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### Discrimination Cases

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## DISCRIMINATION CASES

*Hon. Leon D. Lazer:*

Let us proceed to another topic which has some relationship in certain respects to Equal Protection. To discuss this topic and the relevant cases, we have Touro's Vice-Dean, who has over the years become a recognized authority in the area of discrimination. Of course, I am referring to Professor Eileen Kaufman.<sup>1</sup> Not only has she become an authority at the law school and indeed at these conferences, but she is the original drafter of the sections of New York Pattern Jury Instructions, the model jury instructions that New York judges use in the course of trying discrimination cases. It is now my pleasure to introduce Professor Eileen Kaufman.

*Professor Eileen Kaufman:*

Thank you. Leon always asks me to speak late in the day, but the *quid pro quo* is that he gives me the best cases to talk about. The Equal Protection<sup>2</sup> cases that I will be describing represent either the finest or the worst moments of the term, depending on your point of view.

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1. Vice Dean and Professor of Law, Touro College Jacob D. Fuchsberg Law Center. B.A., Skidmore College, 1970; J.D., New York University, 1975; L.L.M., New York University, 1992. In addition to serving as Vice Dean and Professor of Law at Touro Law Center, Dean Kaufman has been a Managing Attorney at Westchester Legal Services, Inc. and serves on the New York State Bar Association President's Committee on Access to Justice, and is Reporter for the New York Pattern Jury Instructions. She has published primarily in the area of civil rights law.

2. See U.S. CONST. amend. XIV, § 1. This amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

Last term, the Supreme Court decided three important discrimination cases: one involving age discrimination in the workplace,<sup>3</sup> one involving discrimination against gays and lesbians in the political process<sup>4</sup> and one involving sex discrimination in higher education.<sup>5</sup> Not surprisingly, Justice Scalia figured prominently in all three cases.<sup>6</sup> I will discuss *O'Connor v. Consolidated Coin Caterers Corp.*,<sup>7</sup> the statutory age discrimination case, rather quickly so that we can focus on the two highly controversial equal protection cases of the term, *Romer v. Evans*<sup>8</sup> and *United States v. Virginia*.<sup>9</sup>

The first of these important discrimination cases was *O'Connor v. Consolidated Coin Caterers Corp.* This case arose under the Age Discrimination in Employment Act of 1967<sup>10</sup> [hereinafter "ADEA"].<sup>11</sup> The issue in *O'Connor* was whether a plaintiff, in

3. See *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996).

4. See *Romer v. Evans*, 116 S. Ct. 1620 (1996).

5. See *United States v. Virginia*, 116 S. Ct. 2264 (1996). See also Eric J. Stockel, *United States v. Virginia: Does Intermediate Scrutiny Still Exist?*, 13 TOURO L. REV. 229 (1996).

6. Justice Scalia authored the majority opinion in *O'Connor* and wrote particularly ascerbic dissents in *Romer* and *Virginia*, the two equal protection cases.

7. 116 S. Ct. 1307 (1996).

8. 116 S. Ct. 1620 (1996).

9. 116 S. Ct. 2264 (1996).

10. See 29 U.S.C. § 623 (1985). Section 623(a) states:

(a) It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a).

11. Petitioner was employed by respondent for twelve years before he was fired. *O'Connor*, 116 S. Ct. at 1309. He claimed that he was discharged in violation of the Age Discrimination in Employment Act of 1967 that prohibits the denial of employment opportunities on the basis of age. *Id.* Petitioner, age

an age discrimination suit, must demonstrate that he or she was replaced by someone outside of the protected age category in order to make out a prima facie case under the *McDonnell Douglas Corp. v. Green*<sup>12</sup> framework.<sup>13</sup>

In *McDonnell Douglas v. Green*, a Title VII case, the Supreme Court developed a formula that allocates the burdens and order of presentation of proof in discrimination cases based on circumstantial evidence.<sup>14</sup> Under this formula, a plaintiff must establish the following four elements to make out a prima facie case of discrimination: 1) that plaintiff is a member of a protected group defined by the statute; 2) that plaintiff applied for and was

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56 at the time of his discharge, could not prove that his replacement was a member of a class not protected by the statute. *Id.* at 1310. The Court held that the fact that Petitioner was replaced by someone within the protected class is "irrelevant, so long as he has lost out because of his age. . . . because the ADEA prohibits discrimination on the basis of age and not class membership." *Id.*

12. 411 U.S. 792 (1973). Respondent was employed by petitioner as a mechanic for eight years before he was laid off. *Id.* at 794. Respondent maintained that his discharge was a result of respondent's racially motivated hiring practices and was, therefore, in violation of Title VII of the Civil Rights Act of 1964. *Id.* See generally, 42 U.S.C. § 2000e - 2000e-17 (1988 & Supp. V 1993). Title VII was enacted in response to the nationwide persistence of discrimination against minority groups to eliminate the unfairness and humiliation of discrimination. See, e.g., David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 671 (1995). In *McDonnell Douglas*, respondent was an active participant in a variety of protests at petitioner's manufacturing plant. *McDonnell Douglas*, 411 U.S. at 794-95. The Court found that, while petitioner was able to justify its reasons for discharging the respondent, the respondent must be afforded an opportunity to refute petitioner's reason for his discharge as a mere pretext. *Id.* at 804. The case was remanded to the District Court because respondent was not given a "full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision." *Id.* at 805.

13. *O'Connor*, 116 S. Ct. at 1309. While the *McDonnell Douglas* framework has traditionally been applied to plaintiffs bringing Title VII discrimination actions, it has also been applied to ADEA cases. *Id.* at 1310. Therefore, in order to make out a claim under the ADEA, petitioner must make a prima facie showing under this framework. *Id.*

14. *McDonnell Douglas*, 411 U.S. at 804.

qualified for a position for which the employer was seeking applicants; 3) that plaintiff did not receive the position; and 4) that after the rejection, the position remained open and the employer continued to interview applicants possessing plaintiff's qualifications.<sup>15</sup> These four elements must be adapted for discharge or promotion cases. Once the plaintiff makes this initial four part showing, the burden of production shifts to the employer to articulate a "legitimate, nondiscriminatory reason for the employer's rejection."<sup>16</sup> After the employer attempts to explain its reasons for the discharge, the plaintiff has the opportunity to establish that the employer's proffered reason was merely a pretext for discrimination.<sup>17</sup>

In *O'Connor*, plaintiff, age 56, claimed that he was discharged because of his age in violation of the ADEA.<sup>18</sup> He had no difficulty establishing the first three *McDonnell Douglas* elements.<sup>19</sup> Clearly, he was a member of the age group protected by the ADEA, he was discharged, and at the time of his discharge he was performing his job at a level that met his employer's expectations.<sup>20</sup> However, he was unable to meet the burden of proving the fourth element because his replacement was also within the protected age group proscribed by the ADEA.<sup>21</sup> Thus, the issue became whether a *prima facie* claim of discrimination requires that the replacement be outside the protected class.<sup>22</sup> The Court concluded that it does not.<sup>23</sup>

15. *Id.* at 802.

16. *Id.*

17. *Id.* at 804.

18. *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1309 (1996).

19. *Id.*

20. *Id.* The ADEA protects all persons who are at least 40 years of age. See 29 U.S.C. § 631(a) (1985 & Supp. 1996). Petitioner, at the time of his discharge, was 56 years old, and well within the protected class enumerated in the statute. *O'Connor*, 116 S. Ct. at 1309.

21. *Id.* Plaintiff's replacement was 40 years old. *Id.*

22. *Id.* at 1310.

23. *Id.* The Court noted that "the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* *prima facie* case." *Id.*

According to the Court, in order to determine whether an inference of discrimination exists, the proper inquiry should be whether the plaintiff was replaced by someone *substantially younger*, not whether plaintiff was replaced by someone outside the protected group.<sup>24</sup> The Court reasoned that “the fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*.”<sup>25</sup>

An important question that arises from *O'Connor* is whether or not this principle will be applied to other discrimination statutes, particularly race or sex discrimination claims arising under Title VII.<sup>26</sup> The central rationale of *O'Connor* seems to be equally applicable to cases involving race or gender discrimination although there is already disagreement in the circuits about the applicability of *O'Connor* to Title VII. For example, in *Carson v. Bethlehem Steel Corporation*,<sup>27</sup> a case involving race discrimination under Title VII,<sup>28</sup> the Seventh Circuit held that *O'Connor* applies and that a Title VII plaintiff need not allege that the replacement was outside the protected class.<sup>29</sup> The Court reasoned that:

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24. *Id.* The Court illustrated this distinction by comparing a 40 year old who is replaced by a 39 year old to a situation where a 56 year old is replaced by a 40 year old worker. *Id.* In the former circumstance, the replacement is outside the protected class but a one year age difference would hardly support an inference of age discrimination. *Id.* Whereas, in the latter situation, a 16 year age difference may signify age discrimination even though both individuals are within the protected class. *Id.*

25. *Id.*

26. Title VII is aimed at eliminating employment discrimination “against any individual with respect to his compensation, term, conditions, or privileges in employment, because of the individual’s race, sex, color, religion, and national origin.” 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. V 1996)

27. 82 F.3d 157 (7th Cir. 1996).

28. Plaintiff, a white female, brought suit against her former employee claiming that her discharge was in violation of Title VII. *Id.* at 158.

29. *Id.* at 158. The court noted that the relevant inquiry was “whether the employee would have taken the same action had the employee been of a *different race* . . . and everything else had remained the same.” *Id.* (emphasis added).

[a]n employee may be able to show that his race or another characteristic that the law places off limits tipped the scales against him, without regard to the demographic characteristics of his replacement. . . . That one's replacement is of another race, sex or age may help to raise an inference of discrimination, but it is neither a sufficient nor a necessary condition.<sup>30</sup>

However, the Sixth Circuit, in dicta, has indicated that the *O'Connor* reasoning does not apply with equal force to sex discrimination cases.<sup>31</sup> Ultimately, the Supreme Court is likely to decide the scope and reach of the *O'Connor* holding.

The two Equal Protection discrimination cases decided last term are among the most symbolically and practically significant decisions of the Court in recent years. The first case, *Romer v. Evans*,<sup>32</sup> involved a challenge to Amendment 2 of the Colorado State Constitution, which prohibited the State of Colorado and its political subdivisions from enacting any statute, regulation, ordinance or policy designed to protect homosexual persons from

30. *Id.* at 158-59. The Seventh Circuit hypothesized an employer who retains black workers only in the top quarter of its labor force on a yearly basis but keeps white employees at the top half. This employer is engaging in racial discrimination which is not purged if, thereafter, the employer has another black employee. *Id.*

31. *See Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996) (holding that, even though the plaintiff met the four element test of *McDonnell Douglas*, the defendant was able to prove that their decision not to promote plaintiff was not based on sex, but rather that plaintiff lacked necessary computer skills), *cert. denied*, 117 S. Ct. 683 (1997).

32. 116 S. Ct. 1620 (1996). Respondents challenged the constitutionality of the State of Colorado's Amendment 2 on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1623. The effect of Amendment 2 was to prohibit any governmental entity from adopting any statute, ordinance, rule or policy that barred discrimination based sexual preferences. *Id.* at 1624. Respondents alleged that Amendment 2 would "subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation." *Id.* Petitioners maintained that Amendment 2 only denies homosexuals preferential treatment. *Id.* The majority of the Court ruled that Amendment 2 puts homosexuals in a "solitary class . . . [and] withdraws from [them], but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Id.* at 1625.

discrimination.<sup>33</sup> The Amendment withdrew from gays and lesbians “specific legal protection from the injuries caused by [private and governmental] discrimination.”<sup>34</sup> Further, Amendment 2 forbade such anti-discrimination laws, which had already been enacted in Denver, Aspen and Boulder, to be reinstated.<sup>35</sup> Thus, while the proponents of Amendment 2 linguistically described the amendment as denying special rights, Amendment 2 did just the opposite; it imposed a special disability on this group alone because no other group must amend the State constitution in order to obtain protection against discrimination.<sup>36</sup>

In a 6-3 decision, Justice Kennedy, writing for the majority, subjected the legislation to rational basis review,<sup>37</sup> the lowest level of judicial scrutiny afforded to equal protection claims.<sup>38</sup> Under the rational basis test, a classification is upheld so long as it bears a rational relation to a legitimate end.<sup>39</sup> Thus, even a law that “seems unwise or works to the disadvantage of a particular group” or is supported by only a tenuous rationale, will, nevertheless, survive constitutional challenge.<sup>40</sup>

However, Colorado’s Amendment 2 could not pass even this most deferential level of scrutiny.<sup>41</sup> The Court could not find a legitimate, nondiscriminatory reason for the classification and noted that this type of broad “disqualification of a class of persons from the right to seek specific protection from the law is

33. *Id.* at 1623.

34. *Id.* at 1625.

35. *Id.*

36. *Id.* at 1626-27.

37. *Id.* at 1627.

38. *See e.g., Heller v. Doe*, 113 S. Ct 2637 (1993) (holding that a state statute that draws classifications involving the mentally retarded and mentally ill are upheld if there is a rational basis between the classification drawn and a legitimate governmental purpose).

39. *Romer*, 116 S. Ct. at 1627.

40. *Id.* The Court stated that “[b]y requiring that a classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.” *Id.*

41. *Id.* at 1628.



unprecedented in our jurisprudence.”<sup>42</sup> The disadvantage imposed on the group was not a by-product of the classification, it was itself the purpose of the classification.<sup>43</sup> The Court concluded that “the inevitable inference raised by Amendment 2 is that the disadvantage imposed was born of animosity toward the class of persons affected.”<sup>44</sup> Justice Kennedy strongly reminded us that, “[i]f the constitutional concept of ‘equal protection’ of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>45</sup>

The majority opinion is as interesting for what it does not say as for what it does say. First, the Court makes no mention of the political process cases, such as *Hunter v. Erickson*,<sup>46</sup> even though that was the basis for the Colorado Supreme Court decision.<sup>47</sup> The Colorado Supreme Court had held that Amendment 2

42. *Id.*

43. *Id.*

44. *Id.* “Amendment 2 . . . make[s] a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing and real injuries that outrun and belie any legitimate justifications that may be claimed for it.” *Id.* at 1628-29.

45. *Id.* at 1628 (*quoting* Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)(emphasis omitted)).

46. 393 U.S. 385 (1969). After the City Council of Akron, Ohio adopted a fair housing ordinance, voters amended the city charter to prohibit any ordinance regulating “the use, sale advertisement, transfer . . . of real property . . . on the basis of race, color, religion or ancestry.” *Id.* at 387. The Court held that a State may not “disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.” *Id.* at 393. Since this was exactly what the City of Akron intended to do, the ordinance violated the equal protection clause and constituted “a real, substantial, and invidious denial of equal protection of the laws.” *Id.*

47. *Romer*, 116 S. Ct 1624. The Colorado Supreme Court found that “Amendment 2 was to be subject to strict scrutiny because it infringed the fundamental right of gays and lesbians to participate in the political process.” *Id.* The Colorado court relied on previous United States Supreme Court decisions in both voting rights cases and cases involving discriminatory restructuring of governmental decision making. *Id.* See *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994).

violated the fundamental right of equal participation in the political process.<sup>48</sup> Second, the majority opinion neither mentions nor cites *Bowers v. Hardwick*,<sup>49</sup> the 1986 decision upholding Georgia's consensual sodomy statute. More about that in a moment. Third, the Court failed to decide whether heightened scrutiny should be applied in Equal Protection challenges based on sexual orientation. Instead, the Court's opinion reflects the approaches advocated in two amicus briefs, one submitted by five constitutional law professors including Lawrence H. Tribe of Harvard Law School<sup>50</sup> and the other by the Human Rights Campaign Fund.<sup>51</sup> The brief filed by the

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48. *Romer*, 116 S. Ct 1624.

49. 478 U.S. 186 (1986). Respondent was charged with committing sodomy with another adult male in the privacy of his home in violation of a Georgia statute forbidding sodomy by any person. *Id.* at 187-88. Hardwick brought suit challenging the constitutionality of the Georgia statute. *Id.* at 188. Hardwick challenged the statute on the basis of substantive due process and the Court framed the issue as whether he had a fundamental right to engage in homosexual sodomy. *Id.* at 191. The Court held that fundamental liberties are either "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Id.* at 194. As such, the Court concluded that homosexual sodomy was not such a liberty under the aforementioned criteria and therefore, the Court upheld the statute against Respondent's substantive due process attack. *Id.* at 196.

50. See Amicus Brief of Lawrence H. Tribe, John Hartley, Gerald Gunther, Phillip B. Kurland and Kathleen M. Sullivan in Support of Respondents, 1995 WL 862021 (No. 94-1039).

51. See Amicus Brief of the Human Rights Campaign Fund, et al., in Support of Respondents, 1995 WL 782809 (No. 94-1039). Amici consisted of a variety of organizations including:

several national organizations dedicated to the protection of civil rights, including the Human Rights Campaign Fund, the National Gay and Lesbian Task Force, the National Lesbian and Gay Law Association, the National Center for Lesbian Rights, the Gay and Lesbian Medical Association, the Union of American Hebrew Congregations, the National Asian Pacific American Legal Consortium, the National Organization for Women and the NOW Legal Defense and Education Fund.

Amici also include state organizations concerned about discrimination, including the Connecticut Women's Education and Legal Fund, Inc., the Gay and Lesbian Law Association of Florida, the Oregon Gay and Lesbian Law Association, Bay Area Lawyers for Individual Freedom,

constitutional law professors argued that Amendment 2 was the rare example of a literal deprivation of equal protection because only gays and lesbians were ineligible for state law protection against discrimination.<sup>52</sup> The brief submitted by the Human Rights Campaign Fund argued that given the state's justifications for Amendment 2, which included the protection of the freedom of association of landlords and employers and the need to conserve law enforcement resources, the amendment could not withstand rational basis review because the amendment was so tremendously over and under inclusive with respect to those objectives. The majority opinion incorporates both theories enumerated in the amicus briefs and, despite its failure to tackle some of the obvious questions prompted by this Amendment, it does establish the principle that governmental discrimination against gays and lesbians will not be upheld when supported only by an animus directed against this particular group.<sup>53</sup>

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, wrote a particularly scathing dissenting opinion.<sup>54</sup> In the very first sentence, Justice Scalia writes "[t]he Court has mistaken a Kulturkampf for a fit of spite."<sup>55</sup> Kulturkampf refers to the conflict between the German imperial government and the Roman Catholic Church in the late 19th century, chiefly over the control of educational and ecclesiastical appointments.<sup>56</sup> In other words, a kulturkampf is a culture struggle and Justice Scalia makes clear which side of this culture war he supports. According to Justice Scalia, Amendment 2 is the result of a cultural debate over whether opposition to homosexuality is as

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Lawyers for Human Rights - the Lesbian and Gay Bar Association of Los Angeles, Orange County Lawyers for Equality Gay and Lesbian, and the Tom Homann Bar Association of San Diego.

*Id.* at \*1.

52. Amicus Brief of Lawrence H. Tribe, et al., 1995 WL 862021, \*3 (No. 94-1039).

53. *Romer v. Evans*, 116 S. Ct 1620, 1627 (1996).

54. *Id.* at 1629 (Scalia, J., dissenting).

55. *Id.* (Scalia, J., dissenting)

56. Kulturkampf is defined as a "conflict between civil government and religious authorities especially] over control of education and church appointments." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 667 (1989).

reprehensible as racial or religious bias.<sup>57</sup> To Justice Scalia, there is nothing objectionable about a “modest attempt by seemingly tolerant Coloradoans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”<sup>58</sup>

Moreover, Justice Scalia found the majority’s reasoning to be inconsistent with *Bowers*. He maintained that if *Bowers* permitted a State to make homosexual conduct illegal, then it must surely be “constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.”<sup>59</sup> Anticipating the argument that Amendment 2 reaches status and not conduct, Justice Scalia asserted that it is surely “rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.”<sup>60</sup> One of the mistakes that Justice Scalia makes in his analysis is that homosexual sodomy is not synonymous with homosexual conduct.

The intriguing question that arises after *Romer* is to what extent, if at all, *Romer* undercuts the continued vitality of *Bowers*. As an aside, we should note that after Justice Powell retired, he admitted that he probably made a mistake in joining the 5-4 majority in *Bowers*.<sup>61</sup> On the surface, one can easily reconcile the two cases by pointing out that *Romer* is an Equal Protection case whereas *Bowers* was a substantive due process case. Second, the Court is unquestionably averse to expanding substantive due process. Third, it is not necessarily inconsistent to permit a state to prohibit a particular activity while not permitting the state to immunize open-ended discrimination against an entire class of persons, some of whom might engage in

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57. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

58. *Id.* (Scalia, J., dissenting)

59. *Id.* at 1631 (Scalia, J., dissenting) (emphasis omitted).

60. *Id.* at 1632 (Scalia, J., dissenting).

61. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 530 (1994) (“On October 18, 1994, Powell gave the annual James Madison lecture at New York University Law School and afterward answered students’ questions. . . . ‘I think I probably made a mistake on that one,’ Powell said of *Bowers*.”).

that activity.<sup>62</sup> At the very least, *Romer* symbolically marks the beginning of a new era in which the Court, for the very first time, has recognized and sustained an equal protection claim advanced by gays and lesbians.<sup>63</sup>

The other equally controversial Equal Protection case of the term was *United States v. Virginia*,<sup>64</sup> where the Court found that Virginia's policy of excluding women from the Virginia Military Institute [hereinafter "VMI"] violated the Equal Protection Clause.<sup>65</sup> VMI, as we all know, is an unusual and indeed a unique institution. Its self-described mission is to produce "citizen-soldiers" defined as men prepared for leadership in either military service or civilian life.<sup>66</sup> VMI has been quite successful in fulfilling this mission as its graduates include military generals, Congressmen, and captains of industry.<sup>67</sup> The manner in which VMI prepares its students to be citizen-soldiers is through a model of education featuring "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior and indoctrination in desirable values."<sup>68</sup>

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62. *Romer*, 116 S. Ct. at 1622. Kathleen Sullivan, counsel for Amici Curiae, argued that even if a State made gambling illegal, it would not follow that the same State may authorize unlimited discrimination against gamblers as a class. Amicus Brief of Lawrence H. Tribe, et al., 1995 WL 862021, \*10 (No. 94-1039). Furthermore, when the State permits inequality under the law, it "renders a person ineligible for the protection from an entire category of wrongful conduct that might otherwise be available through the state's system for making and enforcing laws." *Id.*

63. *Romer*, 116 S. Ct. 1629.

64. 116 S. Ct. 2264 (1996).

65. *Id.* at 2287 ("The State [of Virginia] has shown no 'exceedingly persuasive justification' for withholding from women qualified for the experience premier training of the kind VMI affords.").

66. *Id.* at 2269. VMI's mission statement aims "to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service . . . and ready as citizen-soldiers to defend their country in time of national peril." *Id.* at 2270 (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

67. *Id.* VMI's reputation as an exceptionally challenging military undergraduate school and its wide base of alumni contacts attracts men dedicated to becoming citizen-soldiers. *Id.* at 2270-71.

68. *Id.* at 2270.

All sides in the dispute agreed that this model of education was unique to VMI and unavailable to women.<sup>69</sup>

Despite that fact, the district court ruled in favor of VMI, finding that single sex education yields substantial benefits, which would be lost if women were permitted to enroll.<sup>70</sup> Moreover, the district court found that single-sex education brings diversity to an otherwise coeducational school system.<sup>71</sup> The Fourth Circuit reversed, finding that Virginia had failed to rationalize its determination to achieve diversity by offering VMI's unique type of program to men but not to women.<sup>72</sup> The court concluded that "a policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."<sup>73</sup>

The Fourth Circuit offered the following three remedial options to VMI: (1) admit women to VMI; (2) establish a parallel program; or (3) give up financial support from the State.<sup>74</sup> Virginia responded by proposing a plan to establish an all-female, publicly-funded military college that would provide a single-sex education similar to that of VMI.<sup>75</sup> The Virginia Woman's Institute for Leadership [hereinafter "VWIL"] would be located at Mary Baldwin College, a private liberal arts college, and would be supported with funding equal to the support provided for VMI cadets. Both the District Court and a divided Fourth Circuit approved this remedial plan by using a "substantive

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69. "VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia." *Id.* at 2269.

70. 766 F. Supp. 1407, 1411 (W.D.Va. 1991).

71. *Id.* at 1413.

72. 976 F.2d 890, 892 (4th Cir. 1992).

73. *Id.* at 899. The court went further and stated that "if responsibility for implementing diversity has somehow been delegated to an individual institution, no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." *Id.*

74. *Id.* at 900.

75. The plan called for the establishment of the Virginia Woman's Institute for Leadership. *United States v. Virginia*, 116 S. Ct. 2264, 2282-83 (1996).

comparability” test, roughly equivalent to a “separate but equal” approach.<sup>76</sup>

Two issues were presented for Supreme Court review: first, did Virginia’s exclusion of women from VMI constitute unlawful gender discrimination under the Equal Protection Clause; and second, presuming that the exclusion violated the Equal Protection Clause, what is the appropriate remedy for that constitutional violation.<sup>77</sup>

Writing for the majority, Justice Ginsburg must have derived tremendous satisfaction.<sup>78</sup> After all, she led the fight in the 1970’s to establish the Equal Protection Clause as a weapon to combat sex discrimination.<sup>79</sup> It was not until 1971, in *Reed v. Reed*,<sup>80</sup> that the Equal Protection Clause was used to strike down

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76. See generally, *United States v. Virginia*, 852 F. Supp. 471 (W.D.Va. 1994); *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995). The Fourth Circuit determined that, in order for Virginia to satisfy the “substantive comparability” test, the court had to determine:

(1) whether the state’s objective of providing single-gender education to its citizens may be considered a legitimate and important governmental objective; (2) whether the gender classification adopted is directly and substantially related to that purpose; and (3) whether the resulting mutual exclusion of women and men from each other’s institutions leaves open opportunities for those excluded to obtain substantively comparable benefits at their institution or through other means offered by the state.”

*Id.* at 1237.

77. *United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996).

78. The majority opinion was written by Justice Ginsburg and was joined by Justices Stevens, O’Connor, Kennedy, Souter and Breyer. Chief Justice Rehnquist concurred separately and Justice Scalia dissented. Justice Thomas did not participate because his son attends VMI.

79. See Deborah L. Marcowitz, *In Pursuit of Equality: One Woman’s Work To Change The Law*, 14 WOMAN’S RTS. L. REP. 335 (1992). Justice Ginsburg became active with women’s rights in the 1960’s while she was a professor at Rutgers University School of Law. *Id.* at 337. Shortly after acting as a volunteer attorney for the New Jersey affiliate of the ACLU, she joined Melvin L. Wulf, Legal Director of the ACLU, in drafting the ACLU’s amicus brief in *Reed v. Reed*. *Id.* See 404 U.S. 71 (1971).

80. *Id.*

a state statute that discriminated against women.<sup>81</sup> Justice Ginsburg painstakingly detailed the history of romantic paternalism that was the hallmark of the judicial response to claims of gender discrimination in an effort to remind the reader why the Court applies heightened scrutiny when reviewing gender classifications.<sup>82</sup> Interestingly, despite the fact that mid-level scrutiny has come to be recognized as the appropriate test to evaluate gender claims, Drew S. Days, Jr., on behalf of the Clinton administration, argued that the Court should adopt strict scrutiny in this case.<sup>83</sup>

While not adopting strict scrutiny, the Court did apply a particularly rigorous mid-level or intermediate scrutiny test.<sup>84</sup> Mid-level scrutiny generally requires that the classification be based upon an important governmental objective and that the means employed by the state be substantially related to achieving that objective.<sup>85</sup> Since the adoption of mid-level scrutiny in 1976,<sup>86</sup> we have seen at least a few variations on how that test is employed. For example, in the hands of Justice Rehnquist, mid-level scrutiny is hard to distinguish from rational basis review, most notably in *Matter of Michael M. v. Superior Court*,<sup>87</sup> the statutory rape case.

81. *Id.* at 73. In *Reed*, the Court held that a mandatory provision of an Idaho statute, which gave preference to men over women for appointments as administrators of estates, was an unconstitutional gender classification. *Id.* at 77. The Court rejected the State's argument that administrative convenience sufficed to justify the disparate treatment under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 76.

82. *Virginia*, 116 S. Ct. at 2274-75. Heightened scrutiny places a burden on the State to show that the classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 2275.

83. See Reply Brief for the Petitioner at 18, *United States v. Virginia*, 116 S. Ct. 2264 (1996) (No. 94-1941).

84. *Id.*

85. *Id.*

86. See *Craig v. Boren*, 429 U.S. 190 (1976). In *Craig*, a majority of the Court adopted an intermediate standard of judicial scrutiny for discrimination based upon gender. *Id.* at 197.

87. 450 U.S. 464 (1981).



However, in *United States v. Virginia*, Justice Ginsburg refereed to mid-level scrutiny as “skeptical scrutiny,”<sup>88</sup> requiring a searching review, whereby the Court determines whether the government has satisfied the demanding burden of establishing an exceedingly persuasive justification.<sup>89</sup> This exceedingly persuasive justification must be “genuine, not hypothesized or invented *post hoc* in response to litigation . . . and it must not rely on over-broad generalizations about the different talents, capacities, or preferences of males and females.”<sup>90</sup>

Applying this standard to VMI’s exclusion of women, Justice Ginsburg rejected Virginia’s claim that the exclusion of women furthered the state’s interest in achieving diversity in education.<sup>91</sup> Because mid-level scrutiny requires that the classification be evaluated in reference to its actual objectives, and not after the fact justifications, the majority concluded that the history of excluding women from VMI was unrelated to achieving educational diversity.<sup>92</sup> In other words, the Court decided that achieving diversity among institutions was not the actual reason for the challenged admissions policy.<sup>93</sup>

The majority had little trouble rejecting Virginia’s claims that: (1) the program at VMI could not be adapted for women; (2) that the admission of women would downgrade VMI’s stature; and (3) that women would not be interested in enrolling at VMI.<sup>94</sup> While conceding that most women would not choose to attend VMI, the majority also noted that most men would choose not to enroll.<sup>95</sup> However, that was not the issue in this case. The issue was “whether the State can constitutionally deny to women who

88. *Virginia*, 116 S. Ct. at 2274.

89. *Id.* at 2275.

90. *Id.* at 2274-75.

91. *Id.* at 2279.

92. *Id.* at 2277. The Court cautioned that “benign justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual State purposes, not rationalizations for actions in fact differently grounded.” *Id.*

93. *Id.* at 2279.

94. *Id.*

95. *Id.* at 2280.

have the will and capacity, the training and attendant opportunities that VMI uniquely affords.”<sup>96</sup>

In response to the concern that the admission of women would tarnish the reputation of VMI, if not completely destroy the institution, Justice Ginsburg documented the fact that, over the ages, this fear has been used to deny rights and opportunities to women.<sup>97</sup> She cited a 1925 report from Columbia Law School which stated:

the faculty . . . never maintained that women could not master legal learning . . . No, its argument has been . . . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!<sup>98</sup>

The majority concluded that VMI’s goal of producing citizen soldiers would not be compromised by the admission of women “who today count as citizens in our American democracy equal in stature to men.”<sup>99</sup>

Having found that the admissions policy violated the Equal Protection Clause, the Court had to determine an appropriate remedy. The Court noted that a proper remedy must “eliminate to the extent possible the discriminatory effects of the past and bar like discrimination in the future.”<sup>100</sup>

The Court found Virginia’s remedial plan, which consisted of establishing VWIL at Mary Baldwin College, to be woefully inadequate.<sup>101</sup> The Court found that, although described as a parallel program, VWIL did not provide a rigorous military training, the very hallmark of VMI.<sup>102</sup> Instead, VWIL de-

96. *Id.*

97. *Id.* at 2281 (“The notion that admission of women would downgrade VMI’s stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other ‘self-fulfilling prophecies.’”).

98. *Id.* (quoting *The Nation*, Feb. 18, 1925, at 173).

99. *Id.* at 2282.

100. *Id.*

101. *Id.* at 2284.

102. *Id.* at 2283.

emphasized military training in favor of a cooperative method of education designed to reinforce self-esteem.<sup>103</sup>

Furthermore, VWIL students do not wear uniforms, they do not live together throughout the four year program and they do not eat meals together.<sup>104</sup> In short, none of the VMI barracks style living, "designed to foster an egalitarian ethic" and deemed so essential to that experience, exist at VWIL.<sup>105</sup> Thus, in many ways, the VWIL program proved dramatically inferior: the students were less qualified; the faculty was less impressive and not paid as well; the course offerings were far more limited; and the facilities were far less extensive.<sup>106</sup>

While acknowledging the pragmatic differences between the programs, Virginia maintained that they were justified pedagogically based on the important differences between how men and women learn.<sup>107</sup> However, the Court stated that this is just the type of stereotypical thinking and over-broad generalization that proves fatal when evaluating gender discrimination claims.<sup>108</sup> According to the Court, Virginia could not demonstrate the substantial equality between the two programs, and as such, the remedy failed to match the severity of the constitutional violation and was deemed inadequate.<sup>109</sup>

Justice Scalia wrote another scathing dissent, criticizing the majority for applying what, to him, seems to be a beefed up mid-level scrutiny test.<sup>110</sup> He also condemned the Court for implying that it has not ruled out the use of strict scrutiny to resolve gender cases.<sup>111</sup> Justice Scalia accused the majority of playing Supreme Court "peek-a-boo" and of irresponsibly using language

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 2287.

107. *Id.* at 2283.

108. *Id.* at 2284.

109. *Id.*

110. *Id.* at 2295 (Scalia, J., dissenting) ("Intermediate scrutiny has never acquired a least-restrictive-means analysis, but only a 'substantial relation' between the classification and the State interests that it serves.").

111. *Id.* at 2292 (Scalia, J., dissenting).

calculated to destabilize the law.<sup>112</sup> Even Chief Justice Rehnquist fails to escape Justice Scalia's pen. Although finding Justice Rehnquist's concurring opinion more moderate than the majority's, Justice Scalia believes that was at the expense of being even more implausible.<sup>113</sup>

What is the status of government supported single-sex institutions, given the VMI decision? In *Mississippi University for Women v. Hogan*,<sup>114</sup> the 1982 nursing school case, the Court declined to decide the question of whether states can provide separate but equal undergraduate institutions for males and females.<sup>115</sup> In *United States v. Virginia*, the Court pointedly stated that it was addressing only the constitutionality of an educational opportunity recognized as being unique and available only at the State's sole single-sex university.<sup>116</sup> However, in a footnote, the majority acknowledged they "do not question the

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112. *Id.* at 2295 (Scalia, J., dissenting). Justice Scalia argued that both the State and Federal Government are entitled to know what standard of judicial scrutiny they will be held to before they act. *Id.* (Scalia, J., dissenting).

113. *Id.* at 2303 (Scalia, J., dissenting). Justice Scalia found that Chief Justice Rehnquist's approach was even more implausible than the majority's approach because of his dismissal of Virginia's justifications for a single-sex admission policy. *Id.* at 2304 (Scalia, J., dissenting). To Justice Scalia, one question was left unanswered under Justice Rehnquist's rationale: "[I]f Virginia cannot get *credit* for assisting women's education if it only treats women's private schools . . . then why should it get [the] *blame* for assisting men's education if it only treats VMI as it does all other public schools? This is a great puzzlement." *Id.* at 2305 (Scalia, J., dissenting).

114. 458 U.S. 718 (1982). In *Mississippi Univ. for Women v. Hogan*, the State of Mississippi sought to uphold the female-only admissions policy at the Mississippi University for Women School of Nursing on the grounds that the admissions policy was designed to compensate for past discrimination against women, and therefore, constituted educational affirmative action. *Id.* at 727. The lawsuit was brought by Joe Hogan, a male who had sought admission to the baccalaureate program at the nursing school. *Id.* at 720. He was denied admission solely on the basis of his sex, even though his qualifications equaled those of the admitted women. *Id.* at 720-21. The *Hogan* Court, applying intermediate scrutiny, struck down the statute, finding the exclusion did not serve the compensatory purpose proffered by the State. *Id.* at 730.

115. *Id.* at 721 n.1.

116. *Virginia*, 116 S. Ct. at 2276 n.7.

State's prerogative evenhandedly to support diverse educational opportunities."<sup>117</sup>

In my opinion, this statement means that the court would uphold single-sex schools so long as they were justified pedagogically, and so long as substantial equality between the schools was established. However, what is less clear is whether substantial equality will, in every case, require programmatic equivalence.

As a final note, I should add that we may be entering a new era of Equal Protection analysis, whereby the choice of what standard of review governs may be less outcome-determinative than in the past. Two terms ago, in *Adarand Construction v. Peña*,<sup>118</sup> an affirmative action case, the Court explicitly rejected the maxim that "strict scrutiny was strict in theory but fatal in fact."<sup>119</sup> Moreover, the Court's use of rational basis in *Romer v. Evans* may signify a toothier test than the "any conceivable basis" version lately in vogue.

While the outcome of cases using mid-level scrutiny has always been difficult to predict, it may be that, if the Court continues to use the version of mid-level scrutiny employed by the majority in *VMI*, the test may more closely resemble strict scrutiny than it has in the past.<sup>120</sup>

Perhaps the Court is unwittingly and unself-consciously edging toward what Justice Marshall unsuccessfully advocated more than twenty years ago, a sliding scale of judicial review dependent on

117. *Id.*

118. 115 S. Ct. 2097 (1995).

119. *Id.* at 2275 n.6.

120. It must be noted that the Supreme Court has, on two occasions, seemingly left open the possibility that strict scrutiny may be adopted for review of gender classifications in the future. *See* Stockel, *supra* note 5, at 237, n.55 (*citing* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982) ("Because we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect."); *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1425 n.6 (1994) ("Because we conclude that gender-based peremptory challenges are not substantially related to an important government objective, we once again need not decide whether classifications based on gender are inherently suspect.")).

the strength of the interest asserted and the invidiousness of the classification itself.<sup>121</sup> The Court's recent Equal Protection cases may not signal a major sea of change in Equal Protection analysis but they do signify some shifting of the sands.

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121. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting).