



10-1981

Mississippi University for Women v. Hogan

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/casefiles>



Recommended Citation

Mississippi University for Women v. Hogan. Supreme Court Case Files Collection. Box 90. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Inclined to Deny

PRELIMINARY MEMORANDUM

October 30, 1981 Conference
List 1, Sheet 4

No. 81-406-CFX

MISS UNIV FOR WOMEN, et
al.

Cert to CA5 (Clark, Gee, Spears
[DJ])

*Good panel, & Clark
is from Miss.*

v.

HOGAN (rejected male
applicant)

Federal/Civil

Timely

1. SUMMARY: (1) Is Mississippi's maintenance of an all-woman state-supported university violative of a qualified male applicant's right to equal protection? (2) Did Congress exempt Mississippi University for Women from Title IX, Educational Amendments of 1972?

I tend to deny. Petr's second argument -- the Congressional exemption -- was not addressed by the CA5 and it is not evident from the petition that the argument was ever raised below. I do not think that there is a conflict with →

Vorckheimer (CA3) since in that case there were
separate schools for each sex.

The memo writer recommends a grant, but I
think I would let this one alone. But a grant may be
appropriate.

DL

2. FACTS AND DECISIONS BELOW: The facts were not disputed. Mississippi University for Women (MUW), which offers a nursing program, among other courses of study, has admitted only women since it was established in 1884. Joe Hogan, a male, was rejected when he applied for admission to MUW's nursing program. But for his sex, he would have been admitted. Miss maintains two other, coeducational universities which offer degrees in nursing, but maintains no all-male university. Hogan sued for declaratory and monetary relief.

The DC granted summary judgment in favor of MUW, holding that the maintenance of an institution of higher learning for females bore "a rational relationship to Mississippi's legitimate interest in providing the greatest practical range of educational opportunities for its female student population." The DC also found the single-sex admissions policy was not arbitrary since it was consistent with a respected, although controverted, attitude of some educators that benefits may accrue to students "who matriculate in a single-sex educational environment."

The CA⁵ reversed. That ct relied upon this Court's judgment in Kirchberg v. Feenstra, 450 U.S.____, 101 S.Ct. 1195 (1981), and required a showing that the gender-based classification was substantially related to an important governmental objective. The CA rejected the State's attempt to justify its maintenance of MUW by relying upon a statute [Miss.Code Ann. §37-117-3 (1972)] which states the purpose of establishing MUW was to provide "moral and intellectual advancement of the girls of the state . .

. as necessary or proper to fit them for the practical affairs of life."¹

The CA noted that Mississippi was attempting to justify a gender-based classification with purposes that are also gender-based. While the state has a substantial interest in providing a quality education for all its residents, that interest does not stop with female residents. The CA carefully limited its holding, stating only that the maintenance of MUW as the only state-supported single-sex collegiate institution in the state was violative of equal protection rights.

3. CONTENTIONS: Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681, prohibits gender-based discrimination in undergraduate education. However, petr contends, this action is controlled by subsection (a) (5) of that statute, which specifically provides that Section 1681 shall not apply to any public undergraduate institution which has continually, from its establishment, admitted students of only one sex. Petr argues subsection (a) (5) was an exercise of Congress's enforcement power under section 5 of the 14 Amend. Resp answers that Congress specifically found that a sex-segregated system of education

¹The purpose of MUW is defined more specifically as educating the girls of the state "in the arts and sciences . . . normal school methods and kindergarten . . . bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general and practical needlework"

denies equal protection of the law and that, while Congress can indeed enforce the 14 Amend by virtue of its section 5 powers, it cannot, through that provision, allow states to maintain practices otherwise violative of the 14 Amend.

Petr also contends that, given the state's purpose of providing for the moral and intellectual advancement of the girls of the state by maintaining a first-class institution for their education, maintenance of MUW is permissible under either the rational relationship or substantial relationship test. Resp contends that petr did not meet its burden of showing a substantial relationship related to an important governmental objective. The sole justification lay in the enabling legislation (quoted in part in Sec. 2, supra and in whole in Pet., at 8), which only demonstrates MUW's genesis in the kind of "archaic and overbroad" stereotypes which this Court has condemned.

Pet further contends that a conflict exists between the decision below and that of the CA3 in Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (CA3 1976), aff'd, 430 U.S. 703 (1977). In Vorchheimer, the CA3 upheld Philadelphia's practice of maintaining single-sex schools. That crt found that the city's practice of maintaining a limited number of secondary single-sex schools of equal quality did not offend the 14 Amend. The evidence was sufficient to establish that legitimate educational policies could be served by utilizing single-sex

schools since some educators believe single-sex schools allow more effective studying.

4. DISCUSSION: A distinction can be made between Vorchheimer and this action. Vorchheimer involved secondary schools; this action involves a university. Philadelphia maintained both all-male and all-female schools; Mississippi has no all-male university. However, if single-sex schools offend the 14 Amend. unless the classification is substantially related to an important governmental objective, CA5 and CA3 are in conflict. In both decisions, the rationale advanced to justify the gender-based discrimination was the respected, although controverted, theory that some students learn or study better in single-sex schools. CA3, relying upon that approach, found a substantial relationship between single-sex schools and the legitimate state objective of providing quality education. CA5, in contrast, found that the only state interest involved was providing a quality education to a state's residents, despite the DC's conclusion that the decision to maintain a single-sex institution was consistent with a well-established body of opinion that benefits may accrue to students in such schools. The conflict is, therefore, real, since the legal issue does not depend upon whether single-sex schools are maintained for both sexes or for one.

In addition, this action presents the question of whether Congress can declare whether a particular practice is allowed by the 14 Amend. By first finding that single-sex schools denied

equal protection of the law and then deciding that such discrimination was permitted in a particular class of public schools, Congress apparently attempted to determine, through statute, what distinctions were permissible under the 14 Amend. The extent of congressional power in this area presents a substantial federal question.

I recommend a grant.

A response has been filed.

October 14, 1981 McGregor opn in petn

MB

GRANT
Schultz

G

October 30, 1981 Conference
List 5, Sheet 6

No. 81-406

MISSISSIPPI UNIV. FOR
WOMEN, et al:

Motion of Mississippi
University for Women Alumnae
Association for Leave to
File a Brief as Amicus Curiae

v.

HOGAN

SUMMARY: Movant, an alumnae association of the petr, requests leave to file a timely amicus brief in support of the cert petn. The petrs have consented to the filing.^{1/} Representing thousands of graduates and former students of the petr-University, the movants state that their purpose is to "preserve and promote the purposes of the [University] as an institution devoted to the exclusive higher education of women." Further, although movant was not a party in the litigation below, it has a distinct interest in the outcome because of the large number of women who have received, or will receive, their education at the University.

^{1/}As of the filing of the motion, resps had not yet consented.

Grant
Mary

DISCUSSION: Although the resp has to date not yet consented to this amicus brief, the movant has demonstrated an adequate interest to warrant its filing.

There is no response.

10/26/81

Schlueter

PJC

No. 81-406

vs.

Motion of Mississippi University for Women Alumni Association for
leave to file a brief as amicus curiae.

Grant

[illegible]

jsw 03/21/82

though I am tentatively ~~not~~ inclined
to hold that the Court does not prohibit
this type of choice in its educational
system.

The Refers is deprived of nothing
except the convenience of home
town education - hardly a
Court deprivation.

BOBTAIL BENCH MEMORANDUM

To: Mr. Justice Powell
From: John Wiley
Nos. 80-406: Mississippi University for Women v. Hogan

March 21, 1982

Question Presented

Can MUW constitutionally exclude men?

Discussion

In the abstract, this case presents a potentially difficult issue: whether the 14th Amendment prohibits a State, which operates a number of sexually integrated nursing schools, from adopting a sex-conscious admissions policy at one of them, "to eliminate [or] to compensate for past discrimination due to sex." Petr Br. 8. I find this abstract issue difficult for two reasons. First, it must evaluate "discriminatory" behavior -- the exclusion of men from all-women schools -- that is based

upon the plausible educational theory that sexually segregated learning is beneficial to students. Highly respected educational institutions (e.g., Vassar, Radcliffe, Bryn Mawr) in the not-so-distant past adhered to women-only admissions policies. They did so for well informed and good faith educational reasons. It is true that most such schools have abandoned the policy. But the recent history is a testimony to the legitimacy of the central pillar of Mississippi's state interest in this case: that an all-woman student body offers women otherwise unattainable educational opportunities. / ger

The second reason that the case is difficult is that the remedial aspects of such educational affirmative action cannot be quickly dismissed. One reason affirmative action cases (like Bakke) are so difficult is the sympathy inspired by good faith effort to combat the often tragic legacies of past discrimination. Consequently Mississippi's general appeal to affirmative action logic is entitled to serious consideration.¹ / ?

¹I leave a third, potentially troublesome point off my list of reasons why this issue is difficult. That third point is the fact that Congress, when enacting Title IX, excepted college admissions policies for institutions "that traditionally and continually from its establishment has had a policy of admitting students of only one sex" from the general Title IX ban on sex discrimination in education. 20 U.S.C. §1681(a)(5). Mississippi argues this exception means that Congress has authorized single sex colleges pursuant to the power granted by §5 of the 14th Amendment. It argues that the Court must defer to this congressional judgment about the substantive content of the 14th Amendment, citing Katzenbach v. Morgan, 384 U.S. 641, 655-58 (1966).

I disagree. Most importantly, I do not think that Title IX declares affirmative congressional policy favoring single sex colleges. Rather §1681(a)(5) simply excludes single sex colleges

Footnote continued on next page.

The Court has little specific help from precedent matter on this subject. Twice the Court has affirmed sexual segregation policies in public schools. See Williams v. McNair, 316 F.Supp. 134 (D.S.C. 1970), aff'd, 401 U.S. 951 (1971); Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (CA3 1975). But Williams v. McNair preceded the Court's first substantive analysis of the problem of gender discrimination. See Reed v. Reed, 404 U.S. 71 (1971). I therefore think the McNair result is of little consequence to the problem at hand. And Vorchheimer, according to the CA3, involved no sex discrimination issue; Philadelphia ran Central High for boys and Girls

from its remedial scheme, consisting of federal fund cutoffs and (since Cannon v. Univ. of Chicago, at least!) private damage actions. Such an omission does showing Congress' reluctance to tangle with traditional single-sex colleges. It thus reinforces the point I made earlier about the very recent legitimacy of single-sex education. But the omission does not amount to a substantive congressional declaration of 14th Amendment rights.

A second reason supports this same conclusion. Katzenbach does hold (in the alternative) that the Court must defer to congressional judgments about the substance of rights conveyed by the 14th Amendment. But Justice Brennan specifically stated there that "§5 grants no power to restrict, abrogate, or dilute" the guarantees of the 14th Amendment. 384 U.S. at 651 n.10. Katzenbach thus only grants Congress the power to expand, not to subtract, 14th Amendment protections. Obviously resp Hogan's 14th Amendment rights are not expanded by this Title XI omission.

I conclude that Title IX's omission does not control or affect the analysis of whether MUW's policy offends the 14th Amendment. That constitutional judgment is for the Court. It has not, and properly could not have been, made by Congress. But Congress' policy acknowledgement of the legitimacy of single-sex college education as a principle does, as a practical matter, make the abstract issue in this case more difficult -- for the same general reason as does Radcliffe's, etc., recent endorsement of single-sex education.

High, which assertedly was of quality equal to that of Central. The case was affirmed, you recall, by an equally divided Court. Our file shows that you (joined by Justice Brennan, Marshall, and Stewart) believed that the two Philadelphia high schools in question in fact were not of equal quality. Therefore you would not have reached the question of whether segregation per se constituted sex discrimination. More importantly, Vorchheimer involved high schools rather than a college-level professional school, and there the state ran a segregated school for each sex. This case differs in both regards. I consequently believe that Vorchheimer also casts little light on the instant problem.

Notwithstanding the confounding generalities that surround the abstract issue in this case, I note that this issue is of narrow significance as a practical matter. According to our library research staff, there are only two other public single-sex colleges in the nation: VMI and Texas College for Women.

VMI

Texas

College

Moreover, I think the condition of the record does much to simplify and narrow the decision that must be made in this case. Resp Hogan has shown that he has suffered a gender-based injury: but for his sex, he would be entitled to attend MUW.² Indeed, Mississippi freely concedes this point. Petr Br

7

²It is important to separate the relevant from the irrelevant injury to Hogan. The relevant equal protection injury is that fact that Hogan could attend MUW -- except for the fact of his

Footnote continued on next page.

4.

Although sex is not a suspect category, it has received heightened review. Consequently it seems to me that the burden of going forward with a showing that MUW's policy is substantially related to important state interests must shift to Mississippi. (Mississippi fails to perceive this shift in the burden of going forward, confusing it instead with the burden of persuasion -- which must always rests with the party attacking the constitutionality of a statute. See Petr Reply at 1.) I think Mississippi, by reason of a thin record, fails to substantiate its claim. Therefore I think the Court should find that MUW has failed adequately to defend its single-sex policy on these facts, and leave open the more general question of whether other state professional schools (and certainly educational institutions, such as high schools, that deal with less mature students) could justify other, better supported sex-based admissions policies.

Mississippi cites commentary by three authors supporting the advantages of one-sex schools. (The three are Alexander Astin, Elizabeth Tidball, and a group (to which MUW be-

gender. Hogan further complains that he will have to move, leave his job, sell his house, etc., to attend a Mississippi state nursing school other than MUW. This is true but immaterial. Individuals have no right to attend university in their own home town. Happy coincidence locates MUW in Hogan's neighborhood. Typically he would have to move, leave job, etc., if he sought a nursing education.

you

longs) called the Women's College Coalition. Petr Br at 12-18.) As Hogan points out in rebuttal, Resp Br at 23-24, this commentary appears to be only the tip of the iceberg on this topic -- and a much-disputed tip as well. Because the matter of single-sex colleges can be a difficult issue in the abstract, I think the Court should rely on the facts of the specific case to identify how well asserted state interests are served by the state policy in the particular case. Therefore the the general, abstract, and extra-record commentary on both sides of this issue should be discounted, I think. It seems to me that the Court should avoid couching this decision as a general, quasi-legislative, judgment as to whether single-sex education is good or bad policy in all instances. Rather the Court should stick to the record and pose the question as whether a particular act of gender-based discrimination is justified on the facts of the case.

Record support for Mississippi's state interest ap-
pears to be limited to a statement by MUW's president. See
 Reply at 2-3. In relevant part, this interest is Mississippi's
 belief that "the level of [women's] achievement in leadership
 is enhanced by the role models that are there at the 'W', by
 the environment of the classroom where women are totally en-
 couraged to fulfill themselves in leadership as well as in aca-
 demics." Id. at 2.

Encouraging women's achievement in leadership and academics seems plainly to be an important state interest. The

key therefore is whether Mississippi's treatment of Hogan bears a substantial relationship to this interest.

The facts of this case incline me to think that Mississippi fails to establish such a relationship. First, in this case there is reason to doubt the asserted academic and leadership benefits supposed to flow sexually segregated education. I think it is quite plausible that there is less of the "mating game" (as amicus Alumae, at 3, colorfully term it) on sexually segregated campuses and that therefore women students may concentrate on and achieve more in the way of academics and leadership. But Mississippi has no sexually segregated campus for men. This fact either belies Mississippi's claimed interest or demonstrates that Mississippi believes that the "mating game" seriously distracts only female students. Either ground undermines Mississippi's case -- the former directly; the latter because it is the type of archaic and stereotyped reasoning that the Court previously has condemned. E.g., Orr v. Orr, 440 U.S. 268, 283 (1979); Craig v. Boren, 429 U.S. 190, 198-99 (1976).

?
I would
not
rely on
this

I also doubt the veracity of Mississippi's affirmative action argument. MUW's founding date (1844) and mandate (see Resp Br at 12-13) plainly had no remedial affirmative action intent. From the evidence, I see no documentation of a change in purpose. Rather, it appears that the school concentrates on traditional "female" subjects, such as nursing, secretarial and homemaker training.³

??
.

Footnote(s) 3 will appear on following pages.

There certainly is nothing wrong with such training. It is a fact that many, if not most, women still follow such paths. States appropriately can choose to provide such training for those who prefer it. But these are the fields in which women always have excelled. Therefore MUW brings its female students no affirmative academic or leadership training opportunities different from those previously available to them. Consequently, MUW's admissions policy looks more like the perpetuation of outdated stereotypes than an authentic effort to help women break free of such stereotypes.

This doubt is heightened by two additional facts. First, Mississippi adopted this affirmative action only after it had filed its cert petition in this Court. Mississippi did not raise the point in the DC or in the CA5. In fact, resp Hogan even argues that Mississippi should be precluded from making the argument, due to its lateness. While I do not agree with this view, I do believe Mississippi's timing illustrates the post hoc nature of its justification.

Second, female role models, in the form of administration and senior faculty members, appear to be quite rare at

³Mary Becker will be interested to learn from the MUW's "contemporary Women" course series (which is "designed to prepare young women for the very active roles demanded of them in the Twentieth Century") that these roles consist of the following: "Fashion, Introduction to Modeling, [Advanced] Modeling, and Personal Development [which "presents various methods of self-improvement in appearance and . . . acceptable procedures in social situations")! MUW Bulletin 109; Amicus Br 32-33.

But
what
about
some
of
silly
subjects
(e.g. frisbee
throwing) at
many State U's

MUW. See Resp Br. 18-19 (citing MUW Bulletin). And Mississippi offers no evidence that MUW has any higher proportion of women employees at any level as compared to its other, coeducational campuses.

As a separate and final matter, there also is reason to doubt Mississippi's claim that the presence of men at MUW would lessen the quality of the educational experience for women. The best evidence of this is MUW Nursing School Acting Dean's testimony that the presence of men at MUW would have no adverse effect of the performance of female students. See Resp Br 21. Second-best evidence shows that resp Hogan apparently was "told that he could audit any courses that the chose but that he could not receive course credit." Amicus Brief, Nat'l Women's Law Center 30 n.16 (no record citation provided). Male presence thus apparently in fact is not thought fatal by MUW. Similarly, MUW has permitted 138 other male course audits, and apparently has allowed them to participate in other campus activities as well. (But 138 male audits over a 10 year period amounts to only a handful of men per year. If MUW is of any size at all, the number could well be de minimis.)

On these facts, I therefore incline to affirmance. I think, however, that any opinion should be written narrowly, as a fact-specific evaluation of the justification for and history of MUW's policy. This approach would leave it open for a future state school (with more consistent affirmative action interests) to make the case that sexual segregation is permissi-

ble.

In my view, the holding also should be confined carefully to the university level. The state interest in educational sexual segregation could be quite different when students are not adults. The Court therefore should not purport to rule on such matters.

In Vorhees v. School Dist. of
Philadelphia CAB "upheld single
sex high schools in Phila. We
affirmed. Only differences are (1)
there are no ~~more~~ all ~~male~~ colleges
in Miss., + (2) this case involves colleges

Both
sides

WUM

Cholson (State of Minn)

Seven of eight State universities
are co-ed.

That College was founded in 1884
after U of Min had become co-ed. It
was first state women's college.

To extent that Fed funds are granted,
there are 180 ~~other~~ single-sex colleges.

Men may audit certain courses
— usually ^{at} night. But not for credit.

Resp's complaint is that it is not
~~convenient~~ ^{to} attend the other ~~other~~
co-ed colleges that provide degrees in
nursing.

Resp offered no ev. to rebut the
College President's ~~testimony~~ testimony as to
educational reasons for the un-sex college.
See deposition.

Also the judg. of Legislature is
entitled to presumptive validity.

Graduates of MOW have better
records of admissions to graduate
schools of Medicine & Law.

Ev. meets Craig v Bowen
standard.

Not enough males want a ~~sex~~ single
sex male. Thus, State has provided
no such school.

See
Dr Strobel's
testimony

Chelron (cont)

Petr. is not asking for a single sex male school: only right to go to Men school.

Title IX fall-out could be extensive in CA 5 is affirmed: eq. elimination of single sex athletics & dormitories.

Colom (Resp)

Single sex schools have been held only when provided for both men & women.

Burden is on state to justify classification

Consider Resp is not asking for right to go to single sex male school. He only wants to attend MVW because of its convenience.

(Query: Does he have standing to argue his rights are violated by absence of single sex male colleges?)

Chalson (Reply)

W.B.'s op. in Frontiers: women have been discriminated against.

Dr Kraft
&
Dr Strobel

The "auditing" permitted by men is "limited" (see testimony of College officials).
In fact, very few males have ever sought
& even to monitor.

No longer rely on the 1884 purposes,
Though language of Enabling Act
has not been changed, the College's
policy has changed substantially -
curriculum demonstrates this.

No. _____,

The Chief Justice

Rev.

No invidious purpose when this
College was formed or now exists

Justice Brennan

Aff'm

Narrow Q. Only school of nursing
is involved. Resp. may take courses &
should not be denied credit

Need not reach broader issue
of uni- res schools

Justice White

Aff'm

On dif. basis from C A 5
Could go with W Q B.

Justice Marshall

Aff'm

On W J B's basis

Justice Blackmun

Rev (tentative)

Not at rest.

Don't believe every school must be co-ed.

Need not Title IX

Justice Powell

Rev.

(I stated my reasons)

Justice Rehnquist

Rev.

- Can't justify W & B analysis
- issue is not simply merging schools.
Men have not been discriminated against.
(Some of our cases involved
discrimination vs men. E.g. Bosten.)

Justice Stevens

App in

On W & B grounds.

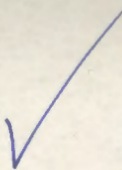
Justice O'Connor

App in

Records here don't show
benefit of unisex schools.

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 1, 1982



RE: No. 81-406 Mississippi University for Women v.
Hogan

Dear Chief:

Sandra has agreed to take the opinion for the Court
in the above.

Sincerely,

The Chief Justice
cc: The Conference

CHAMBERS OF
THE CHIEF JUSTICE

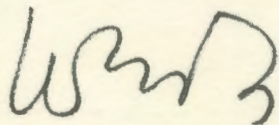
April 2, 1982

Re: No. 81-406 - Mississippi Univ. for Women v. Hogan

Dear Lewis:

Will you take on a dissent in this case?

Regards,

A handwritten signature in dark ink, appearing to be 'W. Powell', written in a cursive, stylized script.

Justice Powell

cc: Justice Rehnquist
Justice Blackmun

April 5, 1982

81-406 Mississippi Univ. for Women v. Hogan

Dear Chief:

I will be glad to undertake a dissent in this case.

Sincerely,

The Chief Justice

lfp/ss

cc: Justice Rehnquist
Justice Blackmun

lfp/ss 05/08/82

81-406 Mississippi University v. Hogan

When I write my dissent I may find some help from the statement in my Rodriguez opinion 411 U.S. 1, at 50, to the effect that:

"No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approach than does public education."

L.F.P., Jr.

SS

PP. 4, 7 Opinion ~~as~~ reasons
as if there were sex
discrimination in fact.
Ref. The State provided
other co-ed schools. OK
redates include this
in a note n 8-15

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: MAY 27 1982

Recirculated:

Received
5/27

This opinion is written 1st DRAFT
as a ^{p 6, 11} SUPREME COURT OF THE UNITED STATES

interstate "sex discrim." No. 81-406
case, I'm not. There was never any
intent to
discriminate
vs men. Only one man ^[May 1982] complained
(class action?) NO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the issue of whether a state statute that
excludes males from enrolling in a state-supported profes-
sional nursing school violates the Equal Protection Clause of
the Fourteenth Amendment.

The facts are not in dispute. In 1884, the Mississippi leg-
islature created the Mississippi Industrial Institute and Col-
lege for the Education of White Girls of the State of Missis-
sippi, now the oldest state-supported all-female college in the
United States. 1884 Miss. Gen. Laws, ch. XXX, § 6. The
school, known today as Mississippi University for Women
(MUW), has from its inception limited its enrollment to
women.¹

¹The charter of MUW, basically unchanged since its founding, now
provides:

"The purpose and aim of the Mississippi State College for Women is the
moral and intellectual advancement of the girls of the state by the mainte-
nance of a first-class institution for their education in the arts and sciences,
for their training in normal school methods and kindergarten, for their in-
struction in bookkeeping, photography, stenography, telegraphy, and
typewriting, and in designing, drawing, engraving, and painting, and their
industrial application, and for their instruction in fancy, general, and prac-
tical needlework, and in such other industrial branches as experience, from

Constitutional
status
- p 5 n -

Assumes
discrimination
- 5

no separate
but equal
issue - 2

no
pattern of
dis. vs
men - 10

Ref's
basic
complaint
is one of convenience - elevator "convenience" to

~~Ref's~~
In a blow
to federalism

- limits right
of states to
provide
deserve
opportunities

little mention made of availability of other
colleges.

The "standard" - the ~~conventional~~ one - 5

In 1971, MUW established a School of Nursing, initially offering a two-year associate degree. Three years later, the school instituted a four-year baccalaureate program in nursing and today also offers a graduate program. The School of Nursing has its own faculty and administrative officers and establishes its own criteria for admission.²

Respondent, Joe Hogan, is a registered nurse but does not hold a baccalaureate degree in nursing. Since 1974, he has worked as a nursing supervisor in a medical center in Columbus, the city in which MUW is located. In 1979, Hogan applied for admission to the MUW School of Nursing's baccalaureate program.³ Although he was otherwise qualified, he was denied admission to the School of Nursing solely because of his sex. School officials informed him that he could audit the courses in which he was interested, but could not enroll for credit. Tr. 26.⁴

Hogan filed an action in the United States District Court for the Northern District of Mississippi, claiming the single-sex admissions policy of MUW's School of Nursing violated the Equal Protection Clause of the Fourteenth Amendment. Hogan sought injunctive and declaratory relief, as well as compensatory damages.

time to time, shall suggest as necessary or proper to fit them for the practical affairs of life." Miss. Code Ann. § 37-117-3 (1972).

Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether states can provide "separate but equal" undergraduate institutions for males and females. Cf. *Vorchheimer v. School District of Philadelphia*, 532 F. 2d 880 (CA3 1975), *aff'd by an equally divided court*, 430 U. S. 703 (1977).

² Record, Exhibit 1, 1980-1981 Bulletin of Mississippi University for Women 3, 32-34, 212-229.

³ With a baccalaureate degree, Hogan would be able to earn a higher salary and would be eligible to obtain specialized training as an anesthetist. Transcript of Preliminary Injunction Hearing (Tr.) 18.

⁴ Dr. James Strobel, President of MUW, verified that men could audit the equivalent of a full classload in either night or daytime classes. Tr. 39-40.

no
separate
but
equal
issue

Only one
single-sex
school

Following a hearing, the District Court denied preliminary injunctive relief. App. to Pet. for Cert. A4. The court concluded that maintenance of MUW as a single-sex school bears a rational relationship to the state's legitimate interest "of providing the greatest practical range of educational opportunities for its female student population." *Id.*, at A3. Furthermore, the court stated, the admissions policy is not arbitrary because providing single-sex schools is consistent with a respected, though by no means universally accepted, educational theory that single-sex education affords unique benefits to students. *Ibid.* Stating that the case presented no issue of fact, the court informed Hogan that it would enter summary judgment dismissing his claim unless he tendered a factual issue. When Hogan offered no further evidence, the District Court entered summary judgment in favor of the State. Record 73.

The Court of Appeals for the Fifth Circuit reversed, holding that, because the admissions policy discriminates on the basis of gender, the District Court improperly used a "rational relationship" test to judge the constitutionality of the policy. 646 F. 2d 1116, 1118. Instead, the Court of Appeals stated, the proper test is whether the State has carried the heavier burden of showing that the gender-based classification is substantially related to an important governmental objective. *Id.*, at 1118, 1119. Recognizing that the State has a significant interest in providing educational opportunities for all its citizens, the court then found that the State had failed to show that providing a unique educational opportunity for females, but not for males, bears a substantial relationship to that interest. *Id.*, at 1119. Holding that the policy excluding Hogan because of his sex denies him equal protection of the laws, the court vacated the summary judgment entered against Hogan as to his claim for monetary damages, and remanded for entry of a declaratory judgment in conformity with its opinion and for further appropriate proceedings. *Id.*, at 1119-1120.

not
unique

DC

CA5
Reversed
- use
of rational
basis
test - err

On rehearing, the State contended that Congress, in enacting § 901(a)(5) of Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 373, 20 U. S. C. § 1681 *et seq.*, expressly had authorized MUW to continue its single-sex admissions policy by exempting public undergraduate institutions that traditionally have used single-sex admissions policies from the gender discrimination prohibition of Title IX.⁵ Through that provision, the State argued, Congress limited the reach of the Fourteenth Amendment by exercising its power under § 5 of the Amendment.⁶ The Court of Appeals rejected the argument, holding that § 5 of the Fourteenth Amendment does not grant Congress power to authorize States to maintain practices otherwise violative of the Amendment. 653 F. 2d 223.

We granted certiorari, — U. S. —, and now affirm the judgment of the Court of Appeals.⁷

⁵ Section 901(a) of Title IX, Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 373, 20 U. S. C. § 1681(a) (§ 1681), provides in part:

“(a) No person in the United States shall, on the basis of sex, 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, except that:

“(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

“(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex. . . .”

⁶ Section 5 of the Fourteenth Amendment provides:

“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

⁷ Although the Court of Appeals' decision refers to all schools within MUW, see 646 F. 2d, at 1119, the factual underpinning of Hogan's claim for relief involved only his exclusion from the nursing program. Complaint ¶ 8-10. During oral argument, counsel verified that Hogan sought only

II

We begin our analysis aided by several firmly-established principles. Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Reed v. Reed*, 404 U. S. 71, 75 (1971). That this statute discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.⁸ *Caban v. Mohammed*, 441 U. S. 380, 394 (1979); *Orr v. Orr*, 440 U. S. 268, 279 (1979). Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg v. Feenstra*, 450 U. S. 455, 461 (1981); *Personnel Administrator of Massachusetts v. Feeney*, 442 U. S. 256, 273 (1979). The burden is met only by showing at least that the classification serves "an important governmental objective and that the discriminatory means employed" is "substantially related

admission to the School of Nursing. Tr. of Oral Argument 24. Because Hogan's claim is thus limited, we decline to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment.

⁸ Without question, MUW's admissions policy worked to Hogan's disadvantage. Although Hogan could have attended classes and received credit in one of Mississippi's state-supported coeducational nursing programs, none of which was located in Columbus, he could attend only by driving a considerable distance from his home. Tr. 19-20, 63-65. A similarly situated female would not have been required to choose between foregoing credit and bearing that inconvenience. Moreover, since many students enrolled in the School of Nursing hold full-time jobs, Deposition of Dean Annette K. Barrar 29-30, Hogan's female colleagues had available an opportunity, not open to Hogan, to obtain credit for additional training. The policy of denying males the right to obtain credit toward a baccalaureate degree thus imposed upon Hogan "a burden he would not bear were he female." *Orr v. Orr*, 440 U. S. 268, 273 (1979).

not
discriminate in
customary
sense

??

The
standard

Convenience
of Hogan

??

Inconvenient!

Absurd

But it was not so
applied by this
opinion

to the achievement of those objectives." *Wengler v. Drug-
gists Mutual Insurance Co.*, 446 U. S. 142, 150 (1977).⁹

Although the test for determining the validity of a gender-
based classification is straightforward, it must be applied free
of fixed notions concerning the roles and abilities of males and
females. Care must be taken in ascertaining whether the
statutory objective itself reflects archaic and stereotypic no-
tions. Thus, if the statutory objective is to exclude or "pro-
tect" members of one gender because they are presumed to
suffer from an inherent handicap or to be innately inferior,
the objective itself is illegitimate. See *Frontiero v. Richard-
son*, 411 U. S. 677, 684 (1973) (plurality opinion).¹⁰

⁹ Because we conclude that the challenged statutory classification is not
substantially related to an important objective, we need not decide
whether classifications based upon gender are inherently suspect. See
Stanton v. Stanton, 421 U. S. 7, 13 (1975).

¹⁰ History provides numerous examples of legislative attempts to exclude
women from particular areas simply because legislators believed women
were less able than men to perform a particular function. In 1872, this
Court remained unmoved by Myra Bradwell's argument that the Four-
teenth Amendment prohibited a State from classifying her as unfit to prac-
tice law simply because she was female. *Bradwell v. Illinois*, 16 Wall. 130
(1872). In his concurring opinion, Justice Bradley described the reasons
underlying the State's decision to determine which positions only men
could fill:

"It is the prerogative of the legislator to prescribe regulations founded on
nature, reason, and experience for the due admission of qualified persons
to professions and callings demanding special skill and confidence. This
fairly belongs to the police power of the State; and, in my opinion, in view
of the peculiar characteristics, destiny, and mission of woman, it is within
the province of the legislature to ordain what offices, positions, and callings
shall be filled and discharged by men, and shall receive the benefit of those
energies and responsibilities, and that decision and firmness which are pre-
sumed to predominate in the sterner sex." *Id.*, at 142.

In a similar vein, the Court in *Goesart v. Cleary*, 335 U. S. 464, 466
(1948), upheld a legislature's right to preclude women from bartending, ex-
cept under limited circumstances, on the ground that the legislature could
devise preventive measures against "moral and social problems" that result

Take out
of new
Patsy opinion

yes -
none
of this
in present
can

If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.¹¹ The need for the requirement is amply revealed by reference to the broad range of statutes already invalidated by this Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a "proxy for other, more germane bases of classifications," *Craig v. Boren*, 429 U. S. 190, 198 (1976), to establish a link between objective and classification.¹²

*must be
substantial
relationship*

when women, but apparently not men, bartend. Similarly, the many protective labor laws enacted in the late nineteenth and early twentieth centuries often had as their objective the protection of weaker workers, which the laws assumed meant females. See generally, B. Brown, A. Freedman, H. Katz, & A. Price, *Women's Rights and the Law* 209-210 (1977).

¹¹ For instance, in *Caban v. Mohammed*, 441 U. S. 380 (1979), we invalidated a state statute that required the consent of an unmarried mother, but not of an unmarried father, to the adoption of a child born out of wedlock. We agreed that a State's interest in providing adoptive homes for illegitimate children is important. On analysis, however, we determined that the purported relationship between that objective and the gender-based classification was based upon traditional assumptions about maternal and paternal roles. *Id.*, 391-392. Once those traditional notions were abandoned, no basis for finding a substantial relationship between classification and objective remained.

¹² See, e. g., *Kirchberg v. Feenstra*, 450 U. S. 455 (1981) (statute granted only husbands the right to manage and dispose of jointly owned property without the spouse's consent); *Wengler v. Druggists Mutual Insurance Co.*, 446 U. S. 142 (1980) (statute required a widower, but not a widow, to show he was incapacitated from earning to recover benefits for a spouse's death under workers' compensation laws); *Orr v. Orr, supra* (1979) (only men could be ordered to pay alimony following divorce); *Craig v. Boren*, 429 U. S. 190 (1976) (women could purchase "nonintoxicating" beer at a younger age than could men); *Stanton v. Stanton, supra*, (women reached

Applying this framework, we now analyze the arguments advanced by the State to justify its refusal to allow males to enroll for credit in MUW's School of Nursing.

III

A

The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. Pet. Brief 8.¹³ As applied to the School of Nursing, we find the State's argument unpersuasive.

*State's
arguments*

majority at an earlier age than did men); *Weinberger v. Wiesenfeld*, 420 U. S. 636 (1975) (widows, but not widowers, could collect survivors' benefits under the Social Security Act); *Frontiero v. Richardson*, 411 U. S. 677 (1973) (determination of spouse's dependency based upon gender of member of armed forces claiming dependency benefits); *Reed v. Reed*, 404 U. S. 71 (1971) (statute preferred men to women as administrators of estates).

¹³ In its Reply Brief, the State understandably retreated from its contention that MUW was founded to provide opportunities for women which were not available to men. Reply Brief 4. Apparently, the impetus for founding MUW came not from a desire to provide women with advantages superior to those offered men, but rather from a desire to provide white women in Mississippi access to state-supported higher learning. In 1856, Sally Reneau began agitating for a college for white women. Those initial efforts were unsuccessful, and, by 1870, Mississippi provided higher education only for white men and black men and women. E. Mayes, *History of Education in Mississippi* 178, 228, 245, 259, 270 (1899) (hereinafter Mayes). See also S. Nielson, *The History of Mississippi State College for Women* 4-5 (unpublished manuscript, 1952) (hereinafter Nielson). In 1882, two years before MUW was chartered, the University of Mississippi opened its doors to women. However, the institution was in those early years not "extensively patronized by females; most of those who come being such as desire to qualify themselves to teach." Mayes, at 178. By 1890, the largest number of women in any class at the University had been 23, while nearly 350 women enrolled in the first session of MUW. Mayes, at 178, 253. Because the University did not solicit the attendance of women until after 1920, and did not accept women at all for a time between 1907 and 1920, most Mississippi women who attended college attended MUW.

Wm

In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. See *Kahn v. Shevin*, 416 U. S. 351 (1974). However, we consistently have emphasized that “the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.” *Weinberger v. Wiesenfeld*, 420 U. S. 636, 648 (1975). The same searching analysis must be made, regardless of whether the State’s objective is to eliminate family controversy, *Reed v. Reed*, *supra*, to achieve administrative efficiency, *Frontiero v. Richardson*, *supra*, or to balance the burdens borne by males and females.

It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. We considered such a situation in *Kahn v. Shevin*, *supra*, which involved a challenge to a state statute providing widows, but not widowers, a property tax exemption. Noting that there could be “no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man” and that “the job market is inhospitable to the woman seeking any but the lowest paid jobs,” *id.*, at 353, we upheld the taxing scheme as furthering the objective of reducing the disparity between the economic capabilities of men and women. See also *Califano v. Webster*, 430 U. S. 313, 318 (1977) (holding valid a

Nielson, at 86. Thus, in Mississippi, as elsewhere in the country, women’s colleges were founded to provide some form of higher education for the academically disenfranchised. See generally II T. Woody, *A History of Women’s Education in the United States* 137–223 (1966); L. Baker, *I’m Radcliffe! Fly Me! The Seven Sisters and the Failure of Women’s Education* 22, 136–141 (1976).

statutory classification that allowed women higher monthly Social Security benefits than men with the same earning history because the statute took into account that women "as such have been unfairly hindered from earning as much as men" and "work[ed] directly to remedy" the resulting economic disparity.)

A similar pattern of discrimination against women influenced our decision in *Schlesinger v. Ballard*, 419 U. S. 498 (1975). There, we considered a federal statute that granted female Naval officers a 13-year tenure of commissioned service before mandatory discharge, but accorded male officers only a 9-year tenure. We recognized that, because women were barred from combat duty, they had had fewer opportunities for promotion than had their male counterparts. By allowing women an additional four years to reach a particular rank before subjecting them to mandatory discharge, the statute directly compensated for other statutory barriers to advancement.

In sharp contrast, Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities. In fact, in 1970, the year before the School of Nursing's first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees earned nationwide. United States Department of Health, Education, and Welfare, *Earned Degrees Conferred: 1969-70*, 388. That year was not an aberration; one decade earlier, women had earned all the nursing degrees conferred in Mississippi and 98.9 percent of the degrees conferred nationwide. United States Department of Health, Education, and Welfare, *Earned Degrees Conferred 1959-1960: Bachelor's and Higher Degrees* 135. As one would expect, the labor force reflects the same predominance of women in nursing. When MUW's School of Nursing began operation,

NO
discrimination
vs women

NO
showing
that
women
lacked
opportunities
— wholly
unnecessary

nearly 98 percent of all employed registered nurses were female.¹⁴ United States Bureau of the Census, 1981 Statistical Abstract of the United States 402 (1981).

7. Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job.¹⁵ By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy. See *Stanton v. Stanton*, 421 U. S. 7 (1975). Thus, we conclude that, although the State recited a "benign, compensatory purpose," it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.¹⁶

What
about
other
colleges
in Miss.

¹⁴ Relatively little change has taken place during the past 10 years. In 1980, women received more than 94 percent of the baccalaureate degrees conferred nationwide, National Center for Education Statistics, 1981 Digest of Education Statistics 121, and constituted 96.5 percent of the registered nurses in the labor force. United States Bureau of the Census, 1981 Statistical Abstract of the United States 402.

7.1 ¹⁵ Officials of the American Nurses Association have suggested that excluding men from the field has depressed nurses' wages. Hearings Before the United States Equal Employment Opportunity Commission on Job Segregation and Wage Discrimination 510-511, 517-518, 523 (April 1980). To the extent the exclusion of men has that effect, MUW's admissions policy actually penalizes the very class the State purports to benefit. Cf. *Weinberger v. Wiesenfeld*, *supra*.

¹⁶ Even were we to assume that discrimination against women affects their opportunity to obtain an education or to obtain leadership roles in nursing, the challenged policy nonetheless would be invalid, for the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination. Cf. *Califano v. Webster*, 430 U. S. 313, 318 (1977) (legislative history of the compensatory statute revealed that Congress "deliberately addressed the justification for differing treatment of men and women" and "purposely enacted the more favor-

The policy is invalid also because it fails the second part of the equal protection test, for the State has made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men.

*no
substantial
relation*

MUW permits men who audit to participate fully in classes. Additionally, both men and women take part in continuing education courses offered by the School of Nursing, in which regular nursing students also can enroll. Deposition of Dr. James Strobel 56-60 and Deposition of Dean Annette K. Barrar 24-26. The uncontroverted record reveals that admitting men to nursing classes does not affect teaching style, Deposition of Nancy L. Herban 4, that the presence of men in the classroom would not affect the performance of the female nursing students, Tr. 61 and Deposition of Dean Annette K. Barrar 7-8, and that men in coeducational nursing schools do not dominate the classroom. Deposition of Nancy Herban 6. In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.

Thus, considering both the asserted interest and the relationship between the interest and the methods used by the State, we conclude that the State has fallen far short of establishing the "exceedingly persuasive justification" needed to

able treatment for female wage earners. . . .") The State has provided no evidence whatever that the Mississippi legislature has ever attempted to justify its differing treatment of men and women seeking nurses' training. Indeed, the only statement of legislative purpose is that in § 37-118-3 of the Mississippi Code, see note 1, *supra*, a statement that relies upon the very sort of archaic and overbroad generalizations about women that we have found insufficient to justify a gender-based classification. *E. g.*, *Orr v. Orr*, *supra*; *Stanton v. Stanton*, *supra*.

sustain the gender-based classification. Accordingly, we hold that MUW's policy of denying males the right to enroll for credit in its School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment.

B

In an additional attempt to justify its exclusion of men from MUW's School of Nursing, the State contends that MUW is the direct beneficiary "of specific congressional legislation which, on its face, permits the institution to exist as it has in the past." Pet. Brief 19. The argument is based upon the language of § 901(a) in Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681(a). Although § 901(a) prohibits gender discrimination in education programs that receive federal financial assistance, subsection 5 exempts the admissions policies of undergraduate institutions "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex" from the general prohibition. See note 5, *supra*. Arguing that Congress enacted Title IX in furtherance of its power to enforce the Fourteenth Amendment, a power granted by § 5 of that Amendment, the State would have us conclude that § 1681(a)(5) is but "a congressional limitation upon the broad prohibitions of the Equal Protection Clause of the Fourteenth Amendment." Pet. Brief 20.

The argument requires little comment. Section 5 of the Fourteenth Amendment gives Congress broad power indeed to enforce the command of the Amendment and "to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion. . . ." *Ex parte Virginia*, 100 U. S. 339, 346 (1879). Congress' power under § 5, however, "is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Katzenbach v. Morgan*, 384 U. S. 641, 651 n. 10 (1966). Although we give deference to congres-

sional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment. See, e. g., *Califano v. Goldfarb*, *supra*, at 210; *Williams v. Rhodes*, 393 U. S. 23, 29 (1968).

The fact that the language of § 901(a)(5) applies to MUW provides the State no solace: "[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations, when such an application of the statute would conflict with the Constitution. *Marbury v. Madison*, 1 Cranch 137 (1803)." *Younger v. Harris*, 401 U. S. 37, 52 (1971).

IV

Because we conclude that the State's policy of excluding males from MUW's School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

May 28, 1982

81-406 Mississippi University v. Hogan

Dear Sandra:

In due time, I will circulate a dissent in this case.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 28, 1982

No. 81-406--Mississippi University for Women
v. Hogan

Dear Sandra,

I agree.

Sincerely,

Bill
W.J.B., Jr.

Justice O'Connor
Copies to the Conference

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 28, 1982

Re: No. 81-406 - Mississippi University for Women v.
Joe Hogan

Dear Sandra:

Please join me.

Sincerely,

T.M.
T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 29, 1982



Re: 81-406 - Mississippi University v. Hogan

Dear Sandra,

I agree.

Sincerely yours,

Byron

Justice O'Connor

Copies to the Conference

cpm

June 7, 1982

MS GINA-POW

MEMORANDUM FOR FILE

81-406 MISSISSIPPI UNIVERSITY FOR WOMEN v. HOGAN

Having read Justice O'Connor's opinion, and reread the briefs, I dictate these unorganized comments.

The striking thing about the Court opinion is that it is written as if this were the typical sex discrimination case. The familiar language is repeated frequently. The label "stereotype" appears more than once, heretofore used - I believe - only with respect to discrimination against women.* There is no history of discrimination against men. No ERA for men has been proposed.

*See WJB's opinion in Fronterio v. Richardson.

In the second sentence of the analysis section, (Part II, p. 5), the opinion states as a fact that "the challenged policy expressly discriminates against applicants on the basis of gender". Note the word "policy". There are eight state institutions of higher learning. Only this one has a unisex "policy". It is evident that the state has no such general policy. Although I have not verified my recollection, I believe that the only reference in the Court opinion to the availability of other state universities or colleges is one sentence in n. 1, p. 2. In the same paragraph, the opinion states:

"We are not faced with the question of whether states can provide 'separate but equal' undergraduate education", citing Vorchheimer.

Nor indeed "are we faced" with any situation of "separate but equal" as to college in the sense in which that phrase always has been used.

The sex discrimination cases in the past, including those relied upon by the Court, all involved quite different situations. They concerned classifications of uniform and general application either to an entire state or the nation. In Craig v. Boren, for example, -

one of the few cases involving discrimination against men - a state-wide statute was involved. In Oklahoma a man could not go anywhere for beer if he was under age. Similarly, classifications that provided different benefits for women, afforded them no opportunity for that provided for men. This was true, for example, in Frontiero v. Richardson (armed services benefits); Schleisinger v. Ballard (also armed services benefits); Wineberger v. Wisenfeld (social security survivor benefits), Califano v. Goldfarb (old age widows' and widowers' survivor benefits); Stanton v. Stanton (arbitrary age differences between the sexes with respect to parental support for children); and other similar cases. Here, men have a choice as do the women who chose MWU.*

*As men have no choice of an all male college, a man claiming discrimination would have a different case.

There is no prior sex discrimination decision by this Court in which the plaintiff, as in this case, had a choice of an equal benefit. In the armed services cases, the women were given no opportunity for the same benefits as men. Similarly, in the social security cases, there was no choice. In Boren, a male under twenty-one could not buy a can of beer anywhere in the state.

Nor do I view the "options" available to Hogan in this case as comparable to the "separate but equal" classifications condemned in Brown.** These also were across the board bans, certainly in all pre-college education in the South. They also were across the board bans in higher education until some states provided options in an effort to circumvent decisions of this Court. In a more fundamental sense, the racial classifications were examples of invidious discrimination.

In view of the foregoing, I am presently inclined to write an opinion arguing that this is not a sex discrimination within the jurisprudence of this Court. In only one out of a number of institutions of higher education, this state wishes to continue to maintain one all female college that is almost a hundred years old. At

** Justice O'Connor agrees this is not a "separate but equal" case. See n. 1, p. 1

the same time, the state provides for men and women alike a complete and unrestricted choice of a number of other co-ed institutions. No claim is made that the education offered at MUW is inferior to that available elsewhere, or that the education available elsewhere is inferior to that available at MUW. There is no history of discrimination against men in Mississippi. No claim of discriminatory intent. No claim of any injury whatever except inconvenience. The stereotype talk is nonsense.

Hogan did not aver that he wants the benefit of co-education. Nor does his complaint aver that coeducation in general is preferable to a unisex education. In a word, this is a different case from any previously presented. The conventional sex discrimination analysis - embraced without addressing any of the foregoing differences - simply does not fit.

A second, perhaps easier - but less appealing to me - way to write a dissent is to look only to the facts and averments of this particular case. This is not a class action. As indicated above, none of the classical reasons

for treating state action as sex discrimination exists in this case. I suppose, it could be written as a suit in which a single male, solely because of personal convenience, wishes to go to college in his home town. If this were a legitimate reason for finding discrimination, it would have to be based on a geographic analysis. In Virginia - until recent years - a person living in the far southwest of the state, who desired the advantages of a liberal arts education would have to attend the University of Virginia - located perhaps 250 miles away, with no trains service. The inconvenience would be substantial. Such a person could claim that he was discriminated against as contrasted with a person living in Charlottesville, who could walk to the University.

Whether I dissent broadly (as I am inclined to do), or focus only on the narrow facts of this case, the opinion will have to be reasoned on equal protection analysis. I would start with emphasis on the unique nature of the "classification". If it can be so

characterized in equal protection terms. Normally - as stated above - a challenged classification is general or across the board terms. The college has a long history, with thousands of alumnae with loyalty to it as a women's college. (See brief of Alumnae Association). It is well-attended, is open to women of all races, and those who attend it do so solely as a matter of personal choice. There are abundant other opportunities for coeducation.

But even applying "stereotype" equal protection analysis, the continued maintenance of this single unisex college does further a substantial state interest and is reasonably related to it. I could apply the same standard articulated in Reed v. Reed and Boren. Contrary to the emphasis in petitioner's briefs, the primary justification for continuing MUW is the desire of the state to preserve a choice for women. If there is a denial of equal protection in Mississippi education, it is that no comparable choice is provided for men.

To argue that no substantial state interest is being served, is to condemn the educational judgment - that for most of the history of this country - has justified the great women's colleges. Most of them - genuflecting to fashion and, in fairness, to the good arguments that can

be made for coeducation - now have abandoned the all womens concept that served them so well for so long. But this does not negate the existence of a substantial state interest. This is evidenced - in part, at least - by the fact that a number of private, quality all womens colleges still exist and are well patronized. Faculty members who serve in these colleges, the women who choose to attend them, and the donors who provide endowment are hardly irrational people. They believe - with an abundance of history to support them - that at least for some women, an all womens college affords opportunities and advantages that are preferable to coeducational colleges. The only testimony in this case on this issue is that an all womens college does present opportunities and advantages that are not available in coed institutions. In my view, the long experience with education in womens colleges -- viewed as educationally desirable -- supports the existence of a legitimate state interest. Perhaps I should add as a footnote that I have experienced it personally with a wife and three daughters.

At a broader level of discourse, we can rely on the worth and tradition of diversity that has marked the history of our country. One of the unfortunate aspects of

modern society is a tendency to discourage experimentation and diversity.

The Court, in this case, may have departed farther from the intent and purpose of the Equal Protection Clause than in any prior case.

L.F.P.

June 7, 1982

MS GINA-POW

MEMORANDUM FOR FILE

81-406 MISSISSIPPI UNIVERSITY FOR WOMEN v. HOGAN

Having read Justice O'Connor's opinion, and reread the briefs, I dictate these unorganized comments.

The striking thing about the Court opinion is that it is written as if this were the typical sex discrimination case. The familiar language is repeated frequently. The label "stereotype" appears more than once, heretofore used - I believe - only with respect to discrimination against women.* There is no history of discrimination against men. No ERA for men has been proposed.

*See WJB's opinion in Fronterio v. Richardson.

In the second sentence of the analysis section, (Part II, p. 5), the opinion states as a fact that "the challenged policy expressly discriminates against applicants on the basis of gender". Note the word "policy". There are eight state institutions of higher learning. Only this one has a unisex "policy". It is evident that the state has no such general policy. Although I have not verified my recollection, I believe that the only reference in the Court opinion to the availability of other state universities or colleges is one sentence in n. 1, p. 2. In the same paragraph, the opinion states:

"We are not faced with the question of whether states can provide 'separate but equal' undergraduate education", citing Vorchheimer.

Nor indeed "are we faced" with any situation of "separate but equal" as to college in the sense in which that phrase always has been used.

The sex discrimination cases in the past, including those relied upon by the Court, all involved quite different situations. They concerned classifications of uniform and general application either to an entire state or the nation. In Craig v. Boren, for example, -

one of the few cases involving discrimination against men - a state-wide statute was involved. In Oklahoma a man could not go anywhere for beer if he was under age. Similarly, classifications that provided different benefits for women, afforded them no opportunity for that provided for men. This was true, for example, in Frontiero v. Richardson (armed services benefits); Schleisinger v. Ballard (also armed services benefits); Wineberger v. Wisenfeld (social security survivor benefits), Califano v. Goldfarb (old age widows' and widowers' survivor benefits); Stanton v. Stanton (arbitrary age differences between the sexes with respect to parental support for children); and other similar cases. Here, men have a choice as do the women who chose MWU.*

*As men have no choice of a an all male college, a man claiming discriminaiton would have a different case.

There is no prior sex discrimination decision by this Court in which the plaintiff, as in this case, had a choice of an equal benefit. In the armed services cases, the women were given no opportunity for the same benefits as men. Similarly, in the social security cases, there was no choice. In Boren, a male under twenty-one could not buy a can of beer anywhere in the state.

Nor do I view the "options" available to Hogan in this case as comparable to the "separate but equal" classifications condemned in Brown.** These also were across the board bans, certainly in all pre-college education in the South. They also were across the board bans in higher education until some states provided options in an effort to circumvent decisions of this Court. In a more fundamental sense, the racial classifications were examples of invidious discrimination.

In view of the foregoing, I am presently inclined to write an opinion arguing that this is not a sex discrimination within the jurisprudence of this Court. In only one out of a number of institutions of higher education, this state wishes to continue to maintain one all female college that is almost a hundred years old. At

** Justice O'Connor agrees this is not a "separate but equal" case. See n. 1, p. 1

the same time, the state provides for men and women alike a complete and unrestricted choice of a number of other co-ed institutions. No claim is made that the education offered at MUW is inferior to that available elsewhere, or that the education available elsewhere is inferior to that available at MUW. There is no history of discrimination against men in Mississippi. No claim of discriminatory intent. No claim of any injury whatever except inconvenience. The stereotype talk is nonsense.

Hogan did not aver that he wants the benefit of co-education. Nor does his complaint aver that coeducation in general is preferable to a unisex education. In a word, this is a different case from any previously presented. The conventional sex discrimination analysis - embraced without addressing any of the foregoing differences - simply does not fit.

A second, perhaps easier - but less appealing to me - way to write a dissent is to look only to the facts and averments of this particular case. This is not a class action. As indicated above, none of the classical reasons

for treating state action as sex discrimination exists in this case. I suppose, it could be written as a suit in which a single male, solely because of personal convenience, wishes to go to college in his home town. If this were a legitimate reason for finding discrimination, it would have to be based on a geographic analysis. In Virginia - until recent years - a person living in the far southwest of the state, who desired the advantages of a liberal arts education would have to attend the University of Virginia - located perhaps 250 miles away, with no trains service. The inconvenience would be substantial. Such a person could claim that he was discriminated against as contrasted with a person living in Charlottesville, who could walk to the University.

Whether I dissent broadly (as I am inclined to do), or focus only on the narrow facts of this case, the opinion will have to be reasoned on equal protection analysis. I would start with emphasis on the unique nature of the "classification". If it can be so

characterized in equal protection terms. Normally - as stated above - a challenged classification is general or across the board terms. The college has a long history, with thousands of alumnae with loyalty to it as a women's college. (See brief of Alumnae Association). It is well-attended, is open to women of all races, and those who attend it do so solely as a matter of personal choice. There are abundant other opportunities for coeducation.

But even applying "stereotype" equal protection analysis, the continued maintenance of this single unisex college does further a substantial state interest and is reasonably related to it. I could apply the same standard articulated in Reed v. Reed and Boren. Contrary to the emphasis in petitioner's briefs, the primary justification for continuing MUW is the desire of the state to preserve a choice for women. If there is a denial of equal protection in Mississippi education, it is that no comparable choice is provided for men.

To argue that no substantial state interest is being served, is to condemn the educational judgment - that for most of the history of this country - has justified the great women's colleges. Most of them - genuflecting to fashion and, in fairness, to the good arguments that can

be made for coeducation - now have abandoned the all womens concept that served them so well for so long. But this does not negate the existence of a substantial state interest. This is evidenced - in part, at least - by the fact that a number of private, quality all womens colleges still exist and are well patronized. Faculty members who serve in these colleges, the women who choose to attend them, and the donors who provide endowment are hardly irrational people. They believe - with an abundance of history to support them - that at least for some women, an all womens college affords opportunities and advantages that are preferable to coeducational colleges. The only testimony in this case on this issue is that an all womens college does present opportunities and advantages that are not available in coed institutions. In my view, the long experience with education in womens colleges -- viewed as educationally desirable -- supports the existence of a legitimate state interest. Perhaps I should add as a footnote that I have experienced it personally with a wife and three daughters.

At a broader level of discourse, we can rely on the worth and tradition of diversity that has marked the history of our country. One of the unfortunate aspects of

modern society is a tendency to discourage experimentation and diversity.

The Court, in this case, may have departed farther from the intent and purpose of the Equal Protection Clause than in any prior case.

L.F.P.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 10, 1982

Re: 81-406 - Mississippi University for
Women v. Hogan

Dear Sandra:

Please join me.

Respectfully,

JO

Justice O'Connor

Copies to the Conference

1fp/ss 06/16/82

Rider A, p. 1 (MUV)

MUW1 SALLY-POW

The Court's opinion genuflects deeply to conformity at the expense of the diversity that has characterized - and enriched - so much of American life. It holds that no state now may provide a single institution of higher learning open only to women students. No matter that the State of Mississippi provides abundant opportunities for young men and young women to attend coeducational institutions, and no matter that more than 2,000 young women have evidenced their approval of an all-women's college by voluntarily choosing Mississippi University for Women (MUW) over seven other coed universities available within the state. Today, the Court today decides that the equal protection of the Fourteenth Amendment makes it unlawful for women to have this choice. It makes this decision in a case instituted by one young man, representing no class, whose primary concern was avoiding the inconvenience of traveling some distance to the nearest coed college.

It is undisputed that women enjoy complete equality of opportunity in the Mississippi public higher education system, composed of eight universities and 16 junior colleges. All of these except MUW is coeducational. Respondent wishes to study nursing, and at least two other Mississippi universities would have made this available for him.¹ Respondent alone complains. Indeed, only MUW female students - and alumni of MUW - have filed amici briefs, and these emphatically reject respondent's claim, and urge that the State of Mississippi be allowed to continue offering this choice.

L7D

lfp/ss 06/16/82

Rider A, p. 4 (MUW)

MUW4 SALLY-POW

John: I don't want to omit our Virginia schools, and so

add a footnote at the point indicated on page 4 as

follows:

"The history, briefly summarized above, of
single-sex higher education in the Northeast is duplicated
in other states. I mention only my State of Virginia
where even today Hollins College, Mary Baldwin College,
Randolph Macon Woman's College and Sweet Briar College
remain all women's, and each has a proud and respected
reputation."

L 711

lfp/ss 06/16/82

Rider A, p. 5 (MUW)

MUW5 SALLY-POW

Add a footnote as follows:

"Until the traditional all-men's universities in the East became coeducational, it is true that women preferring that type of educational environment may have had fewer choices of first-rate coeducational institutions - although for many years there were numerous options available."

L7D

lfp/ss 06/16/82

Rider (MUW)

MUWR SALLY-POW

John: In the discussion of the traditional quality
women's colleges, we can head off a reply by Justice
O'Connor by adding a note along the following lines:

"To be sure, the women's colleges referred to
herein are not state institutions. Also, it is true that
until the middle of this century many state institutions of
higher education - particularly in the East and South -
were single sex. To these extents, choices were by no
means universally available to all men and women. But
choices always were substantial, and the purpose of
relating the experience of our country with single sex
colleges and universities is to document what should be
obvious: generations of Americans, including scholars,
have thought - wholly without regard to sex
'discrimination' - that there were distinct advantages in
this type of higher education. The Court's decision today
conveys the impression that this is a discreditable part

6

of our history, reflecting even a studied part of a
pattern of deliberate discrimination against women."

L7P

lfp/ss 06/16/82

Rider A, p. 12 (MUW)

MUW12 SALLY-POW

III

As I view this case as far removed from the line of sex discrimination cases referred to above, I would sustain Mississippi's right to continue MUW on straight rational basis analysis. But I need not apply this "lowest tier" of scrutiny. The Court I can accept - for present purposes - the standard applied by the Court: that this gender based distinction must serve an important governmental objective by means that are substantially related to its achievement. E.g., Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980). As is clear from the record in this case, because of its historic position in the state dating back to 1884, and the continuing desire of many young women in Mississippi to attend MUW, this college has been continued to preserve a choice. As made clear above, it is a choice that discriminates against no one. And the state purpose is legitimate and substantial. Generations of our finest minds, both among educators and students, have believed

that single sex college level institutions afford distinctive benefits. Few thoughtful people have denied that even the choice to attend such an institution, where other options also are available, is not desirable and indeed commendable policy where a state can afford it. There are many persons, of course, who have different views. But simply because there are these differences is no reason - certainly none of constitutional dimension - to conclude that no substantial state interest is served when such a choice is made available.

270

lfp/ss 06/16/82

Rider A, Part IV (MUW)

MUWIV SALLY-POW

IV

A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system in which opportunity for choices and diversity carefully are nurtured both by law and custom. What this case is "all about" for me is the preservation of a small segment of this diversity - this opportunity for choice - at the college level between single sex and coeducational institutions of higher learning. The Court answers that there is discrimination - not just that which may be tolerable but discrimination of constitutional dimension in the continuation of this single all women's college. But the Court finds it difficult to identify the victims of this perceived discrimination. It hardly can claim that women are discriminated against. A constitutional case has been made solely from the fact that one young man, concerned with serving his own personal convenience

claims sex discrimination - not because he is denied the choice of an all male college or the opportunity to attend several coeducational institutions. He wants to have his own way: a college in his own home community. In my view, his claim is frivolous, and the Court's decision comes close to trivializing the Equal Protection Clause of the Constitution.

Question:
p 10 ?

L7P

06/17/82

No. 81-406: Mississippi University for Women v. Hogan
Justice Powell, dissenting.

1 12
3 13
4 14
7 20
7 21
8
9
10
11

The Court's opinion genuflects deeply to the ideal of conformity. Left without honor--indeed held unconstitutional--is an element of diversity that has characterized much of American education and enriched much of American life. The Court holds today that no State now may provide even a single institution of higher learning open only to women students. It gives no heed to the efforts of the State of Mississippi to provide abundant opportunities for young men and young women to attend coeducational institutions, and none to the preferences of the more than 2,000 young women who have evidenced their approval of an all-women's college by choosing Mississippi University for Women (MUW) over seven coeducational universities within the State. The Court decides today that the Equal Protection Clause makes it unlawful for for the State to provide women with a traditionally popular and respected choice of educational environment. It does

6 ?

so in a case instituted by one young man, who represents no class, and whose primary concern is personal convenience.

It is undisputed that women enjoy complete equality of opportunity in Mississippi's public system of higher education. Of the State's eight universities and 16 junior colleges, all except MUW are coeducational. At least two other Mississippi universities would have provided respondent with the nursing curriculum that he wishes to pursue.¹ No other male has joined in his complaint. The only groups to file amicus briefs are female students and alumni of MUW. And they have emphatically rejected respondent's arguments, urging that the State of Mississippi be allowed to continue offering the choice from which they have benefited.

Nor is respondent significantly disadvantaged by MUW's all-female tradition. His constitutional complaint

¹"[T]wo other Mississippi universities offered coeducational programs leading to a Bachelor of Science in Nursing -- the University of Southern Mississippi in Hattiesburg, 178 miles from Columbus; and the University of Mississippi in Jackson, 147 miles from Columbus" Brief for Respondent 3. See also Tr. of Oral Arg. 8.

is based upon a single asserted harm: that he must travel to attend the state-supported nursing schools that concedely are available to him. The Court characterizes this injury as one of "inconvenience." Ante, at 5 n. 8. This description is fair and accurate, though somewhat embarrassed by the fact that there is, of course, no constitutional right to attend a State-supported university in one's home town. Thus the Court, to redress respondent's injury of inconvenience, must rest its invalidation of MUW's single-sex program on a mode of "sexual stereotype" reasoning that has no application whatever to the respondent or to the "wrong" of which he complains. At best this is anomolous. And ultimately the anomoly reveals legal error--that of applying a ^{heightened} rigorous equal protection standard, developed in cases of genuine sexual stereotyping, to a narrowly utilized state classification that provides an additional choice for women. ^{Moreover,} ~~What is more,~~ I believe that Mississippi's educational system should be upheld in this case even if this inappropriate method of analysis is applied.

I

Coeducation, historically, is a novel educational theory. From grade school through high school, college,

and graduate and professional training, much of the nation's population during much of our history has been educated in sexually segregated classrooms. At the college level, for instance, until recently some of the most prestigious colleges and universities--including most of the Ivy League--had ~~settled~~ ^{long} histories of single-sex education. ~~While~~ Harvard, Yale, Princeton, and Columbia remained all-male colleges well into the second half of this century, ^{and} the "Seven Sister" institutions established a parallel standard of excellence for women's colleges. Of the Seven Sisters, Mount Holyoke opened as a female seminary in 1837 and was chartered as a college in 1888. Vassar was founded in 1865, Smith and Wellesley in 1875, Radcliffe in 1879, Bryn Mawr in 1885, and Barnard in 1889. L. Baker, I'm Radcliffe! Fly Me! 2 (1976). Mount Holyoke, Smith, and Wellesley recently have made considered decisions to remain essentially single-sex institutions.

See Carnegie Commission on Higher Education, Opportunities for Women in Higher Education ("Carnegie Report"), as excerpted in B. Babcock, A. Freedman, E. Norton, & S. Ross, Sex Discrimination and the Law 1013, 1014 (1975). Barnard retains its independence from Columbia, its traditional coordinate institution. Harvard and Radcliffe

maintained separate admissions policies as recently as 1975.²

The sexual segregation of students has been a reflection of, rather than an imposition upon, the preference of those subject to the policy. It cannot be disputed, for example, that the highly qualified women attending the leading women's colleges could have earned admission to virtually any college of their choice.³ Women attending such colleges have chosen to be there, usually expressing a preference for the special benefits of single-sex institutions. Similar decisions were made by

²The history, briefly summarized above, of single-sex higher education in the Northeast is duplicated in other States. I mention only my State of Virginia, where even today Hollins College, Mary Baldwin College, Randolph Macon Woman's College, and Sweet Briar College remain all women's. Each has a proud and respected reputation of quality education.

³It is true that historically many institutions of higher education--particularly in the East and South--were single-sex. To these extents, choices were by no means universally available to all men and women. But choices always were substantial, and the purpose of relating the experience of our country with single-sex colleges and universities is to document what should be obvious: generations of Americans, including scholars, have thought--wholly without regard to any discriminatory animus--that there were distinct advantages in this type of higher education.

the colleges that elected to remain open to women only.⁴

The arguable benefits of single-sex colleges also continue to be recognized by students of higher education. The Carnegie Commission on Higher Education has reported that it "favor[s] the continuation of colleges for women. They provide an element of diversity ... and [an environment in which women] generally ... speak up more in their classes, ... hold more positions of leadership on campus, ... and have more role models and mentors among women teachers and administrators." Carnegie Report, supra, quoted in K. Davidson, R. Ginsburg, & H. Kay, Sex-Based Discrimination 814 (1975 ed.). A 10-year empirical study by the Cooperative Institutional Research Program of

⁴In announcing Wellesley's decision in 1973 to remain a women's college, President Barbara Newell said that "[t]he research we have clearly demonstrates that women's colleges produce a disproportionate number of women leaders and women in responsible positions in society; it does demonstrate that the higher proportion of women on the faculty the higher the motivation for women students." Carnegie Report, supra, in Babcock et al., Sex Discrimination and the Law, at 1014. Similarly rejecting coeducation in 1971, the Mount Holyoke Trustees Committee on Coeducation reported that "the conditions that historically justified the founding of women's colleges" continued to justify their remaining in that tradition. Ibid.

the American Counsel of Education and the University of California, Los Angeles also has affirmed the distinctive benefits of single-sex colleges and universities. As summarized in A. Astin, Four Critical Years 232 (1977), the data established that

"[b]oth [male and female] single-sex colleges facilitate student involvement in several areas: academic, interaction with faculty, and verbal aggressiveness Men's and women's colleges also have a positive effect on intellectual self-esteem. Students at single-sex colleges are more satisfied than students at coeducational colleges with virtually all aspects of college life The only area where students are less satisfied is social life."⁵

⁵In this Court the benefits of single-sex education have been asserted ~~vigorously~~ by the students and alumnae of MUW. One would expect the Court to regard their views as directly relevant to this case: o

"[I]n the aspect of life known as courtship or mate-pairing, the American female remains in the role of the pursued sex, expected to adorn and groom herself to attract the male. Without comment on the equities of this social arrangement, it remains a sociological fact.

"An institution of collegiate higher learning maintained exclusively for women is uniquely able to provide the education atmosphere in which some, but not all, women can best attain maximum learning potential. It can serve to overcome the historic repression of the past and can orient a woman to function and achieve in the still male dominated economy. It can free its students of the burden of playing the mating game while attending classes, thus

Footnote continued on next page.

Despite the continuing expressions that single-sex
 institutions may offer singular advantages to their
 students, there is no doubt that coeducational
 institutions ^{now are overwhelmingly} ~~are numerically~~ predominant. But their
^{numerical} predominance ¹ ~~certainly~~ does not establish--in any sense
¹ properly cognizable by a court ~~of law~~--that individual
 preferences for single-sex education are misguided or
 illegitimate, or that a State may not provide its citizens
 with a choice.⁶

giving academic rather than sexual emphasis.
 Consequently, many such institutions flourish and
 their graduates make significant contributions
 to the arts, professions and business." Brief
 for Mississippi University for Women Alumnae
 Assn. as Amicus Curiae 2-3.

⁶"[T]he Constitution does not require that a
 classification keep abreast of the latest in educational
 opinion, especially when there remains a respectable
 opinion to the contrary Any other rule would mean
 that courts and not legislatures would determine all
 matters of public policy." Williams v. McNair, 316 F.
 Footnote continued on next page.

II

The issue in this case is whether a State transgresses the Constitution when--within the context of a public system that offers a diverse range of campuses, curricula, and educational alternatives--it seeks to accomodate the legitimate personal preferences of those desiring the advantages of an all-women's college. In my view, the Court errs seriously by assuming--without argument or discussion--that the equal protection standard generally applicable to sex discrimination is appropriate here. That standard was ~~conceived~~ ^{designed} to free women from "archaic and overbroad generalizations"

Schlesinger v. Ballard, 419 U.S. 498, 508 (1975). In no

Supp. 134, 137 (DSC 1970), aff'd mem., 401 U.S. 951 (1971) (quotations and footnotes omitted).

*Are these cases in
which a female had a
choice?*

10.

previous case have we applied it to invalidate state efforts to expand women's choices. Nor are there prior sex discrimination decisions by this Court in which a male plaintiff, as in this case, had the choice of an equal benefit.

The cases cited by the Court ^{*are not*} ~~thus~~ cannot be controlling of the issue now before us. In most of them women were given no opportunity for the same benefit as men.⁷ Cases involving male plaintiffs are equally

⁷See Kirshberg v. Feenstra, 450 U.S. 455, 456 (1981) (invalidating statute "that gave husband, as 'head and master' of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent"); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 147 (1980) (invalidating law under which the benefits "that the working woman can expect to be paid to her spouse in the case of her work-related death are less than those payable to the spouse of the deceased male wage earner"); Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating statute that provided a shorter period of parental support obligation for female child than for male children); Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975) (invalidating statute that failed to grant a woman

Footnote continued on next page.

inapplicable. In Craig v. Boren, 429 U.S. 190 (1976), a male under 21 was not permitted to buy beer anywhere in the State, and women were ^{given} no choice as to whether they would accept the "statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups." Id., at 209. A similar situation prevailed in Orr v. Orr, 440 U.S. 268, 279 (1979), where men had no opportunity to seek alimony from their divorced wives and women had no escape from the statute's stereotypical announcement of "the State's preference for an allocation of family responsibilities under which the

worker "the same protection which a similarly situated male worker would have received"); Frontiero v. Richardson, 411 U.S. 677, 683 (1973) (invalidating statute containing a "mandatory preference for male applicants"); Reed v. Reed, 404 U.S. 71, 74 (1971) (invalidating an "arbitrary preference established in favor of males" in the administration of decedent's estates).

wife plays a dependent role"⁸

By applying standard equal protection analysis to this case,⁹ the Court ~~confuses~~ ^{frustrates} the liberating purpose of

the Equal Protection Clause, ~~with an arbitrarily~~

~~restrictive aim.~~ It forbids the States from providing

⁸See also Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating law that both denied men the opportunity -- given to women -- of blocking the adoption of ~~his~~ ^{their} illegitimate child by ~~means of~~ withholding ~~his~~ ^{their} consent, and that did not permit women to counter the statute's generalization that the maternal role is more important to women than the paternal role is to men).

⁹Even the Court does not argue that the appropriate standard here is "strict scrutiny"--a standard that none of our "sex discrimination" cases ever has adopted. Sexual segregation in education differs from the tradition, typified by the decision in Plessy v. Ferguson, 163 U.S. 537 (1896), of "separate but equal" racial segregation. Because racial segregation was the product of hostile discrimination against blacks, segregated facilities were offered, not as alternatives to increase the choices available to blacks, but as the sole alternative. MUW stands in sharp contrast. Of Mississippi's eight public universities and 16 public junior colleges, only MUW considers sex as a criterion for admission. Women consequently are free to select a coeducational education environment for themselves if they so desire; their attendance of MUW is not a matter of coercion.

Deck - it was not "hostile" in my State. It was unreasonable acceptance of a system that had prevailed for centuries & approved by Plessy

The Court reasons in this ~~the~~ way in a case in which no woman has complained, ~~and~~ and the only complement is a man ~~whose~~ ^{who advances no right on behalf of any one else.} 13.

women with an opportunity to choose the type of university

that they prefer. And yet it is these women, whom the

Court regards as the victims of ^{an illegal} ~~an illegitimate~~

stereotype, ^{perception of the role of women in our society} whose constitutional interests the Court sees

~~It is particularly~~ ^{His} as requiring today's decision. The plaintiff's claim, it

should be recalled, is not that he is being denied a ^{one} ~~substantive~~

substantive educational opportunity, or even the right to

attend an all-male or a coeducational college. It is only

that the colleges open to him are located at inconvenient

distances.¹⁰ ^{~~In view of the~~ The claim is frivolous, and the case should be dismissed for want of a substantial}

¹⁰ Students in respondent's position, in "being denied the right to attend the State college in their home town, are treated no differently than are other students who reside in communities many miles distant from any State supported college or university. The location of any such institution must necessarily inure to the benefit of some and to the detriment of others, depending upon the distance the affected individuals reside from the institution." Heaton v. Bristol, 317 S.W. 2d 86, 99 (Tex. Civ. App. 1958), cert. denied, 359 U.S. 230 (1959), quoted in Williams v. McNair, 316 F. Supp. 134, 137 (DSC 1970), aff'd mem., 401 U.S. 951 (1971).

Good find!
How did you find it?

~~The case nevertheless is now~~ 14.
If The Court nevertheless chooses to make
this a constitutional case, presenting
a serious equal protection question
of sex discrimination. On this
assumption, I^{III}

As I view this case as far removed from the line of
sex discrimination cases on which the Court relies, I

would sustain Mississippi's right to continue MUW on a
rational basis analysis. But I need not apply this

"lowest tier" of scrutiny. I can accept for present

purposes the standard applied by the Court: that ^{there is} this

a gender-based distinction ^{that} must serve an important

governmental objective by means that are substantially

related to its achievement. E.g., Wengler v. Druggists

Mutual Ins. Co., 446 U.S. 142, 150 (1980). The record in

this ^{case} reflects that MUW has a historic position in the

State's educational system dating back to 1884, and that

many young women in Mississippi retain a preference for

the choice that MUW provides. The choice is one that

discriminates against no one.¹¹ And the State's purpose in preserving that choice is legitimate and substantial. Generations of our finest minds, both among educators and students, have believed that single-sex, college-level institutions afford distinctive benefits. There are many persons, of course, who have different views. But simply because there are these differences is no reason--certainly none of constitutional dimension--to conclude that no substantial state interest is served when such a choice is made available.

¹¹"Such a plan (i.e., giving the student a choice of a 'single-sex' and co-educational institutions) exalts neither sex at the expense of the other, but to the contrary recognizes the equal rights of both sexes to the benefit of the best, most varied system of higher education that the State can supply." Williams v. McNair, 316 F. Supp. 134, 138 n. 15 (DSC 1970), aff'd mem., 401 U.S. 951 (1971), quoting Heaton v. Bristol, 317 S.W. 2d 86, 100 (Tex. Civ. App. 1958), cert. denied, 359 U.S. 230 (1959).

In arguing to the contrary, the Court suggests that the MUW is so operated as to "perpetuate the stereotyped view of nursing as an exclusively women's job." Ante, at 11. But as the Court itself acknowledges, id., at 2, MUW's School of Nursing was not created until 1971--about 90 years after the single-sex campus itself was founded. This hardly supports a link between nursing as a woman's profession and MUW's single-sex admission policy. Indeed, MUW's School of Nursing was not instituted until more than a decade after a separate School of Nursing was established at the coeducational University of Mississippi at Jackson. See University of Mississippi, 1982 Undergraduate Catalog 162. The School of Nursing makes up only one part--a relatively small part¹²--of MUW's diverse

Footnote(s) 12 will appear on following pages.

modern university campus and curriculum. The other departments on the MUW campus offer a typical range of degrees¹³ and a typical range of subjects.¹⁴ There is no indication that women suffer fewer opportunities at other Mississippi state campus because of MUW's admission policy.¹⁵

¹²For instance, the School of Nursing takes up 15 pages of MUW's 234 page course catalog. See Mississippi University for Women, 81/82 Bulletin 185-200.

¹³E.g., Bachelor of Arts; Bachelor of Science; Master of Arts; Master of Science. See Mississippi University for Women, 81/82 Bulletin 40. MUW also offers special pre-professional programs in law, dentistry, medicine, pharmacy, physical therapy, and veterinary medicine. Id.

¹⁴MUW's Bulletin on its Table of Content lists the following subjects (offered in its School of Arts and Sciences): Air Force ROTC; Art; Behavioral Sciences; Biological Sciences; Business and Economics; Cooperative Education; English and Foreign Languages; Health, Physical Education, Recreation, and Dance; History, Journalism and Broadcasting; Mathematics; Music; Physical Sciences; and Speech Communication. See Mississippi University for Women, 81/82 Bulletin 3.

¹⁵For instance, the catalog for the coeducational University of Mississippi lists in its general description
Footnote continued on next page.

In sum, the practice of voluntarily chosen single-sex education is an honored tradition in our country, even if it now rarely exists in state colleges and universities. Mississippi's accomodation of such student choices is legitimate because it is completely consensual and is important because it permits students to decide for themselves the type of college education they think will benefit them most. Finally, Mississippi's policy is substantially related to its long-respected objective.¹⁶

the "Sarah Isom Center for Women's Studies," which is described as "dedicated to the development of cirriculum and scholarship about women, the dissemination of information about their expanding carrier opportunities, and the establishment of mutual support networks for women of all ages and backgrounds." University of Mississippi, 1982 Undergraduate Catalog 13-14. This listing preceeds information about the University's Law and Medical Centers. Id., at 14-15.

Footnote(s) 16 will appear on following pages.

IV .

A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system. At stake in this case as I see it is the preservation of a small aspect of this diversity. But that aspect is by no means insignificant, given our heritage of available

¹⁶The Court argues that MUW's means are not sufficiently related to its goal because it has allowed men to audit classes. The extent of record information is that men have audited 138 course in the last 10 years. Brief for Respondent 21. On average, then, men have audited 14 courses a year. MUW's current annual catalog lists 913 course. See Mississippi University for Women, 81/82 Bulletin passim.

It is understandable that MUW might believe that it could allow men to audit courses without materially affecting its environment. MUW charges tuition but gives no academic credit for auditing. The University evidently is correct in believing that few men will choose to audit under such circumstances. This deviation from a perfect relationship between means and ends is insubstantial.

choice between single-sex and coeducational institutions of higher learning. The Court answers that there is discrimination--not just that which may be tolerable, as for example between those candidates able to contribute most to an institution and those able to contribute less--but discrimination of constitutional dimension. But, having found "discrimination," the Court finds it difficult to identify the victims. It hardly can claim that women are discriminated against. ^{It} A constitutional

is thought to exist solely because
 case ~~has arisen solely from the concerns of~~ one young man,

who ~~has~~ found it inconvenient to travel to any of the *other* institutions made available to him by the State of

Mississippi. ~~In essence he insists that he has a right to~~ *5 feet*

attend a college in his home community. In my view the

Equal Protection Clause does not *fairly* support this

claim, nor can it be made to do so without ~~risk~~ risk of being
trivialized. ~~I dissent.~~