Rhetorical Questions Concerning Justice and Equality in Educational Opportunities

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[I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.

—Justice Ginsburg[1]

The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

—Justice Scalia[2]

INTRODUCTION

What role does equality play in a conception of justice? Although Aristotle forever linked justice to equality,[3] he also understood that the principle of equality could not itself resolve any important jurisprudential question. Aristotle's maxim that "like cases should be treated in a like manner" and its corollary that "unlike cases should be treated in an unlike manner"[4] are both tautological.[5] The principle of equality begs the question of which people affected by a law should have equal status or rights.[6] Even if a regime presumes that all persons

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1. Grutter v. Bollinger, 539 U.S. 306, 346 (2003) (Ginsburg, J., concurring).

2. *Id.* at 349 (Scalia, J., concurring in part, and dissenting in part). In his dissent in *Grutter*, Justice Thomas similarly argued that the race-conscious university admissions policy upheld by the Court "can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause." *Id.* at 378 (Thomas, J., dissenting).

3. ARISTOTLE, NICHOMACHEAN ETHICS 1131a (H.G. Apostle trans., 1984) [hereinafter NICHOMACHEAN ETHICS]. *See also* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 (1982) [hereinafter *The Empty Idea of Equality*] (citing ARISTOTLE, POLITICS, Book III § 9 1280a, Book III § 12 1282b–1283a, Book V § 1 1301a–1301b (B. Jowett trans., 1921) [hereinafter POLITICS], to argue that equality in a jurisprudential sense masks true inequality).

4. *See* POLITICS, *supra* note 3, at Book III § 9 1280a, Book III §12 1282b (illustrating Aristotle's principle of equality).

5. Westen, *The Empty Idea of Equality, supra* note 3, at 544–48.

6. Aristotle recognized that each regime would have to reach the political judgment about whether its citizens were "like" or "unalike." He understood that linking justice with equality begged the political question of the relevance of similarities and differences: "All men agree that what is just in distribution should be according to merit of some sort, but not all men agree as to

are naturally entitled to equal protection of the laws, important judgments about which cases should be treated alike still cannot be resolved without legal, moral, or political standards independent of equality.

As American courts reach such judgments based on standards other than equality, the language of equality becomes useful only as a rhetorical device. It should not be surprising, therefore, that Justices Scalia and Ginsburg both employ the rhetoric of equality to support profoundly different conceptions of justice. The rhetoric of equality can be manipulated to cloud judicial decisions which are actually based on independent values. Phatic appeals to equality are particularly evident in the Supreme Court's significant decisions addressing race-conscious and gender-conscious educational programs.

THE EQUALITY PRINCIPLE AND ITS PERSUASIVE CRITICS

In a seminal series of publications, Professor Peter Westen shows that Aristotle's principle of equality is circular, and thus cannot be employed to resolve any jurisprudential question without reference to "substantive" values or rights wholly apart from equality itself.[7] Professor Westen dissects each part of the Aristotelian equality principle. First, the formula requires a determination of whether two or more persons are, or should be, alike for purposes of application of the equality principle.[8] Because no two persons are truly alike, that determination depends on a judgment about the relevance of the undeniable differences between people.[9] People are alike only if their differences are judged (by some external standard) to be irrelevant.[10]

Second, Westen shows that "treatments can be alike only in reference to some moral rule."[11] The judgment about whether the law should treat people alike or unalike depends on the moral rule or independent legal standard by which it was determined that their similarities and dissimilarities are morally or legally relevant. A law cannot be judged, therefore, by the extent to which it treats people equally. Westen

what that merit should be . . . ." NICHOMACHEAN ETHICS, *supra* note 3, at 1131a.

7. PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF EQUALITY IN MORAL AND LEGAL DISCOURSE (1990) [hereinafter SPEAKING OF EQUALITY]; Peter Westen, *The Meaning of Equality in Law, Science, Math and Morals: A Reply*, 81 MICH. L. REV. 604 (1983) [hereinafter *The Meaning of Equality*]; Westen, *The Empty Idea of Equality, supra* note 3, at 537.

8. Westen, *The Empty Idea of Equality, supra* note 3, at 543.

9. *See id.* at 545 (discussing Aristotle's method of determining equality).

10. *Id*.

11. *Id.* at 547.

concludes that the constitutional concept of equal protection under the law is "an empty vessel with no substantive moral content of its own."[12]

Any principle of justice based on this empty idea of equality is vacuous as well. The foundation of justice is "giving every person his due."[13] The equality principle's declaration that persons who are alike should be treated alike indicates that treating people equally means giving them their "due." To argue that justice requires that persons who are alike should be treated alike, therefore, has no genuine meaning unless the argument contains some moral basis for determining whether they are alike in such a way as to make morally proper their similar treatment. Accordingly, an idea of justice based only on the principle of equality has no meaning apart from "substantive moral or legal standards that determine what is one's 'due.'"[14]

Westen acknowledges that this insight into the circular nature of "equality" is not new.[15] Indeed, he posits that Aristotle's equality maxim has had staying power partly because it expresses an unassailable (if unhelpful) tautology.[16] Nonetheless, shortly after Westen authored his seminal work, a host of scholars began a feverish effort to inject some independent meaning into the idea of equality.[17] Westen, however, effectively discarded these arguments.[18]

More recently, Professors Christopher Peters and Kent Greenwalt have tried to resurrect the principle of equality.[19] Professor Peters argues that the principle of "prescriptive equality" is not meaningless.

12. *Id*.

13. *Id.* at 556.

14. *Id.* at 557.

15. *Id.* at 544–48.

16. *Id*.

17. *See, e.g.*, Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983) (arguing that none of Westen's criticisms of the idea of equality are in any way inherent to that concept); William Cohen, *Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights*, 59 TUL. L. REV. 884 (1985) (contending that many decisions based on the Equal Protection Clause can only be understood by adopting constitutional values from different sources in the Constitution); Anthony D'Amato, *Is Equality a Totally Empty Idea?,* 81 MICH. L. REV. 600 (1983) (using a hypothetical case to challenge Westen's notion that equality has no substantive quality); Kent Greenwalt, *How Empty is the Idea of Equality?,* 83 COLUM. L. REV. 1107 (1983) (arguing that equality is derived from the rights people have); Westen, *The Meaning of Equality, supra* note 7 (contending that the concept of equality is empty and confusing).

18. *See* Westen, *The Meaning of Equality*, *supra* note 7, at 604 (replying to the challenges to his assertions set forth by Erwin Chemerinsky and Anthony D'Amato).

19. *See* Kent Greenwalt, *"Prescriptive Equality": Two Steps Forward*, 110 HARV. L. REV. 1265, 1273 (1997) (arguing that the principle of equality carries normative force); Christopher J. Peters, *Equality Revisited*, 100 HARV. L. REV. 1210, 1211 (1997) (arguing that equality's typical emptiness does not stem from inevitable tautology).

Under the principle of prescriptive equality, the "bare fact that a person has been treated in a certain way is a reason in itself for treating another identically-situated person in the same way."[20] Once it is determined that two persons are identically situated, Peters contends, the equality principle has meaning because it requires their identical treatment.[21] Professor Peters concedes, however, that if this prescriptive principle does have any meaning, that meaning is misguided because it may lead to treating equals equally, even if that treatment is unjust.[22] For example, Professor Peters imagines a competition for scarce resources in which eleven drowning people compete for only ten available spots on a lifeboat.[23] Because the principle of prescriptive equality presumes that all of them be treated equally, none of them may receive lifeboat spots and all of them (equally) may drown.[24] Accordingly, Peters concludes that the principle of equality is either irrelevant or harmful when there are conditions of scarcity.[25]

Professor Greenwalt agrees with Peters that the principle of equality does not always lead to "right action."[26] Still, Professor Greenwalt contends that the equality principle has presumptive force because it "might pull some people to treat equals equally, although other considerations would suggest a different outcome."[27] For example, the principle of equality creates a presumption favoring equal distributions of lifeboat spots, even though that presumption may be rebutted by stronger values such as saving lives. Professor Greenwalt argues that even if the principle of equality sometimes may be overcome by countervailing interests, that principle still has meaning.[28] He suggests that the equality "principle may express deep-rooted feelings, not easily dispelled, to which decision-makers appropriately are responsive."[29]

Professor Westen has anticipated and discarded these arguments as well.[30] He demonstrates that any deeply-rooted presumption favoring equal treatment is inconsistent with the maxim of equality itself. The equality principle contains absolutely no presumption or preference for

20. Peters, *supra* note 19, at 1223.
21. *Id.* at 1217, 1223–27.
22. *Id.* at 1220–21.
23. *Id.* at 1237.
24. *Id.* at 1238.
25. *Id.* at 1238–39.
26. Greenwalt, *supra* note 19, at 1277.
27. *Id*.
28. *Id.* at 1271–73.
29. *Id.* at 1273.
30. Westen, *The Empty Idea of Equality, supra* note 3, at 571–73 (discussing the irony of the equality principle demanding unequal treatment).

like treatment. To the contrary, it demands unlike treatment in cases where people are determined to be unalike.[31] The equality principle cannot justify any presumption favoring or opposing any law because all laws treat some people differently from others for some purposes. Although there may be deeply-rooted feelings supporting the rhetoric that like cases should be treated in a like manner, that rhetoric would also demand that unlike cases should be treated in an unlike manner. When the inevitable questions are asked about which likenesses are meaningful and which like treatments are appropriate, those deeply-rooted feelings manifest themselves in a passion for particular substantive values that have nothing to do with equality. Not surprisingly, those substantive values—and not the principle of equality—guide important judicial interpretations of the United States Constitution's Equal Protection Clause.

THE CONSTITUTION'S PHATIC EQUAL PROTECTION PRINCIPLE

Westen's enduring contribution to serious thought about equality may well be his critique of the abuses of the equality principle in legal and political discourse surrounding the Constitution's Equal Protection Clause.[32] Once it is conceded that the Equal Protection Clause does not require all persons to be treated alike, that Clause (like the equality principle itself) cannot be interpreted without relying upon a legal or moral standard anterior to equality. Even scholars who doubt Westen's premise that equality is meaningless cannot deny his assertion that many judicial interpretations of the Equal Protection Clause rely on the empty rhetoric of equality to support presumptions and results that are rooted in substantive values unrelated to equality.[33]

This insight is particularly instructive in understanding the Supreme Court's recent equal protection decisions regarding race-conscious and gender-conscious educational programs.[34] Under the Supreme Court's

31. *Id*.

32. The Equal Protection Clause in the Constitution's Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

33. *See, e.g.*, Cohen, *supra* note 17 at 902 (arguing that judges use equality as a rationale for deciding cases which are really based on other substantive values in order to "avoid larger issues").

34. *See* discussion *infra*, THE PRINCIPLE OF EQUALITY AND RACIAL DIFFERENCES IN EDUCATIONAL OPPORTUNITIES and THE PRINCIPLE OF EQUALITY AND GENDER DIFFERENCES IN EDUCATIONAL OPPORTUNITIES (discussing the Supreme Court's contemporary approach to gender and race-conscious education programs, applying strict scrutiny to race-based classifications in education allowing only the most narrowly-tailored laws to survive and requiring the state to present exceedingly-persuasive justifications for gender-conscious education

three-tiered Equal Protection Clause analysis, a state educational program that affects a "suspect class" such as an underrepresented racial minority will be strictly scrutinized to determine whether it violates the Fourteenth Amendment.[35] Under the "strict scrutiny" standard, any state regulation which classifies people based on their race will be presumed to violate the Equal Protection Clause; the presumption of unconstitutionality cannot be rebutted unless the state can show that its regulation is finely tailored to achieve a compelling or substantial state interest.[36] Under the "intermediate" standard of scrutiny, all state educational programs distinguishing people based on characteristics such as gender also are presumed to be "unequal;" a presumption of unconstitutionality that cannot be rebutted unless the state can provide an "exceedingly persuasive justification" for its law.[37] In light of Westen's insights, however, it is clear that the Supreme Court's scrutiny of race-conscious and gender-conscious educational programs actually is based on substantive, political standards that have nothing to do with equality itself.

THE PRINCIPLE OF EQUALITY AND RACIAL DIFFERENCES IN EDUCATIONAL OPPORTUNITIES

The concept of equality obfuscates important judicial decisions governing race-conscious educational policies. This is apparent in the significant Supreme Court decisions affecting racial segregation and affirmative action in education.

One of Westen's own examples is *Sweatt v. Painter*,[38] in which the Supreme Court held that a state statute barring African-American students from attending an all-white law school violates the Equal Protection Clause.[39] According to Westen, the statute's constitutionality cannot be determined by reference to any equality

and noting the danger in treating "unlike" people as "equals").

35. *See* Westen, *The Empty Idea of Equality, supra* note 3, at 561 (citing Carey v. Brown, 447 U.S. 455, 460 (1980), in describing the Supreme Court's application of the strict scrutiny standard).

36. *Id*.

37. *See*, *e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding that a state university policy limiting enrollment to women in its nursing school violated the Equal Protection Clause). All other state regulations will be upheld under the most lenient scrutiny, so long as the regulation is rationally related to furthering a legitimate state interest. *See* Westen, *The Empty Idea of Equality, supra* note 3, at 569 (describing the Supreme Court's scrutiny for cases which implicate neither a fundamental right nor a suspect classification); *see also* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (holding that a state statute requiring retirement for police officers over fifty years of age is constitutional).

38. Sweatt v. Painter, 339 U.S. 629 (1950).

39. Westen, *The Empty Idea of Equality, supra* note 3, at 566.

principle in the Equal Protection Clause. It is meaningless to assert that Sweatt should be admitted to the all-white school simply because "like cases should be treated in a like manner."[40] Rather, "[t]he real question . . . was whether Sweatt's race would be allowed to make a constitutional difference between Sweatt and his white co-applicants."[41]

That question can only be answered by a "substantive idea of the kinds of wrongs from which a person has the right to be free."[42] In order to conclude that racial differences are "constitutionally irrelevant" for admissions purposes, a court must decide that "excluding blacks from law school on the basis of race causes them a kind of injury not caused in cases in which using race is conceded to be acceptable."[43] If, but only if, the Court determines that Sweatt has the right to be free from the injury of being denied admission to an all-white school because of his race, can the court then say that the state has treated him unequally by treating him differently from persons who the court has independently determined are the "same" in constitutionally relevant respects.[44] While the court may lace its opinion in the rhetoric of equality, the decision to allow Sweatt to be treated "like" white applicants in admissions to law school is actually based on the independent judgment that African-American applicants to law school should not be subjected to racial injury in admissions.[45]

From this perspective, not even *Brown v. Board of Education*, which stands as an enduring symbol of racial equality, can be justified by the equality principle alone.[46] The Court in *Brown* declared that racially segregated educational facilities are "inherently unequal."[47] As Westen shows, however, there is no such thing as "inherent" inequality. The actual reasoning of *Brown* is that state laws which impose racial segregation in public education violate the Equal Protection Clause

40. *Id.* at 566–67.

41. *Id.* at 566.

42. *Id.* at 567.

43. *Id.* at 566.

44. *Id.* at 567.

45. *Id.* at 568.

46. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that segregating children in public schools on the basis of race is unconstitutional, even when both facilities and tangible factors are equal, because children are still deprived of equal educational opportunities).

47. *Id.* at 495. The *Brown* Court actually goes out of its way to make clear that some of the schools at issue in that case which were attended by African-American students were "like" the schools attended by white students in their tangible facilities and resources. *Id.* The Court declares that the racially-segregated schools in the case, "have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." *Id.* at 492.

because they *injure* African-American school children. According to *Brown*, even if such laws were to provide for equal educational resources, they would nevertheless be unconstitutional because they would have a "detrimental effect" on African-American students.[48] The Court emphasized that the laws (1) perpetuate a stereotype harmful to African-American students; (2) reinforce a stigma of inferiority injurious to African-American students; (3) generate a feeling of lesser status that hurts the hearts and minds of African-American students; (4) retard the mental and educational development of African-American students; and (5) deny to African-American students the educational benefits of attending a racially-integrated school.[49] As in *Sweatt*, the *Brown* case becomes consistent with equality only after it is first determined that African-American children are "like" white children in their right to be free from the "injury" of segregated schools, or in their right to be free from the "injury" of being denied the opportunity to attend a diverse school. *Brown* can be understood only by looking to these important substantive values apart from equality.

Because the rhetoric of equality is hollow, the Supreme Court is able to use that rhetoric in its recent school desegregation decisions to undo the substantive values of *Brown*. Declaring that "[r]acial balance is not to be achieved for its own sake,"[50] the Supreme Court has indicated that state desegregation efforts violate the Equal Protection Clause unless they are finely-tailored to remedy proven cases of legally-mandated or intentionally-imposed segregation.[51] State programs designed to make

48. *Id.* at 494.

49. *Id.* at 494–95. For an excellent analysis of the judicial and political efforts to facilitate the resegregation of American public schools, see generally GARY ORFIELD, ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1997) (describing the current segregated condition of America's schools). *See also* JONATHAN KOZOL, SAVAGE INEQUALITIES (1991) (describing the detrimental effects of unequal government funding to America's schools).

50. Freeman v. Pitts, 503 U.S. 467, 494 (1992). "Where resegregation is not the product of state action but of private choice, it does not have constitutional implications. It is beyond the authority . . . of the federal courts to try to counteract these kinds of continuous and massive demographic shifts." *Id*. at 495. *Freeman* indicates that any voluntary governmental policy designed to achieve racial balance in educational institutions generally would itself violate the principle of equality in the Equal Protection Clause. *Id.*

51. *See, e.g.*, *id.* at 495–96 (noting that though past wrongs have been committed to the black race, those wrongs cannot be used to exaggerate the legal consequences). Specifically, the *Freeman* court noted:

> Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history . . . But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities . . . the District Court was correct to entertain the suggestion that [the school district] had no duty to achieve system-wide racial balance in the student population.

desegregation attractive by enhancing the quality of schools attended by African-American students violate the Equal Protection Clause, the Court suggests, because they treat African-American students differently from white students.[52] By this logic, African-American students are deemed to be "like" white students in all respects relevant to educational opportunity and therefore they must be treated like white students with regard to educational programs. The Court's rhetoric here hides its substantive judgment that any differences between the actual educational opportunities afforded white children and those afforded African-American children either do not exist or are irrelevant for constitutional purposes. The declaration that African-American students should be treated just like white students is used to legitimize the reality that their educational opportunities are not at all alike.

The empty rhetoric of equality also is evident in the Court's decisions regarding the constitutionality of race-conscious school admissions policies. Justice Powell's "touchstone"[53] opinion in *Regents of the University of California v. Bakke* begins with the assertion that "equal protection cannot mean one thing when applied to one individual, and something else when applied to a person of another color."[54] Yet, as Westen shows, equal protection always means one thing when applied to one individual, and something else when applied to another individual, if those two individuals are adjudged to be different in a relevant respect. Indeed, Justice Powell himself indicates that "the attainment of a diverse student body" is a compelling interest that justifies the treatment of one race differently from another.[55]

In *Grutter v. Bollinger*, the Supreme Court accepts Justice Powell's view in *Bakke* that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[56] The Court

Id.; see also Missouri v. Jenkins, 515 U.S. 70, 88–90 (1995) (holding that efforts to integrate school district by developing attractive schools designed to equalize academic achievement are unconstitutional and beyond the scope of permissible remedies for equal protection violations).

52. *See*, *e.g.*, *Jenkins*, 515 U.S. at 88–89 (discussing the state program's unequal treatment of students based on race).

53. Grutter v. Bollinger, 539 U.S. 306, 323 (2003) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

54. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90 (1978). Justice Powell continues: "If both are not accorded the same protection, then it is not equal." *Id.* at 290.

55. *Id.* at 311–14.

56. *Grutter*, 539 U.S. at 324. Justice Powell stated in *Bakke*:

> [A]ttainment of a diverse student body] clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

recognizes that when it strictly scrutinizes all governmental "uses of race," it does so in order to take "relevant" differences between the races into account.[57] The Court acknowledges that "[c]ontext matters" and not every "decision influenced by race is equally objectionable . . . ."[58] In other words, African-American applicants to college and graduate school may not be "like" white applicants to college and graduate school in a relevant respect. An African-American student may bring an element of diversity to the educational institution which is different from that brought by a white student.

Yet, because all governmental programs treat some people differently from others, the question is again reduced to whether the Supreme Court is willing to recognize the moral significance of the distinction made between applicants. In *Grutter*, the Court recognizes that the State of Michigan has valuable reasons for treating applicants of one race differently from those of another, reasons which survive strict scrutiny. The Supreme Court, however, has found only two political values to be so compelling as to justify governmental policies which treat persons differently because of their race: (1) remedying past discrimination against members of a racial minority;[59] and (2) attaining a diverse student body.[60] Reduced to the equality principle, the Court indicates that African-American students are like white students in every other circumstance except victimization by specific, proven, and past acts of racial injury and the capacity to bring diversity.

Suppose, instead, that the Court were to acknowledge that the educational opportunities available to African-American students also are different from those available to white students due to their different history of injury from a legally-enforced "system of racial caste" in education and their different condition of injuries from "conscious and unconscious race bias," educational segregation, and inadequate educational resources.[61] The recognition of these actual differences

Bakke, 438 U.S at 312.

57. *Grutter*, 539 U.S. at 327 (citing Adarand Constr. v. Peña, 515 U.S. 200, 228 (1995)).

58. *Id*. at 308.

59. *See*, *e.g.*, *Adarand*, 515 U.S. 200 (proposing that only the compelling interest in redressing specific acts of proven past racial discrimination could justify a finely-tailored racial affirmative action program); Richmond v. J. A. Croson, 488 U.S. 469, 493 (1989) (suggesting racial classifications are reserved for precise remedial measures).

60. *Grutter*, 539 U.S. at 332.

61. *See* Gratz v. Bollinger, 539 U.S. 244, 298–301 (2003) (Ginsburg, J., dissenting) (arguing that an equal standard of review in the college admission process will not remedy an unequal society). The "detrimental effect" on African-American students from educational inequity has not dissipated since *Brown*. *Id*. (Ginsburg, J., dissenting). Racial segregation in public schools persists. *See Grutter*, 539 U.S. at 345 (Ginsburg J., concurring) (contending that a continuing

would justify (if not mandate) governmental action that treated African-Americans differently from white Americans in the respects by which they are adjudged to be different. Any educational program that failed to recognize and remedy these differences in educational opportunities would be presumed unconstitutional on the grounds that the law would treat unlike cases in a like manner.

In its *Gratz v. Bollinger* decision, however, the Supreme Court effectively presumed the unconstitutionality of any serious effort by the government to recognize racial differences in educational opportunities.[62] In *Gratz*, the Court declared unconstitutional the University of Michigan's undergraduate admissions policy: "[w]e find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity . . . ."[63] The undergraduate policy fails because, unlike the law school's policy upheld in *Grutter*, it does not provide for "meaningful individualized review of applicants."[64] Instead, in treating the underrepresented minority applicant the same, the undergraduate program violates the Equal Protection Clause.[65] Appealing again to the sentiment of equality, the Court concludes that the University's race-conscious

affirmative action policy will not fuel an unequal college admissions policy, rather it will alleviate the need for affirmative action); E. FRANKENBERG, ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?, THE CIVIL RIGHTS PROJECT, HARV. UNIV. 1, 4 (Jan. 2003) (indicating that, in 2000–2001, figures show that 71.6% of African-American children and 76.3% of Hispanic children attended schools in which minorities make up a majority of the school body); *see also* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004) (discussing continued segregation in modern American schools); SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004) (describing how race and social class categorization can restrict upward mobility); GARY ORFIELD & CHRISTOPHER LEE, BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?, THE CIVIL RIGHTS PROJECT, HARV. UNIV. (Jan. 2004) (showing that U.S. schools are becoming more segregated); James E. Ryan, *Schools, Race and Money*, 109 YALE L.J. 249, 273–74 (1999) (discussing the difficulties of achieving racial integration); Kevin Carey, *The Funding Gap: Low Income and Minority Students Still Receive Fewer Dollars in Many States*, THE EDUCATION TRUST FALL 2003, at 1, 9 (indicating that thirty-seven states provide significantly fewer cost-adjusted resources to those school districts which educate mostly underrepresented minority students and that throughout the nation, *each* student in a district which educates primarily underrepresented minorities receives an average of $1,030 less in annual educational resources than students who are educated in a primarily white district).

62. *Gratz*, 539 U.S. at 269–70 (setting forth the strict scrutiny standard to which such efforts will be subjected).

63. *Id.* at 270.

64. *Id.* at 276 (O'Connor, J., concurring).

65. *Id*. (O'Connor, J., concurring).

policy subjects non-minority applicants to "unequal treatment."[66]

The Court's rhetoric conceals its substantive judgment about the presumed similarities between underrepresented minority applicants and other applicants. Based on the rhetoric of equality, the Court presumes that underrepresented minority applicants should be treated like all other applicants. To presume that race-conscious remedies violate the equality principle is to presume that no racial differences exist. If underrepresented minority applicants are not actually like other applicants in their educational opportunities, then treating them as if they were like those other applicants cannot be fairly justified by the equality principle.

Justice Ginsburg, in her dissent, argues that underrepresented minorities in fact are not like other applicants in a respect that should be relevant to whether they are treated alike by a college admissions program: "[i]n the wake of 'a system of racial caste only recently ended' . . . large disparities endure."[67] If "large disparities" between underrepresented minority applicants and other applicants exist, then the state's failure to recognize those disparities is to treat unlike cases in a like manner. As Justice Ginsburg suggests, to judge educational programs which benefit African-Americans in the same way as programs that injure them is to ignore the history and contemporary reality of differences in educational opportunity. Although the Court employs the rhetoric of equality,[68] its holding is really based on its political judgment that significant racial differences in educational opportunity should have little constitutional significance.

THE PRINCIPLE OF EQUALITY AND GENDER DIFFERENCES IN EDUCATIONAL OPPORTUNITIES

The principle of equality also masks the substantive values supporting the Supreme Court's equal protection decisions affecting gender in educational institutions. In *United States v. Virginia,* the Supreme Court held that the Equal Protection Clause precludes the State of Virginia from exclusively reserving to men the unique educational opportunities offered by its all-male Virginia Military Institute.[69] The Court describes the process by which the issue of the constitutionality of

66. *Id.* at 270 (citing Adarand Const., Inc. v. Peña, 515 U.S. 200, 224 (1995)).

67. *Id.* at 299–300 (Ginsburg, J., dissenting) (citing *Adarand,* 515 U.S. at 273 (Ginsburg, J., dissenting)).

68. *See*, *e.g.*, *id.* at 270 (suggesting that the threshold question is whether the use of race in admissions violates the Equal Protection Clause).

69. United States v. Virginia, 518 U.S. 515, 519 (1996).

any state "classification" based on gender must be resolved: "Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely on the State."[70]

This formulation appears to establish a presumption of equality. Women should be treated the same as men, unless the reasons for the "differential" treatment can be persuasively justified. Yet, the presumption of equality here is only another rhetorical device. Virginia's maintenance of a single-sex military academy does not violate the Equal Protection Clause merely because it treats like cases in an unlike manner. Rather, the Court declares that men and women are not like cases in significant ways: the physical differences are "enduring;" men and women are not "fungible;" a community of one sex is "different" from a community of both sexes.[71] The Court even describes the differences between men and women as "inherent."[72]

If, as the Court concludes, men and women are fundamentally different, any consistent principle or presumption of equality should have led the Court to demand a justification for any law that does not treat them differently. Yet, the Court also recognizes that women may be justly treated unlike men for some purposes, but not for others. Hence, "[s]ex classifications" (i.e., treating women unlike men) are good (morally proper forms of discrimination) if they are designed to compensate women for economic disabilities, to promote employment opportunities or to "advance full development of the talent and capacities of our Nation's people."[73] On the other hand, the Court declares that legislation that treats men differently from women is unjust if it is designed "to create or perpetuate the legal, social, and economic inferiority of women."[74]

To some extent, the Court acknowledges Westen's point: women and men are alike in some significant ways and not alike in significant ways, and women may be justly treated the same as men in some ways and may be justly treated differently from men in other ways. The Court, although purporting to rely upon an equality justification for its holding, seems to recognize that the Virginia statute cannot be declared unconstitutional simply because it treats some men differently from

70. *Id.* at 533.
71. *Id.* (citing Ballard v. United States, 329 U.S. 187, 193 (1946)).
72. *Id*.
73. *Id.* at 533–34.
74. *Id.* at 534.

some women. Instead, the statute is unconstitutional because it injures women by denying to them a substantive right which is wholly apart from equality: the right to an educational opportunity.[75] If there is a principle that emerges from this case, it is not the equality principle. Rather, it is the recognition of the injury resulting to women from the denial of a unique educational opportunity.

Nor can the equality principle alone resolve the question of the legitimacy (or constitutionality) of instructional practices which treat female students the same as male students in the classroom. The rhetoric of equality seems to render suspicious any differences between the education of men and women. Suppose, however, that there are significant differences in the way in which men and women learn. If female learners are adjudged to be unlike male learners in significant respects, then treating them in a like manner in an educational institution would appear to disserve the equality principle. If it is determined that men and women are different learners, then there should be a presumption against treating them the same way in the classroom. The equality principle begs the question of whether male learners are like female learners in such a way to make unjust any program that treats them as if they were not alike.

The question of whether men and women learn differently can be answered by descriptive evidence. In fact, all of the available, credible evidence indicates that female learners are fundamentally different from male learners.[76] For example, research indicates that in the elementary

75. *See id.* at 534 (holding that barring women from attending the publicly-funded Virginia Military Institute was unconstitutional). It is not clear whether the right being denied is the right to an educational opportunity, or the right to a *unique* educational opportunity. In a footnote, the *Virginia* Court observed:

> [We] do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as 'unique,' . . . an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college.

Id. at 534 n.7.

76. There is evidence demonstrating significant differences in the way in which men and women (and boys and girls) process information. *See*, *e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (demonstrating that women perceive and construe reality differently from men); MICHAEL GURIAN, BOYS AND GIRLS LEARN DIFFERENTLY! (2001) (establishing that gender affects the brain in many significant ways). In typical elementary school classrooms, girls outperform boys in nearly every subject. Linda L. Peter, *What Remains of Public Choice and Parental Rights: Does the VMI Decision Preclude Exclusive Schools or Classes Based upon Gender*?, 33 CAL. W.L. REV. 249, 263 (1997) (stating that girls finish elementary school performing better than boys on standardized tests in all subjects but science). By middle school, however, girls' standardized test scores drop relative to boys, especially in math and science. *Id*. This disparity grows throughout the

grades, gender differences in the biological development of the brain generally enable girls to see and to read better than boys in low light, while boys are able to see and to read better than girls in bright light.[77]

Accordingly, a governmental program that provides for "bright light" throughout a public school may violate the equality principle as much as a governmental program that prevents female students from taking science classes. A policy providing uniform "bright light" treats unlike cases in a like manner. It treats female students the same as male students, even though their opportunities to learn at an "equal" level of light are fundamentally different. The consistent use of bright light injures female students by denying to them an educational opportunity. Yet, the courts likely would not presume that such a program violates the Equal Protection Clause because the program seems to provide equal treatment to male and female students. Nor would any showing of an "exceedingly persuasive justification" likely have to be made to justify this apparent "equal" treatment of boys and girls. On the other hand, an educational policy which enables male students, but not female students, to take science classes treats people differently even though men and women may be adjudged to be the same in their capacity to learn science. That educational policy will receive heightened judicial scrutiny because it appears to treat like cases in an unlike manner.

The real issue in both cases, however, is not equality. The issue should be whether governmental programs injure female students by denying to them an educational opportunity. Both programs should be

education process. In 2000, the National Center for Educational Statistics confirmed that after elementary school, boys acquire a significant advantage over girls in math and science. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, TRENDS IN EDUCATIONAL EQUITY OF GIRLS 60–67 (March 3, 2000). Some commentators attribute such testing disparities to inherent biological differences in learning styles between the sexes. Peter, *supra,* at 263. Others suggest that this disparity results from the preferential treatment boys receive from their teachers, either because they raise their hands more often in class, speak out of turn, or are otherwise less disciplined than girls. *Id.* at 264; *see* MYRA SADKER & DAVID SADKER, FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS 138 (1994) (noting the decline of girls' success on standardized tests over the course of their education).

Michael Gurian attributes the differences to evolved biological gender dissimilarities in the brain that influence learning. *See* GURIAN, *supra*, at 57–59 ("[B]rain systems explain why girls on average don't like math as much as boys and boys generally don't like reading and writing as much"). In particular, Gurian argues that boys and girls learn in fundamentally different ways and at different rates. *Id.* at 36–37, 59. Gurian concludes that because of their different brain compositions and different learning styles, "*both* boys and girls are victims of gender disadvantage in our schools." *Id.* at 63. According to Gurian, therefore, the ultimate educational environment would confront the disadvantages in the brain chemistry of both males and females and adjust instructional practices to meet the specific educational needs of each gender. *Id.* at 66, 294.

77. *See* GURIAN, *supra* note 76, at 36–37 (displaying the results of experiments on children younger than eighteen).

suspect, not because they are unequal, but because they injure female students' opportunities to learn. If male and female students are adjudged to be alike in their entitlement to the opportunity to learn, then any governmental program which denies that opportunity would not treat like cases in a like manner. The substantive value at stake is the opportunity to learn, not equality.

A program of gender-segregation in education, therefore, cannot be fairly attacked simply because it appears to be "unequal." In *Mississippi University for Women v. Hogan*, the Supreme Court expressly declined to reach "the question of whether States can provide 'separate but equal' undergraduate institutions for males and females."[78] There is a significant body of research suggesting that girls and boys alike benefit from gender-segregated classrooms.[79] The American Civil Liberties Union, however, argues that "[s]ingle-sex education is at best a 'sound-good method' because it is based upon misconceptions about the abilities and preferences of girls and boys rather than empirical evidence."[80] The debate in the courts and in the political sector will no

78. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 720 n.1 (1982).

79. Peter, *supra* note 76, at 264 (citing SADKER & SADKER, *supra* note 76, at 233). In a 2000 survey of 4,200 girls' school graduates, more than eighty percent reported they were better prepared to succeed in the co-ed world precisely because they went to a single sex school. Meg Moulton & Whitney Ransome, *With Fewer Distractions, Students Will Do Better*, ATLANTA JOURNAL-CONSTITUTION (Aug. 26, 2003). Without boys in the classroom, girls speak up more, take more science and math courses, obtain more advanced degrees and hold more high-ranking positions in large companies. *Id.; see also* Kay Bailey Hutchinson, *The Lesson of Single-Sex Public Education: Both Successful and Constitutional*, 50 AM. U. L. REV. 1075, 1077 (2001) (citing Susan Estrich, *Ideologues Decry Single-Sex Education, But Girls Benefit*, DENV. POST, May 22, 1998, at B11, to describe the specific benefits boys and girls will receive from a single-sex education). According to statistics published by The National Coalition of Girls' Schools, girls attending single-sex schools typically score thirty percent higher on Scholastic Achievement Tests ("SAT") than the girls' national average. Julia Morgan School for Girls, *Why a Girls' School?, at* http://www.juliamorganschool.org/girls.html (last updated Nov. 9, 2004). In addition, almost one hundred percent of girls' school graduates go on to college and are twice as likely to earn doctorates. *Id*. Some commentators suggest that boys also benefit from single-sex education because they are more likely to focus on their studies, express themselves more freely and pursue nontraditional arts and literature degrees. *See* Peter, *supra* note 76, at 264 n.107, 108 (suggesting that boys in single-sex schools have better appreciation for art and literature, but cautioning that all boys schools may encourage sexist views).

80. Laura W. Murphy, *Single-Sex Notice of Intent, Comments to the Department of Education,* AMERICAN CIVIL LIBERTIES UNION LEGISLATIVE UPDATE (July 8, 2002), *available at* http://www.aclu.org/WomensRights/Womensrights.cfm?ID=10481&c=174. The ACLU observed that if similar characteristics found in single-sex schools, such as smaller class rooms, extensive resources, well-trained teachers, and advanced educational methods were available in public (co-ed) schools, measurable differences between single-sex education and co-educational programs would disappear. *Id*. The ACLU also argues that single-sex schools undermine Title IX, violate the Equal Protection Clause of the U.S. Constitution, and foster sex discrimination. *Id*.

doubt be peppered with appeals to equality. Yet, the principle of equality is unhelpful; it both supports and opposes gender segregation in education. The real issue is whether gender segregation injures women by denying to them a substantive right to educational opportunity, and whether the courts will recognize that injury.

CONCLUSION: BEYOND EQUALITY AND TOWARD EDUCATIONAL PRINCIPLES

In all of its meaningful opinions regarding race-conscious and gender-conscious educational programs, the Supreme Court appeals to the rhetoric of equality. That rhetoric may appear compelling, but it is as vacuous as the equality principle on which it is based. The rhetoric of equality typically masks substantive, political, or moral judgments unrelated to equality itself.

The Supreme Court's decisions in the arena of education may well be based on substantive judgments about the importance of educational opportunity. Although the Court thus far has rejected the existence of a fundamental constitutional right to educational opportunity,[81] it nonetheless seems to have quietly recognized the substantive value of educational opportunity in its equal protection decisions.

Suppose the Court's equal protection decisions actually conceal the substantive judgment that women and underrepresented minorities should have the right not to be denied meaningful educational opportunities, and that any denial to them of such educational opportunities would result in an unconstitutional injury. What then?

81. *See* San Antonio v. Rodriguez, 411 U.S. 1 (1973) (upholding the constitutionality of a Texas school financing system which left poor students residing in school districts with a low property tax base with a much lower yearly expenditure per student). *But see* Papasan v. Allain, 478 U.S. 265, 285 (1986) ("[T]his Court has not yet definitively settled the question whether a minimally adequate education is a fundamental right"); Plyler v. Doe, 457 U.S. 202, 221 (1981) ("Public education is not [a] 'right' granted to individuals by the Constitution, but neither is it merely some governmental 'benefit.'").