WOMEN WIN THE WAR AT VMI

Throughout the past three decades, women have made significant progress towards securing for themselves equal protection of their rights under the law as guaranteed by the United States Constitution. More specifically, women have relied on the Equal Protection Clause of the Fourteenth Amendment, which guarantees all citizens that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Despite the Fourteenth Amendment's constitutional assurance against discrimination, society and the courts have been slow in reaching agreement about both the type of scrutiny with which to analyze claims of gender discrimination and the overall place of gender-based classifications under the Constitution.

Claims of gender discrimination brought pursuant to the Equal Protection Clause are currently evaluated under the judicially created intermediate scrutiny test. This middle-tier level of review was created to respond to claims of gender discrimination that the Supreme Court felt could be evaluated under neither the strict scrutiny test nor the rational


2 U.S. CONST. amend. XIV, § 1. Section one of the Fourteenth Amendment of the United States Constitution provides in full that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

3 See DeVan, supra note 1, at 489 (commenting that “[t]he conflict between women’s demands for economic and professional equality and men’s basic desire for privacy poses delicate questions that current Equal Protection Clause analysis cannot clearly answer.”).

4 See Allan Ides, The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function, 50 WASH. & LEE L. REV. 35, 35-36 (1993). See also Craig v. Boren, 429 U.S. 190, 204 (1976) (declaring unconstitutional a statute that prohibited the sale of beer to females under the age of 18 and to males under the age of 21); Reed v. Reed, 404 U.S. 71, 77 (1971) (proclaiming unconstitutional a statute that provided that men must be preferred over equally-qualified women to administer a decedent’s estate).

5 See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-7, at 1454 (2d ed. 1988). Strict scrutiny, the highest level of scrutiny applied to equal protection claims, has
basis analysis.\textsuperscript{6} The application of the intermediate scrutiny test to gender-based classifications reflects the notion that the government may not discriminate based on gender unless it provides a sufficiently important justification for the discrimination and creates a program or statute carefully designed to promote its asserted interest.\textsuperscript{7} The judiciary has developed a two-prong test for analyzing gender-based classifications under this intermediate level of review: (1) there must be an important government interest at stake and (2) there must be a substantial relationship between the government interest to be advanced and the gender-based classification.\textsuperscript{8} In applying this intermediate scrutiny test, courts have been applied to legislative and administrative classifications to hold such classifications "unconstitutional absent a compelling governmental justification if they distribute benefits or burdens in a manner inconsistent with fundamental rights." \textit{Id.}

\textsuperscript{6} See Melissa Taylor, \textit{Note, The VMI Decision: A Look at the Balancing Process in Equal Protection Cases}, 60 UMKC L. Rev. 393, 398-99 (1991). Reed prompted the Court to depart from the traditional rational basis approach and instead analyze gender classifications under heightened scrutiny. \textit{See id.} at 399. Thereafter, in Craig, the Court declared that intentional gender discrimination would violate equal protection unless substantially related to the achievement of important government objectives. \textit{See id.} at 400. Consequently, the creation of this intermediate level of review forced equal protection analysis to become somewhat of a "macro-balancing" process. \textit{See id.} Thus, where there was once "a traditional two-sided scale with social and economic regulations on one end and race and alienage regulations on the other, there is now a sliding scale." \textit{Id.}

This resulting sliding scale is attributable to the fact that, as opposed to the two traditional levels of scrutiny, the middle level does not apply a nonrebuttable presumption to the legitimacy of the classification in question. \textit{See id.} at 401. In the absence of a nonrebuttable presumption, it therefore becomes the judiciary's obligation to explain the factors contributing to its decision as well as the process by which such factors are weighed. \textit{See id.} If the judiciary fails to explain the contributing factors clearly and adequately, then "the intermediate level of scrutiny will remain a mask for an unexplained process of adjudication." Kenneth L. Karst, \textit{Note, The Supreme Court, 1976 Term}, 91 HARV. L. Rev. 81, 88 (1977); see also Craig, 429 U.S. at 212 (explaining that "a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard [of review] than an attempt to articulate it in all-encompassing terms.").

Rational basis review, the lowest level of scrutiny applied to equal protection claims and primarily applied to economic legislation, has been described by the Court as requiring "'some rationality in the nature of the class singled out,' with 'rationality' tested by the classification's ability to serve the purposes intended by the legislative or administrative rule . . . ." Tribe, \textit{supra} note 5, at 1440 (quoting Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966)). In applying this requirement, the Court has willingly upheld classifications based "'upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy. . . .'" \textit{Id.} at 1443 (quoting Allied Stores, Inc. v. Bowers, 358 U.S. 522, 530 (1959)).

\textsuperscript{7} See Ides, \textit{supra} note 4, at 36. Given that no mathematical formula exists for assessing the importance of the government's reasons for the discrimination or for measuring the degree to which a government statute or program must be appropriately tailored, the intermediate scrutiny test provides courts with some latitude in making a determination whether a particular gender classification is legitimate. \textit{See id.}

\textsuperscript{8} See \textit{id.} Demonstrating a substantial relationship between the classification and the government interest is somewhat of a less "elastic" concept than is measuring the impor-
struck down gender-based classifications that reflect or reinforce irrational gender stereotypes. Recent court decisions have advocated the notion that gender distinctions, "rationalized by an attitude of 'romantic paternalism'... in practical effect, put women, not on a pedestal, but in a cage."  

In one of the most closely observed and anticipated gender-bias cases, *United States v. Virginia,* the United States Supreme Court decided that the Equal Protection Clause precluded the State of Virginia from preserving exclusively to men, and denying to women, the unique educational experiences and opportunities afforded by the Virginia Military Institute (VMI). The Court declared that neither VMI's pedagogical methods nor its goal of molding students into citizen-soldiers was inherently unsuitable for qualified female applicants. The Court further proclaimed that Virginia's proposed program for women—the Virginia Women's Institute for Leadership (VWIL)—was inherently unequal to

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Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of woman adopting a distinct and independent career from that of her husband. ... The paramount destiny and mission of woman are to fulfill [sic] the noble and benign offices of wife and mother. This is the law of the Creator.

*Frontiero v. Richardson,* 411 U.S. 677, 684 (1973). To illustrate the Court's previously held misconceptions about the role of women in society, Justice Brennan, the author of the majority opinion in *Frontiero,* quoted language from a Supreme Court case decided over one hundred years earlier:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of woman adopting a distinct and independent career from that of her husband. ... The paramount destiny and mission of woman are to fulfill [sic] the noble and benign offices of wife and mother. This is the law of the Creator.

*Id.* at 684–85 (quoting Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872)).
VMI in almost all respects. In sum, the Court declared that VMI's all-male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment because Virginia failed to show an "exceedingly persuasive justification" for excluding women from VMI and because VWIL did not adequately remedy the constitutional violation.  

In 1990, a female high school student prompted the United States Department of Justice to file a complaint against Virginia and VMI, alleging that VMI's male-only admissions policy violated the Fourteenth Amendment's Equal Protection Clause. At the time the complaint was filed, VMI and The Citadel in South Carolina stood as the last two remaining all-male public institutions of higher learning in the United States. In response to the complaint, VMI initially asserted that it was in full compliance with the constitutional standard for single-sex higher education established by Supreme Court decisions and was therefore not obligated to admit women.

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14 See id. at 2284.
15 See id. at 2276.
16 See United States v. Virginia, 766 F. Supp. 1407, 1408 (W.D. Va. 1991). Specifically, suits proceeded against all of the original named defendants to the lawsuit, including Virginia, Governor Lawrence Douglas Wilder, VMI, its president, superintendent, the members of its Board of Visitors, and Virginia's State Council of Higher Education and its members. See id. The State Council of Higher Education and its members were later dismissed from the lawsuit. See id. Both the VMI Alumni Association and the VMI Foundation, private organizations, intervened as defendants. See id. Virginia's Governor, Lawrence Douglas Wilder, was granted permission to withdraw from the litigation in light of his opposition to VMI's male-only admissions policy. See Charles J. Russo & Susan J. Scollay, All Male State-Funded Military Academies: Anachronism or Necessary Anomaly?, 82 EDUC. L. REP. 1073, 1074 (West 1993). Similarly, and perhaps due to outside political pressures, State Attorney General Mary Sue Terry was similarly granted leave to withdraw. See id. As a result, Virginia was forced to obtain pro bono counsel to act as its representative. See id.
17 See Valorie K. Vojdik, At War: Narrative Tactics in the Citadel and VMI Litigation, 19 HARV. WOMEN'S L.J. 1, 1 (1996). Both The Citadel and VMI offer male cadets much more than an undergraduate education within a military environment. See id. Rather, The Citadel and VMI graduates find that they have unlimited access to wealth, opportunity, and power, particularly in the South. See id. Alumni of both institutions have reached elevated positions of power within the military, business, and government sectors. See id.
18 See Virginia, 766 F. Supp. at 1408. Between 1988 and 1990, nearly 350 women sent test scores, inquiries, and requests for applications to VMI. See Bennett L. Saferstein, Note, Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection, 54 U. PITT. L. REV. 637, 655 (1993). VMI failed to respond to any of these women. See id. From the time the complaint was brought, there was never any doubt as to VMI's status as a state actor for purposes of equal protection analysis. See id. In fact, because the women of Virginia could not enroll in VMI but had to support it with their tax dollars, equal protection analysis was clearly triggered. See id.; see also 42 U.S.C.A. § 2000c-6 (West 1997) (allowing the United States to bring complaints alleging discrimination in violation of either federal statutes or the United
Established as a four-year military institution in 1839, VMI remained the sole single-sex public institution of higher learning in Virginia. VMI's unique mission is to mold its students into citizen-soldiers, instilling in them mental and physical discipline while indoctrinating them with a strong moral code. Unlike the federal military academies that prepare cadets for service in the various armed forces, VMI cadets are prepared for both civilian and military life. In fact, only about fifteen percent of graduating VMI cadets enter into military service. In order to achieve its goal of producing citizen-soldiers, VMI employs an adversative, doubt-inducing method modeled after both ear-

States Constitution). The United States alleged only a constitutional violation because historically single-sex schools and the military academies are exempt from claims arising under Title IX of the Civil Rights Act. See Laurie A. Keco, Note, The Citadel: Last Male Bastion or New Training Ground?, 46 CASE W. RES. L. REV. 479, 485 (1996). Furthermore, 20 U.S.C.A. § 1681(a)(4)-(5) (West 1997) provides exemptions for "educational institution[s] whose primary purpose is the training of individuals for the military services of the United States" and "public institution[s] of undergraduate higher education which . . . traditionally and continually from . . . establishment ha[ve] had a policy of admitting only students of one sex." Id.

19 See United States v. Virginia, 976 F.2d 890, 892 (4th Cir. 1992). Many VMI students and alumni fought in the Civil War, including Thomas "Stonewall" Jackson, a VMI professor who became notorious as a confederate general. See id. The cadet corps of VMI fought against union soldiers at New Market, Virginia. See id. A total of about 1800 alumni served in the Civil War. See id. Included among the thousands of alumni who have fought in other wars is George C. Marshall, General of the Army. See id. at 892-93. A total of six alumni were recipients of the Congressional Medal of Honor. See id. at 893.

20 See United States v. Virginia, 116 S. Ct. 2264, 2269 (1996). Besides VMI, Virginia offers its citizens fifteen other public schools of higher learning. See id. The State Council of Higher Education for Virginia supervises and coordinates the fifteen public institutions and VMI. See Virginia, 976 F.2d at 893. The Virginia General Assembly assigns to the Council of Higher Education numerous responsibilities, including the responsibility to review and either approve or disapprove any potential changes in an institution's mission statement. See VA. CODE ANN. § 23-9.6:1(2) (Michie 1993). The General Assembly also delegates to each institution the right to alter or modify its mission and the right to create admissions criteria. See id.

21 See Virginia, 116 S. Ct. at 2269. It is the declared mission of the school, as stated by the VMI Board of Visitors' Mission Study Committee:

[T]o produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril. To accomplish this result, the Virginia Military Institute shall provide to qualified young men undergraduate education of highest quality—embracing engineering, science, and the arts—conducted in, and facilitated by, the unique VMI system of military discipline.

Virginia, 766 F. Supp. at 1425.

22 See Virginia, 766 F. Supp. at 1432.

23 See id.
lier military training and English public schools. This unique and intense pedagogical method is designed to create doubts in the cadets' minds about previously-held beliefs and experiences and instill in their place the values that VMI seeks to advance. The adversative method, also referred to as a process of dissection, is characterized by mental stress, physical rigor, minute regulation of behavior, an absence of privacy, absolute equality of treatment, and indoctrination of military values. The VMI program is composed of six interrelated components that include the "rat line," the "dyke" system, the class system, the honor code, the military system, and the barracks life. This intense and

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24 See Virginia, 976 F.2d at 893.
25 See id.
26 See Virginia, 116 S. Ct. at 2270.
27 See Virginia, 976 F.2d at 893. In defense of the adversative method, Colonel N. Michael Bissell, VMI's Commandant of Cadets, explained the educational process as follows:

I like to think VMI literally dissect the young student that comes in there, kind of pulls him apart, and through the stress, everything that goes on in that environment, would teach him to know everything about himself. He truly knows how far he can go with his anger, he knows how much he can take under stress, he knows how much he can take when he is totally tired, he knows just exactly what he can do when he is physically exhausted, he fully understands himself and his limits and capabilities. Something I think is the mainstay of leadership. I think every VMI man that leaves there knows a great deal about his human capacity to do things under all kinds of duress and stress.

28 See Virginia, 976 F.2d at 893. All entering students are labeled "rats because the rat is 'probably the lowest animal on earth.'" Virginia, 766 F. Supp. at 1422. Generally, the "rats" are grossly mistreated during the first seven months at VMI. See id. Features of the "rat line" include egalitarian treatment, indoctrination, frequent punishments, minute regulation of behavior, and the use of privileges to enhance desirable behavior. See id. The "rat line" has been proven to be more stressful and more dramatic than Army basic training or Army boot camp. See id. It is comparable, however, to boot camp in the Marine Corps in terms of the mental and physical stress of the experience. See id. The "rats" are punished and rewarded collectively as well as individually, wherein a sense of "class solidarity in addition to individual responsibility" is established. Id. Upon completion, those who survive the "rat line" feel a sense of accomplishment and a strong bond to their fellow sufferers. See id.

VMI's class system is one of privileges and responsibilities assigned to classes of cadets and aimed at developing their character and cultivating leadership. See id. Based on rank, each class has specifically outlined responsibilities. See id. The seniors' responsibilities, for example, include providing general leadership to the "rats," writing the operating procedures for the following year's "rat line," supervising the breakout of the "rats," and being a "dyke," or a mentor, to a "rat." See id. at 1422-23. The sophomores, to cite another example, are responsible for acting as the disciplinarians of the "rats." See id. at 1423. Through peer pressure within the class system, upper-class cadets teach new cadets—who have been stripped of their old behaviors and values within the "rat line"—the behaviors and values VMI seeks to instill in them. See id. Overall, the class system provides constant supervision of new cadets, tutoring, and the disburse-
unique program for which VMI is well known has notably produced a great number of leaders since its establishment in 1839—men who give full credit to VMI for both their personal and professional successes.28

The United States District Court for the Western District of Virginia conducted a six-day trial to determine whether VMI’s male-only admissions policy passed constitutional muster under the Fourteenth Amendment’s Equal Protection Clause.30 After hearing the testimony of various

ment of punishment and privileges by which to mold the cadets. See id.

The “dyke system,” which is similar to the class system, provides some relief to the “rats” from the rigors and stress of the “rat line.” See id. A first classman is assigned to each individual “rat” to act as a mentor, or a “dyke,” to that “rat.” See id. The dyke system contributes to the creation of loyalty between the “rats” and between the classes of cadets, while at the same time providing a model for support and leadership. See id.

The VMI honor code is ever-present in all aspects of institutional life. See id. The honor code states that a cadet “‘does not lie, cheat, steal nor tolerate those who do.’” Id. Any violation of the honor code automatically results in expulsion. See id. The code is strictly enforced by an honor court made up of cadets chosen from the two upper classes. See id.

Barracks life is a unique, central, and crucial aspect of the VMI experience. See id. All cadets must live in the barracks throughout all four years at VMI. See id. Within the barracks occur inspections, administration of both the class system and the honor system, the “rat-dyke” relationship, and a large part of the new cadet training, including the “rat line.” See id. Barracks life diminishes cadets to the lowest common denominator, allowing for the slow transformation of values, attitudes, and behaviors to be instilled in cadets year after year. See id. Since no professional member of the staff lives in the barracks with the cadets, it is the cadets’ responsibility to provide support for life in the barracks. See id. The barracks is composed of four floors, with each class occupying one floor. See id. at 1423-24. Each cadet room holds an average of 3.7 cadets. See id. at 1424. There exists throughout the barracks an absolute lack of privacy. See id. A cadet is exposed at all times, since there is no area in the barracks that physically affords even a small amount of privacy. See id. There are no curtains or window shades in the cadets’ rooms, no locks on doors, and even the bathrooms are no retreat for a cadet searching for solitude. See id. The doors in the barracks contain open windows that allow the officer in charge to check in any room at any time and see what any cadet is doing at that time. See id. The conditions within the barracks (i.e., poor ventilation, unappealing furniture, lack of privacy) are purposefully set up to induce stress. See id. VMI is the only institution that places such an intense emphasis on the barracks life. See id. As one of VMI’s expert witnesses explained, “[p]roducing a VMI graduate without the barracks experience would be equivalent to dressing someone up in the uniform of a Marine without first sending them [sic] to boot camp.” Id. at 1423.

The military aspect of VMI, which provides etiquette, regulation, and drill, is a dominant aspect of the VMI experience. See id. at 1424. Each entering student is required to participate in any one of the four ROTC programs throughout his four years at VMI. See id. The ROTC programs operate independently of VMI’s “rat line,” class system, “dyke system,” and barracks system. See id.

28 See Virginia, 116 S. Ct. at 2269. Among VMI’s alumni are members of Congress, military leaders, and business executives. See id. The alumni of VMI possess a strong sense of loyalty that is reflected in the fact that the school’s endowment is the largest per-student endowment of all undergraduate schools in the United States. See id.

30 See Virginia, 766 F. Supp. at 1408. The United States asserted that VMI could not continue as a state-supported institution and continue to exclude women. See id. VMI
expert witnesses, the court concluded that VMI's exclusion of women was not a violation of the Equal Protection Clause.\(^3\) The court commenced its analysis of the gender discrimination claim by reviewing the first challenge to sex discrimination in higher education in Virginia, \(^2\) \textit{Kirstein v. Rector and Visitors of the University of Virginia.}\(^3\) In that case, the court found that the all-male admissions policy of the University of Virginia in Charlottesville violated the Fourteenth Amendment's Equal Protection Clause; the court was unwilling, however, to require Virginia to desegregate all of its learning institutions because it was unprepared to force Virginia's sole military school, VMI, to admit women.\(^4\)

Next, the VMI court looked for guidance to the Supreme Court's decision in \textit{Mississippi University of Women v. Hogan},\(^5\) wherein the Court found that a state nursing school's all-female admissions policy violated the Fourteenth Amendment's Equal Protection Clause.\(^6\) The court responded by claiming that its discrimination against women was not invidious but rather promoted the legitimate state interest of creating diversity within Virginia's educational system. \textit{See id.} All parties agreed that the proper level of review should be garnered from other cases dealing with higher education. \textit{See id.} at 1409. The district court then outlined decisions wherein the Supreme Court deferred to the judgment of universities in making their own academic decisions. \textit{See id.} The court explained that although universities enjoy the fundamental freedom to decide who may be admitted, such freedom is not absolute. \textit{See id.} The district court then observed that in cases where the discretionary academic decisions of individual institutions have had the effect of fostering unconstitutional discrimination, courts have stepped in and overruled the institutions' decision-making powers. \textit{See id.}\(^3\)

\(^3\) \textit{See id.} at 1408. Nineteen witnesses testified, including one expert on human physiology, one expert on college facilities, and four experts on education. \textit{See id.}\(^2\)

\(^4\) \textit{See id.} at 1409.

\(^5\) \textit{See id.} at 187. The court in \textit{Kirstein} explained its position by declaring: We are urged to go further and to hold that Virginia may not operate any educational institution separated according to the sexes. We decline to do so. Obvious problems beyond our capacity to decide on this record readily occur. One of Virginia's educational institutions is military in character. Are women to be admitted on an equal basis, and, if so, are they to wear uniforms and be taught to bear arms? \textit{Id.}

\(^6\) In assessing the constitutionality of VMI's admissions policy, the district court also cited the Supreme Court's decision in \textit{Williams v. McNair}, 316 F. Supp. 134 (D.S.C. 1970). \textit{See Virginia}, 766 F. Supp. at 1410. In \textit{Williams}, male students sought to be admitted into the all-female Winthrop College in South Carolina. \textit{See Williams}, 316 F. Supp. at 135. Because there was no aspect of Winthrop College that made it unique, other than its single-sex status, the \textit{Williams} court found that the plaintiffs' interest in attending college in the same town in which they lived was not sufficiently compelling to declare a constitutional violation. \textit{See id.} at 138. The \textit{Williams} court gave great deference to education experts who proclaimed that "a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex." \textit{Id.} at 137 (citation omitted).


\(^6\) \textit{See Virginia}, 766 F. Supp. at 1410; \textit{Hogan}, 458 U.S. at 731, 733; \textit{see also infra
court, however, quickly found a number of distinctions that differentiated the VMI case from the Hogan decision. The most striking difference, the court noted, was that Mississippi's rationale for remedying past discrimination against women in the nursing field was neither an important government interest nor was the school's all-female admissions policy a substantially-related means of advancing that interest. Conversely, the court recognized that Virginia's aim of promoting diversity in higher education was an important government interest that could only be advanced by maintaining VMI as a single-gender institution.

The district court further acknowledged that "[a] substantial body of 'exceedingly persuasive' evidence" supported the theory that both male and female students benefit greatly from attending single-gender learning institutions. In light of the experts' findings favoring single-gender education, the court declared that the VMI Board of Visitors was wholly justified in its decision to maintain VMI as an all-male institution. Although the court acknowledged the expert testimony that established that

notes 109-113 and accompanying text (discussing Hogan).

37 See Virginia, 766 F. Supp. at 1411. The district court noted that the admission of men into the nursing school in Hogan was found not to affect the teaching style, nor did it affect the female students' classroom performance. See id. The court further posited that the VMI situation was essentially different from Hogan in that the admission of women into VMI would force the institution to alter its educational system fundamentally. See id. In effect, the court declared that the goals of VMI's system would inevitably be thwarted. See id.

38 See id. In Hogan, Mississippi asserted that maintaining the nursing school as an all-female institution was a form of justifiable affirmative action to compensate women for past discrimination. See Hogan, 458 U.S. at 727. The Hogan Court rejected Mississippi's justification and held that promoting affirmative action for women in the nursing field was not an important government objective; therefore, keeping the nursing school all-female was not a substantially related means of advancing that objective. See id. at 727, 730.

In the VMI case, however, the district court explained that "[t]he sole way to attain single-gender diversity is to maintain a policy of admitting only one gender to an institution." Virginia, 766 F. Supp. at 1411. The district court further noted that unlike the plaintiff in Hogan, who would have had to commute outside of his community to attend another nursing school if he was not admitted to the Mississippi University for Women, no such problem existed in VMI because students must live on campus for all four years—thereby eliminating the close-to-home advantage that was a contributing factor in Hogan. See id.

39 See Virginia, 766 F. Supp. at 1411-12. The court reiterated the experts' findings that for those students who benefit from single-sex education, the opportunity to attend such an institution is valuable and likely to contribute significantly to their academic and professional successes. See id. at 1412.

40 See id. The district court gave great deference to the Virginia Legislature's determination that providing this unique, single-sex educational opportunity for men was more important than offering an education to both genders. See id. The court further observed that the VMI Board's decision to maintain the school's all-male status was reinforced because VMI would undergo significant changes if it admitted women, specifically changes in living conditions and methods of instruction. See id.
some women would be mentally and physically able to undergo VMI’s rigorous system, the court stopped short of requiring the admission of women because the court determined that a coeducational college would be considerably different from a male-only college. The court further found that the introduction of even one woman into the VMI process would substantially change it, such that the very experience the woman was seeking would no longer exist. The material changes that VMI would be forced to undergo, the court stated, provided sufficient constitutional support for maintaining a single-gender school. Thus, the district court concluded that Virginia’s objective of diversifying the state’s educational system was legitimate; the only way to meet this objective was to continue to exclude women from the VMI program.

On appeal, the United States Court of Appeals for the Fourth Circuit vacated the district court’s ruling. The appellate court first declared that the trial court was justified in finding that the admission of women into VMI would inevitably alter its unique educational program, particularly with respect to three crucial aspects: (1) the adversative system, (2) the absence of privacy, and (3) the physical training regimen. The court then acknowledged that because men and women are

\footnotesize{\textsuperscript{41} See id. The court deferred to expert findings that indicated that the presence of women within the classroom would not only distract the male students and increase dating pressures, but would also impair the “esprit de corps” and the egalitarian atmosphere that constitute the VMI experience. See id. Furthermore, the court stated, arrangements would need to be made for personal privacy, windows would need to be covered, doors would need to be locked, and the entire adversative method would need to be altered. See id. at 1412-13. Pointing to one expert’s testimony, the court prophesized that in order to accommodate women, the adversative method would ultimately be dropped and replaced with a more nurturing and supportive system. See id. at 1413. \textsuperscript{42} See id. at 1414. \textsuperscript{43} See id. at 1413. \textsuperscript{44} See id. at 1415. The district court hinted that the real issue was whether Virginia must also support an all-female learning institution or whether it could continue to expect private colleges to provide women with single-sex education. See id. at 1414-15. That issue, the court recognized, was not before the court and therefore did not need to be decided at that time. See id. at 1415. The district judge explained: VMI is a different type of institution. It has set its eye on the goal of citizen-solider [sic] and never veered from the path it has chosen to meet that goal. VMI truly marches to the beat of a different drummer, and I will permit it to continue to do so. Id. \textsuperscript{45} See United States v. Virginia, 976 F.2d 890, 900 (4th Cir. 1992). The United States argued on appeal that offering a unique single-sex education to men for the sole reason of enhancing diversity was not a legitimate government objective and that neither VMI nor Virginia had established sufficient justification for the exclusion of women. See id. at 892. \textsuperscript{46} See id. at 896-97. The court of appeals stated that admitting women would force VMI to convert to a dual system of physical training in order for women to undergo a}
physiologically and psychologically different, single-gender education is pedagogically justifiable and beneficial. Nonetheless, the court explained that this finding failed to answer the more significant question whether Virginia could deny to women the unique benefits offered by VMI under the guise of diversity.

The circuit court answered this question in the negative and declared that the state’s policy of promoting diversity within its educational system could not favor one gender over the other. Virginia, the court asserted, failed to explain adequately why it offered the benefits of a VMI-type education to men only. The court therefore concluded that in order to comply with the guarantees of the Fourteenth Amendment’s Equal Protection Clause, Virginia must choose between any one of the following three options: (1) admit women and adjust the program accordingly, (2) establish a parallel institution or program for women, or (3) abandon state funding of VMI and leave it as a private institution with the freedom to follow its own admissions policy.

The circuit court then remanded

regime that would in effect be equal to that of men; nevertheless, both male and female cadets would perceive such a dual system as unequal and ultimately feel resentment and jealousy. See id. at 896. All parties to the litigation, along with the court, agreed that VMI would also be forced to undergo some type of change in order to make accommodations for the privacy of female cadets. See id. Furthermore, the court found that the evidence supported the lower court’s finding that cross-sexual confrontation and the deliberate harassment that is a part of the rigorous training (specifically within the “rat” system) would add additional elements of distraction and stress to VMI’s methodology. See id.

As support for this proposition, the district court deferred to a study that found that single-gender colleges have numerous advantages over coeducational colleges:

Single-sex colleges show a pattern of effects on both sexes that is almost uniformly positive. Students of both sexes become more academically involved, interact with faculty frequently, show large increases in intellectual self-esteem, and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions.

Id. (citation omitted). A similar study cited by the district court demonstrated that students from single-sex colleges were more likely to ignore stereotypical job aspirations and favor more sex-neutral occupations. See id. The district court acknowledged the study’s conclusion that there was no support for the theory that coeducation effectively alters the imbalance in the career goals of academically superior female and male undergraduates. See id.

The appellate court recognized that while VMI’s methodology justified a single-sex environment, Virginia had never explained why this opportunity was offered only to males. See id. The court further contended that because the VMI program depended upon “single-genderedness” rather than “maleness,” an all-female VMI-like institution could be adjusted to accommodate male and female differences without detrimental effects. See id.

See id. at 898. The appellate court recognized that while VMI’s methodology justified a single-sex environment, Virginia had never explained why this opportunity was offered only to males. See id. The court further contended that because the VMI program depended upon “single-genderedness” rather than “maleness,” an all-female VMI-like institution could be adjusted to accommodate male and female differences without detrimental effects. See id.

See id. at 899.

See id.

See Virginia, 976 F.2d at 900.
the case to the district court with orders to oversee the formulation, adoption, and implementation of Virginia's chosen plan.\footnote{See id. Following the Fourth Circuit's decision, the United States filed a petition for rehearing with the suggestion for a rehearing en banc. See id. After taking a poll of the court on the issue of rehearing the case en banc, a majority of the court voted to deny the rehearing. See id.}

Virginia responded to the Fourth Circuit's ruling by proposing a corresponding program for women, the Virginia Women's Institute for Leadership (VWIL).\footnote{See United States v. Virginia, 116 S. Ct. 2264, 2272 (1996).} Mary Baldwin College, a private school for women, was chosen as the location for the state's newly established four-year undergraduate program that would initially admit approximately twenty-five to thirty women.\footnote{See id.} Although VWIL was founded on the idea of fulfilling the same mission as VMI—producing citizen-soldiers—VWIL's program differed from VMI's with respect to its methods of education, financial resources, and academic offerings.\footnote{See id.} Upon returning to the district court with its newly proposed program, Virginia was granted approval to maintain two separate single-gender institutions.\footnote{See United States v. Virginia, 852 F. Supp. 471, 485 (W.D. Va. 1994).}

In adopting the VWIL program, the district court initially recognized that substantial disagreement existed between the parties concerning the requirements of the Equal Protection Clause and the instructions of the Fourth Circuit.\footnote{See id. at 473. The United States posited that the Fourth Circuit and the Fourteenth Amendment's Equal Protection Clause both mandated that if Virginia established a parallel program for women, it must be nothing less than a "mirror image" of the VMI program. See id. Absent that, the United States maintained that the only constitutional remedy was to allow women to attend VMI. See id. at 473 n.2. Virginia, on the other hand, posited that the instructions of the Fourth Circuit required the state to establish an all-female program that would provide women with an education comparable to that obtained by VMI students. See id. at 473. Thus, Virginia argued that attaining the same outcome for women did not necessarily require the all-female program to become the "mirror image" of VMI. See id. Furthermore, Virginia asserted that its proposed program at VWIL comported with the Equal Protection Clause and satisfied the intermediate scrutiny test as applied in prior gender discrimination cases. See id.} Specifically, the court dismissed the notion that the Fourth Circuit's ruling required Virginia to establish a "separate but equal" program for women and explained that such a task would be both impracticable and unconstitutional.\footnote{See id. at 475. The district court decided that in light of the decision in \textit{Sweatt v. Painter}, the Fourth Circuit could not have meant for Virginia to establish a "separate but equal" institution for women. See id. (citing \textit{Sweatt v. Painter}, 339 U.S. 629 (1950)); see infra notes 80-85 and accompanying text (discussing the \textit{Sweatt} decision). In \textit{Sweatt}, the Supreme Court concluded that within the context of educational institutions, it is impossible to establish a "separate but equal" school because a new school cannot possibly}
to VWIL in order to determine whether Virginia's proposed plan complied with the Fourth Circuit's remanding instructions. The court deferred to Virginia's educational experts who determined that the training methods and resources to be used in VWIL, although different from VMI, would produce similar outcomes for women as those that VMI produced for men. The district court explained that both Virginia's policy of diversity and its limited resources precluded the state from establishing identical curricula throughout its colleges. Although the district court acknowledged that some women would be successful within VMI's adversative program, it proffered that the Equal Protection Clause did not require Virginia to implement a "mirror image" of VMI's program at VWIL. It was sufficient and wholly justified, the court pronounced, for Virginia to provide a program such as VWIL for women, not based on stereotypes about men and women, but based on legitimate pedagogical differences between the sexes. The district court was therefore satisfied that Virginia had met the Fourth Circuit's mandate of implementing a corresponding program for women grounded on the needs and differences of each gender. In approving Virginia's proposed plan, the court asserted that "if VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."
On appeal, a divided United States Court of Appeals for the Fourth Circuit affirmed the district court's judgment.\footnote{See United States v. Virginia, 44 F.3d 1229, 1232 (4th Cir. 1995).} The court determined that application of the traditional two-prong intermediate scrutiny test required taking the additional step of inquiring into the "substantive comparability" of both the VMI and VWIL programs.\footnote{See id. at 1237. The circuit court explained that in order to achieve equal treatment of the laws under the Equal Protection Clause: [T]he alternatives left available to each gender by a classification based on homogeneity of gender need not be the same, but they must be substantively comparable so that, in the end, we cannot conclude that the value of the benefits provided by the state to one gender tends, by comparison to the benefits provided to the other, to lessen the dignity, respect, or societal regard of the other gender. Id. Thus, the "special" intermediate scrutiny test that the circuit court applied included determining whether (1) Virginia's objective of providing for its citizens a single-sex educational opportunity was an important and legitimate government objective, (2) the gender classification adopted by Virginia was substantially and directly related to that objective, and (3) the mutual exclusion of men and women from each other's institutions left open the opportunity for those excluded to gain comparable benefits at their respective institutions or through other state-sponsored means. See id.} The court first recognized that providing single-gender education to its citizens was an important and legitimate government interest.\footnote{See id. at 1238. The circuit court deferred to the experts from the lower court who testified that single-gender education greatly benefits both sexes at the college level. See id. at 1239. Recognizing, however, that some disagreement exists among experts about the degree to which single-gender education benefits men and women, the circuit court stated that it was not the court's responsibility to resolve that issue. See id. The circuit court found it sufficient that a growing consensus exists within the professional community that a "sexually homogeneous environment yields concrete educational benefits." Id.} The circuit court then determined that the only way to realize the state's objective of providing single-gender education was to exclude one gender.\footnote{See id. at 1239.} Thus, the court agreed that the exclusion of women from VMI was directly related to obtaining the desired results provided by the adversative method.\footnote{See id.} The court further opined that placing men and women together into the adversative environment would destroy "any sense of decency that still permeates the relationship between the sexes."\footnote{Id.} The court next evaluated the programs offered at VMI and VWIL to determine whether both provided benefits comparable in substance, though not comparable in form and detail.\footnote{See Virginia, 44 F.3d at 1240. Using "substantive comparability" as an analysis} After comparing both pro-
grams, the court concluded that the missions, goals, and results of both institutions would be substantially similar, regardless of how the methods of achieving these results would differ.\textsuperscript{73} Lastly, the court announced that it would retain the district court's jurisdiction in order for the lower court to oversee Virginia's continued involvement in VWIL, both financially and as supervisor of the program.\textsuperscript{74} Following this decision, the

standard, the court determined that both programs satisfied this model. \textit{See id.} at 1240-41. The court then asserted that the alternative to allowing states to provide benefits to their citizens only when such benefits could be provided in an identical fashion to all citizens—regardless of whether the citizens are similarly situated—is only justified by a baseless and needless demand for conformity. \textit{See id.} at 1240.\textsuperscript{73} \textit{See id.} at 1240. The court explained that while VMI employs the adversative method within a military regime, VWIL proposed to employ a structured environment with some military training and a heavy concentration on leadership development. \textit{See id.} at 1240-41. This difference in methodology, the court noted, was the result of a professional judgment concerning the best way to provide the same opportunities and achieve the same results for women at VWIL. \textit{See id.} at 1241. Although the court acknowledged that a VWIL degree would lack the prestige and historical benefit of a VMI degree, it was satisfied that with long-term commitment from Virginia, these intangible factors would develop over time. \textit{See id.} The court further reasoned that men and women were not limited to the programs of VMI and VWIL because Virginia provides numerous other opportunities in higher education, including Virginia Polytechnic Institute and State University, which provides a coeducational military program. \textit{See id.}\textsuperscript{74} \textit{See id.} at 1242. The court instructed the district court to oversee the implementation of the VWIL program with instructions to ensure that (1) the program's administrator was well qualified and highly motivated, (2) the program was well promoted and attracted potentially qualified applicants, (3) the state continued to fund the program adequately in the future, and (4) the program was regularly reviewed by professional educators who would adjust it as necessary in order to continue providing a program that not only offered a valuable bachelor's degree, but one that simultaneously taught discipline and produced women leaders. \textit{See id.}

Senior Circuit Judge Phillips, author of the dissenting opinion, announced that Virginia's proposed plan did not bring the state into compliance with the guarantees of the Equal Protection Clause. \textit{See id.} at 1242-43 (Phillips, J., dissenting). The dissent was therefore willing to reject the State's proposed plan, to declare VMI's admissions policy unconstitutional, and to order VMI either to abandon its policy or forego further support from the State. \textit{See id.} at 1243 (Phillips, J., dissenting). Judge Phillips declared that Virginia's proposal to create VWIL did not survive the intermediate scrutiny test. \textit{See id.} In fact, the judge continued, if the state were required to provide an "exceedingly persuasive justification" for VMI's policy, Virginia's actual purpose would be revealed:

\begin{quote}
\textit{Not to create a new type of educational opportunity for women, nor to broaden the Commonwealth's educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth's higher education... but [simply to allow] VMI to continue to exclude women in order to preserve its historic character and mission.}
\end{quote}

\textit{Id.} at 1247 (Phillips, J., dissenting). The dissent further suggested that Virginia's policy of supporting VMI could withstand constitutional muster if the state simultaneously supported single-gender institutions with substantially comparable programs, physical plant, funding, faculty, administration, support services, and library resources, provided that there did not exist gender-based discrimination with respect to tangible and intangible benefits. \textit{See id.} at 1250 (Phillips, J., dissenting). Judge Phillips contended that there
United States's petition for a rehearing en banc was denied by the Fourth Circuit.\textsuperscript{75}  

The United States Supreme Court granted certiorari.\textsuperscript{76} Writing for the majority, Justice Ginsburg proclaimed that the unique educational op-

must not be any stigmatic implications emerging from the content of the educational programs. \textit{See id.} Thus, because the proposed arrangement fell short of providing substantially similar intangible and tangible educational benefits to both sexes, the dissent declared that the contrast between the two institutions on all the relevant characteristics was so obvious that it did not merit a detailed recitation. \textit{See id.} The judge consequently concluded that even if the VWIL program fulfilled its expectations within a short period of time, it would only be a “pale shadow” of VMI and was therefore not worthy of comparison. \textit{See id.}

\textsuperscript{75} \textit{See United States v. Virginia}, 52 F.3d 90, 91 (4th Cir. 1995). Upon request to take a poll as to whether to rehear the case en banc, the circuit court denied a rehearing. \textit{See id.} Judge Motz, joined by Judges Hall, Murnaghan, and Michael, authored a separate dissent in which the judge expressed disagreement with the decision to deny a rehearing en banc. \textit{See id.} (Motz, J., dissenting). Judge Motz commenced the dissent by reminding the court that over forty years ago, the Supreme Court held it unconstitutional to provide a “separate but equal” education to African American students. \textit{See id.} The judge noted that despite that holding, the court was now allowing Virginia to provide a separate, and concededly unequal, education to women. \textit{See id.} Judge Motz then added that the constitutional standard applied by the circuit court was both confused and contrary to logic and law. \textit{See id.} at 91-92 (Motz, J., dissenting). The judge noted that in \textit{Hogan}, the Supreme Court rejected the notion that a state could constitutionally justify providing single-gender education to students simply because the school was itself a single-gender institution. \textit{See id.} at 92 (Motz, J., dissenting) (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)). Thus, the dissent explained, the first prong of the test—whether Virginia was advancing a legitimate and important objective by supporting an all-male institution—failed because “simply providing single-gender education cannot constitute a state’s legitimate and important objective for excluding one gender from a state-financed institution.” \textit{Id.} The judge further recognized that the state had not shown an “exceedingly persuasive justification” for its male-only admissions policy because the evidence had not demonstrated that keeping VMI all-male was necessary to further its mission to produce citizen-soldiers. \textit{See id.}

There exists no evidence, the judge proffered, that the adversative method was essential to the VMI program. \textit{See id.} at 92-93 (Motz, J., dissenting). Assuming, however, that adversative training was an essential aspect of the VMI program, Judge Motz proclaimed that the VWIL program, which did not include the adversative method, could never be “substantively comparable” to VMI. \textit{See id.} at 93 (Motz, J., dissenting). The judge further argued that if VWIL’s program was truly comparable to that of VMI, then the adversative method must not be a very critical aspect of VMI’s program. \textit{See id.} Based upon this reasoning, the judge concluded that there was nothing to prevent the dissolution of the adversative method and the admission of women into VMI. \textit{See id.}

The judge inquired as to how a “degree from a yet to be implemented supplemental program at Mary Baldwin [could] be held ‘substantively comparable’ to a degree from a venerable Virginia military institution that was established more than 150 years ago?” \textit{Id.} The judge acknowledged that pursuant to the Equal Protection Clause, women need not necessarily be guaranteed equal results, but must be guaranteed an equal opportunity to strive for such results. \textit{See id.} Because that opportunity had been categorically denied to women, the dissent concluded, Virginia had violated women’s equal protection rights. \textit{See id.}

opportunities at VMI reserved exclusively for men denied to qualified women the equal protection of the laws guaranteed by the Fourteenth Amendment.\textsuperscript{77} The Justice explained that because Virginia had not set forth an “exceedingly persuasive justification” for the exclusion of women from VMI, such exclusion was an outright violation of the Equal Protection Clause.\textsuperscript{78} The Court also asserted that Virginia’s proposed plan of establishing the VWIL program exclusively for women at Mary Baldwin College did not remedy the constitutional violation because it failed to provide the same opportunity that the state afforded to men at VMI.\textsuperscript{79}

The United States Supreme Court first addressed the issue of segregated educational institutions in 1950 in the landmark case of \textit{Sweatt v. Painter}.\textsuperscript{80} In \textit{Sweatt}, the Court was asked to compare two racially segregated institutions of higher learning in order to determine whether the state’s segregation policy withstood constitutional muster.\textsuperscript{81} Declaring both institutions to be substantially unequal, the Court compelled the University of Texas Law School, a renowned whites-only school, to accept the black plaintiff seeking admission into the program.\textsuperscript{82} The Court recognized that in terms of both the physical and intangible factors that contribute to the greatness of a law school, the University of Texas Law

\begin{footnotes}
\item[77] \textit{See} United States v. Virginia, 116 S. Ct. 2264, 2269 (1996).
\item[78] \textit{See id.} at 2287.
\item[79] \textit{See id.} at 2286-87.
\item[80] 339 U.S. 629, 631 (1950).
\item[81] \textit{See id.} at 632. Plaintiff, a black applicant seeking to be admitted to the University of Texas Law School, brought suit when his application was rejected solely because of his race. \textit{See id.} at 631. At the time the suit was instituted, there existed no law school in Texas that admitted black applicants. \textit{See id.} Although a state trial court recognized that in denying the plaintiff’s application for admission the state had violated his equal protection rights under the Fourteenth Amendment, the court did not compel the school to admit the plaintiff. \textit{See id.} at 631-32. Instead, the trial court continued the case for another six months in order to permit the state to establish substantially equal facilities for black applicants. \textit{See id.} at 632.

At the end of the six-month period, the trial court decided to deny the plaintiff’s request to be admitted to the University of Texas Law School because the state had adopted a plan to open a law school for black applicants within the upcoming months. \textit{See id.} Although the new school was soon made available to the plaintiff, he refused to register and instead waited for his appeal to be heard. \textit{See id.} A state court of appeals set aside the lower court’s judgment and remanded the case for further proceedings. \textit{See id.} On remand, the trial court compared the newly instituted school for blacks with the University of Texas Law School and found that the new school offered the plaintiff the advantages, privileges, and opportunities to study the law in a manner substantially equivalent to that provided to white students attending the University of Texas. \textit{See id.} The trial court therefore denied the plaintiff relief and the state court of appeals affirmed. \textit{See id.}
\item[82] \textit{See id.} at 633, 636.
\end{footnotes}
school was superior to the newly established blacks-only law school.\textsuperscript{83} The Court further proclaimed that the all-black law school could not be an effective legal training ground because it isolated its students from members of other racial groups with whom the students would be interacting once they became members of the Texas Bar.\textsuperscript{84} Lastly, the Court deemed it irrelevant that only a small number of black applicants had sought admission into the all-white law school. As the Court explained, equal protection rights are personal in nature and must be protected even in the case of a single violation.\textsuperscript{85}

The idea that the Equal Protection Clause of the Fourteenth Amendment could be extended beyond race to include gender within its shield of guaranteed protections originated in 1971 with the Supreme Court's decision in Reed v. Reed.\textsuperscript{86} In Reed, the Court, for the first time, implicitly departed from the rational basis analysis traditionally applied to gender-based classifications and shifted to a higher level of scrutiny.\textsuperscript{87} In so doing, the Court invalidated a section of an Idaho stat-

\textsuperscript{83} See id. at 633-34. The Court explained that the educational and professional opportunities available to white students at the University of Texas Law School far exceeded those available to black students at the all-black school. See id. at 633. The Court observed:

In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.

\textsuperscript{84} See id. at 634. Recognizing that non-black racial groups make up about 85\% of the Texas population—including the majority of lawyers, jurors, and judges—the Court declared it substantially unequal to exclude from the all-black law school such a significant and substantial segment of society. See id.

\textsuperscript{85} See id. at 635.

\textsuperscript{86} 404 U.S. 71, 75 (1971). The Reed Court took a significant step toward incorporating gender-based discrimination into the guarantees of the Constitution and established the intermediate scrutiny level of review as the method with which to analyze gender-based classifications. See Ides, supra note 4, at 41. Furthermore, by incorporating this new gender-based discrimination doctrine into the Fourteenth Amendment's Equal Protection Clause and in applying the intermediate scrutiny test to gender discrimination, the Court in effect created new fundamental law. See id.

\textsuperscript{87} See Reed, 404 U.S. at 76-77; see also Taylor, supra note 6, at 399.
ute that provided that men must be preferred over equally qualified women to administer a decedent's estate. 88

The Court first explained that because Idaho's statute provided for different treatment of men and women based solely on the basis of sex, the classification was subject to equal protection scrutiny. 89 Although the Court acknowledged that the statute's purpose was legitimate—to reduce the workload on probate courts by automatically eliminating one class of persons over another—the Court held that this rationale could not justify a gender-based classification. 90 After balancing the competing interests, the Court determined that the burden of gender discrimination against women outweighed the benefit of a lighter workload for the probate courts. 91 Therefore, the Court concluded that by providing different treatment for similarly situated men and women, Idaho's statute violated the Equal Protection Clause of the Fourteenth Amendment. 92

The rationale for the Supreme Court's decision in Reed was extended two years later in Frontiero v. Richardson. 93 The Court in Frontiero was asked to consider the constitutionality of statutes that provided, solely for administrative convenience, that female members of the uniformed services could not claim their husbands as dependents unless the husbands were in fact dependent upon their wives for over one-half of their support. 94 Male service members, on the other hand, could auto-

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88 See Reed, 404 U.S. at 72-73, 77. Plaintiff Sally Reed sought to be appointed as administratrix of her deceased son's estate. See id. at 71-72. The boy's father, Cecil Reed, subsequently filed a competing petition in order that the court appoint him administrator of the estate. See id. at 72. Following a joint hearing on both petitions, the probate court held that the Idaho Probate Code mandated Cecil Reed be appointed as administrator of the estate for the sole reason that he was a man. See id. Sally Reed then appealed the probate court's order to the District Court of the Fourth Judicial District of Idaho, which held that both applicable sections of Idaho's Code violated the Fourteenth Amendment's Equal Protection Clause. See id. at 73. The district court remanded the matter back to the probate court to determine which of the two Reeds was better qualified to act as administrator of the estate. See id. at 74. Before this determination was made, however, Cecil Reed appealed to the Idaho Supreme Court. See id. That court subsequently reversed the district court's order and reinstated the probate court's original order in favor of Cecil Reed. See id. In so doing, the Supreme Court of Idaho held that the state's statutory preference of males was mandatory and left no room for a probate court's exercise of discretion. See id.

89 See id. at 75.

90 See id. at 76.

91 See id. at 76-77.

92 See id. at 77.


94 See id. at 678-79. Claiming the spouse as the dependent of a member of the uniformed services entitles a couple to receive increased quarters allowances along with comprehensive medical and dental benefits. See id. at 678.
matically claim their wives as dependents regardless of whether the wives were in fact dependent upon the husbands for any of their support. 95

The Court commenced its analysis by acknowledging the prolonged and unfortunate history of gender-based discrimination in the United States. 96 Recognizing that the plaintiff's claim was brought under the Due Process Clause of the Fifth Amendment as opposed to the Equal Protection Clause of the Fourteenth Amendment, the Court nonetheless utilized Reed as its guide to establish that gender-based classifications are inherently suspect and are therefore subjected to heightened judicial scrutiny. 97 Although the Court failed to articulate how it applied that standard of review, it declared the statutes to be unconstitutional because they encouraged different treatment for similarly situated men and women. 98 The Court rejected the government's argument that the statutory scheme saved both time and money because the government failed to produce any concrete evidence to support this assertion. 99 Frontiero proclaimed that whenever a statutory scheme draws a sharp and distinct line between men

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95 See id. at 678. Plaintiff Sharron Frontiero, a United States Air Force lieutenant, brought suit when her application seeking to claim her husband as her dependent was denied. See id. at 680. Plaintiff's application was denied because she failed to demonstrate that her husband was in fact dependent on her for over 50% of his support. See id. Plaintiff and her spouse alleged that the statute unconstitutionally discriminated on the basis of gender in violation of the Fifth Amendment's Due Process Clause. See id. Specifically, plaintiffs asserted that the statutes were discriminatory in two respects:

First, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and, second, as a substantive matter, a male member who does not provide more than one-half of his wife's support receives benefits, while a similarly situated female member is denied such benefits.

Id.

96 See id. at 684.

97 See id. at 680, 688.

98 See id. at 690-91. The Court rejected the government's argument that, as a practical matter, wives are frequently dependent upon their husbands and husbands are rarely dependent upon their wives. See id. at 688-89.

99 See Frontiero, 411 U.S. at 689. The Court added that "although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'" Id. at 690 (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)). The Court further commented that one way for the statutes to withstand strict judicial scrutiny would be for the government to demonstrate that it was in fact cheaper to grant the benefits to all male service members than it was to identify which male members were actually entitled to the benefits. See id. at 689. Because there was substantial evidence, the Court continued, that many of the spouses of male members would in fact not qualify for the benefits if they were put to the test, the government's justification inevitably failed. See id. at 689-90. Upon entering the realm of strict scrutiny, the Court declared, "there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality." Id. at 690 (citations omitted).
and women solely to achieve administrative convenience, it partakes in an arbitrary and constitutionally-forbidden legislative undertaking.\textsuperscript{100}

In the 1976 case of \textit{Craig v. Boren},\textsuperscript{101} the United States Supreme Court finally articulated the precise test to use when analyzing gender-based classifications under the intermediate level of review.\textsuperscript{102} The Court in \textit{Craig} declared unconstitutional a statute that prohibited the sale of beer to females under the age of eighteen and to males under the age of twenty-one.\textsuperscript{103} As in \textit{Frontiero}, the \textit{Craig} Court commenced its analysis by relying on the precedent established in \textit{Reed}, which dictated that gender-based classifications must be subject to scrutiny under the Fourteenth Amendment's Equal Protection Clause.\textsuperscript{104} The Court then defined what is known today as the intermediate level of review: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."\textsuperscript{105} In applying this test, the Court held that government traffic safety statistics indicating that young men are more prone to drink and drive than young women were insufficient to justify the gender-based classification.\textsuperscript{106} As the Court explained, the government also failed to demonstrate that gender constituted a legitimate and accurate proxy for the state's prohibition of drink-

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100 \textit{See id. at 690.}
102 \textit{See id. at 197.}
103 \textit{See id. at 192.} The complaint was brought by both a male between 18 and 21 years of age and a licensed vendor of beer. \textit{See id.} Plaintiffs alleged that the gender-based classification constituted invidious discrimination against men between the ages of 17 and 21, and thus violated the Equal Protection Clause of the Fourteenth Amendment. \textit{See id.} Upon reaching the Supreme Court, the young man's claim was rendered moot because he had already turned 21 years of age and he was only seeking injunctive and declaratory relief. \textit{See id.} The Court, however, was able to proceed with the licensed vendor's claim that relied upon the equal protection claims of males between the ages of 18 and 21. \textit{See id.}
104 \textit{See id. at 197.}
105 \textit{Id.}
106 \textit{See id. at 200.} The government introduced a number of statistical surveys indicating that males between the ages of 18 and 21 were arrested more frequently for driving while intoxicated than were females within that same age group. \textit{See id.} Similarly, other statistics demonstrated that among those youths between the ages of 17 and 21 that were injured or killed in traffic accidents, the number of males exceeded that of females. \textit{See id. at 200-01.} Another survey indicated that young males were more likely to drink beer and drive than their female counterparts. \textit{See id. at 201.} Upon analyzing these surveys, the Court determined that overall such statistics were insufficient to justify this type of gender-based classification. \textit{See id.} The Court further proffered "that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." \textit{Id.} at 204.
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Finding that the nexus between traffic safety and gender was too tenuous to fulfill Reed's requirement that a gender-based classification be substantially related to a government objective, the Court declared that the statute invidiously discriminated against males between the ages of eighteen and twenty-one years of age and must therefore be invalidated.\(^\text{108}\)

Several years later in 1982, the United States Supreme Court directly addressed the issue of gender discrimination within the context of a single-sex public institution of higher learning in *Mississippi University for Women v. Hogan*.\(^\text{109}\) Ruling upon the constitutionality of the university's all-female nursing college, the Court declared it a violation of the Equal Protection Clause to exclude men solely because of their sex.\(^\text{110}\) The Court rejected Mississippi's argument that it maintained the nursing school exclusively for women in an attempt to remedy past discrimination against women in higher education.\(^\text{111}\) Unpersuaded by the state's justification, the Court declared that the gender-based classification did not survive intermediate scrutiny because women had not been historically

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\(^{107}\) See Craig, 429 U.S. at 204.  
\(^{108}\) See id. The Court noted that because the statute only prohibited selling beer to young men but did not prohibit drinking beer once acquired, the statute was ineffective. See id.  
\(^{110}\) See id. at 731. Plaintiff Joe Hogan was a registered nurse who wanted to earn a baccalaureate degree in nursing. See id. at 720. Hogan applied for admission to the Mississippi University for Women School of Nursing in 1979 and, although he was qualified, his admission into the program was denied solely because of his gender. See id. at 720-21. Hogan was informed that while he could audit the classes in which he expressed an interest, he was not permitted to enroll for credit. See id. at 721.  
\(^{111}\) See id. at 727. The Court explained that Mississippi's attempt to remedy past discrimination against women constituted educational affirmative action. See id. The Court clarified that a state can only engage in this type of affirmative action when members of the gender who stand to benefit as a result of the gender-based classification currently endure a disadvantage related to that classification. See id. at 728.
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discriminated against in nursing. The Court asserted that rather than compensating women for past discrimination, the nursing school's exclusion of men actually perpetuated the stereotype that nursing was solely a woman's job; such an exclusion was therefore prohibited by the Constitution.

In the 1994 case of *J.E.B. v. Alabama*, the United States Supreme Court suggested that gender-based classifications may no longer be analyzed under intermediate level review but rather may be elevated to the more demanding strict scrutiny analysis. The Court in *J.E.B.* declared that intentional gender discrimination by state actors using peremptory strikes during jury selection violated the Equal Protection Clause and was therefore prohibited. In reaching this conclusion, the Court first remarked that intentional gender discrimination violates the Equal Protection Clause of the Fourteenth Amendment, particularly when the discrimination perpetuates and ratifies overbroad, invidious, and archaic stereotypes about the abilities and roles of men and women. The plaintiff in *J.E.B.* argued that the rationale of *Batson v. Kentucky*, which forbids peremptory strikes solely based on race, should similarly be applied to prohibit the use of peremptory strikes solely based on gen-

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112 See *id.* at 729. The Court further outlined that a year prior to the nursing school's opening, 94% of students obtaining nursing baccalaureate degrees in Mississippi were women, and nationwide, 98.6% of nursing degrees were earned by women. See *id.* Consequently, the Court noted, the predominance of women within the field of nursing is reflected in the labor force. See *id.*

113 See *id.* at 729-30. The Court declared that the nursing school's admissions policy reinforced the outdated notion that only women should become nurses and rendered this notion a self-fulfilling prophecy. See *id.* at 730.

Although *Hogan* seems clearly to have rejected public single-gender education, a more thorough analysis has prompted some critics to view the decision not as a rejection of single-gender education, but as an implied endorsement. See Kristin S. Caplice, The Case for Public Single-Sex Education, 18 HARV. J.L. & PUB. POL'Y 227, 233 (1994). Some critics view it as an endorsement because the Supreme Court limited its holding to the nursing school, leaving intact the rest of the university's exclusively-female admissions policy. See *id.* Furthermore, the Court was not forced to rule on the constitutionality of a separate but equal system of public learning institutions for men and women because the plaintiff had no other local nursing educational programs available to him. See *id.*


116 See *J.E.B.*, *511 U.S. at 129*. Plaintiff, who was on trial to determine whether he was the father of a minor, objected to the State's use of 9 of its 10 peremptory strikes to remove all male jurors during jury selection. See *id.* The trial court rejected plaintiff's claim and impaneled an all-female jury, which subsequently found that plaintiff was the father of the minor child and ordered him to pay child support. See *id.*

117 See *id.* at 130-31.

Although the J.E.B. Court acknowledged that the experiences of racial minorities and women throughout American history have been similar, the Court declined to determine which group has suffered and endured more discrimination at the hands of state actors. Instead, the Court explained that the only issue in question was whether gender discrimination during jury selection substantially furthered the state's interest in providing fair and impartial trials.

The Court declined to accept the state's stereotypical assumptions about the inclinations of male and female jurors as a justification for continuing gender-based peremptory challenges because such assumptions perpetuate the very stereotypes that the law prohibits. In striking down the use of gender-based peremptory challenges, the Court affirmed that parties to a trial retain the freedom to remove jurors from the panel whom they feel may be less acceptable than other jurors so long as gender does not serve as the sole proxy for the decision. As with racial discrimination, the Court concluded, the guarantees of the Equal Protec-

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119 See J.E.B., 511 U.S. at 129.

120 See id. at 135-36. The Court further professed that it was necessary simply to recognize and acknowledge America's unfortunate history of gender discrimination that consequently justified the heightened scrutiny afforded to all gender-based classifications. See id. at 136. Although the Court willingly acknowledged this long history of gender discrimination, the Court explicitly reserved for the future the determination of whether gender-based discrimination, like racial discrimination, should be subject to a strict level of scrutiny. See Mandelbaum, supra note 115, at 15.

121 See J.E.B., 511 U.S. at 136-37. The J.E.B. Court explained:

In making this assessment, we do not weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious discrimination from the courtroom. Instead, we consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury.

Id. at 137.

122 See id. at 138. The Supreme Court pointed out that the State's rationale was reminiscent of arguments once used to exclude women entirely from juries and the ballot box. See id. at 138-39. The Court noted that the State incorrectly assumed that generalizations that would be clearly impermissible if based on race were somehow permissible when based on gender. See id. at 139-40.

123 See id. at 143. Further, the Court sanctioned the use of peremptory challenges to remove from the jury panel any class of individuals normally subjected to rational basis review. See id. The Court determined that, as with race-based claims arising under Batson v. Kentucky, 476 U.S. 79 (1986), the burden similarly lies with the party alleging the gender discrimination to make a prima facie case of intentional discrimination before a court may require the other party to explain the reason for utilizing the peremptory challenge. See id. at 144-45. That party's explanation for removing a juror, the Court commented, must not be pretextual and must be based on a characteristic other than gender. See id. at 145.
tion Clause would be rendered meaningless if jurors could be excluded solely on the basis of gender.124

Two years later, the United States Supreme Court grappled with the issue of gender discrimination within the context of learning institutions in the highly anticipated case of United States v. Virginia.125 Justice Ginsburg, author of the majority opinion,126 commenced the Court's analysis by tracing the history of VMI back to 1839 when Virginia founded the institution.127 The Justice briefly explained that, through the employment of the adversative method, VMI successfully accomplishes its distinctive mission of producing citizen-soldiers.128 Justice Ginsburg

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124 See id. at 146 (quoting Batson, 476 U.S. at 97-98).
126 See id. at 2269. Justices Stevens, O'Connor, Kennedy, Souter, and Breyer joined in Justice Ginsburg's majority opinion. See id. Chief Justice Rehnquist wrote a concurring opinion, while Justice Scalia authored a dissenting opinion. See id. Justice Thomas was involved in neither the consideration nor the disposition of this case. See id.
127 See id. Among Virginia's 15 public learning institutions, Justice Ginsburg explained, VMI remained the sole single-sex institution. See id. The Court noted that from its establishment as one of the country's first state military institutions, VMI has been funded by Virginia and under the control of the State's General Assembly. See id. at 2269-70. The Court further recounted that VMI was the first southern institution of higher learning to teach industrial chemistry and engineering, and at one point required its students to teach in one of the state's schools for a period of two years. See id. at 2270. Although VMI's stability was threatened during the Civil War, the Justice continued, an innovative superintendent managed to regain legislative support for the school. See id. Since then, Justice Ginsburg recognized, VMI has flourished and its popularity is evident from its annual enrollment of about 1,300 male students. See id.
128 See id. at 2269. VMI has successfully completed this mission, Justice Ginsburg recounted, throughout the years since the time of its establishment. See id. The Justice explained that VMI's program is directed at preparing cadets for both civilian and military life, as opposed to the federal military institutions that exclusively prepare cadets for service in the military. See id. at 2270.

The Court further explained that the adversative method induces doubt in the minds of the cadets through "'[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.'" Id. (quoting United States v. Virginia, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)). Quoting one Commandant of Cadets, the majority noted that the process "dissects" the VMI student, making him aware of his capabilities and limits to enable him to understand the degree of stress and physical exhaustion his mind and body can endure. See id. The majority further narrated that the training requires the cadets to live during the four years in spartan barracks where they are constantly observed and where they can find absolutely no privacy. See id. New cadets are exposed to the adversative method in its most extreme form, Justice Ginsburg continued, otherwise known as the "rat line." See id. The Justice further noted that new cadets are also exposed to a hierarchical system of responsibilities and privileges, a "dyke system" that assigns an upper-class student mentor to each entering cadet, and a stringent honor code that punishes those who steal, cheat, lie, or who tolerate those who do. See id. The Justice elaborated that VMI endeavors to instill mental and physical discipline in its cadets, while simultaneously imparting to them the institution's strong moral code. See id. at 2269. The Court then explained that VMI's graduates leave the school with a heightened understanding of their ability to deal
then observed that, although neither VMI's mission nor its pedagogical methodology were inherently unsuitable for female students, Virginia continued to offer the benefits and advantages of a VMI education exclusively to men.129 The Justice recognized that admission to VMI had understandably become desirable to women because of the institution's reputation as a unique and exceptionally challenging military school.130

Next, the Court clarified the two ultimate issues in dispute: (1) whether Virginia's exclusion of qualified women from the benefits and advantages of a VMI education denied to them the Fourteenth Amendment's guarantee of equal protection of the law and (2) assuming VMI's admissions policy was held unconstitutional, what was the appropriate remedy for the constitutional violation.131 Justice Ginsburg then determined that the Court must look primarily to the landmark decisions of J.E.B. v. Alabama132 and Mississippi University for Women v. Hogan133 for the appropriate standard to apply to gender-based classifications.134 The Justice next highlighted relevant cases that gradually changed the way the Court scrutinized gender-based classifications.135

It was not until 1971 in Reed v. Reed,136 the majority recounted, that the Court first held that a state had violated a woman's equal protec-

with stress, along with a strong feeling of accomplishment for having completed the rigorous course. See id.

129 See id. at 2269.

130 See id. at 2269, 2270. The Court reaffirmed that VMI's reputation is further enhanced by its outstanding record in producing leaders in all aspects of civilian and military life and because its alumni maintain remarkably close ties to the school. See id. at 2269, 2270-71.

131 See Virginia, 116 S. Ct. at 2274. Citing J.E.B. and Hogan, the majority reiterated that the party defending the gender-based classification must demonstrate an “exceedingly persuasive justification” for that classification. See id.

135 See id. at 2274-76. Justice Ginsburg noted that the heightened scrutiny applied to gender-based government action was a response to the historical discrimination against women. See id. at 2274. The Justice explained that throughout most of the nation's history, women were not a part of “We the People” and that only in 1920 were women's constitutional rights to vote recognized. See id. at 2275. Despite recognition of this right, the Justice contended, both federal and state governments continued to discriminate against women as long as they could create any basis to justify the discrimination. See id.

136 404 U.S. 71, 73, 77 (1971) (holding unconstitutional a state's probate code that provided that men must be preferred over women when deciding between people equally entitled to administer a decedent's estate); see also supra notes 86-92 and accompanying
tion rights under the Fourteenth Amendment. 137 From that moment on, the Justice asserted, the Court has repeatedly acknowledged that it is unconstitutional for the government to deny to women their full stature as citizens based solely on their gender. 138 In summarizing the Court’s current position on gender-based classifications, the majority set forth the established standard: it is the government’s burden to prove that the classification serves “‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” 139

Furthermore, the Justice explained, it is the Court’s duty to determine whether the government’s justification is “exceedingly persuasive.” 140 Justice Ginsburg then asserted that gender-based classifications may be justified only when employed as a means to compensate women for disadvantages they have suffered in the past, but may never be utilized to perpetuate the economic, legal, and social inferiority of women. 141

The Court then shifted its attention to Virginia’s first justification for maintaining VMI as an all-male institution. 142 Although the majority

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137 See Virginia, 116 S. Ct. at 2275.
138 See id. For example, the Justice noted that in Kirchberg v. Feenstra, the Court invalidated a law that automatically labeled the husband “head and master” of any property that he jointly owned with the wife, thereby giving the husband unilateral power to dispose of the property without the wife’s consent. See id. (citing Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981)). Similarly, Justice Ginsburg continued, the Court in Stanton v. Stanton invalidated a state law that required parents to support their male children until the age of 21 and their female children only until the age of 18. See id. (citing Stanton v. Stanton, 421 U.S. 7, 8, 17 (1975)). The Justice further stated that although the Court has never equated gender-based classifications with race-based or national origin-based classifications, post-Reed decisions have demonstrated the Court’s close and scrutinizing inspection of government action that either closes doors or denies opportunities to women. See id.
139 Id. (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)). The Court proclaimed that the government must prove that its justification for a gender-based classification is genuine and not created or hypothesized in response to litigation. See id. The Court further added that, as established in prior case law, the government’s justification cannot be grounded on generalizations or stereotypes about the different capabilities or preferences of men and women. See id. Justice Ginsburg declared that “‘[i]nherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” Id. at 2276.
140 See id. at 2275.
141 See id. at 2276. The Court acknowledged that gender-based classifications may be utilized to promote equal employment opportunities for women, to compensate women for economic disadvantages they may have suffered, and to advance the development of women’s talents and abilities. See id.
142 See id. at 2276–77. Virginia asserted that single-gender education was beneficial and that the option of single-gender education added diversity to the state’s educational
agreed with Virginia that diversity within the state’s educational system was beneficial, the Court declared that Virginia failed to provide persuasive evidence to prove that VMI had been established, or was being maintained, for the purpose of diversifying the state’s system of higher education.\textsuperscript{143} Justice Ginsburg announced that because Virginia had quite liberally provided a unique educational opportunity to its male citizens

\textsuperscript{143} See Virginia, 116 S. Ct. at 2277. Justice Ginsburg cautioned that the Court will not automatically accept benign justifications offered to explain categorical exclusions. See id. The Justice explained that a justification will survive scrutiny only if it establishes a factual basis for the state’s purposes. See id. The majority further asserted that the present case was similar to Hogan because the Court found no nexus between the state’s objective of compensating women for past discrimination and the actual discriminatory reason underlying the classification. See id. (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982)); see also supra notes 109-113 and accompanying text (discussing Hogan). The Court recognized that when VMI was established in 1839, the state scarcely thought about providing diversified educational opportunities for male and female students. See Virginia, 116 S. Ct. at 2277. In fact, the Court noted, at that time it was considered hazardous for women to pursue higher education because it would take them away from their proper places in the home. See id. It was only in 1879, Justice Ginsburg continued, that the state senate looked into the possibility of offering higher education for women after recognizing that Virginia had failed to provide for the education of its daughters despite so liberally educating its sons. See id. at 2277-78. Despite this acknowledgment, the Justice pointed out, it took Virginia several years to establish women’s colleges and seminaries. See id. at 2278. For example, the Justice recounted, Farmville Female Seminary became public in 1884. See id. Similarly, the Justice continued, between the years 1908 and 1910, Virginia founded three women’s colleges: James Madison University, Mary Washington College, and Radford University. See id. By the 1970s, the Court noted, Virginia converted all four schools into coeducational institutions. See id. The majority further added that the male-only admissions policy of Virginia’s flagship school, the University of Virginia, was held unconstitutional in 1970. See id. (citing Kirstein v. Rector, 309 F. Supp. 184, 187 (E.D. Va. 1970)). Quoting from a history book on women’s education, the majority recounted that prior to Kirstein, the debate centered on the fear that admitting women

- would encroach on the rights of men; there would be new problems of government, perhaps scandals; the old honor system would have to be changed; standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trailed in the dust.

\textit{Id.} (citation omitted).

Following the Court’s 1982 decision in Hogan, Justice Ginsburg explained, VMI conducted a reexamination of its admissions policy. See id. The Justice noted that the VMI Board of Visitors appointed a Mission Study Committee that ultimately advised against converting VMI into a coeducational institution. See id. The Court recognized that Virginia was currently utilizing that Committee’s recommendation as the basis for maintaining VMI’s current status as an all-male institution. See id. Stating that the Court could “hardly extract from that effort any state policy evenhandedly to advance diverse educational options,” the Justice flatly rejected the Committee’s findings. \textit{Id.} at 2279. The Court dismissed the Committee’s evaluation that focused primarily on the expected difficulty in attracting women to VMI and that, according to the Court, provided no explanation as to how the committee reached its conclusion. See id.
without providing a corresponding opportunity to its female citizens, the state had denied to women the equal protection of the laws.\textsuperscript{144}

The majority next addressed Virginia's contention that admitting women into VMI would significantly and detrimentally alter the adversative method, which makes the school's program unique.\textsuperscript{145} Although Justice Ginsburg conceded that admitting women would require the program to undergo certain changes and accommodations,\textsuperscript{146} the Court reiterated the circuit court's finding that neither VMI's goal to produce citizen-soldiers nor its adversative method was inherently unsuitable to qualified women.\textsuperscript{147} Justice Ginsburg instructed that "[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females."\textsuperscript{148}

The majority rejected the argument that admitting women into VMI would adversely affect the program.\textsuperscript{149} The Court characterized this reasoning as both an unproved judgment and a self-fulfilling prophecy.

\textsuperscript{144} See Virginia, 116 S. Ct. at 2279.

\textsuperscript{145} See id. The Court noted that Virginia's concern was that accommodations for women would be so drastic and radical that they would destroy the VMI program. See id. The Court further explained that Virginia's fear was that such a transformation of VMI would favor neither men nor women. See id. According to Virginia, the majority stated, men would no longer have available to them VMI's unique program and women would never experience the uniqueness of the program, because their participation would completely eliminate the very characteristics of VMI that set it apart from the state's other institutions of higher learning. See id.

\textsuperscript{146} See id. The Justice recognized that admitting women into VMI would primarily require accommodations in housing assignments along with a restructuring of the physical training programs for the female students. See id.

\textsuperscript{147} See id. (citing United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992)). The Court further recognized that some female students may prefer the VMI methodology to that of women's colleges and would be interested in attending VMI if provided with the opportunity. See id. The majority then declared, and all parties to the litigation agreed, that even if the VMI program were left unaltered, certain women would still be able to participate in cadet activities and meet the physical standards required of male cadets. See id.

\textsuperscript{148} Id. at 2280 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)); see also J.E.B. v. Alabama, 511 U.S. 127, 139 n.11 (1994) (stating that the Equal Protection Clause precludes state and federal governments from relying on sweeping generalizations to make "judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination").

The Court noted that most female students would not choose to undergo VMI's program, and indeed, most male students would prefer to be educated in a different environment. See Virginia, 116 S. Ct. at 2280. Education, the Court explained, is not a "one size fits all" undertaking. See id. Justice Ginsburg then recognized that the issue was not whether men or women should be forced to undergo the VMI program, but whether Virginia can constitutionally deny to qualified women the unique opportunities that VMI affords. See id.

\textsuperscript{149} See Virginia, 116 S. Ct. at 2280.
reminiscent of earlier justifications used to deny women their rights and opportunities. In fact, Justice Ginsburg asserted, women's successful participation in the federal military academies as well as in the military forces proved that Virginia's fears for VMI's future were not grounded in fact. The Justice concluded that Virginia's justifications for maintaining VMI as an exclusively-male institution did not qualify as "exceedingly persuasive."

Next, Justice Ginsburg examined Virginia's proposed remedial plan to maintain VMI as an exclusively male institution and establish VWIL as a "parallel" program exclusively for women. The Court reminded that, as established by precedent, a court must issue a remedial decree that closely addresses the constitutional violation. In the present case, the Court explained, because the constitutional violation was Virginia's categorical exclusion of female citizens from the educational opportunities and benefits afforded to male citizens, the appropriate remedy was to eradicate past discriminatory effects and to prevent similar discrimination from occurring in the future. Instead of properly remediing the con-

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150 See id. Justice Ginsburg noted that Virginia's current concerns were similar to those historically expressed by the Court when women sought access to legal education and admission to the bar. See id. For example, the Justice observed, in 1876 a Minnesota court creatively explained why women were not suited to the practice of law. See id. Quoting the Minnesota court, the Justice recounted that women's role in educating and training the young forbids that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice...is to any extent the outgrowth of..."old fogyism."..."[It arises rather from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to grade up the profession."

Id. at 2280-81 (citation omitted).

The Court further recounted how similar fears led Columbia Law School to resist admitting women. See id. at 2281. The Court stated that although Columbia's faculty never proclaimed that women could not master the law, its opposition to the admission of women was merely that if women were admitted "then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" Id. (citation omitted). Similarly, the Court continued, women faced resistance upon seeking admission to medical schools, police academies, and a number of other professions. See id.

151 See id. at 2281.

152 See id.

153 See id. at 2282.

154 See id.; see also Milliken v. Bradley, 433 U.S. 267, 280 (1977) (maintaining that a remedial decree must have the effect of placing people that have been unconstitutionally denied benefits or opportunities in a position that they would have occupied absent the discrimination).

155 See Virginia, 116 S. Ct. at 2282 (citing Louisiana v. United States, 380 U.S. 145,
stitutional violation, the Justice observed, Virginia left VMI's exclusionary policy untouched and instead proposed a separate, different, and unequal program for women.156

The majority then delved into a thorough comparison of the programs offered at both VMI and VWIL in order to determine whether the curricula could truly be labeled "parallel."157 The Court first recognized that VWIL lacked the rigorous military training that set apart the VMI experience from other military institutions.158 Instead of providing VMI-type military training, the Justice noted, VWIL de-emphasized the military aspect of the program and instead used a "cooperative" method of education to reinforce women's self-esteem.159 Although Virginia argued that pedagogical differences between the sexes required two separate programs, the Court rejected this reasoning because it was premised on stereotypes and generalizations about men and women.160 The Court

154 (1965)). The Court in Louisiana declared unconstitutional a requirement that voters must first satisfy that they are able to understand any section of either the federal or state constitutions before being permitted to vote. See Louisiana, 380 U.S. at 153.

156 See Virginia, 116 S. Ct. at 2282. According to Virginia, the Court related, VWIL's program adequately paralleled VMI's program to produce citizen-soldiers through military training, education, character, mental and physical discipline, and leadership development. See id. at 2283.

157 See id. at 2283.

158 See id.; see also United States v. Virginia, 766 F. Supp. 1407, 1413-14 (W.D. Va. 1991) (noting that there exists no other private or public school in the United States that offers the same intense military training available at VMI).

159 See Virginia, 116 S. Ct. at 2283. The Court explained that although VWIL students were required to participate in ROTC and a Virginia Corps of Cadets, VWIL was not designed to be a military institute. See id. The majority further noted that VWIL students, unlike VMI cadets, were not required to live together, wear uniforms during schooldays, or eat meals together. See id. The Court therefore recognized that VWIL students would be deprived of the barracks experience that was essential to the overall VMI experience. See id. Ironically, Justice Ginsburg observed, although Virginia declared the barracks experience to be the most crucial aspect of the VMI program, it deemed such an experience inappropriate and unsuitable for the training of female cadets. See id.

The Court further determined that the VWIL program lacked other important aspects of the VMI program. See id. Justice Ginsburg stated that instead of receiving leadership training like the cadets at VMI—through mental stress, physical rigor, constant regulation of behavior, and the indoctrination in desirable beliefs and values—VWIL students participated in externships, seminars, and speakers series. See id. Upon graduation, the Justice continued, VWIL students who did not experience the pressures, rigors, and psychological bonding between cadets that is characteristic of adversative training would not feel the same sense of accomplishment commonly experienced by VMI graduates. See id.; see also supra notes 53-79 and accompanying text (providing more information on the VWIL program).

160 See Virginia, 116 S. Ct. at 2283-84. The Justice explained that the task force, drawn from faculty at Mary Baldwin College, was responsible for designing and implementing the VWIL program and determined that a military program like VMI's would be inappropriate for training and educating most women. See id. at 2283.
further declared that a state policy based upon "the way women are" unfairly denies opportunities to individual women who, because of their talents and capacities, fall outside the stereotypical description of most women.\textsuperscript{161} Justice Ginsburg further observed that VWIL was not equal to VMI in numerous other respects.\textsuperscript{162} For example, the Justice commented, VWIL lacked the faculty, course offerings, student body, and facilities that contribute to VMI's notoriety.\textsuperscript{163} The majority further explained that a VWIL graduate would not have at her disposal the benefits and advantages of graduating from an institution with the prestige, reputation, and influential alumni network that results from a 157-year history.\textsuperscript{164} In

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\item[\textsuperscript{161}See id. at 2284. The Court reiterated that Virginia decided not to make VWIL as militaristic as VMI because VWIL was designed for women who did not contemplate pursuing military careers. See id. Only 15\% percent of VMI graduates enter into military careers; the Court thus asserted that VMI's militaristic program is therefore also inappropriate for men. See id.
\item[\textsuperscript{162}See id.
\item[\textsuperscript{163}See id. Examining the statistics, the Court observed that the student body at VWIL would be composed of first-year students whose average combined SAT score was approximately 100 points lower than that of entering students at VMI. See id. In addition, the majority noted, not only does the faculty at Mary Baldwin College receive substantially lower salaries, but as a group they hold fewer Ph.D.s than the faculty at VMI. See id. Justice Ginsburg further recognized that the VWIL program lacked the array of curricular choices that were available to VMI students. See id. The Justice observed that while VMI cadets could earn degrees in a number of areas such as the liberal arts, chemistry, biology, or electrical, computer, civil, or mechanical engineering, the VWIL program lacked top-rate courses in engineering, math, physics, and science. See id.
\item[\textsuperscript{164}The majority further explained that other differences between the two programs included physical training resources. See id. While VWIL students would have access to one gymnasium and two multipurpose fields, the Court continued, VMI students have access to an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track. Id. at 2284-85 (citing United States v. Virginia, 852 F. Supp. 471, 503 (W.D. Va. 1994)). Additionally, the Justice pronounced, Virginia would provide unequal financial support to both institutions. See id. at 2285. The Court explained that while Mary Baldwin's current endowment stood at about $19 million with an additional $35 million in future commitments, VMI had a current endowment of $131 million (the highest per-student endowment in the United States) and stood to gain $220 million in future commitments. See id.
\item[\textsuperscript{164}See id. at 2284. The Court contended that the VWIL diploma would not unite the graduating student with VMI graduates who had successfully distinguished themselves in both civilian and military life. See id. at 2285. The majority realized that a VWIL graduate would not have available to her the impressive and extensive network of alumni and opportunities available to a VMI cadet. See id.
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sum, the Justice declared, Virginia failed in its quest to provide to women a single-gender institution comparable to VMI and instead merely created a "pale shadow" of that model institution. As a result, the Court explained that Virginia failed to comply with the Sweatt v. Painter requirement that separate educational opportunities be substantially equal.

Continuing, the Court criticized the Fourth Circuit's approval of Virginia's remedial plan. The Court observed that instead of inquiring into whether VWIL adequately placed women in the same position that they would have occupied absent the discrimination, the court of appeals incorrectly considered whether Virginia could, within the parameters of the Constitution, provide separate and unequal educational opportunities for men and women. Justice Ginsburg noted that although the Fourth Circuit acknowledged the existence of significant differences between VMI and VWIL, it nonetheless approved of the VWIL program by substituting the established level of review for gender-based classifications with a newly created standard. The Justice criticized the court of appeals for devising its own test—a "substantive comparability" inquiry—and for subsequently finding that the requirements for this new test were satisfied. In correcting the Fourth Circuit's inappropriate analysis, the majority proclaimed that all gender-based classifications must undergo heightened scrutiny.

Finally, the Court concluded that pursuant to Virginia's obligation to provide its citizens with equal protection of the laws, Virginia could not offer qualified women anything less than a VMI-type education. Justice Ginsburg explained that a primary part of constitutional history has consisted of the deliberate extension of constitutional protections to people once excluded or ignored by the majority. As a result, the Jus-

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165 See id. at 2285.
166 339 U.S. 629 (1950). In Sweatt, the Court declared two racially segregated law schools to be substantially unequal and, therefore, unconstitutional because the students attending the blacks-only law school lacked numerous educational opportunities due to the physical and intangible factors that made the whites-only law school superior. See id. at 633-34; see also supra notes 80-85 and accompanying text (outlining Sweatt).
167 See Virginia, 116 S. Ct. at 2286.
168 See id.
169 See id.
170 See id. The majority proclaimed that the deferential analysis that the Fourth Circuit applied was wholly inconsistent with the standard established by precedent. See id.
171 See id.
172 See id. at 2286 (citing J.E.B. v. Alabama, 511 U.S. 127, 136 (1994)).
173 See Virginia, 116 S. Ct. at 2287.
174 See id. (citing RICHARD MORRIS, THE FORGING OF THE UNION 1781-1789, at 193 (1987)).
tice opined that the notion of “We the People” has expanded throughout history and there is thus no longer any reason to believe that admitting qualified women into VMI would destroy its program rather than enhance its ability to serve the “more perfect Union.”

Authoring a concurring opinion, Chief Justice Rehnquist approved of the majority’s holding but criticized its reasoning. The Chief Justice first outlined the appropriate standard of review with which to analyze gender-based classifications as initially set forth in Craig v. Boren. Although the Court applied the appropriate standard, the Chief Justice explained, the majority added an element of uncertainty by requiring Virginia to demonstrate an “exceedingly persuasive justification” for its gender-based classification. The concurrence then announced that in order to avoid potential confusion in the future, the majority should have adhered closer to the firmly established traditional test.

Chief Justice Rehnquist next recognized that although VMI was founded under the nineteenth-century notion that only men were suited for higher education, policies reflecting this notion were not unconstitutional in 1839 when VMI was established. The Chief Justice admonished that although phrases such as “important governmental objective” and “substantially related” were somewhat vague, they were more specific and unambiguous than the majority’s phrase “exceedingly persuasive justification.” Chief Justice Rehnquist then agreed with the majority that the seminal case for analyzing gender-based classifications is Reed, although as the Chief Justice pointed out, the Reed decision had nothing to do with seeking admission to an educational institution. Chief Justice Rehnquist then posited that although Reed was not sufficient to

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175 See id.
176 See id. (Rehnquist, C.J., concurring).
177 See id. at 2288 (Rehnquist, C.J., concurring) (citing Craig v. Boren, 429 U.S. 190, 197 (1976)). In Craig, the Court declared unconstitutional a statute that prohibited the sale of beer to females under the age of 18 and to males under the age of 21, and determined that gender-based classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives.” 429 U.S. at 197, 210; see also supra notes 101-108 and accompanying text (discussing Craig).
178 See Virginia, 116 S. Ct. at 2288 (Rehnquist, C.J., concurring). Chief Justice Rehnquist observed that although phrases such as “important governmental objective” and “substantially related” were somewhat vague, they were more specific and unambiguous than the majority’s phrase “exceedingly persuasive justification.” See id.
179 See id.
180 See id. The Chief Justice also noted that even after the adoption of the Fourteenth Amendment, it was nearly a century later that the Court began using heightened scrutiny for gender-based classifications. See id. For some time after the adoption of the Fourteenth Amendment, the concurrence recounted, the Court allowed government to make baseless distinctions between women and men. See id. at 2288-89 (Rehnquist, C.J., concurring); see also Hoyt v. Florida, 368 U.S. 57, 61-62 (1961) (holding that despite the progress made with respect to women’s opportunities, women nonetheless continued to be regarded as the nucleus of the home and family); Goeasert v. Cleary, 335 U.S. 464, 466 (1948) (declaring constitutional a Michigan statute that prohibited a woman from obtaining a bartending license unless she was the daughter or wife of a male owner of a liquor establishment).

Chief Justice Rehnquist then agreed with the majority that the seminal case for analyzing gender-based classifications is Reed, although as the Chief Justice pointed out, the Reed decision had nothing to do with seeking admission to an educational institution. See Virginia, 116 S. Ct. at 2289 (Rehnquist, C.J., concurring) (citing Reed v. Reed, 404 U.S. 71 (1971)). Chief Justice Rehnquist then posited that although Reed was not sufficient to
ished the Court for using Virginia's historical justifications for its all-

male policy against it. The Chief Justice agreed with the majority, however, that even Virginia's current justification of promoting diversity in higher education did not justify VMI's exclusively male policy, because there was no corresponding opportunity for women. The concurrence further proclaimed that Virginia's remedial options were not as limited as the Court implied. The Chief Justice realized that a legislative magic wand could not automatically create a VMI-type program for women nor should the state cease its support of VMI. Chief Justice Rehnquist then concluded that Virginia could have avoided a constitutional violation by making a genuine effort to create an all-female institution with comparable public resources. The Chief Justice reiterated that the state should not have been faced with the rigid choice of either changing VMI's admissions policy to include women or abandoning VMI altogether and starting from scratch.

Finally, Chief Justice Rehnquist disagreed with the Court's suggestion that the only remedy for the constitutional violation was for VMI to admit women. The Chief Justice characterized Virginia's violation of the Equal Protection Clause as one that was unconstitutional, not because it excluded women from VMI, but because it maintained an all-male

put Virginia or VMI on notice about the constitutionality of VMI's admissions policy, Hogan did in fact place the state on notice that VMI's exclusively-male admissions policy may violate the Constitution. See id. (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)).


182 See id. at 2290 (Rehnquist, C.J., concurring). From the moment Hogan placed Virginia on notice, Chief Justice Rehnquist explained, the state had the opportunity to resolve the problem by admitting female students. See id. The Chief Justice recognized, however, that because the state did nothing to avoid a constitutional violation, the Court need not inquire as to what Virginia could have done in order to pass constitutional muster. See id.

183 See id.

184 See id.

185 See id.

186 See id. The concurrence stated that if Virginia was willing to provide diversity within its educational system in the form of single-sex education, then that diversity must have been open to females as well as to males. See id. Agreeing with the majority, Chief Justice Rehnquist further opined that Virginia's goal of keeping VMI exclusively male in order to preserve the adversative method was not a sufficiently important government objective. See id. Because the adversative method is not pedagogically beneficial, the Chief Justice continued, Virginia did not have a substantial interest in making it available to its citizens. See id. The concurrence further noted that, unlike the abundant evidence that demonstrated that single-gender education is pedagogically beneficial to some students, there was no similar evidence that proved that the adversative method is also as beneficial. See id. at 2290-91 (Rehnquist, C.J., concurring).

school without providing a comparable institution for females. In fact, the concurrence continued, Virginia may have remedied the constitutional violation by demonstrating that its commitment to educating male students in a single-gender institution was matched by its corresponding commitment to educating female students in a single-gender institution.

The Chief Justice further asserted that while it was appropriate for the state to create single-gender programs according to public interest and demand, it was inappropriate for the state to gauge public interest and demand based upon stereotypes. For example, the concurrence added, the state should not make the unsupported assumption that women would have no interest in attending a school of civil engineering for women or that men would have a similar lack of interest in attending a nursing school for men. The Chief Justice then proclaimed that, because Virginia's proposed women's institution was distinctly inferior to VMI, it undoubtedly failed as a remedy for Virginia's constitutional violation.

In dissent, Justice Scalia criticized the Court for shutting down a distinctive and historical institution such as VMI, and in so doing, rejecting the factual findings of the lower courts, ignoring precedent, and casting away the history of the nation's people. Although the dissent acknowledged it appropriate for the Court to condemn society's past intolerance and mistreatment of women, Justice Scalia praised the nation's ancestors for writing into the Constitution the opportunity to change the laws accordingly to fit the evolving views of society.

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188 See id.
189 See id. Chief Justice Rehnquist further clarified that Virginia could have demonstrated its interest in providing single-gender education for both genders by supporting two institutions with educational offerings of the same quality and overall caliber. See id. In order to demonstrate such a commitment, the Chief Justice asserted, it was irrelevant that both institutions did not have comparable athletic fields, did not accept students with similar SAT scores, and did not hire the same number of faculty with Ph.D.s. See id. It would even be acceptable, the concurrence stated, if the institutions offered their students different curriculum, or if one institution was particularly strong in one field, and the other institution in another. See id.
190 See id.
191 See id.
192 See id.
193 See Virginia, 116 S. Ct. at 2291 (Scalia, J., dissenting). Justice Scalia criticized the Court for rejecting the factual findings of the lower courts that developmental differences between the sexes justified Virginia's decision to apply the adversative method only to an all-male institution. See id. The Justice further criticized the Court's disregard for the lower court's finding that VMI must be kept exclusively male in order to maintain its character and reputation. See id. The dissent further noted that the majority not only revised the established precedent for analyzing gender-based classifications but also ignored the long tradition of state supported and federally supported all-male military colleges. See id.
194 See id. at 2291-92 (Scalia, J., dissenting).
ited that a democratic system that enables people to change their laws "is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution." The dissent denounced the majority's attempt to inscribe into "Basic Law" the current preferences and views of society. The dissent further criticized the Court for concluding that an all-male military institution served no substantial educational value when the people of Virginia had already decided to maintain VMI as an exclusively male institution and women had the opportunity to attend other educational institutions. Justice Scalia buttressed his opinion by noting that the United States Constitution, the old one prior to modification by the majority opinion, stands neutral in this educational debate.

The dissent criticized the Court's approach of evaluating every type of equal protection claim under either rational basis review, intermediate review, or strict scrutiny. These three tests, the Justice asserted, are neither scientific nor predictable and are further compromised by the fact that the decision as to which one to apply is largely left to the Court's discretion. Although the dissent acknowledged that application of the three levels of scrutiny is essential to evaluating whether the restrictions imposed on private conduct comport with the Equal Protection Clause, the Justice refuted the notion that the Court's function is to revise society's values regarding equal protection and declared that the Court must instead preserve such values. Specifically, Justice Scalia proffered, whichever abstract tests the Court devises and applies, the Court should not use such tests to supersede the unbroken and constant national traditions that embody society's understanding of vague constitutional texts.

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195 Id. at 2292 (Scalia, J., dissenting).
196 See id.
197 See id.
198 See id.
199 See Virginia, 116 S. Ct. at 2292 (Scalia, J., dissenting).
200 See id. For example, the dissent posited, strict scrutiny should be applied only in instances where a government classification has infringed upon traditionally protected interests. See id. Because the Court has not historically accepted this view, Justice Scalia recognized, the Court has applied strict scrutiny to the deprivation of any right considered to be fundamental. See id. Similarly, the Justice asserted, the Court has yet to establish the criteria for applying intermediate scrutiny but will "essentially apply it when it seems like a good idea to load the dice." Id. The Justice then explained that up to the present time, intermediate scrutiny has been applied to gender-based classifications, content-neutral restrictions on speech, and questions of illegitimacy. See id.
201 See id.
202 See id. The Justice reiterated that "when 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." Id. (quoting Rutan v. Republican Party of Ill., 497
The dissent then posited that VMI’s admissions policy was one of these unbroken and constant national traditions and was as well-rooted into the nation’s history as is the tradition of only sending men into military combat.\textsuperscript{203} In fact, the dissent observed, only the people may change these traditions through the democratic process; therefore, the majority’s declaration that these traditions are unconstitutional is not law but “politics-smuggled-into-law.”\textsuperscript{204} By favoring current notions of women’s education, the dissent explained, and by writing these notions into the Constitution, the Court had created a new Constitution instead of merely interpreting the old one.\textsuperscript{205}

The dissent further criticized the Court for failing to apply the intermediate scrutiny test in the manner in which it had been historically applied to gender discrimination cases.\textsuperscript{206} Although the Court recited the question posed by the intermediate scrutiny test correctly, the dissent observed, the majority’s analysis did not demonstrate an appropriate application of the test.\textsuperscript{207} Noting that the majority’s use of the phrase “exceedingly persuasive justification” was questionable, the dissent argued that the Court’s conclusion could only have been reached by substituting this phrase for the appropriate standard.\textsuperscript{208} In addition, the dissent

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\item U.S. 62, 95 (1990).
\item See id. at 2293 (Scalia, J., dissenting). The dissent highlighted that all state and federal government-supported military institutions, such as The Citadel, West Point, and the Naval Academy at Annapolis, began as institutions exclusively for men. See id. The admission of women, the Justice observed, was brought about by the people through their representatives and not by a court decree. See id.
\item See id. Similarly, Justice Scalia recognized, the national tradition of providing single-gender education for both sexes is also threatened by the majority’s decision. See id. The Justice further reiterated that the tradition of single-gender education may only be changed by the people and not by the Court. See id.
\item See Virginia, 116 S. Ct. at 2293 (Scalia, J., dissenting).
\item See id.
\item See id. at 2294 (Scalia, J., dissenting).
\item See id. The dissent explained that the majority’s use of the phrase “exceedingly persuasive justification” would be “unobjectionable if the Court acknowledged that whether a ‘justification’ is ‘exceedingly persuasive’ must be assessed by asking ‘[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives.’” Id. However, Justice Scalia continued, the Court chose instead to interpret that phrase in a manner that goes against both precedent and the reasoning of Hogan. See id. (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). The Court’s use of the “exceedingly persuasive” phrase, the Justice continued, was essential to the Court’s decision because it established that VMI’s admissions policy failed the intermediate scrutiny test if there were some women capable of attending VMI and successfully undertaking all of its physical activities and requirements. See id. In order to arrive at the Court’s conclusion, the dissent observed, the Court must have used the amorphous “exceedingly persuasive justification” phrase instead of the standard recitation of the intermediate scrutiny test. See id. at 2294-95 (Scalia, J., dissenting). The dissent reasoned that only application of this amorphous phrase could have allowed the Court to conclude
\end{footnotes}
observed, the majority left unanswered the question of whether gender-based classifications should be held to the highest standard of judicial review, known as strict scrutiny. In so doing, Justice Scalia contended, the Court not only overlooked its duty to clarify the law, but made the law even more ambiguous than it was before. The Justice then proffered that both state and federal governments are entitled to know, prior to acting, the standards to which government actions will be held and should not be forced to guess about the result of “Supreme Court peek-a-boo.” The Justice concluded that, even if the question of the appropriate scrutiny to apply to gender-based classifications was truly undecided, the best approach would be to reduce the standard to rational basis review rather than elevate it to strict scrutiny analysis.

Justice Scalia next proceeded to explain methodically the appropriate manner in which the Court should have conducted the analysis. The Justice first declared that Virginia undeniably had an important interest in providing its citizens with numerous options for an effective college education, one of those options being single-gender education. See id. at 2295 (Scalia, J., dissenting). Justice Scalia asserted that the standard intermediate scrutiny test had never required a “least-restrictive-means” analysis, but rather only required a substantial relation between the state’s interest and the classification. See id. The dissent further stated that cases analyzed under the intermediate scrutiny test have only required a substantial relation between the end and the means, but have never required a perfect fit. See id.

See id. at 2295 (Scalia, J., dissenting). By leaving this question unanswered, Justice Scalia declared, the majority mistakenly suggested that the Court had not previously held the strict scrutiny test inapplicable to gender-based classifications. See id. Such a false suggestion, the dissent pointed out, had the effect of both destabilizing current law and ignoring precedent. See id.

See id.

See Virginia, 116 S. Ct. at 2295 (Scalia, J., dissenting).

See id. at 2295-96 (Scalia, J., dissenting). To illustrate that the Court has never held gender-based classifications to the standard of strict scrutiny, the dissent proclaimed that until the 1970s, the Court applied rational basis review to gender-based classifications. See id. at 2296. (Scalia, J., dissenting). Justice Scalia further reasoned:

It is hard to consider women a “discrete and insular minority” unable to employ the “political processes ordinarily to be relied upon,” when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns.

Id. (alteration in original) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

See id. The Justice then reiterated that the proper focus of the Court’s inquiry should have been whether VMI’s exclusion of women was “substantially related to an important governmental objective.” Id.

See id. Noting that single-sex education was substantially related to meeting Virginia’s interest, the dissent emphasized that similarly all-men’s and all-women’s colleges possess long and successful histories. See id. Justice Scalia further stressed that the evi-
tice declared that the abundant evidence favoring single-gender education alone was sufficient to allow VMI's male-only admissions policy to pass constitutional muster.\textsuperscript{215} The dissent proclaimed that Virginia's decision to maintain one school that employed the adversative method was substantially related to the state's goal of providing diversity in its system of higher education.\textsuperscript{216} Because admitting women would eventually force VMI to drop the adversative method altogether, the dissent explained, Virginia's only real options included either admitting women and dropping the adversative method, or maintaining the adversative method and continuing to exclude women.\textsuperscript{217} As a practical matter, due to the state's limited resources, Justice Scalia recognized, Virginia chose to fund fourteen coeducational colleges and VMI, the only all-male college characterized by the adversative method.\textsuperscript{218}

Next, Justice Scalia refuted the Court's notion that Virginia's actual reason for maintaining VMI as an exclusively male institution was merely an excuse to discriminate against women.\textsuperscript{219} The Justice also refuted the Court's implication that Virginia's failure to state explicitly its actual purpose in the record rendered VMI's admissions policy invalid.\textsuperscript{220} The dissent further asserted that the Constitution does not require a state to
justify and set forth explicit rationale for the actions it takes.\textsuperscript{221} The dissent criticized the Court's rejection of Virginia's argument that it was promoting diversity by granting its institutions of higher learning substantial autonomy and the authority to decide relevant matters such as student-body composition.\textsuperscript{222} Actually, the Justice reasoned, such autonomous institutions promote diversity, because each institution has the incentive to distinguish itself from the others in order to attract certain students from the larger pool of applicants.\textsuperscript{223} The Justice then conceded that none of these institutions was truly autonomous because the legislature could always withdraw funding if it decided that a particular school was not adequately promoting Virginia's interest in educational diversity.\textsuperscript{224}

Justice Scalia next addressed the Court's willingness to find fault with Virginia's decision not to provide a program based on the adversative method for women.\textsuperscript{225} The Justice decried the Court's criticism of the district court, which relied on Virginia's expert witness testimony.\textsuperscript{226} By dispensing with both the evidence submitted at trial and the findings of the lower courts, the dissent posited, the Court managed to render the trial a sham.\textsuperscript{227} The dissent observed that (1) no witness had contested

\begin{itemize}
\item \textsuperscript{221} See id. at 2298 (Scalia, J., dissenting). The dissent proclaimed that "[t]he 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." Id.
\item \textsuperscript{222} See id. at 2300 (Scalia, J., dissenting). The Justice rejected the appellate court's suggestion that it was impossible for an autonomous state institution, lacking any authority over any other institution, to effectuate a policy of diversity among educational institutions. See id. Justice Scalia further commented:
\begin{quote}
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. And where the goal is diversity in a free market for services, that tends to be achieved even by autonomous actors who act out of entirely selfish interests and make no effort to cooperate.
\end{quote}
\item \textsuperscript{223} See Virginia, 116 S. Ct. at 2300 (Scalia, J., dissenting).
\item \textsuperscript{224} See id.
\item \textsuperscript{225} See id. The Justice criticized the majority's absolute dismissal of the lower court's findings with respect to gender-based developmental and learning differences. See id. The dissent observed that the Court dismissed such findings on the grounds that they merely restated stereotypical opinions about men and women expressed by Virginia's expert witnesses. See id.
\item \textsuperscript{226} See id. "How remarkable," Justice Scalia professed, "to criticize the District Court on the ground that its findings rest on the evidence (i.e., the testimony of Virginia's witnesses)! That is what findings are supposed to do." Id. The Justice rebuked the Court for telling Virginia that the burden of justification rested on the state. See id. Justice Scalia then admonished the majority, which ignored the district court's findings, because those findings rested on the evidence put forth by Virginia. See id.
\item \textsuperscript{227} See id. at 2301 (Scalia, J., dissenting). The Court had in actuality, the dissent recognized, substituted the evidence and the lower court's findings with the "Justices' own
Virginia's substantial evidence that single-gender education is beneficial to both genders and (2) the majority must have arrived at the holding by rendering such evidence irrelevant.\textsuperscript{228} The dissent predicted that the Court's analysis will produce several foreseeable results.\textsuperscript{229} The dissent elaborated that the Court's approach will generally result in any all-male policy being deemed unconstitutional whenever the state's objective in pursuing the policy is ample enough to accommodate women—which will always be the case.\textsuperscript{230} Justice Scalia further dismissed the Court's argument that VMI would not need to undergo substantial changes if it became a coeducational institution because the Court's inquiry needed to go no further after finding that VMI's admissions policy was substantially related to an important state interest.\textsuperscript{231} The Justice declared, however, that even if it were appropriate to undertake such a debate, the Court's conclusion would prove incorrect because the record supported the finding that at least three characteristics of VMI's program would undergo change: (1) the physical training, (2) the adversative method, and (3) the absence of privacy.\textsuperscript{232} In light of these findings, Justice Scalia pronounced, it was clear that upon admitting women, VMI would be significantly altered and would eventually be forced to drop the adversative method altogether.\textsuperscript{233}

\textsuperscript{228} See id.
\textsuperscript{229} See Virginia, 116 S. Ct. at 2301 (Scalia, J., dissenting).
\textsuperscript{230} See id. Justice Scalia explained that under the Court's analysis, a state's objectives will be struck down as unconstitutional “no matter how few women are interested in pursuing the objective by that means, no matter how much the single-sex program will have to be changed if both sexes are admitted, and no matter how beneficial that program has theretofore been to its participants.” Id.
\textsuperscript{231} See id. at 2301-02 (Scalia, J., dissenting). There should therefore be no debate, the dissent indicated, over the extent to which VMI would have to change upon admitting women and whether those changes would be too much to ask VMI to undertake. See id. at 2302 (Scalia, J., dissenting).
\textsuperscript{232} See id. at 2302 (Scalia, J., dissenting). Quoting the district court, the dissent recognized that other changes would include new allowances for personal privacy in the barracks, such as locked doors and coverings on windows, which would detract from VMI's approach of regulating minute details of student behavior, “contradict the principle that everyone is constantly subject to scrutiny by everyone else,” and impair VMI's “total egalitarian approach” under which every student must be “treated alike”; changes in the physical training program, which would reduce “[t]he intensity and aggressiveness of the current program”; and various modifications in other respects of the adversative training program which permeates student life.
\textsuperscript{233} See id.
Further, the dissent declared it immaterial that Virginia failed to create an all-women's institution parallel to VMI. Justice Scalia asserted that if the constitutionality of a single-gender program were to be measured by whether a parallel program for the other gender exists, then the Hogan opinion, which observed that Mississippi did not support any other single-gender institution of higher learning, would have ended at the first footnote. The Justice explained that Virginia's establishment of VWIL as a parallel program should have been irrelevant to the Court's analysis, because VMI's all-male composition was found to be "substantially related" to an important state interest. The dissent further indicated that VWIL was properly designed to provide a program for women that would achieve substantially similar results to those achieved at VMI. The dissent agreed with officials at Mary Baldwin College who explained that, although creating a mirror image of VMI would have required less research, thought, and educational expertise, such an elementary approach would have resulted in a paper program without a real expectation of success. Justice Scalia contended that although the VWIL program was carefully and thoroughly designed by professional and experienced educators, the Court nonetheless baldly declared that such professionals acted on stereotypes and generalizations about women.

Justice Scalia next criticized the concurring opinion for being even less plausible, although more moderate, than the majority opinion. The Justice disagreed with the concurring opinion's assertion that there was scarce evidence in the record to prove that diversity was the actual reason Virginia decided to maintain VMI as an all-male institution. The Justice refuted this argument and instead declared that the record

234 See id. The dissent cited Hogan, where the Court found it of no constitutional significance that the state failed to create an exclusively-male nursing school. See id. at 2302-03 (Scalia, J., dissenting) (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)).
235 See Virginia, 116 S. Ct. at 2303 (Scalia, J., dissenting).
236 See id.
237 See id. The VWIL program, the dissent noted, rejected the notion that there exists a "difference in the respective spheres and destinies of man and woman." Id. (quoting Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872)). The dissent declared that the district court correctly held that there existed a valid pedagogical basis for VMI and VWIL to employ different means in order to achieve substantially similar results. See id.
238 See id.
239 See id. The dissent noted that the Court did not consider that no expert for the United States testified that the adversative method was appropriate for the education of women. See id.
240 See id.
241 See Virginia, 116 S. Ct. at 2303-04 (Scalia, J., dissenting).
contained substantial evidence to indicate that diversity was the state's actual objective. The dissent then criticized the concurrence's second point that maintaining the adversative method did not serve an important government objective. The pedagogical benefits of the adversative method, the Justice emphasized, had been proven time and again throughout the litigation.

Lastly, the dissent criticized the concurring opinion's third rationale, namely that after Hogan, Virginia should have recognized that it needed to provide comparable public resources in an all-female institution in order to avoid an equal protection violation. Justice Scalia considered it unrealistic for Virginia to have known pursuant to Hogan—which did not require the state to establish a corresponding single-gender institution for both sexes—that Virginia was then expected to institute a parallel VMI-type program for women. In sum, the Justice noted, the concurrence had improperly disregarded both the four all-female private colleges in Virginia and the state's policy of coordinating private with public educational offerings. In fact, the dissent proclaimed, no need existed to make VMI a coeducational institution when both male and fe-

242 See id. at 2304 (Scalia, J., dissenting). The Justice further noted that one must first reject, as done by the concurrence, the initial reason for VMI's establishment in days when beliefs and attitudes towards women's education were drastically different. See id. Justice Scalia further declared that it was absurd to require Virginia to prove that it maintained an exclusively-male military academy in order to foster diversity in the educational system. See id. In fact, the Justice continued, requiring Virginia to prove that diversity was the real reason for VMI's admissions policy was similar to requiring the United States Army to record evidence that its mission is to prepare soldiers for battle. See id. The Justice proclaimed that "[a] legal culture that has forgotten the concept of res ipsa loquitur deserves the fate that it today decrees for VMI." Id.

243 See id.

244 See id. The dissent explained that the benefits of the adversative method had been established from the beginning because the woman who prompted the suit wanted to attend VMI not because of its all-male composition—it would no longer be all-male once she was admitted—but because of the unique adversative education that VMI provides. See id. Similarly, because the concurrence agreed that single-gender education is beneficial, the Justice continued, that alone was sufficient to decide in Virginia's favor because admitting women to VMI would do away with both single-gender education and the adversative method. See id. at 2304-05 (Scalia, J., dissenting).

245 See id. at 2305 (Scalia, J., dissenting).

246 See id. The Justice commented:

Any lawyer who gave that advice to the Commonwealth ought to have been either disbarred or committed. (The proof of that pudding is today's 6-Justice majority opinion.) And any Virginia politician who proposed such a step when there were already 4 4-year women's colleges in Virginia (assisted by state support that may well exceed, in the aggregate, what VMI costs . . . ) ought to have been recalled.

Id.

247 See Virginia, 116 S. Ct. at 2305 (Scalia, J., dissenting).
male citizens already possessed diverse opportunities in the form of co-
educational and single-gender institutions of higher learning.248

Justice Scalia then opined that the Court’s decision would adversely
affect the future of all single-gender public institutions.249 The dissent
continued, however, that because the Court characterized the decision as
applying only to unique educational opportunities such as those offered
by VMI, the Court had created the illusion that in future cases govern-
ment officials could constitutionally justify single-gender institutions.250

Justice Scalia announced that the principal role of the Supreme
Court is to establish precedent and laws that bind all lower courts, not to
make decisions on unique or rare dispositions.251 By proclaiming that
any unique single-gender program must also be offered to any member of
the opposite sex equally capable of participating in that program, the dis-
sent explained that the Court had effectively killed single-gender public
education.252 The Court’s decision, the dissent opined, was especially
regrettable because of the increasing awareness and recognition of the
benefits that single-gender education provides to both men and women.253

248 See id. The dissent criticized the concurring opinion for discounting Virginia’s
assistance to its all-women’s private colleges because the state treated the private
women’s colleges in the same manner it treated all of its other private colleges. See id.
The dissent further observed:

But if Virginia cannot get credit for assisting women’s education if it only
treats women’s private schools as it does all other private schools, then
why should it get blame for assisting men’s education if it only treats VMI
as it does all other public schools? This is a great puzzlement.

Id. 249 See id.
250 See id.
251 See id.
252 See id. at 2306 (Scalia, J., dissenting). The dissent observed that along with the
risks of losing, the expense of litigating whether single-gender programs are constitutional
is too high for government officials to embrace. See id. The Court’s decision, Justice
Scalia asserted, will enable any person to bring into court any state that supports a single-
gender program and compel it to demonstrate an “exceedingly persuasive justification”
for the gender-based classification. See id. The Justice then acknowledged that if other
courts heed this ambiguous language, it will be impossible for a state to satisfy that re-
quirement even with abundant evidence. See id. The effect of this, the dissent observed,
will be that:

No state official in his right mind will buy such a high-cost, high-risk law-
suit by commencing a single-sex program. The enemies of single-sex edu-
cation have won; by persuading only seven Justices . . . that their view of
the world is enshrined in the Constitution, they have effectively imposed
that view on all 50 States.

Id. 253 See Virginia, 116 S. Ct. at 2306 (Scalia, J., dissenting). The dissent recounted the
failure of the Detroit Board of Education in 1991 to establish an experimental program
exclusively for inner-city male youths. See id. The dissent recounted that the plan was
Justice Scalia next expressed concern for the future of private single-gender institutions that receive substantial government support. The dissent dismissed as meaningless the Court's distinction that private institutions are not converted into state actors, for purposes of equal protection analysis, merely because they directly or indirectly benefit by government funding. The real issue, the dissent explained, is whether by providing funds to private single-gender institutions, a state is itself violating the Constitution.

Justice Scalia further hypothesized that it would be difficult, if not impossible, to find future circumstances under which the Court will hold private single-gender programs to be constitutional unless the Court first does away with the legal principles applied to the present case. The Justice recognized this abandonment of legal principles to be a strong possibility because the present decision itself abandoned principles of law traditionally applied to gender-based classifications.

Lastly, the dissent rejected the Court's self-righteous imposition of its own economic and social preferences on the entire nation. Justice Scalia asserted that the Court's decision progressively narrowed the sphere of self-government that should be left untouched and reserved to the American people. The Justice then concluded by recognizing that no court opinion could leave VMI without honor and none, including women, will be better off in the future for the destruction of VMI.

swiftly abandoned upon the filing of a lawsuit against the Board and upon the district court's grant of a preliminary injunction. See id. Justice Scalia concluded that the Court's decision regrettably guaranteed that no similar experiment will ever again be tried. See id.

254 See id. The dissent relied on statistics to demonstrate that for the 1990-1991 school year, private institutions derived about 19% of their financial budgets from local, state, and federal governments. See id. Also of significance, the Justice continued, are the facts that these governments provided substantial financial aid for students to attend private institutions and that the institutions retained charitable status under the states' tax laws. See id.

255 See id. at 2307 (Scalia, J., dissenting).

256 See id.

257 See id.

258 See id.

259 See Virginia, 116 S. Ct. at 2308 (Scalia, J., dissenting).

260 See id. In fact, the Justice noted, "[a]s today's imposition, and others this single Term, show, this places it beyond the power of a 'single courageous State,' not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old." Id.

261 See id. at 2308, 2309 (Scalia, J., dissenting). After extracting an excerpt from "The Code of a Gentleman," a booklet that all entering VMI students are required to possess at all times, the Justice proclaimed that VMI had been targeted because of its endorsement of the booklet's old-fashioned concepts such as manly honor. See id. at 2308 (Scalia, J., dissenting). The Justice professed how impressive it was for a modern institution of higher learning to seek to instill in its students the values expressed in the book-
The Supreme Court's decision in *United States v. Virginia*,\(^{262}\) undoubtedly one of the most anticipated cases argued before the Court in 1996, sparked a great deal of controversy throughout the nation while inflaming the passions and emotions of many men and women. Many commentators have characterized the contested decision as simply a court order unlatching the doors of America's last all-male military academy and finally allowing women, who had been locked out for 150 years, to set foot inside. Others, however, have recognized that the decision and the implications it carries for the future extend far beyond the admission of women into a single all-male military academy.

First, the Court's decision will inevitably affect all future claims of gender discrimination brought under the Equal Protection Clause. From this point forward, courts will turn to this decision when seeking the appropriate test under which to analyze all gender-based classifications. Although *United States v. Virginia* provided the Court with the opportunity to clarify the intermediate scrutiny test and to enunciate once and for all its exact language, the Court failed to seize upon this opportunity and instead further complicated the test by supplementing it with new language. Resuscitating Justice O'Connor's statement in *Mississippi University for Women v. Hogan*\(^{263}\) that the party seeking to uphold a gender-based classification must show an "exceedingly persuasive justification" for the classification,\(^{264}\) Justice Ginsburg incorporated this ambiguous phrase into an already nebulous test. Providing neither an explanation nor any guidelines as to what may constitute an "exceedingly persuasive justification," the majority deferred interpretation of that phrase to a future date and thereby left the status of gender-based classifications in its pre-existing state of ambiguity.

*United States v. Virginia* further provided to the Court ammunition with which to declare gender a suspect class and thus elevate gender-based classifications to the level of strict scrutiny analysis. The Court, however, once again failed to seize upon this opportunity. The majority's numerous allusions to subjecting gender-based classifications to heightened scrutiny have unfortunately never been converted into concrete law. Nevertheless, by supplementing the traditional test with new language and thereby making gender-based classifications less likely to withstand constitutional muster, the Court has in effect heightened the level of scrutiny for gender-based classifications, though not expressly saying so. The Court, presented with the opportunity to clarify the

\(^{1}\) See id. at 2309 (Scalia, J., dissenting).
\(^{262}\) 116 S. Ct. 2264 (1996).
\(^{263}\) 458 U.S. 718 (1982); see also supra notes 109-113 and accompanying text (discussing Hogan).
\(^{264}\) See Hogan, 458 U.S. at 724.
muddied waters of gender-based classifications, has instead squandered that chance and provided no clear guidance as to the fate of future equal protection claims of gender discrimination.

Second, the Court’s decision will impact upon the future of both public and private single-gender institutions of higher learning, leaving many state government officials wondering whether they should convert their single-gender institutions into coeducational schools or risk the threat of future litigation. Although only a few state-sponsored single-gender institutions are currently in existence in the United States, the fate of such schools now remains a mystery. The majority’s decision relied on the fact that VMI provided a unique opportunity to its male citizens—one that was unavailable to the female citizens of Virginia. This determining factor, however, may prove to be problematic because most, if not all, single-gender institutions can be classified as unique in one way or another. Pursuant to the Court’s decision, single-gender admissions policies at these institutions will most likely be rendered unconstitutional and the institutions will be forced to become coeducational. In so doing, courts will deny to students—particularly women, who have been found to benefit the most from this type of education265—the benefits of a single-gender education.

The decision may also potentially reach into the private sector and similarly affect private single-gender institutions because of the substantial state and federal government funding with which most institutions operate. By not addressing the future of other public and private single-gender institutions and by strictly focusing on the VMI situation, the Court may have left advocates of both public and private single-gender institutions pondering what standards, if any, will be used to judge the constitutionality of their schools.

Third, the United States v. Virginia decision denotes that even as the nation approaches the twenty-first century, women must continue their unending, historic fight against stereotypes concerning their traditional roles and abilities against those who still believe that there are certain places where women do not belong. Although the Court failed to seize upon the opportunity either to clarify the intermediate scrutiny test or to elevate gender to a suspect class, the majority is correct in following well-established precedent and thereby reaffirming that stereotypes and traditional notions about women cannot justify gender-based classifications.

VMI refused to admit women primarily because of the institution’s antiquated belief that women, whether qualified or not, could not and

265 See generally Caplice, supra note 113 (commenting on Hogan).
should not be forced to undergo the adversative method of education. Thus, in attempting to protect and shield women from the harsh and "masculine" world of military training, Virginia categorically denied its female citizens—who supported VMI with their tax dollars—an extraordinary educational, professional, and personal opportunity. As is evident from the seven-to-one decision, the United States Supreme Court recognized Virginia's conduct as a blatant and outright denial of women's equal protection under the laws. The lower courts, however, failed to recognize such obvious discrimination and instead concocted numerous justifications for its continued existence. One lower court judge even went so far as to proclaim that "[i]f VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."266 The triumph of United States v. Virginia is that women will no longer settle for the less significant role of the fife267 and will only be content with the best that a state has to offer.

Yanet Perez

267 Webster's New World Dictionary defines a fife as "a small, shrill-toned musical instrument resembling a flute, used mainly with drums in playing marches." WEBSTER'S NEW WORLD DICTIONARY 520 (2d ed. 1980).