HOW THE SUPREME COURT'S EQUAL PROTECTION JURISPRUDENCE STRIKING DOWN GENDER-BASED CLASSIFICATION SYSTEMS DEPRIVES STUDENTS OF EQUAL PROTECTION UNDER THE LAW

by

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The Equal Protection jurisprudence of the United States Supreme Court (“the Court”) has a checkered past that once allowed the federal and state governments to use classification systems that infringed upon the civil rights of members of suspect classes.¹ Eventually Congress recognized the problems associated with many of these decisions and took action by passing laws that undermined them.² In addition, the Court has also reversed some of its previous decisions and invalidated the use of classification systems on the grounds that they deprive people of Equal Protection under the law.³ Although this shift in the Court’s jurisprudence is laudable it has not gone far enough to ensure that everyone enjoys Equal Protection under the law. The Court has become increasingly skeptical of classification systems that treat people differently based on membership in a protected class.⁴

¹ See, Scott v. Sandford, 60 U.S. 393 (1865); Plessy v. Ferguson, 163 U.S. 537 (1896); Fisher v. Hurst, 333 U.S. 147, 1948 U.S. LEXIS 2531 (where A black student was not entitled to petition for a writ of mandamus to compel compliance with the court's mandate requiring the state to provide legal education to black students because a subsequent state court order properly followed the mandate).
² Citation for civil rights acts of 1866, 1964 etc
³ See, Brown v. Board of Educ., 347 U.S. 483 (1954); Griffin v. County School Board, 377 U.S. 218 (1964) (holding a school board decision closing public schools and giving tuition grants to private white only schools to be unconstitutional for denying African American students equal protection of the laws guaranteed by the Fourteenth Amendment); J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127 (1994) (holding that the use of peremptory challenges to eliminate jurors solely on the basis of their gender because the exclusion was a violation the Equal Protection Clause of the Fourteenth Amendment).
⁴ See, Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that a public university's admission policy violated the Equal Protection Clause of the Fourteenth Amendment because its gave an automatic point increase to all racial minorities rather than making individual determinations); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (holding that the use of a race-based system designed to achieve racial balance in public schools was not narrowly tailored nor a compelling interest); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (holding that Mississippi University for Women's single sex admissions policy violated the Fourteenth Amendment's Equal Protection Clause).
denial of Equal Protection under the law to these groups of people.\footnote{Id.} As a result, the Court has struck down laws designed to ensure that members of a protected class do enjoy Equal Protection under the law.\footnote{Id.} This paper will analyze the reasons why the use of a gender-based classification system that is intended to produce single-sex public schools, from which both groups derive a benefit, is valid under the 14th Amendment’s Equal Protection Clause.

The Equal Protection Clause does not require a finding of unconstitutionality when similarly groups are treated similarly and dissimilar groups are treated dissimilarly.\footnote{This point cannot be applied to the segregation of students based on race because data shows that students thrive in diverse learning environments and that there is no distinction in intellectual capacity between races. In addition the levels of scrutiny applied to classifications based on gender differs from classifications based on race, which is analyzed using strict scrutiny. To survive strict scrutiny the government must show that the aim of its law is to achieve a compelling governmental objective. The segregation of students based on race serves no such purpose. Id.} The Court’s Equal Protection jurisprudence falsely assumes that identical treatment under the law is equal treatment.\footnote{Id.} In fact, it could be argued that identical treatment of male and female students may violate the Equal Protection Clause because it fails to protect both groups when evidence shows that both groups benefit from being treated differently. There is indisputable, scientific evidence that male and female students have different learning strategies.\footnote{Anne Moir & David Jessel, Brain Sex: The Real Difference Between Men and Women (1991) (behavioral differences in boys and girls reflect a basic difference in the brain that are not present between the races).} Male students are more likely to speak up in math and science classes to the disadvantage of female students.\footnote{Carolyn B. Ramsey, Subtracting Sexism from the Classroom: Law and Policy in the Debate Over All-Female Math and Science Classes in Public Schools, 8 Tex. J. Women & L. 1 (Arguing girls-only math classes should not run afoul of the law as long as they are optional and substantially equal to those offered to boys).} Furthermore, research indicates that altering the learning environment can benefit male students while disadvantaging female students or vice-versa.\footnote{Id.; See Michael J. Kaufman, Beyond Presumption and Peafowl: Reconciling the Legal Principle of Equality with the Pedagogical Benefits of Gender Differentiation, 53 Buff. L. Rev. 1059 (2005).} The benefits of separating students by gender are particularly apparent in the areas of science and mathematics for females, as they are known
to perform at a higher level when male students are removed from the learning environment.\textsuperscript{12} Both male and female students in single-sex classrooms had groups had higher rates of proficiency on standardized tests than students in coeducational classrooms.\textsuperscript{13} The improved performance of students in single-sex schools provides empirical evidence that both groups benefit. A logical conclusion is that the use of a gender-based classification system that separates students by gender, may best protect them because it provides students with the tools to perform at a higher level than they would in a coeducational classroom. The improvement in student performance is impressive and welcome; however, the results have not been enough to quell concerns above the constitutionality of single-sex schools. These concerns can be addressed in a couple of different ways.

To address the constitutional concerns of using a gender-based classification system to operate single-sex public schools, the Court must become less skeptical of such classification systems and hold that these systems can be permissible if certain standards are met. The Court first announced that gender-based classifications must serve important government interests and be substantially related to achieving those same interests nearly thirty-five years ago.\textsuperscript{14} It has continued to apply this standard since.\textsuperscript{15} The educational success of children in America’s public schools is undoubtedly an important government interest. To survive constitutional scrutiny, a school district must make a genuine effort at creating and maintaining separate, comparable learning environments and facilities for male and female students that offer substantially similar

\textsuperscript{12} See, M. Gurian, Boys and Girls Learn Differently! (2001).
\textsuperscript{13} See, What teachers need to know about the emerging science of sex differences. Educational Horizons, 84:190-212, Spring 2006. Accessible at \url{www.boysadrift.com/ed_horizons.pdf}
\textsuperscript{14} See, Craig v. Boren, 429 U.S. 190 (1976).
educations to students does not violate the Equal Protection Clause. Although the debate around single-sex public schools is relatively new and there are few schools with the deep traditions of Virginia Military Institute (“VMI”), the legal defenses of single-sex public legal education can be applied to the creation of new schools. Chief Justice Rehnquist’s analysis of the constitutionality of single-sex public schools in U.S. v. Virginia, noted that the choice between the admission of women to a single-sex public college or its closure were not, in his view, the only solutions to the Equal Protection challenges the school faced. In addition, he noted that because VMI had a deep tradition, a well-established alumni base and a history of producing successful students it would be a tremendous loss to force the school’s closure. Chief Justice Rehnquist’s concurring opinion recognizes that that Virginia provided substantial financial support to the public, men’s college without having done the same for any women’s college. Chief Justice Rehnquist concludes that Virginia may have been able to avoid constitutional scrutiny if it had provided the same support to a women’s college because it would have been able to demonstrate that it its interest in providing a single-sex education to women was matched by its interest in providing the same opportunity for women. This presented a third, unexplored option that may have addressed the constitutional challenges. Chief Justice Rehnquist’s opinion is a step in the direction towards legally recognizing that providing Equal Protection under the law does not always require that the law provide identical treatment when considering gender.

17 Id. (At the time the Court heard this case, VMI was approximately 157 years old, had an established alumni base and had produced a number of successful students).
18 Id. at 564 (suggesting that the creation of a substantially similar program for women with equal funding and opportunities may have survived an Equal Protection challenge).
19 Id.
20 Id.
21 Id.
Chief Justice Rehnquist’s concurring opinion acknowledges that single-sex schools could not only survive constitutional scrutiny but would not be forced to provide totally identical treatment to each gender despite their well-documented differences.\textsuperscript{22} Schools could provide similar facilities and the same caliber of education while meeting the distinct needs of both male and female students.\textsuperscript{23} Giving schools the opportunity to operate separate schools for the genders allows educators to meet the needs of each group of students.\textsuperscript{24} Because schools would not be forced to treat male and female students identically, they would be better positioned to establish schools with the same levels of funding that meet the needs of both male and female students. Chief Justice Rehnquist’s opinion recognizes that different groups of students may in fact have different needs.\textsuperscript{25} Furthermore, the adoption of Chief Justice Rehnquist’s reasoning on this issue would signal a shift in the Court’s Equal Protection jurisprudence that would recognize that unlike treatment of unlike groups is constitutional.\textsuperscript{26} Virginia sought to adopt this argument when it tried to remedy the situation by creating the Virginia Women’s Institute for Leadership (“VWIL”) as a state sponsored program at Mary Baldwin College, a private liberal arts school for women.\textsuperscript{27}

Virginia’s attempt to address the constitutional concerns directed at its operation and support of VMI was flawed because the program planned to initially enroll just twenty five or thirty students, the combined SAT scores of entering freshman was 100 points lower than those of VMI freshmen, the academic program would not have a military format like that of VMI, the

\textsuperscript{22} Id.
\textsuperscript{24} See, M. Gurian, Boys and Girls Learn Differently! (2001); Carolyn B. Ramsey, Subtracting Sexism from the Classroom: Law and Policy in the Debate Over All-Female Math and Science Classes in Public Schools, 8 Tex. J. Women & L. 1
\textsuperscript{25} Id.
faculty was comprised of a significantly lower number of Ph.D.’s who were paid less than there counterparts at VMI and the school offered far fewer degree programs.28 Even if these issues had been addressed, the majority opinion still exhibits skepticism about the use of this type of classification system. The Court’s “skeptical scrutiny of official action denying rights or opportunities based on sex” is based on historical abuses of these systems.29 This skeptical scrutiny may actually be standing in the way of progress. In the context of gender and education, the unlike treatment of unlike groups is good public policy because it provides students with a substantial benefit while creating a better educated, more diversified labor force.

It is good education policy to give all students equal access to a quality education while recognizing that the needs of certain groups of students may differ from other students. The creation of single-sex public schools would help educators develop curriculum plans that cover the same material but cater to the differences in learning strategies amongst male and female students.30 For instance, it is well documented that male students are much more likely to monopolize class discussions in math and science classes by yelling out both questions and answers.31 In addition, female students are known to experience a significant drop in self esteem, that is partially the result of the excess praise male students often receive, as they begin middle school.32 As a result, female students are likely to disengage and less likely to speak up when they have questions or do not understand what is being taught.33 Because female students are likely to be shut off from conversation and therefore less likely to speak when they do not understand material or have questions, they miss out on information that is critical to establishing

28 Id.
30 Carolyn B. Ramsey, Subtracting Sexism from the Classroom: Law and Policy in the Debate Over All-Female Math and Science Classes in Public Schools, 8 Tex. J. Women & L. 1 (this is not to suggest that single sex education should be compulsory but that it should be an option).
31 Id.
32 Id.
33 Id.
a strong foundation in science and mathematics. This is indicative of the fact that identical treatment of unlike groups may actually fail to protect the people the Equal Protection Clause is designed to protect. Single-sex schools are not only good policy because they better protect the students that the Equal Protection Clause was designed to protect, but also because it helps lay the foundation for creating a better educated, more diverse labor force.

It is good public policy to permit the creation of single-sex schools because it creates a more diverse labor force by providing female students with a better opportunity to learn mathematics and sciences skills necessary to enter into career fields in which they are underrepresented. It is well documented that women are underrepresented at both the schools considered being among the nations most select, in academic programs based on math and science and ultimately in math and science careers. Congress has taken note of this problem. It is indisputable that the government has a legitimate interest in ensuring that the labor force is well trained and diverse. Moreover, the United States has lagged in its production of qualified individuals seeking jobs in mathematics and the sciences. In an attempt to address this issue a bill was introduced which sought to remove the cap on the number of H-1B visas available to non-profit and government research laboratories, to universities and those who are foreign born with graduate degrees in science, technology, engineering, or mathematics from U.S. institutions. The bill also ensures that there are 20,000 H-1B visas available to individuals

34 Fractions, Decimals, Algebra, Geometry, Statistic and Word problem solving are part of mathematics curriculums taught to many 6th through 8th graders. These courses lay the foundation for careers in architecture, life sciences, engineering, physics and computer science among others.
35 Carolyn B. Ramsey, Subtracting Sexism from the Classroom: Law and Policy in the Debate Over All-Female Math and Science Classes in Public Schools, 8 Tex. J. Women & L. 1 (Arguing girls-only math classes should not run afoul of the law as long as they are optional and substantially equal to those offered to boys).
36 118 Cong. Rec. 5803 (Feb. 28, 1972) (speech by Senator Bayh)
37 Innovation Employment Act (H.R. 5630)
38 This should not be interpreted to mean that Congress should implement a protectionist measure such limiting the amount of foreign talent that can compete for jobs in America. Instead, the case is being made for American students to have the best opportunity to develop the skills necessary to compete for jobs in these fields.
with graduate degrees in science, technology, engineering, or mathematics from foreign universities and raises the overall number of H-1B visas from 65,000 to 130,000. When the 130,000 limit is reached it would automatically increase to 180,000 with twenty-percent increases when the limit is reached after that.

The evidence is overwhelming that there is a strong demand for people to prepare for careers in the science, engineering, technology and mathematics (“STEM”). Because female students thrive in the foundational courses for these careers when removed from classrooms with their male counterparts, the creation of single-sex schools would do a better job of preparing young women for them than our current model. Placing young women, who are often turned off or discouraged from enjoying math and science, in their own classrooms ultimately creates a more confident student who will learn substantially more material than the disengaged students in a coeducational classroom. This increased knowledge base and confidence could help encourage female students to pursue careers in these fields. In addition, if the nation’s public schools begin producing a larger number of female students who are confident about their abilities in these disciplines it could also help stop the leaky pipeline in at higher levels of STEM education. The leaky pipeline is the dramatic disparity between the number of women earning undergraduate degrees in STEM fields and the number earning PhDs or other advanced degrees in the same fields. For instance, in 2006 biological sciences was the only STEM field where women earned more than forty percent of the Ph.D’s. While high, this is a dramatic drop off

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39 Innovation Employment Act (H.R. 5630)
40 Id.
41 This is not to suggest that simple isolation from the opposite gender increases interest or performance. Adequate planning is crucial.
for a field in which the nearly sixty-five of bachelors degrees and sixty percent of masters degrees were earned by women. Any increase in the number and percentage of women earning Ph.D.’s in these fields creates a more diverse, better educated labor force that can fill many of the jobs available.

In conclusion, the maintenance of single-sex schools does not violate the Equal Protection Clause provided that male and female students have access to an education that is of the same overall quality and facilities of the same overall caliber. The Equal Protection clause does not require identical treatment of unlike individuals. Identical treatment of groups may be what actually violates the Equal Protection Clause because it fails to protect one of both groups when evidence shows that both groups benefit from being treated differently. Because there is overwhelming data that male and female students learn differently the Court should seriously consider these factors when hearing cases that treat different groups differently. Failure to consider the differences in learning strategies and how learning environments affect the ability of students of different genders to learn does not protect students at all. Instead, this practice preserves the status quo by failing to provide students with the chance to obtain the best education possible. Further, providing single-sex schools is sound public policy because it provides students with a better education by increasing their test scores and performance.

Providing a better education for students provides students with greater opportunities to succeed as college students and ultimately in the global economy. These successes for students mean the United States will have better educated labor force, the rate at which top talent in these
felts is imported will decline\textsuperscript{44} and they help the country maintain its position as a world leader. A genuine effort at creating and maintaining separate, comparable learning environments and facilities for male and female students that offer substantially similar educations to students does not violate the Equal Protection Clause. This is because the Equal Protection Clause does not require a finding of unconstitutionality when similarly groups are treated similarly and dissimilar groups are treated dissimilarly and both groups are deriving a great benefit from the use of this separation. The Court must reverse its practice of skeptical scrutiny – which based on the nation’s stained history of denying rights to member’s of suspect classes – that frequently results in classification systems being struck down even when they are designed to benefit these same groups.\textsuperscript{45} If and when the Court does this, thereby adopting the reasoning of Chief Justice Rehnquist, governments will have a clear path to offer the public single-sex education that seeks addresses the distinct needs of male and female students. Until schools have the opportunity to address the distinct needs of male and female students by offering single-sex public schools, the Court’s Equal Protection jurisprudence will continue to all students of protection under the law.

\textsuperscript{44} Particularly in math and science where thousands of employees come to the states on visas to work in these fields. While there is nothing wrong with foreign talent seeking employment in the U.S., our schools must do a better job of training more students who are able to compete for these positions.

\textsuperscript{45} See, Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (holding that Mississippi University for Women's single sex admissions policy violated the Fourteenth Amendment's Equal Protection Clause); J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127 (1994) (holding that the use of peremptory challenges to eliminate jurors solely on the basis of their gender because the exclusion was a violation the Equal Protection Clause of the Fourteenth Amendment); United States v. Virginia, 518 U.S. 515 (1996) (striking down the state of Virginia’s operation of a single-sex public military institute).