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Gender Classification and United States v. Virginia: Muddying the Waters of Equal Protection

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Gender Classifications and *United States v. Virginia*: Muddying the Waters of Equal Protection

I. INTRODUCTION

The Commonwealth of Virginia never considered female cadets when it opened Virginia Military Institute (VMI) in 1839.[1] Nineteenth century America educated its men and women for different tasks and Virginia established VMI to produce citizen-soldiers, a decidedly male occupation.[2] At the time, the responsibilites of women were limited to the home and family.[3]

That maxim is no longer true, but VMI's founders could not have foreseen the vast changes in store for society, and for Virginia in particular. Within three decades of VMI's inauguration, most of its alumni were fighting for the South in the Civil War.[4] The school itself entered the conflict in May 1864, when VMI cadets battled Union troops at New Market, Virginia.[5] The cadets' cause ultimately failed, however, and

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1. *See* United States v. Virginia, 116 S. Ct. 2264, 2277-78 (1996) (outlining the history of education in Virginia).

2. *Id.* at 2277-79. In 1879 the Virginia State Senate resolved to look into the possibility of coeducation, but Virginia's Superintendent of Public Instruction dismissed the idea as "repugnant to the prejudices of the people." *Id.* at 2278 n.10 (citing 2 THOMAS WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 254 (1929) (quoting H.R. DOC. NO. 58-5, at 438 (1904))) (internal quotation marks omitted). As an alternate he proposed an all-female college and in 1884 Farmville Female Seminary became a public institution. *Id.* at 2278 & n.10.

3. *See Virginia*, 116 S. Ct. at 2277 n.9; *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 727 n.13 (1982) (stating that schools "academically disenfranchised" women at that time); Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 670 (6th Cir. 1981) (noting that society believed women were unable to attend class on a regular basis because they were mentally and physically inferior).

4. Almost 1800 VMI graduates (94% of all VMI graduates at the time) fought in the Civil War. United States v. Virginia, (VMI I) 976 F.2d 890, 892 (4th Cir. 1992), *aff'd*, 116 S. Ct. at 2264.

5. *Id.* at 894.

General Lee surrendered the Confederate Army at Appomattox Courthouse, just sixty-four miles from VMI.[6]

The Union victory had almost immediate ramifications on the Constitution as states ratified Amendments to legally guarantee broader civil rights to newly freed slaves.[7] Altering the Constitution was not only the first step toward legally guaranteeing racial equality, but a catalyst for future change. The Amendments had no effect on women's attendant role in American society, however, and as racial minorities made substantial headway, social and legal divisions between the sexes lingered.[8]

The century between VMI's turbulent beginning and the 1996 Supreme Court decision in *United States v. Virginia*[9] was equally dynamic: states amended the Constitution over a dozen times to deal with an ever-changing American society,[10] America fought and won two world wars, men walked on the moon, and women made substantial gains as equal citizens under the law.[11] Almost every facet of American life changed drastically between the mid-nineteenth and late-twentieth centuries, yet Virginia Military Institute's men-only policy never budged.[12]

In *Virginia*, the United States Attorney General claimed VMI's obdurate position violated equal protection guarantees to women.[13] For the American public, *Virginia* put an important social issue on the front page of almost every newspaper.[14] The case also had great legal signifi-

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6. *See Lee's Retreat: The Final Days of the Civil War* (visited Mar. 26, 1997) <http://www.chr.vt.edu/civil war/retreat.html>.

7. Just after the Civil War, the States ratified the Thirteenth, Fourteenth, and Fifteenth Amendments, known collectively as the "Reconstruction Amendments." *See infra* note 24 (discussing the passage of the Reconstruction Amendments).

8. For example, the Fifteenth Amendment, ratified in 1870, provided that no citizen could be denied the right to vote on account of "race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. Women did not gain the right to vote until the States ratified the Nineteenth Amendment in 1920. *Id.* at 1291.

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

10. *See* U.S. CONST. amend. XV-XXVII.

11. *See infra* notes 74-126 and accompanying text (discussing how women received equal protection much later than racial minorities).

12. *Virginia*, 116 S. Ct. at 2277-78. VMI's Mission Study Committee did consider female admissions after the Supreme Court struck down as unconstitutional a state supported, all-female nursing school in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding gender classification in a public nursing school's admissions policy violative of the Equal Protection Clause), but concluded that a lack of interest by females justified its single-sex character. *Virginia*, 116 S. Ct. at 2278-79.

13. Brief for Petitioner at 20-49, *Virginia* (No. 94-1941).

14. *See, e.g.*, Mike Allen, *Defiant VMI to Admit Women, but Will Not Ease Rules for Them*, N.Y. TIMES, Sept. 22, 1996, at A1; Linda Greenhouse, *In Supreme Court's Decisions, a Clear Voice and a Murmur*, N.Y. TIMES, July 3, 1996, at A1; Linda Greenhouse, *The Supreme Court; Discrimination; Military Colleges Can't Bar Wom-*

cance and presented the Supreme Court with a novel opportunity. For decades the Court had settled similar gender classification cases using a limber standard of scrutiny prone to producing ad hoc decisions.[15] With a well-reasoned *Virginia* opinion, the Court could rule on the government's Constitutional role in single-gender education and clarify an area of law plagued with inconsistencies.[16] Unfortunately, at the end of the day, the Court failed both tasks.[17]

This Note examines the Court's perplexing decision in *United States v. Virginia* and its impact on equal protection jurisprudence. Part II lays the historical foundation of gender classification equal protection case law and its application in both military and educational scenarios.[18] Part III presents the facts of *Virginia*,[19] and Part IV analyzes the majority, concurring, and dissenting opinions.[20] Part V considers the impact of the Court's decision on single-gender educational programs.[21] The Note concludes with a brief look at the confusion created by *Virginia* and a prediction of what may lie ahead for single-gender programs and institutions at all levels of education.[22]

II. HISTORICAL BACKGROUND

The Fourteenth Amendment declares that no state may deny any person equal protection of the laws, thus guaranteeing that the government treat all individuals in a similar manner.[23] Although originally designed to protect the rights of emancipated African Americans,[24] the

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en, *High Court Rules*, N.Y. TIMES, June 27, 1996, at A1.

15. *See infra* notes 53-152 and accompanying text (discussing the difficulty of applying this standard consistently).

16. *See infra* notes 53-152 and accompanying text (discussing inconsistencies in the law regarding gender-based classifications).

17. *See Virginia*, 116 S. Ct. at 2287-91 (Rehnquist, C.J., concurring) (arguing that the Court needlessly clouded the issue by applying a new standard unsupported by precedent); *id.* at 2293-96 (Scalia, J., dissenting) (same); *see also infra* Section IV and accompanying text (analyzing the *Virginia* decision).

18. *See infra* notes 23-156 and accompanying text.

19. *See infra* notes 157-84 and accompanying text.

20. *See infra* notes 185-322 and accompanying text.

21. *See infra* notes 323-61 and accompanying text.

22. *See infra* notes 362-67 and accompanying text.

23. U.S. CONST. amend. XIV, § 1.

24. *See* John Galotto, Note, *Strict Scrutiny for Gender, Via* Croson, 93 COLUM. L. REV. 508, 510-11 (1993). The thirty-ninth Congress passed the Reconstruction Amendments, U.S. CONST. amends. XIII, XIV, XV, in conjunction with the 1866 Freedmen's

Court recast the Equal Protection Clause early this century when it applied the clause to nonracial classifications.[25] Many scholars now believe it to be the greatest protector of individual rights.[26]

Ironically, as the Equal Protection Clause secured a prominent role in Constitutional jurisprudence, the Court's choice of interpretation methodology grew increasingly erratic.[27] In general, to satisfy equal protection scrutiny, the Court has required a sufficient relationship between a classification and the purpose for which the government designed the classification.[28] The Court analyzes the exact degree of relationship required under different standards of scrutiny, depending on the nature of the classification.[29] The appropriate level of scrutiny for varying types of classifications has been the subject of great controversy.[30] Not only has the proper scrutiny due each type of classification been at issue, but the vigor with which the Court should apply each standard has been difficult to settle and, at times, bewildering.[31] The Supreme Court has changed the level of scrutiny and vigor of application within each level many times, and holdings have been particularly inconsistent with respect to gender-based equal protection claims.[32]

Bureau Act and the Civil Rights Act of 1866, just after the end of the Civil War. Galotto, *supra*, at 510 n.10. Most historians agree that Congress designed the Amendments solely to protect the rights of the freed slaves by placing the constitutionality of these two acts beyond doubt. *Id.* In the *Slaughter-House Cases*, which discussed the Reconstruction Amendments, Supreme Court Justice Miller wrote, "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within [the Equal Protection Clause's] purview . . . ." *In re* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

25. Galotto, *supra* note 24, at 512.

26. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.1, at 595 (5th ed. 1995).

27. *See infra* notes 65-152 and accompanying text.

28. *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

29. NOWAK & ROTUNDA, *supra* note 26, § 14.3, at 600-01.

30. *See* George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1350 (1993).

31. *See id.* at 1349-50 (comparing the Court's Equal Protection analysis to a shell game and stating that "the individual Justices have been unable to agree under which shell to place the ball").

32. *See id.* at 1363-70. *Compare* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-26 (1982) (applying intermediate scrutiny review to a gender-based classification system) *with* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to a gender-based classification), *with* Frontiero v. Richardson, 411 U.S. 677, 682-84, 688 (1973) (applying strict scrutiny to a gender classification), *with Reed*, 404 U.S. at 76 (applying rational basis scrutiny "with bite" to a gender classification and thus using a standard more similar to an intermediate scrutiny). For a discussion of the history of gender-based classifications in the equal protection analysis, see *infra* notes 65-112 and accompanying text.

A. The Standards of Review

The appropriate level of scrutiny hinges on a legal categorization of the challenged state action, and "this threshold determination often decides the case: for each level of scrutiny there is a well-settled mode of analysis that often foreordains particular results."[33] Consequently, for as much conflict that the Court creates by its determination of the applicable level of scrutiny, the Court creates an equal amount of controversy in its application of the standard.[34] The Court refers to the scrutiny levels with varying terminology, but has essentially developed three: rational basis scrutiny, intermediate scrutiny, and strict scrutiny.[35]

1. Rational Basis Scrutiny

Rational basis scrutiny defers assessment of legislative means and ends to the legislative branches.[36] Within "this area the Justices have determined that they have no unique function to perform," and so the application of the rational basis test has become almost a rubber stamp of approval.[37] A gender classification will survive this level if a court can find a rational basis between the legislation and a legitimate gov-

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33. Galotto, *supra* note 24, at 509. Intermediate scrutiny is the clear exception to this rule. *See infra* notes 65-112 and accompanying text (analyzing history and application of intermediate scrutiny).

34. *Compare* United States v. Virginia, 116 S. Ct. 2264 (1995) (applying new "exceedingly persuasive justification standard" to gender classifications), *with id.* at 2288 (Rehnquist, C.J., concurring) (arguing for intermediate scrutiny standard), *and id.* at 2291-93 (Scalia, J., dissenting) (arguing for intermediate scrutiny); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (applying strict scrutiny to a benign racial classification), *with id.* at 2120 n.1 (Stevens, J., dissenting) (asserting that the Court should distinguish between invidious and benign discrimination and apply different levels of scrutiny to each); Rutan v. Republican Party, 497 U.S. 62 (1990) (applying strict scrutiny to strike down patronage-based employment practices as violative of the First Amendment's right of political association), *with id.* at 2746-52 (Scalia, J., dissenting) (arguing for a "not so clear" standard such as the intermediate "reasonableness" standard); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (applying strict scrutiny to a benign racial minority set-aside program), *with id.* at 535 (Marshall, J., dissenting) (arguing that the Court should analyze benign racial set aside provision under a lower level of scrutiny); *Hogan*, 458 U.S. at 718 (applying intermediate scrutiny to gender classification), *with id.* at 733-41 (Powell, J., dissenting) (arguing for rational basis).

35. NOWAK & ROTUNDA, *supra* note 26, § 14.3, at 600-06.

36. *Id.* § 14.3, at 601, 606-09.

37. *Id.* § 14.3, at 601.

ernment objective.[38] Until the early 1970s, the Supreme Court applied rational basis scrutiny to gender classification cases and routinely upheld discriminatory laws as rationally related to the legitimate government objective of preserving the traditional social roles of men and women.[39]

2. Strict Scrutiny

While rational basis scrutiny gives the utmost deference to legislative will, strict scrutiny brings intense judicial examination into the relationship between a classification and its purported government objective.[40] With strict scrutiny, the Court does not accept every government purpose as sufficient, but requires the government to produce a compelling or overriding end to justify the classification.[41] Even if the state shows a compelling interest, the Court will uphold the classification only if the classification is narrowly tailored, essential, and sufficiently related to the compelling end it serves.[42] Thus, while strict scrutiny is not "'fatal in fact,'" it is unavoidably fatal in most applications.[43]

Strict scrutiny's austerity was no mistake. The Court conceived the standard to protect "fundamental rights"[44] and certain "discrete and insular minorities."[45] A government classification found to carve out a discrete and insular minority is "inherently suspect" and automatically given strict scrutiny.[46] Originally, the Court held only discrimination against African Americans was inherently suspect.[47] The Court expanded this category to include other ethnic groups, and now the inherently suspect category includes all racial classification scenarios.[48] Further

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38. *Id.*

39. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-25, at 1560-61 (2d ed. 1988) (citing Hoyt v. Florida, 368 U.S. 57 (1961)). In *Hoyt*, the Warren Court unanimously approved, despite the "enlightened emancipation of women," a state law that included men on the jury list unless they requested an exemption, but exempted women unless they volunteered, because "wom[en] [were] still regarded as the center of home and family life." *Id.* at 1561 (quoting *Hoyt*, 368 U.S. at 61-62).

40. NOWAK & ROTUNDA, *supra* note 26, § 14.3, at 601-02.

41. *Id.* § 14.3, at 602.

42. *Id.*

43. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (quoting Fullilove v. Klutznic, 448 U.S. 448, 519 (1980)).

44. NOWAK & ROTUNDA, *supra* note 26, § 14.3, at 602.

45. Hlavac, *supra* note 30, at 1378 n.190. Suspect classifications are those based on "invidious prejudgment, grounded in notions of superiority and inferiority, in beliefs about relative worth, [and] attitudes that deny the premise of human equality." *Id.* at 1379 (citing Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 201-02 (1976)).

46. NOWAK & ROTUNDA, *supra* note 26, § 14.3, at 602.

47. Galotto, *supra* note 24, at 511.

48. *Adarand*, 115 S. Ct. at 2113 (holding all racial classifications, including federal

advancing its value, the Court has even applied strict scrutiny to non-racial classifications.[49] Women's rights advocates have continuously petitioned for strict scrutiny of gender-based classifications[50] and, true to its unpredictable nature within this area of law, the Court agreed with them on one occasion.[51] In *Virginia*, The Attorney General also believed gender classifications worthy of the "inherently suspect" label and argued that strict scrutiny was the proper standard with which to evaluate VMI's admissions policy.[52]

3. Intermediate Scrutiny

Until the 1970s, an author could write an article on equal protection and profile only rational basis and strict scrutiny.[53] The polarity of these two standards virtually predestined that once confronted with a classification which did not fit into its limited framework, the Court would have to fashion another standard.[54] For cases falling in the middle, intermediate scrutiny became the final tier.[55]

Intermediate scrutiny grants less deference to legislative will than rational basis but is less difficult for governments to satisfy than strict scrutiny.[56] The exact terminology changes from case to case, but under

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affirmative action programs, must meet strict scrutiny).

49. *Id.* at 2117. Other inherently suspect classifications are those based on alienage or national origin. NOWAK & ROTUNDA, *supra* note 26, § 14.3, at 602.

50. *See infra* notes 74-156 and accompanying text (discussing Supreme Court cases in which women's groups advocated for the use of strict scrutiny).

51. *See* Frontiero v. Richardson, 411 U.S. 677, 682-84, 688 (1973); *see also infra* notes 87-95 and accompanying text (discussing the *Frontiero* decision)

52. Brief for Petitioner at 20-49, *Virginia* (No. 94-1941).

53. *See* NOWAK & ROTUNDA, *supra* note 26, § 14.3, at 602-03.

54. Justice Marshall argued that an equal protection framework with only the two extremes of rational basis and strict scrutiny was untenable in his dissents to *San Antonio Independent School District v. Rodriguez* and *Dandridge v. Williams*. *See Antonio*, 411 U.S. 1, 70-133 (1973) (Marshall, J., dissenting); *Dandridge*, 397 U.S. 471, 508-30 (1970) (Marshall, J., dissenting).

55. Although the Court first openly adopted intermediate scrutiny in *Craig v. Boren*, 429 U.S. 190 (1976), in *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court withdrew from its "posture of utmost deference to political judgments respecting the role of women." TRIBE, *supra* note 39, at 1561. *Reed* can be viewed as a "rationality with bite" case or "[a]lternatively, . . . as a struggle [by Justice Burger] to avoid having to refine the equal protection doctrine (by applying intermediate scrutiny) or having to define clearly the existing doctrine (by applying strict scrutiny outside the context of race)." Galotto, *supra* note 24, at 520.

56. NOWAK & ROTUNDA, *supra* note 26, § 14.3, at 603.

intermediate scrutiny, when the government seeks to uphold a classification, it must, as with rational basis and strict scrutiny, justify the classification.[57] Facially, this involves a two prong test: first, the classification must serve an important government objective, and second, the classification must be substantially related to the achievement of that objective.[58] The Court consistently directs that the government objective not reflect invidious, archaic, overbroad, or stereotypic notions.[59] This directive offers guidance to government actors; objectives based on stereotypes are not "important" and fail the first inquiry.[60] The Court's directive carries great weight, and in practice "the Court has continued to show little tolerance for legislative classifications that presume women have no responsibilities outside the home."[61]

The Court designed intermediate scrutiny in and for gender classification cases,[62] but its use has spread to other areas of constitutional analysis.[63] It remains most extensively used, however, in the equal protection arena where, until *Virginia*, it provided government actors with a fairly consistent legal standard on which to base their conduct.[64]

B. Historic Application of the Standards

1. Gender Classifications

Gender classification equal protection jurisprudence has been inconsistent enough to provoke scholars and Supreme Court Justices to refer to it as "diaphanous,"[65] a "shell game,"[66] and even the product of a

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57. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); *Craig*, 429 U.S. at 197.

58. *See Hogan*, 458 U.S. at 724; *Craig*, 429 U.S. at 197.

59. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1422 (1994) (holding that the state's intentional discrimination based on gender in use of peremptory strikes violated the Equal Protection Clause). In *J.E.B.*, the Court wrote that the "Equal Protection Clause . . . acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments." *Id.* at 1427 n.11.

60. *Hogan*, 458 U.S. at 724-25.

61. TRIBE, *supra* note 39, § 16-26, at 1564.

62. *See Craig*, 429 U.S. at 197-99.

63. NOWAK & ROTUNDA, *supra* note 26, § 14.3, at 603 (citing Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (holding that the Court would use the intermediate standard when reviewing racial classifications described as "benign" or "affirmative action" in federal legislation), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995)). The Court may have used the intermediate standard in an "undocumented children" alienage case, but the opinion does not clearly state the exact standard used. *Id.* § 14.3, at 603 (discussing Plyer v. Doe, 457 U.S. 202 (1982)).

64. *Id.* § 14.3, at 788.

65. *Craig*, 429 U.S. at 221 (Rehnquist, J., dissenting). Justice Rehnquist scorned both the new intermediate scrutiny standard and the majority's method of establishing

"magician's school."[67] Prior to 1971 the law was simple: the Court applied rational basis scrutiny to gender classifications and accepted discrimination as an unfortunate byproduct of man's natural role as woman's benevolent protector and defender.[68]

For example, in *Goesaert v. Cleary*[69] a Michigan law provided that the State would not license a woman to tend bar unless she was the wife or daughter of the male bar owner.[70] Michigan asserted that the purpose of the classification was to avoid the "social and moral problems" that it believed accompanied unsupervised female bartenders.[71] Characteristic of its broad deference under the rational basis standard, the Supreme Court followed a mountain of precedent and determined that Michigan's classification was rationally related to the State's purpose.[72] In its decision to uphold the discriminating law, the Court made a telling observation when it noted that "[t]he Constitution does not require legislatures to reflect sociological insight, or shifting social standards."[73]

Twenty-three years after *Goesaert*, the Burger Court began to drift away from rational basis scrutiny in *Reed v. Reed*.[74] In *Reed*, the Court

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it. *Id.* at 217-28 (Rehnquist, J., dissenting). Justice Rehnquist was concerned that the Court's new intermediate scrutiny standard invited the use of "subjective judicial preferences or prejudices relating to . . . legislation, masquerading as judgments." *Id.* at 221 (Rehnquist, J., dissenting). See *infra* notes 99-111 and accompanying text for a discussion of the controversy surrounding intermediate scrutiny's creation.

66. Hlavac, *supra* note 30, at 1349-50.

67. *Id.* at 1379.

68. TRIBE, *supra* note 39, § 16-25, at 1560. *See, e.g*, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding state statute which deemed males eligible for jury duty unless they requested an exemption, but granted females an exemption unless they waived it because society viewed women as the center of the home and family life); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a state statute limiting women's ability to bartend), *overruled by Craig*, 429 U.S. at 190.

69. 335 U.S. 464 (1948).

70. *Id.* at 465.

71. *Id.* at 466.

72. *See id.* at 467.

73. *See id.* at 466. Justice Frankfurter, writing for the Court, also noted:

> We are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald, in Shakespeare, but centuries before him she played a role in the social life of England. The Fourteenth Amendment did not tear history up by the roots . . . . Michigan could, beyond question, forbid all women from working behind a bar.

Id. at 465 (citations omitted).

74. 404 U.S. 71 (1971).

subjected an Idaho statute favoring men over women as estate administrators to rational basis scrutiny.[75] The Court found that "clearly, the objective of reducing workload on probate courts . . . [was] not without some legitimacy."[76] With *Goesaert* as guiding precedent, this objective had a rational basis in reason and consequently should have been valid.[77] The Director of the American Civil Liberties Union (ACLU) Women's Rights Project, Ruth Bader Ginsburg, disagreed.[78] She argued in an ACLU amicus brief that this purpose was not enough to justify gender discrimination.[79] Ginsburg advocated gender as a suspect classification and urged the Court to apply strict scrutiny.[80] The Supreme Court did not adopt the ACLU argument but made a surprising move—it slightly elevated rational basis scrutiny.[81] The Court held Idaho's purpose for the gender classification—"merely to accomplish the elimination of hearings on the merits"—to be irrational.[82] With no rational basis in reason, the Court struck down the statute as unconstitutionally violative of equal protection.[83] The outcome perplexed Idaho's lawyers because the Court had recently upheld similar classifications as entirely rational.[84] Further, the *Reed* opinion candidly stated rational basis as the applicable standard, and Idaho had provided one.[85] Idaho had no reason to be upset with its lawyers, for they had not misread the law—the Supreme Court had changed it. *Reed* gave rational basis scrutiny some bite, and unlike in prior cases, "any old rational basis" was not enough.[86]

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75. *Id.* at 73.

76. *Id.* at 76.

77. *See Goesaert*, 335 U.S. at 465-67.

78. Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335, 337 (1992).

79. Collin O'Connor Udell, *Signaling a New Direction in Gender Classification Scrutiny:* United States v. Virginia, 29 CONN. L. REV. 521, 525 (1996).

80. *Id.*

81. *See Reed*, 404 U.S. at 76; Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (asserting that *Reed* notched the standard up to strict scrutiny); *see also* NOWAK & ROTUNDA, *supra* note 26, § 14.22, at 778-79.

82. *Reed*, 404 U.S. at 76-77.

83. *Id.* at 75-77.

84. *See supra* note 68. On the other hand, the composition of the Court changed substantially in the years just before *Reed* because of Richard Nixon's appointment of four Justices to the Supreme Court: Chief Justice Burger replaced Chief Justice Warren in 1969, Justice Powell replaced Justice Black in 1972, Justice Blackmun replaced Justice Fortas in 1970, and Justice Rehnquist replaced Justice Harlan in 1972. GERALD GUNTHER, CONSTITUTIONAL LAW, app. A (10th ed. 1981).

85. *Reed*, 404 U.S. at 76.

86. *See id.* at 75-77. "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

The Court's creativity in *Reed* was tame in contrast to what followed. Equal protection analysis "took a strange turn"[87] with *Frontiero v. Richardson*.[88] The *Frontiero* case involved a challenge to an administrative armed forces rule requiring servicewomen, but not servicemen, to affirmatively show that their dependents were actually dependent in order to qualify for certain benefits.[89] A female Air Force lieutenant challenged the rule, and again Ruth Bader Ginsburg found her way into the fray.[90] Ginsburg authored another ACLU amicus brief pushing for strict scrutiny.[91] The resulting *Frontiero* plurality opinion, authored by Justice Brennan, remains to date the high water mark of gender classification scrutiny.[92] Justice Brennan ungracefully propelled gender classification scrutiny straight to the top and baffled many by stating that the Court had applied strict scrutiny in *Reed*.[93] Justice Brennan wrote that gender was an "inherently suspect" class and required the imposition of strict scrutiny because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."[94] Justice Brennan looked squarely to *Reed* as precedent for his assertion, concluding that *Reed*'s "stringent analysis" was a clear departure from rational basis scrutiny and offered "at least implicit support" for strict scrutiny of gender classifications.[95]

In the wake of *Frontiero*'s puzzling twist, the Court struggled to find the proper scrutiny standard for gender-based classifications.[96] In a five-year period, the Court provided little guidance for lower courts and government actors by careening between the equal protection extremes of rational basis and strict scrutiny.[97] Fortunately, only one year after

87. Hlavac, *supra* note 30, at 1364.
88. 411 U.S. 677 (1973).
89. *Id.* at 678.
90. *Id.*
91. *Id.*
92. *See id.* at 677; *see also* Hlavac, *supra* note 30, at 1364-65.
93. *See* Hlavac, *supra* note 30, at 1365 (labeling Justice Brennan's conclusion "extraordinarily puzzling").
94. *Frontiero*, 411 U.S. at 686.
95. *Id.* at 682. Justice Powell, author of the *Reed* opinion, rejected the idea of characterizing gender as an inherently suspect classification and stated that *Reed* "did not add sex to the limited group of classifications which are inherently suspect." *Id.* at 691-92 (Powell, J., concurring).
96. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).
97. *See supra* notes 65-95 and accompanying text (discussing cases spanning this five-year period).

Frontiero, a case arising out of the disparate drinking habits of Oklahoma's young men and women presented the Court with a chance to remedy its inconsistency.[98]

The Court lived up to the task and supplied some stability to gender classification jurisprudence with *Craig v. Boren*.[99] The case began when a man between eighteen and twenty-one years old, Craig, and a beer vendor, Whitener, challenged an Oklahoma statute that prohibited the sale of 3.2% beer to males under the age of twenty-one but to females under the age of eighteen.[100] Ruth Bader Ginsburg agreed with Craig and Whitener and submitted an ACLU amicus brief in support of their challenge.[101] They won.[102]

The scrutiny level applied in *Craig* was not due to a respite in the otherwise turbulent waters of Court logic; if anything, the 1976 decision was the apex of its ingenuity.[103] The *Craig* Court pointed to both *Reed* and *Frontiero* to support its vague conclusion that gender classifications were "subject to scrutiny."[104] The logic behind this ambiguous conclusion was as mysterious as the decision itself. The Court reasoned that "previous cases" had established a standard whereby the government must show that a gender classification (1) serves an important governmental objective, and (2) is substantially related to that objective.[105]

Although *Craig* purported to apply the standard used in previous cases, it actually furnished a new standard.[106] In his dissent, Justice Rehnquist labeled the new level "intermediate" scrutiny, and outlined his displeasure with the standard.[107] First, Justice Rehnquist criticized the majority's decision to insert another level of review between two with which the Court already "had enough difficulty."[108] Further, Jus-

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98. Craig v. Boren, 429 U.S. 190 (1976). According to statistical evidence, police arrested only .18% of females, but 2% of males, between the ages of 18 and 20 for drunk driving. *Id.* at 201.

99. *See id.* at 190.

100. *Id.*

101. *Id.* at 191 n.*.

102. *Id.* at 210.

103. Once again, Justice Brennan disregarded his own precedent and authored the Court's change of direction. *See id.* at 191. Justice Rehnquist dissented, writing that "[t]he only redeeming feature of the [*Craig*] opinion . . . is that it apparently signals a retreat by those who joined the plurality opinion in *Frontiero v. Richardson*." *Id.* at 217 (Rehnquist, J., dissenting).

104. *Id.* at 197.

105. *Id.* at 197-98; *see also* Hlavac, *supra* note 30, at 1370-71.

106. *See Craig*, 429 U.S. at 220-21 (Rehnquist, J., dissenting); NOWAK & ROTUNDA, *supra* note 26, § 14.22, at 782.

107. *Craig*, 429 U.S. at 217-28 (Rehnquist, J., dissenting).

108. *Id.* at 220-21 (Rehnquist, J., dissenting).

tice Rehnquist correctly pointed out that the Court enunciated its new intermediate standard "without citation to any source."[109] Despite the fact that intermediate scrutiny rested on noticeably uncited cases, or more accurately came out of "thin air,"[110] the standard provided legal consistency for future gender discrimination equal protection claims: the Court facially followed *Craig* as guiding precedent for over two decades.[111]

Craig settled the verbal formula, but the diverse holdings in intermediate scrutiny decisions since *Craig* reflect a continued ad hoc nature.[112] Results depend largely on the circumstances surrounding each case and often turn on the majority's finding as to whether the government based the classification on a sexual stereotype or truly intended to promote a legitimate objective.[113] This leaves the Court open to criticism, and both the Justices and scholars often ridicule intermediate scrutiny as a tool with which broad social policy emanates from an active, outcome-driven judicial branch.[114] Whatever the Supreme Court's intent, it is clear that intermediate scrutiny is slightly heightened or slightly lowered depending on other circumstances surrounding a case.[115] A good example of this is in military affairs, where the Court slightly lowers intermediate scrutiny and defers to Congress a greater extent than pure application might allow.[116]

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109. *Id.* at 217, 219-21 (Rehnquist, J., dissenting).

110. *Id.* at 220 (Rehnquist, J., dissenting).

> The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized—the norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved—so as to counsel weightily against the insertion of still another "standard" between those two.

Id. at 220-21 (Rehnquist, J., dissenting).

111. NOWAK & ROTUNDA, *supra* note 26, § 14.23, at 782; Hlavac, *supra* note 30, at 1370-71. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Goldfarb, 430 U.S. 199 (1977).

112. NOWAK & ROTUNDA, *supra* note 26, § 14.23, at 782-88.

113. *Id.* § 14.23, at 782.

114. *See* United States v. Virginia, 116 S. Ct. 2264, 2292-93 (Scalia, J., dissenting) (asserting that the *Virginia* decision was not law, but "politics-smuggled-into-law"); *see also* NOWAK & ROTUNDA, *supra* note 26, § 14.23, at 782 (stating that "the Court's decisions appear to be *ad hoc* judgments based upon Justices' perceptions of the gender classification at issue in each case").

115. NOWAK & ROTUNDA, *supra* note 26, § 14.23, at 782-88.

116. *Id.* § 14.23, at 786-87.

However pliant the exact degree of intermediate scrutiny in certain circumstances, it is important to remember that since *Craig v. Boren*, the Court has formally employed intermediate scrutiny as the proper standard of review for gender classification equal protection claims.[117]

2. Gender Classifications in a Military Context

As in most military matters, when gender discrimination is alleged in military affairs the Supreme Court shows great deference to Congress and curtails its application of intermediate scrutiny.[118] In *Rostker v. Goldberg*,[119] several men subject to the military draft challenged the Selective Service Act's male-only registration policy.[120] Applying *Craig*'s standard, the majority reasoned that draft registration plans substantially related to the important objective of maintaining an inventory of available personnel for combat in the event of a military emergency.[121] Because women did not serve in combat positions, registration of women was not necessary.[122] Justice Rehnquist's opinion stressed the importance of national defense, noting that "in no other area has the Court accorded Congress greater deference."[123] Even this has not satisfied Congress, however, which continually requests the Court to apply rational basis scrutiny to matters of national defense in order to broaden legislative power over national security.[124] Nonetheless, intermediate scrutiny endures, and the Court will not allow Congress to draw any gender classification it wishes simply because national defense is a factor in the Court's analysis.[125] The im-

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117. *Id.* § 14.23, at 782; Laurie A. Keco, Note, *The Citadel: Last Male Bastion or New Training Ground?*, 46 CASE W. RES. L. REV. 479, 495 (1996). *But see* Hlavac, *supra* note 30, at 1374-79 (arguing that the proper test is rational basis scrutiny, not intermediate scrutiny).

118. *See* NOWAK & ROTUNDA, supra note 26, § 14.23, at 786-87.

119. 453 U.S. 57 (1981).

120. *Id.* at 61-63.

121. *Id.* at 75-76, 83.

122. *Id.* at 76. The issue of whether women should serve in combat was not addressed by the majority opinion. Accepting the exclusion of women from combat as proper, the Court asked if the policy of excluding women from registration was "closely related" to the objective of national defense. *Id.* at 76-79.

123. *Id.* at 64-65.

> The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality. . . . This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.

Id.

124. *See, e.g., id.* at 57 (1981); Schlesinger v. Ballard, 419 U.S. 498 (1975).

125. *See* Lucille M. Ponte, Waldie *Answered: Equal Protection and the Admissions*

port of the objective affects the application, but *Craig*'s intermediate scrutiny standard survives largely intact.[126]

3. Gender Classifications and State Supported Education

Since *Craig*, the Court has consistently applied intermediate scrutiny in education cases but, as one should expect, the results deserve mixed reviews for consistency.[127] *Mississippi University for Women v. Hogan*[128] presented the Court with the chance to rule on single-gender public education fourteen years before the Court addressed *Virginia*. *Hogan* involved Mississippi University for Women (MUW), a state-supported university that accepted only women.[129] A prospective student challenged the policy after the school denied him entry to MUW's School of Nursing solely because he was male.[130] Mississippi justified the single-gender admissions policy on the basis that it compensated for past discrimination against women.[131] The exclusion of women from one institution, asserted Mississippi, was "valid as 'educational affirmative action.'"[132] A majority of the Supreme Court disagreed.[133]

Hogan shared an important feature with *Craig* which the Court made a point to mention: although Mississippi discriminated against men and not women, this did not affect the intermediate scrutiny analysis.[134] Justice O'Connor's majority opinion began with a reflection on the proper scrutiny standard: MUW's gender discrimination required an "exceedingly persuasive justification."[135] The Court had not used this

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of Women to Military Colleges and Academies, 25 NEW ENG. L. REV. 1137, 1147-51 (1991).

126. Ponte concluded that despite the high deference given to Congress over military affairs, the Court maintains that it generally applies intermediate scrutiny to gender-based classifications in the military context. *Id.* at 1153.

127. *See, e.g.*, United States v. Virginia, 116 S. Ct. 2264 (1996); J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Faulkner v. Jones, 51 F.3d 440, 444 (4th Cir. 1995).

128. 458 U.S. 718 (1982).

129. *Id.* at 719-20.

130. *Id.* at 720-21.

131. *Id.* at 727.

132. *Id.* & n.13 ("In its reply brief, the state understandably retreated from its contention that MUW was founded to provide opportunities for women which were not available to men.").

133. *Id.* at 731.

134. *See id.* at 723.

135. *Id.* at 724 (citing Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel

phrase in *Craig*,[136] but nevertheless, Justice O'Connor applied the two-prong intermediate scrutiny test just as in *Craig*.[137] Indeed, the opinion's initial call for an exceedingly persuasive justification had no effect on the substantive legal analysis beyond requiring an inquiry into Mississippi's true purpose, and most Court observers looked past it.[138] At most, the Court recognized the phrase as a shorthand referral to intermediate scrutiny.[139]

The *Hogan* majority subjected one of Mississippi's offered objectives—to provide its female citizens with a choice of educational environments—to a brief, but traditional, *Craig* analysis.[140] Justice O'Connor disposed of this objective in a footnote, stating that it begged the question because "[t]he 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."[141]

Mississippi's other important objective of compensating women for past discrimination warranted particular attention from Justice O'Connor.[142] This objective, she determined, was not an actual objective but a hollow rationalization.[143] First, Mississippi provided no evi-

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Adm'r v. Feeney, 442 U.S. 256, 273 (1979)). As though the Court was not changing the intermediate scrutiny analysis at all, the very next sentence recites the exact test outlined in *Craig*: "The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Hogan*, 458 U.S. at 724 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

136. The Court did require an exceedingly persuasive justification in *Personnel Administrator v. Feeney* and *Kirchberg v. Feenstra*. In each case, the Court used the phrase "exceedingly persuasive justification" to reflect the difficulty of meeting intermediate scrutiny. *See Feeney*, 442 U.S. at 273 (upholding state law giving employment preference to military veterans, 98% of whom were men); *Kirchberg*, 450 U.S. at 461 (striking down statute which gave husbands but not wives the power to sell property).

137. *See Hogan*, 458 U.S. at 724-34.

138. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 26, § 14.23, at 787 (stating that "[t]he majority opinion, like those since 1976, stated that the classification would only be upheld if it served important governmental objectives and if the classification was substantially related to the achievement of those objectives"). Nowak and Rotunda published their treatise before the *Virginia* decision and, although they gave an extensive review of *Hogan*, they did not mention the phrase "exceedingly persuasive justification." *See id.* § 14.23, at 787-88.

139. *See* United States v. Virginia, 116 S. Ct. 2264, 2288 (Rehnquist, C.J., concurring); *id.* at 2294-96 (Scalia, J., dissenting).

140. *Hogan*, 458 U.S. at 731 n.17.

141. *Id.*

142. *Id.* at 727-31.

143. *Id.* at 730.

dence that its true purpose was to compensate women for past harms.[144] To the contrary, the record showed that Mississippi was not at all concerned with remedying past harms to women.[145] Second, nursing was a traditionally female occupation and there was no past harm in the nursing field to remedy.[146] "Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job."[147] Not only was the offered purpose not the true government interest, but the classification did not, and could not, advance that interest.[148] Justice O'Connor cast aside this objective as a sham and put government actors on notice: to defend a gender classification, the offered purpose must

144. *Id.* at 729-31.

145. *Id.* at 731.

146. *Id.* at 729-30. The decision left open the possibility of whether MUW could address past harms done to women in other areas such as engineering, law, and medicine through a valid affirmative action program. *Id.*

147. *Id.* at 729.

148. *Id.* at 729-30. The Supreme Court had, on two occasions prior to *Hogan*, found an offered purpose illegitimate because the discriminatory classification did not advance the offered purpose. In *Weinberger v. Wiesenfeld*, the Court struck down a portion of the Social Security Act which granted benefits based on a deceased husband and father's earnings to his widow and minor children while granting payments based on a deceased wife and mother's earnings only to her minor children and not to her widower. *Weinberger*, 420 U.S. 636, 638-39 (1975). The Social Security Administration argued Congress's purpose behind this classification was to compensate women for past economic harms. *Id.* at 648. The Court found this objective unauthentic, pointing to the fact that the benefits ceased when the widow's children reached maturity. *Id.* at 648-53. The Court questioned how this system could compensate women for past harm, when the very women who had spent years at home with their children would no longer receive the benefits of the law after their children reached the age of majority. *Id.* Because the classification did not advance the stated purpose, the Court found it a mere rationalization. *Id.* The Court likewise struck down a gender classification statute in *Califano v. Goldfarb* after determining that the classification did not advance the government's offered objective. *Califano*, 430 U.S. 199, 202 (1977). In *Califano*, another Social Security Act provision granted benefits to widows automatically, but only to widowers who could prove dependency on their wives' income. *Id.* at 201. The Court found the classification "completely unadvanced" the government's stated purpose of looking after the social needs of widows and widowers. *Id.* at 202. It was simply irrational, wrote Justice Stevens, that the law advantaged women who had gained employment and independence but denied dependent men benefits. *Id.* at 221-22 (Stevens, J., concurring).

be authentic.[149] That is, the offered purpose must be advanced by the classification and be the true purpose behind the classification.[150]

Hogan did not completely settle the single-gender education issue. The Court was able to avoid the question of separate but equal institutions because Mississippi had not established a male-only nursing school.[151] The Court also dodged an important issue that many educators wanted resolved—namely, the legitimacy of single-gender education in general; a footnote limited the Court's decision to the unique facts of the case.[152]

Although the opinion lacked a much desired broad rule, *Hogan*'s reliance on intermediate scrutiny made it surprisingly clear to scholars and lower courts that after sporadic maneuvering among three levels of scrutiny the Supreme Court had firmly placed gender in the middle.[153] In the case of *Virginia*, the fact that VMI's stated objective might fall into the military context was of little importance because intermediate

149. *See Hogan*, 458 U.S. at 723-31.

150. *See id.* at 731.

151. *See id.* at 718-33.

152. *Id.* at 723 n.7 ("[W]e decline to address the question of whether [the University's] admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment."). The four dissenting Justices were concerned that the precedent would nevertheless lead to broad interpretation. *Id.* at 733-46. Justice Blackmun stated, "I hope that we do not lose all values that some think are worthwhile (and are not based on differences of race or religion) and regulate ourselves to needless conformity." *Id.* at 734-35 (Blackmun, J., dissenting).

153. NOWAK & ROTUNDA, *supra* note 26, § 14.23, at 787 (concluding that the adoption of the substantial relationship to an important government interest standard by a majority of Justices settled, at least formally, the issue of the proper definition of a middle level standard of review for gender classifications); Keco, *supra* note 117, at 500 (asserting that *Hogan* finalized intermediate scrutiny as the standard of analysis for equal protection violations based on gender); Ponte, *supra* note 125, at 1160 (concluding that the *Rostker* case affirmed the acceptance of intermediate scrutiny for reviewing gender discrimination equal protection claims in the military context); *see, e.g.*, Faulkner v. Jones, 51 F.3d 440, 444 (4th Cir. 1995) (utilizing intermediate scrutiny to determine if a publicly-funded, male-only military institute violated equal protection); United States v. Virginia, (VMI I), 976 F.2d 890 (4th Cir. 1992) (holding Virginia's maintenance of a male-only admissions policy at Virginia Military Institute without the provision of a comparable opportunity for women was not justified by a state policy of providing diversity in education and thus violated of equal protection), *aff'd*, 116 S. Ct. 2264 (1996); United States v. Virginia, (VMI II), 44 F.3d 1229 (4th Cir. 1995) (applying a special intermediate scrutiny test designed to analyze a state's provision of single-gender education, and holding that Virginia's plan of providing single-gender education was not a pernicious state objective and, thus, not violative of the Equal Protection Clause), *rev'd*, 116 S. Ct. 2264 (1996).

scrutiny prevailed even in gender discrimination cases directly involving the armed forces.[154]

With three well-developed scrutiny levels, the Court had created a predictable framework with which to evaluate classifications. Additionally, by using the intermediate level, it was not difficult for the Court to justify a ruling based on its gut instinct.[155] This inherent flexibility made the constitutionality of VMI and The Citadel, the only two single-gender military schools in the nation, highly uncertain and susceptible to an ad hoc decision. Nevertheless, an important issue was well-settled: if a woman challenged VMI's male-only policy as violative of equal protection, the Court would resolve the case under the *Craig* and *Hogan* line of precedent.[156]

III. STATEMENT OF THE CASE

The Supreme Court confronted two issues in *Virginia*. First, the constitutional validity of excluding women from the unique educational opportunity of a state-supported military academy, and second, the proper remedy if exclusion was unconstitutional.[157] VMI was an all-male, state-supported college using an "adversative" training method in its mission to produce citizen-soldiers.[158] At the time of the case, VMI boasted the largest per-student endowment of any public undergraduate college in the nation and was widely recognized as an incomparable military college having military generals, members of Congress, and business executives among its alumni.[159] The adversative method used by VMI to educate its cadets emphasized physical rigor, mental stress, equality of treatment, absence of privacy, and minute regulation of behavior.[160] VMI was the only school in Virginia where a student could

154. *See supra* notes 118-26 and accompanying text (discussing armed forces cases).
155. *See supra* notes 112-16 and accompanying text (discussing ad hoc nature of decisions in intermediate level standard cases).
156. *See supra* note 153 (setting forth various constitutional scholars' opinions on the standard of review in gender classification cases).
157. *Virginia*, 116 S. Ct. at 2274.
158. *Id.* at 2269. The Court noted that only 15% of VMI cadets entered the military as a career. *Id.* at 2270.
159. *Id.* at 2269.
160. *Id.* at 2270.

receive this unique style of education,[161] and it was the only single-gender school among Virginia's fifteen public institutions of higher learning.[162]

In 1990, a female high school student interested in attending VMI filed a complaint with the United States Attorney General.[163] She requested the office challenge VMI's all-male admissions policy.[164] The Attorney General filed suit against the Commonwealth of Virginia and VMI, claiming that the policy violated the Fourteenth Amendment's Equal Protection Clause.[165] The United States District Court for the Western District of Virginia applied intermediate scrutiny and justified VMI's policy.[166] The district court found that single-gender education provided substantial educational benefits.[167] Further, the district court held that VMI's unique method of educating men created a "measure of diversity" in Virginia's overall system of education.[168] The only way for Virginia to maintain the benefits of the single-gender environment, the court concluded, was to exclude women.[169]

On appeal, the Fourth Circuit also applied intermediate scrutiny, but disagreed with the district court's conclusion.[170] The circuit court held Virginia had a strong interest in providing its citizens with a diversified system of education, but because Virginia offered the adversative approach only to men it violated the Equal Protection Clause.[171] The Fourth Circuit's opinion, however, contained an interesting observation:

> [T]he district court was not clearly erroneous in concluding that if a court were to require the admission of women to VMI to give them access to this unique methodology, the decision would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation. The Catch-22 is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.[172]

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161. *Id.* at 2269.
162. *Id.*
163. *Id.* at 2271.
164. *Id.*
165. *Id.* From 1990 to 1992, VMI ignored 347 inquiries from women interested in attending. *Id.*
166. United States v. Virginia, 766 F. Supp. 1407, 1410 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *aff'd*, 116 S. Ct. 2264 (1996).
167. *Id.* at 1415.
168. *Id.*
169. *Id.*
170. *Virginia*, 976 F.2d at 900.
171. *Id.* at 898-99 ("A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender.").
172. *Id.* at 897 (citations omitted).

In light of this "Catch-22" inherent in admitting women, the Fourth Circuit remanded the district court's decision with instructions that Virginia "remedy" the violation.[173] The court of appeals offered Virginia three remedial suggestions: admit women, establish a parallel program for women, or end state support of VMI.[174]

Virginia chose the second option.[175] It proposed the Virginia Women's Institute for Leadership (VWIL) as a state-sponsored parallel program to VMI and decided to locate the new institution at Mary Baldwin College, a private women's college not far from VMI.[176] A "Task Force" of Mary Baldwin College administrators, faculty, and students determined that the VMI methodology was inappropriate for women.[177] Instead of the adversative approach, the Task Force recommended, and VWIL instituted, a co-operative learning method featuring a Reserve Officer Training Corps (ROTC) program, leadership courses, and student participation in the Virginia Corps of Cadets.[178] The Attorney General claimed the creation of VWIL was not a valid remedy and again made a challenge in district court, this time arguing that VWIL was not "sufficiently similar" to VMI "in all respects."[179] The district court, however, held for Virginia and found VWIL to be a satisfactory remedy.[180]

The U.S. Attorney's Office appealed, and a divided Fourth Circuit panel devised a "heightened intermediate scrutiny test specially tailored to the circumstances" surrounding VMI.[181] In essence, the panel added a third prong to the *Craig* intermediate scrutiny test: to pass constitutional muster, it required VWIL to be "substantively comparable" to VMI.[182] Applying this new standard, the Fourth Circuit held VWIL to be inferior to VMI in historical benefit and prestige but nevertheless substantively comparable.[183] The United States appealed, and the Supreme Court granted certiorari.[184]

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173. *Id.* at 900.
174. *Id.*
175. United States v. Virginia, 116 S. Ct. 2264, 2272 (1996).
176. *Id.* at 2272. VWIL's mission also would be to produce "citizen soldiers." *Id.*
177. *Id.*
178. *Id.* at 2272-73.
179. United States v. Virginia, 852 F. Supp. 471, 481 (W.D. Va. 1994), *aff'd*, 44 F.3d 1129 (4th Cir. 1995), *rev'd*, 116 S. Ct. at 2264.
180. *Id.* at 485.
181. *Virginia*, 44 F.3d at 1229.
182. *Id.* at 1239-41.
183. *Id.* at 1240-41.
184. United States v. Virginia, 116 S. Ct. 281, 282 (1995).

IV. ANALYSIS OF THE COURT'S OPINION

A. *Justice Ginsburg's Majority Opinion*

1. Heightened Scrutiny

Justice Ginsburg wrote for herself and five other Justices.[185] She began with a controversial statement: "The core instruction . . . [is that p]arties who seek to defend gender-based government action must demonstrate an '*exceedingly persuasive justification*' for that action."[186] The phrase was not new, plucked from Justice O'Connor's *Hogan* opinion, but had never been the core instruction.[187] Justice Ginsburg gave another signal that she was altering the long-followed *Craig* standard: "In response to our nation's long and unfortunate history of sex discrimination," she explained, gender classifications require a heightened standard of review.[188] The Court had shorthandedly referred to intermediate scrutiny as "heightened review" in other Supreme Court decisions, and the phrase had always precluded a traditional *Craig* analysis.[189] Howev-

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185. *Virginia*, 116 S. Ct. at 2269. Chief Justice Rehnquist filed a concurring opinion, and Justice Scalia dissented. *Id.* Justice Thomas recused himself because his son was a student at VMI at the time the Court heard the case. Linda Greenhouse, *Legacy of a Term*, N.Y. TIMES, July 3, 1996, at A1.

186. *Virginia*, 116 S. Ct. at 2274 (emphasis added). Justice Ginsburg cited *J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127 (1994), and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), as precedent supporting this standard. *Virginia*, 116 S. Ct. at 2274. Although these opinions use this phrase, in neither opinion did the Court treat the phrase as a test unto itself; rather, the Court used it to introduce the intermediate scrutiny test, immediately thereafter defining it as requiring the defender of a gender classification to show that the classification was substantially related to the achievement of an important governmental objective. *See J.E.B.*, 511 U.S. at 136-37; *Hogan*, 458 U.S. at 724. Indeed, between the two cases there were five separate dissents and two concurring opinions—none of which took any notice of the phrase. *See J.E.B.*, 511 U.S. at 146-63; *Hogan*, 458 U.S. at 733-46.

187. The first paragraph of the Court's legal analysis reads:

> We note, once again, the core instruction of this Court's pathmarking decisions in *J.E.B. v. Alabama ex rel. T. B.* and *Mississippi University for Women*: Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

Virginia, 116 S. Ct. at 2274 (citations omitted). According to Justice Ginsburg's opinion, *Hogan* and *J.E.B.* were the "pathmarking" decisions, and the instant decision merely followed an already beaten path. *Id.* This is simply not true: *United States v. Virginia* did the path beating. *See infra* notes 211-16, 238-42, 263-67 and accompanying text.

188. *Virginia*, 116 S. Ct. at 2274-75. Justice Ginsburg also referred to her analysis as "skeptical scrutiny." *Id.* at 2274.

189. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 771 (1994); Nordlinger v. Hahn, 505 U.S. 1, 10 (1992); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).

er, although Justice Ginsburg's intention was unclear, her use of the phrase seemed to carry new meaning.[190] No longer would the Court read heightened review as shorthand, for it now required a standard further heightened from intermediate scrutiny. Indeed, the opinion that followed this murky introduction made clear that two simple phrases which in the past served as shorthand for a consistent application of intermediate scrutiny had come to mark a departure from that standard: heightened review would now be a new heightened intermediate scrutiny.[191]

Justice Ginsburg acknowledged that sex, unlike race, was not a proscribed classification, but she implied that decisions following *Reed* had skirted on the edge of strict scrutiny.[192] The Court had not "equat[ed] gender classifications, for all purposes, to classifications based on race or national origin," but had carefully inspected state action that "close[d] a door or denie[d] an opportunity to women (or to men)."[193] These close inspections, Justice Ginsburg reiterated, required that classifications based on gender have an exceedingly persuasive justification.[194] The burden is demanding, and "'[t]he 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.'"[195] This was a hollow restatement of *Craig*'s principles, and the Court found little guidance in traditional inter-

190. Neither the Court nor scholars have settled on an exact name for the *Craig v. Boren* test. Some opinions never name the test, but simply cite *Craig* and apply its "substantially related to an important government objective" logic. *See, e.g.*, Wengler v. Druggist's Mut. Ins. Co., 446 U.S. 142, 150 (1980). Many of the Justices and theorists consistently use the term "intermediate scrutiny," *see, e.g.*, NOWAK & ROTUNDA, *supra* note 26, and for that reason this author chose the term for use in this Note. Justice Ginsburg used the phrase "heightened scrutiny" in *Virginia*, and although therein she may consider it synonymous with intermediate scrutiny, as used in this Note, heightened scrutiny refers to Justice Ginsburg's peculiar application, or misapplication, of the *Craig* test.

191. *See supra* notes 53-61 and accompanying text (discussing the intermediate scrutiny standard).

192. *Virginia*, 116 S. Ct. at 2275.

193. *Id.*

194. *Id.* The Court described the standard of review just as it had in the past, but the Court went out of its way to stress that, in fact, it requires the state to show an "exceedingly persuasive justification." *See, e.g., id.* at 2274-76, 2287.

195. *Id.* at 2275 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980) (internal quotation marks omitted))).

mediate scrutiny.[196] Justice Ginsburg did address Virginia's two offered objectives, but found one to be unauthentic and the other to fall "far short" of the required exceedingly persuasive standard.[197]

2. Virginia's Objectives

Aware that the Court had analyzed gender classifications exclusively under *Craig* for more than twenty years, Virginia offered two objectives that the State claimed VMI's male-only policy admirably accomplished.[198] First, Virginia asserted that a single-gender university was vital to the State's attempt to provide diverse educational opportunities for its citizens.[199] The Court agreed that educational diversity did serve the public good,[200] but found it in this case to be a mere rationalization for discrimination.[201] As in *Hogan*, the Court insisted that the proffered objective be genuine and not hypothesized or invented post hoc in response to litigation.[202] The Court looked to the record and found only a single document, the Report of the Virginia Commission on the University of the 21st Century, in which Virginia had declared educational diversity to be its true purpose.[203] The Court also delved into the history of educational opportunity in Virginia and observed that the State had long "deliberately" excluded women from higher education.[204] Justice Ginsburg criticized this historic lack of educational opportunity for women. For example, one of many elements in Virginia's constant plan to provide for the State's sons but not her daughters was Virginia's premier university, the University of Virginia, which did not allow female students until 1970.[205] Each of the other state institutions had abandoned single-gender education, leaving VMI as the only single-gender institution.[206] Relying on the record and her own history books, Justice Ginsburg found "no persuasive evidence . . . that VMI's male-only admission policy [wa]s 'in furtherance of a state policy of diversity.'"[207] With *Hogan* "immediately in point" as precedent, Justice Ginsburg reached "the same conclu-

196. *See id.* at 2276.
197. *Id.* at 2279, 2282.
198. *Id.* at 2276.
199. *Id.*
200. *Id.* at 2277 ("It is not disputed that diversity among public educational institutions can serve the public good.").
201. *Id.* at 2279.
202. *Id.* at 2277.
203. *Id.* at 2278.
204. *Id.* at 2277-79.
205. *Id.* at 2278.
206. *Id.* at 2279.
207. *Id.* (quoting United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992), *aff'd*, 116 S. Ct. at 2264.

sion" as Justice O'Connor—educational diversity was not the authentic objective but a mere rationalization.[208]

Justice Ginsburg, however, had stretched precedent beyond its full value. To begin, *Hogan* was not immediately in point. In *Hogan*, the Supreme Court found Mississippi's proffered objective to be a mere rationalization because it was not advanced by the gender classification (there was no evidence of past discrimination against women in the field of nursing requiring the remedy of maintaining an all-female nursing school) and was not the true purpose behind the classification (Mississippi had established MUW to provide white women with some source of education).[209] In *Virginia*, however, the Court readily acknowledged that the classification promoted Virginia's objective: "Single-sex education affords pedagogical benefits to at least some students, . . . and that reality is uncontested in this litigation."[210] Nevertheless, because Virginia never stated "in the record" that its objective was to promote educational diversity, and because women in Virginia historically have been denied educational opportunity, Justice Ginsburg found Virginia's objective disingenuous.[211] In contrast to cited precedent, Justice Ginsburg's disposal of Virginia's proffered objective turned not on the proficiency of the classification in meeting the objective, but on her deduction of Virginia's true motive.[212] The Court's *Virginia* decision directly contra-

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208. *Id.* at 2279; *see* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982).

209. *See Hogan*, 458 U.S. at 727-31. In *Hogan*, Mississippi claimed that its primary goal in maintaining MUW was "educational affirmative action." *Id.* at 727.

210. *Virginia*, 116 S. Ct. at 2276-77.

211. *Id.* at 2279.

212. *See id.* at 2276-79; *see also* Califano v. Goldfarb, 430 U.S. 199 (1977) (striking down a gender classification statute because the classification did not advance the government's stated purpose of looking after the social needs of widows and widowers); Weinberger v. Wiesenfeld 420 U.S. 636 (1975) (striking down a gender discriminatory statute because the classification did not advance the government's stated purpose of compensating women for past economic harms; rather, the purpose was a mere rationalization). In both *Califano* and *Weinberger*, the Court addressed reasons—beyond the classifications' failure to advance the offered objective—to buttress its decision that the government objective was not authentic; nevertheless, in both cases the Court gave great weight to the fact that the classification did not advance the stated objective. *See Califano*, 430 U.S. at 213-14; *Weinberger*, 420 U.S. at 651-53. Ruth Bader Ginsburg argued both cases. *Califano*, 430 U.S. at 198; *Weinberger*, 420 U.S. at 637. For a thorough discussion of this aspect of Justice Ginsburg's opinion, see *Leading Cases*, 110 HARV. L. REV. 135, 181-85 (1996), which notes that "[a]s a separate test, the rationalization inquiry threatens to transform the Supreme Court into a 'council of revision,' bestowed with tremendous power to overturn legislation."

dicted *Adarand Constructors, Inc. v. Pena*,[213] which concluded that absent strict scrutiny, "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions. . . ."[214] Reading *Adarand* and *Virginia*, one could conclude the Court has realized that although it is unable to ascertain using intermediate scrutiny the motivations behind racial classifications, it is more adept at understanding when the motive behind a gender classification is artificial.[215]

Justice Ginsburg addressed Virginia's second proffered objective—to "achiev[e] the results of an adversative model"—with considerable disdain.[216] She acknowledged that most women would not want to go to VMI.[217] The district court had even accepted expert testimony and concluded that most women would not prosper under the adversative method.[218] However, Justice Ginsburg found these factual findings to be "fixed notions" of women's abilities and looked strictly to the fact that *some* women had both the desire and ability to attend VMI.[219] Virginia's argument that admission of even these few women would destroy the adversative system (and the school) was simply a "self-fulfilling prophec[y]" based on the same ancient and familiar fears that once kept women out of law, medicine, the military, and other professions.[220] Predicting that women would fare as well at VMI as they had at the service academies,[221] Justice Ginsburg determined Virginia's objective to be "'far short of establishing the "exceedingly persuasive justification" that must be the solid base for any gender-defined classification.'"[222]

3. The VWIL Remedy

"A remedial decree," Justice Ginsburg wrote, "must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity . . . in 'the position they would have occupied in the absence of [discrimination].'"[223] The remedy must eliminate the dis-

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Id. at 183 (citations omitted).

213. 115 S. Ct. 2097 (1995).

214. *Id.* at 2112 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

215. *See Virginia*, 116 S. Ct. at 2279; *Adarand*, 115 S. Ct. at 2112.

216. *Virginia*, 116 S. Ct. at 2279-82.

217. *Id.* at 2280.

218. United States v. Virginia, 766 F. Supp. 1407, 1434-35 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *aff'd*, 116 S. Ct. at 2264.

219. *Virginia*, 116 S. Ct. at 2280.

220. *Id.* at 2279-81.

221. *Id.* at 2281 & n.13.

222. *Id.* at 2282 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982)) (internal citations omitted).

223. *Id.* (quoting Milliken v. Bradley, 433 U.S. 267, 280 (1977)) (internal quotation

criminatory effects of the past to the extent practicable and prohibit similar discrimination in the future.[224]

Virginia designed its remedy—the creation of VWIL—for those with the desire and ability to attend VMI whom VMI could not admit because of gender.[225] Virginia's decision not to adopt the VMI adversative model (or at a minimum, a vigorous military training program) at VWIL failed to provide women who desired such training with an adequate remedy for their unconstitutional exclusion from VMI.[226] The fact that most women would not want, and could not handle, the aggressive training at VMI did not concern Justice Ginsburg.[227] She was not interested in what most women wanted, instead writing that not only did most men not want to attend VMI either, but generalizations about "the way women are" would no longer justify discrimination.[228] In response to the argument that Virginia toned down VWIL because women rarely choose to pursue military careers, Justice Ginsburg made a clever observation: "By that reasoning, VMI's 'entirely militaristic' program would be inappropriate for men in general or *as a group*, for '[o]nly about 15% of VMI cadets enter career military service.'"[229]

Justice Ginsburg's comparison of VMI's and VWIL's tangible features revealed remarkably polar institutions.[230] VMI greatly eclipsed VWIL in all areas, including financing, faculty, library, and physical plant.[231] VWIL was "'a pale shadow of VMI.'"[232] Moreover, Justice Ginsburg found the intangible benefits of VMI to be a great asset and a greater concern to women denied them; in this area, VMI and VWIL were entirely disparate.[233] A VMI degree, she stated, carried with it the "'reputation of the faculty, experience of the administration, position and influence of

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marks and citations omitted and alteration in original).

224. *Id.*

225. *Id.* at 2284.

226. *See id.*

227. *Id.*

228. *See id.*

229. *See id.* at 2284 (quoting United States v. Virginia, 766 F. Supp. 1407, 1432 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *aff'd*, 116 S. Ct. at 2264) (alteration and brackets in original).

230. *Virginia*, 116 S. Ct. at 2284-85.

231. *Id.* For example, VWIL's endowment commitments were $35 million, while VMI's were $220 million—augmenting dramatically already the largest per-student endowment in the United States. *Id.* at 2285.

232. *Id.* at 2285.

233. *Id.*

the alumni, standing in the community, traditions and prestige.'"[234] These intangible considerations, Justice Ginsburg wrote, are incapable of measurement, but surely VMI "'possesses [them] to a far greater degree' than the VWIL program."[235] VMI's prestige and incredible resources, along with Virginia's failure to provide a substantially comparable opportunity to women, convinced the Court that the only valid constitutional remedy was to offer women nothing less than VMI.[236]

B. Chief Justice Rehnquist's Concurring Opinion

Chief Justice Rehnquist favored precedent. In his view, *Virginia* merited an unclouded application of *Craig*'s intermediate scrutiny standard; that is, a gender classification must serve an important government objective and substantially relate to the achievement of that objective.[237] To support his position, the Chief Justice cited *Craig* and thirteen intermediate scrutiny cases decided under *Craig*,[238] including two that the majority termed as "pathmarking" decisions justifying the heightened scrutiny level employed in *Virginia*.[239] The Chief Justice also asserted that the majority's call for an exceedingly persuasive justification was confusing and "best confined . . . as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself."[240] In sum, Chief Justice Rehnquist adhered to the Court's traditional, "'firmly established'" *Craig* principles.[241]

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234. *Id.* at 2285-86 (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)). Justice Ginsburg found VWIL "reminiscent of the remedy Texas proposed 50 years ago" in *Sweatt*. *Id.* at 2285. In *Sweatt*, Texas denied blacks entry into the University of Texas Law School, but, in response to an adverse trial court equal protection ruling, the University set up a separate law school for black students. *Sweatt*, 339 U.S. at 632. The Supreme Court found the separate school vastly inferior to the University of Texas and ruled that because the separate educational opportunities were not substantially equivalent the Equal Protection Clause required the University of Texas Law School to admit the black students. *Id.* at 636.

235. *Virginia*, 116 S. Ct. at 2287 (quoting *Sweatt*, 339 U.S. at 634).

236. *Id.*

237. *Id.* at 2288 (Rehnquist, C.J., concurring). Ironically, in *Craig*, Justice Rehnquist dissented, writing: "The only redeeming feature of the Court's opinion, to my mind, [i]s that it apparently signal[s] a retreat by those who joined the plurality opinion in *Frontiero v. Richardson*. . . . [T]he Oklahoma statute challenged here need pass only the 'rational basis' equal protection analysis." Craig v. Boren, 429 U.S. 190, 217-18 (1976) (Rehnquist, J., dissenting) (citation omitted).

238. *Virginia*, 116 S. Ct. at 2288 (Rehnquist, C.J., concurring).

239. *See id.* at 2274 (citing J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)).

240. *Id.* at 2288 (Rehnquist, C.J, concurring).

241. *Id.* (Rehnquist, C.J., concurring) (quoting *Hogan*, 458 U.S. at 723).

The majority's approach in evaluating the first of Virginia's two offered objectives—providing diverse educational institutions—also disturbed the Chief Justice.[242] He saw no reason for an inquiry into Virginia's nineteenth-century motivation for establishing VMI, and found the majority's mewling over the prevalence of gender discrimination throughout Virginia's history superfluous.[243] The Chief Justice asserted the proper analysis focused only on Virginia's conduct since the Court's 1982 *Hogan* decision.[244] As Chief Justice Rehnquist explained, "VMI was founded in 1839, and . . . admission was limited to men because under the then-prevailing view men, not women, were destined for education. However misguided this point of view may be by present-day standards, it surely was not unconstitutional in 1839."[245] Further, the Chief Justice stated that the precedent prior to *Hogan*, relied upon by the majority,[246] was of little value to Virginia in evaluating the legality of excluding women from VMI.[247] Although decisions such as *Reed* established equal protection scrutiny for women, "[e]ven at [that] time . . . Virginia and VMI were scarcely on notice that [*Reed*'s] holding would be extended across the constitutional board. They were entitled to believe that one 'swallow doesn't make a summer' and await further developments."[248]

Nevertheless, Chief Justice Rehnquist determined that Virginia's first objective was a mere rationalization because Virginia did not seriously reconsider VMI's policy even after *Hogan* put the State on notice that the policy was questionable.[249] If diversity was truly Virginia's objective, then it served only men and remained problematic under the substantially related prong of *Craig*.[250] He rejected Virginia's second objective—maintenance of the adversative method—as simply unimportant.[251]

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242. *Id.* at 2288-90 (Rehnquist, C.J., concurring).
243. *Id.* at 2288-89 (Rehnquist, C.J., concurring).
244. *Id.* at 2290 (Rehnquist, C.J., concurring).
245. *Id.* at 2288 (Rehnquist, C.J., concurring).
246. *See id.* at 2274-76. Justice Ginsburg's majority opinion cited *Reed v. Reed*, 404 U.S. 71 (1971), as the Court's initial holding that women were due equal protection. *Virginia*, 116 S. Ct. at 2275.
247. *Virginia*, 116 S. Ct. at 2289 (Rehnquist, C.J., concurring).
248. *Id.* (Rehnquist, C.J., concurring).
249. *Id.* at 2289-90 (Rehnquist, C.J., concurring).
250. *Id.* at 2290 (Rehnquist, C.J., concurring).
251. *Id.* at 2290-91 (Rehnquist, C.J., concurring).

Finally, Chief Justice Rehnquist took issue with the Court's decision as to the proper remedy.[252] He found the majority's required remedy unnecessarily overbroad, instead suggesting gender-separate institutions that would be equal in quality and "of the same overall calibre."[253]

C. *Justice Scalia's Dissenting Opinion*

Justice Scalia premised his dissent on broad conceptual grounds,[254] a disagreement with the majority on the appropriate standard of review,[255] and a scathing critique of virtually every conclusion reached by the Court.[256] The majority decision provided another example, stated Justice Scalia, of the Court removing issues from the democratic process and "inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law."[257] According to Justice Scalia, the Court had no reason to subject VMI to any form of constitutional scrutiny.[258] He asserted that the Constitution "takes no sides in this educational debate," and VMI's male-only policy was an issue for the legislature.[259] He maintained the function of the Court was to preserve restrictions on government and prevent "backsliding," not to impose upon the democratic process values based on popular whims of the

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252. *Id.* at 2291 (Rehnquist, C.J., concurring).

253. *Id.* (Rehnquist, C.J., concurring).

254. *Id.* at 2292-93 (Scalia, J., dissenting) Justice Scalia's philosophy on Constitutional interpretation has marginalized him in recent years, and his dissents have grown in number. Greenhouse, *in Supreme Court's Decisions, a Clear Voice and a Murmur*, *supra* note 14, at A20. Court watchers note that these dissents are usually "more likely to offend than to persuade." *Id.* Justice Scalia wrote in a recent dissent that "[t]he Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize." Board of County Comm'rs v. Umbehr, 116 S. Ct. 2361, 2373 (1996) (Scalia, J., dissenting).

255. *Virginia*, 116 S. Ct. at 2293-97 (Scalia, J., dissenting).

256. *Id.* at 2298-309 (Scalia, J., dissenting).

257. *Id.* at 2292 (Scalia, J., dissenting). Justice Scalia took issue with what he termed the Court's "deprecat[ion] . . . of our forebears." *Id.* at 2291-92 (Scalia, J., dissenting). He wrote,

> Closeminded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.

Id. (Scalia, J., dissenting).

258. *Id.* at 2292-93 (Scalia, J., dissenting).

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

time.[260] Specifically, Justice Scalia stressed the great importance of the VMI tradition:

> "[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." The same applies *mutatis mutandis*, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment.[261]

The democratic process may change traditions such as VMI, but, according to Justice Scalia, the majority's assertion that VMI "has been unconstitutional through the centuries is not law, but politics-smuggled-into-law."[262]

Justice Scalia recognized, however, that his philosophy would not win five votes anytime in the near future, and it was better to participate in "creating" a Constitution than to sit by while others created one.[263] Consequently, he too evaluated VMI within the Court's precedential equal protection framework.[264] Nevertheless, he remained at odds with Justice Ginsburg's opinion. Justice Scalia asserted that the Court did not "apply honestly" the intermediate scrutiny standard that it had applied to gender classifications for two decades.[265] The Court recited that test, he noted, but never answered the question in any form resembling *Craig* or *Hogan*.[266] In ignoring precedent and instead requiring an exceedingly persuasive justification, Justice Scalia found *Virginia* to destabilize what had been well-settled law and "muddy the waters" of equal protec-

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

261. *Id.* at 2292-93 (Scalia, J., dissenting) (quoting Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)) (internal citations omitted).

262. *Id.* at 2293. (Scalia, J., dissenting). Justice Scalia also relied on the tradition of The Citadel, founded only three years after VMI, because the majority's decision would also force that school to admit women. *Id.* (Scalia, J., dissenting).

263. *Id.* (Scalia, J., dissenting) ("[T]he Court favors current notions so fixedly that it is willing to write them into the Constitution of the United States by application of custom-built 'tests.' This is not the interpretation of a Constitution, but the creation of one.").

264. *Id.* at 2293-97 (Scalia, J., dissenting). Justice Scalia evaluated VMI under traditional intermediate scrutiny analysis. *Id.* (Scalia, J., dissenting).

265. *Id.* at 2293 (Scalia, J., dissenting).

266. *Id.* at 2294 (Scalia, J., dissenting).

tion.[267] The Court's decision, wrote Justice Scalia, was simply "irresponsible."[268]

VMI passed the "correct test," asserted Justice Scalia, because single-gender education and the adversative method of education were both substantially related to Virginia's "important state interest in providing effective college education for its citizens."[269] He found the district court's factual conclusions to provide more than enough evidence on the benefits of both single-gender educational environments and the adversative method.[270] Therefore, concluded Justice Scalia, even if the Court ignored his broad assertions on constitutional philosophy, VMI easily met the intermediate scrutiny requirements.[271]

Confident that he had proven VMI's policy constitutional under a proper application of intermediate scrutiny, Justice Scalia turned his pen to a "series of contentions that are irrelevant or erroneous as a matter of law, foreclosed by the record in this case, or both."[272] Conspicuously unconcerned with maintaining a good relationship with his fellow justices, he scorned and lectured the majority, methodically slashing almost every one of its conclusions.[273]

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267. *Id.* at 2295 (Scalia, J., dissenting). In characteristically different styles, the Chief Justice and Justice Scalia agreed: they both viewed intermediate scrutiny as the proper standard. *See id.* at 2288 (Rehnquist, C.J., concurring); *id.* at 2293-94 (Scalia, J., dissenting).

268. *Id.* at 2295 (Scalia, J., dissenting).

269. *Id.* at 2296 (Scalia, J., dissenting). In the manner Justice Scalia framed his application of the intermediate scrutiny test, VMI would only fail the test if a court concluded that either "effective college education" was not an important government interest or that single-gender education was not substantially related to that interest. *See id.* His framing of the issue in a different manner than both the majority and concurring opinions illustrates that intermediate scrutiny is largely a play on words, and decisions rest largely on the gut feelings of Justices. *See supra* notes 112-16 and accompanying text (discussing application of intermediate scrutiny).

270. *Virginia*, 116 S. Ct. at 2296-97. Justice Scalia did not address to what degree VMI benefited different genders, but cited a significant mass of evidence from the record to buttress his conclusion that single-gender education at VMI was beneficial:

> "That single-gender education at the college level is beneficial to both sexes is a *fact established in this case.*"
>
> The evidence establishing that fact was overwhelming—indeed, "virtually uncontradicted." . . . "One empirical study in evidence, not questioned by any expert, demonstrates that single-sex colleges provide better educational experiences than coeducational institutions."

Virginia, 116 S. Ct. at 2296 (Scalia, J., dissenting) (quoting United States v. Virginia, 766 F. Supp. 1407, 1415 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *aff'd*, 116 S. Ct. at 2264) (citations omitted).

271. *Id.* at 2293 (Scalia, J., dissenting).

272. *Id.* at 2298 (Scalia, J., dissenting).

273. *See id.* (Scalia, J., dissenting).

Justice Scalia began with a purely legal argument. He stated the majority's implicit use of "strict scrutiny [was] without antecedent in [] sex-discrimination cases" and found that it "discredit[ed] the Court's decision."[274]

He then addressed the majority's assertion that VMI's stated goal of educational diversity was a pretext for discrimination.[275] This conclusion, he pointed out, could be true only if VMI's Mission Study Committee held a "base motive" for its report recommending that the school remain all male.[276] To the contrary, proclaimed Justice Scalia, the Committee's "sober 3-year study, and the analysis it produced, utterly refute[d] the claim that VMI [] elected to maintain its all-male student-body composition for some misogynistic reason."[277]

Justice Scalia ridiculed the majority's search for an explicit statement by Virginia in VMI's recorded history as to its actual purpose in maintaining an all-male institution.[278] In spirited language, he proclaimed that the Court should not require a state's actions to

> be accompanied—in anticipation of litigation and on pain of being found to lack a relevant state interest—by a lawyer's contemporaneous recitation of the State's purposes. The Constitution is not some giant Administrative Procedure Act, which imposes upon the States the obligation to set forth a 'statement of basis and purpose' for their sovereign acts.[279]

Justice Scalia then described the hypocrisy of this requirement, noting that while the Court required a recitation of Virginia's actual purpose in the record before it would recognize the proffered purpose of diversity, nowhere was the majority's assumption that Virginia established VMI "to keep women in their place" recorded.[280] He stated: "[S]ince the 1839 policy was no more explicitly recorded than the Court contends the present one is, the mere fact that *today's* Commonwealth continues to fund VMI "'is enough to answer the [United States'] contention that the [classification] was the accidental by-product of a traditional way of thinking about females.'"[281]

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274. *Id.* (Scalia, J., dissenting).
275. *Id.* (Scalia, J., dissenting).
276. *Id.* (Scalia, J., dissenting).
277. *Id.* (Scalia, J., dissenting).
278. *Id.* (Scalia, J., dissenting).
279. *Id.* (Scalia, J., dissenting) (quoting 5 U.S.C. § 553(c) (1994)).
280. *Id.* (Scalia, J., dissenting).
281. *Id.* at 2298-99 (Scalia, J., dissenting) (quoting Michael M. v. Superior Court, 450 U.S. 464, 471 n.6 (plurality opinion) (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (quoting Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concur-

As for the majority's call for a recording of diversity as Virginia's actual motive, Justice Scalia went on to argue that although this requirement was nonsensical, Virginia had in fact offered VMI as a diverse educational institution on the record.[282] The 1990 Report of the Virginia Commission on the University of the 21st Century specifically pronounced diversity as a goal of Virginia's educational policy.[283] Thus, accepting the need for such a statement, "the plain fact, which the Court does not deny, is that it *was* [there]."[284]

Justice Scalia quickly threw aside the majority's contention that VMI did not advance the purpose of diversity by surmising that "[t]he apparent theory of this argument is that unless Virginia pursues a great deal of diversity, its pursuit of some diversity must be a sham."[285] Justice Scalia's answer to this was simple: Virginia could not afford all possible permutations of schools and the Court should not penalize the State for coordinating an all-male school along with the other institutions it "assist[ed]—which include[d] four women's colleges."[286]

Justice Scalia's final argument with respect to the asserted diversity purpose behind VMI's all-male character related to the majority's assertion that VMI alone, with no authority over any other state institution, did not have the capacity to affect a statewide policy of educational diversity.[287] VMI's autonomy, Justice Scalia chided, did not impede its pursuit of diversity among Virginia's institutions: "If it were impossible for individual human beings (or groups of human beings) to act autonomously in effective pursuit of a common goal, the game of soccer would not exist."[288] Justice Scalia further countered this argument by pointing out that VMI was not entirely autonomous because the Virginia legisla-

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ring)))) (internal quotation marks omitted and alteration in original).

282. *Id.* at 2299 (Scalia, J., dissenting).

283. *Id.*

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

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

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

287. *Id.* at 2300 (Scalia, J., dissenting).

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

ture could simply cease funding if it felt that VMI was not serving a valid purpose.[289]

Next, Justice Scalia addressed the majority's rejection of expert testimony offered at trial, which suggested the adversative method of education was unsuitable to women, because the court felt these findings merely restated the State's own witnesses.[290] It is "inexcusable," asserted Justice Scalia, to tell Virginia that it must justify its program and then ignore findings that rest on evidence proffered in an attempt to meet that justification.[291] Pointing to the fact that even the United States' expert witness "called himself a believer in single-sex education," he proposed that the Supreme Court could have saved the parties the trouble, time, and expense of a trial because the majority never addressed the findings of the courts below, instead supplanting them with

> the Justices' own view of the world, which the Court proceeds to support with (1) references to observations of someone who is not a witness, nor even an educational expert, nor even a judge who reviewed the record or participated in the judgment below, but rather a judge who merely dissented from the Court of Appeals' decision not to rehear this case en banc, . . . (2) citations of nonevidentiary materials such as *amicus curiae* briefs filed in this Court, . . . and (3) various historical anecdotes designed to demonstrate that Virginia's support for VMI as currently constituted reminds the Justices of the "bad old days."[292]

This approach, wrote Justice Scalia, "rendered the trial a sham."[293]

The next issue Justice Scalia addressed was the majority's statement that Virginia had misperceived precedent by focusing its argument on

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289. *Id.* (Scalia, J., dissenting). The dissent transforms into mockery in a footnote following this argument, stating:

> The Court, unfamiliar with the Commonwealth's policy of diverse and independent institutions, and in any event careless of state and local traditions, must be forgiven by Virginians for quoting a reference to 'the Charlottesville campus' of the University of Virginia. . . . The University of Virginia . . . occupies the portion of Charlottesville known, not as the 'campus,' but as the 'grounds.' More importantly, even if it were a 'campus,' there would be no need to specify 'the Charlottesville campus,' as one might refer to the Bloomington or Indianapolis campus of Indiana University. Unlike university systems with which the Court is perhaps more familiar, such as those in New York . . . , Illinois . . . , and California . . . , there is only *one* University of Virginia.

Id. at 2300 n.4 (Scalia, J., dissenting).

290. *Id.* at 2300-01 (Scalia, J., dissenting).

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

292. *Id.* at 2301 (Scalia, J., dissenting).

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

means rather than end.[294] VMI's mission was analogous to the mission of every college in Virginia.[295] Justice Scalia argued it was not VMI's mission which was at issue—it was the distinct way VMI accomplished that mission through the all-male adversative method.[296] And, he and the courts below had found, "*that* mission [was] *not* 'great enough to accommodate women.'"[297]

Justice Scalia also disagreed with the majority's claim "that VMI would not have to change very much if it were to admit women."[298] His "principal response" to that argument was that because VMI survived intermediate scrutiny, the point was irrelevant.[299] Eager to argue every point with the majority, however, Justice Scalia went on to state that even if it was relevant, the majority was in error because forcing VMI to admit women would frustrate the adversarial method.[300] Armed with findings of fact from the district court and the Fourth Circuit, Justice Scalia concluded that the admission of women would significantly alter VMI's training methods and eventually lead to the demise of the adversative system.[301]

In his sixth and final challenge to the majority's conclusions, Justice Scalia attacked the dismissal of VWIL.[302] Although he asserted that any discussion on VWIL was irrelevant because VMI passed intermediate scrutiny and thus required no remedy, Justice Scalia went on to address the point.[303] Once again, he pointed to the majority's decision to ignore lower court findings of fact solely because the majority found them based on overbroad generalizations as to the proper roles of men and women.[304] Accepting the lower courts' finding that the State carefully designed VWIL to produce "substantially similar outcomes to VMI's in an all-female environment" because the adversative method was not appro-

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294. *Id.* (Scalia, J., dissenting).
295. *Id.* (Scalia, J., dissenting).
296. *Id.* (Scalia, J., dissenting).
297. *Id.* (Scalia, J., dissenting).
298. *Id.* (Scalia, J., dissenting).
299. *Id.* at 2302 (Scalia, J., dissenting).
300. *See id.* (Scalia, J., dissenting).
301. *Id.* (Scalia, J., dissenting).
302. *Id.* at 2303 (Scalia, J., dissenting).
303. *Id.* (Scalia, J., dissenting). Justice Scalia pointed out that the Court did not rely on the absence of an all-male nursing school in its *Hogan* opinion. *Id.* at 2302-03 (Scalia, J., dissenting). ("As Virginia notes, if a program restricted to one sex is necessarily unconstitutional unless there is a parallel program restricted to the other sex, 'the opinion in *Hogan* could have ended with its first footnote, which observed that 'Mississippi maintains no other single-sex public university or college.'" (quoting Brief for Cross-Petitioners at 38, *Virginia* (Nos. 94-1941, 94-2107) (quoting Mississippi Univ. v. Hogan, 458 U.S. 718 n.1, 720 (1982)))).
304. *Id.* at 2303 (Scalia, J., dissenting).

priate for women, Justice Scalia deferred to Mary Baldwin College's statement on the issue:

> "It would have been possible to develop the VWIL program to more closely resemble VMI, with adversative techniques associated with the rat line and barracks-like living quarters. Simply replicating an existing program would have required far less thought, research, and educational expertise. But such a facile approach would have produced a paper program with no real prospect of successful implementation."[305]

Thus, by showing that Virginia had taken the most intelligent path in providing a successful analogue to VMI, Justice Scalia rejected the majority's call for an exact analogue with equal resources and credentials.[306] In fact, Justice Scalia did not even see fit to address the great disparities between VMI and VWIL underscored by the majority.[307]

Finally, Justice Scalia addressed Chief Justice Rehnquist's concurrence. Justice Scalia disagreed with the Chief Justice's determination that there was no evidence that diversity was Virginia's true purpose in maintaining VMI.[308] Not only was there evidence in the record that this was Virginia's intention, but "[a] legal culture that has forgotten the concept of *res ipsa loquitur* deserves the fate that it today decrees for VMI."[309] Justice Scalia also took issue with the Chief Justice's quick dismissal of VMI's second offered objective of maintaining the adversative model.[310] The Chief Justice, wrote Justice Scalia, ignored factual findings and was "simply wrong."[311] Justice Scalia's third and final disagreement with the Chief Justice was over the latter's assertion that *Hogan* provided notice that Virginia's maintenance of an all-male school, absent an all-female counterpart, was unconstitutional.[312] Justice Scalia countered by stating that Virginia responded to *Hogan* with a thoughtful study into VMI's legitimacy and established VWIL.[313] This was not enough to satisfy the majority, he noted, and in any event Virginia already supported four four-year women's colleges in Virginia.[314]

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305. *Id.* (Scalia, J., dissenting) (quoting Brief for Mary Baldwin College as Amicus Curiae at 5, *Virginia* (No. 94-1941)).
306. *Id.* at 2303 (Scalia, J., dissenting).
307. *See id.* (Scalia, J., dissenting).
308. *Id.* at 2303-04 (Scalia, J., dissenting).
309. *Id.* at 2304 (Scalia, J., dissenting).
310. *Id.* at 2304-05 (Scalia, J., dissenting).
311. *Id.* at 2304 (Scalia, J., dissenting).
312. *Id.* at 2305 (Scalia, J., dissenting).
313. *Id.* (Scalia, J., dissenting).
314. *Id.* (Scalia, J., dissenting).

The breadth of the Court's decision infuriated Justice Scalia, and he believed it would seriously impact all levels of single-gender education.[315] Although he recognized that the majority limited its decision to "unique" educational programs, he argued that all single-sex programs are by definition unique.[316] Thus *Virginia* made the chance of litigation so high and the new standard so difficult to meet that it effectively ended single-gender education in America, for "[n]o state official in his right mind will buy such a high-cost, high-risk lawsuit."[317] Further, Justice Scalia asserted that under the majority's ruling, the states may deny private institutions government aid if they discriminate on the basis of gender.[318]

The dissent concluded with a hope that *Virginia* was useless law.[319] The majority opinion, Justice Scalia pointed out, had gone out of its way to label the case "unique."[320] Further, the Court often abandoned principles of law applied in previous gender classification decisions, and might never look to the principles developed in *Virginia* for precedent.[321] Justice Scalia was both "happy and ashamed to say that this abandonment provided hope."[322]

V. IMPACT OF THE COURT'S DECISION

The Supreme Court's *Virginia* decision certainly had two casualties—the decision forced the country's only two public men's military colleges to admit women.[323] On the other hand, VWIL will likely remain

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315. *Id.* at 2305-08 (Scalia, J., dissenting).
316. *Id.* at 2306 (Scalia, J., dissenting).
317. *Id.* (Scalia, J., dissenting).
318. *Id.* at 2306-07 (Scalia, J., dissenting).
319. *Id.* at 2307 (Scalia, J., dissenting).
320. *Id.* (Scalia, J., dissenting).
321. *Id.* (Scalia, J., dissenting).
322. *Id.* (Scalia, J., dissenting).
323. The Citadel, a Charleston, South Carolina military college, agreed to admit women within 48 hours of the Supreme Court's *Virginia* decision. Michael Janofsky, *Citadel, Bowing to Court, Says It Will Admit Women*, N.Y. TIMES, June 29, 1996, at A6. Under a federal court order, Shannon Faulkner became the first woman to attend The Citadel in March 1995, but she withdrew within a week. *Id.*; *see* Faulkner v. Jones, 51 F.3d 440 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995). The VMI Alumni Association, which spent approximately $10 million dollars in the legal battle to defend VMI's all-male status, attempted to purchase VMI so that it could maintain its single-sex status. Mike Allen, *Defiant VMI to Admit Women, But Will Not Ease Rules for Them*, N.Y. TIMES, Sept. 22, 1996, at A1; Elizabeth Levitan Spaid, *Last All-Male Bastion Faces Its Own 'D-Day,'* CHRISTIAN SCI. MONITOR, Sept. 20, 1996, at 5; *To Keep an All-Male VMI, Its Alumni Consider Buying It*, N.Y. TIMES, June 30, 1996, at A11. The attempt failed, and VMI's Board of Visitors voted to admit women on September 21, 1996. Allen, *supra*, at A1. Two women attended the first coed open house for

intact.[324] Otherwise, the opaque holding left almost everyone guessing at its import. Those directly involved with single-gender programs must do more than guess, however, as they decide if their single-gender character is constitutional. Indeed, private single-gender universities and secondary public schools with single-gender programs reading the *Virginia* opinion may fear that the decision could result in lower courts using Justice Ginsburg's heightened scrutiny against them.[325]

There are eighty-four private women's colleges[326] and three private all-male colleges in the United States.[327] Justice Scalia argued that the majority's rationale threatens the existence of all eighty-seven institutions.[328] The Attorney General who initially filed the VMI lawsuit in 1990 had a similar opinion, and declared Justice Ginsburg's *Virginia* opinion "'the death knell for gender discrimination where public funds are used.'"[329] Read literally, however, *Virginia* leaves largely untouched the issue of whether these schools are now vulnerable to an equal protection challenge. That issue rests on the complex state action doctrine, another murky area of law with a history of unpredictability.[330] While it is true that public and private colleges are distinct creatures, with public institutions under the direct control of state legislatures and private schools governed by private bodies, a court may very well consider a private institution receiving substantial government aid a state actor.[331] If so, any discrimination on the basis of sex would be an equal protection violation and thus the destruction of that school's single-gender

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prospective students. *Coed Open House Draws 2 Women to VMI Campus*, VIRGINIAN-PILOT, Oct. 19, 1996, at B5.

324. *See VMI Admitting Women Won't Spell End of VWIL*, VIRGINIAN-PILOT, Sept. 29, 1996, at B7.

325. Twenty-six private single-gender institutions combined to submit an amicus brief in support of single-sex education. *See* Brief for Twenty-Six Private Women's Colleges as Amicus Curiae, *Virginia* (No. 94-1941).

326. Mike Allen, *Separatism Is In, Except for White Men*, N.Y. TIMES, June 30, 1996, at D5. Total enrollment at women's colleges is approximately 120,000 students. *Id.*

327. The all-male colleges are Hampden-Sydney College in Virginia, Wabash College in Indiana, and Morehouse College in Atlanta. *Id.* Total enrollment of all three colleges is under 5000 students. *Id.*

328. United States v. Virginia, 116 S. Ct. 2264, 2306-07 (1996) (Scalia, J., dissenting).

329. Katia Hetter, *End of an All-Male Era*, U.S. NEWS & WORLD REP., July 8, 1996, at 50 (quoting former U.S. Attorney General Richard Thornburgh).

330. The Supreme Court's thinking on the subject is presented in *Blum v. Yaretsky*, 457 U.S. 991 (1982). *See generally* ROTUNDA & NOWAK, *supra* note 26, at 494-509.

331. *See infra* notes 332-40 and accompanying text.

policy. Although finding a private college to be a state actor is unlikely, it is not impossible. Private institutions count on government for a substantial amount of financial assistance, deriving approximately nineteen percent of their budgets directly from the government, with another large portion routed through students in the form of financial aid (loans, scholarships, and grants).[332] In addition, private colleges highly covet charitable status under the tax laws.[333] Indeed, without government support most private institutions could not survive.

The *Virginia* dissent also pointed out that the issue is not necessarily whether the private institution is a state actor, but whether the "government *itself* would be violating the Constitution by providing state support to single-sex colleges."[334] This is not a novel idea. In *Norwood v. Harrison*[335] the Supreme Court invalidated a grant of books to students who attended racially discriminatory schools under a state law that provided free books to all students.[336] *Norwood* involved a racial, not a gender, classification, but with Justice Ginsburg's declaration in *Virginia* that the Court does not equate gender classifications with race classifications "for all purposes,"[337] private schools are left to wonder if the *Norwood* rule is one for which racial and gender classifications *are* equatable.[338] If so, the future of single-gender education in America is in jeopardy.[339]

An application of *Norwood* to gender classifications is a subject deserving much more attention than the scope of this Note allows, but if the Court exercises what it perceives as its broad power to overturn legislative decisions—based on its newfound ability to decipher legislative motive,[340] single-gender private schools certainly provide an opportunity. There is a major deterrent to exercising this power: effectively

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332. *Virginia*, 116 S. Ct. at 2306 (Scalia, J., dissenting) (citing Brief for Mary Baldwin College as Amicus Curiae at 22 n.13, *Virginia* (No. 94-1941) (citing U.S. DEPT. OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 38 & n. (1993))).

333. *Id.* at 2306 (Scalia, J., dissenting).

334. *Id.* at 2307 (Scalia, J., dissenting).

335. 413 U.S. 455 (1973).

336. *Id.* at 471.

337. *Virginia*, 116 S. Ct. at 2275.

338. In a similar case, the Court upheld a grant of textbooks to students of religious schools. Board of Educ. v. Allen, 392 U.S. 236 (1968). The Court premised the holding in *Allen*, however, on the protection of free association and free exercise of religion rights. *See id.* Gender classifications have no such basis and are more easily analogized to racial classification cases because gender, like race, is an immutable characteristic. *See* Grove City College v. Bell, 465 U.S. 555 (1984).

339. For a persuasive argument that *Virginia* will have little or no effect on private institutions, see Sara L. Mandelbaum, *"As VMI Goes . . . : The Domino Effect and Other Stubborn Myths*, 6 SETON HALL CONST. L.J. 979 (1996).

340. *See supra* notes 209-15 and accompanying text.

ending the education of the 125,000 students enrolled at private single-sex colleges[341] would be a giant leap even for this "most illiberal Court."[342]

Many opponents of VMI argued that even if the Court determined that public funding to private single-gender colleges violated equal protection, women's colleges would nevertheless remain valid because they address the historic lack of educational opportunity available to women and promote equal opportunity, thus fulfilling a "compensatory purpose."[343] This argument cannot be taken seriously, for although women have undoubtedly been the subject of past discrimination, they now enjoy great success in American universities: last year, *women* earned more associate's, bachelor's, and master's degrees than men.[344] Surely, the gender having greater success is in no need of broad special treatment. Further, preferences for women "reinforc[e] precisely the same paternalistic stereotypes—women need special treatment and protection."[345]

There is also the possibility that *Virginia* does not forbid single-gender public education in general. Justice Ginsburg limited the holding in *Virginia* by specifically stating that the Court was not faced with the question of whether states can provide separate but equal institutions for males and females:

> [I]t is the mission of some single-sex schools "to dissipate, rather than perpetuate, traditional gender classifications." We do not question the State's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as "unique," an opportunity available only at Virginia's premier military institute, the State's sole single-sex public university or college.[346]

It was clear to the Court that VMI and VWIL were incomparable, and thus, its evaluation of the separate opportunities available to males and

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341. Of the 125,000 students, 120,000 are women. Allen, *supra* note 326, at D5.

342. *See Virginia*, 116 S. Ct. at 2292 (Scalia, J., dissenting). A "blueprint for defending" private women's colleges is available. *See* Jennifer R. Cowan, *Distinguishing Private Women's Colleges From the* VMI *Decision*, 30 COLUM. J.L. & SOC. PROBS. 137, 137-38 (1997) (asserting that private women's college are not unconstitutional under VMI).

343. *See* Jeffrey Rosen, *Single-Sex Schools and Double Standards*, N.Y. TIMES, July 3, 1996, at A23.

344. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 191, tbl. 300 (1996). Women earned 59.2% of associate's degrees, 54.3% of bachelor's degrees, and 51.8% of master's degrees. *Id.* Men, however, took home more professional degrees (58.5%) and doctorates (62.8%). *Id.*

345. Rosen, *supra* note 343, at A23.

346. *Virginia*, 116 S. Ct. at 2276 n.7 (internal citations omitted).

females was logically simple.[347] The Court did not question a state's prerogative to evenhandedly support diverse schools, but neither did it endorse single-sex public institutions.[348] Although this ambiguity amplified the legal dilemma currently faced by public secondary schools wishing to establish single-sex programs, it has not halted the recent fervor to open such schools. For example, New York's East Harlem School District Four opened the Young Women's Leadership School, a girls-only public school, in September 1996.[349] The ACLU, the National Organization for Women (NOW), and other groups promptly filed a lawsuit seeking to block the operation of the school.[350] Although the legal protests may win in the courts, there is a rise in the popularity of single-gender programs across the country: national enrollment at private girls schools jumped eight percent between 1991 and 1996, and new single-gender schools opened recently in California and Maine.[351] While most involved admit that the effect of *Virginia* on these programs is unknown,[352] officials at the Board of Education in East Harlem claim that they can provide Justice Ginsburg with an exceedingly persuasive justification for their all-girl school.[353] The Board, however, is probably in error: courts were not kind to the gender programs before *Virginia*,[354] and the decision's more rigorous standard for gender discrimination only makes single-gender programs that much more difficult to justify.[355]

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347. *Id.* at 2284-87.

348. *See id.* at 2276-77, 2285.

349. Scott Baldauf, *Merits, Demerits of Single-Sex Ed Raised in Harlem: Separate but Equal?*, CHRISTIAN SCI. MONITOR, Sept. 4, 1996, at 1.

350. Jacques Steinberg, *Rights Groups Seek to Bar Girls-Only School*, N.Y. TIMES, Aug. 23, 1996, at B2. For a discussion and criticism of the ACLU and NOW's approach to ending single-gender education, see Anita K. Blair, *The New Move Equal Protection Clause*, 44 FED. LAW. 35, Jan. 1997.

351. Baldauf, *supra* note 349, at 1.

352. Mary B. W. Tabor, *Planners of a New Public School for Girls Look to Two Other Cities*, N.Y. TIMES, July 22, 1996, at B1 (discussing the Young Women's Leadership School in East Harlem, Philadelphia High School for Girls, and Western High School in Baltimore).

353. Steinberg, *supra* note 350, at B4. One member of the Board said the justification was that "girls did not do as well in math and science in co-education as they do in a single-gender setting." *Id.* Nevertheless, under Justice Ginsburg's VMI logic, if one boy would flourish in the all-girls school, the school must admit him. *See Virginia*, 116 S. Ct. at 2280.

354. In 1991, the Detroit School Board began to implement a program for a boys-only school to aid inner-city youth. Garrett v. Board of Educ. of School Dist. of Detroit, 775 F. Supp. 1004, 1006 (E.D. Mich. 1991). The ACLU sued, and a district court entered an injunction, applying the intermediate scrutiny test as developed in *Hogan*. *Id.* at 1005-08, 1014. In response, the Board of Education promptly abandoned the plan. *See Detroit Plan to Aid Blacks With All-Boy School Abandoned*, L.A. TIMES, Nov. 8, 1991, at A4.

355. *See supra* notes 185-236 and accompanying text (discussing the Court's new

Virginia substantially alters the legal framework used to evaluate gender discrimination cases.[356] Unfortunately, *Virginia* also revives an erratic history of gender classification decisions.[357] Before *Virginia*, intermediate scrutiny "seemed to mean different things to different appeals courts."[358] Now, it means different things to everyone, as constitutional lawyers begin to argue over the Court's mishandling of intermediate scrutiny and the implication of what is presumably a new standard in gender discrimination jurisprudence.[359]

In 1973, *Frontiero v. Richardson* brazenly applied strict scrutiny as the appropriate standard of review for gender discrimination, and the Court quickly repudiated the decision.[360] *Virginia* did not go as far as *Frontiero*, but arguably heightened the standard in just as clumsily a manner. The Court's resolve to maintain the new standard is unknown, but if the past is any indication, the next case might overturn, change, or simply ignore it.[361] If the heightened standard endures, state gender classifications will be incredibly difficult to defend.

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standard).

356. *See* Hope Viner Samborn, *Scrutiny Scrutinized: Case Sparks Debate on Intermediate Standard*, A.B.A. J., Sept. 1996, at 29 (discussing effects of *United States v. Virginia* on intermediate scrutiny standard); *supra* notes 211-15, 238-42, 262-68 and accompanying text.

357. *See* discussion *supra* notes 65-117, and accompanying text.

358. Greenhouse, *The Supreme Court; Discrimination; Military Colleges Can't Bar Women, High Court Rules*, *supra* note 14, at A1 (quoting Judith Lichtman, President of the Women's Legal Defense Fund).

359. *See, e.g.*, Martin A. Schwartz, *Equal Protection Developments*, N.Y.L.J., Sept. 17, 1996, at 3 (asserting that although there are minor differences, *Virginia*'s equal protection "analysis fairly resembles strict judicial scrutiny"); Anita K. Blair, *Junior High and* VMI, WASH. POST, Sept. 30, 1996, at A22 (opinion piece written by executive vice president and general counsel of the Independent Women's Forum asserting that a new level of "skeptical scrutiny" was created by Justice Ginsburg in *Virginia*); Erwin Chemerinsky, *Breakdown in the Levels of Scrutiny*, TRIAL, Mar. 1, 1997, at 6-8 (asserting that with *Virginia*, the Supreme Court made intermediate scrutiny "virtually indistinguishable from strict scrutiny"); Rosemary C. Salamone, *The* VMI *Case: Affirmation of Equal Educational Opportunity for Women*, TRIAL, Oct. 1, 1996 (asserting that with *Virginia*, the Supreme Court did not move to strict scrutiny, but applied intermediate scrutiny with "bite"). *See generally* Wilfred M. McClay, *Of "Rats" and Women*, COMMENTARY, Sept. 1, 1996, at 46 (outlining disagreements within the women's movement over the impact of *Virginia*).

360. *See supra* notes 87-95 and accompanying text (analyzing *Frontiero* decision).

361. *See supra* notes 65-111 and accompanying text (discussing ad hoc nature of Court's past gender-classification decisions).

VI. CONCLUSION

Vague but established precedent was available to guide the Court's decision in *United States v. Virginia*.[362] The Court could have easily confined a ruling for or against VMI within the *Craig* substantial relationship standard.[363] Indeed, precedent required this application, and a result based on the Court's instinct, rather than a proper objective application of the law, would have fallen in line with past decisions.[364] *Virginia*, however, serves as an important reminder that gender politics is alive and well even in the Supreme Court's chambers. A veteran women's rights proponent guided the Court into an opinion that vindicated her legal career[365] and destroyed a loved tradition, but provided little in the form of honest judging. In the process, the Court not only cast the appropriate scrutiny standard into doubt, but irresponsibly complicated the future of beneficial and much needed educational programs well beyond the unique program it purported to address.[366] Ironically, as Justice Ginsburg admonished Virginia for providing a mere rationalization for its actions, she essentially followed the same path as the accused—claiming to apply precedent and objectively arrive at a conclusion, but in fact revising two decades of entrenched law.[367]

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362. *See supra* notes 112-16, 237-41, 265-71 and accompanying text.

363. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

364. *See supra* notes 112-15 and accompanying text.

365. Robert Marquand, *Male-only Military School Must Admit Female Cadets: Court Bolsters Protections for Women in* Virginia *Case*, CHRISTIAN SCI. MONITOR, June 27, 1996, at 1.

366. *See* discussion *supra* Part V.

367. *See supra* notes 112-17, 238-41, 265-71 and accompanying text. For a discussion by the Court on the importance of following precedent, see Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2114-17 (1995) (stating that "any departure from the doctrine of *stare decisis* demands special justification").