1/19/77

No. 76-37

In the Supreme Court of the United States

OCTOBER TERM, 1976

SUSAN LYNN VORCHHEIMER, PETITIONER

v.

SCHOOL DISTRICT OF PHILADELPHIA AND
MATTHEW W. COSTANZO

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

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-37

SUSAN LYNN VORCHHEIMER, PETITIONER

v.

SCHOOL DISTRICT OF PHILADELPHIA AND MATTHEW W. COSTANZO

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

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the exclusion of females from an all-male public high school with facilities, reputation, and prestige that are better in some respects than those offered by the comparable all-female school violates the Equal Educational Opportunities Act of 1974 and the Equal Protection Clause of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

Congress has declared, as the policy of the United States, that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin." Section 202(a)(1), 20 U.S.C. (Supp. V) 1701(a)(1) (the Equal Educational Opportunities Act of 1974, 88 Stat. 514). Congress found that "the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment." Section 203(a)(1), 20 U.S.C. (Supp. V) 1702(a)(1).

The Equal Educational Opportunities Act, Section 204(c), 20 U.S.C. (Supp. V) 1703(c), provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by," *inter alia*,

> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student.

The Act also states (Section 206, 20 U.S.C. (Supp.

> Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin * * *.

The Act provides for civil suits in federal court by individuals denied equal educational opportunity as defined in the Act (Section 207, 20 U.S.C. (Supp. V) 1706), for suits by the Attorney General on behalf of such individuals (*ibid.*), and for intervention by the Attorney General in suits instituted by individuals (Section 210, 20 U.S.C. (Supp. V) 1709). Thus, the United States has an interest in cases involving the right to equal educational opportunity afforded by the Act.

In addition, Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. (Supp. V) 1681 *et seq.*, prohibits discrimination on account of sex in programs and activities conducted by public high schools receiving federal assistance. On July 21, 1975, Title IX regulations went into effect providing, *inter alia*, that a local educational agency receiving federal assistance may not, on the basis of sex, exclude any person from admission to:

> (b) Any other school or educational unit operated by such recipient [other than vocational schools], unless such recipient otherwise makes available to such person, pursuant to the same

policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

45 C.F.R. 86.35 (see 40 Fed. Reg. 24141). Thus, to the extent that local school districts that receive federal assistance operate single-sex schools that are not comparable with regard to each course, service and facility, Title IX regulations are applicable.[1]

STATEMENT

1. On March 29, 1974, Susan Lynn Vorchheimer, by her parents, filed a class action in the United States District Court for the Eastern District of Pennsylvania under 42 U.S.C. 1983 for declaratory and injunctive relief against the School District of Philadelphia (App. 5a-12a). Plaintiff alleged that the school district had deprived her of equal protection of the laws in violation of the Fourteenth Amendment by denying her admission to Central High School of Philadelphia on account of her sex.[2] Trial was held on May 28-30, 1975, and on August 7, 1975, the district court entered findings of fact and conclusions of law and an order enjoining defendants

[1] Title IX does not cover single-sex admission practices of public high schools *per se*. See 20 U.S.C. (Supp. V) 1681 (a) (1).

[2] Plaintiff also alleged violation of the Equal Rights Amendment of the Pennsylvania Constitution, Article 1, Section 28. However, the court declined to exercise pendent jurisdiction over this claim, since the state courts had not yet clearly defined the applicability of that amendment to the field of education (Pet. App. 55a).

from refusing to admit plaintiff or other members of her class to Central High School solely on the basis of sex (Pet. App. 38a-86a). On March 16, 1976, the court of appeals reversed (Pet. App. 1a-33a).

The School District of Philadelphia operates 22 senior high schools, two of which—Central High School ("Central") and the Philadelphia High School for Girls ("Girls")—are categorized as "academic" high schools. For admission to these schools specific standards must be met (Pet. App. 3a).[3] The only difference in admission criteria between the two academic high schools is that Central accepts only male students and Girls accepts only female students (Pet. App. 3a). The Philadelphia School system does not have a coeducational "academic" high school (Pet. App. 3a).

Central and Girls are the only schools in Philadelphia that draw their student bodies from the entire city. Students who attend "comprehensive" high schools (*i.e.*, schools offering industrial and commercial, as well as college preparatory, courses) generally attend the comprehensive school located in their own neighborhoods. At the time of trial, two of the comprehensive schools were all-male and one was all-female (Pet. App. 45a-46a).

In 1974 petitioner applied for admission to Central. The parties stipulated, and the district court

[3] At the time the suit was brought, students were required to score no lower than the 82d percentile in a national achievement test and present a superior junior high school record (Pet. App. 39a).

found (Pet. App. 55a), that had petitioner been a boy, she would have qualified for admission to Central.[4] Her application was rejected, however, solely because of her sex (Pet. App. 41a-42a).

2. The district court did not find a pervasive difference in the facilities and courses offered by the two schools. The court made general findings that the academic facilities at Central and Girls High are comparable, and that the courses offered at Girls are similar, and of equal quality, to those offered at Central (Pet. App. 45a). The court did find, however, that the scientific facilities at Central High School are superior to those at Girls.

In addition, the district court made extensive findings regarding the reputation and accomplishments of each school. The court found that from its founding "Central has consistently maintained a reputation for academic excellence" (Pet. App. 42a) and that (Pet. App. 42a):

> During the nineteenth century members of [Central's] faculty were nationally known physicists and English stylists. Its graduates have risen to the top of the business world, the professions, politics, and academia.

The court also found that (Pet. App. 43a):

[4] Upon graduation from junior high school, petitioner received the school's awards in English, history, science, and geometry, the American Legion Award for citizenship and scholarship and the most outstanding student award (Pet. App. 41a).

> Many men who are currently prominent in the professional, political, and cultural life of the city and state are graduates of Central. Central has a deserved reputation for training men who will become local and national leaders in all fields of endeavor.

The court further noted that Central's academic standing and reputation as "a training ground for community leaders" had attracted the attention of national figures including Presidents (Pet. App. 43a-44a). Moreover, Central High School has an active and loyal alumni association which, the court found, "is an influential group in Philadelphia, both because of its activities as a group and the individual positions held by its members" (Pet. App. 44a). Central is the only high school in Philadelphia with a substantial private endowment (Pet. App. 45a).

The district court found that Girls High has had a large number of prominent graduates in the field of business and the professions, including three local judges and the first vice-president of the American Medical Association (Pet. App. 44a). The court also found, however, that the number of Girls High graduates who have become influential in the community did not approach the number of influential graduates of Central (Pet. App. 44a).

The district court held that the policy of denying all females admission to Central High deprived them

of equal protection of the laws.[5] Finding that the policy "has an adverse impact on [petitioner] and on other women" (Pet. App. 83a), the court concluded that the evidence did not demonstrate that the classification bore " 'a fair and substantial relationship' to the School Board's legitimate interests" (Pet. App. 84a). Rejecting the argument that exclusion of male students from Girls High neutralized the discrimination, the court stated: "[T]his argument overlooks [petitioner's] expressed desire to attend Central, a desire which, in light of Central's history and reputation, does not seem frivolous or eccentric" (Pet. App. 82a-83a). The court also noted that "the existence of Girls does not satisfy [petitioner's], or any other girl's, desire to attend a coed academic school" (Pet. App. 83a).[6]

3. A divided panel of the court of appeals reversed. Viewing the issue in this case as whether single-sex schools are *per se* impermissible under the Constitution and the Equal Educational Opportunities Act of 1974,[7] the court of appeals concluded that they are not.

---

[5] The statutory issues in this case were not raised or considered in the district court. They were first discussed at the request of the court of appeals.

[6] The court noted that "[t]he result of defendants' policy of excluding young women from Central is to deny them the opportunity to attend a coeducational, academically superior, public high school" (Pet. App. 83a).

[7] The court defined the question as follows (Pet. App. 2a):

> Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational? Stated another way, do our Constitution and laws forbid the maintenance by a public school board, in a system otherwise coeducational, of a limited number of single-sex high schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal?

At the outset, the court of appeals attempted to set forth "[a] fair summary of the parties' positions" (Pet. App. 5a) including, among other things, that "the schools for boys and girls are comparable in quality, academic standing, and prestige * * *" (*ibid.*) and that "the deprivation asserted is that of the opportunity to attend a specific school, not that of an opportunity to obtain an education at a school with comparable academic facilities, faculty and prestige" (*ibid.*). The court also stated that "[petitioner] prefers to go to the boys' school because of its academic reputation and her personal reaction to Central. She submitted no factual evidence that attendance at Girls High would constitute psychological or other injury" (*ibid.*).

Addressing the statutory question, the court of appeals held that the Equal Educational Opportunities Act of 1974 did not require dismantling of all schools segregated on the basis of sex. The court noted that the Act specifically referred to sex as an impermissible basis for classification in certain provisions but omitted it in other provisions, and stated: "Insofar, then, that the Equal Educational Opportunities Act of 1974 might have application to established single-sex schools, the legislation is at best ambiguous"

(Pet. App. 9a). Turning to the legislative history of the Act, the court found "no indication of Congressional intent to order that every school in the land be coeducational and that educators be denied alternatives" (Pet. App. 11a).

The court specifically found Section 204(c), 20 U.S.C. (Supp. V) 1703(c)—which prohibits "the assignment * * * of a student to a school, other than the one closest to his or her place of residence * * *, if the assignment results in a greater degree of segregation of students on the basis of * * * sex * * *"—to be inapplicable to this case.[8] In the court's view, that section was concerned with the preservation of neighborhood schools and demonstrated a policy "against assignment of students to non-neighborhood schools to achieve segregation on any of the forbidden bases" (Pet. App. 10a). The court concluded, without explanation, that "[w]e do not here face an attempt by a school board" to make such a prohibited assignment (Pet. App. 10a).

The court also found no constitutional grounds for dismantling the single-sex schools. Stating that petitioner had not alleged "a deprivation of an education equal to that which the school board makes available to boys" (Pet. App. 12a) or the operation of a quota system or differential admission standards, the court observed that "[i]f there are benefits or detri-

[8] The court also reviewed other provisions of the Act (not including Section 206) and concluded that they were inapplicable to this case (Pet. App. 10a).

ments inherent in the system, they fall on both sexes in equal measure" (Pet. App. 13a). The court held that *Sweatt* v. *Painter*, 339 U.S. 629, and *Brown* v. *Board of Education*, 347 U.S. 483, are inapplicable to this case because "[r]ace is a suspect classification under the Constitution, but the Supreme Court has declined to so characterize gender" (Pet. App 13a). Instead, the court gave great weight to this Court's summary affirmance of *Williams* v. *McNair*, 316 F. Supp. 134 (D. S.C.), affirmed, 401 U.S. 951, in which a three-judge court upheld against constitutional attack South Carolina's exclusion of men from one of its several state colleges. The court concluded that, whether the sex classification involved here is measured by the rational basis test or the "fair and substantial relationship" test applied by the district court, the exclusion of female students from Central High School is constitutionally permissible.

In dissent, Judge Gibbons argued that the Equal Educational Opportunities Act of 1974 prohibited sex segregated public schools such as Central (Pet. App. 19a-26a). He also urged that such schools are prohibited by the Equal Protection Clause of the Fourteenth Amendment.

DISCUSSION

I. THE EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974 PROHIBITS THE ASSIGNMENT OF A STUDENT TO A SUBSTANTIALLY LESS ADVANTAGEOUS SCHOOL SOLELY ON THE BASIS OF SEX

The Equal Educational Opportunities Act of 1974 on its face addresses the problem of sex discrimination in education at several points. Section 202(a)(1) of the Act, 20 U.S.C. (Supp. V) 1701(a)(1), declares, as the policy of the United States, that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, *sex*, or national origin * * *" (emphasis added). Section 203(a)(1), 20 U.S.C. (Supp. V) 1702(a)(1), states: "The Congress finds that * * * the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, *sex*, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment" (emphasis added). It is thus clear from these preliminary provisions that Congress was specifically concerned with denials of equal educational opportunity and found that, at least in some circumstances, assignment of students to schools solely on the basis of sex would be a denial of equal protection of the laws.

Certain practices involving assignment of students by reason of sex are declared unlawful in Sections

204 and 206 (20 U.S.C. (Supp. V) 1703, 1705). Section 204, 20 U.S.C. (Supp. V) 1703, provides:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, *sex*, or national origin, by—
>
> * * * * *
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, *sex*, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student * * *. [Emphasis added.]

This provision by its terms applies only to the assignment of a student to a school other than the school nearest to his or her home, where the result of the assignment is greater segregation constituting a denial of equal educational opportunity.

Section 206, 20 U.S.C. (Supp. V) 1705, states in relevant part:

> Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is

> not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, *sex*, or national origin * * *. [Emphasis added.]

In contrast to Section 204(c), this section concerns only assignments to the nearest school and does not make such assignments unlawful unless the purpose of the assignment is to segregate students on an impermissible basis.

Read together, Sections 204(c) and 206 primarily evidence a congressional intent to encourage the assignment of students to neighborhood schools except in certain specified circumstances. Since Congress had declared in Section 202, as the policy of the United States, not only that equal educational opportunity should be afforded without regard to race, color, sex, or national origin, but also that "the neighborhood is the appropriate basis for determining public school assignments" (Section 202(a)(2), 20 U.S.C. (Supp. V) 1701(a)(2)), Congress logically would wish to prohibit assignments of students to more distant schools that resulted in greater segregation. But to reconcile the occasionally competing policies set forth in Section 202, Congress also provided that assignments to the nearest school, while generally permissible, are not lawful where the purpose of the assignment is to increase segregation. In short, Congress made clear that a neighborhood school policy, while normally to be favored, could not serve as a justification for deliberate segregation.

The schools involved are not neighborhood schools, and the record does not disclose whether Central High School is nearer to petitioner's home than Girls High, the academic school to which petitioner was effectively assigned by her rejection at Central High, or vice versa. Petitioner is therefore entitled to seek relief under either Section 204(c) or Section 206, but not both. If she, and the class members she represents, are required to attend the *farther* academic school solely because they are female, the case invokes Section 204(c), since such assignments "[result] in a greater degree of segregation of students on the basis of * * * sex" than would result from random assignment to the nearest academic school. On the other hand, if petitioner, and the class members, are being assigned to the *nearest* academic school, Section 206 is invoked since the record leaves no doubt that the assignments are for the purpose of keeping the academic high schools segregated by reason of sex. Respondents have made no pretense that petitioner was denied admission to Central High because it was not the nearest academic school.

The fact that petitioner's decision to attend an academic high school, and Central High in particular, is voluntary does not make the provisions of the Act inapplicable.[9] Both Section 204(c) and Section

---

[9] Petitioner admittedly was qualified to attend an academic high school. Because her application to Central High was rejected solely on the basis of sex, her only opportunity to attend an academic high school was to attend Girls High.

206 speak in terms of assignments to schools providing "the appropriate grade level and type of education for such student."

Moreover, there is no indication that Congress wished school districts to provide equal educational opportunity only for students in standard schools, while assigning more qualified students or students requiring special attention to less advantageous schools on the basis of sex or race. It is more reasonable to suppose that Congress, committed to the principle of equal educational opportunity, wished it to prevail at all levels of an educational system. It is not clear, however, that Congress intended the particular mechanisms of Sections 204(c) and 206 invariably to apply to such assignments (not involving neighborhood schools),[10] for the statute would then arguably [11] preclude any possibility of sex-segregated special schools, even in circumstances where there is no denial of equal educational opportunity. Unless the Court were to hold that sex segregation in public education is, like racial segregation, inherently unequal and hence unconstitutional (see point II, *infra*, pp. 21-29), such a construction of the Act would raise a serious constitutional question concerning the extension to this context of the principle of congressional authority under Section 5 of the Fourteenth Amendment adopted by this Court in *Katzenbach* v. *Morgan*, 384 U.S. 641, in a context involving a significant nexus with governmentally furnished (or approved) education in the Spanish language in Puerto Rico. Cf. *Oregon* v. *Mitchell*, 400 U.S. 112.

In light of the seriousness of that constitutional question and the fact that the focus of congressional

---

Once petitioner chose to attend an academic high school and was deemed qualified, therefore, she was effectively assigned to Girls High as the only alternative to attending her neighborhood comprehensive high school.

In any event, the term "assignment" has commonly been used to mean placement in a particular school, regardless of whether or not the student attended the school voluntarily. See Section 401(b) of Title IV of the Civil Rights Act of 1964, 78 Stat. 246, as amended, 42 U.S.C. (Supp. V) 2000c(b); *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 433 (free choice plans); The Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964 (H.E.W. publication (1968)) (free choice plans). Were the term construed to include only involuntary assignments, the Act would not be applicable to freedom of choice plans that resulted in greater segregation than would result in a system of neighborhood schools, a result that Congress hardly can have intended.

[10] Although there is no explicit reference to neighborhood schools in the operative provisions of Sections 204(c) and 206, the heading of the latter section is "Assignment on Neighborhood Basis not a Denial of Equal Educational Opportunity" (88 Stat. 515, 20 U.S.C. (Supp. V) 1705).

[11] Another possibility for a narrowing construction of these two provisions (which would apply as well to standard, neighborhood schools) would be to read the introductory language of Section 204, that "[n]o State shall deny equal educational opportunity" as limiting the circumstances in which the prohibitions of Section 204(c) and (through Section 206's cross reference "to the other provisions of this subchapter") Section 206 apply.

concern in the 1974 Act was on remedies for constitutional violations, rather than on extension of the constitutional prohibitions, we have concluded that the Act should not be construed, at least in the present context of special system-wide schools (see n. 10, *supra*), as intended to prohibit sex segregation that does not independently constitute a denial of equal protection of the laws (through denial of equal educational opportunity) within the meaning of Section 1 of the Fourteenth Amendment.

As the court of appeals noted (Pet. App. 6a-9a), Congress considered the issue of single-sex public schools in 1972 and declined to prohibit them. Title IX of the Education Amendments of 1972, 20 U.S.C. (Supp. V) 1681 *et seq.*[12] The bill that became Title IX, as passed by the House, would have required all single-sex schools to become coeducational; the Senate bill, which was enacted, was amended to exempt the admissions policies of certain institutions (including single-sex public high schools) on the ground that information regarding those institutions was incomplete. 118 Cong. Rec. 5807 (1972) (remarks of Senator Bayh). Two years later, Congress changed its course and prohibited, at least in some circumstances, the segregation of students by sex.[13] The legislative

[12] Title IX generally forbids discrimination in education on account of sex. The admission practices of public schools segregated by sex *per se*, however, are expressly excluded from its coverage (20 U.S.C. (Supp. V) 1681(a)(1)).

[13] These provisions of the 1974 Act are virtually identical to provisions contained in the Equal Educational Opportunities Act of 1972, which was passed by the House, but defeated in the Senate (H.R. 13915, 92d Cong., 2d Sess. (1972)). The court below found that "significantly," the term "sex" was deleted from certain provisions of the 1972 bill before it was passed on the floor of the House (Pet. App. 9a). However, as the dissent below pointed out (Pet. App. 24a-25a), there was an apparent error in the Committee Report relied upon by the majority (H.R. Rep. No. 92-1335, 92d Cong., 2d Sess. (1972)), which conflicts with the language of the bill actually reported out of committee and read by the Clerk on the floor of the House. 118 Cong. Rec. 28883 (1972).

history of the 1974 Act, however, casts no light on this decision; the House and the Senate devoted principal attention to the provisions of the Act intended to limit the use of busing as a remedy for racial segregation in the schools.

While this history does not, in our view, suggest that Congress intended to expand the constitutional standards concerning sex discrimination, the Act does indicate a congressional concern to afford a comprehensive remedy for denials of equal educational opportunity on the basis of sex. Indeed, in 1974 Congress also recognized in other ways the disadvantages faced by women in public education and was concerned with providing remedies. In Title IV of the Education Amendments of 1974, 88 Stat. 484,[14] entitled the Women's Educational Equity Act of 1974, 88 Stat. 554, 20 U.S.C. (Supp. V) 1866, Congress expressly found that "* * * educational programs in the United States * * * are frequently inequitable as such programs relate to women * * *"

[14] The Equal Educational Opportunities Act of 1974 constituted Title II of the Education Amendment of 1974.

(20 U.S.C. (Supp. V) 1866(b)(1)), provided for grants to correct educational inequities (20 U.S.C. (Supp. V) 1866(d)), and established an Advisory Council on Women's Educational Programs to advise the Commissioner of Education (20 U.S.C. (Supp. V) 1866(f)). Moreover, the Senate Committee report on the bill that became Public Law 93-380 stated (S. Rep. No. 93-763, 93d Cong., 2d Sess. 79 (1974)):

> The Committee concluded that a more vigorous and focused Federal role should be taken in eliminating the widespread sex discrimination in education; and that the Women's Educational Equity Act, by providing support for affirmative action programs, would enhance the prospects of full implementation of Title IX.

The provisions of the Equal Educational Opportunities Act of 1974 show that Congress gave discerning attention to the problem of denial of equal opportunities on the basis of sex. Although the court of appeals found it anomalous that sex was omitted from the coverage of Section 204(a), 20 U.S.C. (Supp. V) 1703(a), which prohibits "deliberate segregation * * * of students on the basis of race, color, or national origin *among or within* schools" (emphasis added), that exclusion is entirely reasonable in view of the possibility that Section 204(a) could be read to eliminate separate facilities (such as locker rooms) or classes (such as gym classes) *within* coeducational schools. Indeed, Section 204(a) must be read in conjunction with Section 221(c) of the Act, 20 U.S.C. (Supp. V) 1720(c), (not cited by the

court of appeals), which defines "segregation" as "the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin or *within a school* on the basis of race, color, or national origin" (emphasis added).

Accordingly, we conclude that the 1974 Act provides a remedy in the present case if, and only if, petitioner was denied the equal protection of the laws, within the meaning of Section 1 of the Fourteenth Amendment. We turn now to a discussion of the appropriate criteria for adjudicating that question.

II. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS THE ASSIGNMENT OF STUDENTS TO SEPARATE HIGH SCHOOLS ON THE BASIS OF SEX, WHERE THE SCHOOLS DO NOT AFFORD SUBSTANTIALLY EQUAL EDUCATIONAL OPPORTUNITIES

This Court has recently stated that "[t]o withstand constitutional challenge, * * * classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren*, No. 75-628, decided December 20, 1976, slip op. 7. Without question the classification at issue in this case is a "classification by gender," for the school authorities stipulated, and the district court found (Pet. App. 55a), that "[p]laintiff has been denied admission to Central solely because of her sex."

On the other hand, although racially segregated "educational facilities are inherently unequal" (*Brown* v. *Board of Education*, 347 U.S. 483, 495), neither this Court nor Congress has declared that sex segregation in educational facilities is inherently unequal. Indeed, as we have shown, the Equal Educational Opportunities Act of 1974 appears to recognize the permissibility of sex segregation in some educational programs within a school. And this Court's summary affirmance in *Williams* v. *McNair*, *supra*, apparently upheld a state's adoption of particular, or various, theories of educational philosophy as a justification for denial of admission to a particular institution on the basis of sex, so long as substantially equal educational opportunities were afforded. The findings and record before the Court in the present case do not provide an adequate basis for a determination that that standard of constitutional flexibility, permitting non-invidious experimentation in methods of achieving educational objectives, is no longer appropriate. Compare *Brown* v. *Board of Education*, 345 U.S. 972, decided, 347 U.S. 483. Accordingly, we believe the pertinent constitutional inquiry here is whether petitioner, and the class she represents, have been afforded educational opportunities substantially equal to those available for students admitted to Central High School, and we turn now to that question.

Although the district court found that "the education available to the female students at Girls is comparable to that available to the male students at Central" (Pet. App. 45a), the district court also

recognized that very real differences exist between the two schools. The findings of fact, none of which was disturbed by the court of appeals, establish that Central High School has superior science facilities, a more extensive library, a more prominent body of graduates, an enhanced reputation, and a greater endowment. Insofar as physical facilities are concerned, the district court found (Pet. App. 45a), and the court of appeals recognized (Pet. App. 3a), that Central has scientific facilities superior to those found at Girls. Indeed, Central possesses the first classroom planetarium built in any high school in the country, and a student built cyclotron (App. 39a-40a). The school's libraries are also considerably different in size.[15]

Other distinctions between the two schools are more subtle and are intertwined with the historically disparate roles of the sexes in the community. The district court found that Central has a "deserved" reputation for training men who will become local and national leaders in all fields of endeavor (Pet. App. 43a). The Central Alumni Association is an influential group in Philadelphia, "both because of its

---

[15] Although the two schools now have faculties and student bodies of approximately equal size (Pet. App. 3a), Central's library contains more than 50,000 volumes (App. 39a) while the library at Girls High contains only 30,000 volumes (R.M. Klein, Tr. 223). No finding indicates, however, whether these figures reflect a practical difference in educational opportunity rather than, for example, a larger proportion of obsolete volumes at Central, which is the older of the two schools.

activities as a group and the individual positions held by its members" (Pet. App. 44a). While the district court found that persons of note also had graduated from Girls, it further stated that "the number of Girls High graduates who have become influential in business, professional, or academic affairs does not approach the number who have graduated from Central * * *" (*ibid.*). The record also indicates that Girls High has an alumni association whose members contribute financially to the school; however, "Central High is the only high school in Philadelphia with a substantial private endowment" (Pet. App. 45a). Finally, as the district court found, the dedication and loyalty of Central's alumni, "whether measured by financial contributions or day-to-day participation in matters related to the school, equals the loyalty of many college alumni to their alma mater" (Pet. App. 44a). The court made no such finding with regard to Girls High.

These distinctions are closely related to a history of state-supported segregation by sex. When Central High School was founded in 1836, the Philadelphia school system unquestionably was engaging in deliberate discrimination against young women. At that time Central was the only public high school in Philadelphia (Pet. App. 42a). During at least part of the nineteenth century, therefore, female students had no opportunity to attend a public high school.[16] Although

[16] Females were allowed to attend Central for a time in the mid-nineteenth century:

> An innovation of Dr. Hart's administration was the

Girls High School was established in 1893 as a secondary school for girls, its antecedent was a teachers' training school founded in 1848 (App. 9a, 14a).[17] Another distinction between Central and Girls, begun in the nineteenth century, and continued to the present, is that Central, unlike Girls, or any other high school in the Philadelphia public school system, confers a Bachelor of Arts Degree upon its graduates (App. 9a, 15a).[18]

> whom were teachers in the lower schools and part "some of the more advanced pupils in the girls' Grammar Schools." Dr. Hart's notice is dated October 21, 1844, and marks the beginning of the first and only period during a regular school year when girls were educated within the halls of Central High.
>
> Cornog, *School of the Republic* 17 (1952) (Plaintiff's Exhibit 7).
>
> This innovation in 1844 marked the beginning of public higher education of women in Philadelphia. The Saturday classes were continued until 1851, when the work was taken over by the Girls' Normal School, which had been established three years before. Thus, although Central High School was never a co-educational institution (except for the summer school sessions begun in 1922), it rendered valuable service during a period of seven years in qualifying women for their work as teachers.
>
> *Hand Book of the Central High School of Philadelphia,* The Mary Gaston Barnwell Foundation 214 (1955).

[17] One of the expert witnesses for the School District of Philadelphia testified that in her opinion there were "fairly common lay attitudes" in the nineteenth century that girls schools should, among other things, prepare women students "for docile homemaking roles" (Tr. 106, testimony of M. Elizabeth Tidball).

[18] The Act of Assembly of Pennsylvania of April 2, 1849 provides that:

These differences are in some respects reminiscent of those involved in this Court's decision, more than twenty-five years ago, in *Sweatt* v. *Painter*, 339 U.S. 629. There, the Court held that a black student could not be denied admission to the University of Texas Law School, from which he had been barred because of his race, where the State had not provided a substantially equivalent alternative. Discussing the relative merits of the University of Texas Law School and the newly formed black law school at Texas State University for Negroes, this Court observed (339 U.S. at 633-634):

> Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas

---

The Controllers of the Public Schools of the First School District of Pennsylvania shall have and possess power to confer academic degrees in the arts upon graduates of the Central High School, in the City of Philadelphia, and the same and like power to confer degrees, honorary, and otherwise, which is now possessed by the University of Pennsylvania.

The degree is the functional equivalent of a high school diploma (App. 15a), but it is symbolic of the special status of Central High.

> Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

The Court then rejected the suggestion that a policy of mutual exclusion somehow saved the segregated plan (339 U.S. at 634-635):

> It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those held open to petitioner. That such a claim, if made, would be dishonored by the State, is no answer. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948).

Sweatt v. *Painter* was decided prior to this Court's holding in *Brown* v. *Board of Education*, *supra*, that racial segregation in education is inherently unequal. For this and other reasons, we believe that similar considerations are pertinent in determining whether

a state has unconstitutionally denied equal educational opportunities on the basis of sex.

There are, however, important differences between the disparities in the opportunity for a professional education and subsequent professional employment found in *Sweatt* and the disparities involved here—differences which have not adequately been addressed in the findings below. We are, for example, uninformed about whether the existing disparities between the two schools in science and library facilities have any practical effect on the graduates' employment opportunities or, what is probably more pertinent, opportunities for college preparation, admissions and scholarships—or whether the constitutionality of those disparities must instead be assessed solely on the basis of differences in the opportunities for high school students to pursue their immediate intellectual interests.

Similarly, we do not know whether the differences found in the prestige of the two schools meaningfully affect employment opportunities—especially in the professions principally discussed in this record, which ordinarily require preparatory higher education. The findings below do not, for example, provide a basis for determining whether professional opportunities would likely be any different for two women with identical college and graduate school records at the same university and identical high school records, if one were a graduate of Girls and the other a graduate of Central. To the extent that any professional disadvantages for graduates of Girls High

result instead only from sex prejudice in the community, petitioner's complaint in this regard would seem to raise only an issue concerning the possibility that sex stereotypes in the community are reinforced by the city's sex segregated high schools—an issue which could be regarded as having greater political than constitutional dimension, especially in light of the fact that women are not a political minority.

We conclude, therefore, that the findings in this case do not provide an adequate basis for adjudication on the merits by this Court and suggest that the Court may wish to consider remanding the case for pertinent further findings and, if appropriate, the hearing of additional evidence on which to base those findings.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 227403 42