REFLECTIONS ON THE VMI DECISION

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The Supreme Court's decision in United States v. Virginia¹ is a landmark victory for the women's legal movement in a number of respects. In addition to requiring the Virginia Military Institute ("VMI") to open its doors to women and rejecting the use of gender-based stereotypes about women as a group to limit women's opportunities as individuals, the Court applied what may prove to be its strongest legal test yet for sex-based discrimination.² Although some commentators read the decision as a rebuff to the United States government's request that the Court adopt strict scrutiny for gender, the decision in fact strikes a careful balance in crafting a standard with the teeth, if not the name, of strict scrutiny.³ At the same time, the Court's analysis leaves room to justify affirmative action programs that use sex-based classifications designed to remedy, rather than perpetuate, gender stereotypes that limit women's opportunities.

In briefs and oral argument presented to the Court, the United States asked the Court to recognize sex as a suspect class and apply strict scrutiny to sex-based discrimination, even though the adoption of strict scrutiny was not necessary for the United States to win the case.⁴ The amicus curiae brief filed by the National Women's Law Center, ("The Center") and joined by twenty-seven civil rights and women's groups, detailed the case for strict scrutiny and explained why the Court should reach the issue even though a proper application of intermediate scrutiny would yield the same result.⁵ The Center's brief focused on the inability of many lower courts to prop-

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¹ Senior Counsel, National Women's Law Center.
² United States v. Virginia, 116 S. Ct. at 2276.
³ Id.
erly apply the intermediate scrutiny standard, as exemplified by the Fourth Circuit’s decisions in the challenges to the exclusion of women from VMI and the Citadel, among other cases.  

The Center’s brief also discussed a number of anomalies created by the Court’s recent application of strict scrutiny to race-based affirmative action programs, including the fact that, without strict scrutiny for sex discrimination against women, white men would receive greater legal protection in challenges to affirmative action programs designed to remedy race discrimination than women would have against straightforward sex discrimination.  

In addition, because race and gender are often lumped together in local affirmative action programs and evaluated by legislators under the same legal standard, in practice, affirmative action for blacks would be subjected to the highest level of Constitutional scrutiny, while government discrimination against women would receive only intermediate scrutiny.

While the Court stopped short of explicitly adopting strict scrutiny for sex-based classifications, the opinion includes a number of indicators suggesting that the standard applied in VMI is essentially as rigorous as today’s strict scrutiny standard. Indeed, the analysis the Court applied to strike down VMI’s exclusion of women is all but indistinguishable from strict scrutiny.

In rejecting the use of stereotypes to justify the separate women’s Virginia Women’s Institute for Leadership (“VWIL”) program and the exclusion of women from VMI, the Court focused on the denial of opportunity to the individual women who did not fit Virginia’s sex-based generalizations. In evaluating the fit between the exclusion of women from VMI and the state’s interest in using the adversative method at VMI, the Court found that the fit was not sufficiently close. The Court rested this conclusion on the district court’s findings that “some women” may prefer VMI’s methodology to that of VWIL and have the ability to meet all of VMI’s requirements.

By requiring VMI to admit a woman if she has the interest and ability to succeed at VMI, the decision comes very close to applying the

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6. See United States. v. Virginia, 976 F.2d 890 (4th Cir. 1992), aff’d, 44 F.3d 1229 (4th Cir. 1995).
9. Id. at 2283-84.
10. Id.
11. Id. at 2279.
narrowly tailored strict scrutiny standard, requiring a perfect fit between the classification and the state's interest. Justice Scalia seized on the closeness of the fit required to attack the majority for adopting strict scrutiny sub silentio. Justice Rehnquist's concurring opinion also viewed the majority as essentially applying strict scrutiny standard based on its requirement of an "exceedingly persuasive justification" for gender-based classifications. The concurring and dissenting opinions thus provide a gift to women's rights advocates seeking to have courts apply strict scrutiny to sex-based discrimination. Moreover, the majority opinion does not respond to the assertions by Justices Rehnquist and Scalia that the standard applied is higher than the intermediate scrutiny test applied by the Court in the past. Although the Court's silence in the face of these accusations is not dispositive, it provides further support for the increasing proximity between the standard applicable to sex discrimination and strict scrutiny.

The heavy burden the opinion places on states seeking to uphold sex-based classifications is further weighted by the Court's admonition that "[t]he burden of justification is demanding and it rests entirely on the State." In spite of language in Mississippi University for Women v. Hogan ("Hogan") stating that persons seeking to uphold sex-based classifications "must carry the burden of showing an 'exceedingly persuasive justification,'" some post-Hogan courts have placed the burden of proof on the challenger to prove that the classification is unrelated to an important state interest. The Court's statement to the contrary should end such confusion by unequivocally placing the burden on the state to show that the sex-based generalizations on which it relies are not overbroad.

It is also significant, in determining the degree of scrutiny applied by the Court, that the majority did not need to go as far as it did in articulating a standard that requires such a close fit between means

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12. Id. at 2294 (Scalia, J., dissenting).
14. Id. at 2287, 2291.
15. Id. at 2275.
17. Id. at 724.
and ends in order to decide the case. The Court could have found the exclusion of women unconstitutional simply by recognizing, as it did, that the state's interest in educational diversity was not the genuine purpose behind VMI's exclusion of women, and moreover, that such an interest would not be substantially served by denying a unique educational opportunity to women. In addition, because the other interest asserted by VMI, preserving the adversative method, did not rise to the level of an important state interest, the Court could have required VMI to admit women without discussing in greater detail the required fit between the sex-based classification and the asserted governmental interest.

While the genesis of the Court's discussion of the fit between sex-based classifications and the state interest has strong roots in the Court's past cases, including \textit{J.E.B. v. Alabama}, \textit{Hogan}, and \textit{Reed v. Reed}, all of which rejected overbroad generalizations about women's abilities, the \textit{VMI} Court takes this analysis a step further. The majority's discussion suggests that if an individual woman does not conform to the sex-based generalization on which the state has relied, the generalization is overbroad and therefore invalid. The "substantially related" piece of the intermediate scrutiny test is thereby tightened and now appears closer to the "necessary" fit required under strict scrutiny.

The opinion also inched closer to strict scrutiny in its requirement that classifications based on sex be supported by an "exceedingly persuasive justification." Although this language first surfaced in the 1979 decision, \textit{Personnel Administrator of Massachusetts v. Feeney},

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\item \textbf{19.} \textit{Virginia}, 116 S. Ct. at 2283-85.
\item \textbf{20.} Such a ruling would have been fully supported by \textit{Hogan}. As the \textit{Hogan} court recognized, the main issue is whether the state's use of discrimination is substantially related to achieving a legitimate goal rather than whether the benefited class profits from the classification:
\begin{quote}
The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.
\end{quote}
\textit{Hogan}, 458 U.S. at 731 n.17. While Virginia's decision to offer VMI to men only may provide educational diversity to men, as the Court found, it does not justify the denial of such a unique opportunity to women.
\item \textbf{22.} 458 U.S. 718 (1982) (holding that MUW's policy of denying males the right to enroll for credit in its nursing school violated the Equal Protection Clause).
\item \textbf{24.} \textit{Id.} at 2267.
\end{itemize}
and again in Hogan, it had previously been used only to describe the difficulty of demonstrating that the challenged sex-based classification bore a substantial relationship to an important state interest.

In the VMI opinion, however, the majority used the "exceedingly persuasive justification" requirement as a substantive standard in its own right, that appears to be somewhat more stringent than the substantial relationship-important state interest test. The Court referred to the test as "[t]oday's skeptical scrutiny" and emphasized that the state must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives,'" suggesting that the burden may in fact be higher.

In explaining the basis for "[t]oday's skeptical scrutiny," the Court referred to the "long and unfortunate history of sex discrimination" recognized in Frontiero v. Richardson, in which four Justices adopted strict scrutiny for sex-based classifications. After Frontiero, without a fifth vote for strict scrutiny, the Court retreated from a strict scrutiny standard for gender in Craig v. Boren, and fashioned the intermediate scrutiny test. Since Craig, the Court has consistently applied intermediate scrutiny to gender discrimination, although it has explicitly reserved the applicability of strict scrutiny to gender as an open question.

The VMI Court took a further step in closing the gap between intermediate and strict scrutiny by acknowledging similarities in the Court's analysis of racial and sex-based classifications, stating: "Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-Reed decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men)." The Court's implication is

26. 458 U.S. at 718.
27. Feeney, 442 U.S. at 256.
29. Id. at 2274-75.
30. Id. at 2275 (emphasis added) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).
32. 411 U.S. 677, 684 (1973) (holding that sex-based discrimination must be subject to strict scrutiny and that the statutes violate the due process clause).
33. Id.
34. 429 U.S. 190, 197-98 (1976) (emphasizing that to withstand constitutional challenge, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives).
35. See J.E.B., 511 U.S. at 134-44; Hogan, 458 U.S. at 724 n.9.
36. Virginia, 116 S. Ct. at 2275 (emphasis added).
that, at least in some contexts, race and gender classifications will warrant the same legal treatment.

The Court further embellished this suggestion by noting that it has "thus far reserved most stringent judicial scrutiny for classifications based on race or national origin, but last Term observed that strict scrutiny of such classifications is not inevitably 'fatal in fact.'" One plausible reading of this statement is that "thus far" means until today, in this very decision. At a minimum, the Court refused to foreclose the explicit adoption of strict scrutiny to gender-based classifications in the future.38

The strength of the test fashioned by the VMI Court makes it even more difficult for sex-based classifications that discriminate against women to survive constitutional scrutiny—a possible development for women's rights litigators.39 On the other hand, if in fact the Court's decision does raise the level of scrutiny applicable to sex-based discrimination, opponents of affirmative action will argue that sex-based classifications designed to compensate for past discrimination will be subjected to a higher standard of review as well. The Court's opinion, however, goes a long way toward ensuring that the standard crafted still leaves room for sex-based classifications designed to remedy sex discrimination.40

In noting that the Court has "thus far" reserved strict scrutiny for race and national origin, the majority reiterated its observation last term in Adarand that strict scrutiny "is not inevitably 'fatal in fact.'"41 In this statement, the Court not only edges the standards for race and gender closer together by acknowledging that strict scrutiny is not, as it once was thought to be, necessarily fatal, but also supports the continuing viability of affirmative action.42

In addition to suggesting that the application of strict scrutiny to gender would not be fatal in fact, the Court carefully distinguished sex-based classifications designed to remedy discrimination from sex-based discrimination against women.43 The Court acknowledged that sex is not a "proscribed classification," because sex classifications, while not permitted to limit individual opportunity, "may be used to

37. Id. at n.6 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)).
38. Id. at 2276.
39. Id.
40. Id. at 2287.
41. Virginia, 116 S. Ct. at 2275 n.6 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)).
42. Id.
43. Id. at 2276.
compensate women ‘for particular economic disabilities [they have] suffered,’ to ‘promot[e] equal employment opportunity,’ to advance full development of the talent and capacities of our Nation’s people.”

This language approving the affirmative use of sex classifications to compensate for past discrimination is perhaps the broadest the Court has used in recent years to describe valid affirmative action programs.

The Court’s approval of carefully designed affirmative action programs has particular significance for the future of educational programs targeting girls and women in order to compensate for the particular barriers they face. The Court suggests that single-gender programming that is tailored to overcome sex-based obstacles stands on a different footing from all-male programming that does not serve such a compensatory purpose.

In one footnote, the Court approvingly cites an amicus curiae brief filed by twenty-six private women’s colleges, describing the purpose of women’s colleges as “to dissipate, rather than perpetuate, traditional gender classifications.” At another point, in the context of acknowledging the potential benefits of single-gender education, the Court cites a discussion by social scientists that invokes a similar rationale to distinguish all-male from all-female education:

The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges . . . . The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay.

This footnote, coupled with the Court’s analysis of the denial to women of the benefits of VMI, casts a shadow of doubt on the validity of all-male public education, while leaving room to distinguish all-female public education under an affirmative action rationale. Although the Court purports to address only the exclusion of women

44. Id.
46. 116 S. Ct. at 2277.
47. Id. at 2276-77.
48. Id. at 2276 n.7 (citing Hogan, 458 U.S. 718, 720 n.1 (1982)).
49. Id. at 2277 n.8 (quoting CHRISTOPHER JENCKS & DAVID RIESMAN, THE ACADEMIC REVOLUTION 297-298 (1968)).
from a single-gender educational program that is "unique," the Court's detailed analysis of those factors which make a program unique, including a myriad of intangible factors, will make virtually all education programs "unique" because these factors will rarely, if ever, be identical.

All-female education programs, however, even if regarded as "unique" under the Court's analysis, may nevertheless be justified if they are narrowly tailored to serve the state's interest inremedying the persistent sex-based barriers that limit women's opportunities. As more states and localities experiment with single-gender programming for girls, particularly in fields such as math and science where women have been historically underrepresented, the validity of such programs will depend on their ability to demonstrate that they truly serve a compensatory purpose, rather than simply reflect stereotyped notions about male and female roles and abilities. While such programs will be carefully scrutinized in the future, the Court's analysis leaves open the possibility that single-gender programming for a gender that has faced disproportionate barriers will survive constitutional scrutiny.

The implications of the Court's decision extend far beyond all-male military colleges. The VMI ruling sends a clear message to public institutions that traditional stereotypes about women's abilities may not be used to limit an individual woman's access to opportunity. In addition, the level of scrutiny applied to gender-based classifications which discriminate against women has become indistinguishable from the strict scrutiny applied to race and national origin discrimination. The Court's clarification of the standard of scrutiny for gender, and its application to affirmative programs designed to overcome gender-based barriers, may prove to be the most enduring part of the VMI decision and have significant implications for future sex-based discrimination cases.

50. Id. at 2276.
51. Id.