

Gender and the Law Stories: Learning from the Longstanding Debate

The Ruth Bader Ginsburg Lecture --- Feb. 7, 2011

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To give a lecture named for Justice Ruth Bader Ginsburg to this august assembly is an extraordinary honor, and to do so in her company is simply a joy.

Justice Ginsburg, your significance to my professional fields of civil procedure, constitutional law, and gender and the law is simply unparalleled. And your place in my own life includes pivotal encouragement as you joined the appellate bench and while I served as a clerked. Later, there was a memorable phone call telling me you nominated me to serve on the board of the American Bar Foundation—an affiliation that changed my research and my relationship with the bar. I will never forget your support as I decided to entitle an article, “Justice Engendered,” in the Harvard Law Review. Your example-- as a short, Jewish woman whose work opens the literal and professional doors I have been lucky enough to enter. Your repeated kindnesses mean more than I can ever say.

¹ Dean and Jeremiah Smith, Jr. Professor, Harvard Law School. Thanks to Vicki Jackson, Josephine Minow, Nell Minow, Newton Minow, and Joe Singer for helpful comments, and to the many friends and students who helped with my in efforts in the related work published in Elizabeth Schneider and Stephanie Waldman, *Women and the Law Stories* (2011) and Martha Minow, *In Brown’s Wake: Legacies of America’s Judicial Landmark* (2010).

I want to take a moment to salute Marty, who I know loved this event and who remains a distinguished, beloved graduate of my school—and the chef of one of the few good meals I had while in Washington.

So I give deep thanks to the New York City bar for this honor, and also note what a delight it is to be here with so many distinguished people, friends, colleagues, former students, and people I want to meet.

I turn to this assembly with a puzzle, and ask you to think with me about its origin and its future. The puzzle is this: why there is a surge of educational initiatives separating students by sex (or gender) in the United States right now—why at all, and why now, after recent decades in the United States have brought dramatic transformations in the legal treatment of women, opening educational and professional opportunities. During my lifetime—indeed, since I went to college—reforms opening education, professions, careers and institutions to women have been palpable and thrilling.

Here's a vivid example: when I graduated from law school there had never been a woman justice on the Supreme Court. Now there three: one of course being this lecture's namesake.

Yet—and here is the puzzle—the last decade as brought a sudden and growing revival of single-sex education. To consider the puzzle, I will offer two stories of gender and law,

stories that touch on my life and Justice Ginsburg's life, and then invite us to explain the puzzle and assess this moment.

1. The Story of Advances

The first is the story of advances in the direction of gender equality—in education and in the professions. In the past fifty years, there are few aspects of American society undergoing more change than women's place in the professions. At times, the changes surge with surprising speed. Margaret Thatcher in 1971 said, “I don't think that in my lifetime there will be a woman Prime Minister,” and then she became Great Britain's first woman Prime Minister in 1979.² It's been a time of prodigious change.

When I was a child, a riddle that truly stumped people asked, how could it come to pass that an injured young person, delivered to the hospital by his father, met there an aghast the surgeon who exclaimed, "but I cannot operate on my own child!" Neither I nor others immediately guessed that the surgeon was the child's mother. We knew no women doctors or clergy, or CEOs of major companies. I did know one woman lawyer: my cousin, also named Martha. That she became a lawyer after a divorce simply added to her anomalous status, toughing out personal tragedy, although she also seemed deeply engaged by her work.

Just as I was learning what a lawyer is, Ruth Bader Ginsburg was admitted to Harvard Law School given her stellar record at Cornell University. She gave up her admission, though, to join her husband Marty, already a student at Harvard Law School, as the

² Quoted in A. Pierce, The epitome of a ‘Very Pretty’ Tory Lady: Daily Telegraph Feb. 23, 2009, at 5.

military called him to service from the reserves.³ The school welcomed Marty back but Ruth had to reapply; readmitted, she joined 8 other women in the fall of 1956 in the class a year behind her husband. When Marty became ill with cancer, Ruth organized his studies and typed his papers while continuing with her own work. Marty recovered, graduated, and accepted a job in New York. The family, including by then young Jane, moved to New York. Harvard's Dean refused to allow Ruth Ginsburg to retain her status at Harvard while finishing her legal studies at Columbia—despite Ruth's high grades, Law Review membership, and family situation. She made the law review at Columbia. A fellow student described her as “scary smart”.⁴ There, she graduated in a tie for first in the class in 1959. Impressive experiences followed: a law clerk for a federal judge, researcher of the Swedish legal system, funded by the Carnegie Foundation, and one of the first women law professors in the country. Her c.v. does not, however, report the refused interviews and jobs along the way foreclosed by such notables as Justice Felix Frankfurter. By 1970, Professor Ginsburg had started teaching a course on women and the law, and began to work with the ACLU to challenge legally-enforced gender discrimination.

I entered college in 1972. That was precisely the year that Congress enacted Title IX, banning sex discrimination in schools receive federal aid; Congress sent the Equal Rights Amendment to the states for ratification, and the Supreme Court ruled that the right of privacy protecting access to contraception extended to single as well as married people.

³ See Fred Streibigh, *Equal: Women Reshape American Law* 9-14, 19-28 (2009); Stephanie Francis Ward, *Family Ties: A Look Inside the Private and Public Lives of Justice Ruth Bader Ginsburg*, *ABA Journal* 36 (Oct. 2010).

⁴*Id.*, at 12.

And that was the year that Ruth Bader Ginsburg began her representation of Stephen Wiesenfeld. The Social Security Administrative denied him parental benefit despite his wife's contributions to Social Security. Lawyer Ginsburg argued that not only did this denial of the "mother's insurance" benefit treat a man worse than a woman; it also treated the woman contributor to the social insurance as unequal to a male contributor when benefits came due. The Supreme Court agreed-- unanimously—in 1975, in one of the milestone cases Ginsburg established on the journey to enforce equal protection in the context of gender.

As that case and others pended, I was a fairly carefree college student. I wanted to attend a school where being a woman was not an anomaly. I found it at the University of Michigan where women had attended since 1870. Like other women at the time, I faced remnants of bias against women but also benefitted from emerging efforts to rectify it. My university nominated me for a Rhodes Scholarship before they were awarded to women. I guess I was a "test case." The interviewers asked, "how will you have a career and raise a family?" I replied, "My father did." The following year, the selection committee awarded its first scholarships to women. I've had the privilege of being the "first woman" to do various things, but the even greater privilege of NOT being the first, as in, not being the first woman dean at Harvard Law School.

My own biography mirrors larger national developments. In 1967, President Lyndon Johnson added gender discrimination to his affirmative action executive order, directing federal agencies and contractors to take active measures to ensure for all the same

educational and employment opportunities as white males.⁵ The Equal Employment Opportunity Commission outlawed sex-segregated help wanted ads in newspapers in 1968 and the Supreme Court agreed five years later. Congress banned discrimination in employment on the basis of pregnancy in 1978.⁶ So many of the changes came about because Ruth Bader Ginsburg's ACLU Women's rights Project won pivotal victories; notable decisions include Reed v. Reed, Frontiero v. Richardson, and Weinberger v. Wiesenfeld.⁷

All-male education colleges and universities opened their doors to women in the 1960s and 1970s.⁸ During this period, women increasingly entered law schools and the legal profession. In 1967, women made up only 5% of law school enrollments nationwide.⁹ This would grow to 8% in 1968, 30% by 1974, and by 2011 it hovering around and in some places exceeds 50%.¹⁰ During the same period, women enrolled in medical schools grew to around 52%.¹¹ In 1982, the Supreme Court rejected the exclusion of a student from a state-supported higher educational program—in a case brought by a man seeking entrance to an all-female state nursing school. For my own daughter, now a college freshman, these events seem--- like much of her mother's life-- ancient history. That sense of the naturalness of the new order is itself a sign of how far we have come.

⁵ Women's Rights Movement in the U.S.: Timeline of Events (1921-1979) — Infoplease.com
<http://www.infoplease.com/spot/womenstimeline2.html#ixzz1C9uQXxRg>

⁶ Id.

⁷ In 1981, the year after she joined the federal bench, and while I was a law clerk, the Supreme Court for the first time rejected a law giving a husband control of marital property without his wife's consent..

Kirchberg v. Feenstra, 450 U.S. 455, 462-463 (1981).

⁸ Yale and Vassar: 1969.

⁹ Streibach, *supra*, at ix.

¹⁰ Fred Strebeigh, *Equal: Women Reshape American Law* 16 (2009).

¹¹ See https://www.aamc.org/download/152934/data/enrollment_data_2010.pdf

II. Story Two: The Revival of Single-Sex Education

Because story two tells of the revival of single-sex education, the story must start with its earlier rise and fall. Distinctive treatment of girls and women stems from long-standing set of beliefs bestowing on girls and women (really, on white girls and women) a special place in home and family, a private realm imagined as separate from the public realms of boys and men.¹² In the 17th century, education for girls in North America rarely moved beyond home instruction or at best, primary school. Colleges and schools preparing students for college excluded girls.¹³ By the late 18th century, a few boarding schools started for girls but they tended to focus on refinements like music and art rather than the subjects, such as science, pursued by boys.

The push for basic public education in this country started in the 1840s. Advocates debated whether to make it coeducational. Opponents warned that boys would be too coarse and would corrupt girls. Single-sex instruction, they said, better suited the real differences between boys and girls. Early women's rights reformers agreed that about gender differences but argued for co-education because the presence of girls would

¹² See, e.g., Nancy Cott, *The Grounding of Modern Feminism* (1987); Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 *Am. Quarterly* 151 (Summer 1966); Martha Minow, 'Forming Underneath Everything that Grows': *Toward A New History of Family Law*, 1985 *Wis. Law. Rev.* 819. The notion of "true womanhood" did not extend to African-American women. See Vera L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 *Wis. L. Rev.* 15, 38, 55-57 (2004).

¹³ Ilana DeBare, *Where Girls Came First* 17 (2005); Rosemary C. Salomone, *Same, Different, Equal: Rethinking single-Sex Schooling* (2003); Janice Streitmatter, *For girls Only: Making a Case for Single-Sex Schooling* (1999); David Tyack and Elizabeth Hansot, *Learning Together: A History of Coeducation in American Public Schools* (1992).

civilize the boys. In the end, co-education was cheaper, so it won out in the public schools. Into the late 19th century, ostensibly scientific and moral rationales for excluding women from legal and medical education persisted.

The most elite private schools and colleges remained single-sex—and typically excluded blacks, Jews, and recent immigrants. But coeducation remained the norm for public schools even as public education expanded to include high schools.

The Supreme Court's decision in *Brown v. Board*, the judicial highlight in the struggle for racial justice in the 20th century, also carried significant repercussions for the treatment of gender¹⁴ in schools. Activists cited *Brown*'s rejection of “separate but equal” instruction in the context of race. They challenged use of gender to sort students into different classrooms or schools. Proponents of gender equality also at times defended all-girl instruction as a kind of remedial, empowerment measure,¹⁵

The 1964 Civil Rights Act enlarged *Brown*'s rejection of state-mandated exclusions beyond schooling, beyond government-run institutions, and beyond race-based exclusions. The growing movement for women's rights successfully propelled the 1972 Education Amendments, producing Title IX which conditions the use of federal funds for educational programs on individual legal protections against gender discrimination.¹⁶

¹⁴ I use “gender” and “sex” to refer to male and female both in terms of the bodily characteristics of individuals and to the social production of the preferred attitudes and practices associated with males and females.

¹⁵ See Kimberly J. Jenkins, Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools, 47 William and Mary L. Rev. 1953 (2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799926; Nancy Levit, Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools, 2005 U. Ill L. Rev. 455 (2005).; Denis C. Morgan, Anti-subordination Analysis After United States v. Virginia: Evaluating the ‘Constitutionality of K-12 Single-Sex Public Schools, 1999 U. Chi. Legal. F. 381 (1999).

¹⁶ Title IX was renamed in 2002 for its lead drafter, Representative Patsy Mink.

Advocates used law to equalize resources across programs for boys and girls and also to open up male- only settings.

Yet Title IX expressly excluded from its coverage the admissions policies at secondary schools¹⁷ and public colleges traditionally enrolling only students of one sex.¹⁸ By exempting school admissions from protections against gender discrimination, the legislators indicated an enduring belief that differential treatment by gender is not necessarily derogatory or negative. Even advocates and scholars committed to combating discrimination have disputed the analogy between race and gender especially around the issue whether separate can ever be equal.¹⁹ Gender has an undisputed biological basis. Racial differences do not. Also, Jim Crow laws mandated racial segregation while males and females have always shared communities and homes. So the integrative function of schooling might be less vital when it comes to gender than with race. Complicating matters, officials and decisionmakers historically justified many restrictions on women as benign and protective. Justice Ginsburg reflected on the contrast between racial and sex-based discrimination during her confirmation hearings before joining the United States Supreme Court:

Race discrimination was immediately perceived as evil, odious, and intolerable. But the response I got when I talked about sex-based discrimination was 'What are you talking about? Women are treated ever so much better than men.' I was

¹⁷ See 20 U.S.C. sect. 1681 (a)(1).

¹⁸ 20 U.S.C. sect. 1681(a)(5).

¹⁹ For thoughtful treatments, see Robert L. Hayman, Jr. and Nancy Levit, *Unnatural Things: Constructions of Race, Gender and Disability*, in Francisco Valdes, Jerome M. Culp, and Angela P. Harris, *Crossroads, Directions, and a New Critical Race Theory* 173-175 (2002); Christine Littleton, *Reconstructing Sexual Equality*, 75 Cal. L. Rev. 1279 (1987).

talking to an audience that thought . . . I was somehow critical about the way they treated their wives ... [and] their daughters.²⁰

To individual women, restrictions often did not seem benign. In 1974, Susan Vorchheimer sought admission to Central High School in Philadelphia, an elite college-preparatory public high school restricted to boys.²¹ She saw nothing benign in being barred from that school. Nor did she accept as an alternative the separate neighboring Philadelphia High School for Girls which lacked the endowment, science labs, and distinguished history of Central High. The very contrast between the name “Central High” and the name “High School for Girls” signaled historic significance of the boys’ school, compared with the girls’.

A federal district court agreed with Vorchheimer in 1975. It found unacceptable the absence of a co-educational option for students seeking an academically rigorous public school program.²² The appellate court reversed and pointed to real differences between the sexes. A dissenter described the result for approving “separate but equal” education based on gender.

Susan Vorchheimer pushed for Supreme Court review and received support from Ruth Bader Ginsburg and her ACLU Women’s Rights Project, although Justice Ginsburg later described her disappointment with the presentation by Vorchheimer’s lawyer and did not

²⁰ Quoted in Ruth Bader Ginsburg, Supreme Court Historical Society, <http://www.supremecourthistory.org/myweb/justice/ginsburg.htm>.

²¹ 532 F.2d 880 (3d Cir. 1976), aff’d by an equally divided court, 430 U.S. 703 (1977).

²² 400 F. Supp. 326 (E.D. Pa. 1975), rev’d, 532 F.2d 880 (3d Cir. 1976), aff’d mem by an equally divided Court, 430 U.S. 703 (1977).

participate in the reply brief.²³ At the Supreme Court, Vorchheimer's lawyers challenged the separate-but-equal approach on the grounds that "[i]n the context of the subordinate place so long assigned to women in society, no school 'sister' to Central can supply an educational experience genuinely equal in character, quality, and effectiveness."²⁴ With one justice missing for health reasons, in 1977, the Supreme Court justices split 4–4, producing no decision and leaving in place the appellate decision affirming the single-sex policy.²⁵ Later, before she herself became a Supreme Court justice, Justice Ginsburg commented that the *Vorchheimer* case had been brought too soon because the justices then serving on the Court were not yet ready to understand that preserving all-male institutions conveyed a tacit message of female inferiority.²⁶

Challenges to gender exclusion in education continued in the courts. In 1979, Joe Hogan challenged his denial of admission to the baccalaureate program at the nursing school at the Mississippi University for Women as a violation of equal protection. In a 5-4 decision, the Supreme Court in 1982 ruled that the exclusion of men a violation of equal protection.²⁷ Interestingly, the university has kept its name, despite a claim that the name, "University for Women," could deter men from applying.²⁸

²³ Philippa Strum, *Women in the Barracks: The VMI Case and Equal Rights* (Lawrence: University Press of Kansas, 2002), 74, reporting author's interview with Justice Ruth Bader Ginsburg.

²⁴ Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 990 (3d Cir. 1976), aff'd by an equally divided Court, 430 U.S. 703 (1977).

²⁵ See 430 U.S. 703 (1977), aff'g 532 F.2d 880 (3d Cir. 1976) by an equally divided Court.

²⁶ Ginsburg, "Sex, Equality and the Constitution: The State of the Art," *Women's Rights Law Reporter* 4 (1978): 147; Ginsburg, "The Burger Court's Grapplings with Sex Discrimination," in *The Burger Court: The Counter-revolution That Wasn't*, ed. Vincent Blasi (New Haven, Conn.: Yale University Press, 1983), 132–56.

²⁷ See *id.*

²⁸ Mississippi University for Women, "Limbert to Address MUW Name Change in the Spring," http://www.muw.edu/publicaffairs/2002_prnews/021119_name_change_1.html. In 2008, the university leadership proposed finally to eliminate "Women" from its name, given changes in society reducing the

In light of the *Hogan* decision,²⁹ three plaintiffs in 1984 renewed the challenge to the single-sex admissions policy of Central High School in Philadelphia in 1984, this time, in state court. That court cited the disparity in resources invested in the two schools and rejected the male-only admission policy at Central High. Meanwhile, alumnae, teachers, and students of Girls High organized to defend that school as a place that empowered girls. To this day, it retains its mission of advancing women's success.³⁰ In 1992, the federal Department of Education investigated Girls High and found no violation of equal treatment because boys *could* apply for admission.³¹ Apparently, none has.

This asymmetrical approach, allowing all-girls schools but not all-boys schools, appeals to some who defend all-girls programs as redressing historic discrimination while rejecting all-boys programs as unfairly exclusionary. In fact, nationwide, the federal court of appeals' decision in *Vorchheimer* allowing single-sex public education for both boys and girls remains the last word from federal courts on the subject.³²

New arguments for single sex public schools mounted in the late 1980s. Spencer Holland and others argued that male role models and discipline could engage inner-city minority

need for and appeal of women-centered institutions. "Dr. Claudia Limbert's Convocation Speech," *Commercial Dispatch*, Aug. 11, 2008.

²⁹ Requiring an "exceedingly persuasive justification" for sex-based distinctions.

³⁰ Philadelphia High School for Girls, "About Us," <http://webgui.phila.k12.pa.us/schools/g/girlshigh/about-us>; Salomone, *Same, Different, Equal*, 26–32. Salomone reports that its admissions policy does not exclude boys, and people at the school respond to the occasional inquiry from a boy applicant with help finding an appropriate alternative. Salomone, *Same, Different, Equal*, 32.

³¹ Julia F. Mead, "Single-Gender 'Innovations': Can Publicly Funded Single-Gender School Choice Options Be Constitutionally Justified?" *Educational Administration Quarterly* 39 (2003): 177.

³² See Jill Elaine Hasday, "The Principle and Practice of Women's 'Full Citizenship': A Case Study of Sex-Segregated Public Education," *Michigan Law Review* 101 (2002): 755–810.

boys in education in ways that female teachers could not. He urged schools to address low self-esteem and alienation among boys who often had no adult men in their lives.³³ Detroit's city council and board of education noted that 80 percent of the males in Michigan's criminal justice population had attended the Detroit public schools and black men in Detroit died at almost fifteen times the national average rate for all men in the country.³⁴ They planned to offer 560 seats in specially designed all-male academies; 1,200 applied.³⁵ The National Organization of Women's Legal Defense Fund challenged the plan and noted the bleak prospects for black girls as well. Local groups criticized the national women's group as an unwelcome interloper. A federal court halted the boys-only admissions policy with a preliminary injunction in 1991, and a similar effort in Milwaukee ended.

During the 1980s and 1990s, public school districts increasingly admitted girls into all-boys schools where no comparable opportunities existed in all-girls schools. But public systems also preserved all-girls schools and promoted new ones through a combination of tradition, informal policy, and "success in warding off the handful of boys who express

³³ For a description of Spencer Holland's views and a discussion of his subsequent work in mentoring programs, see Rhonda Wells-Wilbon and Spencer Holland, "Social Learning Theory and the Influence of Male Role Models on African American Children in PROJECT 2000," *Qualitative Report* 6, no. 4 (2001), <http://www.nova.edu/ssss/QR/QR6-4/wellswilbon.html>.

³⁴ See Charles Vergon, "Male Academies for At-Risk Urban Youth: Legal and Policy Lessons from the Detroit Experience," *West's Education Law Quarterly* 2, no. 2 (1993): 352; Gregory Huskisson, "Preserving Manhood Civic, Political Leaders Unite to Rescue Young Black Males at Risk," *Detroit Free Express*, Jan. 29, 1991. For these references and other insights about the situation, I read Jia Michelle Cobb, "Resurrecting Civil Rights Litigation as a 'Problem-Solving' Tool: The Lawyers' Role in *Garrett v. Board of Education*" (unpublished manuscript, Harvard Law School, Spring 2008).

³⁵ See Brief of Amici Curiae States in Support of the Commonwealth of Virginia at 8–11, *VMI V* (Nos. 94-1941, 94-2107), at 18, cited in William Henry Hurd, "Gone with the Wind? VMI's Loss and the Future of Single-Sex Public Education," *Duke Journal of Gender Law & Policy* 4 (1997): 27.

interest.”³⁶ Many people rationalized the coincidence of two notable developments affecting single-sex education in the summer of 1996. That is when the Supreme Court rejected the exclusion of females from the Virginia Military Institute (VMI) just as New York City announced plans to create an all-girls public high school for low-income families in East Harlem.³⁷

By then, President Bill Clinton had appointed Ruth Bader Ginsburg to serve as an associate justice of the U.S. Supreme Court. President Clinton compared Ruth Bader Ginsburg’s role in the women’s rights movement to the role that Thurgood Marshall played in the struggle for civil rights for African Americans.³⁸ As a lawyer, Justice Ginsburg had worked to establish sex-based distinctions as worthy of the same judicial vigilance as race-based distinctions, and she achieved partial success in cases calling for intermediate scrutiny, but not strict scrutiny, of sex-based classifications by government.

The question of scrutiny arose again with a challenge to the male-only admissions policy to the Virginia Military Institute, known as VMI. Its administration maintained that some students, especially adolescents, benefit from single-sex education, even though evidence

³⁶ Mary B. W. Tabor, “Planners of a New Public School for Girls Look to Two Cities,” *New York Times*, July 22, 1996, quoted in Salomone, *Same, Different, Equal*, 127.

³⁷ *United States v. Virginia*, 518 U.S. 515 (1996); Jacques Steinberg, “All-Girls Public School to Open Despite Objections,” *New York Times*, Aug. 14, 1996, <http://query.nytimes.com/gst/fullpage.html?res=9F05E6D91431F937A2575BC0A960958260>. This juxtaposition provides the opening for Rosemary Salomone’s 2003 book, *Same, Different, Equal: Rethinking Single-Sex Schooling*, which suggests that the links between the two events expose assumptions about sex and schooling but also about race and poverty. See Michael Heise, “Are Single-Sex Schools Inherently Unequal? Review of *Same, Different, Equal: Rethinking Single-Sex Schooling*,” *Michigan Law Review* 102 (2004): 1219–44.

³⁸ Danielle Burton, “10 Things You Didn’t Know about Ruth Bader Ginsburg,” *U.S. News and World Report*, Oct. 1, 2007, <http://www.usnews.com/articles/news/national/2007/10/01/10-things-you-didnt-know-about-ruth-bader-ginsburg.html>.

on the subject was limited in both quantity and quality.³⁹ One witness argued that females and males learn differently—and that males need the kind of grueling discipline used at the school but females do not.⁴⁰ The lawyers introduced expert witnesses to address alleged differences between male and female students.⁴¹ The Department of Justice’s expert maintained that the mission of developing citizen-soldiers would not be defeated by the inclusion of women in the class, while the school invoked the work of psychologist Carol Gilligan to support the claim of gender differences.⁴² Gilligan herself submitted a brief to the appeals court in support of gender integration, and she stressed that her research identified tendencies in groups rather than characteristics attached to all individuals.⁴³

The trial court upheld the gender exclusion based on generalizations about males and females and assessments of group averages. The ACLU Women’s Rights Project attacked this approach and emphasized that the constitutional guarantee of equal protection of the law is a guarantee for individuals, not group averages or stereotypes.⁴⁴ The Court of Appeals for the Fourth Circuit concluded that the state school could not proceed as it had and faced three options: it could admit women, it could create a separate parallel institution for women, or it could become a private rather than a state-run school.⁴⁵ Virginia decided to develop a separate program for women. The Department of Justice continued its challenge and argued that the new program, launched during the

³⁹ Strum, *Women in the Barracks*, 101.

⁴⁰ *Id.*, 145–46 (testimony of Colonel Normal M. Bissell).

⁴¹ *Id.*, 150–52 (testimony of Clifton Conrad).

⁴² *Id.*, 153.

⁴³ See *id.*, 258.

⁴⁴ See Strum, *Women in the Barracks*, 183–87.

⁴⁵ *United States v. Virginia*, 976 F.2d 890 (1992).

litigation at a small private liberal arts college, would not offer the same rigorous military training, faculty, courses, facilities, financial opportunities, reputation, and connections with distinguished alumni that the Virginia Military Institute provided its male students. Indeed, the alternative for women did not even try to offer key elements of the VMI program.⁴⁶

After argument at the Supreme Court, the majority rejected the program for women as faulty and insufficient. It also rejected Virginia's historic exclusion of women from the military academy and other educational opportunities.⁴⁷ Writing the opinion for the Court was Justice Ruth Bader Ginsburg. The opinion expressed "skeptical scrutiny of official action denying rights or opportunities based on sex." Virginia failed to show "exceedingly persuasive justification" for the exclusion of women. Virginia hastily erected alternative women's school was patently inferior. Given that, the Court did not need to resolve whether single-sex education could ever be equal.⁴⁸

Even as the Court debated the VMI case, plans for a high school named the Young Women's Leadership School in Harlem unfolded. A national correspondent for NBS news, Ann Rubenstein, in 1985 asked a teenage mother in a Milwaukee high school at a

⁴⁶ See Nina Pillard, "United States v. Virginia: The Virginia Military Institute, Where the Men Are Men (and So Are the Women)," in *Civil Rights Stories*, ed. Myriam Gilles and Risa Goluboff (New York: Foundation Press, 2007), 44.

⁴⁷ *United States v. Virginia*, 518 U.S. 515, 535–38 (1996).

⁴⁸ *United States v. Virginia*, 518 U.S. at 534. William Henry Hurd, who represented Virginia, later argued that the state's problem was not the exclusion of women from VMI but the failure to provide a separate but equal alternative. Hurd, "Gone with the Wind?" Similarly, Linda Peter argued that Justice Scalia was wrong to worry that the VMI decision signaled the end of single-sex education because the decision was limited to a situation lacking a remotely equivalent alternative education for the excluded group. Linda L. Peter, "What Remains of Public Choice and Parental Rights: Does the VMI Decision Preclude Exclusive Schools or Classes Based on Gender?" *California Western Law Review* 33 (1997): 249–79.

day-care center for teen parents where the girl imagined herself five years later. The girl started weeping silently. At that moment, as Rubenstein later recalled, she realized that the girl

knew she was doomed. . . . She knew she was locked in a cycle that happens when a teenager has a baby, particularly an underprivileged teenager. She knew, and I knew. That had a profound impact on me. I knew based on that moment that we were not doing enough. The day-care center wasn't enough. We had to get these young women on a different path.⁴⁹

Rubenstein decided to launch a public high school to offer at-risk girls better options. She and her husband used their money, social networks, and media access to create the Young Woman's Leadership School of East Harlem. It succeeded and became a model and a spur to philanthropic and public investment in all-girls schools.

The Young Woman's Leadership School's recruitment materials emphasize that it is not designed for gifted students.⁵⁰ A public school, it also receives financial and programmatic assistance from a private foundation which in turn effectively lobbies for federal and local aid for similar schools elsewhere.⁵¹ After its first ten years of experience, the Young Women's Leadership School of East Harlem reported 100 percent

⁴⁹ Ilana DeBare, *Where Girls Come First: The Rise, Fall, and Surprising Revival of Girls' Schools* (Los Angeles, Calif.: Tarcher, 2005), 250, quoting Ann Rubenstein Tisch. See also Joe Dolce, "The Power of One," http://www.oprah.com/uyl/omag/uyl_omag_200110_tisch.jhtml.

⁵⁰ See, e.g., Young Women's Leadership Foundation, "Our Schools: The Young Women's Leadership Network School of East Harlem," http://www.ywlfoundation.org/network_schl_harl.htm.

⁵¹ Private support contributes about \$1,000 per student in addition to the public funds, and Ann Rubenstein Tisch has also helped to secure links with artistic, corporate, and postsecondary partners, opening opportunities for the students. Salomone, *Same, Different, Equal*, 21–22. Tisch founded the Young Women's Leadership Foundation, which supports this and other similar schools and lobbies for them. Young Women's Leadership Foundation, "Our National Impact," http://www.ywlfoundation.org/about_what2.htm#5, reporting the influence of No Child Left Behind funding of single-sex instruction, and reporting that by the 2004–5 school year, thirty-three single-sex public schools would be in operation and roughly ninety other coed public schools would offer single-gender classrooms. See also the Ann Richards School for Young Women Leaders, "Why a Girls' School?" <http://annrichardsschool.org/about/girls-school.php>, citing the influence of the model of the Harlem school and copies in New York, Chicago, and Texas.

attendance compared with 60 percent citywide. 100 percent of its graduating students were admitted to college.⁵²

When the school was founded in 1996, however, three months after the Supreme Court rejected the all-male Virginia Military Institute's single-sex admission policy, some women's rights advocates denounced the Harlem Young Women's Leadership School while others celebrated it.⁵³ The New York Civil Liberties Union, the National Organization for Women, and the New York Civil Rights Coalition challenged gender as an admissions criterion at the school. The U.S. Department of Education's Office for Civil Rights indicated a preliminary finding that the school's policy, like the Detroit all-male academies, appeared to contravene Title IX.⁵⁴

Members of the Clinton administration postponed and temporized, torn between the competing arguments over gender neutrality and enhancing opportunities for low-income

⁵² Young Women's Leadership Foundation, "Our Schools." The school also reports that 87 percent of the schools' alumnae are still enrolled in college or have graduated; student enrollment is 66 percent Latina, 33 percent African American, and 1 percent other, with approximately 75 percent of the students residing in Harlem.

⁵³ Morgan, "Finding a Constitutionally Permissible Path" (supporter); Wendy Kaminer, "The Trouble with Single-Sex Schools," *Atlantic Monthly*, April 1998, <http://www.theatlantic.com/doc/199804/singlesex>; Fred Kaplan, "Storm Gathers over School in Flower," *Boston Globe*, Feb. 23, 1998, describing lawsuit by the National Organization for Women and the New York Civil Liberties Union claiming the school violates Title IX. For a thoughtful treatment of the suit and underlying issues, see Salomone, *Same, Different, Equal*, 1–25, 61–63. For detailed discussion of the splintering of civil rights and women's groups, see Nancy Levit, *The Gender Line: Men, Women, and the Law* (New York: New York University Press, 1998), 153–66. Law professor Rosemary Salomone commented about this period: "Some [women's rights advocates] who had passionately denounced all-male admissions at state military academies . . . were suddenly rallying to support public single-sex schools for inner-city girls in the name of affirmative action. Others, despite their avid support for [that concept], were condemning [such schools] with equal resolve. Rosemary C. Salomone, "Feminist Voices in the Debate over Single-Sex Schooling: Finding Common Ground," *Michigan Journal of Gender & Law* 11 (2004): 70.

⁵³ See Salomone, *Same, Different, Equal*, 15–17; Kaminer, "The Trouble with Single-Sex Schools."

⁵⁴ See Salomone, *Same, Different, Equal*, 15–17; Kaminer, "The Trouble with Single-Sex Schools."

girls of color.⁵⁵ Eventually, they began to view the school as an affirmative action remedy, which would make it support rather than violate Title IV.⁵⁶

But mainly, the clock ran out. Then a new administration went farther and embraced single-sex education. George W. Bush included single-sex schools in his plan to “leave no child behind.” Starting in 2001, his Department of Education⁵⁷ developed a rule allowing and promoting single-sex instruction and schools. The stated reasons were to increase the diversity of educational options and to meet the needs of specific students.⁵⁸

The final rule clarified that these single-sex options had to be entirely voluntary, and that evaluation of substantially equal opportunities for boys and girls should include intangible features and reputation of faculty, along with other considerations.⁵⁹ In a big

⁵⁵ Vicki Jackson, Georgetown Law Center, deputy assistant attorney general in the Office of Legal Counsel in the U.S. Department of Justice (2000–1), in discussion with the author, April 9, 2008; Elena Kagan, dean of Harvard Law School, who served in the White House domestic policy and legal staffs during the Clinton administration, in discussion with the author, July 12, 2007.

⁵⁶ Salomone, *Same, Different, Equal*, 18.

⁵⁷ “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistant,” *Federal Register* 67, no. 89 (May 8, 2002): 31098 (to be codified at 34 C.F.R. pt. 106).

<ex>*Single-sex classes*: The Title IX statute generally prohibits sex-based discrimination in education programs or activities receiving Federal financial assistance. Specifically, it states that no person in the United States, on the basis of sex, can be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C. 1681. Section 1681(a) of Title IX contains two limited exceptions relating to classes or activities within primary and secondary schools that otherwise are coeducational.

Subsection 1681(a)(7)(B) of Title IX exempts any program or activity of any secondary school or educational institution specifically intended for the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference or for the selection of students to attend such a conference. Subsection 1681(a)(8) of Title IX states that the law does not preclude father-son or mother-daughter activities at educational institutions. However, if those activities are provided for students of one sex, opportunities for reasonably comparable activities must be provided for students of the other sex. Accordingly, these activities are permitted on a single-sex basis if the requirements of the statute are met.<ex>

⁵⁸ See U.S. Department of Education, “Guidelines regarding Single Sex Classes and Schools,” <http://www.ed.gov/about/offices/list/ocr/t9-guidelines-ss.html>, for the Bush administration’s interpretation of the law.

⁵⁹ “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” *Federal Register* 71, no. 206 (Oct. 25, 2006): 62532. Organizations supporting the proposals

departure, the rule permitted schools to offer particular classes to students of only one sex only if the excluded group could be shown to lack interest or particular needs.⁶⁰

The *New York Times* characterized the rule as “the most significant policy change on the issue [in] more than 30 years.”⁶¹ Hearing of the rule, Paul Vallas—who has headed schools systems in Louisiana, Philadelphia and in Chicago-- predicted “You’re going to see a proliferation of these [single-sex schools]...”⁶² South Carolina alone now has more than 200 single-sex public schools.⁶³ No one knows the complete number today; the National Association for Single Sex Public Education claims the number rose from 11 in 2002 to 540 in 2009.

III. Explanations?

So what explains the resurgence of proposals for and experiments with single sex education in past two decades, and what lessons should we learn from this development? I offer four hypotheses, but then look forward to your explanations and assessments.

included the National School Boards Association. Among those organizations opposing the propositions were the National PTA, the National Education Association, the Women’s Sports Foundation, the Women’s Law Project, the American Civil Liberties Union, and the AAUW.

⁶⁰ Id., 62537.

⁶¹ Diana Jean Schemo, “Federal Rules Back Single-Sex Public Education,” *New York Times*, Oct. 25, 2006.

⁶² Diana Jean Schemo, “Federal Rules Back Single-Sex Public Education,” *New York Times*, Oct. 25, 2006.

⁶³ Aisha Khan, Whittemore Park Middle School explores single-gender classrooms, March, 24, 2010, http://www2.scnw.com/scp/news/local/grand_strand/article/whittemore_park_middle_school_singlegender_classrooms_showing_academic_suc/112015/.

First, advocates point to new research—triggered by advances in studies of the human brain and biology—to support separating boys and girls for educational purposes, though at least some of this work seems to revive old gender stereotypes without foundation;

Second, there are growing concerns about the status and educational progress of boys and men, and single-sex education seems to many a good response;

Third, single-sex schooling may be a reaction to increasing sexualization—meaning, imposition of sexual images and dimensions—on increasingly younger children;

Fourth, single-sex schooling may represent a conception of school reform uniquely tied to differences in race, religion, class—and parental preferences along these lines are advanced by the movement toward school choice. I will explore these explanations, and then offer a concluding thought.

1) New research—or recycled stereotypes?

If the 20th century was the age of physics, then the 21st is the age of biology. Functional **Magnetic Resonance Imaging** (fMRI) allows real-time mapping of blood flow changes related to neural activity, and other tools of brain research. New tools suggest that men's brains on average are larger than female brains, and on average men may have larger parietal lobes, associated with visual and spatial thinking; females on average have larger Wernicke's and Broca's areas, the areas apparently responsible for language processing.^[41] Nonetheless, men and women apparently achieve similar IQ results with different brain regions.⁶⁴ Recent research in genetics and endocrinology similarly report gender differences along with disputes over such findings and their meaning.

⁶⁴ "Intelligence in men and women is a gray and white matter: Men and women use different brain areas to achieve similar IQ results, UCI study finds, University of California, Irvine. Press release. January 20, 2005.

The most recent direction in empirical research revives old radioactive issues of inherent gender differences. Marketed to mass audiences, books for parents and teachers report biological differences in how boys and girls process information—and even differences in the optimal classroom temperature for boys versus girls.⁶⁵ This kind of work is described by critics as a revival of ideas about biological gender differences already debunked by science.⁶⁶ Lawrence Summers’s remark about such research triggered a firestorm that precipitated his removal from his post as president of Harvard University...freeing him to turn to running the economy.⁶⁷

Psychologist Cordelia Fine’s 2010 book, Delusions of Gender notes how recent gender research echoes now-rejected early 20th century speculations about inherent gender differences.⁶⁸ There is simply not yet enough knowledge about the connections between brain structure and psychological function.⁶⁹ Cultural ideas about gender continually affect the research questions, social expectations, and self understandings.⁷⁰ Books and articles claiming to find differences in male and female reasoning, emotions, and capabilities fail to pass basic standards of scientific accuracy and reliability.⁷¹ Popular books are particularly problematic. For example, Fine reports that Leonard Sax, a big advocate for single-sex

⁶⁵ See Weil, “Teaching Boys and Girls.”

⁶⁶ See Caryl Rivers and Rosalind C. Barnett, “The Difference Myth,” *Boston Globe*, Oct. 28, 2007, http://www.boston.com/news/globe/ideas/articles/2007/10/28/the_diff.

⁶⁷ Marcella Bombardieri, “Summers’ Remarks on Women Draw Fire,” *Boston Globe*, Jan. 17, 2005, http://www.boston.com/news/local/articles/2005/01/17/summers_remarks_on_women_draw_fire. Made at a small academic conference, Summers’s remarks and the reaction to them provoked international news coverage, and the university posted a copy of Summers’s remarks. Lawrence H. Summers, “Remarks at NBER Conference on Diversifying the Science & Engineering Workforce,” Jan. 14, 2005, <http://www.president.harvard.edu/speeches/2005/nber.html>. The issue was one of several cited by observers when Summers announced his resignation the next year. Daniel J. T. Schuker, “Summers Named Eliot Univ. Prof.,” *Harvard Crimson*, July 7, 2006.

⁶⁸ Cordelia Fine, *Delusions of Gender* 154 (2010).

⁶⁹ *Id.*, at 155.

⁷⁰ *Id.*, at xxvi .

⁷¹ *Id.*, at 158-186.

education, cites a neuroimaging study of maze navigation to justify teaching girls and boys math in different ways as incorrect in its report of the research and a complete conjecture in its conclusions.⁷² When it comes to individuals, neuroscientists cannot tell male and female brains apart.⁷³ A new field seems to be launched: neuro-nonsense. Yet journalists, editors, and book reviewers often do not even ask whether the popular reports of new-found hard-wired gender differences are accurate.

New claims of gender differences may be merely sloppy, or they may reflect backlash following achievements of the women's rights movement. Sociologists define backlash as a popular negative reaction to something which has gained popularity or influence. In most circles, it remains politically unpopular to express resentment of the increasing presence of women in higher education and the professions. Witness the response to Larry Summers comments about research questioning gender equality in intellectual ability. Yet Susan Faludi's 1991 book, Backlash: The Undeclared War Against American Women, documented resentment and retrenchment following gains from the women's movement. The book won the National Book Critics Award for general nonfiction that year, just around the time that the current push for single-sex education began.

Twenty years later, it is hard to know what to make of the emergence of programs defended in terms of gender stereotypes. The revival of outmoded gender stereotypes by new single-sex educational initiatives is not a mere flight of the imagination.⁷⁴ A Louisiana middle school proposed single-sex classes based on stereotypic views of boys as hunters and girls as

⁷² Id., at 164.

⁷³ Id., at 165.

⁷⁴ Datnow and Hubbard, *Gender in Policy and Practice*.

mothers. Perhaps this is expression of backlash or instead opportunistic uses of a national trend to express old-fashioned views. The American Civil Liberties Union's threat of suit halted the plan.⁷⁵ Reanimating gender stereotypes may be especially a risk with all-boys schools; one study of single-sex academies in the 1990s in California found that they perpetuated traditional gender stereotypes and reinforced macho cultural attitudes.⁷⁶ Even all-girls schools, however strong the educational experience, may appear to confirm gender stereotypes.⁷⁷

Biology-based research proffered to justify single-sex education is especially galling to those who have worked for years to challenge assumptions of women's inferiority or essential difference from men. The ACLU Women's Right Project challenged the sex-segregated classroom practices of a Breckinridge County Middle School, a public school in Kentucky.⁷⁸ Isabelle Pinzler, once head of the ACLU women's rights project and later a lawyer in President Clinton's Department of Justice, in 2005,⁷⁹ confessed that she attended an all-girls' school and contemplated one for her daughter. But, she cautioned, sex stereotyping works as both cause and effect of faith in single-sex schools.⁸⁰

2) Concerns about the status and educational progress of boys and men

⁷⁵ Caryl Rivers and Rosalind C. Barnett, "Against Single-Sex Public Schools," *L.A. Times*, Oct. 2, 2006.

⁷⁶ See Carolyn Jackson, "Can Single-Sex Classes in Co-educational School Enhance the Learning Experiences of Girls and/or Boys? An Exploration of Pupils' Perceptions," *British Educational Research Journal* 28 (2005): 46 (all-boys classes may fail to confront macho cultures in schools or actually exacerbate them).

⁷⁷ *Id.*; Datnow and Hubbard, *Gender in Policy and Practice*

⁷⁸ *A.N.A. v. United States Department of Education and Breckinridge County Board of Education*, W.D. Ky. Civil Action No. 4:08-cv-00004-CRS (May 19, 2008).

⁷⁹ Isabelle Katz Pinzler, "Separate But Equal Education in the Context of Gender," *New York Law School Law Review* 49 (2005): 785-807.

⁸⁰ *Id.*, at 805.

Backlash seemed at least in part at work in Christina Hoff Sommers' 2001 book, The War Against Boys: How Misguided Feminism Is Harming Our Young Men. Yet another hypothesis about the resurgence of single-sex education looks to growing America concerns about boys and their academic prospects. Studies by the U.S. Department of Education and others indicate that male enrollment, performance, and work ethic at colleges and universities have declined in the last decade. Educators ask whether elementary schools favor girls over boys by expecting quiet orderly conduct, restricting physical movement in the classroom, and rewarding fine motor skills.⁸¹

The trend in public concern is clear. Marketed as both parenting advice and policy discussions, recent popular books include: Why Boys Fail: Saving Our Sons from an Educational System That's Leaving Them Behind, Boys Adrift: The Five Factors Driving the Growing Epidemic of Unmotivated Boys and Underachieving Young Men ; The Trouble with Boys: A Surprising Report Card on Our Sons, Their Problems at School, and What Parents and Educators Must Do ; and The Minds of Boys: Saving Our Sons From Falling Behind in School and Life.⁸² All-boy classroom with male teachers are among the prescriptions in such works. Do we know if they work? Some studies indicate that boys do better academically in single-sex schools, but girls do not; some suggest

⁸¹ E.g., William A. Draves, Why boys under-perform in school, www.williamdraves.com/works/boys.htm

⁸² Richard Whitmire's Why Boys Fail: Saving Our Sons from an Educational System That's Leaving Them Behind (2010), Leonard Sax's Boys Adrift: The Five Factors Driving the Growing Epidemic of Unmotivated Boys and Underachieving Young Men (2009); Pet Tyre's The Trouble with Boys: A Surprising Report Card on Our Sons, Their Problems at School, and What Parents and Educators Must Do (2009); and Michael Gurian's The Minds of Boys: Saving Our Sons From Falling Behind in School and Life (2007).

girls also do better; others do not.⁸³ Few of the studies control for other factors; many of the studies, for example, involve Catholic schools which differ from other schools due to parental self-selection, curriculum, and mission.⁸⁴

3) Response to sexualization

Theory 3: single-sex education may be a response to perceptions of a growing ‘sexualization’ of women and girls by mass media. Three books published in 2009 alone address the subject.⁸⁵ The American Psychological Association in 2007 raised concern about the imposition of sexual identity on increasingly younger children and linked this pattern to particular risks for girls.⁸⁶ Those risks include impaired performance in mathematics and logical reasoning and increased shame, anxiety about appearance,⁸⁷ eating disorders depression.⁸⁸

⁸³ See further discussion in Martha Minow, Reading the World: Law and Social Science,” in Transformations in American Legal History: Essays in Honor of Morton J. Horwitz, Volume II., Daniel Hamilton and Alfred Brophy, eds., (2010).

⁸⁴ U.S. Dept. of Education, Single-Sex vs. Co-education: A systematic Review (Doc. 2005-1)(authored by Fred Mael, Alex Alonso, Doug Gibson, Kelly Rogers and Mark Smith).

⁸⁵ M. Gigi Durham, The Lolita Effect: The Media Sexualization of Young Girls and Five Keys to Fixing It (2009); Sharna Olfman, The Sexualization of Childhood (2009); Diane E. Levin and Jean Kilbourne, So Sexy So Soon: The New Sexualized Childhood and What Parents Can Do to Protect Their Kids (2009).

⁸⁶ Report of the APA Task Force on the Sexualization of Girls, *www.apa.org > ... > Women's Programs Office > 2007*.

⁸⁷ See id. (citing Frederickson, Roberts, Noll, Quinn & Twenge, 1998; Gapinski, Brownell & LaFrance, 2003; Hebl, King & Lin, 2004; Slater & Tiggemann, 2002).

⁸⁸ Id. (citing Abramson & Valene, 1991; Durkin & Paxton, 2002; Harrison, 2000; Hofschire & Greenberg, 2001; Mills, Polivy, Herman & Tiggemann, 2002; Stice, Schupak-Neuberg, Shaw & Stein, 1994; Thomsen, Weber & Brown, 2002; Ward, 2004).

Sexual harassment in schools is either on the rise or newly recognized, with legal sanctions. One study indicates that one-third of middle- and high-school students may be victims of sexual harassment.⁸⁹ The rising interest in single-sex education could reflect concerns about distractions and harms from contact between girls and boys especially during and after puberty. What this rationale looks like in an era of greater acceptance of same-sex attractions and relationships is a topic for another day.

4) Single-sex schooling tied to racial and class issues in education

As a final guess about the revival of single-sex schooling, I wonder about its ties to racial, class, and religious differences. Historically, single-sex education existed and has persisted in elite private schools. Single-sex schools have been common in religious education, further complicating their attraction.⁹⁰

Single-sex schooling thus may be associated in the minds of many with excellence and hence seem the way to open opportunities for disadvantaged children. Nowhere has the idea of single-sex options had more legs than as a way out of failing schools for poor

⁸⁹ Susan Fineran and James Gruber, *The Impact of Bullying and Sexual Harassment on Middle and High School Girls*, 13:6 *Violence Against Women* 627-643 (June 2007) ; see also Tara Parker-Pope, *Sexual Harassment at School*, N.Y. Times (May 1, 2008).

⁹⁰ Judge John Gibbons, the sole dissenter from the Court of Appeals Vorchheimer case –the one who compared Philadelphia’s all-boy admissions policy to the separate-but-equal rejected in *Brown v. Board of Education*. wrote me:

Oddly, I am the product of single-sex education; St. Benedicts prep School, Holy Cross College and Harvard Law School. Moreover, my four daughters attended Oak Knoll School, an all-girl preparatory school and one of them, Mary Whipple, is currently Vice-Chairman of the Board.” He went on: “I was instrumental in persuading the Holy Cross trustees to admit women in the early 1970s and Mary was in the first class of women there. Email from John Gibbons to Martha Minow, June 20, 2008.

children of color.⁹¹ Single sex campuses and programs at historic black colleges similarly combine pride in identity with aspiration and achievement.

The intersections of race, class, and gender are complicated. When white feminists fought all-male public schools in Detroit, some wondered whether this reflected concerns for the girls in Detroit or remoteness from the concerns of the local community.

Fans of single-sex education may be willing to invest in opportunities that disadvantaged children otherwise would not have. A state legislative initiative gave districts \$500,000 to operate single-sex public schools in low-income communities,⁹² and a principal in the state acknowledged, “Why do I go for the single-gender [schools]?...It’s a great opportunity. It’s also money. I can do something.”⁹³

IV. How to Assess the Revival of Single-Sex Schooling

I have not reached a settled view about the revival of single-sex schooling. The law school where I work once excluded women; I think it’s a better place now that it is co-educational. But I also know that among our most engaged and contributing students are graduates of Wellesley and Spelman, still all female colleges, and Morehouse and Yeshiva, still all-male. Continuing problems with K-12 education should make us open to experiments that hold promise of improved opportunities especially for poor children and immigrant children. The school choice movement offers at least a temporary

⁹¹Single-sex classes at Ryerson help raise achievement for black boys--and girls Posted By Sarah Karp On Thursday, August 27, 2009, *rbb.catalyst-chicago*.

⁹² Amanda Datnow & Lea Hubbard, eds., Gender in policy and practice: Perspectives on single-sex and coeducational schooling 122 (2002).

⁹³ Hubbard and Datnow, at 123 (quoting the principal).

solution;⁹⁴ the rhetoric of individual choice is the solvent of so many confusing and divisive issues in America. The availability of school choice relieves school systems from having to make a definitive judgment about single-sex education for all students. Inclusion of at least some single-sex schools gives parents and students options⁹⁵ while also creating a basis for more rigorous research.

What remains troubling to me are unthinking uses of old or new gender stereotypes in single-sex schools and involuntary assignments of kids to single-sex schools. Yet gender stereotypes are also persistent in co-ed schools. Single-sex schools devoted to overturning stereotypes may wrongly relieve co-educational schools from promoting gender equality in all classrooms. With or without single-sex schools, vital questions of fairness and equal opportunity persist—as do challenges in forging the kind of social practices for the next generation that dismantle prejudices of the last one.

Delving into this issue, I have come to see the great wisdom in demanding a searching inquiry into each use of gender classifications. Perhaps, rather than banning or approving single-sex schools across the board, each individual single-sex school should have a burden of justification, and need to present strong—that is, “exceedingly persuasive” reasons. As Justice Ginsburg wrote the VMI case,

Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is “exceedingly persuasive.” The burden of justification is demanding and it rests entirely on the State.... The State must show “at least that the [challenged]

⁹⁴ See *Same, Different, Equal: Rethinking Single-Sex Schooling* 239 (Yale University Press, 2003) (arguing there is no evidence that single-sex education is harmful and there is evidence that it can help some students).

⁹⁵ 518 U.S., at 535.

classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " ... The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.⁹⁶

I don't know if I have been persuasive tonight, but it has been my deep privilege to be here, and I look forward to your responses.

⁹⁶ United States v. Virginia, 518 U.S. 515 (1996). While on the D.C. Circuit Court of Appeals, Judge Ginsburg reflected on this strategy in 1988 in the Keynote Address for The University of Chicago Legal Forum Symposium (prepared in collaboration with Professor Barbara Flagg):

"The 1970s cases in which I participated under ACLU auspices all rested on the same fundamental premise: that the law's differential treatment of men and women, typically rationalized as reflecting 'natural' differences between the sexes, historically had tended to contribute to women's subordination - their confined 'place' in man's world....The arguments addressed to the courts were designed to reveal and to challenge the assumptions underpinning traditional sex-specific rules, and to move the Supreme Court in the direction of a constitutional principle that would provide for heightened, thoughtful review of gender classifications."

Hon. Ruth Bader Ginsburg and Barbara Flagg, Some Reflections on the Feminist Legal Thought of the 1970s, 1989 University of Chicago Legal Forum 9, 11.