males at twenty-one); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (unanimously holding that authorizing widows, but not widowers, to get special benefits violated the Fifth Amendment).

22 See BUECHLER, supra note 16, at 112.

23 See PATRICK J. McGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005, 25 (2006). School districts first arose in 1647, and this system was legally sanctioned in by the act of 1789. See AUGUST WILLIAM WEBER, STATE CONTROL OF INSTRUCTION: A STUDY OF CENTRALIZATION IN PUBLIC EDUCATION 13 (1914). The single-school town was then supplanted by several schools in one town, which was controlled by the local district. See id. With the rise of localized districts by 1817, these localities were made influential corporations, restricted only from “the raising and apportioning taxes and the qualifications of teachers.” Id.

24 The original Office of Education was created in 1867 (as the Department of Education) with the objective to collect and publish information about schools and teaching to facilitate state officials in establishing a successful educational
remained minor in central academic and governance matters until the 1990s.  


1. to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual;
2. to supplement and complement the efforts of States, the local school systems and other instrumentalities of the States, the private sector, public and private educational institutions, public and private nonprofit educational research institutions, community-based organizations, parents, and students to improve the quality of education;
3. to encourage the increased involvement of the public, parents, and students in Federal education programs;
4. to promote improvements in the quality and usefulness of education through federally supported research, evaluation, and sharing of information;
5. to improve the coordination of Federal education programs;
6. to improve the management and efficiency of Federal education activities, especially with respect to the process, procedures, and administrative structures for the dispersal of Federal funds, as well as the reduction of unnecessary and duplicative burdens and constraints, including unnecessary paperwork, on the recipients of Federal funds; and
7. to increase the accountability of Federal education programs to the President, the Congress and the public.


The Cold War inspired the first model of wide-ranging federal education legislation, and in reaction to the Soviet launch of Sputnik, Congress introduced the National Defense Education Act of 1958 ("NDEA"). See The Federal Role in Education, supra. To ensure "the best and the brightest" would be on hand to assist the U.S. in its science and technology race with the Soviet Union, the NDEA incorporated the following: federal aid toward college loans; the development of math, science, and foreign language training in primary and secondary schools, graduate programs, and area studies; and vocational-technical instruction. See id.

25 See id. In 1980, Congress established the contemporary Department of Education ("ED") as a Cabinet-level agency with the passage of the aforementioned Department of Education Organization Act. See id. At present, the ED manages elementary and secondary education programs involving "every area and level of education," which yearly supports almost 14,000 school districts, 56
With the publication of the 1983 *A Nation at Risk* report, NCLB was the most comprehensive renovation of federal education policy since the Elementary and Secondary Education Act ("ESEA") of 1965, which the federal government essentially reauthorized with the passage of NCLB.\(^{26}\) Originally aiming to provide only additional support for national education reform, the ESEA commenced a comprehensive collection of programs to tackle the difficulties of poor urban and rural regions, such as the Title I program of federal aid to underprivileged children.\(^{27}\) However, as federal legislative regulations, bureaucratic directives, and court mandates for the pedagogical arena "became increasingly numerous and prescriptive," initial supplemental-assistance efforts burgeoned into an administrative system with a rapidly cementing federal presence.\(^{28}\)

Of note are the anti-poverty and civil rights laws of the 1960s and 1970s, which provided additional opportunities for the Department of Education ("ED") to assist in educational administration.\(^{29}\) The ED established civil rights enforcement as one of its fundamental concentrations with the passage of laws such as: "Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973," which prohibited discrimination based upon race, sex, and disability, respectively.\(^{30}\) Most germane to the topic of this comment was the historic adoption of Title IX.\(^{31}\) Federal prohibition of sex

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million students that attend around 99,000 public schools, and 34,000 private schools. *Id.* Furthermore, the programs supply grant, loan, and work-study aid to over fourteen million undergraduates and graduates. *See id.*

\(^{26}\) See *McGUINN*, supra note 23, at 25.

\(^{27}\) See *The Federal Role in Education*, supra note 24. Demonstrating the ED had not disregarded those pursuing higher education, the Higher Education Act of 1965 approved federal aid for postsecondary education, which involved providing indigent undergraduate students with financial assistance. *See id.*

\(^{28}\) *McGUINN*, supra note 23, at 25.

\(^{29}\) See *The Federal Role in Education*, supra note 24.

\(^{30}\) *Id.*

\(^{31}\) Title IX generally stated: "[N]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance." 34 C.F.R. § 106.31(a) (1979). However, it more precisely identified a myriad of school-related areas where sex discrimination was
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discrimination in schools not only gave abstract credence to the efforts of the women’s rights movement, but on a more concrete level, it made it possible for women to secure less problematic access to various institutions and academic programs.32

B. The History of Single-Sex Education in the United States

The history of single-sex education in this nation is not without its complications. As was detailed above, someone cannot construct an accurate historical outline of the American education system without at least mentioning the segregation of the sexes. First examining the relevant constitutional and federal laws33 and then moving onto the resultant legal history, this section dissects the nature of single-sex instruction in two separate, yet intersecting, disciplines.

Many opposing arguments to NCLB’s single-sex education provision find their foundation in the Constitution.34 Specifically, the

banned, including: admissions (§ 106.22), recruitment (§ 106.23), access to classes and schools (§ 106.34), financial assistance (§ 106.37), athletics (§ 106.41), and employment (§§ 106.51-.61). See id.

32 Though some controversy accompanied the passage of Title IX (such as in the area of athletics), the educational and academic gains resulting from Title IX are significant. See About Title IX, U. IOWA LIBR., http://bailiwick.lib.uiowa.edu/ge/aboutRE.html (last updated Feb. 23, 2006). Prior to Title IX, numerous institutions either flat-out declined to admit women or implemented stringent limits. See id. Some The University of Iowa Libraries noted the following statistics, which highlight some of the progress realized by Title IX: “In 1994, women received 38% of medical degrees, compared with 9% in 1972. In 1994, women earned 43% of law degrees, compared with 7% in 1972. In 1994, 44% of all doctoral degrees to U.S. citizens went to women, up from 25% in 1977.” Id.

33 See supra notes 31-32 and accompanying text. Title IX of the Education Amendments of 1972 is one previously mentioned federal law that remains important and relevant to this segment of the discussion.

34 See infra notes 213-18 and accompanying text. As Professor Rosemary Salomone observes that “opponents of single-sex programs base their most foundational legal claim in the equal protection clause of the federal Constitution. That argument takes on two casts. The first focuses on separation itself: separating girls from boys in public schooling is intrinsically unequal and therefore unconstitutional. The less absolutist argument looks for equal treatment: offering a
frequently referenced constitutional segment is the Fourteenth Amendment Equal Protection Clause. Reading, “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws,” the Equal Protection Clause provides for a legal hotbed of discussion for opposing camps of the single-sex education debate—particularly since, at first glance, each side appears to present sound arguments for their respective stances.

Another important (and popular) go-to source is the case law that has developed as a result of the contentious nature of single-sex education in America’s history. Though each side of this clash may argue its own interpretation of the various rules and analyses presented by the courts is exact and unambiguous, the simple existence of such conflicting legal interpretations may very well be demonstrating just the opposite. In truth, just as the Equal Protection Clause offers an almost textbook foundation for such spirited discussion, the legal history and related case law proffer no less. Tracing the related case history, beginning with a 1970s Third Circuit ruling and closing with a more recent Supreme Court decision,


35 See infra note 213 and accompanying text.

On a different note, although not often cited or even mentioned, the equal protection component of the Fifth Amendment Due Process Clause subjects the federal government to constitutional equal protection principles, as well. See Donald T. Kramer, What Constitutes Reverse Sex or Gender Discrimination Against Males Violative of Federal Constitution or Statutes—Nonemployment Cases, 166 A.L.R. FED. 1 (2000).

36 U.S. CONST. amend. XIV, § 2. The Equal Protection Clause generally requires public bodies and institutions to regard “similarly-situated” individuals in an equal manner. 16B AM. JUR. 2d Constitutional Law § 833 (2010). The clause thus forbids a governing organization from applying a law differently to those the law deems similarly situated. Id. Additionally, the purpose of the Equal Protection Clause is to “secure every person within a state’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents.” Id.

37 See infra text accompanying notes 213 - 18.
allows for a more in-depth look into the legal context for contentions made by pro and anti camps.

_Vorchheimer v. School District of Philadelphia_, a Third Circuit case, considered whether "our Constitution and laws forbid the maintenance by a public school board, in a system otherwise coeducational, of a limited number of single-sex high schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal."\(^{38}\) Here, an honors graduate of a Philadelphia junior high school was denied application to a public high school because admission was limited to males only.\(^{39}\) Determining the segregated-sex policy did bear a substantial relationship to "the School Board’s legitimate interest,"\(^{40}\) the appeals court held that rules establishing admission requirements based on gender classifications, for two single-sex public high schools, did not upset the obligations of the Equal Protection Clause, so long as "attendance at either of the two single-sex high schools was voluntary, and the educational opportunities offered at the two schools were essentially equal."\(^{41}\)

A "bittersweet victory" for some,\(^{42}\) _Vorchheimer_ represented something different to each side of the debate.\(^{43}\) For those supporting

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\(^{39}\) See id. at 881.

\(^{40}\) Id. at 882, 887. First analyzing the statutory language of 20 U.S.C. §§ 1702(a)(1) and 1703(a), the Third Circuit found the legislation to be far too equivocal for application because although 1702(a)(1) declared unconstitutional dual school systems where students are assigned exclusively based on sex, 1703(a) proceeds to allow states to separate schools based on sex. See id. at 884-85. Encountering "no Congressional enactments which authoritatively address the problem," the court then examined the string of recent cases addressing similar issues. Id. at 885-86. However, it still found no analogous situation here since each of the cited cases involved "an actual deprivation or loss of a benefit to a female which could not be obtained elsewhere." Id. at 886. (emphasis added). Eventually answering the presented issue with a "no," the court instead found Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970) _aff’d_, 401 U.S. 951 (1971), a South Carolina District Court case, a "strong, if not controlling authority." Id. at 887.

\(^{41}\) Id. at 888. The teenage plaintiff was thus denied the relief she sought in this class-action suit: opening the male-only admittance to females. See id.

\(^{42}\) SALOMONE, _supra_ note 34, at 123. Salomone dubs this case the bittersweet triumph because in the years following the case, Philadelphia’s remaining
single-sex instruction, the decision placed "a symbolic judicial imprimatur on publicly supported single-sex schooling." However, for persons in opposition, Vorchheimer indicated that Plessy v. Ferguson's long-overturned "separate but equal" doctrine with regard to race, "seemed constitutionally permissible in the realm of gender."

In Mississippi University for Women v. Hogan, the Supreme Court addressed the limited issue of whether the policy of a state-sponsored professional nursing institution, which barred males from enrolling for credit, was in violation the Fourteenth Amendment Equal Protection Clause. Here, the plaintiff, an otherwise qualified registered nurse, was denied admission to the nursing program solely on the basis of his sex. Answering the question presented in the affirmative, a divided Court found the discriminatory enrollment nonselective single-gender high schools became coeducational, while the all-male and all-female high schools from Vorchheimer continued to be sex-segregated. See id.

43 See id.
44 Id.
46 SALOMONE, supra note 34, at 123.
48 See id. at 720-21.
49 See id. at 733. The Court scrutinized the policy under the authority of the Equal Protection Clause. See id. at 723. Seeing no point to effect a different approach for a rule discriminating against men, rather than women, the Court determined that the university held the burden of showing that at the very least, "the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Id. at 724. (quoting Wengler v. Druggists Mut. Ins.Co., 446 U.S. 142, 150 (1980)). In applying this standard, the Court resolved that even though the Mississippi University for Women provided a "benign, compensatory purpose" for the classification, the university still failed to prove that "compensation for discrimination against women" was the actual underlying purpose of the categorization. Id. at 727, 730 (internal citations omitted). Moreover, the university still failed to show that the sex-based classification was "substantially and directly related to its proposed compensatory objective." Id. at 729.
policy showed no "exceedingly persuasive justification" for the sex-based classification.\textsuperscript{50}

At first glance, \textit{Hogan} seems to be a distinctive victory for those opposed to single-sex schooling.\textsuperscript{51} However, the narrow boundaries set by the \textit{Hogan} decision created uncertainty where "single-sex schooling gained increased interest while popular and judicial support for affirmative action began to wane."\textsuperscript{52} Furthermore, the Court chose not to close the door to publicly backed sex-segregated education, as long as school administrators averted the intent or the effect of encouraging "archaic and stereotypic" outlooks on the functions and capabilities of males and females.\textsuperscript{53} In the end, though, those against single-sex education were left dissatisfied by the \textit{Hogan} ruling since the Court still offered no answer to a much more challenging question: what governmental interest, aside from compensation for truly disadvantaged persons, could possibly justify single-sex education?\textsuperscript{54}

Rounding off this exploration of case law addressing single-sex schools and programs is the Court's most recently decided case on the subject, \textit{United States v. Virginia}.\textsuperscript{55} This controversial mid-nineties case tackled two issues: (1) whether the exclusion of females from the educational options afforded by the Virginia Military Institute ("VMI"), identified as "extraordinary opportunities for military training and civilian leadership development," denied fully qualified and capable women the equal protection of the laws, and (2) whether the Court can provide a sufficient remedial solution if VMI's "unique situation," as Virginia's only single-sex public establishment of higher learning, affronts Fourteenth Amendment equal protection principles.\textsuperscript{56} Answering "yes" to the first issue, Justice Ginsburg, for

\textsuperscript{50} Id. at 724. Though the university failed to meet its burden, the Court did acknowledge that a compensatory objective might be allowed if it "intentionally and directly assists members of the sex that is disproportionately burdened," who "actually suffer a disadvantage related to [gender]." \textit{See} \textit{Salomone}, \textit{supra} note 34, at 141-42 (quoting \textit{Hogan}, 458 U.S. at 730, 728-29).

\textsuperscript{51} \textit{See} \textit{Salomone}, \textit{supra} note 34, at 142.

\textsuperscript{52} Id.

\textsuperscript{53} Id.

\textsuperscript{54} \textit{See id.} at 141-42.


\textsuperscript{56} \textit{See} \textit{Virginia}, 518 U.S. at 515, 530-31.
the majority, concluded that Virginia failed to show any “exceedingly persuasive justification” for barring all women from VMI’s citizen-soldier training.\textsuperscript{57} Finding VMI’s remedy reminiscent of the alternative proposed by Texas some fifty years earlier,\textsuperscript{58} the Court then continued on to determine that in maintaining VMI exclusively for men, Virginia failed to supply any “comparable single-gender women’s institution.”\textsuperscript{59} Since Virginia’s proffered remedy failed to

\textsuperscript{57} See \textit{id.} at 534. Relying on the standards outlined in \textit{Hogan}, the Court considered the explanations and “alternatives” presented by VMI, including the District Court’s corresponding reasoning that if VMI admitted women, the schools’ “single-sex status would be lost, and some aspects of the school’s distinctive method would be altered . . . allowance for personal privacy would have to be made, physical education requirements would have to be altered, at least for the women, [and] the adversative environment could not survive unmodified.” \textit{Id.} at 524 (quoting \textit{United States v. Virginia}, 766 F. Supp. 1407, 1412-13 (W.D. Va. 1991) (internal quotation marks omitted). And as an alternative to admitting women into VMI, Virginia suggested a “parallel” women’s program called the Virginia Women’s Institute for Leadership (“VWIL”). \textit{See id.} at 526. VMI proposed that Mary Baldwin’s College, a private liberal arts university for women, accommodate the four-year, state-funded undergraduate program that claimed to share VMI’s aim to produce “citizen-soldiers.” \textit{See id.} However, the VWIL program diverged noticeably from VMI, in education methods (the VWIL Task Force favored “a cooperative method which reinforces self-esteem,” in lieu of the adversative method employed at VMI), scholastic offerings, and monetary resources. \textit{Id.} at 526-27.

The Court determined that the explanations offered by VMI failed to demonstrate a substantial relation to achieving any important governmental objectives, finding that sex-based classifications may be used to compensate women “for particular economic disabilities they have suffered, to promote equal employment opportunity,” to develop full advancement of the “talent and capacities” of the American people. \textit{Id.} at 533 (referencing \textit{Califano v. Webster}, 430 U.S. 313, 320 (1977) (per curiam) and \textit{Cal. Fed. Sav. & Loan Ass’n. v. Guerra}, 479 U.S. 272, 289 (1987)) (internal quotation marks omitted). However, the Court continued on that “such classifications may not be used, as they once were to create or perpetuate the legal, social, and economic inferiority of women.” \textit{Id.} at 534 (citing \textit{Goesaert}, 335 U.S. at 467) (internal quotation marks omitted).

\textsuperscript{58} Here the Court is referring to \textit{Sweatt v. Painter}, 339 U.S. 629 (1950), a case where the University of Texas Law School, unwilling to admit black students, instead instituted a separate school for black law students, but the school lacked accreditation and an independent faculty and library. \textit{See id.} at 553.

\textsuperscript{59} See \textit{id.} at 553. The Court added that Virginia instead designed a VWIL program equitably regarded as a “pale shadow” of VMI as to “the range of curricular choices and faculty stature, funding, prestige, alumni support and influence.” \textit{Id.}
Is "Different but Equal" the New "Separate but Equal"

correspond with the constitutional violation, as stipulated in *Milliken v. Bradley*, the Court ruled that maintaining VMI as a single-sex institution would be in violation of the Equal Protection Clause.

The VMI case was not solely a dispute about single-sex education, it was also a matter of gender equality. This landmark decision marked another victory in the pursuit for equity and equal learning opportunities for a group once deemed "the weaker sex." With *Virginia* and its lineage, the Supreme Court has made it clear that although the intermediate scrutiny standard for sex-based discrimination is not as strict as the strict scrutiny standard in place for discrimination based on race or ethnic origin, schools, Local Education Agencies ("LEAs"), and other institutions intending to work a sex-based classification still bear the challenging burden of showing an exceedingly persuasive justification for doing so.

At the same time, the Court's efforts to settle byzantine legal concerns that added pressure to contradictory social standards, left a line of

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60 *Milliken v. Bradley*, 433 U.S. 267, 280 (1977). The Court long established that a remedial decree, "must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination." *Virginia*, 518 U.S. at 547 (citing *Milliken*, 433 U.S. at 280). For the instant case, the Court deemed the constitutional violation to be the absolute exclusion of women from "an extraordinary educational opportunity" provided to men. *Id.* Consequently, the Court determined that an appropriate remedy for such an unconstitutional omission must endeavor to "eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *Id.*

61 See *Virginia*, 518 U.S. at 547.

62 See *Salomone*, supra note 34, at 164. Salomone highlights the fact that VMI's institution of VWIL stamped women with a "'badge of inferiority' or second class citizenship," which the Court found "most troublesome." *Id.* at 163. By ultimately ruling Virginia was in violation of the Equal Protection Clause, Salomone continues on that Justice Ginsburg not only postured against the historical exclusion of women from academic opportunities, she also "acknowledged both the reality of difference and its potentially harmful misapplication." *Id.*

63 See *id.* at 167.


65 See *Virginia*, 518 U.S. at 524 (finding that an "exceedingly persuasive justification" requires "the defender of the challenged action [to] show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives'") (internal citations omitted).
unanswered questions for “scholars to ponder, school districts to struggle with, and federal civil rights officials and the judiciary ultimately to address head on.” Any further procrastination in trying to resolve the difficulties presented by single-sex instruction will only further encourage both sides to continue trundling along in a seemingly roundabout “Caucus Race”—one filled with much chaotic rhetoric but too little intentional action.

III. NCLB AND THE REEMERGENCE OF SINGLE-SEX EDUCATION IN PUBLIC SCHOOLS

A. The “Ins and Outs” of the Provision

As a part of President Bush’s push for elevated standards in K-12 public education, NCLB initially included statutory language authorizing the use of federal funds in “same-gender schools and classrooms (consistent with federal law).” Then, in 2002, the ED issued Pub. L. No. 107-110, § 5131(a)(23), a proposed rule that created more opportunities for single-sex instruction in public

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66 See Salomone, supra note 34, at 167.

67 The “Caucus Race” concept refers to a scene in Lewis Carroll’s Alice’s Adventures in Wonderland, where Alice and a motley crew of animals run haphazardly in a circle to dry off after being soaked in Alice’s tears. See Lewis Carroll, Alice’s Adventures in Wonderland 79, 82-83 (Macmillian Co. 1897). After half an hour of running in a race without an end, everyone is declared a winner. See id. at 84. Carroll’s “thinly veiled” implication that late eighteenth century English politicians engage in similar activity is illustrated by this infamous scene: “the animals run randomly in circles, progress nowhere, and arbitrarily adjourn without any clear conclusion.” Lewis Carroll. Alice’s Adventures in Wonderland and Through the Looking-Glass, United Architects (July 28, 2009, 9:50 PM), http://danliterature.wordpress.com/2009/07/ (follow “Pages: *Lewis Carroll. Alice’s Adventures in Wonderland” hyperlink).

schools. Since four years passed with no final rule adopted, according to academic scholars Minow, Shweder, and Markus, the ED seemed to be "devis[ing] the proposed rule, without proceeding to a final rule, in order to encourage experimentation with single-sex schools before issuing a final rule that could be challenged in court." However, on October 25, 2006, the ED announced and released its final rule authorizing instruction and programs in single-sex classrooms and schools.

The pertinent passages of NCLB read as follows:

(a) INNOVATIVE ASSISTANCE PROGRAMS - Funds made available to local educational agencies under section 5112 shall be used for innovative assistance programs, which may include any of the following . . .

....

(23) Programs to provide same-gender schools and classrooms (consistent with applicable law).

....

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69 See id., at 49 n.30 (further explaining that issuing the proposed rule in 2002 may have been part of a political campaign strategy, because by "[p]roposing a rule and leaving it in that proposed state[,] . . . [t]he administration gains points from supporters for pursuing this policy, avoids court challenge to it, and generates potential support from both experimentation and research efforts that could bolster the policy if it does reach a final rule . . . ").


(c) GUIDELINES - Not later than 120 days after the date of enactment of the No Child Left Behind Act of 2001, the Secretary shall issue guidelines for local educational agencies seeking funding for programs described in subsection (a)(23).

In accordance with subsection (c), the ED provided public school administrators, teachers, and parents with a wealth of guidance and knowledge on the application of this effort to offer single-sex classes, schools, and programs. The ED explained that Secretary of Education Margaret Spellings was amending the Title IX regulations

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Though subsection (a)(23) is the official, substantive provision authorizing public single-sex schools and programs, subsection (c) is significant for the prospective assurance the government declared it would provide to parties interested in gaining more detail on the application of the substantive provision. See U.S. Department of Education, Secretary Spellings Announces More Choices in Single Sex Education Amended Regulations, http://www2.ed.gov/news/pressreleases/2006/10/10242006.html (last modified Oct. 25, 2006) (detailing the issuance of the final guidelines and regulations pertaining to subsection (a)(23)).

The ED provided this assurance because it understood that while the single-sex education provision in NCLB may be brief, the conversation and legislation surrounding this clause would be anything but marginal. See id. Issuing guidelines from the Secretary of Education, offering opportunities for the public to submit feedback on the provision, and creating easy-to-follow roadmaps for the regulations concerning the provision are only some of the steps the ED has taken to provide the public with as much information relating to (a)(23) as possible. See U.S. Department of Education, Department to Provide More Educational Options for Parents, http://www2.ed.gov/news/pressreleases/2004/03/03032004.html (last modified Mar. 10, 2004) (permitting people to submit and view comments on the proposed legislation during a “45-day public comment period”); see also U.S. Department of Education, Office for Civil Rights, Fiscal Year 2005, available at www2.ed.gov/about/reports/annual/ocr/annrpt2005/annrpt2005.doc (last modified Nov. 1 2007) (“The Office for Civil Rights (“OCR”) received approximately 5,860 comments on the proposed amendments.”); see also U.S. Department of Education, A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act, http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf (last modified Mar. 15, 2010) (clarifying the reform efforts that will be undertaken by the White House during the Obama Administration).

73 See supra note 72. See also infra notes 264-66 and accompanying text (demonstrating different types of single-sex instruction that schools can offer).
on three particular grounds. 74 Firstly, the purpose of the amendments was to “clarify and modify” Title IX obligations, specifically on ways public elementary and secondary institutions could offer single-sex extracurricular activities, classes, and schools. 75 Furthermore, the amendments aimed to “expand flexibility” for those providing single-sex education options. 76 Finally, and arguably most significantly, the ED purposed to “explain how single-sex education may be provided consistent with the requirements of Title IX.” 77

Now, rather than forbid publicly funded single-sex instruction other than in “exceptional circumstances,” with the final 2006 regulations, the federal government allows such instruction to enhance variety in educational options and to meet particular needs of students. 78 Rejecting objections that single-sex programs would

74 See Nondiscrimination, supra note 71, at 62, 530 (stating that Secretary Spellings’ amendments intended to (1) clarify Title IX requirements, (2) expand flexibility for implementers, and (3) explain how public school administrators can offer single-sex options while still remaining in compliance with Title IX).

75 See id. For example, Secretary Spellings’ amendments required the participating schools to conduct periodic evaluations of its single-sex programs, to ensure the schools implement courses with a legally legitimate basis, rather than “rely[ing] on overly broad generalizations about the different talents, capacities, or preferences of either sex.” 34 C.F.R. § 106.34(b)(4)(i) (2011).

76 See Nondiscrimination, supra note 71, at 62, 530. In the effort to “expand flexibility,” the amendments announced that Title IX’s proscription on conducting classes and activities separately on the basis of sex was inapplicable to programs such as contact sports in physical education courses, human sexuality classes, and choirs. 34 C.F.R. § 106.34(a)(1)-(2), (3).

77 See Nondiscrimination, supra note 71, at 62, 530. The burden of thorough compliance did not rest solely on the shoulders of the participating schools. See id. The amendments highlighted the “non-exhaustive list of factors” the ED must consider in resolving whether or not the single-sex classes and extracurricular activities were “substantially equal.” See id. at 62, 530-31. The factors to be considered include “the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books . . . the [faculty and staff] qualifications . . . the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as [faculty] reputation.” 34 C.F.R. § 106.34(b)(3) (2011).

78 See MINOW, ET. AL., supra note 68 (citing Nondiscrimination, supra note 70, at 11, 276); see also JOHN D. HURST & INGRID M. JOHANSEN, THE CHANGING LANDSCAPE OF SINGLE SEX EDUCATION, Univ. of N.C. at Chapel Hill, Sch. of Gov., 4 (2006), http://www.sog.unc.edu/pubs/electronicversions/slb/ slbspr06 article1.pdf. This publication provides a succinct summary of the changes made to Title IX concerning single-sex instruction:
reinforce negative gender stereotypes, the ED, in the final amendments, specified that participating school districts do not have to provide a comparable alternative for members of the other sex. The ED asserted that since the focus of the single-sex provision was on improving educational outcomes, "justifiable diversity should apply to the types of education options, not merely to the characteristics of the members of a particular class." The ED sanctioned the final 2006 amendments while acknowledging that there was, and has continued to be, a fierce debate among parents, educators, behavioral experts, and the like on the efficacy of single-sex instruction. Nonetheless, in providing official statements about, guidelines for, and regulations to NCLB's single-sex provision, the ED not only attempted to assuage potential misgivings about the provision, it also purposed to bolster public support for a unified federal effort to "spur change within a seemingly failing education system."

Bipartisan support for NCLB was robust from the outset, and the federal endorsement of the potential prospects accompanying the

1. Single-sex classes and extracurricular activities are permissible if they are
   a. justified by an important governmental objective, which is defined to include
   b. educational diversity, and
   c. service to the identified needs of particular students and are
   d. accompanied by substantially equal coeducational opportunities for students of the excluded sex.

2. Single-sex schools are permissible without an important governmental objective, as long as a substantially equal coeducational alternative is available to students of the excluded sex.

79 See id. (citing Nondiscrimination, supra note 71, at 62, 533-34).
80 Id. (citing Nondiscrimination, supra note 71, at 62, 534-535).
81 See Nondiscrimination, supra note 71, at 62, 532.
82 Blue, supra note 5. See also, Nondiscrimination, supra note 71, at 62, 532.
83 See Frederick M. Hess & Chester E. Finn Jr., Introduction to No Remedy Left Behind: Lessons from a Half-Decade of NCLB 4, 6 (Frederick M. Hess & Chester E. Finn Jr., eds., AEL Press 2007) (noting that "[a]fter nearly a year of negotiations, administration and congressional leaders hammered out a bipartisan measure that commended support not only from most Republicans but also from such prominent Democrats as Massachusetts Senator Edward M. Kennedy and California Representative George Miller," who were the chairmen of Congress' two education committees in 2007); McGUINN, supra note 23, at 177 ("The vote to approve the conference report of NCLB was overwhelming and bipartisan in both
single-sex provision was no different. While recognizing the potential for serious controversy surrounding such legislation, the ED remained undaunted, reassured by its systematic reassurance efforts. Strengthened by these candid clarification efforts, the ED asserted that the final regulations were not in place to trounce the constitutional rights of public school students. Rather, they were designed to permit each participating school district to "make an individualized decision about whether single-sex educational opportunities will achieve the recipient’s important objective and whether the single-sex nature of those opportunities is substantially related to achievement of that important objective consistent with the nondiscrimination requirements of these regulations."

Recently, the federal government has made a fair attempt to reenergize general federal support for NCLB. The Obama Administration’s proposal for “a sweeping overhaul of President
Bush’s signature education law” has also spurred a parallel effort, once again, to “attract bipartisan support.”8⁹ Even so, years after the option for same-gender education was proposed in 2001, public opinion of the provision still reflects a wealth of dissension and vacillation.⁹⁰ On one hand, proponents make a rather convincing case for the potential and existing benefits of single-sex elementary and secondary schooling options.⁹¹ However, on the other side, the opposition raises significant and valid points of contention that threaten to poke sizeable holes in the fundamental line of reasoning of subsection (a)(23) advocates.⁹²

B. Current Implementation of NCLB’s Title IX Amendments

1. Procedural Safeguards

The single-sex provision of NCLB “mandates research-based innovative instructional strategies,” prohibiting reckless or last-minute implementation.⁹³ In an effort to adhere to the principles and requirements of Title IX and the U.S. Constitution, while still allowing “additional flexibility in providing single-sex classes, extracurricular activities, and schools in elementary and secondary education,” the ED incorporated certain procedural safeguards that the “recipients” must follow.⁹⁴

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⁸⁹ Dillon, supra note 88.

⁹⁰ See Rosemary C. Salomone, Single-Sex Programs: Resolving the Research Comundrum, 108 TCHRS. C. REC. 778, 781 (2006) (“This contemporary revival of publicly supported single-sex education has proven highly controversial. In fact, it has provoked rancorous debate plumbing the depths of gender, race, and political ideology . . . [and] it has created a deep rift among those who have championed the cause of equal educational access for women.”).

⁹¹ See infra notes 169-86 and accompanying text.

⁹² See infra notes 193-218 and accompanying text.

⁹³ Bradley, infra note 193 (referencing Katherine Bradley, Don’t Just Do It!, EDUC. ARTICLES (9 Sep 2007, 1:05 AM), http://www.edarticle.com/differentiated-learning/dont-just-do-it.html. The ED recognizes the danger of having schools implement single-sex programs without first completing “quality current, intensive and high quality research utilizing the public school environment.” Id.

⁹⁴ Nondiscrimination, supra note 71, at 62,530, 62, 533. For instance, “[i]n April 2004, OCR issued a “Dear Colleague” letter reminding all school districts to designate a Title IX coordinator, adopt and disseminate a nondiscrimination policy,
Firstly, the Amendments require that the recipients garner specific information that indicates single-sex instruction will benefit the students. However, the ED does not define a particular data set in the regulations, recognizing that “recipients that implement single-sex education will have differing objectives addressing differing student populations.” Secondly, since the recipients have an ongoing duty to comply with Title IX regulations, the ED states that they must “have a justification—in other words, an important objective that is substantially related to the sex segregation to achieve the objective.” To prevent the ED from finding that “the sex segregation is outright sex discrimination and violates Title IX,” the justifications must meet the standards established by the Supreme Court, which resolved that the “justification must be genuine, not hypothesized or invented post hoc in response to litigation’ and that ‘it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” Thirdly, while the final regulations do not necessitate single-sex education, they allow “a recipient that has determined that single-sex education and put grievance procedures in place to address complaints of discrimination on the basis of sex, as required by the regulations implementing Title IX.” Annual Report to Congress, supra note 72, at 15.

Amy. R. Rigdon, Comment, Dangerous Data: How Disputed Research Legalized Public Single-Sex Education, 37 STETSON L. REV. 527, 544 (2008), available at http://justice.law.stetson.edu/lawrev/abstracts/PDF/37-2Rigdon.pdf. The ED introduced this opening safeguard to address the comments the ED received, which “expressed concern that increased flexibility to provide single-sex education might result in a reversion to sex-based stereotypes or roles.” Nondiscrimination, supra note 71, at 62, 533.

Nondiscrimination, supra note 71, at 62,533.

Rigdon, supra note 106. The ED incorporated the second safeguard in response to public comments that expressed objections to the regulation amendments, which asserted that “the amendments were inconsistent with standards pertaining to sex discrimination under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution,” adding that “recipients who implemented programs consistent with these regulations might be subject to litigation.” Nondiscrimination, supra note 71, at 62, 532.

Rigdon, supra note 106.

Nondiscrimination, supra note 71, at 62, 534 (quoting Virginia, 518 U.S. at 533). In addition, the ED also determined that the use of “overly broad sex-based generalizations in connection with offering single-sex education would be sex discrimination” also does not qualify as a genuine justification. Id. at 62, 533-34.
may be beneficial for some portion of its student population to offer single-sex education consistent with the requirements in these regulations. Finally, to assuage those general fearing that the Title IX amendments may bleed into non-instructional spheres via an unanticipated loophole, the ED adopted the last safeguard, which explicitly states:

These regulations do not change the prohibitions on sex discrimination in employment, or any other area not specifically addressed in these amendments, in the Title IX regulations. Among other things, the Title IX regulations prohibit recipients from making job assignments on the basis of sex, § 106.51(b)(4), and from classifying jobs as being for males or females, § 106.55(a). Both of these provisions would prohibit schools from assigning teachers to single-sex classes based on their sex.\textsuperscript{101}

With the distribution of the subsection (c) guidelines and the subsequent regulations under 34 C.F.R. § 106.34, along with the incorporation of such detailed safeguards, successful implementation was a given, right?

2. States’ Varied Application

The large amount of available instructional and informational material seemed to indicate that so long as recipients made a bona fide attempt to follow the law, implementation would be a smooth and successful process. However, as with any large-scale endeavor, a smooth, well-received transition was not experienced by all who participated.\textsuperscript{102} Predictably, early efforts to establish single-sex

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\textsuperscript{100} Id. at 62, 534; see also Rigdon, supra note 106, at 544-45. This safeguard is included to allay the concerns of those who commented on the socialization consequences students may face as a result of single-sex educational environment. Nondiscrimination, supra note 71, at 62, 534.

\textsuperscript{101} Id.

programs for public education in a post-VMI society were anything but effortless—let alone successful—for some recipients. And from these varying ventures came an assortment of results that encompassed successes, failures, and even those enterprises which remain pending.

Although it is a general practice to give the bad news before the good news, I am doing the opposite and am exploring implementation in the order addressed in the preceding paragraph: successes, failures, and pending cases. Concerning successful implementation, various public schools have already exhibited notable gains from properly instituted single-sex programs—particularly, encouraging accounts of academic turnaround. The


103 See infra notes 193-218 and accompanying text (providing detailed reports of the turbulence that accompanied many implementation efforts).

104 I must preface my report on schools’ diverse implementation by stating that I incorporate a “no difference” result under the “failure” category. Though some may argue that these belong in a separate category of their own, I regard these as failures because the entire purpose of the single-sex amendments is to effect change. Stagnation is never a positive option when it concerns the academic development of students within the public education system. Therefore, I view the results in a black-or-white manner: either the school realizes some gain (no matter how minute it may seem), or implementation was a failure. All that being said, I am exempting pending outcomes from my rudimentary success/failure configuration.

105 See Jim Rex, Single-Gender Classrooms: In South Carolina, Schools Flock to Offer Separate Classes with Promising Early Results for Students, EDUCATION.COM, Sept. 1, 2009, 1, 3, http://www.education.com/reference/article/single-gender-classrooms-south/ (“In South Carolina, single-gender education has been a win-win-win choice. It has invigorated teachers, engaged students and involved parents . . . Overall, South Carolina schools are reporting increased academic performance and decreased
Young Women’s Leaders School of East Harlem (“TYWLS”) serves as the quintessential model for the successful execution and continuance of an exceptional single-sex public school.\textsuperscript{106} Founded in 1996 as one of the first single-sex public schools in more than thirty years, TYWLS affords “low-income students of color an outstanding college-prep education [in] a personalized, dynamic, hands-on learning environment.”\textsuperscript{107} TYWLS boasts many academic successes, including an impressive 100% graduation and college acceptance rate for ten consecutive years.\textsuperscript{108} Inspired by the

tremendous advancements of the original TYWLS, the Young Women's Leadership Foundation has since established more schools in Queens, the Bronx, Dallas, Philadelphia, and Chicago.\footnote{A.L. Gordon, \textit{Out \& About}, N.Y. SUN, Sept. 28, 2006, \url{http://www.nysun.com/out-and-about/out-about-2006-09-28/40524/}.}

On the opposite coast, Thurgood Marshall Elementary School in Seattle\footnote{Although unrelated to the topic of this comment, in the spirit of full disclosure, I must point out that Thurgood Marshall has been featured more recently by many news sources for rather suspect activities. See, e.g., Nina Shapiro, \textit{Thurgood Marshall Elementary Loses $200,000 as Affluent, “Gifted” Students Move In}, \textit{SEATTLE WEEKLY}, Mar. 16, 2010, \url{http://blogs.seattleweekly.com/dailyweekly/2010/03/thurgood_marshall_elementary_1.php}; Susan Kelleher, \textit{Daughter Taken out of Class at Thurgood Marshall Elementary; Parents Have Lots of Questions}, \textit{SEATTLE TIMES}, June 4, 2010, \url{http://seattletimes.nwsource.com/html/localnews/2012035349_classroom04m.html}.} is another example that embodies the spirit of academic excellence recipients hope for upon adopting proper, diligent implementation efforts.\footnote{The significance? I want to make it clear that I am only holding Marshall as a fine example of successful single-sex instruction—\textit{not} in any other context.} Former Marshall Principal Benjamin Wright was instrumental in turning around this once-failing school.\footnote{See Leonard Sax, \textit{The Promise and Peril of Single-Sex Public Education}, 24 EDUC. WEEK 48, 48, Mar. 2, 2005, \url{http://www.singlesexschools.org/edweek.html} (“Seattle’s Thurgood Marshall Elementary School used to be a failing school in one of that city’s poorest neighborhoods . . . . The program at Thurgood Marshall has now achieved consistently high results for four consecutive years.”).} In 2001, only one year after the school switched to a single-sex format, “the percentage of boys meeting the state’s academic standards rose from 10 percent to 35 percent in math and 10 percent to 53 percent in reading and writing”\footnote{See \textit{id.} (“Then the school’s energetic principal, Benjamin Wright, reinvented the school as a dual academy: girls in all-girls classrooms, boys in all-boys classrooms.”).} and “discipline...
problems plummeted.\textsuperscript{114} Some nine years later, Marshall is still faring well academically, as the standardized test scores remain above the Washington average.\textsuperscript{115}

Although recent unsuccessful initiatives do not seem to be as numerous, the press and other interested parties seem equally as dedicated to publishing the less-than-stellar implementation attempts that failed to flourish quite like TYWLS has—as well as the attempts that crashed and burned...terribly.\textsuperscript{116} For six years, Silvestri Junior High in Las Vegas separated its seventh-grade students by sex for reading classes “in a bid to boost student achievement.”\textsuperscript{117} However, since the Clark County School District failed to assess, evaluate, or in any way research the consequences of dividing the sexes from 2003 until the close of the 2008-09 curricular year, none of the district officials seemed to know if initiative made any progress for the school.\textsuperscript{118} The lack of investigation and documentation for the Silvestri single-sex venture led many to believe “the six-year experiment may have been for naught.”\textsuperscript{119} Due to the data deficiency


\textsuperscript{116} See infra notes 117-25 and accompanying text (describing the infamous failure of the California Pilot Program).


\textsuperscript{118} See id. (“For the 2008-09 academic year, Silvestri was one of the 12 campuses that offered such classes to try to close achievement gaps between boys and girls in math, reading, and science.”).

\textsuperscript{119} Id. The director of Clark County school district’s instruction unit, Kaweeda Adams, disclosed that no record of any past reviews of the Silvestri program could be located by her office. \textit{Id}. Moreover, the lack of formal evaluation by the school district was even apparent to the school board’s Vice President Carolyn Edwards, who emphasized that “[y]ou don’t try anything experimental without having a plan to collect data and determine whether it’s working or not . . . [a]fter six years you would think there would be something to show for it.” \textit{Id}.
and budget and staffing cuts, four Clark County schools, which included Silvestri, abandoned implementation efforts by 2009.¹²⁰

The single-sex initiative attempted by Greene County in Georgia failed for slightly dissimilar, yet related, reasons.¹²¹ The school district dumped the county-wide initiative to separate all four of its schools by sex after facing strong opposition from irate parents who were outraged that they were not consulted by the school board ahead of time.¹²² Greene County would have been the first school district in the nation to adopt an entirely single-sex program.¹²³ However, as school board member Velicia Cobb recognized, parental feedback is an essential component of the data recipients must gather before instituting any single-sex programs.¹²⁴ Thus, at an April 14, 2008 meeting, the school officials formally dropped the plan, instead electing to ask parents, educators, and school staff members for their input before moving forward with any future single-sex program.¹²⁵

There are also a growing number of single-sex initiatives that neither qualify as a definite “success” nor an explicit “failure”—in large part because they have been so recently inaugurated.¹²⁶ In

¹²⁰ See id.; see also Micki Steele, Berkley Middle School Tests Single-Sex Classes, DETROIT NEWS, Jan 4, 2011, http://detnews.com/article/20110104/SCHOOLS/101040368/Berkley-middle-school-tests-single-sex-classes (reporting that due to “staffing and financial issues,” school officials canceled sex-segregated classes for eight-grade students attending Berkshire Middle School in Michi gan’s Birmingham school district).

¹²¹ See infra note 124 (affirming that procuring parental input is a vital part of the pre-implementation process).


¹²³ See id.

¹²⁴ See id. (“‘I think this is what should have been done first,’ said Cobb, who voted in favor of the conversion last month despite reservations. ‘Whenever you’re trying to implement a plan like that at that magnitude, you need parents’ buy-in for it to be successful.”’).

¹²⁵ See id.

¹²⁶ See, e.g., Debate: Single-Gender Classrooms Show Promise, GASTON GAZETTE, Jan. 15, 2011, http://www.gastongazette.com/articles/debate-54308-single-attempted.html (“Students’ performance measures will tell the tale when it comes to deciding whether single-gender education is a solid path for the future or just another in the long line of public education experiments.”); Rivera, infra note 233 (“If at the end of the year we find that one group is working out better than the
November 2010, the Associated Press reported that Normandy High School in St. Louis had recently converted to single-sex classrooms as part of effort to “turn around a district that could lose its accreditation because of low test scores and other academic woes.”

Normandy school officials announced that they will evaluate test scores to determine whether or not to expand the single-sex method within the school. As part of an applied academic study, Anderson Middle School in Berkley, Michigan also commenced a pilot program in the fall of 2010 to separate two eighth-grade language arts classes by gender. Educators are hopeful for the scholastic possibilities at Woodhill Elementary in Gaston County, North Carolina, which has just started a single-sex class this year.

For Westinghouse High School, a Pittsburgh, Pennsylvania school, the district is planning to instate by spring a curriculum that offers professional training with a particular concentration on single-sex instruction. Principal Pamela Odom and her staff recently other, then I don’t think we’d continue to subject one cohort to being coed,’ [Excel Charter Academy Principal Patricia Mora] said. ‘But I honestly don’t know what we’ll find.’


See Steele, supra note 120. Similar to the Normandy program, Oakland County school administrators plan to “compare test scores from the single-sex classes with those from two of five co-ed eighth-grade classes at the end of the school year, based on benchmarks set in the fall.” Id. Anderson principal, Vince Gigliotti, already reports that early results show promise for the single-sex program, with students in both classes stating that they like their “55-minutes of gender-specific instruction.” Id.

See Amanda Memrick, Gaston Schools Experiment with Single-Gender Classrooms, GASTON GAZETTE, Jan. 15, 2011, http://www.gastongazette.com/articles/doesn-54304-grader-erby.html. Teacher Tonya Stone said that the boys in her class are already exhibiting higher math assessment scores. See id. Stone and other instructors at Woodhill plan to compare their academic and social progress following the second two-month grading period. See id.

See Jodi Weigand, Westinghouse’s Single-Gender Academies to Bolster Opportunity, PITTSBURGH TRIBUNE-REVIEW, Dec. 19, 2010,
celebrated the good news concerning Clary Middle School in Syracuse: the school board voted that in the fall of 2011, the academy will become the first gender-separate public school in the Syracuse school district.\footnote{See Maureen Nolan, \textit{Syracuse School Board Votes to Put Boys and Girls in Separate Classes at Clary Middle School}, \textit{The Post-Standard}, Jan. 12, 2011, http://www.syracuse.com/news/index.ssf/2011/01/syracuse_school_board_votesto_3.html. Unlike some of the schools that switched to a single-sex curriculum, Clary’s academic performance has actually been improving in the past few years. See Maureen Nolan, \textit{Clary Middle School in Syracuse Looks to Separate Classes for Boys and Girls}, \textit{The Post-Standard}, Dec. 26, 2010, http://www.syracuse.com/news/index.ssf/2010/12/clary_middle_school_in_syracus.html. Principal Odom affirmed that the move to same-gender academies is in place to “push the students to the next level.” \textit{Id.} (“We want to do all that we can to have them focus on academics, and this is why we feel separating boys and girls and having a boys and girls academy is going to be beneficial for our students.”).}

These pending cases play an important role in the larger single-sex education debate not only for the additional information they add to the pool of available data, but also for the “swing vote” potential of these pending programs.\footnote{See, e.g., Sara Lenz, \textit{Should Single-Sex Classrooms Be Offered in Utah Public Schools?}, \textit{Deseret News}, Feb. 2, 2011, http://www.deseretnews.com/article/700106421/Should-single-sex-classrooms-be-offered-in-Utah-public-schools.html (illustrating the role successful single-sex initiatives play in persuading coeducational public school districts to adopt single-sex programs); Pauline Vu, \textit{Single-Gender Schools on the Rise}, \textit{Stateline.Org}, Sept. 19, 2006, http://www.stateline.org/live/details/ story?contentId=142575 (“The studies and promise of flexibility touched off a surge of new single-gender schools . . . schools experimenting with single-sex education apply it in some – but not all – courses or classes.”).} The data reveals a significant increase in the number of public schools offering single-sex programs since the passage of NCLB.\footnote{See Lenz, \textit{supra} note 133 (“[T]hirty-nine states and the District of Columbia have at least one school if not a dozen or so that offer single-gender classes. Some of the most offerings are in South Carolina, Florida, Kentucky, New York, Ohio and Texas.”).} The data also shows that while only a
dozen public schools provided single-sex classes in 2002, as of January 2011, at least 524 public schools offer single-sex instruction options.\textsuperscript{135} Additionally, available research offers optimistic statistics concerning the growing number of successful single-sex initiatives.\textsuperscript{136} As more schools introduce gender separate programs, the outcomes of these ventures serve to inform parents, teachers, and school officials on how to implement single-sex instruction at public schools.\textsuperscript{137} Furthermore, the initiatives may also help impassioned individuals on both sides of the debate reach a consensus on the proper role for single-sex education in the nationwide effort to rehabilitate the public education system.\textsuperscript{138}

\textsuperscript{135} See id.

\textsuperscript{136} See McGrory, supra note 102, at 2. Woodward Avenue Elementary in Florida saw positive results in the single-sex classrooms: “In the co-ed classrooms, 59 percent of girls passed the FCAT. In the single-gender classrooms, the number was 75 percent. The split was even wider for boys. In coed classrooms, 37 percent of boys earned passing scores. In single-gender classrooms: 86 percent.” Id. Whittemore Park Middle School, located in Conway, South Carolina, “reported students in 7th grade, which offered single-gender classes for the first time last year, had only 4 F’s compared to more than 50 F’s during a comparable time frame the previous school year.” Rex, supra note 105, at 2. There was also a reported increase in the percentage of fifth graders who scored “proficient or advanced” on state assessments at Geiger Elementary in Fairfield County, South Carolina: “Boys improved in math from 16.5 percent proficient/advanced in coed classes to 31.3 percent in single-gender classes. Girls in single-gender classrooms increased their proficient/advanced level in reading from 19 percent to 42 percent.” Id. Additionally, South Carolina’s Kingstree Junior High in Williamsburg County reported continuing scholastic improvement two years after using single-sex instruction: “The percentage of 7th-grade males scoring below basic on the state tests dropped from 55 percent in 2006 (the last year with only coed classrooms) to 30 percent in 2008. Girls in 7th grade improved from 25 percent below basic to only 11 percent over the same period.” Id.


\textsuperscript{138} See Salomone, supra note 90, at 796-98. (noting that although educators appear to comprehend how much there is still to be learned about single-sex public education and seem “eager to engage in well-intentioned and open dialogue . . . at some point, these insights [may] become sufficiently pointed, consistent, and
States’ implementation endeavors involve the good, the bad, and the to-be-determined. But why such varied outcomes? Why are some schools able to realize positive results when they initiate single-sex programs or classes, while others experience little to no improvement, or even academic, behavioral or environmental decline?139 As author Leonard Sax explains, the data appears to establish that professional development has a critical function: “At the schools where single-sex classrooms were not effective, teachers received no specific training in best practices for gender-specific teaching. Putting a teacher in a single-sex classroom for which she is not suited by temperament or training may be a recipe for failure.”140 Although public reception of such implementation efforts runs the gamut from genuine hope to utter fury, the scales appear to be tipping in the favor of hope and promise.141 However, school officials compelling to resolve the current debate or to push public sentiment decidedly in either direction” because amidst all of this politically charged hullabaloo, advocates and opponents must “remain mindful that this is all about children and not ideology”).

139 See Sax, supra note 111.

140 Id. See also, Kimberley J. Jenkins, Comment, Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools, 47 WM. & MARY L. REV. 1953, 2006, n.275 (2004), available at http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1260&context=wmlr (“[P]erhaps most important, many of the authors find that both single-sex and coeducational schooling can provide possibilities or constraints to students’ achievement or future opportunities, and these outcomes depend to a great degree on how these forms of schooling are implemented.”) (quoting Amanda Datnow & Lea Hubbard, Introduction to GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING [hereinafter GENDER IN POLICY AND PRACTICE] 3, 7 (Amanda Datnow & Lea Hubbard eds., 2002).

141 See U.S. Department of Education, Early Implementation of Public Single-Sex Schools: Perceptions and Characteristics (2008), 29, available at http://eric.ed.gov/PDFS/ED504174.pdf (revealing that the ED’s “survey data from 478 teachers in 19 single-sex schools and similar data from a subsample of 723 coed school teachers selected from the SASS database suggest that school climate is somewhat more positive in single-sex schools than in coed schools.”). See, e.g., S.C. Survey Shows Single Gender Education Improves Student Performance, HUFFINGTON POST, Dec. 1, 2010, http://www.huffingtonpost.com/2010/12/01/sc-survey-shows-single-ge_n_790630.html. The survey results that included “[r]oughly 7,000 students, 1,120 parents, and 760 teachers from 119 different elementary, middle, and high schools around the state” illustrated some of the positive effects of single-sex instruction: “65 percent of students indicated that the classes increased their academic success and attitudes toward learning.”
intending to initiate single-sex instruction must not disregard the procedural safeguards incorporated by the ED, for ill-planned, uninvestigated implementation does not only bode legal consequences, it also harms the very students the ED had in mind to benefit. Nonetheless, educators, parents, administrators and policymakers on all sides of the debate must appreciate the precarious perch upon which single-sex public education is positioned, heeding the parameters established by the law and, just as importantly, learning from previous failures.

3. The California Catastrophe

The 1997 California Pilot Program ("CPP") in fact stands as one of the leading "failure" exemplars under the single-sex public education paradigm. With the growing number of successful single-sex education models, why elect to spotlight California’s “brief love affair with single-gender public education”? I offer three fitting reasons: 1) "everyone loves a good train wreck, literal or

Furthermore, “75 percent of students said that the classes improved their self-confidence.” Id. Finally, “80 percent of parents said that single sex classes were a factor in improving their childrens’ performance in school.” Id.

142 See Nolan, Clary Middle School, supra note 132 (“If single-sex education is not done properly, results can be bad for boys and girls, and good professional development for teachers is critical.”); Sadker, infra note 199 (“Without safeguards requiring ‘equitable’ schools, we may once again create two sets of schools, separate and unequal. This gender gap in educational spending is a trend we should reverse, not promote, and Title IX is a law we should strengthen, not weaken.”).

143 The serious degree to which California failed in implementing single-sex public schooling options is partly why I am examining this situation under a microscope. However, I also chose to look closer at the transpired events because, analysis reasons aside, as a born-and-raised “California girl” and an appreciative product of its public education system, I hold a particular interest for California public schools.

144 See Debra Viadero, Study Cites Flaws in Single-Sex Public Schools, 20 EDUC. WEEK 9, 9 May 30, 2001 (“California’s precedent-setting experiment to set up separate public schools for girls and boys largely ended in failure.”).

otherwise, 146 2) this monumental flop proves the necessity of the ED’s post-NCLB guidelines, regulations and safeguards, 147 and 3) most importantly, the CPP endures as an invaluable “never emulate” teaching resource for current and future recipients. 148

Two years after Governor Pete Wilson proposed single-sex instruction as a way to expand academic options for parents, California lawmakers reserved $5 million to stimulate gender-separate initiatives in schools across ten school districts. 149 However, only six districts applied for the program and twelve schools participated. 150 Although “each district hoped to address the problems unique to its student population[, w]hether the issue was low self-esteem, truancy, or disruptive behavior,”151 a 2001 Ford

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147 See, e.g., Meghan O’Rourke, Single-Sex Ed 101: Welcome to the Latest Educational Fad, SLATE, Nov. 15, 2006, http://www.slate.com/id/2153505/ (“And a 2001 study of pilot single-sex programs in California demonstrated what can happen when programs are badly implemented: In this case, unconscious teacher bias inadvertently accentuated more trivial stereotypes as well, with girls encouraged to be ‘concerned with their appearance,’ and boys encouraged to be ‘strong.’”).

148 See Sadker & Zittleman, infra note 210, at 1 (“Did students benefit from the experiment? It’s hard to say, because . . . planning and evaluation were absent . . . The California experiment was a valuable lesson in how not to go about educational change.”).

149 See Asimov, supra note 145. The attorneys for the California Department of Education first had to work out a way around the Equal Protection Clause and the Title IX prohibition of sex discrimination in schools. See id. Therefore, they agreed that for each single-sex school that opened within a district, a corresponding school for the other sex had to open, as well. See id. Moreover, each school had to spend evenly on “facilities, staff, books, equipment, curriculum and such extracurricular activities as sports.” Id.

150 See Elizabeth Zwerling, California Study: Single-Sex Schools No Cure-All, WENEWS, June 3, 2001, http://www.womensenews.org/story/education/010603/california-study-single-sex-schools-no-cure-all (disclosing that the six participating school districts were in East Palo Alto, San Francisco, Stockton, Dorris and San Jose in Northern California, and Fountain Valley in Southern California). Of the six districts that participated in the CPP, only East Palo Alto’s San Francisco 49ers Academy still operates a single-sex academy today. Viadero, supra note 144.

151 AMANDA DATNOW, LEA HUBBARD & ELISABETH WOODY, IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR? LESSONS FROM
Foundation study determined the experiment to be a failure—not because the concept of single-sex instruction was a bad initiative, but because: “the programs were often badly carried out, with teachers poorly trained in gender issues and little state funding [and] . . . the schools had closed too soon to know if girls and boys benefited from the separate classrooms.”

Researching Professors Amanda Datnow, Lea Hubbard, and Elisabeth Woody interviewed over 300 participants and uncovered rather intriguing information: “in practice, the academies inadvertently reinforced gender stereotypes, squandered opportunities to address issues of gender inequity, and exposed students to teasing from peers in co-educational classes.”

The Ford report concluded that California’s single-sex pilot study was “not an ideal test case of single gender public education.” As the results of the study show, a combination of poor planning, deficient implementation, and careless follow-through contributed to the failure of the CPP. The CPP embodies this observation, illustrating why contemporary educators, parents, and debaters cannot allow ideology and political agendas to eclipse the practical

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152 Asimov, supra note 145. See also Zwerling, supra note 150 (identifying additional problems with the CPP: “the lack of a gender equity-driven agenda and the overriding goal of helping primarily at-risk, low-achieving students instead of . . . empowering all students, . . . short time-lines [and] . . . the lack of proper student recruitment and advertising to communities”); see, e.g., DATNOW, HUBBARD & WOODY, supra note 151, at 71 (“We found that when single gender academies tailored curriculum and instruction to meet the different educational needs of boys and girls (as the legislation suggests), they did not, despite their best intentions, offer equal educational opportunity to both boys and girls.”).

153 Viadero, supra note 144. See, e.g., DATNOW, HUBBARD & WOODY, supra note 151, at 55 (“Students consistently complained about the teasing that they experienced . . . . Derogatory comments included being called ‘preppy’ or ‘snotty’. . . . Single gender academy students were also labeled as ‘bad’ kids, particularly because most of the schools targeted ‘at-risk’ students.”).

154 DATNOW, HUBBARD & WOODY, supra note 151, at 72.

155 See id., at 5, 73 (“The success of California’s pilot program was undermined by implementation challenges . . . Policies for single gender public schooling need to be more carefully crafted and need to provide an infrastructure of support.”).
academic advancement of public school students.\textsuperscript{156} Although the CPP predates NCLB and the 2006 amendments, advocates, critics, and recipients now understand that this program also serves as a concrete example of the consequences that can and will occur should school officials fail to heed the guidelines and procedural safeguards the ED adopted in order to prevent a future “California disaster.”\textsuperscript{157}

\textit{C. The “Pro” Camp}

“Educational research, though it’s ongoing and shows some mixed results, does suggest that single-sex education can provide some benefits to some students, under certain circumstances.”\textsuperscript{158} Oddly enough, this peculiarly ambiguous declaration from Assistant Secretary for Civil Rights Stephanie Monroe is the cornerstone upon which advocates have built their case in support of NCLB’s single-sex provision.\textsuperscript{159} However, an enlightened understanding of the “whats” and “whys” of pro single-sex education arguments must first be preceded by an exploration of the “whos” that are in favor of the latest legislative push for single-sex schooling options.

Allies and champions of single-sex instruction have emerged from miscellaneous sources.\textsuperscript{160} One prominent proponent of single-sex public education is the National Association for Single Sex

\textsuperscript{156} See id., at 70 (“In sum, the single gender schools in this study struggled to survive under circumstances that in many ways are symptomatic of the public educational system in general . . . . Power and politics dictated the course of events that followed.”).

\textsuperscript{157} See supra note 148.


\textsuperscript{159} See \textit{About NASSPE, NAT’L ASS’N FOR SINGLE SEX PUB. EDUC.}, http://www.singlesexschools.org/home-nasspe.htm (last visited Feb. 6, 2011) (“We do NOT believe that every child should be in a single-sex classroom. We DO believe that every parent should have a CHOICE of formats, single-sex vs. coed.”); Baumeister, \textit{infra} note 185 (“Many boys and girls do fine with coed schools. But some do better in same-sex schools.”).

\textsuperscript{160} See \textit{infra} notes 160-67.
Public Education ("NASSPE"). Founded in 2002 by Sax, NASSPE identifies itself as a non-profit organization that is "dedicated to the advancement of single-sex public education for both girls and boys." Nationally known for being "committed to a highly controversial pedagogy," NASSPE not only endeavors to increase awareness of NCLB's single-sex public education provision, it aims to educate parents, teachers, and school districts on proper single-sex schooling methods.

In an editorial effort to puzzle through the profusion of research data concerning single-sex education, Salomone identifies

162 About NASSPE, supra note 159. See also About Leonard Sax, MD, PhD, NAT'L ASS'N FOR SINGLE SEX PUB. EDUC., http://www.singlesexschools.org/home-leonardsax.htm (last visited Feb. 6, 2011).
164 See About NASSPE, supra note 159. NASSPE helpfully summarizes its position on single-sex public education as the following:

NASSPE has three major missions:

1) To provide professional development opportunities for teachers, sharing the latest research about different teaching strategies for girls and boys . . .

2) To serve as a resource for teachers, parents and administrators considering single-sex educational programs . . .

3) To provide a clearinghouse for relevant facts and information about public schools and classrooms in the United States, as well as to promulgate new research.

Id.

With objectives that roughly align with NASSPE's missions, the Gurian Institute, founded by educator and author Michael Gurian, is another prominent organization that not only supports single-sex classrooms, institutions, and programs, it also promotes the benefits of the proper application of single-sex instruction. See Introduction to MICHAEL GURIAN & KATHY STEVENS, BOYS AND GIRLS LEARN DIFFERENTLY!: A GUIDE FOR TEACHERS AND PARENTS 1-4 (Jossey-Bass rev. ed. 2001). Based on a pilot research program that practically applied Gurian's "initial gender/brain-based child development theory" in schools, the Gurian Institute now provides international, "professional development for educators and training programs for parents . . . to help them implement systemic change." GURIAN, supra, at 4.

165 Salomone is particularly invested in the conversation. See Weil, supra note 106, at 3. She supported TYWLS prior to its 1996 opening and was later contacted
additional supporters of NCLB’s controversial provision.166 Specifically, Salomone notes that the recent spotlight on single-sex program options in public school has also spawned quite an “unusual political alliance” between “social conservatives touting ‘hard-wired’ differences between girls and boys, political conservatives interested in a free market of parental choice, feminists seeking to close the gender gap favoring boys . . . in math and science, and urban educators and activists concerned with the plight of minority students and particularly African American males.”167

Just as varied as the origins of the supporters are the arguments they offer to illustrate the contended benefits of NCLB’s single-sex provision.168 To begin with, advocates frequently assert the oft-cited, overly broad declaration that “boys and girls learns differently.”169
Reliance on such a nebulous statement is off-putting—particularly to this law student, who automatically hears "conclusory statement" chants dancing within her head like the good law school automaton that she is. However former and current law students can rest assured that this argument contains much more substance, because this first argument is exactly that, a conclusion. It is a conclusion that single-sex education supporters have reached after scrutinizing the available research data that suggests such a supposition.

Those maintaining that girls and boys have distinct learning styles base this claim on the rapidly increasing body of research highlighting differences in underlying biological factors, such as neurological function, hormone levels, and even auditory

they access that potential, how they put their skills and talents to work."); Because Boys Learn Differently, PRINCETON ACADEMY SACRED HEART, http://www.princetonacademy.org/main/admission/boys-learn-differently.html (last visited Feb. 8, 2011) ("A growing body of research shows that boys learn and develop differently from girls and...[w]e at Princeton Academy have embraced these findings."); Why Choose an All-Girls' School?, EXCEL ACADEMY PUB. CHARTER SCH., http://www.excelpubliccharterschool.org/academics/why-choo...all-girls-school (last visited Feb. 8, 2011) ("While there are no innate differences in what girls and boys are capable of learning, boys and girls do develop and learn differently."); The All-Girl Advantage, BUFFALO SEMINARY, http://www.buffalo.seminary.org/page.cfm?p=21 (last visited Feb. 8, 2011) ("Girls learn differently than boys do, at different rates and different times developmentally."). See generally http://www.girlslearndifferently.com/; and http://www.schoolsforboys.com/.


171 See infra notes 172-73.
capabilities. How are such research findings relevant to the single-sex education debate? Advocates point to such concrete empirical

172 See Juliet A. Williams, Learning Differences: Sex-Role Stereotyping in Single-Sex Public Education, 3 HARV. J.L. & GENDER 555, 557 (2010) (referencing GURIAN, BOYS AND GIRLS LEARN DIFFERENTLY!, at 13-68 (2001). Michael Gurian, author and co-founder of the Gurian Institute, provides that “researchers, notably Laurie Allen at UCLA, have discovered actual structural differences in the brain.” GURIAN, supra, at 29. He adds that “[s]till others, such as Ruben Gur at the University of Pennsylvania, have discovered functional differences using positronic emission tomography, or PET, scans.” Id. Together with the PET scans, Gur also employed magnetic resonance imaging (“MRI”) and additional brain imaging techniques to demonstrate how the “resting female brain” is as active as the “activated male brain.” Id. Consequently, Gurian reports, “there is more going on in a resting female brain than in a resting male brain.” Id. (internal quotation marks omitted). Regarding neurological chemical variances, Gurian informs readers of boys’ tendency to process serotonin, “often called the ‘feel good’ chemical,” contrasting that with girls’ more frequent stimulation of oxytocin by crying, which may make girls more apt to experience “quick and immediate empathic responses to others’ pain and needs.” Id. at 27. Furthermore, Gurian discusses how the dominance of testosterone in boys and estrogen and progesterone in girls makes boys “more likely to be aggressive first and ask questions later,” while a girl may “bond first and then ask questions later.” Id. at 27-28. Finally, in relation to sensory differences, Gurian affirms that research has shown how females tend to hear better than males, connecting this phenomenon with the occasional need for teachers to use a louder classroom voice when addressing boys. Id. at 29. Moreover, Gurian adds, these auditory differences apply to teaching music, as well. Id. at 30 (“Six times as many girls can sing in tune as boys”).

Gurian not only reports on the differences between boys and girls concerning neurological activity, hormonal prevalence, and sensory distinctions, his book methodically goes through the differences in the structure of various cerebral components explains how the differences in functionality for males and females impact their learning processes. See id. at 20. For example, the amygdala, which processes fear and anger, tends to be larger in males, make boys more apt to be aggressive. See id. In addition, the more highly active nature of the Broca’s area in females, which regulates grammatical configurations and word production, is useful for identifying girls’ tendency to possess improved verbal communication. See id.

and medical evidence not only to illustrate the learning variations between boys and girls, they also rely on research data to demonstrate the benefits of single-sex education, justify gender separation in academic settings, and, more compellingly, to explain the potential detriments of coeducational instruction.173

References to available scientific data that supports male and female learning differences often lead backers of single-sex education to espouse another common argument: coeducation reinforces gender stereotypes.174 Since, coeducation can “intensify the gender roles,” supporters maintain that traditional coeducational settings can lead girls to fall behind boys in math and science, while boys fall behind girls in reading and writing.175 In contrast, they continue, single-sex schools and classes can not only reverse many of “these seemingly entrenched gender disparities” that result, they can

Using MRI technology to acquire 829 brain scans from “387 subjects, ages 3 to 27,” NIMH ultimately reported “robust male/female differences in the shapes of trajectories with total cerebral volume peaking at age 10.5 in females and 14.5 in males.” Lenroot, et al., supra, at 1065.

173 See, e.g., Lenroot, et al., supra note 172, at 1065, 1072 (noting that “these sexually dimorphic trajectories confirm the importance of longitudinal data in studies of brain development and underline the need to consider sex matching in studies of brain development,” adding that such information is also significant to acquire an understanding of “the factors that influence these trajectories, [which] may have important implications for the field of developmental neuropsychiatry where nearly all of the disorders have different ages of onset, prevalence, and symptomatology between boys and girls”). See also Samantha Abrams, Thoughts on Single-Sex Schools, LEARNING FIRST (Sept. 1, 2010) http://www.learningfirst.org/thoughts-single-sex-schools (reporting that proponents of single-sex schooling, like NASSPE, “argue that teachers at these schools are able to tailor their teaching more specifically to the different learning-styles of the opposite sexes,” who also base such arguments on “the incongruent brain development patterns of boys and girls, [showing] the opposite sexes reach their highest level of academic achievement through different teaching strategies”).

174 See Brain Differences, supra note 172 (“If you teach the same subjects to girls and boys in the same way, then . . . you will have girls who think ‘geometry is tough’ and boys who believe ‘art and poetry are for girls.’ The lack of understanding of gender differences has the unintended consequence of REINFORCING gender stereotypes.”).

175 See Grace Chen, Why Single-Sex Public Schools Are Growing in Popularity, PUB. SCH. REV. (Dec. 9, 2009) http://www.publicschoolreview.com/articles/173 (“While boys still tend to outscore girls in math and science achievement tests, girls tend to outpace boys in tests of reading and writing.”).
also aid in narrowing the gender gap that remains prevalent in academics today.\textsuperscript{176} Also supporting their argument with “gender equity” justifications,\textsuperscript{177} proponents maintain that single-sex programs are designed to work with the differences between the sexes, “whether biologically based or socially constructed,” effectively reducing the academic chasm between girls and boys.\textsuperscript{178} Additionally, supporters asserting the “gender gap” argument add that the relevant facts and figures demonstrate that single-sex education not only offers an environment that permits boys and girls to improve in areas where they may struggle, it is also a prime

\textsuperscript{176} Chen, \textit{supra} note 175 (adding that “paradoxically . . . by educating them separately, we [a]re able to do much to reverse the gender gaps that typically leave girls behind in math and boys behind in literacy.”) (internal citations and quotation marks omitted). See also Salomone, \textit{supra} note 90, at 782 (“[S]ingle-sex programs . . . hold the potential for closing not only the gender gap favoring boys in math, science, and technology but perhaps the gap favoring girls in reading, language arts, and foreign languages, and that they result in less gender-polarized interests and participation among students.”); NAT’L CTR. FOR EDUC. STATISTICS, FINDINGS FROM THE CONDITION OF EDUCATION 1997: WOMEN IN MATHEMATICS AND SCIENCE 20 (1997), available at http://nces.ed.gov/pubs97/97982.pdf (“Although boys and girls have similar mathematics and science proficiencies at age 9, a gap begins to appear at age 13. At age 17, there is some evidence that the gender gap in mathematics and science has narrowed over time, although a substantial gap remains.”).

\textsuperscript{177} Salomone, \textit{supra} note 90, at 783. Salomone explains that the use of the expression “gender equity”—as opposed to “gender equality”—is a deliberate “distinction with a decided difference.” \textit{Id.} Gender equity advocates assert that “in practice, equity looks beyond mere equal or identical treatment.” \textit{Id.; see also} Fred Mael, et al., \textit{Theoretical Arguments for and Against Single-Sex Schools: A Critical Analysis of the Explanations}, AM. INSTS. FOR RES., (Nov. 9, 2004) 16, available at http://www.eric.ed.gov/PDFS/ED494925.pdf (“The primary issue of gender equity is the argument that teachers in mixed classrooms shortchange girls. Early research advanced the idea that males received not only more attention but also more praise and less criticism for the quality of their work.”). Supporters develop the particulars of this concept, adding that, in reference to the law, since “equity” speaks of “a system of decision making based in fairness and justice,” it does not depend on a “distinct set of positive rules.” \textit{Id.} Moreover, equity principles do not rely on “equal results” in a conventional, systematic fashion, but rather on “substantive outcomes that take into account differences in the individual circumstances of the parties.” \textit{Id.} With such an inventive, unconventional marriage of gender differences and educational equality, it is of little surprise that “in fact, ‘gender equity’ is the one rationale that seems to have gained widest support, or at least acceptance, for single-sex programming.” \textit{Id.}

\textsuperscript{178} \textit{Id.}
breeding ground for independent thinking, innovative learning, and academic excellence.\textsuperscript{179}

NASSPE and other proponents also view NCLB’s single-sex education provision as a way to ameliorate the disciplinary problems and “distractions” that can develop in a coeducational setting.\textsuperscript{180} Therefore, supporters contend, single-sex classes, programs, and schools promote healthier learning environments, which are more conducive to learning, and afford both genders the opportunity to excel academically.\textsuperscript{181}

Finally, and most pertinent to the central premise of this comment, advocates of single-sex education simply underscore the revitalized federal support for same-gender public instruction.\textsuperscript{182} Largely to counter one of the chief criticisms voiced by dissenters, those upholding the benefits of same-gender education reiterate that

\textsuperscript{179} See supra notes 105-108, 118 (providing statistics and data demonstrating the benefits schools have seen after implementation); Why Choose an All-Girls School?, supra note 169 (“But [all-girls schools] all share one core principle: Every girl deserves the opportunity to realize her full potential, to draw forth her talents and discover new ones, in a setting where she is valued for who she is and what she brings to the experience.”).

\textsuperscript{180} Single-Sex Education: Do All-Boy and All-Girl Schools Enhance Learning?, 25 CQ Res’r 569, 572-73 (2002), available at http://www.syossetistops.org/userimages/mborra/Economics%20of%20Education/singlesexed.pdf (reporting that the parents in the low-income community of Jefferson Leadership Academies “felt that coeducational classes provided too many distractions for students, prompting the conversion to single-sex classes,” and that Principal Hattie Johnson of Robert Coleman Elementary observed how “discipline problems all but vanished,” after she separated the classes by gender). See, e.g., King, infra note 265 (“[Teachers] Brooks and Dawson said their single-sex class students seem to be more focused on their work and less distracted without students of the opposite sex in the room.”).

\textsuperscript{181} Peter Meyer, Learning Separately: The Case for Single-Sex Schools, EDUC. NEXT 10, 20 (Winter 2008) available at http://media.hoover.org/sites/default/files/documents/ednext_20081_10.pdf (“Study after study has demonstrated that girls and boys in single-sex schools are academically more successful and ambitious than their coeducational counterparts.”) (internal citations and quotation marks omitted).

\textsuperscript{182} See GreatSchools Staff, supra note 7 (“Those who advocate for single-sex education in public schools argue that . . . [f]ederal law supports the option of single-sex education[,] . . . allowing schools to offer single-sex classrooms and schools, as long as such options are completely voluntary. This move gives parents and school districts greater flexibility.”).
the option for public school districts to offer single-sex programs was officially authorized by NCLB and the corresponding regulations.183 Furthermore, advocates argue that it is unjust to allow single-sex education options to those who can afford private schooling but not to poorer individuals who may also be seeking a quality education for their children.184 The increasingly compelling voice of the supporters for NCLB’s single-sex instruction round off their argument with one final assertion: if the public at large seeks “to promote excellence and innovation,” then “it is important that parents have an opportunity to choose an educational program that best fits the needs of their children and that educators have an array of educational options to meet the diverse needs of this nation's students.”185

183 See The Legal Status of Single-Sex Public Education, infra note 284 (“NASSPE supports the new regulations, although we regret that . . . [w]e continue to hear of school administrators who are advised by school district legal counsel that ‘you can't have single-sex classes in public schools.’”).

184 See Salomone, supra note 7, at 3 (“And from a broader policy perspective, they argue that single-sex schooling provides educational options to parents and children who lack the economic means to purchase them in the private market. What is good for rich kids should be good for poor kids.”). See also Jennifer Smith Richards, Columbus’ New Single-Sex Middle Schools Face Instant Rivalry, COLUMBUS DISPATCH, Aug. 25, 2010, http://www.dispatch.com/live/content/local_news/stories/2010/08/25/instant-rivalry.html (“‘I could never have imagined something like this. This is something special,’ said Tasha Jones, whose twin 11-year-old boys, Thaddeus and Quentin, are enrolled. ‘A preparatory school for no charge. It came at the perfect time.’”).

185 U.S. Department of Education, Office Civil Rights, Notice of Intent to Regulate Regarding Single Sex Classes and Schools, http://www2.ed.gov/policy/rights/reg/ocr/t9-noi-ss.html (last modified Sept. 15, 2004) (explaining that the federal government supports single-sex educational options because “[w]e want to permit appropriate latitude for schools to implement innovative efforts to help children learn and to expand the choices parents have for their children’s education,” while ensuring that implementation of single-sex programs are “consistent with the Title IX statute and the Constitution.”) (emphasis added); see also Roy F. Baumeister, Single Sex Schools? Do We Need Single Sex Public Schools?, CULTURAL ANIMAL BLOG (Oct. 18, 2008), http://www.psychologytoday.com/blog/cultural-animal/200810/single-sex-schools (“This year my research on gender got me invited to speak at the annual conference of [NASSPE] . . . Nobody there is saying we should require kids to be in same-sex classrooms. They are merely in favor of choice.”) (emphasis added); see also Splitting Students by Sex, WASH. TIMES (May 22, 2007, 12:06 AM), http://www.washingtontimes.com/news/2007/may/22/20070522-120652-3661r/print/ (“The benefits are quite diverse . . . The key issue however is choice.
common objective to “help fix the . . . ailing public school system,” advocates of federally authorized single-sex instruction options do not merely “extol the virtues” of separating boys and girls in the academic setting, they assert that offering single-sex options is one of the many steps necessary to reform public schools.186

D. The “Anti” Camp

The skeptics, critics, and outright opponents of the Title IX single-sex education amendments are not quite as unexpected as those who are in favor of NCLB’s single-sex provision and the accompanying Title IX amendments.187 Dissenters to the recent federal regulations range from the most resolute opponents, such as the National Organization for Women (“NOW”) and the American Civil Liberties Union (“ACLU”),188 to the more moderate skeptics that are wary of haphazard efforts or illegal implementation of single-

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187 See Michael Alison Chandler & Maria Glod, More Schools Trying Separation of the Sexes, WASH. POST, June 15, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/06/14/AR2008061401869.html (noting that women and civil rights groups are among the opponents of single-sex public schools, who reference “a long history of separate and unequal education for girls” to support their position).
188 See Kim A Gandy, et al., Single-Sex Proposed Regulations Comments, NAT’L ORG. FOR WOMEN, Apr. 23, 2004, 4, http://www.now.org/issues/education/042304comments.pdf (“As a civil rights organization with a particular focus on women’s rights, NOW opposes regulatory programs that threaten to deprive women of equal protection of the laws, such as the program OCR is currently pursuing.”); see also Laura W. Murphy, et al., ACLU Single-Sex Notice of Intent Comments to the Department of Education, AM. CIV. LIBERTIES UNION, July 8, 2002, http://www.aclu.org/womens-rights/aclu-single-sex-notice-intent-comments-department-education (“The ACLU believes that every person has the right to equality of educational opportunity free from invidious discrimination . . . we believe the proposed changes are ineffective means of improving education for all public school children and have the potential to exacerbate inequality.”).
sex instruction based on dubious facts and figures. The National Coalition for Women and Girls in Education ("NCWGE"), the American Association of University Women ("AAUW"), and other affiliated groups are not wholly against single-sex education so long as local school districts follow "careful safeguards to ensure that these programs, where offered, serve appropriate purposes and do not perpetuate sex discrimination." However, such critics are not absolutely pro single-sex public education, finding that too often the unsubstantiated rationales given by many single-sex advocates and the misguided motivations for implementation, combined with the current problematic state of the relevant research data, do little but

189 See, e.g., Who We Are: Our Policy Agenda, NAT’L COUNCIL FOR WOMEN’S ORGS., http://www.womensorganizations.org/index.php?option=com_content&task=view&id=16&Itemid=45 (last visited Feb. 12, 2011) (stating that the National Council for Women’s Organizations ("NCWO"), which “includes over 200 member organizations . . . that address girls’ and women’s economic, legal, social and physical well-being throughout their lifespan,” supports “[1]egal single sex education for the affirmative purpose of reducing sex discrimination” and opposes “[1]egal single sex education under the 1975 Title IX regulations and the 14th amendment equal protection clause”).


191 Katherine Bradley, Single Gender Education — Why?, EDUCATION.COM, (2008), at 1, http://www.education.com/reference/article/Ref_Single_Gender/ (“Some educational theorists doubt whether single gender education will actually have any positive benefits, but rather represent another educational bandwagon.”). See also Separated by Sex, supra note 190 http://www.aauw.org/act/issue_advocacy/actionpages/upload/single-sex_ed111.pdf (“The regulations rely on unproven assumptions about the benefits of single-sex programs. The research supporting the effect of single-sex education on improving educational outcomes is inconclusive at best, and some shows potentially harmful effects.”); Annual Report to Congress, supra note 72 ("For example, OCR conducted compliance reviews at four school districts of varying sizes to determine
help muddy the waters and further confuse inquiring parents, educators, and administrators.\textsuperscript{192}

The opponents of NCLB's single-sex provision have voiced their dissent, constructing rather convincing counterarguments in response to the assorted rationales by supporters of single-sex schooling.\textsuperscript{193} Critics counter with three varying [arguments]: 1) the rationales advanced by proponents are merely ill-supported, bogus, and feeble excuses advanced by agenda-driven individuals;\textsuperscript{194} 2) even if girls and boys have differing learning styles, single-sex instruction fails to reflect the gender-mixed circumstances of the real world;\textsuperscript{195} and 3) not only does single-sex education contribute to an already-segregated society, it undermines cherished civil liberties, statutory their compliance with Title IX procedural requirements and found noncompliance in all four districts.

\textsuperscript{192} See SALOMONE, supra note 34, at 6 ("[T]he deepest fears, hopes, and passions of advocates, skeptics, and opponents who continue to shout across a huge ideological divide, leav[e] parents and policymakers bewildered and frustrated as they search for definitive answers.").

\textsuperscript{193} See, e.g., HURST & JOHANSEN, supra note 78, at 2 ("Many people oppose single-sex educational programs for some of the same reasons that proponents support them. For example, the boy-girl socialization that occurs in middle and high schools may indeed be distracting, but it also may be beneficial.").

\textsuperscript{194} See, e.g., Wendy Kaminer, The Trouble With Single-Sex Schools, ATLANTIC.COM, Apr. 1998, 2, http://www.theatlantic.com/magazine/archive/1998/04/the-trouble-with-single-sex-schools/4661/ (""Studies show ..." is the usual lead-in to any defense of single-sex education . . . . "There does not seem to be research support for this perspective," the sociologist Cynthia Epstein politely observes . . . . add[ing] that there is no consensus among psychologists as to the existence of psychological or cognitive differences between the sexes."); see also Separated by Sex, supra note 190, at 6-7 ("[M]uch of that research is of questionable value . . . . Less than 2 percent of the over 2,000 quantitative studies were of high enough methodological quality to be accepted by the National Center for Education Statistics, even with relaxed standards.").

\textsuperscript{195} See GreatSchools Staff, supra note 7 ("Those who claim single-sex education is ineffective and/or undesirable [argue]: . . . . Students in single-sex classrooms will one day live and work side-by-side with members of the opposite sex. Educating students in single-sex schools limits their opportunity to work cooperatively and co-exist successfully with members of the opposite sex."); see, e.g., Chen, supra note 1 ("Katie Schwartzman, Legal Director of the ACLU of Louisiana remarked: 'Boys and girls will be less prepared to succeed in the world if they do not socialize, compete and collaborate with members of the opposite sex in school. Real life is not separated by sex . . . .'").
rights, and constitutional principles that are at the core of American democracy.\textsuperscript{196}

Those against offering single-sex instruction challenge the research used to support the “boys and girls learn differently” justification for gender-separate instruction and challenge the application of the available data by single-sex instruction advocates.\textsuperscript{197} Individuals on all sides of the debate acknowledge that there is a wealth of data regarding same-gender instruction and related areas of interest.\textsuperscript{198} However, opponents of single-sex education also point out the contradictory and questionable nature of the relevant research, emphasizing that the facts and figures do not indeed corroborate the many overconfident theories and rationalizations presented by supporters.\textsuperscript{199} Moreover, opponents add

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\item See ACLU Single-Sex Notice, supra note 188 (“Single-sex education violates the equal protection guarantees of the Fifth and Fourteenth Amendments, as well as basic civil liberties principles.”).
\item See Weil, supra note 106, at 3 (“What kind of message does it give when you tell a group of kids that boys and girls need to be separated because they don’t even see or hear alike? . . . . Every time I hear of school officials selling single-sex programs to parents based on brain research, my heart sinks.”) (internal quotations omitted).
\item See supra note 89; but see Chandler & Glod, supra note 187 (“Research remains slim on whether single-sex education boosts achievement in public schools. Most studies have examined private schools.”).
\item See David Sadker, Commentary, At Issue: Should Federal Regulations Make It Easier for School Districts to Establish Single-Sex Schools or Classes?, 25 CQ RES’R 569, 585 (2002), available at http://www.syossetistops.org/userimages/mborra/Economics\%20of\%20Education/singlesexed.pdf (“[T]he effectiveness of single-sex schools is a big educational question mark. Some studies show that they are more effective for girls than boys, others that only lower class students benefit and still others that such schools intensify homophobia.”); see also Nancy Zirkin, et al., RE: Single-Sex Notice of Intent Comments, NAT’L COAL. FOR WOMEN & GIRLS EDUC. (July 8, 2008) 2, available at http://www.ncwge.org/PDF/SingleSex-7-11-02.pdf (“[NCLB] repeatedly points to the need for “scientifically-based research” to be the foundation of implementing new programs and initiatives. However, the research on single-sex education is at best inconclusive, largely anecdotal, and based on the private and parochial schools, not public schools.”); Separated by Sex, supra note 190, at 7 (“[According to a] 2006 study completed at the College of Education at Arizona State University . . . , the research is mostly flawed by failure to control for important variables such as class, financial status, selective admissions, religious values, prior learning or ethnicity.”) (citing Gerald W. Bracey, Separate but
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that, in contradiction to the numerous "benefits" supporters claim single-sex instruction offers to students, the research actually demonstrates that single-sex education is a detriment to students—or, at best, an irrelevance to academic excellence. Furthermore, skeptics criticize how some proponents interpret the pertinent research data, asserting that they manipulate the research to push their own political agenda.

While many doubters and dissidents dispute the contention that "boys and girls learn differently," other opponents of single-education may not refute this claim. However, they respond with the alternative counterargument that single-sex educational settings do not reflect the mixed-gender environments of the real world.

Superior? A Review of Issues and Data Bearing on Single-Sex Education, EDUC. POL'Y RES. UNIT, DEP'T EDUC., ARIZ. ST. UNIV. (November 2006)) (internal citations and quotation marks omitted); and Zirkin, supra (referencing the 1998 report by the AAUW Educational Foundation, which condensed the most up-to-date research on single-sex education, and concluded:

1) there is no evidence that single-sex education in general "works" or is "better" than co-education;
2) educators and policymakers need to further identify the components of a "good education;"
3) single-sex educational programs produce positive results for some students in some settings; and
4) the long-term impact of single-sex education for boys and girls is unknown.

The NCWGE also added that the report presented "conflicting research," containing findings that "girls do better in some single-sex classes . . . versus other research pointing to diminished achievement for girls in single-sex classrooms.

See Kaminer, supra note 194 ("What do these studies tell us about the relationship between single-sex education and achievement? Virtually nothing. [Many make] the common mistake of confusing correlation with causation."); GreatSchools Staff, supra note 7 ("[T]he teaching style promoted by advocates of single-sex education could be ineffective (at best) or detrimental (at worst). For example, a sensitive boy might be intimidated by a teacher who 'gets in his face' and speaks loudly believing 'that's what boys want and need to learn.'").

See, e.g., Weil, supra note 106, at 8 (stating that "the disproportion between the reported facts and Sax's interpretation is spectacular" and that "Dr. Sax isn't summarizing scientific research; he's making a political argument . . . [because the] political conclusion comes first, and the scientific evidence — often unrepresentative or misrepresented — is selected to support it.").

See infra note 205.

See supra note 195 and accompanying text; see also Sex Segregated Schools: Just the Facts, AM. CIV. LIBERTIES UNION, May 19, 2008,
Although those making this assertion acknowledge that there may be some students who reap some social and disciplinary benefits from single-sex education, these critics aver that single-sex instruction deprives students of coeducational interaction that is essential to healthy behavioral growth and social development. In addition to resulting in cross-gender ineptitude, opponents argue that "such specialized teaching can force girls and boys into society's socially constructed gender roles and reinforce gender stereotypes." Wary
of the potential to hearken back to the antiquated gender-oppressive principles espoused throughout the nineteenth century, those against single-sex schooling maintain that this avenue of instruction merely amplifies the very "gender stratification" consequence that advocates claim is broadened by coeducation.207

Most significantly, opponents also voice their opinion on the legal implications of NCLB's single-sex provision.208 Relying on America's sordid history of gender inequality, current statutory and case law, and the highest legal authority in this country, critics of single-sex education have constructed quite a strong attack against the legality of federally supported "sex-segregated" schools, classes, and programs.209

According to numerous opponents, same-gender public education is antithetical to the gender equality principles that had been fought

207 See Salomone, supra note 90, at 781-82. Salomone reports that some individuals consider such single-sex programs "against the dark history of women's exclusion from prominent secondary schools and colleges and the hard battles fought to remove those barriers." Id. at 781. Adding that since "it is only within the past generation that schools like Boston Latin, Central High School in Philadelphia, Choate, and Andover as well as universities including Harvard, Princeton, Yale, and the University of Virginia have opened their doors to women," opponents understandably view same-gender schooling as "Victorian at best and downright harmful at worst, reinforcing archaic sex stereotypes and misguidedy suggesting that girls are inherently deficient in certain curricular areas." Id. at 781-82. For these critics, "separate is always unequal in theory and inevitably unequal in fact as blatant inequalities in access and resources between female and male schools painfully proved in the past." Id. at 782.

208 See, e.g., Sex-Segregated Schools: Separate and Unequal, AM. CIV. LIBERTIES UNION, June 14, 2007, http://www.aclu.org/womens-rights/sex-segregated-schools-separate-and-unequal ("The ACLU opposes sex-segregation in public education because it is unconstitutional, because it perpetuates antiquated gender stereotypes, and because it deprives both girls and boys of the benefits of co-education.").

209 See Murphy, supra note 189. The ACLU has declared that its chief rationale for opposing the recent amendments to Title IX lies within the legal precedent established over the past two centuries, specifically stating that the amendments not only "undermine Title IX and violate the Equal Protection Clause," they also "perpetuate the inequalities associated with gender segregation." Id. Additionally, the ACLU adds that the Title IX changes "fail to meet constitutional scrutiny because there is no exceedingly persuasive justification for regulations allowing greater flexibility to create single-sex classes or schools." Id.
for throughout the women’s rights movements of the nineteenth and twentieth centuries, cresting with momentous gains, such as the ratification of the Nineteenth Amendment, the passage of Title IX, or the more recent victory secured in the landmark $VMI$ decision.\(^{210}\)

“Hadn’t the civil rights and women’s movements put all these issues to rest?” confused liberals, feminists, and civil liberties groups have wondered; “hadn’t American society concluded that coeducation was the more enlightened way to educate girls and boys so they could ultimately relate as women and men?”\(^{211}\) Such confusion is understandable since it seems as if the language of the Equal Protection Clause had clearly prohibited sex discrimination and as if the U.S. Supreme Court had already established the unconstitutionality of sex-separated schools under the equal protection guarantees of the Fifth and Fourteenth Amendments.\(^{212}\)

Bewilderment aside, opponents of single-sex public education steadfastly maintain that “[t]he proposed changes would turn the clock back thirty years, encouraging schools to implement exactly what Title IX seeks to eliminate: disparities in educational opportunities for girls and boys . . . [and would violate] the equal protection guarantees of the Fifth and Fourteenth Amendments, as well as basic civil liberties principles.”\(^{213}\)

Dead-set against acquiescing to a law that advances the “ineffective and unlawful practice of separating the sexes,” the ACLU, NOW, and other critics have determined to further the legal advancements achieved by women’s and civil rights champions and

\(^{210}\) David Sadker & Karen Zittleman, Single-Sex Schools: A Good Idea Gone Wrong?, CHRISTIAN SCI. MONITOR, Apr. 8, 2004, 9-10 http://www.sadker.org/PDF/SingleSexSchools.pdf (“What the [ED] seem[s] to have forgotten is that Title IX is not an educational option, it is a civil rights protection. While Title IX currently permits select single-sex classes – in physical education or to remedy past discrimination, for example – it doesn’t allow schools to segregate students arbitrarily.”).

\(^{211}\) SALOMONE, supra note 34, at 3.

\(^{212}\) Reading: “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws,” the Equal Protection Clause is the foundation for the blanket Title IX ban on sex-based discrimination in education absent fulfilling Justice Ginsburg’s very narrow “exceedingly persuasive justification” standard. U.S. CONST. amend. XIV; Virginia, 518 U.S. at 524.

\(^{213}\) Murphy, supra note 189.
to remain committed to ending sex-based discrimination.\footnote{NOW Opposes Single-Sex Public Education as ‘‘Separate and Unequal,’’ NAT’L ORG. FOR WOMEN, Oct. 24, 2006, http://www.now.org/press/10-06/10-24.html.} As I have shown, opponents have gone to great lengths to formulate their own equally compelling case against single-sex instruction in public schools.\footnote{Ilana Debare, Making the Case for Girls’ Schools: Today’s Single-Sex Institutions are Separate and Equal, SFGATE.COM, August 15, 2004, http://articles.sfgate.com/2004-08-15/living/17438034_1_single-sex-schools-girls-schools-single-sex-classes. Debare recounts how “[t]he country’s most respected feminist groups,” including NOW, the Feminist Majority Foundation, AAUW, the National Women’s Law Center, and the California Commission on the Status of Women, “came out swinging in opposition” to the 2006 amendments. \textit{Id.} Such groups “wrote letters of protest and organized the e-mail lobbying efforts that fill[ed] those black binders” kept at the ED with harsh legal critiques. \textit{Id.} Debare adds that at “[t]he heart of their criticism was that single-sex schools would take us back to the bad old days of ‘separate but unequal’ education.” \textit{Id.}} Dubbing the 2006 Title IX amendments a dangerous throwback to “pre-women’s lib days,” opponents, skeptics, and critics are through imploring the federal government to “reconsider” its amendments to Title IX, determining instead to counter the swiftly disseminated single-sex propaganda and to fight sex segregation on all fronts.\footnote{Terry Christner & L.P. Hutchinson, \textit{All Girls} Editorial Reviews: \textit{Library Journal}, CAHNERS BUS. INFO., INC. (2002), available at http://www.karenstabiner.com/site/allgirlsined; see also Zirkin, \textit{supra} note 199, at 3.} Unconvinced by the findings of existing “educational research,” which determined that “single-sex education may provide benefits to some students under certain circumstances,”\footnote{Nondiscrimination, \textit{supra} note 71, at 62, 532.} many dissenters maintain that single-sex public schooling is not only erroneously justified by the available “research data,” it also violates the constitutional principles of equality, fairness, and justice under all circumstances.\footnote{See Eleanor Smeal, Single-Sex Proposed Regulations Comments, Feminist Majority Foundation, Apr. 23, 2004, 1, http://www.feminist.org/education/pdfs/FMF_Single-Sex_Comments.pdf (“These proposed regulations are antithetical to the spirit, purpose, and letter of Title IX.”); Murphy, \textit{supra} note 189.}

The arguments encompass the general and the specific, the social and the behavioral, the scientific and the legal. However, the bulk of my research has demonstrated that the divergent schools of thought
related to the single-sex education debate have constructed their respective arguments on curiously dissimilar foundations. Those supporting the single-sex amendments to Title IX most often draw from evidence relating to the social sciences, referencing the psychological, social, and behavioral consequences of single-sex education. Unsurprisingly, opponents of single-sex instruction options more often rely on law-based rationales to attack the legal support beams that form the foundational structure of proponents’ line of reasoning. Meanwhile, while both sides maintain unwavering positions across from their ideological opposition, school districts, policymakers, and parents all wait and see whether single-sex schooling opportunities will make any difference for at least one child that otherwise would have fallen through the gaping cracks of the public education system.  

IV. CONCLUSION: DO THE PROVISION’S CONSTITUTIONAL IMPLICATIONS ECLIPSE ITS POTENTIAL GAINS?

A. Looking Ahead

Professor Salomone has commented on the preliminary and continuing reaction to NCLB’s single-sex provision and subsequent regulations, describing the issue of single-sex public education as “a flashpoint for deeper social, political, and philosophical differences.”220 After the ‘60s and ‘70s, when “women’s struggle for equal treatment and access rocked the nation,” something had happened that was critical enough to “cautiously [prod] single-sex schooling into the educational mainstream and [create] this huge ideological rift.”221 That “something” was slightly different for each

219 See SALOMONE, supra note 34, at 187 (“The weight of the legal and policy evidence supporting single-sex schools and classes finally rests in empirical research supported by anecdotal reports documenting the academic, social, and developmental benefits that at least some students may derive from single-sex schools or classes.”); Richmond, supra note 117 (“Is it worth the investment in resources? ‘I can’t tell you that,’ [math teacher Tommy] Sieler said. ‘You really have to look at the data to have a solid answer.’”).

220 SALOMONE, supra note 34, at 3.

221 Id.
of the sexes.\textsuperscript{222} However, the facts and figures were staggering concerning dropout rates, violence, and teenage pregnancy, as well as other signs for “academic failure and social dysfunction.”\textsuperscript{223} Scientific, sociological, and legal exploration eventually converged, leading inquiring minds to pose a loaded question: “whether coeducation could effectively deliver on the promise of equal educational opportunity so integral to the larger civil rights agenda.”\textsuperscript{224}

This dangerous line of inquiry touched off the pedagogical, sociological, and constitutional storm that surrounds the single-sex public education debate.\textsuperscript{225} The maelstrom over same-gender schooling appears to encircle two critical matters: (1) whether it is legal for public schools to offer this option, and (2) whether it even yields educational returns for girls or boys.\textsuperscript{226} On one side, those advocating for gender-separate options point to the beneficial results from practical initiatives and empirical investigation, while reciting their oft-referenced mantra: “[e]xisting educational research suggests that single-sex education may provide benefits to some students under certain circumstances.”\textsuperscript{227} Positioned contra supporters, indignant opponents of the polemical NCLB “fad” write off claims that “boys and girls learn differently,” instead triple-underlining the equal protection principles enumerated in the Constitution and upheld by precedential case law.\textsuperscript{228} Caught in the elocutionary crossfire,

\textsuperscript{222} See id. Salomone notes that for girls, that “something” “had all to do with widely-publicized research on their loss of self-esteem as they approach adolescence, the popularly reported gender gap in math and science, the ‘chilly climate’ for girls in public schools and college classrooms, and the arguable shortcomings within coeducation to meet their emotional and academic needs.” Id. While, “[i]n the case of minority girls and especially boys, there was mounting evidence that the current system of schooling was doing little to stop the downward spiral that increasingly has caught so many of them in its grip.” Id.

\textsuperscript{223} See id. at 3-4.

\textsuperscript{224} Id. at 4.

\textsuperscript{225} See SALOMONE, supra note 34, at 4-6.

\textsuperscript{226} See id., at 5-6.

\textsuperscript{227} Nondiscrimination, supra note 71, at 62, 532.

parents—the confused, the well-informed, and the understandably skeptical—demand confirmation that single-sex instruction will engender positive academic and social results for their children.\textsuperscript{229}

Amid the clamor for definitive evidence, parents, school officials, and political enthusiasts must understand that the precise nature of the results, as well as the process of implementation, is highly contextual.\textsuperscript{230} So, what does this context hinge on? Essentially, it rests on "the individual students and their particular backgrounds, abilities, and needs[,] . . . [in addition to] what the stakeholders are looking for in the end."\textsuperscript{231} Nonetheless, recognizing the contextual nature of the results is only one of the preliminary steps we must take to progress the clash over single-sex schooling from a static, imprecise conflict saddled with "historical and political baggage" to an open dialogue that helps facilitate widespread academic evolution for public schools.\textsuperscript{232}

\textsuperscript{229} See SALOMONE, supra note 34, at 188.
\textsuperscript{230} See id.
\textsuperscript{231} See id. at 188. See, e.g., id., at 189 ("Urban school reformers place special emphasis on overcoming and preventing the social and educational disadvantages confronting inner-city minority youth, both males and females[,] . . . [such as] drug abuse, violence, dropping out, and teen pregnancy."); Hitt, supra note 137 (Urban Prep, an all-boys charter school, offers hope for one of Chicago's roughest neighborhoods); Megan Knight, Queen Rania Visits Harlem School, EXAMINER.COM, Sept. 22, 2009, http://www.examiner.com/royal-news-in-national/queen-rania-visits-harlem-school (TYWLS, a top-ranked school in New York, serves low-income and minority girls).
\textsuperscript{232} See SALOMONE, supra note 34, at 6 ("[T]he interrelated developments of the past three decades, weighted down with historical and political baggage, form a veiled but intricately woven subtext inhabited with demons from the far and not so distant past. That subtext subtly roils public discourse on single-sex schooling and effectively immobilizes public policy.").
1. The Impact of Implementation

a) The Educational Effect

Opponents of publicly funded single-sex instruction often highlight the inconsistent, indeterminate nature of the research on single-sex schooling, holding fast to arguments that "there is little evidence that girls and boys do better apart." However, in focusing on the deficiencies of the findings from the general body of research, many critics may miss the successful results seen from more concentrated studies and individual initiatives. Moreover, those that argue against the research supporting single-sex schooling are unlikely to appreciate another significant point: the fundamental purpose of gathering research data is not to show that properly implemented single-sex schooling is beneficial to all, or even most, public school students. Rather, as the ED has stated time and time again, the positive research findings must support the assertion that some students benefit from single-sex instruction in particular situations, substantiating the key impetus behind the Title IX amendments, which is to permit school districts to improve local educational achievement by "provid[ing] the opportunity to choose among diverse educational opportunities." Most significantly, the current open-ended state of the research allows for pioneering single-sex ventures that will add to the rich

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234 See, e.g., *supra* notes 169-86; see also Eric Horng, *Same-Sex Classes Catch on in Public Schools*, ABCNEWS.COM, Apr. 18, 2009, 1, http://abcnews.go.com/Health/story?id=7371420&page=1 (reporting that for the Dr. Walter Cunningham School for Excellence in Waterloo, Iowa, the switch to single-sex classrooms has yielded positive results, such as improved grades and test scores and fewer disciplinary problems—especially for boys); Jeremy P. Meyer, *Genders Split Up at More Schools*, DENVER POST, June 1, 2008, http://www.denverpost.com/breakingnews/ci_9442419 (informing readers that over a two-year period the all-girls class at Roncalli Middle School in Pueblo, Colorado did best in science, English, and math, followed by the all-boys class and then the coed class).

body of existing data, in turn increasing public knowledge on successful single-sex instruction. Aply planned, legally executed, and resultant effective single-sex instruction in public schools have been quite a rarity in throughout U.S. history. Thus, the most recent Title IX amendments permit advocates and critics to “explore the barely charted territory of single-sex schooling in its new incarnation,” while ushering in a broader variety of academic opportunities that embody “a free market of parental choice.”

Even this brief comment on single-sex public education illustrates that we still have much to discover on the application, consequences, and significance of single-sex instruction. A quick examination of assorted states’ implementation efforts shows the scholastic rewards students can reap from properly initiated single-sex programs.

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236 See Salomone, supra note 90, at 792, 94 (“[A] growing body of case studies and anecdotal reports from public schools in the United States [identify] certain benefits to be gained from various forms of separate classes or schools . . . [and] studies comparing single-sex and coeducation provide useful direction to educators as they initially consider justifications and define goals.”)

237 See infra note 300 (noting that the school in Vorcheimer was the one exception at the time).

238 Salomone, supra note 90, at 781, 97.

239 See, e.g., Zirkin, et al., supra note 199, at 2 (“It is clear that there is much to learn on the value of single-sex education as a whole and in what circumstances is it beneficial and what circumstances is it not.”).

240 See Jennifer Buske, Prince William Middle School to Try Single-Sex Classes, WASH. POST, June 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/06/15/AR2010061505183.html. Buske reports that the Woodbridge Middle School principal, Skyles Calhoun, revealed that the key to their initiative’s success was proper training for the school’s educators: “[Calhoun] trained his staff for a year before implementing the program. He also educated parents about single-sex classrooms and explained how to determine if they were right for their children.” Id. Calhoun emphasized that “‘taking the time to train teachers prior to implementation and educating parents about the same-gender structure has been the key to our success,’” because “‘[t]here is much more to it than simply putting girls in one room and boys in another.’” Resultantly, in the program’s first year, “we did a survey after about three months, and the biggest sign of success to me was, boys were coming back and saying ‘I like school.’” Id. Calhoun added that “[f]or sixth-grade boys to say that — well, that was just unheard of.” Id. See also Rex, supra note 105, at 3. Jim Rex, the state superintendent of education in South Carolina, provided his top three ingredients for successfully executing single-sex instruction at public schools:
Simultaneously, shoddily planned and executed attempts have revealed the dangers that loom for recipients who fail to follow the guidelines and restrictions established by federal law.241

Nonetheless, as the data output enlarges, the odds of reincarnating failures reminiscent of the botched CPP diminishes at a rapid rate.242 With America’s checkered sex-segregated past, the accompanying drive to recoil from propagating pre-19th Amendment ideology can help moves society further beyond the days of “accomplishments,” finishing schools and separate spheres. In short, I would be hard-pressed to regard the “inconclusive findings” that arise from single-sex initiatives and experiments as a detrimental aspect of the debate, considering the essential role it plays in impelling supporting and opposing contributors past a grandiloquent impasse and on toward effective solutions. Single-sex implementation will not miraculously transform the public education

- training for teachers to better understand how gender can influence learning and supporting teachers throughout the year as they reflect on their practice;
- communicating with parents so they understand the reasoning behind the program enough to make informed decisions; and
- analyzing data in multiple formats to determine the need for and impact of single-gender classes.

Id.241 See Bradley, supra note 193, at 2 (“[T]he roadway to school reform has been littered by would-be reform panaceas fat on the wayward spending of educational funds. Evidence of fiscally gluttonous, failed and abandoned reform efforts, most attempted without empirical evidence lending creditability to the effort or without appropriate professional development necessary for implementation is everywhere.”).

242 See Salomone, supra note 90, at 796, 98 (“The wider the research net is cast, the more aspects explored . . . . Gradually, findings will start stacking up and provide useful feedback to educators in addressing the needs of different populations of girls and boys at different stages in their schooling, whether in single-sex or coeducational settings.”); Carol E. Thom, A Comparison of the Effect of Single-Sex Versus Mixed-Sex Classes on Middle School Student Achievement (2006) (unpublished Ed.D dissertation, Marshall University) (on file with Marshall University, College of Education and Human Services), 5, available at http://www.marshall.edu/etd/doctors/thom-carol-2006-phd.pdf (“Research in this area can contribute to the body of knowledge available on the effects of single-sex classes for boys and girls, and for at-risk students. It can also help determine whether separating the sexes for instruction will help close the achievement gap that now exists . . . .”).
system. So, while I urge advocates and opponents to remain patient with burgeoning initiatives and future investigative studies, I also urge recipients to do their homework before attempting single-sex instruction, bearing in mind that “[they] can’t simply separate kids by gender and think magic is going to happen.”

Additionally, there are many who still insist that the authorization of NCLB’s single-sex provision is purely an act of federal desperation, arguing that the ED’s “desperate decision” will only encourage the deterioration in coeducational schools, while reversing equal opportunity progress in “rely[ing] on outdated gender stereotypes to shape the way children learn and behave in our public schools.” However, not unlike the ED, proponents of single-sex schooling opportunities have shown that they neither desire nor purpose to relive the days where patriarchy and gender inequality

243 Chandler & Glod, supra note 187, at A2. See also Richmond, supra note 117 (“Single-sex education isn’t complicated... but it does require more than simply separating boys and girls. ‘In any endeavor, you improve your odds of success when you do your homework.’”); Sherman, supra note 105 (“But [Jefferson Middle School Principal Mike] Zimmers also warns against schools jumping right in. ‘This is not a quick fix,’ he said. ‘You have to go through a process to make it work.’”).


245 Ariela Migdal, Jessica Moldovan & Aliya Hussain, Title IX: Looking Back and Ahead, ACLU BLOG RTS. (June 23, 2010, 5:27 PM) http://www.aclu.org/blog/womens-rights/title-ix-looking-back-and-ahead; see also Gandy, et al., supra note 188, at 4 (“Girls, as the traditionally subordinated group, are likely to experience a badge of inferiority as a result of being grouped on the basis of sex—particularly if there are all-boys schools—because the message to the girls is that they are the problem.”).
Rather, they aim to maximize the learning experience for certain students that may fare better in a gender-separated setting, thereby advancing an educational structure which will help foster academic growth, boost students' enthusiasm for learning, and produce genuine beneficial consequences for both of the sexes.\textsuperscript{247} Mainstreaming single-sex public education does not stand as a threat to the coeducational school system. The incentive to reform and develop mixed-sex public schools, classrooms, and programs is not going to fall to the wayside as a result of the recent Title IX amendments.\textsuperscript{248}

Nonetheless, advocates cannot simply dismiss the concerns and fears voiced by opponents of single-sex public education. Claims of "faddishness" and "desperation" carry a ring of truth, as some news stories and research reports have shown that there have been recipients who jumped the gun in rushing to implement same-gender programs without first "doing their homework."\textsuperscript{249} Carelessly executed single-sex programs are no better than the poorly maintained, academically deficient coeducational schools that influenced federal authorities to amend Title IX in the first place. Supporters and critics alike have stressed the dangers of inadequate planning or a lack of effective follow-through.\textsuperscript{250} For example,

\textsuperscript{246} See, e.g., Salomone, supra 90, at ("Some . . . suggest that, as a matter of law and policy, gender equity is, at most, the only acceptable justification for separating girls and boys . . . permissible for girls solely as a 'compensatory' measure to overcome the remnants of sex discrimination in education and throughout society.").

\textsuperscript{247} See, e.g., Richmond, infra note 267 ("At Cortez, which began a limited use of single-sex classes in 2007 before expanding last fall, Principal Ariel Villalobos is declaring it a success. He said he's seen significant improvement in the overall learning environment and a steep drop-off in discipline issues for boys and girls.").

\textsuperscript{248} See Ritsch, supra note 105, at 3 ("The spectrum of opinions suggests that new single-sex programs in public school districts won't all look alike, few if any will be mandatory, and most public schools will remain coed.").

\textsuperscript{249} See, e.g., supra note 243 and accompanying text.

\textsuperscript{250} See Goudreau, supra note 105, at 2 ("Results can be disastrous when teachers have no training. They teach algebra to girls using shopping metaphors . . .") (internal quotation marks omitted); Amina Khan, \textit{Single-Sex Middle School Aims to Divide and Conquer}, L.A. Times, Nov. 29, 2009, 2, http://articles.latimes.com/2009/nov/29/local/la-me-singlesex30-2009nov30 ("Without proper training, . . . teachers start teaching algebra to girls with shopping
recipients are unlikely to achieve beneficial results if they attempt to implement a one-size-fits-all teaching structure. Similar to coeducational schooling, single-sex instruction must be tailored to the qualities, needs, and goals of the students.\textsuperscript{251}

At the same time, supporters cannot use the renewed interest in single-sex education as an excuse to neglect coeducation reform efforts.\textsuperscript{252} Though it may seem far-fetched for critics to expect such a thing to occur, ten years ago, it likely seemed just as improbable that the federal government would sanction gender-separate public education. The ED should not encourage school districts to turn to single-sex education as some sort of a last-ditch effort to inject life back into the public school system because there remain plenty of students who are unsuited to a sex-segregated pedagogical format. Additionally, the ED, concurrently with parents and recipients, must ensure that the enthusiasm they have shown in offering single-sex opportunities is reflected in genuine attempts to improve preexisting coeducational classrooms and institutions. Though proposed in protest of the Title IX amendments, the “elements of a good education” that anti-single sex groups have advocated should be applied and cultivated for single-sex and coeducational programs.\textsuperscript{253}

analogies, and algebra to boys with sports analogies, and that reinforces stereotypes.”) (internal quotation marks omitted).

\textsuperscript{251} See Ritsch, supra note 105, at 3 (“There is no definitive study that says absolutely, positively, without a doubt the best way to educate kids is single-sex classrooms. But there’s also no definitive study that says absolutely, positively, without a doubt the best way is coed classrooms.”) (internal quotation marks omitted).

\textsuperscript{252} See Patricia B. Campbell & Ellen Wahl, Of Two Minds: Single-Sex Education, Coeducation, and the Search for Gender Equity in K-12 Public Schooling, 14 N.Y.L. SCH. J. HUM. RTS. 289, 308-09 (1997-98) (“We need to focus as much on coeducational settings as we have on single-sex settings, looking at what is taught and how female and male students are treated in coeducational settings . . . no one, male or female, learns well . . . where he or she is disrespected, discriminated against, and not supported.”); Memrick, supra note 130 (“‘Single-gender classes are not necessarily better than co-ed classes, [David Chadwell, S.C. Department of Education single-gender initiatives coordinator] said. ‘And they shouldn’t be. ‘Both of them should be improving,’ Chadwell said.”).

\textsuperscript{253} “Single-Sex Education,” supra note 190, at 1 (advocating that the ED should promote “successful practices and qualities, regardless of the gender makeup of the school,” such as: “a focused academic curriculum, small class size, qualified teachers, sufficient funding, parental involvement, equitable teaching practices, [and] maintaining appropriate and consistent discipline”); see Gandy, et
Supporters and opponents are apt to agree that improving the general condition of American public education includes the adoption of such “good education” components as smaller class sizes, increased funding, and more purposeful teacher-student interaction. Therefore, everyone involved in the single-sex revival, including parents, educators, policymakers, and the schools undertaking the initiatives, must also work with fully or partially coeducational schools to provide improved academic alternatives for all public school students—regardless of the type of environment that may fit them the best.

The operative buzzwords here continue to be “options” and “voluntary.” Though the concerns voiced by critics have some merits, the ED did not amend Title IX to supplant coeducational schools, as it has reiterated that “participation in single-sex classes [will] be completely voluntary” and that “single-sex public educational opportunities [will be provided] among a diversity of educational opportunities.” In instituting safeguards, the federal government has shown that it recognizes and appreciates that single-sex public schooling is a delicate educational matter—particularly when, up until very recently, “our nation’s history has been characterized by a long and difficult struggle to provide every citizen with equal rights under the law.”

Although the implementation process raises the eyebrows of those opposed to gender-separate public education, as more research is developed on this topic, we can all anticipate more highly developed, effective initiatives, along with

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el., supra note 188, at 17 (adding “More Diverse Curriculum Offerings To Which All Students Have Access, Gender Equity Training for Administrators, Teachers, Counselors, and Other Staff, [and] Sexual Harassment Training and Improving Support Services for Students Who Encounter Sexual Harassment” to the attributes listed by AAUW).

254 Nondiscrimination, supra note 71, at 62, 534, 537.

255 See SALOMONE, supra note 34, at 119 (“Many prestigious academic institutions explicitly denied entry to women based on the implicit belief that they were intellectually inferior to men. And even where separate schools were available, these schools perpetuated gender stereotypes while the educational program and facilities offered to women were often of lesser quality and rigor.”).

academic progression for students reaping the rewards of successful instructive efforts.257

b) Forget Education, What About Socialization?

Along with the debate over the academic effects of single-sex schooling, proponents and critics clash over the broader, social consequences of allowing government-authorized, publicly funded separation of girls and boys. On one side, advocates of NCLB’s single-sex provision promote the idea that “boys and girls learn differently[; therefore] single-sex education can help both genders perform better.”258 They not only laud the academic rewards single-sex instruction can provide, they also identify various non-academic benefits to separating girls and boys at some point throughout their formative years, such as eliminating social distractions, enhancing self-esteem, diminishing sexual harassment, and even allowing recipients to address more effectively other “social problems affecting students, i.e., social needs . . . includ[ing] pregnancy, discipline problems, drug or alcohol abuse, delinquency, and criminal activity.”259

257 See Campbell & Wahl, supra note 252 (maintaining that if future analyses investigate the core of the educational process, “in relation to resources and gender composition, and look at single-sex and coed settings where there is minimal harassment and positive support of both genders, we can anticipate that we will learn a great deal more about strategies that serve both girls and boys well”); Rex, supra note 105, at 3 (“Educators . . . across South Carolina have been amazed by the impact of single-gender programs. Nurtured over time, that success can be a strong step toward our goal of offering a broader range of instructional choices that engage parents and students and meet the individual needs and interests of every child.”).

258 The Associated Press, supra note 169.

259 Nondiscrimination, supra note 71, a 62, 536. See also Katherine Bradley, The Impact of Single-Sex Education on the Performance of First and Second Grade PUBLIC School Students, GA. EDUC. RES’R, Spring 2009, at 5, available at http://coefaculty.valdosta.edu/lschmert/gera/volume-7/article%20revised-2009-article084format.pdf (“Non-academic variables that have been research[ed] to date include increases in attendance frequency, self-esteem, the development of leadership skills and social skills, and reductions in discipline referral frequency, dropout rate, premartial sex, sex stereotyping and sexual harassment.”); see, e.g., Rex, supra note 105, at 2 (informing readers that Taylors Elementary School in Greenville “reported a drop in discipline referrals from 0.36 referrals per student in 2007-08 to 0.06 referrals per student in 2008-09”).
However, opponents contend that claims of learning differences between the sexes, "hyped as 'new discoveries' about brain differences," are nothing more than "dressed up versions of old stereotypes,"\(^{260}\) maintaining that there are imminent social dangers in separating children based on these brain differences, including the engenderment of socially ineffectual children, ill-equipped to handle the stressors of real-world interactions with the opposite sex. Critics also highlight an even more dangerous outcome: that single-sex public education will promote the "discrimination[ion] against women, [building] upon the historic sexism that has denied all students truly equal opportunity, access, and treatment in American education."\(^{261}\)

However, critics maintaining that implementation efforts are going to set the American public education system back thirty years are not considering that current initiatives are offered as an alternative way to enrich students, "designed to give students more than one opportunity to show promise."\(^{262}\) Successful recipients note that a "unique feature of single-sex education is that it can be implemented quickly, in various formats and at a low cost."\(^{263}\) Some schools implement single-sex formats where all aspects of education, i.e., academic courses, lunch breaks, and even extracurricular activities held by the school, are separated by sex.\(^{264}\) However, many schools adopt a more modified approach, where some aspects are

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\(^{260}\) *Sex Segregated Schools*, supra note 203.

\(^{261}\) *ACLU Single-Sex Notice*, supra note 188. See also Weil, *supra* note 106, at 16 ("But schools, inevitably, present many curriculums, some overt and some subtle; and critics argue that with Sax's model comes a lesson that our gender differences are primary, and this message is at odds with one of the most foundational principles of America's public schools.").

\(^{262}\) Weigand, *supra* note 131. See also Rex, *supra* note 105, at 1 ("Educators in the local school determine how single-gender classes can complement current offerings. Single-gender classes need not replace ongoing instructional strategies, but they can be a catalyst for engaging students by altering the structure of classes and student dynamics.").

\(^{263}\) Rex, *supra* note 105, at 1.

single sex and some are coeducational. Currently available data does not necessarily reveal any benefit to having a wholly single-sex school over having some coeducational aspects, instead illustrating that the quality of the educational curriculum is far more critical to the students’ academic and social success. The beauty of being able to customize “single-sex classes in all their permutations” is that educators can provide an educational program that offers boys and girls the opportunity to excel in an environment unaccompanied by certain social pressures that may be present in a coeducational atmosphere.

As stakeholders, researchers, and educators have all recognized, recipients cannot base the implementation of single-sex instruction solely on disciplinary problems or on socioeconomic status or even on gender. Schools implementing single-sex instruction must consider a myriad of factors, including the socialization consequences, to make their initiatives work. This is why the ED

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265 See Horng, supra note 234, at 2 (“And the students enrolled in the single-gender classes aren’t separated from the opposite sex all day. Lunch, recess, and fieldtrips are all co-ed.”); Rex, supra note 105, at 1 (“Some schools offer single-gender classes in pre-kindergarten, others in grades K-2 or in grades 1-5 . . . . Some schools target core academic areas like English language arts, math and science. High schools typically offer single-gender classes in 9th grade and in courses requiring state-mandated testing.”); SALOMONE, supra note 34, at 227-28 (“One single-sex educational model that has attracted significant media attention is the dual academy, or what in the past was called the constitutional approach[, where] boys and girls are educated in separate classes . . . . They join together, however, for extracurricular activities and perhaps for certain academic subjects.”). See, e.g., Megan King, Single-Sex Classes Show Promise at Drew-Freeman Middle School, GAZETTE.NET, Oct. 16, 2008, http://www.gazette.net/stories/10162008/prinnew164800_328483.shtml (“The students are separated by gender for core classes such as English, math, science and social studies, but boys and girls are together for other classes such as music and physical education. Each class is also offered in a co-educational setting . . . .”).

266 SALOMONE, supra note 34, at 227. See, e.g., Khan, supra note 250 (“Aside from the dress code – no skinny jeans, no colored undershirts – sixth-grader Zaira Lemoli had no complaints. ‘It’s cool, because you can pay attention more to the teachers without boys.’”).

267 See King, supra note 265 (“‘It’s not just the act of putting together the all-girls class or all-boys class. It’s really paying attention to what makes learning interesting for them, to understand how boys and girls learn differently,’ [Jing Lin, professor of international education policy at the University of Maryland, College Park] said.”); Emily Richmond, Single-Sex Classes Being Praised on Many Levels,
did not specify what the pre-implementation data analysis was to entail. The ED understood that “recipients that implement single-sex education will have differing objectives addressing differing student populations.” Correspondingly, supporters are not espousing that girls and boys learn differently to prove somehow that one sex is inferior to the other. In fact, advocates even acknowledge that “[d]ifferences in brain size between males and females should not be interpreted as implying any sort of functional advantage or disadvantage.”

Educational bearing aside, there still remains a dispute over the effects single-sex schooling may have concerning important non-academic questions. Supporters assert that properly implemented single-sex schools show America’s progress since its VMI days, while opponents argue that the resurgence of single-sex instruction is indicative of a telltale societal regression to the days of widespread gender discrimination. Even if the entire anti camp conceded the academic benefits of single-sex schools and classrooms, opponents are still concerned over the effect such initiatives may have on sociological issues, such as self-esteem, interaction between the sexes, and potential “badges of inferiority.” Critics of single-sex education have maintained that sex-segregated education is a step away from gender equality, demanding concrete and “equivalent empirical evidence that they are needed and likely to make progress toward equality.” The key flaw with that argument is that it argues against a statement that has never been espoused by single-sex advocates: that single-sex instruction can benefit all students in every circumstance. I have yet to encounter a source that asserts this, whether in relation to single-sex or mixed-sex schooling. In fact, the current state of the public education system shows that this is not the case, even for coeducational settings. Both coeducational and single-


268 See supra notes 95-96 and accompanying text.
269 Nondiscrimination, supra note 71, at 62, 533
270 Lenroot, et al., supra note 172, at 1027.
271 See Gandy, et al., supra note 253 and accompanying text.
272 Kaminer, supra note 194, at 5.
sex schools can have drawbacks for different students, such as pressure from either educators or other students, which can force girls or boys into certain gender roles.²⁷³ On a similar vein, just as there are students who flourish in coeducational environments, there are students who have and will flourish in a single-sex environment.²⁷⁴ As has been repeated throughout this comment, proponents are supporting the option of single-sex schooling based on Assistant Secretary Monroe’s assessment that gender-separated education can benefit some students in particular circumstances. The ED has amended Title IX in large part for that group of students who get either an academic “do-over” or simply a self-esteem boost from learning under a single-sex format. Even so, educators must come to understand that “the determining factor isn’t the gender composition of the school, but rather the values that are promoted in the school,” ensuring that those “certain circumstances” occur far more often than not.²⁷⁵

Furthermore, the implementation of single-sex classrooms, programs, or schools is not “a silver bullet to improving performance in our public schools.”²⁷⁶ The unease opponents are communicating over possible socialization issues cannot simply be dismissed as implausible anxieties from out-of-touch critics.²⁷⁷ Having emotionally healthy and socially balanced students should be just as important as having high-achieving students, not only because academic success goes hand-in-hand with the caliber of the students’ surroundings, but also because schools help prepare children for

²⁷³ See Abrams, supra note 173 and accompanying text.
²⁷⁴ See Salomone, supra note 90, at 785 (emphasizing the rationales given by advocates that support many legitimate governmental interests, such as “increasing achievement, interest, and career opportunities in math, science, and technology for girls; improving literacy skills among boys; decreasing teenage pregnancy among inner-city minority girls; developing academic identification, increasing college enrollment, and decreasing the drop-out rate and even criminal activity among inner-city minority boys”).
²⁷⁵ Id.
²⁷⁶ Separated by Sex, supra note 190, at 1.
postsecondary life. As a microcosm of the greater American society, schools must focus on behavioral and sociological—along with academic—health. Single-sex learning environments do not mean that students will be ill-prepared for the postgraduate world, as the schools still instill necessary values into their students and many of them offer coeducational interaction, as well. \textsuperscript{278} Furthermore, simply being in a single-sex environment can help alleviate some of the issues between the sexes that arise in traditional public schools. \textsuperscript{279}

However, same-gender environments are not without their own problems. \textsuperscript{280} Single-sex programs do not give recipients a free pass to relax on administrative and disciplinary procedures. Additionally, they do not permit recipients to forego affirmative, deliberate efforts to ensure that students from within and without single-sex environments do not come to believe that one sex is inferior to the other in any way, shape, or form. Establishing a single-sex school or switching to single-sex classrooms requires patience and hard work by all involved. Not all students will thrive in a single-sex atmosphere, and the same single-sex format will not work for all recipients. Offering single-sex opportunities means that schools are providing a learning environment that is more tailored to the needs and goals of certain students—but not every student. Therefore, just as with academic matters, proper socialization that equips all students to “set sail” is a duty that recipients, policymakers, and parents must

\textsuperscript{278} See Horng, supra note 234, at 2 (“But the boys at Cunningham Elementary disagree and say Ferguson’s lessons go beyond academics. ‘They teach us how to be gentlemen, treat others with respect,’ said fifth grader Davion Givens.”); Weigand, supra note 131 (“‘We want to get kids in a space where they are not only exploring careers, but developing the ‘look, act and speak’ of the work place’ . . . . ‘[T]hey’ll be in a traditional classroom two-and-a-half days a week, and the other days will be career and technical education . . . .’”).

\textsuperscript{279} See supra note 274 and accompanying text.

\textsuperscript{280} See, e.g., King, supra note 265 (“But several girls in Dawson’s science class said the all-girl classes can cause ‘drama’ with so many girls in one class.”); Sarah Korones, The Growing Campaign for Single-Sex Education, Tufts Daily, Sept. 7, 2010, (“Tufts senior Sarah Tavares, who attended a private, single-sex middle school, agreed with Ott’s concerns about social preparedness — which is one reason she transferred to a coeducational public high school. ‘I felt like I was missing out on a normal teenage social experience being at an all-girls school . . . .’”).
not take lightly. School districts must act in full consideration of the social implications of single-sex public education in, making sure that schools not only "instruct children in reading and math but also . . . teach them commonality, tolerance and what it means to be American."c)

Forget Education and Socialization, What About Constitutional Rights?

Whether the reemergence of single-sex public schools and classes "retards or advances civil rights and social equality" is a central question in this debate. Even with the potential educational and social benefits of gender-separated instruction, critics pose a provocative and important question: is society is willing to indulge implementation efforts at the expense of time-honored constitutional principles—namely "the equal protection of the laws"? More specifically, opponents wonder, should the fact that "some students may learn better in single-sex academic environments" be sufficient basis for allowing such a blatant infringement on students' constitutional rights? Most meaningfully, do single-sex schools indicate the resurrection of Plessy's dreaded "separate, but equal" standard?

Advocates of single-sex public education offer quick replies to the legal arguments raised by critics, scholars, and inquiring parents, standing by their go-to response: "single-gender education is now legal in the United States, provided that administrators comply with [the 2006] regulations." However, critics note that within that legal conclusion stands one crucial caveat: "in United States

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281 See Horng, supra note 234, at 2 ("'They're ready for a co-ed world' . . . . 'If you're going to build a ship, you build it on dry land, and then when it's ready, that's when you put it in the water. The foundation is there. They're ready.'").

282 Weil, supra note 106, at 16 (noting that even if supporters could prove that sending a child to "his or her own school based on religion or race or ethnicity or gender did a little bit better job of raising the academic skills for workers in the economy, there's also the issue of trying to create tolerant citizens in a democracy") (internal quotation marks omitted).

283 See Kaminer, supra note 194, at 1.

education, separate has never been equal." Critics note that the existence or lack of considerable financial assets not only has a substantial effect on the instruction quality the school offers, it also carries legal stigmatizations of inequality and inferiority, akin to those reflected in Brown, Sweatt, and Virginia.

Those who oppose single-sex public schooling assert that initiatives affront the Constitution’s prohibition of sex-based discrimination and which has set American society on a slippery slope toward the reauthorization of other “suspect classifications”—including race-based discrimination. Accordingly, some opponents argue that single-sex public education is merely a hop,

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285 Campbell & Wahl, supra note 252, at 309 (referencing Brown, 347 U.S. at 495). See also supra note 207 and accompanying text; Sadker, supra note 199 ("[I]t remind[s] us why Title IX restricted single-sex schools in the first place. Three decades ago, Philadelphia, Boston, and most major cities were proud of their single-sex schools . . . [T]he cities argued that the girls’ and boys’ schools were “comparable,” the courts found the girls’ schools underfunded and clearly inferior.").

286 See Campbell & Wahl, supra note 252, at 309 & n.115 ("[B]ecause girls’ high schools typically receive less funding than boys’ school and had a less extensive curriculum, lawyers successfully brought suits on grounds on non-comparable resources, thereby opening the doors of the male schools to girls.") (citing David Tyack & Elizabeth Hansot, Learning Together: A History of Coeducation in American Schools 284 (1990)).

287 See Inequity in Illinois: How Illogical School Funding Has Eroded Public Education, SPECIAL REP. (People For Am. Way Found., D.C.), 2004, at 9, available at http://www.eric.ed.gov/PDFS/ED484340.pdf (“While many factors effect education quality, adequate funding is absolutely necessary to guarantee a quality education . . . . Unless Illinois’ education funding system is addressed, the quality of student learning and the quality of life in our communities will only get worse.”) (internal quotation marks omitted); supra notes 114, 142 and accompanying text (describing how inadequate funding played a role in closing certain single-sex initiatives).

288 See Richmond, supra note 267. Richmond reports that the attorney for the ACLU of Nevada, Allen Lichtenstein, finds the local school district’s School District’s venture into the single-sex arena “troubling,” even though it may comply with federal law: “Let’s suppose that they decide that racially integrated classrooms are not a good idea and don’t help student achievement . . . . Would we then have separate classrooms for blacks and whites?” Id.
skip, and a jump away from a time when government-funded schools were legally segregated by race, class, or gender. Troublingly enough, the fears voiced by opponents may not be for naught. To proponents, it may seem as if the ACLU has threatened and initiated lawsuits against several recipients just to convey their obstinate opposition to all things single-sex. However, at least two separate school districts have been reported to undertake recent, and appalling, educational initiatives to segregate their students, not only by gender but also by race—confirming that the legal concerns raised by critics are not as exaggerated or incredible as some advocates may claim. Though these instances may be anomalous in the contemporary scholastic community, they bode ill for present and future single-sex initiatives, while simultaneously illustrating exactly why recipients must tread with utmost care in implementing single-sex instruction by adhering to the guidelines, regulations, and safeguards prescribed by the federal government.

Nevertheless, both sides of the legal debate are grounded in Brown, which proposes that "when government policy forces a historically disadvantaged group to remain separate from the

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289 See Chen, supra note 1 (stating that the ACLU recently sued Vermilion Parish School District in Louisiana for the allegedly unequal distribution of resources between the single-sex and separate co-educational tracks, claiming that "all the "gifted and talented" students were disproportionately placed into the single-sex classrooms," while coed classes were dominated by special needs students"); Vu, supra note 133 (reporting that the "threat of a lawsuit shut down a plan by Louisiana's Livingston Parish school system to pilot gender-separated classes at two middle schools this fall . . . when the ACLU sued on behalf of 13-year-old Michelle Selden"); see also Rivera, supra note 233 (adding that "[t]he complaint against the Livingston Parish School Board cited statements that girls would be taught 'good character' while boys would be taught about 'heroic' behavior").

290 See Lenz, supra note 133 (disclosing that "one public high school in Atlanta recently started to separate their students by gender and race and/or language for several minutes each day and 20 minutes twice a week for mentoring . . . . The school says research shows this kind of segregation will be helpful to students."); Monika Plocienniczak, Pennsylvania School Experiments with "Segregation," CNN.com, Jan. 27, 2011, http://articles.cnn.com/2011-01-27/us/pennsylvania-segregation-neighborhood-schools-system-students?_s=PM:US (stating that another high school in Pennsylvania separates some students "by race, gender and language for a few minutes each day in an effort to boost academic scores . . . [and as part of] a pilot program intended to capitalize on ‘enriching students’ experiences through mentoring").
dominant group, it stigmatizes its members and conveys a message that they are of lesser intrinsic worth." 291 Though it is undeniable that the history of education for women, comparable with that of racially segregated schools, is "tainted with the mark of subordination," 292 all stakeholders involved must "recognize both the subtle nuances and the sharp distinctions between then and now." 293 Just as proponents must not ignore the historical perceptions of inequality, critics cannot ignore their distinctions from modern reality. For one thing, at present, participation in single-sex programs is generally voluntary. 294 Moreover, neither the purpose nor the result of current initiatives is to "generate a feeling of inferiority" but rather to help students realize their full potential," contrasting starkly with past racial and sex segregation. 295 Most significantly, the larger purpose of NCLB-stimulated single-sex education is "to provide access, not to deny it, and to mainstream students into the larger society, not to perpetually segregate them . . ." 296.

To some it may seem as if the "fragile consensus" of the women's rights' movements is "unraveling at the seams." 297 Confused, yet furious, opponents contend that the Constitution, along with the Supreme Court, have both made it clear that federal and case law, such as Hogan and Virginia, are presumptively mistrustful of educational curricula segregated by sex. 298 And these opponents would be correct were it not for one key discrepancy: Hogan and Virginia involved only higher education. 299 Therefore, the Supreme

291 SALOMONE, supra note 34, at 117, 119.
292 Id. at 119.
293 Id. (emphasizing that "[t]o fully understand and objectively assess contemporary single-sex education proposals, we must first disengage them from these past indignities . . . ").
294 Id.
295 Id.
296 SALOMONE, supra note 34, at 119-20.
297 Id. at 3.
298 See HURST & JOHANSEN, supra note 78, at 6.
299 See id.
Court might yet distinguish the cases that concern primary or secondary education.300

So, is “different but equal” America’s new “separate but equal?” Actually, neither. Shirley Ison-Newsome, a senior executive director in the Dallas Independent School District, phrased an answer that I believe perfectly communicates my stance in this debate301 and best encapsulates the intended spirit of modern single-sex public schooling, stating that while “[I am] not a proponent of separate but equal because, as an African-American, I see how that didn’t work,’ . . . she also believes [but] it’s possible to be ‘separate and empowered.’” As it has been all along, the key concept in this debate remains “choice.”303 All the same, gender-separated environment not only gives schools more flexibility in their educational format, it also constitutes an ideal breeding ground for controversy. Therefore, recipients should take all precaution in

300 See id. (“After all, the Court did (albeit in 1976 and in a sharply divided decision) uphold the constitutionality of a single-sex education program in a Philadelphia public school district.”) (referencing Vorcheimer v. Sch. Dist. of Phila., 532 F.2d 880 (3d Cir. 1975), aff’d by equally divided Court, 430 U.S. 703 (1977)).

301 As an African American and a woman, my initial reaction to this debate was to side with the opposition, remaining as steadfastly opposed to any mention of “segregation” and “education” in the same breath. However, the more research I have conducted on single-sex public education, the more I have come to appreciate the true spirit of modern gender-separated programs—the spirit of academic advancement, of lawful innovation, of individual empowerment.

302 Huff, supra note 228.

303 See Separating the Girls and Boys, CHI. TRIB., Nov. 18, 2006, at 24, available at http://www.singlesexschools.org/chicago_Jan07.htm (“The key here is choice. Parents can choose which model works best for their child . . . For years affluent parents have been able to choose single-sex education if they thought it was right for their children. Relaxing the rules in public education rightfully extends the choice.”); Howard M. Glasser, Single-Sex Middle school Science Classrooms: Separate and Equal?, (2008) (unpublished Ph.D dissertation, Michigan State University) (on file with Michigan State University, Graduate School), 9, available at https://www.msu.edu/~glasserh/research/dissertation/Glasser_Dissertation10b.pdf (“By granting families more choices in the types of public schooling their children can attend, there is a belief that more families will have their children remain in, or return to, public schools.”).
undergoing a single-sex format. Greatly dissimilar to old gender-separate instructive models, modern single-sex initiatives do not provide segregation "as an end in itself but rather as a means to provide appropriate education to students who may benefit from this particular approach at certain points in their schooling." 

2. The Obama Administration’s Reform of NCLB

The impact of single-sex initiatives on educational, social, and legal matters supplies the current executive office with much information on the difficulties and expediencies of NCLB’s single-sex provision, as well as on the bifurcated public perception of implementation efforts. In February 2010, the Obama Administration announced that it planned to “revamp” and “overhaul” certain provisions of NCLB, proposing up to a $4 billion increase in funding for America’s elementary and secondary schools. The president’s office subsequently released its Blueprint for Reform of NCLB in March 2010. The blueprint contains several favorable modifications to NCLB, taking a wholesale

304 See HURST & JOHANSEN, supra note 78, at 7. Hurst and Johansen offer one multistep example for foiling potential controversies: “involv[ing] parents in the planning stages of a single-sex program by asking them what they think about such a program and why.” Id. Furthermore, they advise that “[b]efore implementing a single-sex program, school officials might send around a letter explaining why the program is set up the way it is—for example, pointing out that boys are performing significantly less well than girls in language arts, so they will have a single-sex class.” Id. As a final bit of advice, Hurst and Johansen recommend that “once the program is up and running, parents and students . . . be told about their choices, as well as what measures are being taken to address issues of evenhandedness and substantial equality.” Id.

305 SALOMONE, supra note 34, at 120.


307 See Linda Kulman, Reform of “No Child Left Behind” Calls for More Flexibility, Higher Standards, POL. DAILY, Mar. 17, 2010, http://www.politicsdaily.com/2010/03/17/reform-of-no-child-left-behind-calls-for-more-flexibility-hig/ (“On Monday, Obama delivered his much-anticipated wish list for revamping NCLB to Congress, to largely positive reviews . . . . Along with greater flexibility, the administration is setting a higher bar.”); see generally A Blueprint for Reform, supra note 72.
approach to renovating the now-unpopular Act.\textsuperscript{308} However, amidst talks of “state accountability systems” and “achievement gaps,” there is not one phrase throughout the document devoted to single-sex education. The absence of any pertinent language is glaringly obvious to anyone expecting revisions or at least some executive comments on the current laws concerning single-sex initiatives. Upon learning of this absence, supporters of current single-sex flexibility likely cheered—enthused that they have more time to realize the outcome of current or planned initiatives, while frustrated opponents perhaps sighed, subsequently penning irate correspondence to the executive office.

However, whether a pleased advocate, disgruntled critic, or perplexed parent, we must all bear in mind that in comparison to many of the traditional mixed-sex public schools, the majority of NCLB-induced single-sex public schools and programs are still in the infancy stage. “More research! More data! More statistics!” comprises the general attitude toward single-sex initiatives from both camps. Therefore, the federal government is most likely biding its time, patiently waiting for more concrete and reliable research to surface before it takes any immediate action. For the time being, it seems as if the power of implementation rests in the hands of educators, parents, and local school districts. Therefore, recipients must make every effort to effect improved schools, complying with current federal law, considering the concerns of critics and parents alike, and focusing on “the elements that enable children to succeed in single-sex education[:] a focus on core academics, small class size, qualified teachers, sufficient funding, and parental involvement.”\textsuperscript{309}

\textsuperscript{308} See Press Release, U.S. Dep’t Educ., Obama Administration’s Education Reform Plan Emphasizes Flexibility, Resources and Accountability for Results (Mar. 15, 2010) (on file with author), available at http://www2.ed.gov/news/pressreleases/2010/03/03152010.html (“Under the Obama administration’s blueprint, state accountability systems will set a high bar of all students graduating from high school ready to succeed . . . [Also,] states and districts will continue to focus on the achievement gap by identifying and intervening in schools that are persistently failing to close those gaps.”).

\textsuperscript{309} Zirkin, et al., supra note 199, at 3.
3. What does the future hold for *Doe v. Vermillion*?

Commencing from the 2009-2010 academic year, Louisiana’s Vermillion Parish School Board sanctioned Principal David Dupuis of Rene A. Rost Middle School to initiate sex-segregated classes.\(^\text{310}\) The justification Dupuis gave for implementing segregated classes originated from a study he had completed concerning the benefits of single-sex instruction, to meet the requirements of his Ph.D program; the “study” ended up having serious flaws.\(^\text{311}\)

The plaintiffs, Jane Doe with her two minor daughters, filed a complaint against the school board and other school officials, contending that the defendants had “unlawfully segregated girls and boys attending Rene A. Rost Middle School in the 2009-2010 school year in violation of the Fourteenth Amendment’s Equal Protection Clause, Title IX of the Education Amendments of 1972 (‘Title IX’),” and several other federal statutes and regulations.\(^\text{312}\) On April 19, 2010, an order of by the district court denied the plaintiffs of the injunctive relief they sought and instead prescribed the school board to implement a court-generated 10-point plan for single-sex classes for the 2010-11 school year, which “focus[ed] almost entirely on improving notice to parents and on the number of single-sex classes that should be offered.”\(^\text{313}\)

Finding that the school board “had not intentionally discriminated against plaintiffs because the evidence did not show that the board intended to cause an adverse effect on males and females’ attending the school,” the district court held that “the same-sex program at [the middle school] is proper so long as the


\(^{311}\) See Gramer, *supra* note 310; Complaint, *supra* note 309, at 7; Brief of Amici Curiae National Women’s Law Center et. al., In Support of Plaintiffs-Appellants’ Brief Urging Reversal at 28, *Doe v. Vermilion Parish Sch. Bd*, No.10-30378 (5th Cir. June 4, 2010) (stating that “[t]he District Court held that theDupuis study is ‘extremely flawed’”).

\(^{312}\) Complaint, *supra* note 310, at 1; see Gramer, *supra* note 310.

\(^{313}\) Brief of Amici Curiae, *supra* note 311, at 30; see Gramer, *supra* note 310.
program is completely voluntary and there is a substantially equal co-ed opportunity available to every student.\footnote{314}

Following this order, in June 2010, the ACLU and the ACLU of Louisiana appealed on behalf of the original plaintiffs,\footnote{315} arguing that "the District Court departed from well-established precedent and failed to apply any heightened level of scrutiny to Vermilion Parish’s classification of students by sex, despite abundant evidence that the single-sex classes at issue would not pass constitutional muster."\footnote{316} The Fifth Circuit heard oral arguments on October 5, 2010, but an opinion or memorandum disposition has yet to be published or released.\footnote{317}

The plaintiffs on appeal have argued a compelling case against the Vermilion School Board, with the gist of their suit being: "because of the Defendants’ failure to show an exceedingly persuasive justification for the single-sex plan, the plan is unconstitutional both as implemented and as modified by the order of the District Court."\footnote{318} In disposing of the males-only admissions policy at VMI, the Supreme Court made it plain that there remains a "‘strong presumption that gender classifications are invalid’ and that single-sex programs must have an ‘exceedingly persuasive’ justification."\footnote{319} Justice Ginsburg triple-underlined the challenging “exceedingly persuasive” burden of proof to legitimize sex-based discrimination in schools.\footnote{320}

What does the future hold for Vermillion? What it has since Hogan and Virginia: the requirement of an “exceedingly persuasive justification.” The ED has amended Title IX to guide recipients on how to properly implement single-sex initiatives within the requirements of Title IX and the Constitution. The approval of

\footnote{314}{Gramer, supra note 310 (internal citations and quotation marks omitted).}
\footnote{316}{Brief of Amici Curiae, supra note 311, at 8.}
\footnote{317}{See Gramer, supra note 310.}
\footnote{318}{Brief of Amici Curiae, supra note 311, at 30.}
\footnote{319}{Salomone, supra note 90, at 784 (quoting Virginia, 518 U.S. at 532-33).}
\footnote{320}{See id. (‘Here the burden of proof is ‘demanding,’ the Court noted, and ‘rests entirely on the State.’”) (quoting Virginia, 518 U.S. at 533).}
lawful single-sex public schools and classes does not mean school districts can simply circumvent the proscriptions of black-letter law. The federal government has not enfeebled the intermediate scrutiny standard for sex-based discrimination, granting school districts a free pass to implement careless, illegal initiatives willy-nilly. The 2006 regulations provided by the ED were not to teach recipients how to get around the established law but how to work with the law, implementing single-sex initiatives in light of the rules adopted by the legislature and the corresponding standards set by the judiciary. If *Vermilion* moves on to the Supreme Court, the Court should find that the district’s single-sex initiative, based on an “extremely flawed” graduate study, is not substantially related to serve an important governmental interest. However, there is a chance the Court may affirm the ruling of the district court, approving the implementation of the district court’s 10-step plan. Either way, *Vermilion* will serve as another teaching lesson for current and future recipients: how not to resemble the failed CPP in justifying your single-sex initiatives on defective studies.

**B. Conclusion**

The constitutional implications of authorizing single-sex instruction in public schools stand as the main source of the conflict between supporters and critics of recent implementation efforts. Though merely a pipe dream to anticipate that there will ever be a consensus on the specific issue of single-sex options offered in the public school arena, a more important objective amidst the fracas is not to allow the discord brought on from the single-sex provision to stop us from continuing to dialogue, plan, and execute ways to improve the public education system. Merely characterizing the dissonance over single-sex education as a simple debate shortchanges what should be the true focus of this interchange: “[r]eforming our schools to deliver a world-class education” to each child within the system.321 If we approach this matter as a simple scholarly debate or an exchange of differing opinions and ideologies, then we will miss the fact that generating academic success and a genuine enthusiasm

321 A Blueprint for Reform, *supra* note 72, at 1.
for learning was and still is the basic premise for a federal initiative titled "No Child Left Behind."\textsuperscript{322}

So, yes, the option to offer single-sex public education in accordance with constitutional and statutory law is hotly debated, relatively undeveloped, and legally tenuous. Advocates on all sides of the debate make compelling cases for their respective positions, injecting strength into their arguments with personal, social, and academic observations, available research evidence, and persuasive legal analyses. Supporters have defended their point of view with numerous individualized, anecdotal accounts of successful implementation, often confounded or frustrated with unyielding critics who refuse to acknowledge the benefits many schools have seen after implementing single-sex classes or programs. Many opponents are rooted determinedly opposite their counterparts, doing all they can to chip away at the justifications offered by advocates, all the while underscoring the anti-discrimination dicta of the law. Yet, even for all of the impassioned counterarguments proffered, it does not appear as if opponents to single-sex education are wholly unwilling to recognize cognitive, behavioral, or socialization differences in boys and girls. Rather, an underlying fear of inequity and degeneration appears to be the impetus for such strong dissent.

Thus, present and future recipients must tread carefully in their forays into single-sex instruction. Gender stratification in education can put the American public education system on the fast track to pre-twentieth century times. So it should be of no surprise that many groups and individuals would be hesitant, skeptical, or resolutely opposed to the idea of harking back to an age where women and men operated in separate spheres and the sphere of women was marked by inequality and subordination. The concerns and fears expressed by the opposite camp are not baseless. The extensive history of gender discrimination in education should be sobering enough to give us all pause.

Though opponents of NCLB's single-sex provision make a strong case against government-endorsed single-sex instruction—

\textsuperscript{322} See Campbell & Wahl, supra note 252, at 310 ("The debate needs to be reshaped into a thoughtful dialogue, with an acknowledgement that the shared goal is schooling that fully educates each girl and each boy. That job is far from done, and that is where we need to dedicate ourselves.").
particularly with the utterly laughable track record that gender-separated education has throughout American history, the ED has taken comprehensive measures to ensure that modern initiatives are a far cry from historical sex-segregated schools. It is all-too-easy for those interested in, associated with, or impacted by this debate to get so caught up in the rhetoric-filled confusion that they altogether disregard the initial core ambition of NCLB and all of its provisions: to improve America’s failing public education system for the sake of the children. Because in the end, the impact of this legislation on our children is what really matters. There are not many educators, policymakers, or parents who will commend America’s general public school system in the current state that it is in. However, the federal government has taken quite an energetic crack at the larger education problem. And if all we can say is that, at the end of the day, the widespread implementation of single-sex public education afforded “some benefits to some students, under certain circumstances,” that will still denote that many more students have achieved academic success than are doing so currently. The painful past of American history calls for us to be critical of current single-sex initiatives, taking incisive measures to ensure that careless or illegal implementation efforts are forced to expose their weaknesses and flaws. With that being said, we cannot ignore the need for far-reaching education reform, along with the Supreme Court’s authorization of single-sex instruction provided there is an exceedingly persuasive justification. Therefore, in the spirit of academic progression and freedom of choice, who am I not to support such an audacious, yet lawful, endeavor to heal a broken education system?

323 See supra note 4 (detailing aspects of the failures of the public education system).