CHALLENGE TO SINGLE-SEX SCHOOLS UNDER EQUAL PROTECTION: *MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN*

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Eleven years ago, in *Reed v. Reed*,[1] the Supreme Court established that sex-based discrimination is "subject to scrutiny under the equal protection clause."[2] The cases since *Reed* have reaffirmed that principle, but have failed to resolve definitively two important underlying issues: first, the constitutionally appropriate level of scrutiny;[3] and second, the extent to which the Court will look behind assertedly benign classifications[4] to assess their actual impact on women. Last Term, in *Mississippi University for Women v. Hogan*,[5] the Court addressed both of these issues in a challenge to the admissions policy of an all-female nursing school, and held that the policy violated the equal protection clause of the fourteenth amendment.[6] In doing so, the Court reasserted the propriety of an "intermediate level"[7] of judicial scrutiny for sex-based classifica-

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[1] 404 U.S. 71 (1971).

[2] *Id.* at 75.

[3] Until *Reed*, equal protection analysis was bifurcated into "strict scrutiny," under which suspect classifications such as race and national origin were examined, and the less exacting "rational basis" test, under which economic and social welfare legislation was reviewed. This two-tier arrangement yielded fairly predictable outcomes: legislation was generally upheld if examined for a rational basis, but invalidated if subjected to strict scrutiny—unless the law served a compelling state interest that could be served in no other way. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076–1132 (1969). The manipulability of this approach to constitutional adjudication has been recognized even by the Court. *See* Rostker v. Goldberg, 453 U.S. 57, 69–70 (1981) ("[L]evels of 'scrutiny' may . . . all too readily become facile abstractions used to justify a result.").

In *Reed*, the Court for the first time applied a "heightened" level of scrutiny to classifications based on sex. *See* Comment, *Plessy Revived: The Separate But Equal Doctrine and Sex-Segregated Education*, 12 HARV. C.R.-C.L. L. REV. 585, 626–27 (1977).

[4] "Benign" classifications are those which extend benefits to historically oppressed groups. *See generally* Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978); Kanowitz, *"Benign" Sex Discrimination: Its Troubles and Their Cure*, 31 HASTINGS L.J. 1379 (1980).

[5] 102 S. Ct. 3331 (1982).

[6] *Id.* at 3340, 3341.

[7] *See infra*, text accompanying notes 37–42.

tions and indicated that under such a test even purportedly "benign" institutions such as single-sex schools will not automatically pass constitutional muster.

Mississippi University for Women (MUW) has excluded male students since its inception in 1884.[8] Although the state of Mississippi operates two other nursing schools, both of which are coeducational,[9] Joe Hogan applied to MUW because of its proximity to his Columbus, Mississippi, home;[10] to attend either of the other two schools would have meant relinquishing seven years of seniority at a hospital job where he was then a nursing supervisor.[11] Hogan was, not unexpectedly, refused admission to MUW on the basis of his gender.[12] The federal district court denied Hogan injunctive relief on the grounds that MUW's policy was rationally related to the state's goal of providing women with diverse educational opportunities, and therefore did not violate the fourteenth amendment.[13] The Fifth Circuit reversed, holding that the "rational basis" test was inappropriate for sex discrimination cases, and that MUW's exclusion of men failed to meet a higher level of scrutiny which demanded a "substantial relationship" to the state's mission of providing for the education of all its citizens.[14]

In a 5-4 decision, the Supreme Court affirmed. Writing for the Court, Justice O'Connor[15] explained that, as a preliminary matter, it was of no constitutional significance that MUW discriminated against men rather than women.[16] *Any* statute that "classifies individuals on the basis of their gender must carry the burden of show-

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[8] MUW is the oldest single-sex public college or university in the United States. 102 S. Ct. at 3334.

[9] 102 S. Ct. at 3342 n.1 (Powell, J., dissenting) (quoting Brief for Respondent at 3).

[10] MUW is located in Columbus, while the other two schools are 147 and 178 miles distant. Brief for Respondent at 3.

[11] Brief for Respondent at 3 & n.6. In addition, Hogan would have had to sell his house and move his family. *Id.* Justice Powell, in his dissent, unfairly trivialized the level of hardship involved when he claimed that Hogan's "primary concern is personal convenience." 102 S. Ct. at 3342 (Powell, J., dissenting); *cf.* Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (" 'absence of an insurmountable barrier' will not redeem an otherwise unconstitutionally discriminatory law").

[12] The parties agreed, by stipulation, that Hogan was otherwise qualified for admission. Hogan v. Mississippi University for Women, 646 F.2d 1116, 1117 (5th Cir. 1981).

[13] 102 S. Ct. at 3334 (summarizing unreported district court opinion reproduced in Petition for Certiorari app. at A3).

[14] 646 F.2d at 1118-19.

[15] Justice O'Connor was joined by Justices Brennan, White, Marshall, and Stevens. Chief Justice Burger filed a brief dissent, as did Justice Blackmun. Justice Powell filed a dissenting opinion in which Justice Rehnquist joined.

[16] 102 S. Ct. at 3336.

ing an 'exceedingly persuasive justification' for the classification."[17] This burden, Justice O'Connor stated, could be carried "only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[18] This two-part test was first articulated by the Court in *Craig v. Boren*,[19] and has become the standard for deciding sex discrimination cases.

In accordance with the standard delineated in *Craig*, the Court required a demonstration by the state that its objective in excluding men is not only important but legitimate; it cannot reinforce "archaic and stereotypic notions" about protecting women because they are "innately inferior."[20] Furthermore, the state must show a "direct, substantial relationship"[21] between the asserted objective and the means chosen to attain it. To survive judicial scrutiny, that relationship must be based on "reasoned analysis" rather than on "traditional, often innacurate assumptions about the proper roles of men and women."[22] Moreover, the Court must determine that there is not a "more germane basis" for classification than the sex-based classification under review.[23]

Applying this analysis to the admissions policy at MUW, Justice O'Connor concluded that neither ends nor means withstood the test. The state had claimed that its objective in excluding men was "educational affirmative action,"[24] but Justice O'Connor correctly noted that no compensatory purpose could be served when the benefited class (women) had never been underrepresented in the nursing profession.[25] Indeed, by contributing to the *over*representation of

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[17] *Id.* (citing Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

[18] 102 S. Ct. at 3336 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

[19] 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge,...classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

[20] 102 S. Ct. at 3336.

[21] *Id.* at 3337.

[22] *Id.* (footnote omitted).

[23] *Id.* (citing Craig v. Boren, 429 U.S. 190, 198 (1976)).

[24] The state raised this claim for the first time in the Supreme Court proceedings. As the respondent noted, "the eleventh-hour nature of these contentions reflect[s] on their merit.... To raise these contentions here for the first time seriously prejudices Hogan, who has had no occasion or opportunity to present contrary evidence or to cross-examine the 'experts' now relied upon by petitioners." Brief for Respondent at 10-11 (citations omitted).

[25] 102 S. Ct. at 3339. " '[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.' " *Id.* at 3338 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)).

women, the Court pointed out, MUW's policy may have had the perverse effect of reinforcing the stereotype of nursing as "women's work," thereby reducing the income of nurses.[26] Justice O'Connor found, in addition, that even if the asserted purpose were credible, the critical link between means and ends was missing: "the record in the case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals."[27] Citing the inadequacy of ends and means, and the questionable relationship between them, the Court concluded that "the State has fallen far short of establishing the 'exceedingly persuasive justification' needed to sustain the gender-based classification."[28]

In a brief dissent, Chief Justice Burger argued that the Court's holding was limited to public nursing schools.[29] Because of the majority's reliance on the female domination of the nursing profession as an important factor in its decision, he suggested that the Court might rule otherwise if the school in question were a business or liberal arts college.[30] Justice Blackmun's dissent warned, however, of an "inevitable spillover" into other educational arenas.[31] In his view, all state-supported single-sex schools may now be in "constitutional jeopardy," even where the state provides those students who are excluded with an equivalent program elsewhere.[32]

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[26] 102 S. Ct. at 3339 n.15. In addition to its effect on the pay scales in traditionally female fields of work, job segregation tends to reduce the status of those jobs. *See* S. ROSS, THE RIGHTS OF WOMEN 36-37 (1973) (quoted in Brief for Amici Curiae, National Women's Law Center at 23-24).

[27] 102 S. Ct. at 3340.

[28] *Id.* In a brief section of the majority opinion, the Court also dealt with the state's claim that a statutory exemption for single-sex undergraduate institutions, § 901(a)(5) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(5) (1976), immunizes MUW's admissions policy from equal protection scrutiny. Justice O'Connor disposed of this contention by pointing out that while § 5 of the 14th amendment gives Congress the power to enforce the amendment's protections, " '§ 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.' " 102 S. Ct. at 3340 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966)).

[29] 102 S. Ct. at 3341 (Burger, C.J., dissenting). None of the Justices called attention to the fact that MUW was the only remaining public nursing school in the United States that did not admit men. Brief of Amici Curiae, National Women's Law Center, at 1. Therefore, if *Hogan* really is limited to its facts, the case will have essentially no reach at all. A more expansive reading of *Hogan* would reach only a little farther; even if *Hogan* applies to all public colleges and universities (as Justice Powell feared it might, 102 S. Ct. at 3342 (Powell, J., dissenting)), there is only one single-sex public college or university in the United States besides MUW—Texas University for Women. *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 115 n.39 (1982) (citing N.Y. Times, July 2, 1982, at A1, col. 1).

[30] 102 S. Ct. at 3341 (Burger, C.J., dissenting).

[31] 102 S. Ct. at 3341 (Blackmun, J., dissenting).

[32] *Id.*

Justice Powell, also dissenting, contended that single-sex education continues to be a legitimate preference of many students.[33] Pointing to diversity as a distinctive element of American political culture, Justice Powell found in MUW's admissions policy an "important governmental objective" – not affirmative action, but freedom of choice.[34] By depriving women of an opportunity to choose a coeducational or single-sex school, the majority, according to Justice Powell, would narrow the horizons of women in the name of expanding them. Although he maintained that "rational basis" analysis was the appropriate standard for deciding this case,[35] Justice Powell asserted that MUW's policy of preserving educational choice easily survives the higher standard called for by *Craig* and relied on by the majority.[36]

As the vote and opinions in *Hogan* indicate, a consensus on the extent to which the Constitution prohibits sex-based classifications continues to elude the Court. In its early civil rights decisions of the 1950's and 1960's, the Court was able to marshall more coherent doctrine and a unanimous commitment to end at least the most blatant forms of race discrimination. In its sex discrimination decisions of the past decade, however, the Court has fared less well. Not only has its commitment to equality of women been less than unequivocal, the Court has also failed to reach agreement on the basic underlying questions raised by *Hogan*: (1) What is the appropriate level of scrutiny in challenges to sex-based classifications under the equal protection clause? (2) Are some classifications "benign," and therefore not violative of the fourteenth amendment? and (3) Is single-sex education an example of such a "benign" classification?

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[33] 102 S. Ct. at 3343-44 (Powell, J., dissenting). One reason for that preference, in Justice Powell's view, is the exposure to same-sex role models and mentors. *Id.* at 3343. Although appealing in theory, this advantage is little more than illusory as applied to MUW, where every university president since the school's inception has been male, and where "the [u]niversity's administration and faculty are male-dominated." Brief for Respondent at 6.

[34] 102 S. Ct. at 3346 (Powell, J., dissenting).

[35] *Id.* Justice Powell made this assertion in spite of the fact that both Hogan *and* MUW had identified the *Craig* test, *see infra* text accompanying notes 37-42, and not a "rational basis" test, as the appropriate standard. Brief for Petitioner at 10; Brief for Respondent at 8.

[36] 102 S. Ct. at 3346 (Powell, J., dissenting). Since by definition the maintenance of MUW's single-sex policy bore a substantial relationship to MUW's asserted goal of providing women with a more diverse range of educational choices, Justice Powell's analysis was complete before it was even begun. As Justice O'Connor pointed out, "[t]he issue is *not* whether the benefited class profits from the classification," *id.* at 3340 n.17 (emphasis added); the issue is whether the classification is directly related to a legitimate and substantial governmental purpose—in MUW's case, providing more diversity for all students rather than for women alone.

1. *The* Craig *test*

The Court has failed to settle on the type of scrutiny required by the Constitution in sex discrimination suits. In *Reed* and several other cases of the early 1970's,[37] the Court called for a "heightened" rational basis scrutiny.[38] In fact, in *Frontiero v. Richardson*,[39] the Court fell only one vote short of declaring sex to be a suspect classification.[40] After *Frontiero*, both the Court and commentators recognized the emergence of an "intermediate" level of equal protection scrutiny.[41] In *Craig* the Court defined this new standard, holding that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[42]

Although the *Hogan* Court reaffirmed the *Craig* test, it did so by only one vote. In earlier cases *Craig* had been solidly endorsed by unanimous[43] and nearly unanimous[44] Courts. *Hogan* and two other very recent cases,[45] however, point in the opposite direction—a return to less exacting scrutiny. The importance of the *Craig* test for those seeking to eliminate sex discrimination is apparent: the extent to which legislatures are permitted to make laws which differentiate between men and women may in large measure be determined by the level of scrutiny invoked by the Court. If *Craig* falls, however, it may be attributable as much to the inherent weakness of the test itself as to the general retrenchment of the Court on fourteenth amendment protections.

The principal shortcomings of the test are the vagueness and utter manipulability of its terms. In *Hogan*, for example, the state's

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[37] *See, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

[38] *See supra* note 3.

[39] 411 U.S. 677 (1973).

[40] Justices Douglas, Brennan, Marshall, and White joined in the plurality opinion which called for strict scrutiny of classifications based on sex. Justice Powell argued in a dissenting opinion that the submission (in 1973) of the Equal Rights Amendment to the states for ratification made the Court's consideration of the issue ill-advised. Under that analysis, the recent expiration of the ratification deadline may provoke the Court to retreat even further from consideration of strict scrutiny.

[41] *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 17 (1975); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12, 17-20 (1972).

[42] 429 U.S. 190, 197 (1976).

[43] *See* Kirchberg v. Feenstra, 450 U.S. 455 (1981); Califano v. Webster, 430 U.S. 313 (1977).

[44] *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980).

[45] Rostker v. Goldberg, 453 U.S. 57 (1981); Michael M. v. Superior Court, 450 U.S. 464 (1981).

"objective" was first said to be the one relied on in the district court proceedings below: the education and advancement of its female students.[46] When this objective was held by the court of appeals to be constitutionally infirm, MUW's goal became "educational affirmative action" to compensate for past discrimination.[47] The Supreme Court found that this objective, too, was unpersuasive, but in Justice Powell's dissent the school's purpose was transmogrified once more; "freedom of choice" was pointed to as the animating spirit of MUW's policy.[48] With each change, a closer fit was reached between stated objective and challenged practice.[49] But what can be said for the integrity of a standard which allows for such extravagant second-guessing? If defendants are not bound by their previous assertions of purpose, and the Court is willing to join in the search for replacements when those purposes are found wanting, the *Craig* test loses any semblance of rigor.

The second part of the *Craig* test—examining the "substantial relationship" between a sex-based classification and its asserted purpose—suffers from the same indeterminacy and manipulability as the first part of the test. In *Hogan* the Court was not called upon to weigh the substantiality of this relationship because, in the majority's view, the relationship was in fact the opposite of the one asserted by MUW. In other cases, however, the Court has evaluated this relationship by standards which remain unarticulated and which hardly inspire confidence in the process as one of principled decisionmaking.[50]

The indeterminacy of the *Craig* test is attributable to the indirect method by which it seeks to enforce equal protection. As Professor Ely has observed, that method is to "smoke out" discriminatory intent by examining the "fit" of asserted goals and legislated means.[51] Where the two do not match closely, and an otherwise impermissible classification has been made, the Court will infer an improper motive. The advantage of this method is that it avoids the evidentiary difficulties of proving intent.[52] Yet one might question whether intent,

[46] 646 F.2d 1116, 1118 (5th Cir. 1981).

[47] 102 S. Ct. at 3337-38; *see supra* note 24.

[48] 102 S. Ct. at 3342 (Powell, J., dissenting).

[49] Similarly, in *Michael M.*, the justification for California's statutory rape law was held to be the prevention of pregnancy, 450 U.S. at 470, although this purpose had been unknown throughout the statute's 130 year history. *Id.* at 495 n.10 (Brennan, J., dissenting).

[50] *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (Congressional exclusion of women from military draft held to be substantially related to national defense despite Defense Department recommendation that women be included).

[51] J. ELY, DEMOCRACY AND DISTRUST 145-48 (1980).

[52] *Id.*

rather than effect, should be the focus of the inquiry.

Indeed the strength of Justice O'Connor's opinion consists in its assessment of the concrete *effects* for *women* of creating barriers for men who seek professional training as nurses.[53] Her analysis produced a sound decision because it avoided a mechanical application of equal protection principles, under which she might have reached the same result by focusing on Hogan's interest in attending the school of his choice.[54] By grounding her opinion instead on the realization that perpetuating female predominance in occupations like nursing[55] actually undermines the interests of women, Justice O'Connor took the promising step of applying equal protection analysis in a way that challenges the substantive consequences of sex discrimination.[56]

2. *Benign classifications*

Based on its finding of female domination of the nursing profession, the *Hogan* Court found that the exclusion of men at MUW was not a benign classification.[57] Justice O'Connor's reliance on that fact, emphasized by Chief Justice Burger in his dissent,[58] suggests that the Court may be willing to approve classifications similar to MUW's in circumstances which indicate that the protected class is truly benefited. Moreover, the Court reaffirmed the principle announced in *Schlesinger v. Ballard*[59] that granting preferential treatment to women is constitutionally acceptable within certain limits.[60]

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[53] *See supra* note 26 and accompanying text. Justice Powell was surely disingenuous in suggesting that MUW's policy could have no such effect because MUW's School of Nursing has only been in existence for eleven years. *See* 102 S. Ct. at 3346 (Powell, J., dissenting).

[54] Justice Powell, in his dissent, argues that the Court *should* have focused its inquiry on Hogan's equal protection rights rather than on those of the nursing students at MUW, none of whom had intervened in the action. 102 S. Ct. at 3342, 3345 (Powell, J., dissenting). (The MUW Alumnae Association did file an amicus brief opposing Hogan's admission.) In Justice Powell's view, of course, Hogan's "inconvenience" falls short of having constitutional significance. *See supra* note 11.

[55] In 1970, the year before MUW's School of Nursing was founded, 98.6% of all nursing degrees were awarded to women. 102 S. Ct. at 3339.

[56] *See generally* C. MacKinnon, Sexual Harassment of Working Women 116–18 (1979) (arguing that purpose of equal protection clause in sex discrimination case is rectification of actual harm to women, rather than perpetuation of existing differential treatment).

[57] 102 S. Ct. at 3339; *see also supra* note 4. Although not mentioned in the majority opinion, the Court was also presented with evidence of MUW's discriminatory hiring practices, *see supra* note 33, and sex-stereotyped course offerings. Brief for Amicus Curiae, National Women's Law Center at 32–33.

[58] 102 S. Ct. at 3341 (Burger, C.J., dissenting).

[59] 419 U.S. 498 (1975).

[60] 102 S. Ct. at 3338 ("In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that [historically has been] disproportionately burdened." (citations omitted)).

The *Hogan* Court's definition of benign classifications seems to depend on two factors: actual benefit to the protected class and a credible "compensatory purpose."[61] Justice O'Connor properly warned against purportedly benign legislation that is based on paternalistic stereotypes.[62] As the Court has recognized in the past,[63] the reinforcement of those stereotypes is an inherent risk of sex-based classifications. Indeed some commentators have argued that *all* benign classifications impede sexual equality and should therefore be impermissible.[64] Support for this position comes from the observation that assertedly protective measures often have a correspondingly disabling aspect. In its decisions since *Reed*, however, the Court has upheld a variety of measures which help to compensate for the effects of past discrimination,[65] and *Hogan* indicates, both explicitly and implicitly, that the Court probably will continue to do so.

The *Hogan* opinions do not inspire much confidence, however, that the Court's definition of benign classifications will be a useful one for feminists. Justice O'Connor's opinion, for example, relies on the "compensatory" function of benign classifications. Under this view benign legislation will pass muster only when the Court can discern a prior wrong in need of rectification. Yet because the Court frequently finds it difficult to see men and women as similarly situated for equal protection purposes,[66] it often takes a narrow view of its duty to rectify sex discrimination. One might fear, therefore, that the Court will take a correspondingly narrow view of its duty to validate compensatory schemes.

The dissenters' views are even less promising. Justices Powell and Blackmun, for example, consider MUW's policy "benign" — and therefore no affront to equal protection — because it conforms to an "honored tradition" which gives women the benefit of diversity in their choice of schooling.[67] There are several problems with this optimistic view.

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[61] *See id.*

[62] *Id.* at 3336.

[63] *See* Orr v. Orr, 440 U.S. 268, 283 (1979).

[64] *See generally* Kanowitz, *supra* note 4.

[65] *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975) (adjustment in Navy tenure rules upheld on basis that they compensate for promotion barriers to women); Kahn v. Shevin, 416 U.S. 351 (1974) (property tax exemption for widows upheld on basis that it served to compensate for economic discrimination against women).

[66] *See, e.g*, Geduldig v. Aiello, 417 U.S. 484 (1974); *see also* C. MacKinnon, *supra* note 57, at 107–16.

[67] 102 S. Ct. at 3347 (Powell, J., dissenting) ("[T]he practice of voluntarily chosen single-sex education is an honored tradition in our country. . . [and] is legitimate because it is completely consensual. . . ."); 102 S. Ct. at 3342 (Blackmun, J., dissenting)).

First, it is clearly a mistake to assume that women, or men, have unlimited freedom of choice as to the school they attend. Many students are forced, as Joe Hogan was, to attend school where their families or jobs are located. Moreover, the notion that a woman's decision to attend a sex-segregated school is truly voluntary is deeply undercut by the reality, recognized even by Justice Powell, that one of the factors that make single-sex schools attractive for women is the sexist treatment they receive at coeducational schools.[68]

Second, separate schools for women have historically been significantly inferior to comparable male facilities.[69] This second-class status may affect not only the self-esteem of students who attend women's schools, but their careers and salaries as well.[70]

Third, the Justices' invocation of ancient tradition on behalf of single-sex schools[71] probably does more to undermine the legitimacy of the schools than to bolster it. Women's schools were originally founded in the United States because of the exclusion of women from the established colleges and universities, and bore an unmistakable stigma on that account.[72] Their curricula, moreover, were defined by traditional, stereotyped notions of "women's place."[73] To the extent that women's schools have transcended these limitations, they have generally done so in spite of their heritage rather than because of it.

Given the disadvantages which both coeducational *and* sex-segregated schools have had for women, the argument that diversity or freedom of choice is a good in and of itself begs the question. "Choice" is relatively unmeaningful for women when the range of options is largely determined by men.[74] Under such circumstances,

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[68] 102 S. Ct. at 3344 n.5 (Powell, J., dissenting) (quoting Brief for Amicus Curiae, Mississippi University for Women Alumnae Association at 2-3); *see also* Rich, *Toward a Woman-Centered University*, in WOMEN AND THE POWER TO CHANGE 15, 20 (F. Howe ed. 1975), *reprinted in* A. RICH, ON LIES, SECRETS, AND SILENCE 125 (1979).

[69] *See* Comment, *supra* note 3, at 611.

[70] *Id.* at 611, 621.

[71] 102 S. Ct. at 3341 (Blackmun, J., dissenting) ("[I]t is easy to go too far...in this area of *claimed* sex-discrimination, and to lose—indeed destroy—values that mean much to some people.") (emphasis added); 102 S. Ct. 3342 (Powell, J., dissenting) (single-sex schools provide "an element of diversity that has characterized much of American education and enriched much of American life").

[72] *See* Oates & Williamson, *Women's Colleges and Women Achievers*, 3 SIGNS 795, 796 (1978).

[73] *See* Comment, *supra* note 3, at 618-19.

[74] *See id.* at 619 n.157, 645.

"benign" may be an inappropriate description of any form of sex segregation.

3. *Single-sex schools*

To social scientists the relative advantages and disadvantages of women's colleges pose an unsettled question. Justice Powell was able to cite two authorities for the proposition that single-sex schools benefit women students,[75] but several others which cast doubt on the proposition could have been cited.[76] There is no convincing evidence one way or another of the relative academic achievement of women at single-sex schools, as compared with women at coeducational institutions.[77] With respect to the claim that women's schools provide positive role models for women, the evidence is also ambiguous. On the one hand, women are far more likely to be taught by women professors at a single-sex college;[78] on the other hand, male predominance in the tenured and administrative positions at these schools undermines the colleges' claim that they are modelling female professional accomplishment.[79]

As a legal matter the status of single-sex schools is also unsettled, even after *Hogan*. *Brown v. Board of Education*[80] struck down the "separate but equal" doctrine as applied to race. As applied to sex, however, the doctrine is still alive, although *Hogan* casts some doubt on its future.[81] *Hogan* is reminiscent of *Brown* in the sense that

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[75] *See* 102 S. Ct. at 3343–44 (Powell, J., dissenting).

[76] *See, e.g.*, Oates & Williamson, *supra* note 72; Comment, *supra* note 3, at 638–41.

[77] *See* C. JENCKS & D. RIESMAN, *Feminism, Masculinism and Coeducation*, in THE ACADEMIC REVOLUTION 291, 307 & n.26 (1968).

[78] Sandler, *A Feminist Approach to the Women's College*, Speech before the Southern Association of Colleges for Women (Nov. 30, 1971), *reprinted in* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 1016, 1018 (1975).

[79] *See* Harris, *The Second Sex in Academe*, 56 A.A.U.P. BULL. 283 (1970) ("Of the Seven Sisters colleges...only Wellesley has more female than male faculty in tenured ranks and in chairmanships."), *quoted in* Comment, *supra* note 3, at 640 n.264.

[80] 347 U.S. 483 (1954).

[81] In two earlier decisions, both announced without opinion, the Court approved public single-sex schools, but only where equivalent alternatives were available nearby. *See* Vorchheimer v. School District, 532 F.2d 880 (3d Cir. 1976), *aff'd mem. by an equally divided court*, 430 U.S. 703 (1977); Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971).

The Fifth Circuit in *Hogan* suggested that MUW's policy would have survived equal protection scrutiny if the state had provided a separate nursing college for men. 646 F.2d at 1119. Justice O'Connor expressly reserved this question, however. 102 S. Ct. 3334 n.1.

each Court invoked principles of social science to justify its decision. One might, then, predict that the precedential value of *Hogan* will depend on the extent to which the teaching of *Brown*—that under present social conditions, segregation reinforces subjugation—is applied to sex as well as race. The *Hogan* Court did apply this teaching. Indeed, without such a basis for intervention, there would be no reason, as Justice Burger pointed out in dissent,[82] to invalidate women's professional or liberal arts schools, or a school in any field that had not been traditionally dominated by women.

Challenges to such schools may well be forthcoming. The pending attempt, for example, to strip racist schools like Bob Jones University of tax-exempt status[83] may provoke similar challenges to the tax-exempt status of private women's colleges. Yet it is far from clear that such challenges would promote women's equality; even if the verdict on such colleges is not unequivocally positive, neither is there any reason to conclude that women are better served by coeducation.

Moreover, there may be an important role to play for feminist education which empowers women students by challenging patriarchal values. Indeed, the possibility of a woman-centered institution offering a feminist education may be especially important in fields like nursing, where the segregation of women has traditionally limited women's income and power. The record in *Hogan* makes it fairly clear that MUW's nursing school was not an example of such a model.[84] Indeed, few existing women's colleges could presently be said to exemplify this feminist vision. Yet the seeds of this vision may exist within the present structure of many women's schools. The Court is to be commended for giving MUW's program a hard look, but a more deferential posture might be appropriate when considering women's schools which more effectively advance the best interests of women.

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[82] 102 S. Ct. at 3341 (Burger, C.J., dissenting).

[83] Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981) (No. 81-3).

[84] *See supra* note 33.