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United States v. Virginia

The United States Supreme Court held in *United States v. Virginia*, 116 S. Ct. 2264 (1996), that the Equal Protection Clause of the Fourteenth Amendment forbids a state from offering a unique educational opportunity to one gender when no comparable opportunity is provided for the excluded gender. The Court rejected the Commonwealth of Virginia's proffered justification that the exclusion of women from the Virginia Military Institute furthered the Commonwealth's important interest in providing diversity in the educational choices offered to its residents. The Court's decision requires a government to advance an "exceedingly persuasive justification" to sustain disparate treatment based upon gender.

In 1839, the Virginia General Assembly established the Virginia Military Institute ("V.M.I.") as one of this country's first state military colleges. Since its inception, V.M.I. has been maintained by the Commonwealth of Virginia, subject to the control of that state's legislature. In furtherance of its stated mission of producing "citizen-soldiers" for roles of leadership in public life, V.M.I. consistently refused to admit women as cadets. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the Supreme Court held that Mississippi's exclusion of otherwise qualified males from a state-sponsored school of nursing

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By Marshall Perkins

solely on the basis of gender violated the Equal Protection Clause. Following that decision, V.M.I. appointed a committee to study the legality and wisdom of continuing to exclude women. Consonant with that committee's recommendation, however, V.M.I. continued its single-sex admissions policy.

In 1990, the United States Attorney General filed a lawsuit on behalf of a female student denied admission to V.M.I. The complaint alleged that the Institute's exclusively male admissions policy violated the Fourteenth Amendment. After a trial in the United States District Court for the Western District of Virginia, the trial court rejected the United States's equal protection challenge, reasoning that V.M.I.'s continued exclusion of women furthered Virginia's interest of ensuring diversity in an otherwise co-educational system. The United States Court of Appeals for the Fourth Circuit vacated the judgment of the district court. Finding

that the Commonwealth of Virginia had advanced no sufficiently important interest to justify the exclusion of women from V.M.I., the court of appeals remanded the case to allow Virginia to alter V.M.I.'s admissions policy so as not to violate the Equal Protection Clause. Noting that the litigation had not yet come to a final judgment, the United States Supreme Court denied V.M.I.'s petition for writ of certiorari in May of 1993.

Responding to the mandate of the Fourth Circuit, Virginia proposed the Virginia Women's Institute for Leadership ("V.W.I.L.") as a comparable alternative to the education afforded men at V.M.I. Located at Mary Baldwin College, V.W.I.L. would offer a four-year, state-subsidized undergraduate program to approximately twenty-five women. While sharing V.M.I.'s mission of producing "citizen-soldiers," the V.W.I.L. planned to employ a significantly less adversarial means to achieve this end.

Upon remand, the district court concluded that the Commonwealth's V.W.I.L. proposal satisfied intermediate constitutional scrutiny by offering women a comparable educational experience. A divided panel of the United States Court of Appeals affirmed the district court's judgment. The Fourth Circuit reasoned that the potential benefits offered by a V.W.I.L. degree were "substantively comparable" to the ben-

efits offered by a V.M.I. degree. By a margin of one vote, the Fourth Circuit denied an *en banc* rehearing. The Supreme Court then granted both the United States and the Commonwealth of Virginia's petitions for writs of certiorari.

Writing for six justices, Justice Ginsburg began the Court's analysis by identifying the two ultimate issues presented by the case. *Virginia*, 116 S. Ct. at 2274 (Justice Thomas took no part in the consideration or decision of the case). First, did the Commonwealth of Virginia deny the equal protection of the laws guaranteed by the Fourteenth Amendment when it excluded fully capable women from enrolling as cadets at V.M.I., thus denying a unique and extraordinary developmental opportunity? *Id.* Second, if Virginia's denial of this opportunity did violate the Fourteenth Amendment, what is the appropriate remedy? *Id.*

Justice Ginsburg initially reviewed the history of gender discrimination in the United States. *Id.* at 2274-75. The Court observed that traditionally governmental distinctions based upon gender need only survive "rational basis" scrutiny to be constitutionally permissible. *Id.* at 2275. Under current analysis, however, such discrimination must survive the careful scrutiny established by *Hogan* and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). *Virginia*, 116 S. Ct. at 2274-76. The Court enunciated a two-prong test that gender-based exclusionary treatment must satisfy so as not to

violate the Equal Protection Clause. *Id.* at 2275. First, once a *prima facie* claim of gender discrimination has been established, the party seeking to defend governmental classification based upon gender must initially demonstrate an "exceedingly persuasive justification" for the distinction. *Id.* The burden of proving this justification rests entirely with the state. *Id.* Moreover, the justification must be both genuine, rather than an *ad hoc* response to litigation, and may not rely upon overly broad generalizations regarding the differences in talents and capabilities between females and males. *Id.* Second, under intermediate scrutiny, all such gender-based classifications must serve an important state interest, and the discriminatory means employed must be substantially related to achieving that interest. *Id.* (citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

Applying the initial prong of the test, the Court discussed Virginia's two asserted justifications for continuing V.M.I.'s exclusively male admissions policy. *Id.* at 2276. First, the Commonwealth argued that single-gender education provides significant educational benefits, as well as increasing diversity in educational opportunities. *Id.* Second, Virginia contended that V.M.I.'s adversative educational approach would have to be discarded to accommodate the admission of women. *Id.* In rejecting both proffered justifications, the Supreme Court concluded "that Virginia has

shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by V.M.I." *Id.*

In analyzing Virginia's first justification, the Court noted that the Commonwealth's alleged interest in single-sex education bore no resemblance "to 'the actual purpose underlying the discriminatory classification.'" *Id.* at 2277 (quoting *Hogan*, 458 U.S. at 730). Justice Ginsburg observed that, from 1839 through V.M.I.'s reaction to the *Hogan* decision, there was no evidence that indicated Virginia actually sought to evenhandedly advance diversity through an interest in single-gender education. *Id.* at 2277-79. The majority rejected Virginia's "diversity" argument, reasoning that a "genuine" interest in diversity would not be furthered by a policy that only "serves the State's sons, [but] makes no provision whatever for her daughters." *Id.* at 2279. Implicit in this analysis was the determination that Virginia's diversity justification was only an *ad hoc* response to litigation. *See id.* at 2277.

Turning to the Commonwealth's second justification for denying women admittance to V.M.I., the Supreme Court acknowledged alterations would be necessary to accommodate the admission of women to V.M.I., but rejected Virginia's premise that these changes would necessarily "destroy" V.M.I. *Id.* at 2279. The Court cited testimony that *some* women can endure the physical activities required of cadets, as well as the Fourth Circuit's earlier

conclusion that V.M.I.'s adversative methodology is not "inherently unsuitable to women." *Id.* (quoting *United States v. Virginia*, 976 F.2d 890, 899 (4th Cir. 1992)). Finally, the majority hypothesized that the admission of women to V.M.I. could mirror "[w]omen's successful entry into the federal military academies." *Id.* at 2281. Thus, the court rejected the premise that admitting women to V.M.I. would "destroy" the institution because the admission of women as cadets was not in conflict with V.M.I.'s stated mission of producing "citizen-soldiers." *Id.* at 2281-82.

Having concluded that the Commonwealth of Virginia fell short of its initial hurdle of providing the "exceedingly persuasive justification" necessary to justify V.M.I.'s exclusively male admittance policy, the Supreme Court next determined the appropriate remedy for Virginia's constitutional violation. *Id.* at 2282. The Court observed that a remedial decree must closely correspond to the constitutional violation, and must place the disadvantaged parties in the position they would have occupied absent the violation. *Id.* (citing *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)). Noting the relative inferiority of V.W.I.L.'s proposed endowment, military training, student body, faculty, course selection, physical facilities, and alumni network, the Court concluded that a V.W.I.L. degree would be substantially inferior to a V.M.I. degree for the foreseeable future. *Id.* at 2283-85. Indicating that "[t]here is no rea-

son to believe that the admission of women capable of all the activities required of V.M.I. cadets would destroy the Institute rather than enhance its capacity," the Supreme Court held that the Commonwealth of Virginia could not offer qualified women anything less than "a V.M.I.-quality education." *Id.* at 2287.

Concurring with the Court's judgment, but not its reasoning, Chief Justice Rehnquist cited fourteen cases decided since 1976 to support his argument that firmly established precedent required that gender-based discrimination must only bear a close and substantial relationship to an important state interest. *Id.* at 2288. Hence, in Rehnquist's opinion, the majority's requirement that government must demonstrate an "exceedingly persuasive justification" to sustain gender classification unnecessarily "introduces an element of uncertainty respecting the appropriate test." *Id.* Ultimately, however, the Chief Justice agreed with the result reached by the majority since, as proposed, V.W.I.L. "fails as a remedy, because it is distinctly inferior to the existing men's institution and will continue to be for the foreseeable future." *Id.* at 2291.

In dissent, Justice Scalia theorized that V.M.I.'s exclusively male admissions policy satisfied traditional intermediate scrutiny. *Id.* at 2293-94. He accused the majority of introducing the "exceedingly persuasive justification" requirement as the only means by which the court could reach its desired result. *Id.* at 2294-95. Finally, Justice Scalia noted that

the effect of the Court's decision would be to "enshrine[] the notion that no substantial educational value is to be served by an all-men's military academy." *Id.* at 2292.

The decision issued by the United States Supreme Court in *United States v. Virginia* reflected a strengthened commitment to the principle that the Constitution does not permit a state to treat similarly situated individuals differently based upon gender except in the most compelling circumstances. The Court's reasoning, however, arguably raised more questions than it resolved. Significantly, it is neither self-evident nor explained in the Court's opinion how the "exceedingly persuasive justification" requirement differs substantially from the prong of traditional intermediate scrutiny requiring the state to demonstrate an "important governmental interest." Moreover, the majority's analysis provided no guidance as to whether the state must now demonstrate an "exceedingly persuasive justification" in other equal protection categories where the Court has traditionally applied intermediate scrutiny. While the majority opinion suggests a state may engage in gender classification based upon a legitimate interest in diversity, lower courts will have to struggle with whether the breadth of the Supreme Court's reasoning actually permits any circumstances under which a state may legitimately offer a "unique" opportunity to one gender without providing an absolutely comparable alternative to the excluded gender.

