10-1976

Vorchheimer v. School District of Philadelphia

Lewis F. Powell Jr.

(Inclined to Deny)

9/17/76: Petr's reply in - adds little. Stresses that class certification was proper and that case is not moot. Dave

Phila. Operates two high schools for college bound students of exceptional ability: one a Boys School, the other a Girls School.

Petr, a girl, brought this class action (1983) alleging gender based discrimination.

But DC found the two schools afforded substantially equal facilities & ed. opportunities. DC also found no ev. that girls suffered psychological distress (as did blacks in segregated schools). But DC nevertheless ruled for Petr.

Preliminary Memo

Summer List 15
Sheet 2

No. 76-37

VORCHHEIMER

v.

SCHOOL DISTRICT OF PHILADELPHIA

Cert to CA 3
(Weis, Markey; Gibbons dissenting)
Federal/Civil

After she won, Petr elected not to attend Boys School & she is now in college. But timely class was certified.

CA 3 Reversed, finding no E/P violation and also finding E/Education Opp Act did not provide separate schools.

1. SUMMARY: Petr is a female high school student who sought admission to Philadelphia's all male high school; she was denied admission solely on the basis of her sex. Petr claims this violated the Equal Protection Clause and the Equal Education Opportunities Act of 1974.

2. FACTS: The facts as found by the district court are not in dispute and are the basis of this summary.

Discuss, but I know of no compelling reason to grant now (e.g. no conflict). The federal statutory question may be the most important one — and it seems Congress has done a sloppy job.

Dave

Philadelphia maintains two types of senior high schools for college bound students: comprehensive and academic. The only two schools in the academic category, Philadelphia High School for Girls (female only) and Central High School (male only), have been segregated by sex since their founding in the nineteenth century. Girls and Central are the only two schools which draw their student bodies from the entire city. Admission is granted upon application of a student who meets certain academic requirements (tests and grades); only 7% of the students in the Philadelphia school district meet the admission standards. The admissions standards for both schools are comparable. The courses offered at Girls are similar and of equal quality to those offered at Central. Since its founding in 1848 as a school to train teachers, Girls has become "the equal of Central in preparing its students for college." With one exception, the academic facilities of the two schools are comparable. "In general, it can be concluded that the education available to the female students at Girls is comparable to that available to the males at Central." Graduates of both schools have been and are accepted by the best and the most prestigious colleges.

The schools differ in the following respects: (1) Central has better scientific facilities; (2) Central has earned and maintained a unique reputation for academic excellence and for training men who will become local and national leaders in all fields of endeavor; although Girls has a large number of

graduates who have achieved similar prominence; (3) because of its academic standing and reputation, Central has attracted the attention (and speeches) of national leaders throughout the school's history; (4) Central has a dedicated, loyal, and distinguished alumni who are involved in matters pertaining to the school and who have established a substantial private endowment for the school. There is no evidence that as a result of this endowment Central's facilities, faculty, or course of instruction is superior to Girls.

Both Central and Girls offer their students a more intensive intellectual experience and better preparation for college than is offered by any of the nonacademic high schools. Admission to a comprehensive high school is normally based on a student's residence. Three of the comprehensive high schools are sexually segregated (2 male, 1 female).

In 1974, while in the ninth grade, petr applied for admission to Central; she met the academic qualifications but was rejected solely on the basis of her sex. Her parents brought this § 1983 action on her behalf and on behalf of the class of similarly situated females. She chose not to apply for admission to Girls and enrolled in a comprehensive coeducational high school in her neighborhood. Her motivation and grades have declined, in part because of her perception that her teachers expect and demand less than was expected at her academic, coed, junior high school. After trial, the DC ordered that petr and her class not be denied admission on the basis of sex; CA 3 did

not stay this order as to petr. Nevertheless, petr declined to attend Central. Since the trial petr has qualified for early admission to college after the eleventh grade and, according to resps, citing a Philadelphia newspaper, petr will enter college this fall.

At trial, the studies of two expert witnesses were considered by the DC. The Tidball study concluded generally that women from coed colleges were not as career successful as women from all female colleges. The Jones study examined attitudes of New Zealand secondary students toward their school, schoolwork, extracurricular activities, and the approval of their parents and peers. The study concluded generally that boys and girls at single sex schools in New Zealand held attitudes associated with stronger academic motivation than boys and girls at coed schools. Tidball is a woman, Jones is a man.

Resps' goals relevant to academic high schools are (1) increasing efficiency and basic skills of students, (2) providing an extensive network of early childhood programming, and (3) providing educational options to students and parents.

3. DECISIONS BELOW: The DC (Newcomer, E.D. Pa.) concluded that the substantial equality of the education at the two schools and the lack of evidence that exclusion of women from Central had generated a sense of inferiority in the women students took the case out of the realm of Brown. Nevertheless,

the court found that female students were unconstitutionally denied the opportunity to attend a coeducational, academically superior, public high school. 1/ "Having identified this classification [men and women] as adversely affecting women," the court found that it was not justified by a fair and substantial relationship to the resps legitimate goals. The court acknowledged that under a mere rational relationship test the classification would be constitutional.

On appeal, CA 3 sua sponte raised the issue of the application of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-21 (relevant sections attached to this memo). It then examined the legislative histories of a 1972 act pertaining to federally funded educational programs, 20 U.S.C. §§ 1681-86, a prior formulation of the EEOA that was not enacted, and the EEOA. 2/ Based on this analysis, the

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1/ The DC also seemed to find some harm in the frustration of petr's desire to attend Central, "a desire which, in light of Central's history and reputation, does not seem frivolous or eccentric." Opinion, Petn., at 82a-83a.

2/ CA 3's analysis is somewhat confusing and hardly a model of statutory interpretation. It first noted that the 1972 legislation, prohibiting sexual discrimination in federally funded schools, did not apply to the admission policies of secondary schools, despite the House version of the bill, which covered all primary and secondary schools. It then observed that the 1972 version of the EEOA originally contained no reference to sexual discrimination, that references were added in committee, that some of these references were omitted without explanation, that the bill was defeated, and that the EEOA was passed in 1974. Applying this history to the ambiguities of the statute, CA 3 concludes that "Congress spoke clearly enough on single-sex schools in 1972 when it chose to defer action in order to secure the data needed for an intelligent judgment." Opinion, Petn., at 11a. The dissenter's complaint that CA 3 has found silence in 1972 to speak louder than words in 1974 is not wholly frivolous.

court concluded that the Act does not require that every school be coeducational.

On the constitutional claim, CA 3 distinguished this Court's sex discrimination cases on the ground that every case striking down a sex classification involved an inadequacy of female rights in relation to male rights. The court found that petr was not deprived of an opportunity for equal education, since any benefits or detriments inherent in the single sex academic high schools falls on both sexes equally. Whether or not the theory underlying separation of the sexes into equal schools is conclusive, it is based on equal benefit, not discriminatory denial. CA 3 concluded that under either standard of review, the single sex school policy was constitutional. 3/

Judge Gibbons dissented on both the statutory and constitutional claims. Disagreeing with the majority's reading of the legislative history and the provisions of the EEOA, he argued that Congress had, pursuant to § 5 of the Fourteenth Amendment as construed in Katzenbach v. Morgan, 384 U.S. 641 (1966), found that single sex schools violate the equal protection clause and had therefore prohibited them. On the

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3/ In support of its conclusion, CA 3 cited Williams v. McNair, 316 F. Supp. 134 (D. S.C. 1970), aff'd, 401 U.S. 951 (1971). There the DC refused to find an equal protection violation when two institutions in an eight school system were single sex (one male, one female). Plaintiffs were males seeking entry into the female school. This Court affirmed without opinion.

constitutional issue, the dissenter argued that the majority had impermissibly resurrected the "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537. He felt that Brown prohibited that result. Judge Gibbons concluded that the exclusion of females from Central did not bear a fair and substantial relationship to the resps' legitimate goals.

4. CONTENTIONS: Petr contends that the two schools are not equal because Central's superior science facilities and the "intangibles" noted supra. She also claims that Central's refusal to admit girls "carr[ies] a clear message [that] females [are] members of the 'second sex,'" i.e., the Brown inferiority complex. She then contends that resps have not shown a fair and substantial relationship between the unequal treatment and the resps' goals. On the statutory issue, petr contends that the EEOA prohibits separation of the sexes in the only two academic high schools and that it declares such separation to violate the Equal Protection Clause.

Resps agree with CA 3 on the constitutional and statutory issues and further contend that the case is moot because petr is going to college in the fall and the DC did not properly certify the case as a class action. They claim that the improper certification results from the DC's failure "as soon as practicable after the commencement of an action . . . [to] determine by order" that the case is properly brought as a class action. (Rule 23(c)(1)). They also cite the DC's failure to make express

findings that the Rule 23(a) prerequisites were satisfied.

5. DISCUSSION: The DC's conclusions of law, dated the same day as the judgment and order, include the following:

> "This suit is a proper class action under Federal Rule 23(b)(2). Plaintiff is therefore certified pursuant to that subsection as the representative of all those females, who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex."

Resps cite no authority to support their contention that this does not satisfy the Rule 23 requirements. Even if this is adequate certification, however, a mootness problem remains. In Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975), this Court held that when a named plaintiff drops out of an action the case is moot unless it was duly certified as a class action, a controversy still exists between members of the class and the opposition, and the issue is such that it is capable of repetition yet evading review. Id., at 129 (emphasis added). Assuming that Susan Vorchheimer, the named plaintiff, has dropped out (because she declined to attend Central when permitted by court order and she is going to college in the fall), the case is moot under the third Jacobs requirement. Students may apply to academic high schools as early as January in the ninth grade; thus, a plaintiff would have three years to pursue her action. This would not seem to evade review.

this is inaccurate after Franks v. Bowman Transp., 44 U.S.L.W. 4356, 4358 – "evading review" is a policy rule in a case like this, not an absolute requirement. I don't think this case is moot.

On the merits, the case raises some interesting but not clearly certworthy issues. The initial problem is the factual

question of whether the two schools are equal. As to educational opportunity, the DC's findings clearly establish equality. Neither the DC, CA 3, nor the appellate dissenter bought petr's argument that the other differences between the two schools are of constitutional significance. Those courts seem correct. Petr does not suggest that this Court should adopt the DC's version of the inequality: that females are denied an opportunity to attend a coeducational academic high school. Petr's silence on this point is understandable, since both male and female students are denied that opportunity. Petr has not claimed anything other than a gender based discrimination.

The Court may wish to take cert to decide the Brown issue of is-sexually-separate-inherently-unequal in the context of high school education. The DC, however, found that there was no evidence before it to support that claim. Petrs have provided this Court with no support for the assertion that women at all-female institutions perceive themselves as inferior. The only sociological studies considered at trial support the opposite conclusion.

Absent any inequality, the question of which is the appropriate standard need not be decided. Resp has classified its students by gender, but there is no significant difference of treatment between the two classes.

The statutory issue may be certworthy simply to clarify a very ambiguous piece of legislation. Congress' finding on

equal protection pertains to the "maintenance of dual school systems in which students are assigned to schools soley on the basis of . . . sex . . ." 20 U.S.C. § 1702 (emphasis added). Resps' system is not so maintained, some of its schools are. Under Part 2 of the Act, entitled "Unlawful Practices," Congress prohibits deliberate segregation of students among or within schools by race, color, etc., but not by sex. § 1703(a). Yet subsection (c) of the same section prohibits assignment of a student to a school other than the closest appropriate (grade level and type) one, if the assignment results in a greater degree of sex segregation. Unless "assignment" is construed not to include the voluntary application procedure of Girls and Central, resps are in violation of this section, at least as to those girls who live closer to Central than Girls. Moreover, those female students living closer to Girls are possibly being "assigned" to the closest appropriate for the purpose of segregating students on the basis of sex in violation of § 1705. All these violations despite resps' apparent compliance with the congressional policy of § 1701 of providing equal educational opportunity without regard to sex. Perhaps the statute should be remanded to Congress.

There is a response.

9/2/76 Kujovich DC & CA Opinions in Petition

ME

§ 1701. Congressional declaration of policy

(a) The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

§ 1702. Congressional findings; necessity for Congress to specify appropriate remedies for elimination of dual school systems without affecting judicial enforcement of fifth and fourteenth amendments

(a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

§ 1703. Denial of equal educational opportunity prohibited

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

§ 1705. Assignment on neighborhood basis not a denial of equal educational opportunity

Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin, or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis.

§ 1706. Civil actions by individuals denied equal educational opportunities or by Attorney General

An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate.

§ 1720. Definitions

For the purposes of this subchapter—

* * *

(c) The term "segregation" means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin or within a school on the basis of race, color, or national origin.

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 76-37

Submitted ....., 19... *Announced* ....., 19...

SUSAN LYNN VORCHHEIMER, BY HER PARENTS BERT AND CAROL VORCHHEIMER, ETC., Petitioner

vs.

SCHOOL DISTRICT OF PHILADELPHIA, ET AL.

7/12/76 - Cert.

D

Relisted
for Byron

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....		✓											
Stevens, J.		✓											
Rehnquist, J.			✓										
Powell, J.			✓										
Blackmun, J.			✓										
Marshall, J.		✓											
White, J.			✓										
Stewart, J.			✓										
Brennan, J.		✓											
Burger, Ch. J.			✓										

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 76-37

Submitted ....., 19... *Announced* ....., 19...

VORCHHEIMER

vs.

SCHOOL DIST. OF PHILADELPHIA

RELIST for J. White

Granted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Stevens, J.		✓		✓									
Rehnquist, J.			✓										
Powell, J.			✓										
Blackmun, J.		✓	✓										
Marshall, J.		✓											
White, J.			✓										
Stewart, J.			✓										
Brennan, J.		✓											
Burger, Ch. J.		✓											

February 21, 1977

BENCH MEMO

To: Mr. Justice Powell

From: Dave Martin

No. 76-37, Vorchheimer v. School Dist. of Philadelphia

This is a difficult and close case, but I believe the petitioner has the better of it. I think the following rationale is the best of many available for deciding the case: Central and Girls are sufficiently different, to the disadvantage of females, to call for justification under the standard of Craig v. Boren. The state's interest in fostering maximum educational attainment and a suitably serious attitude toward educational pursuits is undeniably important, but the evidence does not show a substantial relationship between these goals and sex-segregated academic high schools. This would be a constitutional holding and would not rest on the Equal Educational Opportunitees Act of 1974 (EEOA).

And now for the details . . . .

Mootness. The suit is moot as to the named petitioner. But the DC certified a class action and specified the class that petr represents, Pet. App. at 55a (Conclusion 3). Resp argues that this is inadequate, since the DC did not make specific findings or conclusions with respect to all the factors listed in Rule 23(a). Resp is right about the lack of specifics as to those factors, but I disagree with resp's conclusion. Board of School Commissioners v. Jacobs, 420 U.S. 128,

found inadequate certification for failure to describe the members of the class. It went no further. That requirement is met here, and I do not think it makes sense to expand Jacobs. It would have been better for the court to specify its findings under Rule 23(a)--and the opinion here could so state--but dismissal for mootness is a harsh sanction to visit upon petr's class for the failings of the judge, especially when there seems to be no dispute that the 23(a) requirements are in fact satisfied.

The federal statutes. Resp's policy of sex segregation for the two academic high schools does not violate Title IX, see 20 U.S.C. § 1681(a)(1). Whether it violates the EEOA, 20 U.S.C. § 1701, et seq., is a tougher question, since the Act is not well drafted and since it carries contradictory indications as to congressional intent regarding sex segregation. But there is a tougher question yet. If Philadelphia's policy violates the Act but would not be found to violate the Equal Protection Clause standing alone, was the Act a valid exercise of Congress's power under § 5 of the Fourteenth Amendment? That throws us right into the troublesome doctrine announced in Katzenbach v. Morgan, 384 U.S. 641, and modified (?) in Oregon v. Mitchell, 400 U.S. 112. In other words, in this particular case, deciding on statutory grounds would not enable the Court to avoid constitutional questions. In fact, it simply adds an additional one. We would still have to determine what the Equal Protection clause standing alone would require--in order to know if Congress has gone further. And then comes the Morgan inquiry.

In this curious setting, it seems appropriate to decide the Equal Protection question first. The SG seems to urge this, suggesting that we should consider the EEOA as primarily concerned with remedies and not intended to go beyond the unadorned Equal Protection clause in its statement of substantive law. See SG's brief at 18.

In case this course proves impossible or undesirable, I offer my tentative views on the statute. Most of the statute seems clearly intended to ban segregation or discrimination based on the categories usually proscribed: race, color, national origin, and sex. But § 1703(a) does not mention sex:

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national ~~origin~~ origin, by--
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools.

Nevertheless subsection (c) goes on to condemn assignments among schools, if the assignment results in greater segregation by sex (unless it is an assignement to the nearest school). Then § 1705 forbids assignment even to the nearest school if it is for the purpose of segregation on the basis of, inter alia, sex.

The legislative history apparently gives no help in untangling this mess. No solution is completely satisfactory, but I think the SG does the best job, brief at 20. He suggests that § 1703 be read as permitting sex segregation within schools (so as to permit separate gym classes, locker areas, etc.), but not overcoming the other sections with respect to sex segregation among schools. There is support for this notion in § 1720(c), not cited by the court of appeals.

If this is a valid interpretation, then resp's policy violates either § 1703(c) or § 1705. Resp ~~xkxe~~ tries to avoid this result by saying it has not assigned anyone to either Central or Girls; all admissions are based on voluntary applications. I don't buy this. Once a student qualifies for an academic high school and chooses to go that route, he or she is assigned to one school or the other based solely on sex.

Finally, if this is the construction, I think ~~Congress~~ the statute is probably valid under Morgan. But I have always found that case one of the most troublesome in constitutional law, and I would want to review the literature it has generated before taking a final stance on this question.

The Equal Protection clause. Both courts below noted some differences between ~~the~~ Girls and Central, but both concluded that they were "substantially equal." If substantial equality is sufficient, and if there is no independent reason to apply Craig v. Boren scrutiny simply because a gender classification is employed, then there really is not an Equal Protection question presented. This is essentially resp's position.

In my view, "Craig v. Boren scrutiny" applies. First, and less important, the crucial language from Craig is this: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives," (slip at 7). Other cases also imply that mere classification is enough to merit scrutiny. I don't think it can be denied that there is at least a classification

by gender operative here.

More importantly, I do not think there is "substantial equality" here. Or--perhaps to say the same thing in different language--one must be more sensitive to differences that do exist when a sex classification is employed in the realm of education. See Sweatt v. Painter, 339 U.S. 629; Brown v. Board of Education, 347 U.S. 483.

A. Tangible factors. I think both courts below focused on when they concluded that there was substantial equality, were focusing on tangible factors like quality of facilities and student-faculty ratios. They also looked to the fact that graduates of both schools are readily accepted by highly regarded colleges. These factors are certainly important. But there is one tangible factor with respect to which Central excels: science facilities. I cannot understand why neither court below thought this difference was "substantial." Certainly if I were a female interested in pursuing a science career, I would regard these differences as quite substantial--even though I might acknowledge that to most students they would make no difference.

B. Intangible factors. Ordinarily we lawyers are a hard-nosed lot. Intangible factors don't count for much if tangible factors point strongly to a certain conclusion. But in the realm of constitutional law involved here, there is highly respected precedent emphasizing the importance of intangibles: Sweatt and Brown. Both involved racial segregation, and certainly one does not immediately react to sex segregation in the same fashion. ~~But as I have pondered my own reaction pattern,~~

Since sex segregation doesn't have quite the same invidious "feel," it seems that intangibles assume correspondingly lower importance.

But as I have pondered my own reaction pattern, I have come to wonder whether my reactions are not the product of long-standing practice and "old notions" (see Stanton v. Stanton, 421 U.S. 7) that simply cause intangibles to seem less important to me viewing the situation through male eyes. I wonder whether many would not have had a somewhat similar feeling about race segregation ~~xhrixky~~ thirty years ago. My point is certainly not that sex segregation is as invidious as race discrimination--for many purposes one must treat the two quite differently, as the multiple "tiers" of this court's traditional analysis bear witness. My point is that the intangible factors may deserve as careful attention here as they did in the earlier cases.

The intangibles are these: history and prestige of Central (Philadelphia, of course, can't do much about these at this point), books in the library, the endowment fund, and the diploma ~~degree~~ offered. None of these is very important in itself, but in cumulative effect they cannot help but carry a message: Girls is not the best/high school in Philadelphia; Central is.* The diploma is symptomatic. By statute, only Central is authorized to grant something called a Bachelor of Arts degree, while Girls, like other schools, simply awards a diploma. The ~~effect~~ tangible effect of the two is the same. One cannot enter law school on the strength of a Central B.A. But the symbolism is clearly there.

(which results in the exposure of Central's students to important ~~individuals~~ or accomplished individuals as guest speakers)

* I don't know of any difference where Girls is better than Central.

I hope I am not overstating the differences. In any event, I do conclude that they are substantial enough to say that the schools are not equal--meaning the assignment policy must be tested under Craig v. Boren. The state's purposes are clearly important: fostering good academic attitudes and improving achievement. And the Jones study* cited in the lower court opinions shows that there is some relation between sex segregation and attitudes toward academic pursuits (although it said nothing about achievement). But I do not think the demonstrated relation is even as substantial as the relation shown in Craig. Moreover, if Philadelphia really believes that sex segregation makes a substantial contribution to learning, then it is hard to understand why it has not decreed sex segregation for all its high schools.

If the Court follows the outlined reasoning in holding for petr, then it would not be saying that all schools must be coeducational. It would simply be saying that a school system that chooses single-sex schools must be scrupulous in assuring equality. I think that avoiding the broader separate-but-equal question is desirable in itself, although I do acknowledge that a decision such as I have outlined may make it quite hard for public school systems, as a practical matter, to sustain single-sex schools.

No → The "right" to coeducation. I see nothing in this claim. Here the most lenient "rational basis" standard applies, and I think resp has met that.

Remand. The SG suggests a remand, essentially for further

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* I don't think the Tidball study counts for much--no adequate control group.

inquiry into the tangible effects of the intangible differences I have summarized above. I think that would be a mistake. The SG seems to suggest that the DC should be required to figure out the economic impact (in connection with career opportunities) that would obtain if a woman went to Central instead of Girls. I am not sure that can be meaningfully done. More importantly, it seems we know enough now to decide. In saying this, I emphasize that I do not think the course I have sketched above amounts to this Court refinding the facts. It amounts to reassessing the legal significance of undisputed facts.

On this basis, I recommend reversal.

D.M.

76-37 VORCHHEIMER v. SCHOOL DIST. Argued 2/22/77

Phila. School Core - alleged gender based discrimination.

S G's Amicus addresses both the statutory issue (Equal Educational Opportunities Act) and E/P issue. As to first, SG says Act should not be construed to apply to single-sex schools unless there is a violation of E/P (otherwise the Act may not be within the power of Congress under §5 of 14th Amend). Then, therefore, we reach E/P issue.

SG's Brief 23 { SG goes on to find an E/P violation.

We need not hold - certainly I would not - that E/P clause requires co-education schools. (Even Pltf doesn't argue that separate schools for sexes are inherently unequal).

But the classification must be rationally related to a substantial state interest. There is discrimination here, & quest. is whether it is justified by a sufficiently substantial state interest. We require strong showing of justification in gender based cases: Craig v Boren, Reed.

Mr Wallis (Petrs)

Entirely confusing argument - no help.

Gilbert (Resp)

As there is no invidious discrimination, rational basis test applies.

The Chief Justice Affirm

Schools essentially equal. State may experiment

Fed statute not applicable.

At conference on 3/9, & on reconsideration the vote was 4 to 4. Byrnes changed to Affirm

[redacted] Stevens, J. Affirm

There was sufficient equality to meet any reasonable standard of equal ed.

S/Board's decision that single sex schools are educationally desirable should not be disturbed

Brennan, J. Reverse

Need not reach issue of validity of single-sex schools.

These schools were not equal.

Sweatt controls.

Stewart, J. Reverse (tentative)

DC's op. & findings not enlightening. Can be read either way - as supporting or negativing his holding of ~~unequal~~ denial of E/P.

On balance - tho close - believe Central is the "best" schools. Can't keep girls out.

White, J.

9 + not Remanded would affirm. Thinks schools are equal.

Reverse + Remand as SG suggests.

But if we reach Q of "separate but equal", would hold that schools probably are equal & state probably has adequate justification.

Marshall, J.

Reverse

Not equal.

Sweatt cat hole

Blackmun, J. Affirm

Not moot.

Statute not applicable

Powell, J. Reverse

Fed statute not applicable. Not moot

I agree largely with SG's brief

Gender based classifications have been examined more closely.

Central is the best.

I would not reach single sex E/P issue. (separate but equal

Rehnquist, J.

Not present

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 9, 1977

Re: 76-37 - Vorchheimer v. School District of Philadelphia

MEMORANDUM TO THE CONFERENCE:

In today's special Conference, the vote on the merits remained as it was at the March 4 Conference.

I therefore propose that notwithstanding Bill Rehnquist's "disclaimer," we defer consideration until his current views are known. In my view, action by an equally divided Court would be open to valid criticism as an institutional failure to meet our obligations. However, should that be the ultimate result, I will write my view on why the absence of one Justice should lead to reargument.

Obviously, we did not take this case to evaluate findings against the record but only to decide whether gender separated equal schools are "inherently unequal," and that issue should neither be evaded nor delayed.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

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MEMORANDUM TO THE CONFERENCE:

In today's special Conference, the vote on the merits remained as it was at the March 4 Conference.

I therefore propose that notwithstanding Bill Rehnquist's "disclaimer," we defer consideration until his current views are known. In my view, action by an equally divided Court would be open to valid criticism as an institutional failure to meet our obligations. However, should that be the ultimate result, I will write my view on why the absence of one Justice should lead to reargument.

Obviously, we did not take this case to evaluate findings against the record but only to decide whether gender separated equal schools are "inherently unequal," and that issue should neither be evaded nor delayed.

but 4 Justices are convinced this question is not fairly presented by this case.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 11, 1977

Re: 76-37 - Vorchheimer v. School District of Philadelphia

MEMORANDUM TO THE CONFERENCE:

I am not sure I have a clear picture on the motion for reargument.

In the posture that the case stands now, it seems to me that there would be genuine institutional "negatives" in having it reaffirmed by an equally divided Court even though I agree with the results reached by that process.

It is one thing to affirm a case of significance with an equally divided Court when there is nothing we can do about it (as in the 1969 Term with only eight Justices), but it is quite another to follow that course when it will merely require one hour of additional time at the final oral argument session, at which time Bill Rehnquist will be able to participate.

I have an uneasy feeling that the DeFunis case will be linked with this -- erroneously, of course; but it may appear even to some thoughtful people that the Court had evaded the issue at a time when the addition of one hour to the argument session would produce a definitive result.

We should act on this promptly because the parties should be notified very quickly if it is to be set for re-argument in the second week of our final session.

Regards,

WEB

I will place this on the agenda for Friday. WEB

April 18, 1977

No. 76-37 Vorchheimer v. School District of Philadelphia

Dear Chief:

As I view the case as involving unique facts, I am content to "let the chips" lie where they fell.

Your Per Curiam has my approval.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 18, 1977

Re: No. 76-37 - Vorchheimer v. School District of Philadelphia

Dear Chief:

As at conference, my vote is to reargue. I feel the Court will look bad, or at least awkward, if, under the circumstances that attend this case, we affirm by an equally divided vote.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

As I view the case as involving unique facts, I am content to "let the chips" [redacted] lie where they fell.

Your P.C. has my approval.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 18, 1977

Re: 76-37 - Vorchheimer v. School Dist. of Philadelphia

Dear Chief:

My vote is not to reargue.

Respectfully,

John

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 18, 1977

RE: No. 76-37 Vorchheimer v. School District Philadelphia

Dear Chief:

I agree with the Per Curiam you have prepared in the above.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 18, 1977

Re: No. 76-37 - Vorchheimer v.
School District of Philadelphia et al.

Dear Chief,

The Per Curiam you have circulated today seems correct to me.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 18, 1977

Re: No. 76-37 - Vorchheimer v. Philadelphia

Dear Chief:

Although I thought the case should be argued, the per curiam you have circulated seems to reflect the Conference vote.

Sincerely,

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 18, 1977

RE: 76-37 - Vorchheimer v. School District of Philadelphia

Dear Harry:

Your memo of today re the above is what I tried and failed to get five votes for last Friday. We will look "bad" and the four who voted to reargue need not waive the ancient right to say "What did we tell you"!

However, until the Court gives me two votes as in ancient English law when a court is equally divided, I find it difficult to cope with four unregenerate, unreconstructed "rebels"! In which case I conduct as orderly a retreat as possible!

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 19, 1977

Re: 76-37 - Vorchheimer v. School District of Philadelphia

Dear Chief:

Please join me.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 19, 1977

Re: No. 76-37, Vorchheimer v. School District of Philadelphia

Dear Chief:

I agree with your Per Curiam.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Powell

(Slip Opinion)

SUPREME COURT OF THE UNITED STATES

No. 76–37

Susan Lynn Vorchheimer, by her parents Bert and Carol Vorchheimer, etc., Petitioner, *v.* School District of Philadelphia et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[April 19, 1977]

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
PC								
4/18/77	agree 4/18/77	join CJ 4/18/77	join CJ 4/18/77	join CJ 4/19/77	want to reargue 4/18/77	join CJ 4/18/77		prefer not to reargue 4/18/77 join CJ 4/19/77

76-37 Vorchheimer v. School Dist. of Phila.