SEX AS A SUSPECT CLASS: AN ARGUMENT FOR APPLYING STRICT SCRUTINY TO GENDER DISCRIMINATION

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I. INTRODUCTION

In *United States v. Commonwealth of Virginia*[1] ("*VMI*"), the Supreme Court has a landmark opportunity to revisit the legal standard courts should use to review classifications which treat men and women differently. The *VMI* case involves an equal protection challenge to the state's exclusion of women from VMI and its establishment of an alternative, sex-stereotyped women's leadership program as a remedy to that exclusion. The United States, which brought the case against VMI, has asked the Supreme Court to rule that sex-based classifications, like classifications based on race, must be subjected to the highest level of constitutional scrutiny, or "strict scrutiny".

II. A BRIEF HISTORY OF THE SUPREME COURT'S DEVELOPMENT OF A STANDARD OF REVIEW FOR ANALYZING SEX DISCRIMINATION

The standard used by the Court to review sex-based discrimination under the equal protection clause has changed substantially over the past twenty-five years. Until 1971, sex-based classifications were subjected to the lowest level of constitutional scrutiny, that is, rational basis review. Under this standard, a classification must be rationally related to a legitimate government purpose to survive constitutional scrutiny.[2] Courts have only rarely struck down government classifications under rational basis review.

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[1]44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995) [hereinafter *VMI II*].

[2]*See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding law requiring only men to serve on juries under rational basis review).

In 1971, in *Reed v. Reed*,[3] the Supreme Court for the first time applied a higher level of scrutiny to sex discrimination. In *Reed*, the Court implicitly rejected rational basis review of sex-based distinctions to strike down a law that selected men over otherwise equally qualified women as administrators of estates. Although the Court stopped short of explicitly adopting heightened scrutiny for sex-based classifications, it was clear that the Court applied something more stringent than the traditionally lenient rational basis review in rejecting administrative convenience as a sufficient justification for the different treatment of men and women.[4] The Court's failure to articulate a new standard for reviewing sex-based classifications left lower courts with little guidance as to how to analyze sex discrimination under the equal protection clause.

In 1973, the Supreme Court revisited the proper standard of review for sex-based distinctions, and a plurality of four Justices adopted strict scrutiny. In *Frontiero v. Richardson*,[5] the Court held that a rule entitling servicemen to automatically claim their spouses as dependents for purposes of obtaining certain military benefits, while servicewomen had to demonstrate actual dependency by their spouses in order to obtain such benefits, violated the equal protection guarantee of the Due Process Clause of the Fifth Amendment.[6] In adopting strict scrutiny for sex-based discrimination, the plurality found implicit support in the Court's prior decision in *Reed*, which effectively rejected rational basis review for sex discrimination. Although *Frontiero* provided some guidance to lower courts, it did not definitively resolve the issue of the proper standard of review for sex-based classifications because only four Justices joined the plurality opinion adopting strict scrutiny.[7]

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[3]404 U.S. 71 (1971).

[4]*See* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (reading the Court's opinion in *Reed* to implicitly reject rational basis review for sex-based classifications).

[5]411 U.S. 677 (1973).

[6]Constitutional challenges to sex discrimination by the United States are brought under the Fifth Amendment, which applies to the United States, as opposed to the Fourteenth Amendment Equal Protection Clause, which covers actions by states and their subdivisions. However, the same legal standards apply to equal protection actions under the Fifth and Fourteenth Amendments.

[7]Justice Powell, with whom the Chief Justice and Justice Blackmun concurred, disagreed with the plurality's application of strict scrutiny on the grounds that the case could have been decided under *Reed* without reaching the issue of whether sex is a suspect class under the equal protection clause. *Id.* at 692 (Powell, J., concurring). These Justices

Finally, in a retreat from the plurality's approach in *Frontiero*, in 1976 a majority of the Court adopted what is now known as middle tier, or intermediate scrutiny for sex discrimination. In *Craig v. Boren*,[8] the Court ruled that classifications based on sex "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to survive equal protection scrutiny.[9] Applying this standard to a state law prohibiting the sale of 3.2% beer to males under the age of 21 and females under the age of 18, the Court ruled that the law did not survive constitutional scrutiny, despite statistical evidence showing a higher incidence of alcohol-related driving arrests among 18-20 year old males than females in this age range.

While the Court's opinion in *Craig* clarified the proper standard of review for sex-based classifications, it left to lower courts the task of determining whether a state interest is sufficiently "important" and whether the classification challenged is "substantially related" to that interest. The majority in *Craig* held that the statistical evidence proffered by the state, which demonstrated that 18-20 year old males had a higher incidence of drunk driving arrests than females, was insufficient to show a substantial relationship between the state's interest in promoting traffic safety and the use of the challenged sex-based classification. However, the Court did not reject the use of statistics *per se* to establish a substantial relationship between the use of a sex-based classification and an important state interest, and did not specify what degree of statistical correlation, if any, might suffice.[10] The Court did caution that "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in

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found it particularly inappropriate to reach this question because, at that time, the equal rights amendment was pending before state legislatures and would have resolved the question reached by the plurality. *Id.* Justice Rehnquist dissented, for the reasons stated in the district court opinion. *Id.* at 691 (Rehnquist, J., dissenting). Justice Stewart concurred, stating that the statute constituted invidious discrimination, citing *Reed*, without expressing any opinion as to the proper standard of review. *Id.* (Stewart, J., concurring).

[8]429 U.S. 190 (1976).

[9]*Id.* at 197.

[10]The statistics offered in *Craig* showed that 2% of males age 18-20 were arrested for alcohol-related driving offenses, compared to .18% of females in that age group. The Court rejected this evidence, stating that "[w]hile such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device." *Id.* at 201.

tension with the normative philosophy that underlies the Equal Protection Clause."[11]

In subsequent cases, the Court has articulated a stronger intermediate scrutiny standard than that employed by the Court in *Craig*. These later cases clarify that a state seeking to uphold sex discrimination bears the burden of demonstrating "an exceedingly persuasive justification" for the challenged classification.[12] In 1982, the Court applied this formulation to strike down a state statute excluding males from enrolling in Mississippi University for Women's School of Nursing ("MUW"). Although the state had attempted to justify the exclusion of men based on an affirmative action rationale as a means of compensating for past discrimination against women, the Court found that the exclusion did not serve a compensatory purpose and in fact "tends to perpetuate the stereotyped view of nursing as an exclusively women's job."[13]

The *Hogan* Court emphasized that intermediate scrutiny "must be applied free of fixed notions concerning the roles and abilities of males and females," and that the legislative objective, even if purportedly compensatory, must be carefully scrutinized to ensure that it is not premised upon gender stereotypes.[14] Because there was no evidence that discriminatory barriers had suppressed women's opportunities in the field of nursing, the Court found that the alleged objective of remedying past discrimination was not the actual purpose underlying the statute. In fact, the Court noted, far from assisting women, the exclusion of men from the nursing school may even harm women to the extent that the exclusion of men from nursing depresses nurses' wages.[15] In addition, the Court ruled that the state had failed to show the required substantial relationship between the challenged classification and its alleged objective, as men were allowed to audit classes at the school and there was no evidence that their admission would suppress the performance of female nursing students.[16] Hence,

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[11]*Id.* at 204.

[12]Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979).

[13]*Hogan*, 458 U.S. at 729.

[14]*Id.* at 724-25.

[15]*Id.* at 729-30 & n.15.

[16]*Id.* at 731.

MUW's exclusion of men from its nursing program could not survive the Court's intermediate scrutiny test.

More recently, in 1994, the Court decided *J.E.B. v. Alabama*,[17] to hold unconstitutional sex-based peremptory strikes of jurors, applying perhaps the strongest yet formulation of intermediate scrutiny to classifications based on sex. Recognizing the parallels and similarities between race and sex discrimination in this country, the Court applied wholesale a line of cases forbidding race discrimination in jury selection to the gender context. In answering the question of whether equal protection "forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race," the Court held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[18]

In refusing to water down its previous race discrimination rulings in the gender context, the Court again recited the need for a state to justify sex discrimination based on "an exceedingly persuasive justification."[19] Applying intermediate scrutiny, the Court found that gender-based peremptory strikes were not substantially related to the state's interest in securing a fair and impartial trial. The Court rejected the state's assertion that its use of gender-based challenges to strike men from the jury in a paternity case was justified because women were more likely to be sympathetic to claimants in such cases. The Court viewed the state's justification as "'the very stereotype the law condemns,'"[20] and noted that even if there were statistical support for such a proposition, the use of gender as a proxy for determining a potential juror's views was "at the least, overbroad, and serves only to perpetuate the same 'outmoded notions of the relative capabilities of men and women.'"[21]

The Court's rejection of gender-based peremptory strikes as an "overbroad" proxy of an individual's views is very close to the rule under strict scrutiny that the use of a suspect class (such as race) must be necessary to achieve the underlying state interest in order to survive under equal protection. Although the Court stopped short of adopting strict scrutiny for

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[17]114 S. Ct. 1419 (1994).

[18]*Id.* at 1421.

[19]*Id.* at 1425.

[20]*Id.* at 1426 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)).

[21]*Id.* at 1427 & n.11 (quoting Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441 (1985)).

gender classifications in *J.E.B.*, the intermediate scrutiny test applied by the Court looks increasingly close to a strict scrutiny standard.

In addition to applying strong formulations of intermediate scrutiny in recent years, the Court has also gone out of its way not to foreclose a future ruling adopting strict scrutiny for gender classifications. Since establishing intermediate scrutiny in 1976, a majority of the Court has twice noted that the issue of whether gender classifications warrant strict scrutiny is an open question. First, in *Hogan*, in an opinion written by Justice O'Connor, the Court noted that it "need not decide whether classifications based on gender are inherently suspect."[22] A nearly identical footnote again surfaced in the majority's opinion in *J.E.B.* In a particular effort to emphasize the openness of this issue, and in a case brought under a federal statute rather than the equal protection clause, Justice Ginsburg filed a concurring opinion in which she noted that the Court has not foreclosed holding gender as a suspect class under the Equal Protection Clause.[23] The strengthening of an intermediate scrutiny standard, coupled with the Court's explicit recognition that strict scrutiny remains a possibility for gender discrimination, may indicate the Court's willingness to reconsider strict scrutiny for gender classifications in the future.

III. THE MISAPPLICATION OF INTERMEDIATE SCRUTINY BY LOWER COURTS AND RECENT ANOMALIES IN AFFIRMATIVE ACTION LAW WARRANT RECONSIDERATION OF THE STANDARD OF REVIEW FOR GENDER DISCRIMINATION

Although the Supreme Court has repeatedly applied a strong intermediate scrutiny standard to gender discrimination, the history of intermediate scrutiny in the lower courts demonstrates widespread confusion and inconsistent results. Lower courts have often complained that the intermediate scrutiny standard provides insufficient guidance and leaves broad discretion with individual judges in deciding the importance of a state interest and whether the classification is substantially related.[24] Even Justice

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[22]Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982).

[23]Harris v. Forklift Sys., 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring).

[24]*See, e.g.*, Lamprecht v. FCC, 958 F.2d 382, 398 n.9 (D.C. Cir. 1992); Coral Constr. Co. v. King County, 941 F.2d 910, 931 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992); Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.2d 922, 939 (9th Cir. 1987); Meloon v. Helgemoe, 564 F.2d 602, 604 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978); Contractors Ass'n of E. Pa. v. City

Rehnquist, dissenting in *Craig*, criticized intermediate scrutiny as "so diaphanous and elastic as to invite subjective judicial preferences or prejudices . . .,"[25] although Justice Rehnquist's solution would be to subject gender classifications to rational basis, rather than strict scrutiny review.[26]

One of the best examples of an abuse of the intermediate scrutiny standard in the lower courts is found in the Fourth Circuit's decision approving Virginia's alternative program for women in the VMI case. The Fourth Circuit concocted a "special intermediate scrutiny" test for evaluating single-sex education, which asked:

> (1) whether the state's objective of providing single-gender education to its citizens may be considered a legitimate and important governmental objective;
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> (2) whether the gender classification adopted is directly and substantially related to that purpose; and
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> (3) whether the resulting mutual exclusion of women and men from each other's institutions leaves open opportunities for those excluded to obtain substantively comparable benefits at their institution or through other means offered by the state.[27]

By defining the challenged classification itself (the exclusion of women from VMI) as the important state interest (the provision of single-gender education), the Fourth Circuit rendered the first two prongs of the test conclusory and meaningless. The third prong, which it held to be satisfied by similar, broadly defined goals for producing well-educated citizens, was interpreted as sufficiently lenient to permit vast differences between VMI and the women's leadership program premised on traditional gender stereotypes. Had this test been employed by the Supreme Court in *Hogan*, the school's exclusion of men would have survived equal protection, as the exclusion of

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of Phil., 735 F. Supp. 1274, 1303 (E.D. Pa. 1990); Joseph v. City of Birmingham, 510 F. Supp. 1319, 1335 n.22 (E.D. Mich. 1981).

[25]Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

[26]*Id.* at 227.

[27]United States v. Commonwealth of Virginia, 44 F.3d 1229, 1237 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

men was directly related to providing single-gender education for women, and men had opportunities for nursing programs elsewhere in the state.[28]

Other decisions also illustrate the proclivity of lower courts to misapply intermediate scrutiny. In *Faulkner v. Jones*,[29] the Fourth Circuit suggested that while an absence of group demand is not sufficient to justify a deprivation of socio-political rights under the Equal Protection Clause, it may suffice to justify a denial of economic benefits such as education. This reasoning, unsupported by any precedent, led the court to leave open the possibility that South Carolina may be permitted to establish an inferior, alternative women's leadership program in lieu of admitting women to the Citadel. Nor has the misuse of intermediate scrutiny to reach erroneous results been confined to the Fourth Circuit.[30]

The use of intermediate scrutiny in the lower courts has also resulted in inconsistent rulings in similar cases. For example, courts have applied intermediate scrutiny to reach opposite results regarding: the constitutionality of statutes punishing only male rapists who attack female victims;[31] the constitutionality of criminal statutes differentiating between male and female perpetrators who commit the same crime;[32] the constitutionality of statutes

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[28]Indeed, unlike the *VMI* case where the women's program is inferior to the rigorous military school for men in virtually every respect, the male plaintiff who successfully challenged his exclusion from *Hogan* could have attended comparable nursing programs at other state schools in different locations. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.8 (1982).

[29]51 F.3d 440 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995).

[30]*See, e.g.*, United States v. Broussard, 987 F.2d 215, 218-20 (5th Cir. 1993) (relying on gender-based stereotypes to uphold gender-based peremptory strikes); United States v. Nichols, 937 F.2d 1257, 1262-64 (7th Cir. 1991) (same), *cert. denied*, 502 U.S. 1080 (1992); State v. Culver, 444 N.W.2d 662 (Neb. 1989) (same); Vorcheimer v. School Dist. of Phila., 532 F.2d 880, 888 (3d Cir. 1976) (finding that separate high schools for boys and girls would survive both a rational basis and a substantial relationship review, despite acknowledgment that the boys' school had a superior science program), *aff'd without opinion*, 430 U.S. 703 (1977) (by an equally divided Court).

[31]*Compare* Country v. Parratt, 684 F.2d 588 (8th Cir.) (upholding statute), *cert. denied*, 459 U.S. 1043 (1982), *with* People v. Liberta, 474 N.E.2d 567 (N.Y. 1984) (striking down statute), *cert. denied*, 471 U.S. 1020 (1985).

[32]*Compare* State v. Gurganus, 250 S.E.2d 668 (N.C. Ct. App. 1979) (upholding assault statute penalizing males more heavily than females when the victim is female), *with* Tatro v. State, 372 So.2d 283 (Miss. 1979) (striking down statute prohibiting males but not females from sexually assaulting children under age fourteen).

permitting a widow, but not a widower to elect against a spouse's will;[33] and the constitutionality of criminal statutes providing for different penalties on men and women for nonsupport of spouses and children.[34]

New anomalies in equal protection doctrine created by the Supreme Court's recent affirmative action decisions provide a further reason for the Court to adopt strict scrutiny for gender discrimination. Last term, the Court decided *Adarand Constructors, Inc. v. Pena*,[35] which held that the use of race-based classifications by the federal government to remedy past discrimination must be subjected to strict scrutiny. The Court had already ruled, several years ago, that race-based classifications employed in state and local affirmative action programs must also pass strict scrutiny in order to survive under equal protection.[36]

After these decisions, white men now have greater legal protection from reverse discrimination by affirmative action programs than women have from government-sponsored discrimination against women. Given the importance the Court has placed on historic discrimination against protected groups as a justification for invoking heightened scrutiny, such a result does not square with the logic of the Court's equal protection doctrine. A related anomaly, recognized by Justice Stevens in his concurring opinion in *Adarand*, is that race-based affirmative action that is designed to remedy discrimination against racial minorities must now meet a stricter legal test than sex-based affirmative action that is designed to remedy discrimination against women. This result also is incongruous with the Court's equal protection doctrine.

An additional anomaly resulting from the recent affirmative action decisions is an anomaly in fact, rather than law. Most affirmative actions programs combine remedial programs for women with remedial programs for racial minorities. Indeed, the program challenged in *Adarand* was designed to benefit women as well as minorities.[37] As a matter of practice, governments are unlikely to separate out the portion of the program designed

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[33]*Compare* Estate of Baer, 562 P.2d 614 (Utah) (upholding statute), *appeal dismissed*, 434 U.S. 805 (1977), *with* Hess v. Wims, 613 S.W.2d 85 (Ark. 1981) (striking down statute).

[34]*Compare* Perini v. State, 264 S.E.2d 172 (Ga. 1980) (upholding statute), *with* State v. Fuller, 377 So.2d 335 (La. 1979) (striking down statute).

[35]115 S. Ct. 2097, 2118 (1995).

[36]City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989).

[37]*See Adarand*, 115 S. Ct. at 2102.

to benefit women from that portion targeting minorities in deciding whether the affirmative action plan is justified, despite the different standards of review applicable to race and gender classifications. Consequently, affirmative action programs for women will in effect have to survive strict scrutiny in order to survive politically, so that affirmative action for women will not benefit from any differences between intermediate and strict scrutiny. As a result, it will be easier for governments to discriminate against women than to remedy discrimination against them.

By adopting strict scrutiny for gender discrimination, the Supreme Court could resolve these anomalies and avoid further confusion and misapplication of intermediate scrutiny in the lower courts.

III. A BLUEPRINT FOR WHY GENDER-BASED DISCRIMINATION SHOULD BE SUBJECTED TO STRICT SCRUTINY

Although a comprehensive justification for applying strict scrutiny to gender is beyond the scope of this discussion, an outline for why strict scrutiny is the appropriate standard can be found in the plurality opinion in *Frontiero*. In *Frontiero*, the plurality looked at a number of warning signals to support its extension of strict scrutiny to gender. First, the *Frontiero* Court recognized that "[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination."[38] Second, the Court noted that, in part because of this history, "women are vastly underrepresented in this Nation's decisionmaking councils."[39] Third, the Court found that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." Finally, the Court observed that Congress, through statutes addressing sex discrimination, had recognized "that classifications based upon sex are inherently invidious,"[40] and that "this conclusion of a coequal branch of government is not without significance to the question presently under consideration."[41]

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[38]Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

[39]*Id.* at 686 n.17.

[40]*Id.* at 687.

[41]*Id.* at 687-88.

These considerations remain equally persuasive today. Not only has our nation had a long and unfortunate history of sex discrimination,[42] but the legacy of that discrimination continues today, albeit in more subtle forms. Despite tremendous gains by working women, the United States labor force remains highly sex-stratified. In 1991, one out of every four working women held administrative support jobs, and women filled 82% of such jobs in all industries.[43] At the same time, women are a minority of technical and professional workers, comprising only 3.9% of airline pilots and navigators, 18.6% of architects, 10.5% of dentists and little more than 20% of doctors and lawyers.[44] The Federal Glass Ceiling Commission found in 1994, that even where women obtain entry into professional occupations, the remain disproportionately in the lower ranks of the workplace.[45] Women also

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[42]For a comprehensive discussion of the history of sex discrimination in the United States, see BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 69-70 (1975). For the present discussion, however, a few of the more notable examples of sex discrimination will have to suffice.

Women did not obtain the right to vote until 1920. Women also were excluded from jury service well into the twentieth century, *see J.E.B.*, 114 S. Ct. at 1422-23 (discussing relevant history), and even as late as 1961, the Supreme Court upheld an exemption from jury service for women based on women's role as the center of home and family life. Hoyt v. Florida, 368 U.S. 57, 60 (1961). In the late 19th and early 20th centuries, states enacted laws requiring employers to discriminate against women, by excluding them from certain occupations, lucrative overtime work, heavy lifting, night work, and from working before and after childbirth. *See* BABCOCK ET AL., *supra*, at 261. The Court gave its stamp of approval to such discrimination, confirming that women had no right to practice law, Bradwell v. Illinois, 83 U.S. 130, 139 (1873), or bartend, Goesaert v. Cleary, 335 U.S. 464, 467 (1948). Throughout most of the twentieth century, women were also excluded from our country's most prestigious colleges and universities, such as, for example, the University of Virginia, which did not admit women until forced to do so by a 1970 federal court order. *See* Kirstein v. Rector & Visitors of the Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970).

[43]9 to 5, PROFILE OF WORKING WOMEN 1 (1992-1993); EEOC, JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY 1 (1994) (table 1).

[44]BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNTIED STATES 396 (1994).

[45]FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITOL 12 (1995).

continue to make lower wages than men for the same work, even when their levels of education are the same.[46]

Second, today as well as in 1973 when the Court decided *Frontiero*, women are underrepresented in the political process. In 1995, women were only eight percent of all United States Senators and 10.8% of all United States Representatives.[47] In that same year, only 20.7% of state legislators were women.[48] Women hold only 25.9% of all state executive offices, and of the fifty states, only one has a woman governor.[49] Only 18% of cities with populations over 30,000 have women mayors.

Third, at the risk of stating the obvious, and as the Court found significant in *Frontiero*, sex is an immutable characteristic determined at birth.

Finally, to the extent that the Court gives deference to Congress' determination that sex discrimination is inherently invidious, as the plurality did in *Frontiero*, such deference is equally warranted today. In fact, since *Frontiero* was decided, Congress enacted the Civil Rights Act of 1994, adding a damages remedy under Title VII of the Civil Rights Act of 1964 for intentional sex discrimination, based in part on a strong record of the harms inflicted by such discrimination.

Nevertheless, despite the existence of federal laws addressing sex discrimination, these legal protections are far from comprehensive and do not lessen the need for courts to strictly scrutinize sex discrimination under the Constitution. For example, while Congress has enacted laws prohibiting discrimination on the basis of race, color or national origin and discrimination on the basis of disability in all federally funded programs,[50] federal law prohibits sex discrimination in federally funded education

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[46]WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, WOMEN WORKERS: TRENDS AND ISSUES 35, 97 (1993); Robert G. Wood et al., *Pay Differences Among the Highly Paid: The Male-Female Earnings Fap in Lawyers' Salaries*, 11 J. LAB. ECON. 417, 430-31 (July 1993).

[47]CENTER FOR THE AMERICAN WOMAN AND POLITICS, WOMEN IN ELECTIVE OFFICE 1995 (1995).

[48]*Id.*

[49]*Id.*

[50]Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d (1988 & Supp. V 1993) (race, color and national origin); Rehabilitation Act of 1973 (§ 504), 29 U.S.C. § 794 (1988 & Supp. V 1993) (disability).

programs only.[51] Similarly, women are not protected from sex discrimination in public accommodations, although discrimination based on race, color, religion, national origin or disability is prohibited by federal law.[52] In addition, federal law does not prohibit sex discrimination in the making and enforcement of contracts as it does race discrimination.[53]

Perhaps the best example of the need for strong constitutional protections to address ongoing sex discrimination is the VMI case itself. The district court recited a litany of stereotypes to justify its decision that women are better suited for Virginia's alternative, less rigorous women's leadership program, concluding that: "most women reaching college generally have less confidence than men,"[54] "anorexia is rampant among young college women,"[55] "males tend to need an atmosphere of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor,"[56] while "females tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students,"[57] and that integrating VMI "would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes."[58]

Based on generalizations about "most" women's needs and abilities, both the district court and the Fourth Circuit upheld Virginia's denial to

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[51]Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1994). Because institutions which have remained single-sex throughout their history are exempted from the law's requirements, the case against VMI was brought under the U.S. Constitution and did not include a Title IX claim.

[52]42 U.S.C. §§ 2000a, 12182 (1988 & Supp. V 1993).

[53]42 U.S.C. § 1981 (1988 & Supp. V 1993). As a result, federal law only prohibits sex discrimination in employment by employers with fifteen or more employees, *see* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, while race discrimination is prohibited in any employment contract.

[54]United States v. Commonwealth of Virginia, 852 F. Supp. 471, 480 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

[55]*Id.* at 480.

[56]United States v. Commonwealth of Virginia, 766 F. Supp. 1407, 1434 (W.D. Va. 1991), *vacated*, United States v. Commonwealth of Virginia, 976 F.2d 890 (4th Cir. 1992), *cert. denied sub nom.*, 508 U.S. 946 (1993).

[57]*Id.*

[58]United States v. Commonwealth of Virginia, 44 F.3d 1229, 1239 (4th Cir.), *cert. denied*, 116 S. Ct. 281 (1995).

women of a highly prestigious and unique educational opportunity. The adoption of strict scrutiny for such state-sponsored discrimination would go a long way toward securing meaningful equal opportunity for women.