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The Constitution and the One-Sex College

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IN BROWN V. BOARD OF EDUCATION,[1] the Supreme Court said, "Separate educational facilities are inherently unequal." Despite this, the lower federal courts are continuing, in the sex area, to deal in terms of "separate but equal." The Supreme Court acquiesces silently,[2] while rulings upholding colleges and universities in limiting admissions to one sex challenge the *Brown* rationale.

In *Williams v. McNair*,[3] plaintiffs, all males, sued to enjoin the enforcement of a South Carolina statute limiting to women admissions at Winthrop College, a state college located at Rock Hill, South Carolina. The three-judge district court, upholding the statute's validity, concluded that discrimination in the admission of students based on sex was rationally justified on the basis of history, tradition and common practice. The court further stated that, even if such justification could be discounted, there could be no denial of equal protection where the sex-segregated school was only a constituent part of a state-wide system of higher education which made available to students the choice of co-education, all-male and all-female institutions, especially where no school was distinguished by a particular course of instruction or prestige factor not available elsewhere in the system.

The court relied on three previous cases which had applied the same reasoning. *Allred v. Heaton*[4] and *Heaton v. Bristol*[5] involved efforts by females to gain admission to all-male Texas Agricultural and Mechanical College. In both cases, the court rejected the plaintiffs' contention that the state's exclusion of females violated the fourteenth amendment of the U. S. Constitution. The Texas courts refused to view Texas A. & M. as a single institution apart from the state's entire system of higher education. In *Heaton v. Bristol,* the court said:

> . . . the controlling question with reference to the above matter is whether the State, as a matter of public policy, may as a part of its total system of higher education maintain, for the choice and service of its citizens, one all-male and one all-female institution, along with sixteen institutions which are co-educational. We think undoubtedly the answer is Yes. Such a plan exalts neither sex at the expense of the other, but to the contrary recognizes the equal rights of both sexes to the benefits of the best, most varied system of higher education that the State can supply.[6]

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1 347 U.S. 483 (1954).

2 In each of the cases involving this issue which has reached the Supreme Court, it has either affirmed without opinion, Williams v. McNair, 401 U.S. 951 (1971) or denied certiorari, Heaton v. Bristol, 359 U.S. 230 (1959) and Allred v. Heaton, 364 U.S. 517 (1960).

3 316 F. Supp. 134 (D.S.C. 1970, *aff'd mem.*, 401 U.S. 951 (1971).

4 336 S.W.2d 251 (Tex. Civ. App.), *cert. denied,* 364 U.S. 517 (1960).

5 317 S.W.2d 86 (Tex. Civ. App. 1958), *cert. denied,* 359 U.S. 230 (1959).

6 *Id.* at 100.

In *Kirstein v. Rector and Visitors of University of Virginia,*[7] the court held that the state had violated the equal protection provisions of the United States Constitution by maintaining a one-sex institution. In so holding, however, the court embraced the "separate but equal" rationale of the earlier Texas cases, which was to be later followed in *Williams v. McNair.*[8] It found that no institution in the Virginia system of colleges and universities offered to females the same facilities and prestige that the University of Virginia at Charlottesville offered to male students. It limited the constitutional violation to a situation where the state did *not* provide to women an education *equal* to that offered to men. The court said:

> We hold, and this is all we hold, that on the facts of this case, these particular plaintiffs have been, until the entry of the order of the district judge, denied their constitutional right to an education equal with that offered men at Charlottesville and that such discrimination on the basis of sex violated the Equal Protection Clause of the Fourteenth Amendment.[9]

These cases bring into sharp focus the question whether the Constitution permits government-sponsored institutions of higher learning on the basis of sex. Such institutions have a lengthy history in this country and, during the early years of the Republic, were the rule rather than the exception. Tradition, however, is not the test of constitutional permissibility.

The obvious analogy is that of institutions segregated by race. In *Brown v. Board of Education,*[10] the Supreme Court sweepingly condemned segregation of students in public schools solely on the basis of race, on the ground that such segregation deprived black students of equal educational opportunities. The Supreme Court has yet to definitively hold that segregation on a sexual basis is likewise condemned.[11] Current concern over the lack of opportunities[12] for women in our society has caused many to look to the equal protection guarantees of the fifth and fourteenth amendments for the same relief from sex discrimination that has been afforded in the case of racial discrimination.

To constitute a denial of equal protection, the statute or government action complained of must involve both state action and a discrimination which has no reasonable basis.[13]

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[7] 309 F. Supp. 184 (E.D. Va. 1970).

[8] 316 F. Supp. 134 (D.S.C. 1970).

[9] 309 F. Supp. 184, 187 (E.D. Va. 1970).

[10] 347 U.S. 483 (1954).

[11] Williams v. McNair, 401 U.S. 951 (1971); Allred v. Heaton, 364 U.S. 517 (1960); Heaton v. Bristol, 359 U.S. 230 (1959).

[12] *See* TASK FORCE ON EDUCATION, REPORT ON HIGHER EDUCATION (Advance Draft, 1971) at 63 ff. Comparisons of the participation and attainments of men and women in higher education reveal a clearly unequal pattern. . . . We believe that it is not the case that opportunities exist for women which they simply decline to exercise. Rather we find that there are specific barriers which block their progress and which will not disappear without conscious effort. *See also* REPORT OF PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, *A Matter of Simple Justice* (1971).

[13] *Sex Discrimination in College Admissions: The Quest for Equal Educational Opportunities,* 56 IOWA L. REV. 209, 211 (1970).

State Action

Each of the cases which has been brought to date has involved a state institution. The question of state action, therefore, did not arise. Of the three hundred forty-seven one-sex schools in the country, only sixteen are "public" in the sense of state instrumentalities.[14] The remainder are "private," at least in the generally accepted sense of the word. A definitive constitutional interpretation will inevitably have a wider effect on the so-called private institutions than on the clearly public ones. Traditionally, a private school has been allowed to discriminate by sex, age, race, or in any other way it might determine.[15] The question is whether this is legal. The easy answer is to divide the institutions between public (where such discrimination shall be forbidden) and private (where it is to be allowed). Unfortunately, the concept of state action is not so mechanical.

A definitive analysis of the relationship of the private university to the public sector appears in "Private Universities and Public Law." [16] As Professor O'Neill concludes in that article, most private universities are "public" *to some degree;* but, as he further emphasizes, some are much more governmentally involved and affected than others. Constitutional questions concerning private educational institutions cannot, on a practical level, be resolved on the existence or non-existence of "state action," or any similar black letter catchword. As Professor O'Neill contends, constitutional questions involving such institutions must be resolved on the interaction of two elements—the nature of the institution and the relief sought.[17] He would require little in the way of public involvement to hold that a school may not constitutionally refuse to admit a student solely because of race, while urging that private institutions should be allowed to develop experimental programs which would be clearly denied to a public institution. The problem with the one-sex school is: Into which of these categories does it fall? The problem is not easy to solve if the rationale of the cases to date is to be followed.

If the analogy of *sexual* discrimination to *racial* discrimination is regarded as perfect, clearly neither the public nor the private institution may opt out of equal protection requirements by a claimed lack of involvement in state action. If, on the other hand, a useful purpose can be found for sex-segregated programs in higher education, then more latitude may be allowed. In short, "state action" may or may not be found sufficient to force sexual integration of a private school if such classification is determined to constitute an unreasonable classification for constitutional purposes.

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[14] Statistics furnished by the Women's Action Program of the Department of Health, Education and Welfare (based on information supplied it by the U. S. Office of Education). Three percent (3%) of the students enrolled in higher education attend one-sex schools. The numbers of such institutions in the United States are: Public—11 male, 5 female. Private—143 male, 188 female.

[15] *See Sex Discrimination in College Admissions: The Quest for Equal Educational Opportunities,* 56 IOWA L. R. 209, 218, n. 53 (1970).

[16] O'Neill, *Private Universities and Public Law,* 19 BUFFALO L. REV. 155 (1970).

[17] *Id.*

Reasonable Classification

The second part of the equal protection requirement is that of reasonable classification. Any classification of an individual must be for a legitimate purpose, and must have a fair and substantial relation to that purpose.[18] In the cases involving racial discrimination which followed *Brown v. Board of Education*,[19] the court adopted a position which very nearly accorded to *racial* discrimination the presumption that it was *per se* unreasonable. *Sex* discrimination has fared better in the courts.

Kanowitz[20] has divided sex discrimination cases into pre-1963 cases and post-1963 cases.[21] The earlier cases, beginning with *Bradwell v. State*[22] and reaching a high point in *Mueller v. Oregon*[23] accept the principle that sex *is* a valid basis of classification. No further inquiry is made into either the legitimacy of purpose or the reasonableness of the relationship between such purpose and the required classification. Sex, according to such cases, is *per se* a reasonable classification.

Since 1963, women have, with accelerating persistence, sought a re-evaluation of this theory. Though the Supreme Court has not as yet found a violation of equal protection in any sex case, the lower federal courts are beginning to reflect a sensitivity in the area.[24] It has been said that the constitutional sex classification may be disappearing.[25] The pendulum appears to be swinging, if not to the point where a classification based on sex is discriminatory *per se*, at least to the point where any classification based solely on sex is "suspect." Suspect classifications require "rigid scrutiny" by the courts and must be supported by a broader justification than a "merely rational connection with a legitimate public purpose." [26]

Given this assumption—that sex is a suspect classification—is there any theory upon which a one-sex institution can be sustained?

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[18] *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1067 (1969).

[19] 347 U.S. 483 (1954).

[20] Kanowitz, *Constitutional Aspects of Sex-based Discrimination in American Law*, 48 NEB. L. REV. 131 (1968).

[21] 1963 is the date of the REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN. The findings of that Commission started a new evaluation of the place and problems of women in our society.

[22] 83 U.S. (16 Wall.) 130 (1872). There the court held that a woman could constitutionally be denied a license to practice law.

[23] 208 U.S. 412 (1908).

[24] Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593 (S.D. N.Y. 1970) (a licensed bar's refusal to serve women is a denial of equal protection); United States v. York, 281 F. Supp. 8 (D. Conn. 1968) (where a statute provided that women, not men, could be committed to a state farm for indefinite terms); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (holding that exclusion of women from jury duty is unconstitutional); Karczewki v. Baltimore & O. R. R., 274 F. Supp. 169 (N.D. Ill. 1967) (invalidating Indiana's practice of denying women the right to sue for loss of consortium); Mollere v. S. E. La. College, 304 F. Supp. 826 (E.D. La. 1969) (holding that women students cannot be required to live in dormitories if men are not so compelled); and Perry v. Grenada Municipal Separate School Dist., 300 F. Supp. 748 (N.D. Miss. 1969) (providing that unwed mothers cannot be excluded from being students solely because they were unwed mothers).

[25] *See The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296, 314 (1970).

[26] *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087 ff. (1969).

All cases to date support the theory that the state need give only equal educational opportunity to men and women, and that such opportunity can be given in a sex-segregated institution. (A close reading of the cases, with the exception of *Kerstein*,[27] suggests that in the case of a state institution, there may be a further requirement that educational opportunity be afforded in a statewide educational program offering co-education as well.) This is in obvious contrast to the race discrimination cases.

At the outset, the situation with respect to the one-sex institution must be differentiated from sexual discrimination in admission to a coeducational institution, where there is no rationale for discrimination; i.e., we are not here discussing quotas or differing standards for women (or men) at institutions ostensibly non-sexually oriented.[28] Our question is purely the constitutionality of a one-sex (male or female) educational institution.

It is unlikely, since the *Brown* case, that the doctrine of "separate but equal" would be invoked by any court to sustain a judgment, at least if the phrase is squarely used. Nonetheless, the cases on one-sex institutions to date are plainly based on this theory, no matter how carefully the courts avoid the language. A variation of the doctrine, however, may be legitimate in the area of sex discrimination in higher education, even though it would not be acceptable in the area of race discrimination at the present time.[29] That is, the state may provide a choice to students of a variety of environments in which he or she chooses to study. So long as the choice is a genuine one, it will not and should not be constitutionally prohibited. The range of choices to be provided then becomes a matter for the legislature, and will reflect current public thinking and such other factors as availability of funds and facilities. The offering of such choices will only come into conflict with the constitution at a point where the choices are determined to accomplish an impermissible purpose.

This theory, admittedly, has been rejected in the area of race discrimination. In *Kelley v. Board of Education of Nashville*,[30] the court disapproved a state statute which allowed local school boards to provide separate schools for black and white children as well as integrated

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[27] 309 F. Supp. 184 (E.D. Va. 1970). In this case the court appears to be saying that equality is all that is required.

[28] *See Sex Discrimination in College Admissions: The Quest for Equal Educational Opportunities*, 56 IOWA L. REV. 209, 212 (1970) where a number of arguments are offered *and rejected* to support classifications based on sex in educational institutions generally, i.e. the expense of altering facilities to provide for female housing, dining and comfort; the prestige of certain all-male institutions, that would be sacrificed by female admissions; the state's interest in providing a sound academic environment free from the daily diversions present at a coeducational school; the popularity of men's schools that keeps attendance figures high; the relative ease of administering a unisexual school as compared with its coeducational counterpart, and a state's interest in ensuring the fiscal solidarity of future family providers by adequately educating its male populace.

[29] *See, The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296, 311 (1970) in which the author disagrees with this analysis and suggests that sex separation is as illegitimate as racial separation.

[30] 270 F.2d 209 (6th Cir. 1959).

schools. The court held that the maintenance of separate segregated schools was antagonistic to the principles of the fourteenth amendment. The court, in part, based its reasoning on the theory that to exclude children of one race from *any* school bred a feeling of inferiority in the children of the minority race.

Applied across the board, the theory of the *Kelley* case requires a monolithic public educational system. At least two very reasonable arguments can be made to support the theory that there is no such constitutional requirement in every area of possible discrimination. One is that rulings such as *Kelley* are based on the pragmatic fact that in the case of public schools in southern states, a real choice cannot be made available. If all-white schools were provided, no white would attend the non-segregated school. Thus any choice offered to black students would be wholly illusory. Really this is not a constitutional but a factual argument. If, as seems evident, where co-education is made available as an alternative, it will not fail for lack of either males or females, there is no practical and, it is submitted, no constitutional reason for denying a choice to those who prefer one-sex schools. In "Jane Crow and the Law: Sex Discrimination and Title VII," [31] Murray and Eastwood support such a proposition by suggesting that, in the area of sex discrimination, only classifications which treat men and women differently are invalid and that those which treat them separately are not. In their discussion of the effect of an abandonment of the classification by sex doctrine (that is, the doctrine that classification on the basis of sex is permissible *per se*), they say:

> A second category of law or official practice that would not become invalid if the "classification by sex" doctrine were discarded are those that do not treat men and women differently, but only separately: for example, separate dormitory facilities for men and women in a state university or separate toilet facilities in public buildings. Unlike separation of the races in our culture separation of the sexes in these situations carries no implication of inferiority for either sex.[32]

In other words, the conclusion that racially segregated schools are inimical to the well-being of one class of citizens is not a constitutional conclusion but a factual one. And there is no evidence to support a similar factual conclusion in the case of sexually segregated schools, particularly when co-educational institutions are available.[33]

At present, the greatest concern in this area is that of providing women with equal educational opportunities.[34] As a policy matter, as-

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[31] Murray & Eastwood, *Jane Crow and the Law*, 34 GEO. WASH. L. REV. 232, 240 (1965).

[32] *Id.* at 240.

[33] There is little in the way of conclusive research in the area of coeducational as opposed to segregated education. Although the trend is toward coeducation as witnessed by its adoption by such schools as Yale and Princeton, the motivation seems to be toward attracting better students and on the basis student preference. *See* PATTERSON COMMITTEE REPORT RE PRINCETON (Fall, 1968). One study of high school students indicates that there is a value in sex segregated schools. KOLESNIK, CO-EDUCATION: SEX DIFFERENCES AND THE SCHOOL (1969).

[34] *See supra* note 12.

suming women are disadvantaged, the question is: what is the appropriate educational system to provide such opportunities? In the early years after *Brown v. Board of Education,* a color blind theory of education was generally accepted.[35] Must a sexually neuter theory of education be also accepted? In the lag to catch up with racial discrimination, sex discrimination has skipped a generation of educational thinking. The *Brown* theory is now being challenged, at least in respect to discrimination which may be *in favor* of a minority group. Demands for ethnic studies programs and separate living facilities are becoming the rule, not the exception. White students have been excluded from an all-black studies program at Antioch College, and Northwestern University has an all-black dormitory.[36] Affirmative action programs and quotas favorable to minorities are given wide consideration. It has been said:

> It can safely be predicted that this is only the beginning of the coming struggle over ethnic studies programs and whom they are to include and exclude. The ethnic studies problem may require some modification of the *Brown* doctrine and its immediate predecessor cases dealing with higher education as the Supreme Court may find that the law of the 1950's does not fit the demands made by minority groups of the 1970's. Several law professors have already suggested that *Brown v. Board of Education* may be lapsing into "irrelevance." [37]

There may be a legitimate and constitutional function for one-sex schools, especially those for women, so long as societal assumptions and attitudes deny the equality of women both as to their talents and as to their aspirations. If the "black studies" development is a criterion, the elimination of women's colleges may well be only the prologue to a demand that they be immediately reinstated.

The debate here is not whether the overly simplistic view, expressed in *Brown,* has or has not contributed to the educational standards of the country as a whole. (In fact it clearly has done so.) The point is that, assuming the validity of the standards set forth in *Brown* by the Supreme Court, there is no need, either legal or factual, to apply those standards to sex separation in education.[38] The plain fact is that "separate educational facilities" are *not* "inherently unequal" as applied to sexually segregated institutions. If the choice of sexually segregated or non-sexually segregated education is, as a factual matter, available to all, and all other circumstances are equal, it is apparent that the United States Constitution does not inhibit the offering of that choice.

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[35] *See supra* note 18, at 1089.

[36] Avins, *Black Studies, White Separation and Reflected Light on College Segregation and the Fourteenth Amendment From Early Land Grant College Policies,* 10 WASHBURN L. J. 181, 182 (1971).

[37] *Id.* at 183.

[38] In higher education legislation introduced in Congress this session, two measures which would otherwise ban discrimination on the basis of sex assume the constitutionality of certain sexual discriminations. H. R. 5191 would except situations where valid reasons for discrimination exist and H. R. 7248 would exempt all schools which are presently one sex.