

No. 95-100454

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

vs.

DAVIS MILITARY INSTITUTE,
Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Did the Appellate Court err in holding that Davis Military Institute's all-male admissions policy violates the Equal Protection Clause of the United States Constitution?

Did the Appellate Court err in holding that the proposed plan for Davis Women's Institute for Leadership at Betsy Ross College offers substantively comparable benefits for women as Davis Military Institute does for men, and that, therefore, it satisfies the requirements for equal protection?

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STATEMENT OF THE CASE

In 1832, Davis Military Institute (DMI) was established by the Commonwealth of Davis to produce "educated and honorable men," "confident in the functions and attitudes of leadership," who would be prepared for "the work of civil life" and ready as "citizen-soldiers to defend their country in time of national peril." Record, p. 8. The DMI method conformed to an adversative model of education, where physical rigor, absence of privacy, mental stress, regulation of behavior, and equality of treatment were the essential characteristics of the DMI experience. DMI is known as one of the most challenging military institutions in the country, and its alumni are very loyal to the school, providing professional contacts for graduates and strong financial backing. Women have been denied admittance to DMI from its inception. There are no similar state-supported military schools for women in the Commonwealth of Virginia.

The United States filed a complaint against DMI and the Commonwealth of Davis on behalf of five female high school students who sought admission to DMI. The United States argued that affording the DMI experience only to men was a violation of the Equal Protection Clause of the Fourteenth Amendment. DMI argued that the gender discrimination promotes an important state interest, namely diversity in education. The district court allowed a bifurcated trial to consider the issues of liability and remedy separately. After the liability phase, the district court held that the all-male admissions policy of DMI violated equal

protection, because DMI failed to articulate why offering the DMI education to men and not to women substantially supports diversity in education. However, in the remedy phase of the trial, the court held that DMI's proposed parallel program for women at Davis Women's Institute for Leadership (DWIL) at nearby Betsy Ross College was a constitutional alternative to integration of DMI. The court asserted that DWIL provided a program for women that was substantively comparable to the one provided for men at DMI. Rather than following DMI's adversative model, the DWIL program utilizes cooperative teaching methods, which are purported by DMI to produce the same or similar outcome for women that DMI produces for men.

On appeal the Fourteenth Circuit affirmed the entire decision of the district court and agreed that the proposed plan for DWIL offers substantively comparable benefits for women that DMI does for men. This Court granted certiorari to consider all issues raised in the lower courts.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit did not err in holding that the all-male admissions policy of DMI violates the Equal Protection Clause of the Fourteenth Amendment. Under the intermediate scrutiny analysis, statutory classifications that distinguish between males and females must "serve important governmental objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). Furthermore, the discrimination must "be substantially related to achievement of those objectives." Id. The DMI admissions policy fails both prongs

of this test.

The Commonwealth of Davis maintains that DMI can remain a single-sex institution because it provides its citizens with diversity in their educational choices. This, however, falls short of serving an important enough governmental objective to justify denying women the DMI experience. First, this policy runs afoul when compared with the recent coeducation of the other public colleges in the State. Second, the Court has held that the statutory objective cannot exclude women based on stereotypical notions of the differences between males and females. The exclusion of women from DMI for fear that they would "change" the material aspects of the system unconstitutionally perpetuates stereotypes about the roles and abilities of women and encourages the notion that women are inferior to men.

Even if diversity in education is an important enough governmental interest, DMI's all-male admissions policy is not substantially related to achievement of that interest. A policy of diversity which intends to provide a number of educational choices must do more than favor one gender. DMI failed to show why the benefit of the DMI experience should be conferred on men and not women, and why this supports diversity in education.

In addition, DMI's proposed remedy, the establishment of a separate institute for women at a nearby women's college, must be invalidated. Since Brown v. Board of Education it has been clear that separate but equal has no place in the field of public education. Separate institutions deny those excluded segments of

requests this Court to reverse the ruling of the Fourteenth Circuit as to the proposed remedy and remand that portion of the case to the district court for the entry of an order directing Davis to propose a plan for admitting women to DMI and for rehearing regarding the same.

Respectfully Submitted,

201-25-0991

Counsel for Petitioner

society intangible benefits that are provided to those not excluded. In the case of DMI, prestige, tradition, and alumni support are just a few of the intangible benefits which are denied to women. By allowing DMI to create a separate institution for women in order to preserve its male fortress in the mountains, this Court would roll back the clock on important precedents surrounding racial and gender discrimination. By invalidating the DWIL plan, this Court can once and for all assure citizens of this country that discrimination and segregation along any lines will no longer be tolerated.

ARGUMENT

I. THE FOURTEENTH CIRCUIT WAS CORRECT IN HOLDING THAT DMI'S ALL-MALE ADMISSIONS POLICY VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT DOES NOT PASS THE INTERMEDIATE SCRUTINY TEST.

The Equal Protection Clause states that "no state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. At its inception, the purpose of this amendment was to prevent the states from intentionally discriminating against persons on the basis of race. Accordingly, the Supreme Court has consistently recognized that racially-motivated legislation is constitutionally suspect. Such legislation is subject to strict scrutiny and must be justified by a "compelling governmental interest," and "narrowly tailored to the achievement" of that interest. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

Protection against gender discrimination developed within the

context of racial discrimination. Since the early 1970s, government classifications based on gender have been subject to heightened scrutiny. In 1973, the Supreme Court reviewed a statutory scheme that required a woman in the Air Force to demonstrate her spouse's dependency in order to get increased benefits, while no such burden was imposed on men. Frontiero v. Richardson, 411 U.S. 677, 680 (1973). The Court invalidated the statutory scheme, and four justices agreed that "classifications based on sex, like classifications based on race,..., are inherently suspect, and must therefore be subjected to strict judicial scrutiny." Id. at 688. This strict standard for gender classifications was never approved by a majority of the Court, however, a mid-level form of heightened scrutiny was.

In 1976, the Supreme Court determined that in cases involving statutes containing gender-based classifications, mid-level scrutiny would apply. See Craig v. Boren, 429 U.S. 190 (1976). In order to overcome an equal protection challenge, statutory classifications that distinguish between males and females must "serve important governmental objectives" and must "be substantially related to achievement of those objectives." Id. at 197. Thus, the intermediate scrutiny test became the standard of review for gender-based equal protection claims, and, therefore, it is the standard that must be applied to the policy and plan of Davis Military Institute.

A. IN GENERAL, THE INTERMEDIATE SCRUTINY TEST HAS BEEN "STRICTLY" APPLIED.

In all but two cases involving the federal government's use of

its war powers, the strict scrutiny test has proven to be automatically fatal to racially-motivated legislation. See Hirabayashi v. United States, 320 U.S. 81 (1943), See also, Korematsu v. United States, 323 U.S. 214 (1944). Case law reveals a similarly strong presumption that gender classifications are invalid. Supreme Court decisions establish that under the intermediate standard of scrutiny, states seeking to uphold gender classifications, "carry the burden of showing an 'exceedingly persuasive justification' for the classification." Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). For example, in a recent case, the Court made significant comparisons between racial and gender discrimination to conclude that intentional discrimination on the basis of gender by state actors in the use of peremptory strikes in jury selection violated the Equal Protection Clause. J.E.B. v. Alabama, 114 S. Ct. 1419 (1994). However, the Court concluded that since gender-based peremptory challenges failed the intermediate scrutiny test outright, they once again did not need to decide "whether classifications based on gender are inherently suspect." Id. at 1426.

The Supreme Court has allowed gender classifications to pass this rigorous mid-level scrutiny test, only in certain limited types of cases. In Rostker v. Goldberg, the Court accepted the government's assertion that the purpose of the military draft in question was exclusively to raise combat troops. Rostker v. Goldberg, 453 U.S. 57, 76 (1981). The Court asserted that since women as a group are not eligible for combat, Congress was

justified in not authorizing their registration, because the purpose of registration is to raise a pool of combat troops. Id. at 79. Therefore, the exemption of women from the registration was sufficiently related to Congress' purpose. Id. The Court distinguished this case from other gender-classification cases by stressing the importance of "deference to legislative and executive judgments in the area of military affairs." Id. at 66.

In addition, the Court upheld a statutory rape law applying only to men and not to women. Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 481 (1981). The Court relied upon the "real differences" between men and women, including the fact that only women can get pregnant, and stated that the statute realistically reflects the fact that in some limited instances women and men are not "similarly situated." Id. at 469. It is clear that the purpose of the state-funded program at DMI does not fall into either of these categories. Accordingly, the DMI policy cannot survive the two-pronged intermediate scrutiny test for gender classifications solidified in Craig v. Boren.

B. DIVERSITY IN EDUCATION IS NOT AN IMPORTANT ENOUGH GOVERNMENTAL OBJECTIVE.

Diversity in education, and DMI's program in particular, has been advanced as the justification for DMI's all-male admissions policy. However, "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Hogan, 458 U.S. at 728 (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)). In reality, the Commonwealth of Davis seems to

have adopted a broad-based policy of **coeducation** among its public schools. Historically, most of Davis' state-supported colleges were single-sex. However, all the public colleges in Davis, except DMI, are now coeducational. Record, p. 3. DMI's asserted objective of providing diversity in education through single-sex schools runs contrary to this trend. Accordingly, DMI has not sufficiently established that its "alleged objective is the actual purpose underlying the discriminatory classification. Id. at 730.

In addition, excluding women from DMI in order to provide diversity in education cannot be an important enough governmental objective under the intermediate scrutiny test, because it is "based on the very stereotypes that the law condemns." J.E.B., 114 S. Ct. at 1421. The J.E.B. Court, in categorically rejecting Respondent's rationale for allowing gender-based peremptory strikes, stated that Respondent "offer[ed] virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes; yet it urges this Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box." Id. at 1427. The Court concluded that if they allowed state actors to exercise peremptory challenges "in reliance on gender stereotypes," they would be "ratify[ing] and reinforc[ing] prejudicial views of the relative abilities of men and women." Id.

In Hogan, the Supreme Court invalidated a state statute that excluded males from enrolling in Mississippi University for Women's School of Nursing. The State's primary justification for

maintaining the single-sex admissions policy was to compensate women for past discrimination and effectuate educational affirmative action. Hogan, 458 U.S. at 727. The Court found this unpersuasive, however, since statistics showed that women made up nearly 100 percent of all employed registered nurses. Id. at 729. Rather than compensating for gender barriers faced by women, the Court found that "MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." Id. The Court concluded that the State had not met its burden under intermediate scrutiny. Id. at 731. In making the determination, the Court asserted that intermediate scrutiny "must be applied free of fixed notions concerning the roles and abilities of males and females." Id. at 724.

DMI asserts that its unique methodology, centered around the "adversative method" and "barracks life," justifies its single-gender policy and that "material aspects of its holistic system would be changed by coeducation," resulting in the fact that it would offer neither males nor females the DMI education that now exists. Record, p. 2. Anticipated effects of coeducation on DMI as a result of the addition of women on campus include, changes in physical education requirements and a breakdown of the atmosphere of complete equality because of the introduction of cross-sex relationships into the environment. Record, p. 8. Under the Hogan analysis, therefore, the State's policy of excluding women to preserve the DMI system in the name of diversity fails the first

part of the equal protection test. Just as the exclusion of men in Hogan perpetuated the stereotype of women as nurses, the exclusion of women from DMI for fear that they would "change" the material aspects of the system perpetuates the stereotype that women are inferior to men and would taint this model man's world.

The anticipated changes asserted by the district court are based around the psychological and physical differences of women and men. The argument that the introduction of women into DMI would change the DMI experience is based on speculation of how the DMI experience would be inferior if women were admitted. "If the statutory objective is to exclude...members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the object itself is illegitimate." Id. at 725. Evaluating the stated governmental objective "free of fixed notions concerning the roles and abilities of males and females," DMI has failed to assert an important enough governmental objective to keep women out of its institution. Id. at 724.

C. DMI'S ALL-MALE ADMISSIONS POLICY IS NOT
SUBSTANTIALLY RELATED TO ACHIEVING DIVERSITY
IN EDUCATION.

Even if diversity in education is the real governmental objective and an important enough one, the DMI all-male admissions policy fails the second part of the intermediate scrutiny test. A policy of diversity which intends to provide a number of educational choices, including single-sexed institutions like DMI, must do more than favor one gender. DMI has provided no explanation why conferring the benefit of the DMI experience upon

men and not women is substantially related to the achievement of the governmental objective of diversity in education.

Federal courts have stringently applied the second prong of the Craig v. Boren test in cases that address gender segregation in education. A recent district court decision struck down the constitutionality of three male academies designed to offer special programs for males. Garrett v. Board of Educ. of the Sch. Dist. of the City of Detroit, 775 F. Supp. 1004, 1006 (1991). The goal of the academies was "to combat unemployment, dropout and homicide rates among urban males." Id. at 1008. The district court used the two part test for equal protection from Craig, to find that while the schools were furthering important governmental objectives, the exclusion of women was not found to be a means substantially related to this objective. Id. at 1007. The court determined that the exclusion of women at these schools could not pass intermediate scrutiny, since nothing had shown that the failure of the educational system among urban males was because females and males attended school together. Id. at 1008. Likewise, in Hogan, the Court concluded that the State had failed to show why providing a unique educational opportunity for women, and not for men, bore a substantial relationship to its asserted compensatory objective. Hogan, 458 U.S. at 730.

DMI has failed to establish how limiting its unique experience to men, without providing any similar or coeducational experience for women, is substantially related to the governmental interest in diversity in education. Similarly, the State has failed to meet

its constitutional burden of showing an "exceedingly persuasive justification" for the classification. Id. at 724. Accordingly, this Court should follow the Fourteenth Circuit and hold that DMI's all-male admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.

II. DMI'S PROPOSED PLAN FOR DWIL DOES NOT REMEDY DMI'S VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The creation of the Davis Women's Institute for Leadership at nearby Betsy Ross College does not meet the constitutional mandates of the Equal Protection Clause. DWIL does not provide the same kind of education for women that they would receive if admitted to DMI. The separate institution of DWIL does not leave open opportunities for women to obtain substantively comparable benefits to what the men are receiving at DMI. Moreover, the resulting exclusion of women from DMI makes certain intangible factors inaccessible purely on the basis of gender.

A. BECAUSE SEPARATE INSTITUTIONS DENY WOMEN INTANGIBLE BENEFITS THAT ARE PROVIDED TO MEN, SEPARATE BUT EQUAL FACILITIES DO NOT SATISFY CONSTITUTIONAL MANDATES.

In Brown v. Board of Education, the Supreme Court held that "in the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal," because they deny all students access to the same intangible benefits. Brown v. Board of Educ., 347 U.S. 483, 495 (1954). The Court referred to prior decisions regarding racially segregated schools where they had required desegregation on the

basis of intangible factors, not just physical factors. The Court understood that equality includes "those qualities which are incapable of objective measurement but which make for greatness in a...school." Id. at 493 (citing Sweatt v. Painter, 339 U.S. 629, 643 (1950)).

Although the Brown Court was referring specifically to racial segregation, the grounds for rejecting the "separate but equal" doctrine in racially segregated schools are applicable to sex-based separation. Blacks and women have historically faced similar discrimination. In Brown, the Court found that racial separation negatively affected black children by creating a stigma of inferiority. Id. at 494. Sex segregation will have the same effect on females. Forced separation in each case conveys a certain stigma involving inferiority and the denial of intangible rewards readily available to members of the deserving race or gender. Separation in each case only acts to perpetuate stereotypes that have historically disadvantaged women and blacks. Accordingly, separate men's and women's educational institutions are also "inherently unequal."

In recent jurisprudence, the denial of intangible factors has become part of the equal protection consideration concerning gender segregation. In 1970, a group of women challenged the University of Virginia's all-male admissions policy. Kirstein v. Rector and Visitors of the Univ. of Va., 309 F. Supp. 184 (1970). Considering intangible factors such as prestige, reputation, and tradition, the court held that denying women admission to this lauded Virginia

institution denied them "their constitutional right to an education equal with that offered men at Charlottesville and that such discrimination on the basis of sex violates the Equal Protection Clause." Id. at 187. In another decision that same year, the South Carolina District Court decided that the exclusion of males from a state-supported women's college did not violate the Equal Protection Clause. Williams v. McNair, 316 F. Supp. 134 (1970). The court qualified their decision, however, by stating that the plaintiffs had a complete array of other state institutions, either all male or co-educational, which they could attend. Id. at 137. In addition, the court held that the state could maintain its gender classifications only if no denial of tangible or intangible factors occurred. Id. at 138.

The creation of a separate program for women at Betsy Ross College denies women the intangible factors inherent in the DMI program and therefore is a denial of equal protection for women. It is clear that DWIL will be unable to provide for its admittants the prestige, tradition, reputation of faculty, alumni influence, and professional contacts readily available to their all-male counterparts. In addition, DWIL admittedly does not employ the unique educational method of DMI - the holistic experience, adversative model, "rat line," class system, dyke system, and barracks life. Accordingly, women will not be able to learn the essential "values and behaviors that DMI exists to promote," build the same sense of "individual responsibility," learn "everything about [her]self and [her] limits and capabilities," and experience

the "cross-class bonding" and resulting "model for leadership and support" to the same extent and with the same proven success that men at DMI do. Record, p.5-6. This cumulative methodological experience embodies the essence of DMI that is impossible to recreate. Because women are excluded from this experience, they are denied the entire range of tangible and intangible benefits offered by a DMI education. When the Fourteenth Circuit approved DMI's plan for creation of a parallel program at DWIL, they overlooked differences in intangible qualities and allowed the Commonwealth of Davis to violate constitutional prohibitions against state enforcement of gender stereotypes through state-supported programs.

B. APART FROM STEREOTYPICAL BELIEFS ABOUT MALES AND FEMALES, DMI AND DWIL DO NOT PROVIDE SUBSTANTIVELY COMPARABLE BENEFITS TO MEN AND WOMEN.

DMI and DWIL are openly structured around generalizations and stereotypes about male and female characteristics, abilities and needs - not on any claim of "real differences" that have justified separate facilities in the past. Michael M., 450 U.S. at 481. DMI asserts that the DWIL program is the product of a Task Force assembled to consider whether DWIL "should follow or depart from the DMI methodology to produce the same outcomes." Record, p.8. The plan calls for the same outcome of an educated and honorable citizen soldier, but uses different methods to meet the specific needs of most women. Record, p. 8.

The Fourteenth Circuit findings reveal that "an expert on women's education stated that an adversative method of teaching

would be counter-productive for most women." Record, p.15. The Task Force concluded that since "most women reaching college generally have less confidence than men," a "cooperative method which reinforces self-esteem rather than the leveling process used by DMI," would produce the same outcome for women that the DMI method produces for men. Record, p. 15. Accordingly, DWIL's program is highly structured around leadership programs, military and physical training, and academics, "but without the adversative DMI components, such as the rat line and break out." Record, p.15.

However, it is clear that as DWIL was created on the basis of stereotypical beliefs about the roles and abilities of women and men, it does not provide substantively comparable benefits to women as DMI does to men. Therefore, it is unconstitutional. The rationale for the separation and the distinct methodology to be employed at DWIL, ratifies the very prejudicial views being fought against. State statutory schemes supported by "archaic and overbroad generalizations" about the role of females have consistently been invalidated since the 1970s. Craig, 429 U.S. at 198. Gender-based classifications based on "fixed notions concerning the roles and abilities of males and females" have also been condemned by the Court. Hogan, 458 U.S. at 724. Finally, the Court has made it "abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." J.E.B., 114 S. Ct. at 1427, n.11.

The Task Force based its conclusions on the belief that most women lack self-esteem going into college, and that most women would not benefit by the adversative method of teaching at DMI. Accordingly, DWIL is modeled on conventional behavioral norms of the **typical** woman. However, there is no room in this dual plan for either women or men who do not conform to the generalized notions about their gender. The Fourteenth Circuit merely overlooks this portion of society and allows the State to treat its citizens not as individuals, but as members of a sexual class. Contentions that women prefer non-adversative military training are outdated generalizations. DMI fails to sufficiently support its conclusion that the adversative method of education would be counterproductive for the majority of women who seek a military education such as DMI's.

Should the DWIL plan go into effect, DMI and the Commonwealth of Davis will be violating equal protection prohibitions against state enforcement of gender stereotypes. In order for this Court to uphold the Constitution, it is imperative that this plan be invalidated. Since it is impossible for the DMI experience, intangible factors included, to be replicated, the only remedy for DMI's equal protection violation is complete integration.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court to affirm the ruling of the Fourteenth Circuit as to the equal protection violation. In addition, Petitioner