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## Equal Benefits, Equal Burdens: Skeptical Scrutiny for Gender Classifications after *United States v. Virginia*

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**EQUAL BENEFITS, EQUAL BURDENS:  
“SKEPTICAL SCRUTINY” FOR  
GENDER CLASSIFICATIONS AFTER  
*UNITED STATES v. VIRGINIA***

*However “liberally” [the Virginia Military Institute] plan serves the State’s sons, it makes no provision whatever for her daughters. That is not equal protection.*

—Justice Ruth Bader Ginsburg<sup>1</sup>

I. INTRODUCTION

In 1872 Supreme Court Justice Bradley wrote, “Man is, or should be, woman’s protector and defender. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.”<sup>2</sup> To this end, the Court upheld Illinois’s prohibition of the practice of law by women.

How far we’ve come. Women are not only increasingly entering the highest ranks of the legal profession<sup>3</sup> but are also protecting and defending our nation in record numbers.<sup>4</sup> With the appointment of Ruth Bader Ginsburg to the Supreme Court in 1993,<sup>5</sup> feminist legal scholars were optimistic about her potential influ-

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1. *United States v. Virginia*, 116 S. Ct. 2264, 2279 (1996).

2. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

3. See David Segal, *Meet the Women Rainmakers: They’re Generating Big Income for Law Firms and Changing the Face of a Clabby Profession*, WASH. POST, Aug. 12, 1996, at F1. (“[W]hile women have gone a long way toward breaking barriers, and are coming into the profession in large numbers, the glass ceiling is alive and well.” (quoting Cory Amron, former chairwoman of the ABA’s Commission on Women)).

4. See *infra* text accompanying notes 339-44.

5. Justice Ginsburg was appointed by President Bill Clinton and was the first Justice appointed by a Democratic president since 1967. See Joyce Ann Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 2 (1994). Her appointment spurred hopeful predictions that she would nudge the Supreme Court to re-energize liberal decisions of Chief Justice Earl Warren’s Court in the 1960s, decisions that the current regime under Chief Justice William Rehnquist all but vanquished. See *id.* at 2-3.

ence on the Court's decisions regarding women.<sup>6</sup> This optimism was inspired by her vision of a "[b]oldly dynamic interpretation, departing radically from the original understanding . . . to tie to the . . . equal protection clause a command that government treat men and women as individuals, equal in rights, responsibilities and opportunities."<sup>7</sup> These hopes for change in gender jurisprudence became reality in June 1996 with the Supreme Court's decision in *United States v. Virginia (VMI)*,<sup>8</sup> which required the all-male Virginia Military Institute (VMI) to admit women.<sup>9</sup>

In writing for the majority in *VMI*, Justice Ginsburg seized on the opportunity to articulate a new equal protection standard, which she dubbed "skeptical scrutiny."<sup>10</sup> This new test for gender classifications is significant in both feminist jurisprudence and constitutional legal theory. The *VMI* decision addresses a core issue of feminist jurisprudence: should men and women be treated the same or differently? The Supreme Court opted for the former in requiring qualified women to be provided the same educational opportunity as men.<sup>11</sup>

From a constitutional law perspective, the *VMI* decision represents a doctrinal shift in the Court's treatment of gender classifications. The heart of this shift is the evolution of the phrase "exceedingly persuasive justification," which appeared in earlier cases involving gender discrimination.<sup>12</sup> The Court gave this phrase new meaning in *VMI* by placing a higher burden on parties seeking to uphold a gender classification.<sup>13</sup> While the Court still reserves the strictest judicial scrutiny for classifications based on

6. "Although Ruth Bader Ginsburg's name was unfamiliar to the general public when President Clinton proposed her for the Supreme Court, she was much admired by many feminists who describe her as 'the major architect of constitutional issues for women' in recent years." Helen Lillie, *Husbands Who Are Not Afraid to Be Proud of Their Wives*, HERALD (Glasgow), July 15, 1993, at 10. Feminists hoped that Justice Ginsburg's appointment would "restore the 'f' word [feminism] to polite political conversation." Louise Bernikow, *Let's Hear It for the 'F' Word*, NEWSDAY, June 18, 1993, at 62.

7. Jeffrey Rosen, *The Book of Ruth*, NEW REPUBLIC, Aug. 2, 1993, at 19, 30.

8. 116 S. Ct. 2264 (1996).

9. In text, the italicized "*VMI*" refers to the 1996 Supreme Court decision and ordinary roman "*VMI*" refers to the educational institution.

10. *United States v. Virginia*, 116 S. Ct. at 2274.

11. *See id.* at 2287.

12. *See id.* at 2274; *see also infra* Part II.C (tracing the development of intermediate scrutiny).

13. *United States v. Virginia*, 116 S. Ct. at 2275.

race or national origin,<sup>14</sup> the Court is clearly moving toward a more stringent level of scrutiny for gender discrimination.<sup>15</sup> As a result of this shift, it is an appropriate time for the Court to reconsider some of its prior decisions upholding outmoded gender classifications, including *Rostker v. Goldberg*,<sup>16</sup> which upheld the all-male draft registration.

This Note takes both a retrospective and prospective approach to analyzing the intermediate scrutiny standard as applied by the United States Supreme Court. Part II briefly traces the development of the intermediate scrutiny standard for gender discrimination cases. Part III focuses on the Supreme Court's application of intermediate scrutiny to cases involving single-sex education and the military, both philosophies directly impacting the *VMI* decision. Focusing primarily on the courts' conflicting approaches in dealing with sex differences, Part IV outlines the equal protection analysis of the lower court decisions leading up to the Supreme Court's articulation of its new standard in *VMI*. Part V addresses the challenges of implementing the *VMI* decision by looking at The Citadel's decision to abandon its all-male admissions policy. In light of the stricter standards of intermediate scrutiny developed in *VMI*, Part VI invites a reconsideration of *Rostker*, which precludes women's participation in draft registration. This Note concludes that developments in gender discrimination law and the reality of women's increased participation in the military mandate overturning *Rostker* and lifting the few remaining restrictions on women from serving in combat.

## II. THE DEVELOPMENT OF INTERMEDIATE SCRUTINY FOR GENDER-BASED CLASSIFICATIONS

The Equal Protection Clause of the Fourteenth Amendment<sup>17</sup> prohibits discrimination on the basis of gender for people who are similarly situated.<sup>18</sup> While this is a universally agreed-upon pro-

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14. *See id.*

15. *See infra* Part IV.F.5.

16. 453 U.S. 57 (1981).

17. U.S. CONST. amend. XIV, § 1.

18. *See, e.g.,* *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (striking down workers' compensation law that required a widower but not a widow to prove dependence on spouse in order to qualify for benefits); *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating state statute prohibiting the sale of 3.2% beer to males under the age of 21 and females under 18); *Stanton v. Stanton*, 421 U.S. 7 (1975) (striking down statute providing for a parental support obligation for sons until age 21 but for

tection, the question of appropriate judicial scrutiny remains unclear.<sup>19</sup> Over the past thirty years the standard of review for gender discrimination cases has evolved from a deferential analysis to a more searching inquiry culminating in the "intermediate scrutiny" standard.<sup>20</sup> Throughout this development, the Court has adopted two separate analyses: (1) the important governmental interests test<sup>21</sup> and (2) the exceedingly persuasive justification test.<sup>22</sup> These two tests merged in *Mississippi University for Women v. Hogan*,<sup>23</sup> which gave rise to the current shift in intermediate scrutiny spearheaded by Justice Ginsburg.

### A. Early Developments

Until the early 1970s, the Court routinely upheld discriminatory laws that were rationally related to government purposes reflecting traditional views of the "proper" relationship between men and women.<sup>24</sup> *Reed v. Reed*<sup>25</sup> marked the turning point in the Court's policy of deferring to the states those judgments regarding the role of women.<sup>26</sup> In *Reed* the Court unanimously invalidated an Idaho statute requiring that males be preferred to equally entitled females in the appointment of persons to administer an intestate estate.<sup>27</sup> The Court employed a "rational relationship"<sup>28</sup> test to conclude that "a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbi-

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daughters only until age 18); *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating statutory preference of males to administer an estate over equally entitled females).

19. Prior to *VMI*, equal protection jurisprudence "evaluate[d] everything under the sun by applying one of three tests: 'rational basis' scrutiny, intermediate scrutiny, or strict scrutiny." *United States v. Virginia*, 116 S. Ct. 2264, 2292 (1996) (Scalia, J., dissenting).

20. *See infra* notes 45-52.

21. *See infra* Part II.B.

22. *See infra* Part II.C.

23. 458 U.S. 718 (1982).

24. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-25, at 1559 (2d ed. 1988); *see, e.g., Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (upholding the state's prohibition of women to practice law). Ironically, in the same reporter Justice Bradley argued: "[T]he right of any citizen to follow whatever lawful employment *he* chooses to adopt . . . is one of *his* most valuable rights, and one which the legislature of a State cannot invade . . ." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 113-14 (1872) (Bradley, J., dissenting) (emphasis added). Apparently Justice Bradley's use of the male pronoun was not simply a matter of stylistic convention.

25. 404 U.S. 71 (1971).

26. *See* TRIBE, *supra* note 24, § 16-26, at 1561.

27. *See Reed*, 404 U.S. at 73, 77.

28. *Id.* at 76.

trary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.<sup>29</sup> The state defended its preferential statute by arguing that it furthered legitimate state interests: reducing the workload on probate courts<sup>30</sup> and avoiding intra-family controversy.<sup>31</sup> While rational basis scrutiny generally bespeaks deference,<sup>32</sup> *Reed* is unique for employing the rational basis test to invalidate a state law despite the state's articulation of legitimate interests for its passage.<sup>33</sup>

*Reed* established that the Equal Protection Clause mandates that similarly situated persons be treated alike.<sup>34</sup> Conversely, different classes of persons may be treated differently.<sup>35</sup> But *Reed* did not address whether men and women may be deemed similarly situated despite inherent biological differences. Moreover, *Reed* sparked the debate over whether certain gender differences are real or whether they are based on gender stereotypes.<sup>36</sup>

### B. Important Governmental Interest

Even though *Reed* used the language of rational basis review, the decision makes sense only if we assume that "some special sensitivity to sex as a classifying factor entered into the analysis."<sup>37</sup> This assumption became explicit in *Frontiero v. Richardson*,<sup>38</sup> in

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29. *Id.*

30. *See id.*

31. *See id.* at 77.

32. *See, e.g.,* Hoyt v. Florida, 368 U.S. 57 (1961) (upholding a presumptive exemption for women to serve on juries while requiring men to request an exemption), *overruled in part by* Taylor v. Louisiana, 419 U.S. 522 (1975); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding statute prohibiting the licensing of female bartenders unless their husbands or fathers owned the bar in which they worked), *overruled by* Craig v. Boren, 429 U.S. 190 (1976). "The Court in *Goesaert* did not even consider the possibility that the bar might be owned by a woman." *TRIBE, supra* note 24, § 16-25, at 1561 n.15.

33. *See Craig*, 429 U.S. at 198 ("Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications.").

34. *See Reed*, 404 U.S. at 77.

35. *See id.* at 75.

36. *See infra* note 81 and accompanying text.

37. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1972).

38. 411 U.S. 677 (1973) (striking down under the Fifth Amendment Due Process Clause federal statutes classifying spouses of male members of the armed services as "dependents" for purposes of obtaining military benefits, while spouses of female members were not "dependents" unless they could show actual proof of dependency).

which the plurality found “at least implicit support” in *Reed* for treating gender—like race—as a suspect classification subject to strict scrutiny.<sup>39</sup> The Court analogized sex and race in the following manner: “[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”<sup>40</sup> The *Frontiero* Court struck down a military benefits scheme that more heavily burdened the spouses of female members of the military; the Supreme Court described the effect of the scheme as “‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”<sup>41</sup> While the Court may have found sex to be a suspect classification in *Frontiero*,<sup>42</sup> it refrained from developing a judicial standard of review until its decision in *Craig v. Boren*<sup>43</sup> three years later.

With then-ACLU attorney Ruth Bader Ginsburg filing an amicus curiae brief,<sup>44</sup> the *Craig* Court adopted “middle-tier” scrutiny—later termed “intermediate scrutiny”—as the judicial standard of review in gender discrimination cases.<sup>45</sup> To withstand constitutional challenge under this standard of review, classifications based on gender must pass two hurdles: (1) the classification “must serve important governmental objectives” and (2) “must be substantially related to achievement of those objectives.”<sup>46</sup>

Using this test, the *Craig* Court struck down an Oklahoma statute prohibiting the sale of 3.2% beer to males under twenty-one and females under eighteen.<sup>47</sup> While the Court agreed that

39. *Id.* at 682.

40. *Id.* at 686.

41. *Id.* at 684.

42. *See id.* at 688 (“[W]e can only conclude that classifications based upon sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”). *But see id.* at 692 (Powell, J., concurring) (finding it unnecessary to decide whether sex was a suspect classification, pending consideration by the states of the proposed Equal Rights Amendment).

43. 429 U.S. 190 (1976).

44. *See id.* at 191 n.\* (unnumbered footnote in original).

45. *See id.* at 210-11 n.\* (unnumbered footnote in original) (Powell, J., concurring). Justice Powell did not endorse a further subdivision of equal protection analysis, but conceded that deferential rational basis review “takes on a sharper focus when we address a gender-based classification.” *Id.* (Powell, J., concurring).

46. *Id.* at 197. This discussion is applicable only to statutes that expressly differentiate between the sexes. Statutes that are gender-neutral on their face yet have discriminatory impacts are beyond the scope of this Note.

47. *See id.* at 210.

traffic safety was an important governmental objective,<sup>48</sup> the state's statistics did "not satisfy [the Court] that sex represents a legitimate, accurate proxy for the regulation of drinking and driving."<sup>49</sup> The Court concluded that the statistics were distorted as a result of social stereotypes; "reckless" young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home."<sup>50</sup> Since *Craig* the Court has employed intermediate scrutiny to strike down laws that discriminate on the basis of sex, whether it be male or female.<sup>51</sup>

### C. Exceedingly Persuasive Justification

Running parallel to the *Craig* test is another line of cases holding that intermediate scrutiny requires an "exceedingly persuasive justification" to uphold the gender classification. The Court first coined this phrase in dicta in *Personnel Administrator v. Feeney*.<sup>52</sup> The statute in *Feeney* provided that veterans who qualify for state civil service positions be considered for appointment ahead of any qualifying nonveterans.<sup>53</sup> The basis of the suit was that very few women could qualify for the preference as a result of the various federal statutes, regulations, and policies restricting the number of women eligible to enlist in the armed forces.<sup>54</sup> The Court stated in dicta that a law which covertly or overtly discriminates on the basis of sex "would require an exceedingly persuasive justification to withstand a constitutional challenge under the

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48. *See id.* at 199.

49. *Id.* at 204. The government provided statistics showing a high correlation between gender- and alcohol-related traffic accidents. *See id.* at 200-04.

50. *Id.* at 202 n.14.

51. *See, e.g.,* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (striking down a state school's all-female admissions policy); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (unanimously striking down a Louisiana law that gave a husband—as head and master of property jointly owned with his wife—the unilateral right to dispose of such property without his wife's consent); Califano v. Westcott, 443 U.S. 76 (1979) (striking down a provision of the Social Security Act that provided benefits to dependent children of unemployed fathers but not those of unemployed mothers); Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating a New York law that gave unwed mothers, but not unwed fathers, unilateral power to block adoption of their children by withholding consent). *But see* Michael M. v. Superior Ct., 450 U.S. 464 (1981) (upholding California's statutory rape law, which holds only men criminally liable). Ironically, the *Michael M.* decision immediately follows *Kirchberg* in the official reporter, each case standing at opposite poles of the Court's treatment of gender discrimination cases.

52. 442 U.S. 256 (1979).

53. *See id.* at 259.

54. *See id.* at 269-70.



Equal Protection Clause of the Fourteenth Amendment.”<sup>55</sup> The *Feeney* Court declined to apply its exceedingly persuasive justification standard by concluding that the statute did not classify on the basis of gender.<sup>56</sup> Rather, the Court construed the statute to prefer veterans of either sex over nonveterans of either sex—not males over females.<sup>57</sup>

The seminal case incorporating the *Feeney* standard into gender jurisprudence is *Mississippi University for Women v. Hogan*,<sup>58</sup> which required the university’s all-female nursing program to grant academic credit to men. The *Hogan* Court required that a party seeking to uphold a statute that classifies on the basis of gender “must carry the burden of showing an ‘exceedingly persuasive justification’” for that classification.<sup>59</sup> The Court further stated that this “burden is met only by showing *at least* that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”<sup>60</sup> In this way, the *Hogan* Court equated the *Feeney* exceedingly persuasive justification standard with the *Craig* important governmental objective standard.<sup>61</sup> By melding these two tests, the *Hogan* Court raised the requirements for upholding a gender classification under intermediate scrutiny.

After *Hogan* lower courts used the exceedingly persuasive justification test to overturn legislation discriminating on the basis of gender.<sup>62</sup> For example, in *Adams v. Baker*<sup>63</sup> the district court granted a preliminary injunction allowing plaintiff Tiffany Adams

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55. *See id.* at 273.

56. *See id.* at 280.

57. *See id.*

58. 458 U.S. 718 (1982).

59. *Id.* at 724 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Personnel Adm’r v. Feeney*, 442 U.S. 256, 273 (1979)).

60. *Id.* (emphasis added) (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

61. *See id.*

62. *See, e.g.*, *Adams v. Baker*, 919 F. Supp. 1496 (D. Kan. 1996) (finding high school’s policy of excluding women from wrestling team tryout not exceedingly persuasive); *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994) (holding state policy of providing single-sex education at The Citadel to men and not to women violated equal protection), *aff’d, modified*, 51 F.3d 440 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 352 (1995); *Cook v. Babbitt*, 819 F. Supp. 1 (D.D.C. 1993) (striking down museum’s policy barring women from portraying male soldiers at Living History reenactments of the Civil War); *Manufacturers Hanover Trust Co. v. United States*, 576 F. Supp. 837 (S.D.N.Y. 1983) (invalidating use of sex-based tables to determine present value of reversionary interests).

63. 919 F. Supp. 1496 (D. Kan. 1996).

to try out for the all-male high school wrestling team.<sup>64</sup> The school district's claim that the plaintiff's gender put her at greater risk of injury was based on generalized assumptions about the relative physical strength of males and females.<sup>65</sup> In rejecting the school district's safety argument as overly paternalistic, the court concluded that an exceedingly persuasive justification was not found since safety was not substantially related to prohibiting females from wrestling.<sup>66</sup>

The exceedingly persuasive standard promises to be the key to toughening the intermediate scrutiny standard. Soon after Justice Ginsburg's appointment in 1993, she wrote: "Indeed, even under the Court's equal protection jurisprudence, which requires 'an exceedingly persuasive justification' for a gender-based classification, it remains an open question whether 'classifications based upon gender are inherently suspect.'"<sup>67</sup> With this simple statement, Justice Ginsburg foreshadowed later decisions, including *VMI*, which incrementally move towards the notion that gender classifications are indeed inherently suspect.

### III. APPLICATION OF INTERMEDIATE SCRUTINY TO SINGLE-SEX EDUCATIONAL INSTITUTIONS AND THE MILITARY

Public single-sex education and the military are the focus of this Note because they represent the two paradigms of existing governmental gender discrimination. Single-sex admissions policies are generally invalidated while discriminatory regulations in the military are generally untouched. How are these different outcomes accounted for? The difference depends on the level of review. Challenges to single-sex educational institutions are subject to the more rigorous exceedingly persuasive justification test of *Mississippi University for Women v. Hogan*.<sup>68</sup> In stark contrast, the Court has carved out an exception for military affairs cases such that they must satisfy only rational basis review.<sup>69</sup> The Court was confronted by each of these paradigms in deciding *VMI*, a public single-sex educational institution that trains, at least in part, for the

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64. See *id.* at 1505.

65. See *id.* at 1504.

66. See *id.* at 1503-04.

67. *Harris v. Forklift Sys.*, 510 U.S. 17, 26 n.\* (unnumbered footnote in original) (1993) (Ginsburg, J., concurring) (citations omitted) (quoting *Hogan*, 458 U.S. at 724 & n.9).

68. 458 U.S. 718 (1982); see *supra* Part II.C.

69. See *supra* Part II.A.

military.

### A. Public Single-Sex Educational Institutions

Gender discrimination claims against public single-sex institutions prior to *VMI* required the state to establish an exceedingly persuasive justification under *Hogan* to sustain the classification.<sup>70</sup> Courts' decisions abandoning single-sex educational institutions have cut both ways: both all-male and all-female institutions have been forced to integrate.<sup>71</sup> Regardless of which sex is excluded, the same level of scrutiny is applied.<sup>72</sup> Most importantly, the test for determining the validity of gender-based classifications "must be applied free of fixed notions concerning the roles and abilities of males and females."<sup>73</sup>

Yet the Supreme Court has not relegated public single-sex education to a bygone era. A state may maintain an affirmative action single-sex admissions policy if the plan's purpose is to compensate for past discrimination.<sup>74</sup> However, if the exclusion of one sex serves to perpetuate stereotyped views of a particular profession, then the educational institution must admit members of both sexes.<sup>75</sup>

### B. The Military

Congress is accorded virtual autonomy in matters of national defense, including the right to classify similarly situated persons on the basis of sex.<sup>76</sup> Most notably, in *Rostker v. Goldberg*<sup>77</sup> the Court upheld Congress's decision requiring only men to register for the

70. See *Hogan*, 458 U.S. at 724.

71. Compare *id.* at 761 (allowing men to audit courses in the nursing program, but not granting them academic credit, violated equal protection), with *Kirstein v. Rector & Visitors of the Univ. of Va.*, 309 F. Supp. 184, 187 (E.D. Va. 1970) (holding that University of Virginia's all-male admissions policy violated equal protection).

72. See *Hogan*, 458 U.S. at 723 ("That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.").

73. *Id.* at 724-25.

74. See *id.* at 728. Whether a state may maintain a compensatory or remedial all-male program is uncertain after the *VMI* decision. See *infra* note 303.

75. See, e.g., *Hogan*, 458 U.S. at 729 (finding that all-female nursing school perpetuated the stereotyped view of nursing as the exclusive province of women).

76. See *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.").

77. 453 U.S. 57 (1981).

military draft.<sup>78</sup> The majority opinion, written by Justice Rehnquist, reasoned that since only men could be sent into battle, the sexes were not similarly situated with regard to conscription.<sup>79</sup> Justice Rehnquist “turned equal protection analysis on its head by arguing that the government did not *need* women to achieve military readiness”; therefore, the government was “free to discriminate against women by conducting an all-male draft.”<sup>80</sup> In contrast to the Court’s application of intermediate scrutiny in cases involving educational institutions, rational basis is applied in military affairs cases, even if it serves to perpetuate gender stereotypes.<sup>81</sup> Under the *Rostker* holding, one cannot help but ask, how much have we changed since Justice Bradley’s paternalistic description of man as woman’s protector and defender in 1872?<sup>82</sup>

In addition to the Court’s deferential approach to cases involving draft registration and combat, it generally upholds statutes involving military benefits that differentiate between men and women.<sup>83</sup> In particular, the Court upholds disparate treatment of

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78. See *id.* at 83. While *Rostker* can be justified as a “military affairs” case without upsetting the rubric of intermediate scrutiny, it coincided with a backlash of cases upholding state laws discriminating on the basis of sex that cannot be so easily justified. See, e.g., *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981) (upholding California’s statutory rape law, which held only men criminally liable); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (upholding Alabama law excluding women from employment as prison guards in all-male maximum security prison housing sex offenders because their “very womanhood” made them unsuitable for a job that required employees who could not be heterosexually raped); *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985) (Title VII not violated by state basing its pay scales on competitive market rather than comparable worth theories, thereby resulting in low wage rates for jobs in such female employment ghettos as administration, personnel, and secretarial services).

79. See *Rostker*, 453 U.S. at 78-79.

80. *TRIBE*, *supra* note 24, § 16-28, at 1573.

81. The Court in *Rostker* drastically departed from its analysis of just two years prior in *Orr v. Orr*, 440 U.S. 268 (1979), which struck down a state rule against imposing alimony obligations on women. In *Orr* the Court warned that gender classifications “carry the inherent risk of reinforcing [gender] stereotypes about the ‘proper place’ of women and their need for special protection.” *Id.* at 283. The legislative history of the male-only registration law is riddled with sex-role stereotypes disapproved of in *Orr*; Congress expressed deep concern over “unpredictable reactions to the fact of female conscription” and the “broader implications” of “a young father remaining home with the family in a time of national emergency.” S. REP. NO. 96-826, at 159 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2612, 2649.

82. See *supra* text accompanying note 2.

83. See, e.g., *Personnel Adm’r v. Feeney*, 442 U.S. 256 (1979) (upholding facially gender-neutral law providing lifetime preference to veterans that overwhelmingly benefits males); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (upholding federal statute granting female Navy officers longer tenure before mandatory discharge). *But*

male and female officers if the purpose of such treatment is to compensate for past discrimination or for lack of opportunity for women.<sup>84</sup> In *Schlesinger v. Ballard*<sup>85</sup> a federal statute was upheld granting female Navy officers a thirteen-year tenure of commissioned service before mandatory discharge upon failure to be selected for promotion, while their male counterparts were provided only a nine-year tenure.<sup>86</sup> The Court recognized that because women were barred from combat duty, they had fewer opportunities for promotion than male officers.<sup>87</sup> By allowing women an additional four years to reach a particular rank before being subject to mandatory discharge, the Court held that the statute directly compensated women for statutory barriers to advancement.<sup>88</sup>

Four years later in *Personnel Administrator v. Feeney*,<sup>89</sup> the Court upheld a veterans' preference statute that overwhelmingly advantaged males.<sup>90</sup> As previously discussed,<sup>91</sup> the gender-neutral statute in *Feeney* was challenged by a nonveteran female who alleged that the statute unconstitutionally discriminated against women because of its "devastating impact upon the employment opportunities of women."<sup>92</sup> Regardless of the preference's unfair impact, the Court concluded that the law does not intentionally discriminate on the basis of sex; rather the law is a preference for veterans over nonveterans.<sup>93</sup>

In summary, over the past thirty years the Court has shifted the level of scrutiny in cases involving gender classifications from rational basis to a stricter application of intermediate scrutiny.<sup>94</sup>

see *Frontiero v. Richardson*, 411 U.S. 677 (1973) (using strict scrutiny to strike down military benefits scheme that more heavily burdened female members of uniformed services when claiming a spouse as a dependent).

84. See *Schlesinger*, 419 U.S. at 508.

85. 419 U.S. 498 (1975).

86. See *id.* at 499-500, 510.

87. See *id.* at 508.

88. See *id.* at 500. The primary barriers addressed in *Schlesinger* involved statutory restrictions on women officers' participation in combat and in most sea duty. See *id.* at 508. Just as *Rostker* is ripe for reversal, so is *Schlesinger* for its outdated notion of women's involvement in the military. See discussion *infra* Part VI.

89. 442 U.S. 256 (1979).

90. See *id.* at 259, 281. This litigation commenced in Massachusetts where 98% of the veterans were male and over 25% of the state's population were veterans. See *id.* at 270.

91. See *supra* text accompanying notes 52-57.

92. *Feeney*, 442 U.S. at 260.

93. See *id.* at 280.

94. See *supra* Part II; see also *Michael M. v. Superior Ct.*, 450 U.S. 464, 468

While the Court has chosen not to treat gender as an inherently suspect classification,<sup>95</sup> the Court does require an exceedingly persuasive justification to uphold the discrimination.<sup>96</sup> Applying this analysis to single-sex educational institutions, the Court seeks to eradicate gender stereotypes, whether male or female.<sup>97</sup> Despite the Court's position against perpetuating sex role stereotypes, an exception is made in cases involving military affairs in which Congress is granted substantial deference.<sup>98</sup> Similarly, the Court generally upholds laws governing noncombat aspects of the military that have a discriminatory impact in favor of men or that compensate women for past discrimination.<sup>99</sup>

#### IV. THE VIRGINIA MILITARY INSTITUTE: THE INTERSECTION OF EDUCATIONAL AND MILITARY INSTITUTIONS

The diverging lines of equal protection cases in education and the military create a clash in jurisprudential approaches: what happens when a constitutional challenge is raised against a single-sex educational institution that trains, at least in part, for the military? This was the challenge raised by the United States against VMI. Should the Court require women's admission by applying a stricter application of intermediate scrutiny as it has in education cases? Or should the Court accord deference to Virginia and maintain the sanctity and history of VMI as an all-male military institute?

The following chronicle of the lower court decisions reveals the tension and confusion in grappling with sex differences and sex discrimination in educational institutions.<sup>100</sup> This tension is further heightened by the unusual character of VMI as a public military institution.<sup>101</sup>

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(1981) (“[T]he traditional minimum rationality test takes on a somewhat ‘sharper focus’ when gender-based classifications are challenged.”).

95. See *supra* notes 37-45 and accompanying text. But see note 67 and accompanying text (questioning whether gender is a suspect classification).

96. See *supra* Part II.B.

97. See *supra* Part III.A.

98. See *supra* notes 76-81 and accompanying text.

99. See *supra* notes 83-93 and accompanying text.

100. See *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated and remanded*, 976 F.2d 890 (4th Cir. 1992), *cert. denied sub nom. Virginia Military Inst. v. United States*, 508 U.S. 946 (1993), *on remand*, *United States v. Virginia*, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd and remanded*, 44 F.3d 1229 (4th Cir. 1995), *reh'g en banc denied*, 52 F.3d 90 (4th Cir. 1995), *rev'd and remanded*, 116 S. Ct. 2264 (1996).

101. While sex-discrimination by the government is no longer a widespread prob-

Through the lens of feminist theory, the following analysis focuses on the courts' treatment of gender differences, both physical and otherwise. These varied approaches set the stage for Justice Ginsburg to enunciate a new test for gender scrutiny.<sup>102</sup>

A. *The District Court Decided in Favor of VMI: Applying the Mississippi University for Women v. Hogan Test*

In 1990 the United States sued the Commonwealth of Virginia and VMI alleging that the institution's refusal to admit women violated the Equal Protection Clause of the Fourteenth Amendment.<sup>103</sup> A complaint filed with the Attorney General by a female high school student seeking admission to VMI prompted the suit.<sup>104</sup> The impetus for bringing suit against VMI was that Virginia "elected to preserve exclusively for men the advantages and opportunities a VMI education affords."<sup>105</sup>

1. VMI's unique mission and method

At the time of filing the suit, VMI remained the sole single-sex school among Virginia's fifteen public universities.<sup>106</sup> Founded in 1839, VMI attributed the sacredness of its single-sex educational experience to its unique mission and method.<sup>107</sup> VMI's mission was unlike other federal service academies, such as West Point, that "prepare cadets for career service in the armed forces."<sup>108</sup> VMI's

lem, this Note addresses two areas that retain vestiges of exclusive male privilege: military-style education and the military draft.

102. See *United States v. Virginia*, 116 S. Ct. at 2274-76.

103. See *United States v. Virginia*, 766 F. Supp. at 1408.

104. See *id.*

105. *United States v. Virginia*, 116 S. Ct. at 2269.

106. See *id.* Most of Virginia's public colleges were established as single-sex institutions. See *United States v. Virginia*, 766 F. Supp. at 1418. Four of the 15 public colleges that were originally all-female institutions became coeducational by 1972. See *id.* at 1418-19.

In contrast to the voluntary coeducation movement in Virginia's women's colleges, women were admitted to the all-male University of Virginia only after its single-sex policy was attacked in court. See *id.* at 1419; see also *Kirstein v. Rector & Visitors of the Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970) (holding that University of Virginia's all-male admissions policy violated equal protection).

In the private sector, Virginia has five all-female colleges and one all-male college. See *United States v. Virginia*, 766 F. Supp. at 1420. The district court found that "[t]he demand for single sex education is substantially greater among women than among men" and that the private sector is providing for that form of education. *Id.*

107. See *United States v. Virginia*, 116 S. Ct. at 2270.

108. *United States v. Virginia*, 766 F. Supp. at 1432.

unique program was “directed at preparation for both military and civilian life.”<sup>109</sup> VMI achieved its mission through an “adversative method” of training designed to instill both physical and mental discipline in its cadets and to impart in them a strong moral code.<sup>110</sup>

VMI’s method:

“emphasizes physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values.” . . .

VMI’s adversative method is implemented through a pervasive military-style system. . . . includ[ing] the “rat line,” which is a seven-month regimen during which first-year cadets, or “rats,” are “treated miserably,” . . . . “Rats” are subjected to a strict system of punishments and rewards that creates “a sense of accomplishment and a bonding to their fellow sufferers and former tormentors.”<sup>111</sup>

VMI’s strenuous training has produced “military generals, Members of Congress, and business executives.”<sup>112</sup> This loyal and powerful alumni network is “‘enormously influential,’ especially in the male-dominated fields of engineering, the military, business, and public service.”<sup>113</sup>

## 2. VMI’s all-male admissions policy upheld under the guise of diversity

The United States asserted that “as a state-supported college, VMI’s refusal to admit females . . . regardless of their qualifications, violates the Equal Protection Clause of the Fourteenth Amendment.”<sup>114</sup> In this “life-and-death confrontation,”<sup>115</sup> VMI successfully defended its all-male admission policy “by saying that although it discriminates against women, the discrimination is not invidious but rather [it] promote[s] a legitimate state interest—diversity in education.”<sup>116</sup>

Following the single-sex education model of intermediate

109. *Id.*

110. *See* *United States v. Virginia*, 116 S. Ct. at 2269.

111. Brief for Petitioner at 3-4, *United States v. Virginia*, 116 S. Ct. 2264 (No. 94-1941) (citations omitted).

112. *United States v. Virginia*, 116 S. Ct. at 2269.

113. Petitioner’s Brief at 2, *Virginia* (No. 94-1941).

114. *United States v. Virginia*, 766 F. Supp. at 1408.

115. *Id.*

116. *Id.*



scrutiny,<sup>117</sup> the district court used the test in *Mississippi University for Women v. Hogan*,<sup>118</sup> which requires that “[t]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification.”<sup>119</sup> Pursuant to *Hogan*, the district court equated the exceedingly persuasive standard with the important governmental interest standard. The court reasoned that single-gender education at VMI was an important governmental objective that could only be achieved by excluding women from the all-male institution: “[VMI’s] single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women.”<sup>120</sup> Ironically, the same test that required Mississippi University for Women’s all-female nursing program to admit men was used by the district court to uphold the exclusion of women from VMI.

### 3. The backlash of sex difference theories

The court justified its denial of opportunity for women by using a combination of “difference” arguments, including physical, social, and psychological differences among the sexes.<sup>121</sup> While physical differences are less controversial, arguments regarding social and psychological differences are more controversial.<sup>122</sup> Even if we accept these differences as real, how courts choose to respond to them is controversial among feminist theorists.<sup>123</sup>

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117. See *supra* Part III.A.

118. 458 U.S. 718 (1982).

119. *United States v. Virginia*, 766 F. Supp. at 1410 (quoting *Hogan*, 458 U.S. at 724); see *supra* Part II.B.

120. *United States v. Virginia*, 766 F. Supp. at 1413.

121. See *id.* at 1432-34.

122. See *infra* note 132 and accompanying text.

123. See generally Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987), reprinted in *FEMINIST LEGAL THEORY* 35, 35-36 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (describing two approaches courts take in responding to gender differences: (1) the “symmetrical” approach, which treats sex like race by denying that there are any significant natural differences between men and women; and (2) the “asymmetrical” approach, which rejects the notion that all gender differences should disappear and advocates any sexually equal society must somehow deal with these differences); Catherine A. MacKinnon, *Difference and Dominance on Sex Discrimination*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987), reprinted in *FEMINIST LEGAL THEORY* 81, 81 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (“A built-in tension exists between this concept of equality, which presupposes sameness, and this concept of sex, which presupposes difference. Sex equality thus becomes a contradiction in terms, something of an oxymoron, which may suggest why we are having such a difficult time getting it.”).

*a. gender-based physical differences*

The court's findings of fact included a three-page list enumerating the physical differences between men and women.<sup>124</sup> The court emphasized that these differences are real and not stereotypical.<sup>125</sup> Not surprisingly, the court found that men are stronger than women;<sup>126</sup> women cannot perform push-ups, pull-ups, and weight lifting at the same level as men.<sup>127</sup> The court also found that women were slower,<sup>128</sup> fatter,<sup>129</sup> and more prone to injury.<sup>130</sup> However, the district court failed to acknowledge that these conclusions regarding physical differences are skewed since they account for college averages and not averages of those men and potential women applying to VMI.

*b. gender-based psychological differences*

Gender difference theories, spawned by Carol Gilligan's *In a Different Voice*,<sup>131</sup> were intended to recognize and celebrate the psychological differences of women from men;<sup>132</sup> namely, that

124. See *United States v. Virginia*, 766 F. Supp. at 1432-34.

125. See *id.* at 1432.

126. See *id.* ("Even when size is held constant, females are, on the average, only 80% as strong as males.")

127. See *id.* at 1433.

128. See *id.* at 1432 ("The speed of movement in women is, on the average, slower than in men.")

129. See *id.* at 1433 ("On the average, college-age females possess approximately 10% more body fat than college-age males. Body fat imposes a burden on some kinds of physical performance.")

130. See *id.* ("Median college-age females tend to sustain injury up to eight times the rate of median college-age males when engaged in the same or similar physical activities.")

131. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 1-2 (1982).

132. See *id.* Gilligan theorizes that as a result of differences in moral development between young boys and girls, men and women speak in different "voices." See *id.* at 1. Women view their world through a web of relationships sustained by an "ideal of care," while men operate in a world of individualism and hierarchy. See *id.* at 62. Gilligan is one of the most widely quoted and influential feminists of the 1980s whose work is cited in many psychology papers, legal briefs, and public policy proposals. See SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 327 (1991).

Faludi documents the 1980s antifeminist backlash, which holds the feminist movement responsible for nearly every woe besetting women, including depression, suicide, eating disorders, "bag ladies," crime, and rape. See *id.* at xi-xii. Faludi also dispels the myth that women have "made it": 80% of women are stuck in traditional "female" jobs, 99% of employers do not offer child care programs, new laws restricting abortion have been passed, and women still shoulder 70% of the household du-

women's psychological development makes them more caring and cooperative.<sup>133</sup> Since Gilligan's ground-breaking work, her theories have infiltrated mainstream America as a means of recognizing the importance of women's feminine contributions to society.<sup>134</sup> However, Gilligan's theories have been used by others to bolster their arguments that independence is an unnatural and unhealthy state for women and that women pay a "psychic price" for professional success.<sup>135</sup> Gilligan deplors the use of her work on sex differences to rationalize oppression, but the backlash has already taken hold.<sup>136</sup>

While the district court did not cite Gilligan as a basis for its decision, her theories of difference are apparent in the court's opinion. In its discussion of gender-based developmental differences, the court found:

Given these developmental differences females and males characteristically learn differently. Males tend to need an atmosphere of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor. Females tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students.<sup>137</sup>

The court's reasoning exemplifies the current backlash of Gilligan's sex difference theories to oppress women by preventing their success in traditionally male-dominated environments. To give credence to its own conclusions, the court found that "[t]he psychological and sociological differences between men and women

ties. *See id.* at xiii-xiv.

For a discussion of Gilligan's influence on feminist theory, see *id.* at 327. Translating Gilligan's work into a legal framework, the paradigm is one of rights versus responsibilities. *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). Rights represent the autonomy of the male voice while responsibilities represent the "ethic of care" and connectedness of the female voice. *See id.* at 18.

133. *See* GILLIGAN, *supra* note 131, at 10-11.

134. *See, e.g.,* Janet Wiscombe, *In Full Bloom*, L.A. TIMES, Nov. 3, 1996, at E1. The author profiles Judy Rosener, management professor at the University of California at Irvine, known for her theories on gender differences in business. Rosener argues that "women thrive in non-hierarchical ways and prefer cooperative, shared leadership; men are more inclined toward styles of 'command and control.'" *Id.* She further states that "Both are good . . . I'm saying we've got to utilize the skills of professional women. It's not just a social justice issue. It's an economic imperative." *Id.*

135. *See* FALUDI, *supra* note 132, at 331 ("Very much against her will, Gilligan became the expert that backlash mass media loved to cite.").

136. *See id.*

137. *United States v. Virginia*, 766 F. Supp. at 1434.

are *real* differences, not stereotypes.”<sup>138</sup>

The United States’ expert tried to minimize the absoluteness of these conclusions by describing sex differences as mere “tendencies.”<sup>139</sup> Hence, even if we accept these conclusions as accurate, these “attributes of males and females *in individual cases* may diverge from these average tendencies.”<sup>140</sup> By failing to distinguish between exceptional women who would thrive under the adversative method and the stereotypical mass of women, the district court concluded that VMI is unsuitable for all women.

#### 4. VMI unmodified

The court ruled that if VMI was coeducational, the adversative environment could not survive unaltered.<sup>141</sup> Such modifications considered by the court included an “[a]llowance for personal privacy”<sup>142</sup> and a change, “at least for the women,” in the physical education requirements.<sup>143</sup> While the district court recognized that some women could meet all the physical standards imposed on men,<sup>144</sup> its fundamental problem was with mixed-gender education at VMI.<sup>145</sup>

In addition to the conclusion that accommodations would have to be made to the physical fitness curriculum, the court was also concerned with the effect women would have in the classroom.<sup>146</sup> VMI’s expert speculated that women may demand changes such as different reading in literature courses.<sup>147</sup> With such speculation, the court manipulated gender differences to justify excluding women.

In short, it is undisputed that admitting women would represent a “dramatic clientele change.”<sup>148</sup> Such a change would necessitate a modification of the institutional experience in order to at-

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138. *Id.* (emphasis added).

139. *Id.*

140. *Id.*

141. *See id.* at 1412-13.

142. *Id.* at 1412.

143. *Id.* at 1413.

144. *See id.* at 1412; *United States v. Virginia*, 976 F.2d at 896.

145. *See United States v. Virginia*, 766 F. Supp. at 1414 (“Ironically, although much of the testimony at trial concerned the ways that men and women are different, my ruling is based on a trait that men and women share: Both men and women can benefit from a single-sex education.”).

146. *See id.* at 1441.

147. *See id.*

148. *Id.* at 1436.

tract and maintain female students.<sup>149</sup> A change in the educational experience may even include a change to VMI's sacrosanct mission.<sup>150</sup> Virginia convinced the court that VMI is indeed different because it "marches to the beat of a different drummer" and that any change to VMI would obliterate VMI.<sup>151</sup>

*B. The Fourth Circuit Decided to Remand: Applying the Traditional Governmental Objective Test*

The Fourth Circuit Court of Appeals employed the traditional important governmental objective test of *Craig v. Boren*<sup>152</sup> and did not require Virginia to show an exceedingly persuasive justification for women's exclusion. The court cited *Mississippi University for Women v. Hogan*,<sup>153</sup> but interpreted the *Hogan* test to require only that the "statutory classification must be substantially related to an *important governmental objective*."<sup>154</sup> The court agreed that diversity was an important governmental objective, but questioned whether women's exclusion was substantially related to that objective.<sup>155</sup> Thus, the Fourth Circuit vacated and remanded the district court's decision for failing to explain how maintenance of one single-gender institution in the state effectuated the governmental objective of diversity.<sup>156</sup>

The decisive question for the court was why the Commonwealth of Virginia offered this opportunity only to men.<sup>157</sup> The court identified the catch-22 of the conflict: "women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity."<sup>158</sup> The opportunity would be destroyed because the physiological differences between men and women would necessarily require changes in the physical

149. *See id.*

150. *See id.*

151. *Id.* at 1415.

152. 429 U.S. 190 (1976).

153. 458 U.S. 718 (1982).

154. *United States v. Virginia*, 976 F.2d 890, 895 (4th Cir. 1992).

155. *See id.* at 895.

156. *See id.* at 892. Although the Fourth Circuit did not employ the exceedingly persuasive justification test, its decision is not inconsistent with the holding of *Hogan*, which provided that its test could be met by "at least" showing that the classification serves important governmental objectives. *Hogan*, 458 U.S. at 724. Thus, VMI failed to meet this threshold showing.

157. *See United States v. Virginia*, 976 F.2d at 898.

158. *Id.* at 896-97.

training program and physical accommodations to allow for privacy between the sexes.<sup>159</sup> While real gender differences precluded requiring coeducation at VMI,<sup>160</sup> the court provided the Commonwealth with three options: (1) “admit women to VMI and adjust the program to implement that choice”;<sup>161</sup> (2) “establish parallel institutions or parallel programs”;<sup>162</sup> or (3) “abandon state support of VMI.”<sup>163</sup>

*C. The District Court Decision on Remand: Comparable-Outcome Education Satisfies Constitutional Notions of Equality*

After the Supreme Court denied Virginia’s application for certiorari,<sup>164</sup> the only issue on remand to the district court was whether the remedial plan chosen by Virginia comported with the constitutional mandates of equal protection.<sup>165</sup> Virginia’s remedial plan was to establish a separate all-female college program—Virginia Women’s Institute for Leadership (VWIL)—at Mary Baldwin College.<sup>166</sup> In evaluating this plan, the court did not adhere to the prongs of intermediate scrutiny; rather, the court based its decision on philosophical notions of equality. The different approaches toward equality advocated by the United States and Virginia represent the paradigmatic differences in the treatment of gender under equal protection: sameness versus difference.<sup>167</sup>

The United States advocated an equality of sameness philosophy in rejecting VWIL as an appropriate remedy.<sup>168</sup> The United States argued that VWIL did not comply with the Equal Protection Clause because in lieu of coeducation at VMI, VWIL did not adequately resemble the physical structure, curriculum, methodol-

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159. *See id.* at 896.

160. *See id.* at 895 (“[N]o one suggests that equal protection of the laws requires that all laws apply to all persons without regard to actual differences.”).

161. *Id.* at 900.

162. *Id.*

163. *Id.*

164. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993).

165. *See United States v. Virginia*, 852 F. Supp. 471, 474 (W.D. Va. 1994), *aff’d and remanded*, 44 F.3d 1229 (4th Cir. 1995), *rev’d and remanded*, 116 S. Ct. 2264 (1996).

166. *See United States v. Virginia*, 852 F. Supp. at 476.

167. For a discussion of liberal feminism’s sameness approach of denying the differences between men and women, see ROSEMARIE TONG, *FEMINIST THOUGHT* 27 (1989).

168. *See United States v. Virginia*, 852 F. Supp. at 475.

ogy, or prestige of VMI.<sup>169</sup> In using a sameness approach to gender, the United States sought to treat sex like race, that there is no natural difference between men and women.<sup>170</sup>

By refusing to construe VWIL as a "separate but equal" institution for women, the district court decided in favor of Virginia.<sup>171</sup> Instead of focusing on the similarities of the sexes, the district court focused on the "real differences between the sexes."<sup>172</sup> Ironically, the court concluded that while separate but equal institutions are not acceptable for racial discrimination, a separate and unequal institution is acceptable for gender discrimination.<sup>173</sup>

While there were similarities between VMI and VWIL, the differences were more pronounced. VWIL matched VMI as a single-sex, publicly funded, residential four-year college, with the mission to produce "citizen-soldiers": "women who are trained for leadership in both civilian and military life."<sup>174</sup> VMI also pledged to make its alumni network and placement service available to VWIL graduates.<sup>175</sup>

Although these general attributes mirrored each other, VMI and VWIL greatly differed in their methods of education, academic offerings, and financial resources.<sup>176</sup> For example, VWIL women were not required to wear uniforms during the school day, nor were they required to eat together.<sup>177</sup> VWIL women took self-defense courses instead of boxing.<sup>178</sup> VMI had group showers,

169. *See id.*

170. Christine Littleton refers to this sameness model as a "symmetrical" approach to gender. *See Littleton, supra* note 123, at 35-36.

171. *See United States v. Virginia*, 852 F. Supp. at 475.

172. *Id.* at 476 (quoting *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993)). The district court justified its decision in upholding VWIL as a separate and different institution for women by using the language in *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993), which affirmed a preliminary injunction admitting female Shannon Faulkner to day classes at The Citadel, an all-male South Carolina military college. The court stated, "When, however, a gender classification is justified by acknowledged differences, identical facilities are not necessarily mandated." *Id.* at 232.

173. *See United States v. Virginia*, 852 F. Supp. at 475 (discussing *Sweatt v. Painter*, 339 U.S. 629 (1950)).

174. *Id.* at 476. VWIL's mission is "to produce 'citizen-soldiers who are educated and honorable women, prepared for the varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service.'" *Id.* at 494.

175. *See id.* at 499.

176. *See id.* at 477-81.

177. *See id.* at 495.

178. *See id.*

while VWIL had private showers.<sup>179</sup> VMI barracks had doors with windows that remain unlocked, while VWIL residential rooms had solid doors that lock.<sup>180</sup> VWIL faculty held significantly fewer Ph.D.'s than the VMI faculty.<sup>181</sup> VWIL did not offer a bachelor of science degree nor offer engineering on campus; instead, VWIL women who wished to earn an engineering degree were required to travel to Washington University in St. Louis, Missouri to obtain it.<sup>182</sup> Finally, VWIL had an endowment of approximately \$19 million, while VMI's was \$131 million.<sup>183</sup>

These differences gave rise to the question of whether equal protection mandates carbon-copy institutions or only a suitable alternative, taking into consideration women's differences. In developing a VMI-style program suitable for women, Virginia formed a task force that consulted with outside experts who testified at the first hearing in support of a Gilliganesque approach to gender-based psychological differences.<sup>184</sup> Drawing on their own experience and expertise, the task force decided that a military model, particularly VMI's adversative method, would be "wholly inappropriate for educating and training *most* women for leadership roles."<sup>185</sup>

The task force failed to recognize that VMI would not attract "most" women.<sup>186</sup> Instead, it chose to institute "a cooperative method which reinforces self-esteem rather than the leveling process used by VMI."<sup>187</sup> The experts believed, however, that despite the vastly different teaching methods, VWIL would "produce the

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179. *See id.* at 502.

180. *See id.*

181. *See id.* ("While 86% of VMI's faculty holds Ph.D.'s, 68% of [VWIL's] faculty hold such degrees.")

182. *See id.* at 503.

183. *See id.*

184. *See id.*; *see also supra* Part IV.A.3.b (discussing Carol Gilligan's theories of women's psychological development making women more caring and cooperative than men).

185. *United States v. Virginia*, 852 F. Supp. at 476 (emphasis added).

186. *See id.* However, the district court considered the testimony of government expert Dr. Carol Nagy Jacklin that "the plan homogenizes women by assuming that there is an appropriate way to educate women." *Id.* at 479. Dr. Jacklin testified that "[g]ender is not a useful predictor of learning patterns." *Id.* In this battle of the experts, Dr. Jacklin lost. The court fell prey to two sweeping generalizations: (1) women are passive in the classroom as opposed to men who are interactive; and (2) single-sex institutions provide women with more chances for leadership. *See id.* at 480.

187. *Id.* at 476.



same or similar outcome for women that VMI produces for men.<sup>188</sup> But the difference was starkly manifest in the differing nomenclature; VMI men were referred to as “cadets,” while VWIL women were generically referred to as “students.”<sup>189</sup> These labels exacerbated the inequity between the institutions and significantly impacted the self-perception of VWIL women.<sup>190</sup> Simply put, these differing institutions perpetuated gender stereotypes in producing citizen-soldiers; VMI trained the soldier, while VWIL trained the citizen.<sup>191</sup>

*D. The Fourth Circuit Affirms VWIL as an Appropriate Remedy Under a “Special Intermediate Scrutiny Test”*

A divided court of appeals affirmed the district court’s decision that the VWIL plan passed constitutional muster.<sup>192</sup> Not surprisingly, the same court that suggested a parallel institution and program also decided to uphold its establishment.<sup>193</sup> The circuit court rejected the United States’ position that “by not offering co-education at VMI, [Virginia] is relying on false stereotypes and generalizations ‘that women are not tough enough to succeed in VMI’s rigorous, military-style program.’”<sup>194</sup> Instead, the court found that the Equal Protection Clause required only a “substantively comparable” alternative.<sup>195</sup>

In arriving at its conclusion, the court applied a “special intermediate scrutiny test.”<sup>196</sup> This new test incorporated an additional prong into the old test:<sup>197</sup> “whether the resulting mutual ex-

188. *Id.*

189. *See id.* at 483.

190. *See* HAIG A. BOSMAJIAN, *THE LANGUAGE OF OPPRESSION* 5 (1974) (“The power which comes from names and naming is related directly to the power to define others—individuals, races, sexes, ethnic groups. Our identities, who and what we are, how others see us, are greatly affected by the names we are called and the words with which we are labelled.”).

191. *See* *United States v. Virginia*, 852 F. Supp. at 478 (“VWIL, because it is planned for women who do not necessarily expect to pursue military careers, incorporates the element of public service.”).

192. *See* *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (2-1 decision), *rev’d and remanded*, 116 S. Ct. 2264 (1996).

193. *See* *United States v. Virginia*, 44 F.3d at 1242.

194. *Id.* at 1235.

195. *Id.* at 1237.

196. *Id.*

197. *See id.* (“(1) whether the state’s objective of providing single-gender education to its citizens may be considered a legitimate and important governmental objective; (2) whether the gender classification adopted is directly and substantially re-

clusion of women and men from each other's institutions leaves open opportunities for those excluded to obtain *substantively comparable* benefits at their institution or through other means offered by the state."<sup>198</sup>

The circuit court applied "procedural equal protection" analysis, focusing on the state's means for obtaining its objective.<sup>199</sup> Under this analysis, a court closely scrutinizes the procedural mechanism adopted by the legislature to accomplish its purpose and requires that the means selected bear a "*direct and substantial relationship*" to that purpose.<sup>200</sup> In applying procedural equal protection analysis to the case at hand, the first two prongs of the special intermediate scrutiny test were easily passed.<sup>201</sup> Under the first prong, deference was accorded to the state's purpose of providing single-gender education.<sup>202</sup>

The focus of this procedural analysis was on the second prong: the means. The court conceded that the second prong provides little or no scrutiny in cases involving homogeneity of gender because the exclusion of one sex is by definition necessary for accomplishing the objective.<sup>203</sup> The court missed the point when it stated that "[t]he importance of the classification is not the fact that the student body is male or female, but that it is of the same gender, whichever is chosen for the particular program."<sup>204</sup>

In Machiavellian style, the circuit court concluded that the means directly relate to the ends: the adversative method cannot be tolerated in a sexually heterogeneous environment because it "would destroy . . . any sense of decency that still permeates the

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lated to that purpose."); *see also supra* notes 43-46 and accompanying text (discussing the Court's adoption of intermediate scrutiny in *Craig v. Boren*, 429 U.S. 190 (1976)).

198. *United States v. Virginia*, 44 F.3d at 1237 (emphasis added).

199. *Id.*

200. *Id.* at 1236.

201. The court concluded that the classification was not directed at men or women—but at homogeneity of gender. *See id.* at 1237.

202. *See id.* ("[D]eference is to be accorded the state's legislative will so long as the purpose is not pernicious and does not violate traditional notions of the role of government.") *But see* *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."); *Califano v. Goldfarb*, 430 U.S. 199, 212-14 (1977) (inquiring into the actual purposes of a Social Security Act provision that automatically granted benefits to a wife but provided benefits to surviving husband only if he received at least half of his support from his deceased wife).

203. *See United States v. Virginia*, 44 F.3d at 1237.

204. *Id.* at 1239.

relationship between the sexes.”<sup>205</sup> In justifying the unsuitability of women in an adversative environment, the court stated that “[t]he adversative method was not designed to exclude women”;<sup>206</sup> the method only seized on the male need for aggressiveness, conflict, lack of privacy, and stress in order to instill in men the values of VMI.<sup>207</sup> The court failed to recognize its own double-standard—if the adversative method was not designed to exclude women, why not include women? Alternatively, why not institute the adversative method at VWIL, as opposed to the nurturing, caring environment espoused by the task force?

The court recognized the pitfall in applying its two-prong test of intermediate scrutiny for cases involving homogeneity of gender; the classification easily passes the test unless found to be pernicious or incompatible with traditional notions of equal protection. Hence, the court found it necessary to add another prong to the inquiry: substantive comparability.<sup>208</sup> The court defined this prong to require only that “the value of the benefits provided by the state to one gender” may not “by comparison to the benefits provided to the other . . . lessen the dignity, respect, or societal regard of the other gender.”<sup>209</sup>

The court unequivocally stated that comparable does not mean identical.<sup>210</sup> Rather, the alternative must be “comparable in substance, but not in form and detail.”<sup>211</sup> The court concluded that substantive comparability was achieved because VMI and VWIL were both undergraduate institutions that have similar missions to teach discipline and identical goals of preparing students for leadership.<sup>212</sup> Although the mechanisms for achieving those goals differed—VMI used an adversative military method, and VWIL used a structured environment reinforced by some military training—the scheme passed constitutional muster because, the circuit court argued, men and women are different.<sup>213</sup> Thus, when real gender differences are involved, separate and different facilities for each sex may satisfy equal protection so long as the difference

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205. *Id.*

206. *Id.*

207. *See id.*

208. *See id.* at 1237.

209. *Id.*

210. *See id.* at 1240.

211. *Id.*

212. *See id.* at 1240-41.

213. *See id.*

in facilities is sufficiently related to the nature of the difference between the sexes.<sup>214</sup>

The majority failed to require Virginia to make an “exceedingly persuasive” showing that the gender-classification is “substantially and directly related” to the remedial plan as required in *Mississippi University for Women v. Hogan*.<sup>215</sup> Rather, the court cleverly clothed a rational basis standard of review under the guise of this special test. So long as the first two hurdles are met,<sup>216</sup> comparable opportunity will be gauged by deference to professional judgment.<sup>217</sup>

*E. The Dissent to the Fourth Circuit's Denial to Rehear the Case En Banc: Judge Motz's Response to the Varied Approaches to Equal Protection*

Although a majority of the Fourth Circuit voted against rehearing the case en banc, Judge Diana Gribbon Motz wrote a dissenting opinion that attacked the disjointed approaches to equal protection of the district court and court of appeals.<sup>218</sup>

Judge Motz first attacked the notions of equality standard put forth by the district court on remand and accepted in the Fourth Circuit's decision on review.<sup>219</sup> She argued that the Fourth Circuit's decision effectively upholds “separate but equal” education for men and women that is “concededly not even equal.”<sup>220</sup> She further noted that “these cases have very little to do with education. They instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later.”<sup>221</sup>

214. *See id.*

215. *Id.* at 1248 (Phillips, J., dissenting) (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 730 (1982)).

216. *See supra* note 197 and accompanying text.

217. *See United States v. Virginia*, 44 F.3d at 1241 (“[T]he difference [between VMI and VWIL] is attributable to a professional judgment of how best to provide the same opportunity.”). The question of whose professional judgment will control remains unanswered. In this case, the court relied on Virginia's educational experts who testified that a VMI-type education was unsuitable for and unappealing to women. *See id.* The plaintiff failed to satisfy its heavy burden of proving that “the Commonwealth's expert testimony was *clearly erroneous*.” *Id.* (emphasis added).

218. *See United States v. Virginia*, 52 F.3d 90, 91 (4th Cir. 1995) (Motz, J., dissenting), *rev'd and remanded*, 116 S. Ct. 2264 (1996).

219. *See supra* Part IV.C.

220. *United States v. Virginia*, 52 F.3d at 91.

221. *Id.* at 92 n.3 (Motz, J., dissenting) (quoting *Faulkner v. Jones*, 51 F.3d 440, 451 (4th Cir. 1995) (Hall, J., concurring), *cert. denied*, 116 S. Ct. 352 (1995)).

Under the *Hogan* test, Judge Motz argued that Virginia failed to show an exceedingly persuasive justification for VMI's male-only admissions policy.<sup>222</sup> She pointed out that other coeducational military academies graduate far more citizen-soldiers than VMI.<sup>223</sup> Thus, there was no direct and substantial relationship between VMI's objective of producing citizen-soldiers and the means employed of excluding women.<sup>224</sup>

Lastly, Judge Motz criticized the Fourth Circuit's special intermediate scrutiny test. She maintained that even if the lower court's substantive comparability analysis was accepted as a valid part of intermediate scrutiny, the analysis was fatally flawed: "If 'adversative' training is so critical to the VMI program that it virtually defines it, then a program without 'adversative' training can never be 'substantively comparable.'" <sup>225</sup> Judge Motz passionately concluded:

Several months ago, one of the first women fighter pilots was killed during a practice run. Anyone who is prepared to do combat for her country—indeed, to be killed in preparation for that combat—should be eligible to apply for what she perceives to be the best possible training. As long as the Commonwealth provides support for VMI, women should be given the opportunity to attend.<sup>226</sup>

The United States Supreme Court agreed.<sup>227</sup>

#### *F. Certiorari Granted by the United States Supreme Court: Justice Ginsburg Applied "Skeptical Scrutiny"*

In a 7-1 decision, VMI's all-male admissions policy was declared unconstitutional.<sup>228</sup> Considering the divided nature of the Court's recent opinions, this near-unanimity in a ground-breaking case is remarkable.<sup>229</sup>

222. *See id.* at 92 (Motz, J., dissenting).

223. *See id.* (Motz, J., dissenting).

224. *See id.* (Motz, J., dissenting).

225. *Id.* at 93 (Motz, J., dissenting).

226. *Id.* at 93-94 (Motz, J., dissenting).

227. *See United States v. Virginia*, 116 S. Ct. 2264 (1996).

228. *See id.* at 2269. Justice Antonin Scalia was the lone dissenter. *See id.* at 2291.

229. Justice Clarence Thomas did not participate in the decision because his son attends VMI. *See Eva M. Rodriguez, Confusion from the High Court*, CONN. L. TRIB., July 15, 1996, at 9.

### 1. Justice Ginsburg continues her "incremental approach"

Justice Ginsburg was the natural choice for writing the opinion. As an attorney she built her reputation as the preeminent litigator in gender equality litigation with the ACLU and its Women's Rights Project.<sup>230</sup> Most notably, she assisted in preparing the brief for *Reed v. Reed*,<sup>231</sup> which successfully persuaded the Court to declare a state law unconstitutional because of gender discrimination.<sup>232</sup> She also helped pave the way for future cases by suggesting that gender—like race—be subjected to strict scrutiny.<sup>233</sup>

Although Justice Ginsburg advocated for strict scrutiny for gender classifications, she did not expect the Court to adopt this standard when she prepared the brief for *Reed*; rather, she hoped that after presenting the idea over a period of time, a body of precedent would be established making it possible for the Court to later adopt this higher standard of review.<sup>234</sup> Following the *Reed* victory, Ginsburg successfully argued numerous gender discrimination cases before the Supreme Court.<sup>235</sup> She called her strategy the "incremental approach,"<sup>236</sup> in which she would build "precedents one upon the other."<sup>237</sup> In *Frontiero v. Richardson* she succeeded in persuading four Justices that strict scrutiny should be applied to gender discrimination.<sup>238</sup> However, in order to garner majority support, she was required to modify her approach. Thus, she pressed the Court to adopt intermediate scrutiny, culminating with success in *Craig v. Boren*.<sup>239</sup>

Once on the United States Supreme Court, Justice Ginsburg's background as the nation's most influential litigator on gender equality raised expectations of her impact in areas of interest to

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230. See Baugh et al., *supra* note 5, at 24-25.

231. 404 U.S. 71 (1971).

232. See Baugh et al., *supra* note 5, at 25. For a discussion of *Reed*, see *supra* Part II.

233. See Baugh et al., *supra* note 5, at 25.

234. See *id.* at 25 n.197.

235. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

236. Baugh et al., *supra* note 5, at 25.

237. *Id.* (citing Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 11 WOMEN'S RTS. L. REP. 73, 83 (1989)).

238. See *id.* at 26.

239. See *supra* notes 43-48 and accompanying text.

women's rights advocates.<sup>240</sup> In her first year on the bench, Justice Ginsburg supported the outcomes favored by women's rights advocates<sup>241</sup> but did not seize opportunities to expand on women's rights.<sup>242</sup> While she did not author any majority opinions on gender equality during her first term, her short concurring opinion in *Harris v. Forklift Systems*<sup>243</sup> contains a key footnote that raises a significant issue for future constitutional cases and for Justice Ginsburg's role on the Court: whether gender classifications are inherently suspect.<sup>244</sup> This footnote appears to be an example of Justice Ginsburg's incremental approach<sup>245</sup> in which she laid the foundation for questioning the appropriate standard of review. It was only a matter of time before the issue reappeared in the Court's opinions. While it was suggested that this footnote might ultimately provide the basis for Justice Ginsburg's much-anticipated liberal change to provide greater protection against gender discrimination,<sup>246</sup> no one predicted her "skeptical scrutiny" approach.

## 2. Virginia failed the *Hogan* test of intermediate scrutiny

While the Solicitor General urged the Court to adopt strict scrutiny for gender-based classifications, the Court declined the

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240. See Baugh et al., *supra* note 5, at 26.

241. See, e.g., *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) (creating buffer zones around abortion clinics to permit patients to have access without undue interference by protesters); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (prohibiting systematic gender-based application of peremptory challenges to jurors during voir dire); *National Org. for Women v. Scheidler*, 510 U.S. 249 (1994) (granting standing to health care clinics to apply racketeering statutes against a coalition of antiabortion groups that conspired to shut down abortion clinics through extortion).

242. See Baugh et al., *supra* note 5, at 27. "[S]he was never an advocate of women's rights *per se*. She was literally an advocate of *gender equality*. . . . [Justice] Ginsburg's symmetrical vision of sex equality came under bitter attack by a new generation of feminist legal scholars who argued that the law should emphasize women's differences with men, rather than their similarities." *Id.* at 28 (quoting Rosen, *supra* note 7, at 20).

243. 510 U.S. 17 (1993) (unanimous court declared that plaintiffs alleging sexual harassment in the workplace need not prove psychological harm to state a valid claim); see *supra* note 67 and accompanying text.

244. See *Harris*, 510 U.S. at 26 n.\* (unnumbered footnote in original) (Ginsburg, J., concurring); see also Baugh et al., *supra* note 5, at 28 ("The use of a footnote may seem an odd way to send a signal about the possible pursuit of a major change in constitutional doctrine, but a footnote may ultimately provide the basis for significant legal change.").

245. See *supra* note 236 and accompanying text.

246. See Baugh et al., *supra* note 5, at 29.

invitation.<sup>247</sup> In evaluating the United States' equal protection claim, the Court relied on *Mississippi University for Women v. Hogan*<sup>248</sup> and required Virginia to show an "exceedingly persuasive justification"<sup>249</sup> for excluding women. The Court concluded that Virginia did not meet its burden, thereby violating the Equal Protection Clause of the Fourteenth Amendment.<sup>250</sup> Moreover, the Court concluded that VWIL did not cure the constitutional violation.<sup>251</sup>

The Court rejected Virginia's two justifications for its classification: diversity in educational approaches and the unique VMI method.<sup>252</sup> In evaluating these justifications the Court rejected the deferential approach of the Fourth Circuit.<sup>253</sup> Instead, the Court advocated a "searching analysis"—far beyond the articulated justification or rationalization—but for the actual purpose.<sup>254</sup> This searching analysis looked beyond the conflict at hand, and delved into the history of education in the state as a whole.<sup>255</sup>

Looking at the history of diversity in public education in Virginia, the Court noted Virginia's long and bitter history of not admitting women at the university level.<sup>256</sup> The Court concluded that Virginia did not have a history of evenhanded advancement of diverse educational options.<sup>257</sup> Thus, the Court rejected diversity

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247. See Rodriguez, *supra* note 229, at 9.

248. 458 U.S. 718 (1982).

249. United States v. Virginia, 116 S. Ct. at 2274.

250. See *id.* at 2276.

251. See *id.*

252. See *id.* The Court specifically limited its decision to educational opportunities that are "unique," not a sweeping abolition of all public single-sex educational institutions. See *id.* at 2276 n.7. But see *id.* at 2306 (Scalia, J., dissenting) ("[The Court's decision] ensures that single-sex public education is functionally dead.").

253. See *id.* at 2275 ("Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men).") (footnote omitted)

254. *Id.* at 2277 (quoting *Hogan*, 458 U.S. at 728).

255. See *id.* at 2277-78.

256. See *id.* at 2277 ("[N]o struggle for the admission of women to a state university' . . . 'was longer drawn out, or developed more bitterness, than that at the University of Virginia.'" (citing 2 THOMAS WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 254 (1929)). Virginia's most prestigious university, the University of Virginia, did not admit women until 1972. See *id.* at 2278.

257. While Virginia had repealed all statutes requiring individual institutions to admit only men or women, there was only one statement in the record that Virginia held itself as evenhanded: "Because colleges and universities provide opportunities for students to develop values and learn from role models, it is extremely important that they deal with faculty, staff, and students *without regard to sex, race, or ethnic*



as a sufficient justification to deny women admission to VMI.<sup>258</sup>

The Court similarly rejected maintaining VMI's unique character as a proper justification for women's exclusion.<sup>259</sup> The argument that admitting women would downgrade VMI's stature and destroy its adversative system was analogized to the outmoded justifications for denying women admission to the bar and access to legal education and for denying African-Americans admission to VMI until 1968.<sup>260</sup> The Court conceded that there would be a period of adjustment<sup>261</sup> but that "[e]xperience shows such adjustments are manageable."<sup>262</sup> Women's successful entry into federal military academies and their participation in the military "indicate that Virginia's fears for the future of VMI may not be solidly grounded."<sup>263</sup> So long as some women are qualified to meet the admission standards of VMI, Virginia cannot show an exceedingly persuasive justification based on uniqueness.<sup>264</sup>

Furthermore, the Court concluded that Virginia and VMI misperceived legal precedent by focusing on the "'means' rather than the 'end.'"<sup>265</sup> Virginia argued that the end of single-sex education could only be achieved by exclusion.<sup>266</sup> The Court corrected the analysis by stating that the end was to produce citizen-soldiers, not single-gender education.<sup>267</sup> With citizen-soldiers as its aim, the categorical exclusion of women does not substantially advance that aim.<sup>268</sup>

### 3. Inherent physical differences between men and women deemed overbroad generalizations

As an advocate, Justice Ginsburg's ambition "was to purge the law of sweeping stereotypes that prevent individuals, women and men, from following their inclinations rather than submitting to conventional gender roles."<sup>269</sup> As a Supreme Court Justice, she

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*origin.*" United States v. Virginia, 976 F.2d 890 (4th Cir. 1992) (quoting the 1990 Report of the Virginia Commission on the University of the 21st Century).

258. See United States v. Virginia, 116 S. Ct. at 2279.

259. See *id.*

260. See *id.* at 2280, 2282 n.16.

261. See *id.* at 2281 n.15.

262. *Id.* at 2284 n.19.

263. *Id.* at 2281.

264. See *id.*

265. *Id.*

266. See *id.*

267. See *id.* at 2281-82.

268. See *id.* at 2282.

269. Rosen, *supra* note 7, at 31.

called upon a Gilliganesque model of gender differences, pointing out that inherent differences between men and women “remain cause for celebration,” not for denigration.<sup>270</sup> While inherent differences are no longer accepted as a ground for race or national origin classifications, classifications based on physical differences between men and women endure.<sup>271</sup>

Rather than challenging the lower court’s expert findings of average capacities or preferences of men and women, the Court wisely changed the focal point of inquiry. The Court assumed these generalizations to be true, but not true for the population as a whole, viewing them as mere “tendencies” and “overbroad generalizations.”<sup>272</sup> VMI’s method of education was never asserted to be suitable for most men.<sup>273</sup> Similarly, most women would not choose to undergo VMI’s adversative method.<sup>274</sup> Thus, these findings were, by and large, meaningless. Instead, the Court focused on those women who did meet the current standards of admission and asked “whether the State can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.”<sup>275</sup>

The Court did not address the specific physical fitness requirements imposed on new recruits. Regardless, requiring women to perform at the same physical level as men as an admissions prerequisite is questionable since the purpose of VMI is not to send young men onto the battlefield: “VMI’s mission is to produce educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary.”<sup>276</sup> How relevant is one’s percentage of body fat or upper-body strength in corporate boardrooms or the halls of Congress?<sup>277</sup>

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270. *United States v. Virginia*, 116 S. Ct. at 2276; *see also supra* notes 132-36 and accompanying text (discussing Carol Gilligan’s theories of sex differences).

271. *See United States v. Virginia*, 116 S. Ct. at 2276.

272. *Id.* at 2280.

273. *See id.* at 2284.

274. *See id.* at 2280.

275. *Id.*

276. *United States v. Virginia*, 766 F. Supp. 1407, 1425 (W.D. Va. 1991), *vacated and remanded*, 976 F.2d 890 (4th Cir. 1992).

277. *See* ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSIONS: A CRITIQUE OF INDIVIDUALISM* 252 (1991) (“Modern technology ensures that there are very few occupations that women cannot perform as effectively as men. In what way, after all, is muscular strength a prerequisite for pushing the button that will unleash nuclear warfare? Or for flying a jet bomber?”). In contrast to her prior emphasis on androgyny, Dr. Fox-Genovese later focused on sex differences when she testified that “an adversative method of teaching in an all-female school would be

#### 4. Striking down the remedial plan as separate and unequal

After concluding that Virginia had not set forth an exceedingly persuasive justification, the Court examined VWIL as a remedial plan.<sup>278</sup> The Court rejected VWIL as a comparable institution and analogized it to the all-white Texas Law School in *Sweatt v. Painter*.<sup>279</sup> VWIL was described as a “‘pale shadow’ of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence.”<sup>280</sup> The substantive comparability test, which the Fourth Circuit used to uphold VWIL as a remedial measure, was flatly rejected.<sup>281</sup> Instead, the Court required a close fit, such that the remedy would place persons unconstitutionally denied an opportunity or advantage in “‘the position they would have occupied in the absence of [the discrimination].’”<sup>282</sup> The Court concluded that separate and unequal educational programs for men and women did not satisfy the mandates of equal protection.<sup>283</sup> Thus, VWIL was not a satisfactory remedy. Left with only the option to privatize or admit women, VMI was forced to accept the latter.<sup>284</sup>

#### 5. “Skeptical scrutiny”: The exceedingly persuasive justification requirement prevails

The majority never explicitly stated that it utilized a transformed version of intermediate scrutiny. Nor did the majority use the language of “intermediate scrutiny” in referring to its standard of review. Instead, Justice Ginsburg hinted at a change by dubbing her approach “skeptical scrutiny,”<sup>285</sup> which she summarized as follows:

Focusing on the differential treatment or denial of oppor-

not only inappropriate for most women, but counter-productive.” *United States v. Virginia*, 852 F. Supp. 471, 476 (W.D. Va. 1994), *aff’d and remanded*, 44 F.3d 1229 (4th Cir. 1995), *rev’d and remanded*, 116 S. Ct. 2264 (1996).

278. *See United States v. Virginia*, 116 S. Ct. at 2282.

279. *See id.* at 2285 (citing *Sweatt v. Painter*, 339 U.S. 629 (1950)); *see also supra* note 173 and accompanying text (discussing the disparity between the district court’s treatment of sex and race).

280. *United States v. Virginia*, 116 S. Ct. at 2285.

281. *See id.* at 2286 (“The Fourth Circuit displaced the standard developed in our precedent and substituted a standard of its own invention. . . . The Fourth Circuit plainly erred in exposing Virginia’s VWIL plan to a deferential analysis . . . .” (citations omitted)).

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

283. *See id.* at 2286-87.

284. *See infra* text accompanying notes 313-14.

285. *United States v. Virginia*, 116 S. Ct. at 2274.

tunity for which relief is sought, the reviewing court must determine whether the proffered justification is “exceedingly persuasive.” The burden of justification is demanding and it rests entirely on the State. The State must show “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.<sup>286</sup>

Measuring the facts of *VMI* against this standard of review, the Court concluded that Virginia failed to show an “‘exceedingly persuasive justification’ for excluding all women from citizen-soldier training afforded by *VMI*.”<sup>287</sup>

Chief Justice William Rehnquist’s concurrence and Justice Antonin Scalia’s dissent lamented what they perceived to be a sharp turn in the Court’s approach to gender discrimination. Chief Justice Rehnquist agreed with the majority that *VMI*’s all-male admissions policy violated equal protection and that the *VWIL* program did not remedy that violation.<sup>288</sup> However he disagreed with including the exceedingly persuasive justification requirement to support gender-based classifications.<sup>289</sup> Rather, the Chief Justice sought to avoid potential confusion by adhering to the “traditional, ‘firmly established,’” standard.<sup>290</sup> While implying that the majority adopted a new standard of review, he did not go as far as Justice Scalia who labeled this new standard as “indistinguishable from strict scrutiny.”<sup>291</sup>

One reporter noted that Justice Scalia’s dissent reads “more like a sorrowful lament to the passing of the era of male chivalry than a serious effort to defend taxpayer-funded segregation of men and women.”<sup>292</sup> Justice Scalia criticized the Court’s use of the exceedingly persuasive justification requirement found in *Hogan* and

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286. *Id.* at 2275 (citations omitted).

287. *Id.* at 2276.

288. *See id.* at 2287 (Rehnquist, C.J., concurring).

289. *See id.* at 2288 (Rehnquist, C.J., concurring).

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

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

292. Jamin B. Raskin, *Supreme Court Veers Right on Race*, *NEWSDAY*, July 11, 1996, at A49.

its progeny.<sup>293</sup> He argued that the majority took the exceedingly persuasive justification language of *Hogan* and separated it from its traditional analysis of whether the discriminatory means are substantially related to important governmental objectives.<sup>294</sup>

Justice Scalia's primary criticism was that the Court raised the intermediate scrutiny standard to strict scrutiny.<sup>295</sup> Justice Scalia located the Court's application of strict scrutiny in a footnote; a footnote that limited the precedential value of *VMI* to "unique" educational opportunities.<sup>296</sup> This begs the question: what is a unique educational opportunity? Justice Scalia interpreted this footnote not as a limitation but as an invitation to eradicate single-sex institutions.<sup>297</sup> The crux of his criticism was that "the single-sex program that will *not* be capable of being characterized as 'unique' is not only unique but nonexistent."<sup>298</sup> Thus, Justice Scalia feared that all single-sex education institutions would be forced to integrate; he argued that "single-sex public education is functionally dead" because "[n]o state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program."<sup>299</sup>

## V. THE AFTERMATH OF *VMI*

Moments after the decision was released on June 16, 1996, "a handful of journalists gathered in the Supreme Court press room derisively chuckled at the new standard, wondering out loud what it meant."<sup>300</sup> While Justice Scalia's fears of change may be exaggerated, he raised the critical issue of *VMI*'s impact and implementation.

From a feminist jurisprudence perspective, the impact of Justice Ginsburg's debut opinion was cause for celebration.<sup>301</sup> One supporter described the opinion as a "watershed decision for

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293. See *United States v. Virginia*, 116 S. Ct. at 2274.

294. See *id.* at 2294.

295. See *id.* at 2306 (Scalia, J., dissenting).

296. See *id.* at 2276.

297. See *id.* at 2306 (Scalia, J., dissenting) ("Today's opinion assures that no such experiment will be tried again.").

298. *Id.* (Scalia, J., dissenting) (emphasis added).

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

300. Rodriguez, *supra* note 229, at 9.

301. See Raskin, *supra* note 292, at A49 ("The court's resounding 7-1 decision requiring the Virginia Military Institute to open its doors to women amounts to a 'Brown v. Board of Education' in the gender field.").

women's rights."<sup>302</sup> While its full meaning is still unknown,<sup>303</sup> the decision clearly expanded opportunities for women at VMI and elsewhere. Despite the decision's theoretical advancement of gender equality, it provides little guidance for achieving equality in its implementation. As the following discussion indicates, both VMI and The Citadel struggle to carry out the Court's mandate to provide men and women equal opportunity for a military-style education.

Two days after VMI's all-male admissions policy was ruled unconstitutional, South Carolina's Citadel voluntarily agreed to admit women.<sup>304</sup> At both The Citadel and VMI, new recruits face enormous challenges. Many of these challenges focus on the treatment of men and women: will the sexes be treated alike or differently? It appears that, at least initially, men and women at VMI will receive the same treatment.<sup>305</sup> For example, women at VMI will be given buzz cuts like men. In contrast, the first four women admitted at The Citadel received only short hair cuts—"off the face, off the shoulders, off the collar and with the ears showing."<sup>306</sup>

The more difficult challenge is how male and female cadets will get along with each other. Three of the four women at The Citadel disliked their short haircuts for making them different from men and took the controversial step of giving themselves buzz cuts.<sup>307</sup> The punishment these women received for giving

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302. Margo L. Ely, *Court's VMI Decision Reinforces Review Standard for Sex Bias*, CHI. DAILY L. BULL., July 8, 1996, at 6. *But see* Hope Viner Samborn, *Scrutiny Scrutinized*, A.B.A. J., Sept. 1996, at 29, 29 ("[S]ome feminists fear that heightened scrutiny . . . may harm rather than assist women in attacking sex discrimination. . . . because the VMI standard may be used in reverse discrimination cases to attack affirmative action programs—some of which are designed to give women parity with men.").

303. Pursuant to Scalia's dissent, there is speculation that the decision may jeopardize all single-sex education. Stuart Taylor, Jr., *Closing Argument: Did Ginsburg Go Too Far in VMI Case?*, TEX. LAW., July 8, 1996, at 21, 21. This prospect "is especially troubling at a time when many educational experts and some feminists are citing powerful evidence that single-sex education can benefit boys and girls alike." *Id.* Taylor posits that the VMI decision may lead to a double standard favoring women. *Id.* Such a standard would allow compensatory or remedial single-sex programs only for females. *Id.*

304. *See Women Begin a New Era at The Citadel*, L.A. TIMES, Aug. 25, 1996, at A26.

305. *See 3 Citadel Women Cut Own Hair, Face Discipline*, L.A. TIMES, Nov. 9, 1996, at A5.

306. *Id.*

307. *See id.*

themselves buzz cuts<sup>308</sup> exemplifies the institution's resistance to men and women being treated the same.

Hazing rituals that female recruits were subjected to also created tension; two female cadets at The Citadel had nail polish poured on them and their clothes set afire on three occasions.<sup>309</sup> These incidents came to light only after a male cadet reported them to school officials.<sup>310</sup> Why the women chose not to report the incidents is cause for speculation and concern. Did the women's fear of retaliation inhibit their ability to look out for their own well-being? Was the pressure to conform so intense that they were willing to give up their physical safety? Most recently, two female cadets who endured the violent hazing did not return to The Citadel to complete their freshman year.<sup>311</sup> While one decided not to return out of fear for her safety, the other explained that "while I might be physically safe on campus, I would not be welcome."<sup>312</sup>

VMI was not as quick as The Citadel to respond to the Court's decision: "VMI had put off acting while it weighed the possibility of going private to preserve its traditions and discipline."<sup>313</sup> Three months after the VMI decision, the VMI board agreed by the narrowest of margins—a nine to eight vote—to admit women by the fall of 1997.<sup>314</sup>

As a result of the negative national media coverage of its long fight against coeducation, VMI undoubtedly faces major challenges in attracting women.<sup>315</sup> Subsequently, VMI hired a female admissions officer whose primary responsibility is to recruit women.<sup>316</sup> In VMI's revised admissions policy, applicants will be

308. *See id.*

309. *See 2 Female Cadets Said Set Afire 3 Times, Not Once*, L.A. TIMES, Dec. 18, 1996, at A38 [hereinafter *2 Female Cadets*]. While neither woman was injured, at least one was a target of other threats as well. *See 2 Female Citadel Cadets' Clothes Reportedly Set Afire*, L.A. TIMES, Dec. 14, 1996, at A16 [hereinafter *Set Afire*]. One female cadet resorted to wearing a concealed tape recorder until male cadets ordered her to drop her pants and remove it. *See 2 Female Cadets, supra*, at A38.

310. *See Set Afire, supra* note 309, at A16.

311. *See Two Female Cadets to Quit Citadel*, L.A. TIMES, Jan. 13, 1997, at A13.

312. *Id.*

313. *VMI Sounds Retreat, Votes to Admit Women in 1997*, L.A. TIMES, Sept. 22, 1996, at A24.

314. *See id.*

315. Michael Hardy, *VMI Needs \$5.1 Million to Go Coed*, RICHMOND TIMES-DISPATCH, Nov. 16, 1996, at B1.

316. *See VMI Coeducation Recruitment Initiatives: VMI Hires Female Admissions Officer* (visited Nov. 24, 1996) <<http://www.vmi.edu/~pr/coed.htm>>.

evaluated without regard to gender.<sup>317</sup> Whether cadets will continue to refer to their co-ed classmates as "Brother Rats" remains undecided.<sup>318</sup> While the number of women to be admitted for the 1997-1998 academic year remains undetermined, the number of applications from prospective male students has risen significantly,<sup>319</sup> debunking the myth that coeducation would make VMI an unappealing educational choice for young men.

## VI. REVISITING *ROSTKER v. GOLDBERG*

### A. *VMI Opens the Door for a Stricter Standard of Review*

It is clear that *VMI* represents an invitation for courts to apply a stricter standard of review to gender classifications. However, lower courts remain uncertain on how to apply this new standard. Aware of the ambiguity left by *VMI*, the Seventh Circuit in *Nabozny v. Podlesny*<sup>320</sup> declined to express an opinion on whether the Court's ruling heightens the level of scrutiny applied to gender discrimination.<sup>321</sup> Despite the Seventh Circuit's indecision, the Supreme Court opened the door for a more stringent application of intermediate scrutiny, which may lead the Court to reconsider its earlier decisions upholding gender discrimination.

### B. *The Executive Branch Invites Review of Rostker*

While single-sex education is the obvious subject of review after *VMI*, women's exclusion from draft registration and some combat positions are also appropriate targets for reconsideration. Prior to *VMI*, the executive branch revisited the *Rostker* decision. At President Bill Clinton's request in 1994, the Department of Defense (DoD) reviewed the policy of excluding women from the draft.<sup>322</sup> At that time, the DoD concluded that women's exclusion

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317. See *About VMI* (visited Nov. 24, 1996) <<http://www.vmi.edu/~pr/about-vmi.htm>> ("Standards are applied without regard to gender, race, nationality, or religion, and all factors are weighed in the final determination of the applicant's qualifications.").

318. See *id.*

319. See Hardy, *supra* note 315, at B1.

320. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (allowing homosexual student to maintain an equal protection claim against school officials for alleged failure to protect him from harassment and harm by other students).

321. See *id.* at 456 n.6.

322. See *Women and the Draft* (visited Nov. 27, 1996) <<http://www.sss.gov/women.htm>>.



from the draft was justifiable since women were excluded by policy from front-line combat positions.<sup>323</sup> Additionally, the DoD recognized that policies regarding women must be reviewed periodically since the role of women in the military continues to expand.<sup>324</sup> The *VMI* decision presents such an appropriate time.

### C. Overturning *Rostker on the Coattails of VMI*

This Note advocates the reversal of *Rostker v. Goldberg*<sup>325</sup> following the *VMI* decision for symbolic reasons significant within feminist jurisprudence and the upholding of the constitutional mandate of equal protection.

#### 1. Overturning *Rostker* under the feminist jurisprudential mandate of equal citizenship

While the current Selective Service law requires only "male person[s]" to register for the draft,<sup>326</sup> feminists disagree over whether including women in draft registration will advance the cause of feminism.<sup>327</sup> Opponents argue that women should not participate in "the structure of militarism," but should seek to demolish those structures.<sup>328</sup> Others believe that the right to be drafted and serve in combat—to be placed in a position to kill others and be killed—is not a prize worth fighting for.<sup>329</sup> Still others question whether draft registration is a top-priority for the feminist movement since women who choose to join the Army do not represent a cross-section of American women.<sup>330</sup>

Despite these strong arguments for maintaining the status quo, the following compelling symbolic reasons dictate overturning *Rostker*:

Outside the services, the exclusion of women from combat [and the draft] serves functions that are chiefly expressive, symbolizing and reinforcing a traditional view of femininity that subordinates women. Achieving full citi-

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323. *See id.*

324. *See id.*

325. 453 U.S. 57 (1981).

326. Military Selective Service Act, 50 U.S.C. app. § 453(a) (1994).

327. *See* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 523 (1991).

328. *See id.* (quoting Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence As Oxymoron?*, 12 HARV. WOMEN'S L.J. 25, 41 (1989)).

329. *See id.*

330. *See id.* at 523-24 n.93.

zenship for women in America is going to require a lot more than ending the exclusion of servicewomen from combat positions [and the draft], but those ... goals are interrelated.<sup>331</sup>

Some feminists argue that "'combat' is a synonym for 'power'"<sup>332</sup> and that the combat exclusion is "protective" legislation representing paternalistic notions of women.<sup>333</sup> As Catherine MacKinnon argues, "As a citizen, I should have to risk being killed just like you."<sup>334</sup> This principle of equal citizenship mandates sex-integration of the military and full participation by those women who do join.<sup>335</sup>

## 2. *Rostker's* fatal flaw in constitutional theory: overbreadth

Under the mandate of equal protection after *VMI*, there is no exceedingly persuasive justification to uphold the ban on draft registration in light of women's large-scale involvement in the military.<sup>336</sup> While women's exclusion from combat once justified women's exclusion from the draft,<sup>337</sup> that justification is unacceptable after *VMI*; such justification relies on overbroad generalizations specifically prohibited by *VMI*.<sup>338</sup>

These overbroad generalizations regarding the role of women in the military are debunked by the DoD's report entitled *Peacetime Draft Registration and the Selective Service System (SSS)*,<sup>339</sup>

331. *Id.* at 525.

332. *Id.* at 524 (quoting HELEN ROGAN, *MIXED COMPANY: WOMEN IN THE MODERN ARMY* 296 (1981)). Women are deprived of this power because the combat ban (1) bars women from experience needed to advance to important leadership positions; (2) limits women's access to training and employment opportunities; (3) produces tokenism resulting from the limit on the total number of women who can be admitted to the services; (4) marginalizes women in support roles; and (5) subjects women to sexual harassment resulting from their limited numbers. *See id.* at 524-25.

333. *Id.* at 523 n.93 (quoting Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN'S RTS. L. REP.* 175, 187-89 (1982)).

334. MacKinnon, *supra* note 123, at 83.

335. *See* Karst, *supra* note 327, at 523-24.

336. Overturning *Rostker* to end the ban on women's exclusion from draft registration does not necessarily end the ban against women from serving in combat positions. However, combat and the draft are deeply interrelated such that ending the ban on both is crucial to advancing the position of women in the military.

337. *See Rostker*, 453 U.S. at 78-79.

338. *See United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996).

339. *See* Memorandum from Assistant Secretary of Defense to Director of Selective Service System (Nov. 16, 1994) (on file with the *Loyola of Los Angeles Law Review*) [hereinafter 1994 DoD Report].

women recruits in the armed services reached an all-time high of sixteen percent.<sup>340</sup> Furthermore, the DoD estimated that over the next five years the number of women on active duty would reach almost a quarter of a million.<sup>341</sup> While women may be prohibited from engaging in direct ground-combat, they "are now an integral part of world-wide deployable combat and combat support units."<sup>342</sup> With the opening of increasing numbers of positions in the military to women, including combat and combat-support positions,<sup>343</sup> the success of the armed services "now 'depends' on the participation of a great number of America's high quality of young women."<sup>344</sup>

Most significantly, the 1994 DoD Report invites continued debate over women's exclusion from draft registration.<sup>345</sup> The report concedes that much of the congressional debate surrounding the exclusion of women from draft registration "would be inappropriate today."<sup>346</sup> Should there be a draft, the legality of the exclusion of women would foreseeably be contested in the courts, moving almost immediately to the United States Supreme Court, "which may be disposed to rule otherwise than it did in *Rostker v. Goldberg*."<sup>347</sup> When all but ground-combat positions are open to women, their inclusion in the draft will be inevitable.<sup>348</sup>

While *VMI* does not address the Court's policy of deference to military affairs cases, given the opportunity to revisit *Rostker*, the Court's primary obstacle in overturning the case is its obligation to follow precedent according to the doctrine of stare decisis.<sup>349</sup> However, changing legal principles resulting from *VMI*

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340. *See id.*

341. *See id.*

342. *Id.*

343. Over 99% of Air Force jobs, 94% of Navy positions, 62% of Marine jobs, and 67% of Army jobs are open to women. *See id.* Of the 1.2 million jobs available to women department wide, almost 200,000, or 12%, are held by women. *See id.*

344. *Id.*

345. *See id.*

346. *See id.*

347. *The Selective Service System: Hearing Before the House VA, HUD, and Indep. Agencies Subcomm. of the Comm. on Appropriations*, 104th Cong. 462 (1996) (statement of Philip L. Borkholder, Executive Director, National Interreligious Service Board for Conscientious Objectors (NISBCO)).

348. *See id.*

349. The Court enunciated a four-factor inquiry to reexamine a prior holding: unworkability, reliance, evolution of legal principles, and changes in factual assumptions. *See Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (upholding a woman's right to abortion as established in *Roe v. Wade*, 410 U.S. 113 (1973), on

combined with changes in factual assumptions since the *Rostker* decision enable the Court to overcome the stare decisis hurdle. The exceedingly persuasive justification requirement of *VMI*, as interpreted by Justices Rehnquist and Scalia,<sup>350</sup> leads to the conclusion that *Rostker* is “a mere survivor of obsolete constitutional thinking.”<sup>351</sup> If today’s armed forces are increasingly gender neutral,<sup>352</sup> shouldn’t draft registration also be gender neutral? The all-male draft represents the last great bastion of man as woman’s protector and defender.<sup>353</sup>

In addition to changes in legal precedent, shifting social standards also control constitutional analysis.<sup>354</sup> The factual assumptions of *Rostker* are no longer accurate; Justice Rehnquist’s assertion that “women are excluded from combat”<sup>355</sup> is no longer a truism. While public opinion polls indicate that the American people strongly support prohibiting women from combat positions, reality dictates otherwise.<sup>356</sup> Although women are barred from one-third of all Army jobs, women can hold certain combat positions in the Navy and Air Force.<sup>357</sup> In the wake of the 1990 Persian Gulf War, women have been permitted to fly Army helicopters.<sup>358</sup> However, women still cannot become infantry soldiers—“the backbone of the Army.”<sup>359</sup>

As a result of women’s exclusion from infantry positions, a glass ceiling exists that prevents women from becoming senior generals in the Army.<sup>360</sup> Male senior generals who come up

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stare decisis principles despite subsequent maternal health care advances):

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.

350. See *supra* Part IV.F.5.

351. See *Casey*, 505 U.S. at 857 (denying that *Roe v. Wade* is a survivor of such obsolete constitutional thinking).

352. See 1994 DoD Report, *supra* note 339.

353. See *supra* text accompanying note 2.

354. See *TRIBE*, *supra* note 24, § 16-26, at 1565. *But cf.* *Casey*, 505 U.S. at 869 (refusing to overturn *Roe* despite a possible new social consensus on the abortion issue).

355. *Rostker v. Goldberg*, 453 U.S. 57, 77 (1981).

356. See Sheryl Stolberg & Melissa Healy, *Harassment Is Old Battle for Many Army Women*, L.A. TIMES, Nov. 15, 1996, at A1.

357. See *id.*; see also *supra* note 343 (describing Navy and Air Force jobs open to women).

358. See *Stolberg & Healy*, *supra* note 356, at A1.

359. *Id.*

360. See *id.*

through infantry, armor, and artillery commands are viewed as "warriors." Thus, "[i]f you say women aren't going to be warriors, then you are saying we are not going to have a woman who is chief of staff of the Army."<sup>361</sup>

Indeed, many female soldiers break some societal molds simply by joining the armed forces. However, once they are there, they tend to be channeled into fields that are traditionally the province of women.<sup>362</sup> More than one-third of women go into administrative jobs, about one-sixth enter medical occupations, and nearly one-quarter become supply clerks or communications specialists.<sup>363</sup> Only about ten percent join occupations traditionally seen as men's work, such as electronics, craft work, and infantry support.<sup>364</sup> Despite these trends in female professional tracks in the armed forces, women's status will continue to improve as a result of their sheer numbers. Breaking down the remaining legal barriers preventing women's advancement is essential to achieving real equality.

## VII. CONCLUSION

The history of *VMI* is a classic example of the difficulties courts face in grappling with gender differences. The district court's reliance on gender differences to exclude women from *VMI* exemplifies the current backlash against feminist theory in an effort to stymie women's access to male-dominated environ-

361. *Id.*

362. *See id.* The same is true for women in the Israeli Defense Forces (IDF), which drafts both men and women. The IDF reinforces traditional sex roles by placing men in the battlefield and women behind desks: "[T]he whole point of having women in the army is to free men for combat." Kirk Spitzer, *Commission Hears of Myth of Israeli Women of War*, GANNETT NEWS SERVICE, June 26, 1992. Traditional sex roles are entrenched by the Israeli military's organizational structure, which separates women into a separate corps—the Women's Corps, whose acronym is CHEN, which translates as "charm." *See* Irit P. Garshowitz, *Leader of Israeli Women's Corps Defends Ban on Combat Roles*, CHI. TRIB., Nov. 1, 1992, at 5. The Women's Corps is a sham: "The Women's Corps is not a corps in the true sense of the term, but rather an administrative cadre governing training assignments and military careers of women in the IDF." Anne R. Bloom, *Women in the Defense Forces*, in *CALLING THE EQUALITY BLUFF* 128, 135 (Swirski & Safir eds., 1991). One new recruit describes the accepted view of women in the Israeli army as the "zic ('spark'—of love, of hope, of passion) and the chic [of] the military." Gail Hareven, *His Army Her Army: Women in the Israeli Military*, LILITH, Winter 1991, at 9, 9.

363. *See Stolberg & Healy, supra* note 356, at A1.

364. *See id.* Experts agree that the structure of jobs gives rise to rampant sexual harassment. *See id.*

ments.<sup>365</sup> Even when courts confront discrimination and require remedial action, they are reluctant to provide women with opportunities on the same turf as their male counterparts.<sup>366</sup> By creating VWIL as a parallel institution, Virginia argued that it was pursuing diversity in education. Such an objective certainly qualifies as an important governmental interest and would have been upheld if the Supreme Court had taken the deferential approach advocated by the Fourth Circuit's special intermediate scrutiny test.<sup>367</sup> However, the *VMI* case marks a turning point in feminist jurisprudence and constitutional theory by rendering separate and unequal facilities for men and women unconstitutional.

If Justice Rehnquist's or Justice Scalia's spin on *VMI*—that the Court is moving toward a more stringent level of scrutiny—is even remotely accurate, then it is almost certain that given the opportunity the Court will overturn *Rostker*. The key hurdle will not be in the more skeptical application of intermediate scrutiny. Rather it will be for the Court to grant certiorari by choosing to hear a case that addresses the issue of women's involvement, or lack thereof, in the draft and combat. In order for this to occur, the Court must cease to defer to Congress on issues involving the military. Skeptical scrutiny will simply be the *coup de grace* in overturning *Rostker's* outmoded conception of women's involvement in the military. In light of the increased involvement of women in combat and combat-related positions, there appears to be no exceedingly persuasive justification to uphold the exclusion of women from draft registration and ultimately from the draft. The increased involvement of women in the military proves that

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365. See *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated and remanded*, 976 F.2d 890 (4th Cir. 1992).

366. See *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated and remanded*, 976 F.2d 890 (4th Cir. 1992); *United States v. Virginia*, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd and remanded*, 44 F.3d 1226 (4th Cir. 1995), *rev'd and remanded*, 116 S. Ct. 2264 (1996).

367. See *United States v. Virginia*, 44 F.3d at 1237.

today's women are eager to share in the benefits and the burdens of our nation's armed forces and of our society.

*Karen Lazarus Kupetz\**

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