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Constitutional Law - Equal Protection - Gender Discrimination: The Virginia Military Institute Is Given the Opportunity to Create Citizen-Soldiers out of Qualified Women

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CONSTITUTIONAL LAW—EQUAL PROTECTION—GENDER DISCRIMINATION: THE VIRGINIA MILITARY INSTITUTE IS GIVEN THE OPPORTUNITY TO CREATE "CITIZEN-SOLDIERS" OUT OF QUALIFIED WOMEN

United States v. Virginia, 116 S. Ct. 2264 (1996)[1]

I. FACTS

In the words of the district court, "[i]t was May 1864 that the United States and the Virginia Military Institute first confronted each other [in] a life-and-death engagement on the battlefield . . . . The combatants have again confronted each other, . . . this time . . . in . . . court. Nonetheless, . . . the struggle is nothing short of a life-and-death confrontation."[2] Both were battles the United States refused to lose.

A. THE HISTORY OF THE VIRGINIA MILITARY INSTITUTE

The Virginia Military Institute (VMI) is a rare military college that has operated as a single-sex school since its creation in 1839.[3] VMI serves a distinct mission: to produce "citizen soldiers," honorable and educated men who are suited for military and civilian leadership.[4] To accomplish its mission, VMI employs an "adversative method" of education unavailable at any other institution in Virginia.[5] The "adversative method" stresses character development, physical and mental discipline,

1. Before reaching the Supreme Court this case progressed through the lower courts twice. First the liability issue was litigated and appealed, thus the designation VMI I refers to both the district court opinion and the court of appeals opinion on this issue. The cite VMI I encompasses United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated,* 976 F.2d 890 (4th Cir. 1992). Next, the remedial issue was litigated and appealed, thus the designation VMI II refers to both the district court opinion and the court of appeals opinion on this issue. The cite VMI II encompasses United States v. Virginia, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd,* 44 F.3d 1229 (4th Cir. 1995) *cert. granted,* 116 S. Ct. 281 (1995).

Although, the case was appealed to the Fourth Circuit en banc, which denied the application to rehear, this case is not herein specially designated. VMI III is used to refer to the United States Supreme Court decision of United States v. Virginia, 116 S. Ct. 2264 (1996). For the sake of clarity, the citations of VMI I and VMI II herein designate the court and the phase of litigation.

2. VMI I, 766 F. Supp. 1407, 1408 (W.D. Va. 1991) (district court-liability phase).

3. VMI III, 116 S. Ct. 2264, 2269 (1996).

4. *Id.* A 1986 final report from the Mission Study Committee of the VMI Board of Visitors states:

> It is the mission of the Virginia Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.

VMI I, 766 F. Supp. at 1425 (district court-liability phase). As the Court points out, VMI has been very successful in achieving its goal; among VMI's alumni are military generals, members of Congress, and business executives. *VMI III,* 116 S. Ct. at 2269.

5. *VMI III,* 116 S. Ct. at 2269.

and a strong moral code.[6] After four years in this unique system, VMI graduates leave with an awareness of their capacity to deal with duress and stress, a great sense of accomplishment, and connections to very loyal alumni.[7]

VMI is a public school.[8] Since its establishment, VMI has been financially supported by the Commonwealth of Virginia.[9] Furthermore, VMI is subject to the control of the Virginia General Assembly.[10] Thus, as a state sponsored school, VMI is subject to the Equal Protection Clause of the Fourteenth Amendment.[11]

B. VMI I: THE LIABILITY ISSUE. HAS VMI VIOLATED THE CONSTITUTION?

In 1990, the United States Department of Justice brought suit against the Commonwealth of Virginia and VMI to challenge the school's exclusively male admission policy.[12] The United States alleged that VMI's admission policy violated the Equal Protection Clause of the Fourteenth Amendment.[13]

In *VMI I*, the district court recognized that the decision of *Mississippi University for Women v. Hogan*[14] was controlling.[15] However, the

6. *Id.* The salient attributes of VMI's method are: physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values. *Id.* at 2270. The VMI method includes: a "rat line," which is an extremely stressful system that reinforces class solidarity and a cadet's sense of accomplishment through minute regulation of behavior, egalitarian treatment, frequent punishment, and rituals; the "class system," which rebuilds the cadets by reinforcing VMI values through peer pressure; the "dyke system," which assigns an upperclassman to each cadet to provide mentoring and some relief from the rat line; and the honor code, which provides that a cadet "does not lie, cheat, steal nor tolerate those who do." *VMI I*, 766 F. Supp. at 1421-23 (district court-liability phase); *see also VMI III*, 116 S. Ct. at 2270-71 (describing the adversative methods, but in less detail).

7. *VMI III*, 116 S. Ct. at 2269.

8. *Id.*

9. *Id.* at 2270. Reportedly, VMI receives approximately one-third of its $32 million annual operating money from Virginia. Ellen Nakashima & Spencer S. Hsu, *Allen to VMI: Admit Women or Be a Pariah*, WASH. POST, Sept. 19, 1996, at B1; *see also* United States v. Virginia, 52 F.3d 90, 93 n.4 (4th Cir. 1995) (Motz, J., dissenting from denial of rehearing en banc) (noting that in 1994 it was estimated that Virginia gave VMI in excess of $10 million).

10. *VMI III*, 116 S. Ct. at 2269.

11. U.S. CONST. amend. XIV. The Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* VMI never argued that there was insufficient state entanglement with the school to exempt it from the constitutional requirement of equal protection. *See VMI I*, 766 F. Supp. at 1408 (district court-liability phase) (noting that Congress could not pass a statute that would exempt VMI from the equal protection requirement).

12. *VMI III*, 116 S. Ct. at 2271. The suit was prompted by a complaint from a female seeking admission into VMI. *Id.* As the district court noted, the United States is authorized to bring constitutional discrimination claims under Title IV of the Civil Rights Act, 42 U.S.C. § 2000c-6. *VMI I*, 766 F. Supp. at 1408 (district court-liability phase).

13. *VMI III*, 116 S. Ct. at 2271.

14. 458 U.S. 718 (1982). *Hogan* involved a male who was denied admission to an all female state supported nursing school. Mississippi University for Women v. Hogan, 458 U.S. 718, 719 (1982); *see infra* text accompanying notes 96-116 (discussing *Hogan*).

15. *VMI I*, 766 F. Supp. at 1410 (district court-liability phase).

district court found several differences between the university in *Hogan* and VMI.[16] Thus, the district court rejected the claim that VMI's admission policy violated equal protection guarantees.[17] The district court reasoned that single-gender education provides substantial benefits, regardless of which gender is favored.[18] Furthermore, the district court opined that VMI brought diversity to Virginia's higher education system.[19] Evidence that admitting women would require alterations in VMI's methods[20] reinforced the district court's conclusion that VMI had demonstrated sufficient constitutional justification for retaining its male-only admission policy.[21]

The Fourth Circuit Court of Appeals vacated the district court opinion.[22] The court of appeals held that the Commonwealth of Virginia had not advanced any state policy that would justify its determination to provide only men with the opportunity of diversity.[23] The court stated that "[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."[24] The case was then remanded to cure the constitutional violation.[25] The court instructed that the Commonwealth could choose to admit women into VMI, establish a parallel institution, or abandon state support for VMI and allow the school to pursue its objectives as a private institution.[26]

C. VMI II: THE REMEDIAL ISSUE. WILL VMI ADMIT WOMEN?

The Commonwealth of Virginia chose to establish as its remedy a parallel program for women, the Virginia Women's Institute for Leader-

16. *Id.* at 1410-11. There were two particularly relevant differences. First, in *Hogan*, excluding men was not necessary to achieve its educational goals; whereas VMI would be fundamentally different if it was forced to admit women. *Id.* at 1410. Second, in *Hogan*, the school had proffered that its female-only admission policy was justified as compensatory affirmative action; whereas VMI justified its male-only admission policy as diversifying the educational system. *Id.*

17. *See id.* at 1414 (explaining that VMI had established both prongs of the test: first, gender discrimination served an important state educational objective by providing men with a beneficial single-gender education and diversity; second, that the means chosen, excluding women, was the only means to achieve this end).

18. *Id.* at 1411. Relying on evidence from experts in higher education, the court discussed that persons who attend single-sex colleges are likely to achieve more academically and professionally. *Id.* They are more academically involved, have frequent interaction with faculty, and have more intellectual self-esteem. *Id.*

19. *Id.* at 1413. All other higher education institutions in Virginia are coeducational. *Id.* at 1419.

20. *Id.* at 1412. The court explained that allowance for personal privacy would have to be made, physical education requirements would have to be altered, and the adversative system would probably have to be eliminated. *Id.* at 1412-13.

21. *Id.* at 1413.

22. VMI I, 976 F.2d 890, 892 (4th Cir. 1992) (court of appeals-liability phase).

23. *Id.* at 892, 898.

24. *Id.* at 899. VMI was the only single-gender institution out of 15 public higher education institutions in Virginia. *Id.*

25. *Id.*

26. *Id.*

ship (VWIL) which would be located at Mary Baldwin College, an established four year all-female private school.[27] The United States objected to VWIL as an inadequate remedy.[28] Although the district court noted that substantial differences existed between VMI and VWIL, it found those differences pedagogically justified.[29] The court approved of VWIL as an appropriate remedy, stating that the controlling legal principles did not require Virginia to provide women with a mirror image of VMI.[30] The district court poetically concluded its opinion by stating that "[i]f VMI marches to the beat of a drum, then Mary Baldwin [College] marches to the melody of a fife and when the march is over, both will have arrived at the same destination."[31]

The United States maintained that the implementation of VWIL as a remedy did not cure the constitutional violation.[32] Seeking an order that VMI admit women, the United States again appealed to the Fourth Circuit Court of Appeals.[33] It was the government's position that this suit was brought on behalf of those women who wanted to attend VMI because of its demanding and challenging teaching methods.[34] The government asserted that the creation of the women's leadership program at VWIL, which did not employ the adversative method, did little for those women.[35]

The court of appeals noted that applying traditional gender classification analysis in this particular case might bypass any equal protection scrutiny.[36] If homogeneity of gender in education was in fact an important and legitimate state objective, then gender discrimination was by definition necessary to accomplish this objective.[37] As a response to this concern, the court of appeals adopted a third step for analysis of this case.[38] The third step required an inquiry into the substantive comparability of the mutually exclusive programs.[39]

27. VMI II, 852 F. Supp. 471, 475 n.4 (W.D. Va. 1994) (district court-remedial phase).

28. *See id.* at 474 (urging that the Commonwealth was required to produce a plan that closely resembled VMI).

29. *Id.* at 481. The district court relied on expert testimony to the effect that the VMI adversative method would not be appropriate for most young women. *Id.* at 480. However, the court noted that the VMI methodology could be used to educate some women, and in fact some may prefer the adversative methodology. *Id.* at 481.

30. *Id.*

31. *Id.* at 484.

32. VMI II, 44 F.3d 1229,1234 (4th Cir. 1995) (court of appeals-remedial phase).

33. *Id.* at 1234.

34. *Id.*

35. *Id.*

36. *Id.* at 1237.

37. *Id.*

38. *Id.*

39. *Id.* The test used by the court of appeals included these three steps: first, whether the state's objective of providing single gender education was a legitimate and important governmental objective; second, whether the gender classification adopted directly and substantially related to that purpose; and third, whether the resulting mutual exclusion of men and women from the individual institutions

In performing the analysis the court of appeals noted that deference is to be given to legislative will so long as that will is not pernicious.[40] Since education was one of the most important functions of a state government,[41] the adoption of single-gender education as one particular technique of education was a legitimate and important government objective.[42] The court recognized that the only way to realize the benefits of homogeneity of gender was to restrict admission based on gender.[43] The final step of the analysis presented two questions: how are the benefits to be defined; and on what level or to what degree must the benefits be comparable.[44] The court of appeals concluded that the benefits need to be comparable in substance but not in form or detail,[45] and thus the Commonwealth's remedial plan was approved.[46]

In 1995, the Fourth Circuit Court of Appeals declined to hear this case en banc.[47] Holding firm to its position that the Equal Protection Clause of the Fourteenth Amendment precluded Virginia from excluding women from VMI's unique educational experience, the United States sought review from the United States Supreme Court.[48]

The United States Supreme Court granted certiorari to determine two issues: first, whether VMI's exclusion of women denied to women "capable of all of the individual activities required of VMI cadets" equal protection of the laws pursuant to the Fourteenth Amendment;[49] and second, what remedy was required if VMI's admission policy violated the Constitution.[50] On review, the United States Supreme Court

provide opportunities for those excluded to obtain substantively comparable benefits at their institution. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1239.

43. *Id.*

44. *Id.* at 1240.

45. *Id.* The United States urged that any such separate program for women must be identical to that of VMI, and since that could not be done, VMI must admit women. *Id.*

46. *Id.* at 1241. The court discussed that both programs had the same goal and aimed to achieve the same result of training citizen soldiers. *Id.* at 1240. The difference in approach used by the two programs was attributable to professional judgment of how best to provide for the differences between men and women. *Id.* at 1240-41. The Commonwealth had expert testimony that women may not respond well to the adversative method of training and that such a program would attract an insufficient number of women to make the program work. *Id.* at 1241. The court ignored the 347 applications from women that had been sent to VMI over the previous two year period. VMI III, 116 S. Ct. 2264, 2271 (1996).

47. United States v. Virginia, 52 F.3d 90, 91 (4th Cir. 1995) (en banc). Six judges voted to rehear the case en banc, four judges voted against rehearing, and three judges were recused. *Id.* Local rule only permitted rehearing en banc on the vote of a majority of the circuit judges who were in active service without regard to recusals. *Id.* at n.1 (Motz, J., dissenting). This rule allowed the votes of four judges to defeat the votes of six judges. *Id.* Judge Motz wrote an opinion dissenting from the decision not to rehear the case, in which she concluded that as long as the Commonwealth provided support to VMI, women should be given the opportunity to attend. *Id.* at 94.

48. VMI III, 116 S. Ct. 2264, 2269 (1996).

49. *Id.* at 2274.

50. *Id.*

held that VMI had not demonstrated an "exceedingly persuasive justification" for its male-only admissions policy,[51] and that women who sought admission and were fit for a VMI education could not be denied admission.[52]

II. LEGAL BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment mandates that "[n]o State shall . . . deny to any person . . . the equal protection of the laws."[53] The Equal Protection Clause has long been understood to guarantee personal and individual rights.[54] Individuals are entitled to judicial protection because of their personal rights and not because of their status as a group member.[55] Moreover, individuals may not be asked to suffer impermissible burdens in order to advance the standing of their group.[56] The Equal Protection Clause stands for the proposition that the government must treat everyone as an individual, not simply as a member of a class.[57]

In protecting individuals, equal protection analysis utilizes three types of review. As a post Civil War Amendment, the quintessential aim of the Equal Protection Clause is to eliminate all official state sources of invidious racial discrimination.[58] Thus, the highest level of review, strict scrutiny, is used to examine racial classifications.[59] Under this rigid standard of review, almost no classifications based on race have been upheld.[60] Rational basis, the lowest level of review, has less strict standards

51. *Id.* at 2281. The seven-to-one majority opinion was delivered by Justice Ruth Bader Ginsburg, Justice Clarence Thomas was recused. *Id.* at 2269. Justice Thomas did not participate in the case because his son attends VMI. Eric Lipton, *New vs. Old Dominion: Some Cling to a VMI Way Others Say Is the Past*, WASH. POST, Sept. 22, 1996, at A9.

52. *VMI III*, 116 S. Ct. at 2287.

53. U.S. CONST. amend. XIV.

54. *See* Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (noting that the Fourteenth Amendment, by its terms, creates personal, individual rights).

55. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978).

56. *Id.* at 298.

57. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

58. Loving v. Virginia, 388 U.S. 1, 10 (1967). "[C]lassification[s] based upon the race of the participants . . . must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect' . . . ." McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

59. *Loving*, 388 U.S. at 11. Strict scrutiny requires the classification to be necessary to the accomplishment of a legitimate objective. *Id.* Strict scrutiny is not limited to racial classifications, it is applied to national origin classifications. *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (stating that excluding Celtic Irishmen would be inconsistent with the Fourteenth Amendment). Fundamental rights, explicitly or implicitly protected by the Constitution, are also subject to strict scrutiny analysis. Clark v. Jeter, 486 U.S. 456, 461 (1988).

60. *See* Richmond v. Croson, 488 U.S. 469 (1989) (holding that a city based minority set aside program violated equal protection); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding that preferential protection of minorities against layoffs violated equal protection); *Bakke*, 438 U.S. 265 (1978) (holding that the special admissions policy used by the school for minorities violated equal protection); *Loving*, 388 U.S. 1 (1967) (holding that a statutory scheme which prevented marriage

to meet.[61] It is used in areas involving social or economic legislation and requires that the classifications must not be arbitrary or irrational.[62] Most classifications that warrant rational basis scrutiny survive this deferential review.[63] The third level of review is intermediate scrutiny, a heightened level of review which provides more protection than rational basis review.[64] While intermediate scrutiny is the standard currently used to examine gender-based classifications,[65] such classifications have not always warranted heightened scrutiny.[66]

Historically, gender-based classifications gave the Court little pause or concern.[67] This was because gender-based classifications were con-

solely on the basis or racial classification violated equal protection). However, the Court has announced that strict scrutiny is not necessarily fatal. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995); *see also* Korematsu v. United States, 323 U.S. 214, 218-19 (1944) (upholding a racial classification under strict scrutiny analysis).

61. *See* Schweiker v. Wilson, 450 U.S. 221, 235 (1981). Rational basis review only requires the classification to rationally advance a reasonable and identifiable governmental objective. *Id.*

62. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980) (stating that the proper level of review for social and economic legislation is rational basis).

63. *See Schweiker,* 450 U.S. at 238-39 (upholding classification giving comfort allowances to persons in public institutions receiving Medicaid funds but denying the allowance in public institutions not receiving Medicaid funds); *Fritz,* 449 U.S. at 178-79 (upholding dual retirement benefits for those workers that had a current connection to the railroad but not to other workers). *But see* Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336, 346 (1989) (striking down a property tax assessment scheme using rational basis review).

64. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (explaining that between the extremes of strict scrutiny analysis and rational basis review is intermediate scrutiny).

65. *See, e.g.,* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 151 (1994) (O'Connor, J., concurring) (stating that intermediate scrutiny is used to examine gender-based classifications). Intermediate scrutiny is defined as the test which requires the questioned classification to be "substantially related" to the achievement of an "important governmental objective." *Adarand Constructors,* 115 S. Ct. at 2109.

66. *See* Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law,* 14 WOMEN'S RTS. L. REP. 335, 338-39 (1992) (explaining the evolution of the standard used for gender classifications).

67. *See* Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (stating that states are not precluded from drawing a sharp line between men and women without violating the Constitution); *see also* Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (finding that in defining juror qualifications, states may exclude women). Remarkably, some states were far more enlightened about their perception of women in society. For example, in 1884, while Washington was still a territory, its supreme court held that married women living with their husbands were competent to serve as grand jurors. Rosencrantz v. Territory, 5 P. 305, 307 (Wash. 1884). A strong dissent wanted to protect women from that onerous obligation, proposing that:

> In the case of woman, it is not necessary that she should accept the obligation to secure or maintain her rights. If it were, I should stifle all expression of the repugnance that I feel at seeing her introduced into associations, and exposed to influences which, . . . must . . . shock and blunt those fine sensibilities, the possession of which is her chiefest charm, and the protection of which, under the religion and laws of all countries, . . . is her most sacred right.
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> If one woman is competent as a juror, all women having the same qualifications are competent. If women may try one case, they may try all cases. It is unnecessary to say more; to suggest the shocking possibilities to which our wives, mothers, sisters, and daughters may be exposed, [is] . . . a mistaken construction of the law.

Id. at 310 (Turner, J., dissenting). It is worth remembering that in the United States, until 1920, women did not have the right to vote. U.S. CONST. amend. XIX.

sidered natural.[68] The first hint that the Equal Protection Clause provided protection against gender-based classifications came in the ground breaking case of *Reed v. Reed.*[69] In *Reed,* the Court declared that according different treatment on the basis of sex established a classification subject to equal protection scrutiny.[70] The Court proceeded to strike down the statute at issue which granted a mandatory preference of males over females in appointing administrators for intestate decedents' estates.[71] In *Reed,* the Court purportedly used the rational basis test.[72] However, it was later acknowledged that a heightened level of review was implicitly being applied.[73]

In the past twenty-five years since the *Reed* decision, it has been firmly established that gender-based classifications are indeed subject to enhanced review.[74] The current level of review accorded gender-based classifications within the equal protection doctrine has been shaped by three significant cases, one from each of the last three decades.[75]

68. *See Goesaert,* 335 U.S. at 466 (accepting that Michigan could deny to all women the opportunity to bartend, as long as the denial applied to all women). The extent to which gender classifications were considered natural is demonstrated by the early United States Supreme Court case of Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873). In *Bradwell,* the Court affirmed the decision to deny Mrs. Myra Bradwell admission to the practice of law in the state of Illinois. *Id.* at 139. In his concurrence, Justice Bradley explained:

> Man is, or should be, woman's protector . . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony . . . which belong[s] . . . to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .
>
> The paramount destiny and mission of woman are to fulfil [sic] the noble . . . offices of wife and mother. . . . In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings [. . . .] [I]t is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men . . . .

Id. at 141-42. This reasoning prompted a plurality of the United States Supreme Court to assert that the tradition of "romantic paternalism" in our history had the effect of putting "women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) (discussing *Bradwell,* 83 U.S. (16 Wall.) at 141).

69. 404 U.S. 71 (1971).

70. Reed v. Reed, 404 U.S. 71, 75 (1971).

71. *Id.* at 76. The Court stated that to give a mandatory preference to one sex over the other for administrative efficiency was an arbitrary choice under the Fourteenth Amendment. *Id.*

72. *Id.*

73. *See, e.g.,* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135 (1994) (noting that since *Reed,* gender-based classifications have been subject to heightened scrutiny).

74. *Id.*

75. *See* Deborah L. Brake, *Sex As a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination,* 6 SETON HALL CONST. L.J. 953, 954-58 (1996) (discussing the history of the Supreme Court's development of a standard of review for sex discrimination).

In the first case, *Craig v. Boren*,[76] the Court formally pronounced that gender-based classifications warrant a heightened analysis.[77] The test announced in *Craig* requires that gender-based classifications "must serve important governmental objectives and must be substantially related to the achievement of those objectives."[78]

At issue in *Craig* was a statute which prohibited the sale of intoxicating beer to males under the age of twenty-one and to females under the age of eighteen.[79] The Court accepted that the objective of the statute, the enhancement of traffic safety, was an important governmental objective.[80] However, the Court did not accept the proposition that the gender-based distinction was closely linked to the objective of traffic safety.[81]

Craig illustrated that gender may not be used as a proxy for more relevant bases of classifications.[82] Furthermore, *Craig* established that "archaic and overbroad generalizations" and "outdated misconceptions concerning the role of females in the home" could not justify the use of gender to support a state statutory scheme that was premised upon the accuracy of those generalizations.[83] The decision in *Craig* was also important in that the Court applied the heightened scrutiny to a classifi-

76. 429 U.S. 190 (1976).

77. Craig v. Boren, 429 U.S. 190, 197 (1976). In 1973, gender-based classifications got as close as they have ever been to becoming a suspect classification when a plurality of the Court held that gender-based classifications were as repugnant to equal protection as classifications based on race and national origin. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion). In *Frontiero*, the plurality opined that the immutable sex characteristic was different from other nonsuspect statutes, like intelligence or physical disability, because sex frequently bears no relation to ability to perform or contribute to society. *Id.* at 686-87. Sex classifications instead have the effect of invidiously relegating women into an inferior legal status without regard to the actual capabilities of individual members. *Id.* The plurality's decision in *Frontiero*, that sex was a suspect classification, was premature and unnecessary according to three Justices, since the Equal Rights Amendment had been approved by Congress and was awaiting ratification by the states. *Id.* at 692 (Powell, J., concurring). However, the Equal Rights Amendment was never adopted by a majority of the states. *See* Patricia M. Wald, *Some Unsolicited Advice to My Women Friends in Eastern Europe*, 46 SMU L. REV. 557, 565 (1992) (noting that the United States does not guarantee women the same rights given to men since the Equal Rights Amendment was never ratified). A majority of the Court has never held that gender is a suspect classification. *See, e.g.*, VMI III, 116 S. Ct. 2264, 2276 (1996).

78. *Craig*, 429 U.S. at 197.

79. *Id.* at 191-92.

80. *Id.* at 199-200.

81. *Id.* at 200. The Court pointed out that there was only a two percent difference between the percentage of men and women arrested for driving while under the influence. *Id.* at 201. While the difference was not trivial in a statistical sense, for the purposes of equal protection it could not serve as the basis for using a gender-based classification. *Id.* "Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of two percent must be considered an unduly tenuous 'fit.'" *Id.* at 201-02.

82. *Id.* at 198 (involving drinking and driving).

83. *Id.* 198-99, 190-91.

cation that disadvantaged *men*,[84] even though men have never suffered as a disadvantaged class in our society.[85]

A slight shift in direction occurred after *Craig* which cast doubt on the test it established.[86] Speaking for a plurality in *Michael M. v. Sonoma County Superior Court*,[87] then-Justice Rehnquist pointed out that the Court had trouble agreeing on the appropriate approach to and analysis of gender-based classifications.[88] Justice Rehnquist directed that the underlying tone of the previous cases required the traditional minimum rationality test to take on a "sharper focus" when addressing gender-based classifications.[89] However, in applying the *Craig* test, the plurality focused on whether the sexes were "similarly situated" with respect to the purpose of the statute.[90] The *Craig* test did not employ a "similarly situated" analysis.[91] However, Justice Rehnquist, speaking for a majority of the Court in *Rostker v. Goldberg*,[92] again employed the "similarly situated" factor.[93] Thus, there was concern in both *Michael M.*[94] and *Rostker*[95] that the *Craig* test was being brushed aside.

The second significant case, and arguably the most influential gender-based equal protection case, *Mississippi University for Women v. Hogan*, breathed new life into the intermediate scrutiny test.[96] The issue

84. *See id.* at 191. Later cases follow the precedent of using a heightened analysis when men challenge disadvantaging gender-based classifications. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 388 (1979) (using intermediate scrutiny to examine a statute which allowed unmarried mothers but not unmarried fathers to object to the adoption of their illegitimate children).

85. *Craig*, 429 U.S. at 219 (Rehnquist, J., dissenting). Justice Rehnquist objected to the majority allowing men challenging a gender-based statute to invoke a stringent standard of review. *Id.* at 217.

86. *See* Rostker v. Goldberg, 453 U.S. 57, 94 (1981) (Marshall, J., dissenting) (stating that although the Court purports to apply the *Craig* test, the analysis employed by the Court is significantly different); Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 489 n.2 (1981) (plurality opinion) (Brennan, J., dissenting) (objecting that the majority did not fairly apply the equal protection analysis that was carefully developed in *Craig*).

87. 450 U.S. 464 (1981).

88. *Michael M.*, 450 U.S. at 468. The issue in *Michael M.* was whether California's statutory rape law was unconstitutional because it made only men criminally liable for the act of sexual intercourse. *Id.* at 466. The plurality held that the statute was constitutional since it realistically reflected the fact that the sexes were not similarly situated in this context. *Id.* at 471-73.

89. *Id.* at 468 (citing *Craig*, 429 U.S. at 210 n* (Powell, J., concurring)).

90. *See id.* at 471-73 (discussing that males and females are not similarly situated because only females can get pregnant).

91. *See Rostker*, 453 U.S. at 94-95 (Marshall, J., dissenting) (noting the difference between the *Craig* test and the test used by the majority).

92. 453 U.S. 57 (1981).

93. *Rostker*, 453 U.S. at 78. At issue in *Rostker* was whether requiring men and not women to register for the draft was unconstitutional. *Id.* at 59. The Court held that men and women were not similarly situated for purposes of the draft or registration for the draft since women were excluded from combat. *Id.* at 78.

94. *Michael M.*, 450 U.S. at 489 (Brennan, J., dissenting) (explaining that the majority was being too deferential to the legislature in its review of the statutory rape law).

95. *See Rostker*, 453 U.S. at 112 (Marshall, J., dissenting) (noting that the Court was substituting "hollow shibboleths" about deference to the legislature for constitutional analysis).

96. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). The majority opinion was authored by Justice O'Connor in which Brennan, White, Marshall, and Stevens joined. *Id.* at 719. In *Michael M.*, Brennan, White, Marshall, and Stevens dissented. *Michael M.*, 450 U.S. at 465. In

in *Hogan* was whether a state statute, which excluded males from enrolling in a state-sponsored professional nursing school, violated the Equal Protection Clause.[97] The Court directed that a party seeking to uphold a gender-based classification must carry the burden of showing an "exceedingly persuasive justification" for the classification.[98] To do so it must at least be shown that the classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[99]

The Court instructed that the test is straightforward; if anything, the difficulty arises because the test must be applied free of fixed notions about the abilities and roles of men and women.[100] If the government's objective reflects archaic notions about the need to protect one gender, or stereotypes as to one gender's innate inferiority, the objective is unlawful.[101]

Once it is determined that the government's objective is legitimate and important, the direct link between the objective and the means chosen, *i.e.*, the gender-based classification, must be established.[102] This requirement forces the reviewing court to determine whether the classification was chosen after a reasoned analysis or whether it was simply the product of applying stereotypes.[103] Moreover, this prong ensures that

Rostker, White, Brennan, and Marshall dissented. *Rostker*, 453 U.S. at 57. Thus, the dissenting justices in *Michael M.*, and *Rostker* were able to pull the Court back towards the *Craig* decision in *Hogan*. In fact, the test from *Hogan* is arguably a stronger intermediate scrutiny standard than the one employed in *Craig*. Brake, *supra* note 75, at 956.

97. *Hogan*, 458 U.S. at 719. Joe Hogan applied for admission into Mississippi University for Women (MUW), and although he was qualified, he was denied admission solely because he was male. *Id.* at 720-21. Although the school would allow Hogan to audit the courses he was interested in, he could not enroll for credit. *Id.* at 721.

98. *Id.* at 724. The Court also noted that the policy was not exempted from scrutiny or subject to a reduced standard of review just because the policy discriminated against males instead of females. *Id.* at 723.

99. *Id.* at 724 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)) (internal quotation marks omitted).

100. *Id.* at 724-25.

101. *Id.* at 725. Examples of objectives that are not sufficiently important to support gender-based classifications include: reducing the court's workload, *Reed v. Reed*, 404 U.S. 71, 76 (1971), eliminating family controversy, *id.* at 77, and achieving administrative efficiency, *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). Examples of important governmental objectives include: reduction of the disparity in economic conditions between men and women, *Califano v. Webster*, 430 U.S. 313, 317 (1977), protection of public health and safety, *Craig v. Boren*, 429 U.S. 190, 199-200 (1976), and preventing illegitimate teenage pregnancy, *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 470 (1981).

102. *Hogan*, 458 U.S. at 725. A useful way of analyzing this prong of the test is to determine why the gender-based classification serves the state's purpose better than a gender-neutral classification. *See Michael M.*, 450 U.S. at 490 (Brennan, J., dissenting) (stating that government cannot meet its burden without showing that a gender-neutral statute would be a less effective means of achieving the governmental goal). If a gender-neutral classification serves the state's purpose as well, the direct link has not been established. *See* Orr v. Orr, 440 U.S. 268, 282 (1979) (stating that the state's compensatory purpose is served as well by a gender-neutral classification, thus the state cannot discriminate on the basis of sex).

103. *Hogan*, 458 U.S. at 726. A gender-based classification must comport with actual fact to be upheld. *Craig*, 429 U.S. at 199. Often, in addition to closely examining the factual basis of a

gender is not being used as a proxy for other, more accurate bases of classifications.[104] Thus, gender may not serve as a proxy for financial dependency,[105] drinking and driving,[106] financial need,[107] bias, or juror competence.[108]

In applying the test in *Hogan*, the Court held that neither prong of the test had been satisfied.[109] Mississippi University for Women's primary justification for its female-only admissions policy was educational affirmative action, to compensate for discrimination against women.[110] The Court agreed that a compensatory purpose could justify a discriminatory classification, but only if the members of the preferred gender had actually suffered from a disadvantage related to that classification.[111] It was obvious to the Court that women had never been disadvantaged in the nursing profession.[112] Thus, educational affirmative action could not have been the state's actual purpose.[113]

The Court went on to evaluate the state's means and held that the gender-based classification was not substantially or directly related to its proposed compensatory objective.[114] Since men were allowed to audit classes at Mississippi University for Women, the state could not carry its

gender-based classification, the proffered objective of the challenged classification is scrutinized by the Court to see if it is the actual purpose. *See Hogan*, 458 U.S. at 730 (stating that the compensatory purpose of the classification was not established as the actual purpose); *Craig*, 429 U.S. at 200 (stating that although public health and safety was an important objective, it was not apparent that it was the true purpose of the statutory scheme); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) (stating that the Court need not accept "assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation"); *see also* Califano v. Wescott, 443 U.S. 76, 86-88 (1979) (analyzing whether the proffered explanation that reducing the incentive for a father to desert his family was an important objective of the statutory scheme and finding no evidence that the gender distinction was designed to address the problem of desertion). *But see Michael M.*, 450 U.S. at 469-470 (stating that the search for a statute's actual purpose is elusive, thus the proffered purpose should be at least one of the legislature's actual purposes).

104. *Hogan*, 458 U.S. at 726 (citing *Craig*, 429 U.S. at 198).

105. *See Wiesenfeld*, 420 U.S. at 645 (stating that the generalization that men are more likely to be the primary breadwinner may be a good one but that it does not justify depriving social security benefits to those families where the woman was the primary supporter); *see also Frontiero*, 411 U.S. at 678-79 (striking down a statutory entitlement scheme that gave married servicemen an automatic increased quarters allowance and medical care for their wives but required married servicewomen to demonstrate that their husbands were actually dependent on them before receiving the benefits).

106. *Craig*, 429 U.S. at 201-02.

107. *Orr*, 440 U.S. at 281.

108. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129, 144 (1994).

109. *Hogan*, 458 U.S. at 730.

110. *Id.* at 727. Agreeing that a gender-based classification could be used for a benign and compensatory purpose, the Court stated that it still would require the purported benign purpose to be the actual purpose. *Id.* at 728.

111. *Id.*

112. *Id.* at 729. As the Court noted, when MUW began its operation 98% of all employed registered nurses were female; thus, instead of compensating women, this type of classification perpetuated the stereotype that nursing was woman's work. *Id.*

113. *Id.* at 730.

114. *Id.*

burden in proving that the gender-based classification was necessary to reach any of the school's educational goals.[115]

The last Supreme Court case defining the current status of gender-based classifications in equal protection analysis is *J.E.B. v. Alabama ex rel. T.B.*[116] *J.E.B.* established that the use of peremptory challenges on the basis of gender violates the Equal Protection Clause.[117] The intermediate scrutiny test in *J.E.B.* was perhaps the strictest formulation utilized by a majority of the Court.[118] The Court in *J.E.B.* firmly stated: "Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly, where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."[119]

The most notable aspect of the *J.E.B.* decision was the Court's consistent comparison of gender to race.[120] The Court's indiscriminate application of previous race discrimination rulings to gender without eroding the previous rulings suggested that something more than intermediate scrutiny was actually being applied.[121] This is especially intriguing since the Court observed, in a footnote, that the issue of whether gender-based classifications are inherently suspect and subject to strict scrutiny was open.[122] Whatever the implications of the *J.E.B.* language are, suffice it to say that the Court was adamant that gender-based classifications must satisfy an "exceedingly persuasive justification" to withstand constitutional scrutiny.[123]

115. *Id.* at 730-31. The evidence revealed that men auditing classes were allowed to fully participate in class, the presence of men did not affect the teaching style employed, and that the men did not dominate the class or otherwise affect the performance of the female students. *Id.* at 731.

116. 511 U.S. 127 (1994).

117. J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127, 146 (1994). *J.E.B.* extended to gender the decision of Batson v. Kentucky, 476 U.S. 79 (1986), which held that the use of peremptory challenges on the basis of race violated equal protection. *Id.* at 146.

118. Brake, *supra* note 75, at 957.

119. *J.E.B.*, 511 U.S. at 131.

120. *See id.* at 136-141. The Court noted that historically women and African-Americans had been excluded from juries. *Id.* at 136. The Court stated that the gross generalizations that would be deemed impermissible on the basis of race are not permissible when based on gender. *Id.* at 140. This is because discrimination based on gender and race causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded. *Id.* The Court concluded that striking potential jurors based upon their gender is "practically a brand upon them, affixed by law, an assertion of inferiority." *Id.* at 141 (quoting classic language from Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).

121. Brake, *supra* note 75, at 957-58. Brake explains that the Court's rejection of gender-based peremptory strikes as an "overbroad" proxy of an individual's views is very close to the rule under strict scrutiny that the use of a racial classification must be *necessary* to achieve the state's legitimate objective. *Id.*

122. *J.E.B.*, 511 U.S. at 137 n.6.

123. *Id.* at 136.

After a violation of the equal protection clause has been established, the issue of providing the individual with a remedy arises.[124] Indeed, the court has a duty to render a decree that will eliminate the discrimination of the past and prevent discrimination in the future.[125] It has been established that the remedy must closely fit the constitutional violation.[126] Therefore, the remedy must place those persons in the disfavored classification in the position they would have occupied in the absence of discrimination.[127]

III. LEGAL ANALYSIS

In *VMI III*, the United States Supreme Court addressed two issues.[128] First, whether Virginia's exclusion of women from VMI denied to those women, who had the requisite capability, the equal protection of the laws.[129] Second, if VMI's admission policy violated the Equal Protection Clause of the Fourteenth Amendment, what constituted an appropriate remedy.[130]

A. ESTABLISHING A VIOLATION OF THE EQUAL PROTECTION CLAUSE

In determining whether VMI's admissions policy violated the Equal Protection Clause, the Court examined whether Virginia had demonstrated an "exceedingly persuasive justification" for excluding women from VMI.[131] That question required Virginia to demonstrate that the challenged classification served "important governmental objectives and that the discriminatory means employed [were] substantially related to the achievement of those objectives."[132]

In defense of VMI's admissions policy, Virginia offered two justifications for excluding women from the school.[133] First, Virginia argued that single-gender education provided educational benefits and contributed to diversity in the Commonwealth's educational system.[134]

124. *See* Milliken v. Bradley, 433 U.S. 267, 280 (1977) (discussing the equitable principles involved in effectuating a desegregation decree).

125. Louisiana v. United States, 380 U.S. 145, 154 (1965).

126. *Milliken*, 433 U.S. at 280.

127. *Id.*

128. VMI III, 116 S. Ct. 2264, 2274 (1996).

129. *Id.* Virginia challenged the liability determination found by the court of appeals in *VMI I*. *Id.* at 2276.

130. *Id.* at 2274.

131. *Id.* The Court noted that this was the core instruction from recent precedent. *Id.* (citing *J.E.B.*, 511 U.S. at 136 and *Hogan*, 458 U.S. at 724).

132. *Id.* at 2275 (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)) (internal quotation marks omitted). The Court noted that the heightened review did not make sex a suspect class. *Id.* at 2276.

133. *Id.*

134. *Id.*

Second, Virginia argued that VMI's unique style would have to be modified, and might be lost, if VMI was forced to admit women.[135]

In reviewing whether Virginia had demonstrated an important governmental objective, the Court accepted as uncontested the facts that single-sex education provided educational benefits and that diversity among public educational institutions could serve the public good.[136] However, the Court closely examined whether VMI had actually been established or maintained in an effort to diversify the state's educational opportunities.[137] The Court found no recorded evidence which indicated that VMI had excluded women under an espoused policy of diversity.[138]

Once the Court concluded that diversity was not the actual purpose for VMI's admissions policy, the Court considered Virginia's argument that maintaining the adversative method was an important governmental objective.[139] Virginia argued that the educational benefits provided by the adversative method could not be made available to women without destroying VMI.[140] The Court disagreed.[141] Although the Court agreed

135. *Id.* at 2276, 2279.

136. *Id.* at 2276-77. The Court noted that it did not question a state's prerogative to even-handedly support diverse educational opportunities. *Id.* at 2276 n.7. The Court's only concern in this case was an educational opportunity that had been recognized as "unique" and available only at VMI. *Id.*

137. *Id.* at 2277. The Court noted that in equal protection cases the proffered justification must describe the actual state purpose, and not one that was invented post hoc in response to litigation. *Id.* at 2275, 2277.

138. *Id.* at 2279. The Court stressed that diversity could not have been the goal of establishing VMI since higher education was denied to women in 1839 as it was considered dangerous. *Id.* at 2277. At that time, hard study was thought to interfere with the development of women's reproductive systems. *Id.* n.9. Furthermore, it was not until 1884 that Virginia provided women with higher education. *Id.* at 2278. Yet by the mid-1970's all of Virginia's public female-only schools had become coeducational. *Id.* Virginia tried to characterize the absence of current single-sex public higher education schools for women as an anomaly. *Id.* However, the Court found that there had been deliberate action on the part of the state that accounted for the absence of public all-female higher education institutions. *Id.* Moreover, as of the *Hogan* decision in 1982, VMI had reexamined its admissions policy but this reexamination provided no persuasive evidence that the school had retained its admissions policy for the purpose of diversity. *Id.* at 2278-79.

139. *Id.* at 2290 (Rehnquist, C.J., concurring). Chief Justice Rehnquist stated that a state does not have a substantial interest in the adversative methodology unless it is pedagogically beneficial, which it was not since no evidence in the record established that the adversative method was more likely to produce the desired character traits than other methods. *Id.* at 2290-91.

140. *Id.* at 2279. The argument, as posed by Virginia, encompassed a catch-22: "Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would eliminate the very aspects of the program that distinguish VMI from . . . other institutions of higher education in Virginia." *Id.* (internal quotation marks omitted).

141. *See id.* at 2280-81 (explaining that Virginia's justification for excluding women from VMI, namely that alterations would have to be made, was not an "exceedingly persuasive justification"). The Court stated that the notion that admitting women into VMI would destroy the school had hardly been proven. *Id.* at 2280. These types of arguments, the Court explained, had been utilized in the past to deny women other rights and opportunities. *Id.* For example, the case of *In re Application of Martha Angle Dorsett*, it was explained that women were kept out of the legal profession because women couldn't handle "the responsibilities connected with the successful practice of law," and the court had a "desire to grade up the profession." *Id.* at 2280-81 (citing In re Application of Martha Angle Dorsett (Minn. C.P. Hennepin Cty., 1876) *in* SYLLABI, Oct. 21, 1876, at 5). Furthermore, the

that women's admission would require some accommodations,[142] the Court acknowledged what the lower courts had found: that the VMI methodology could be used to educate women, that some women would want to attend VMI, that some women were capable of all of the activities required of the cadets, and that some women could achieve the physical standards.[143] The Court issued a reminder that individual qualified persons could not be denied an opportunity offered by the state based on "fixed notions concerning the roles and abilities of males and females."[144]

As the Court understood the argument, Virginia had focused on the means rather than the end.[145] The goal or end was to create "citizen-soldiers," instead Virginia had treated single-sex education as the end.[146] Properly understood, the goal of creating "citizen-soldiers," VMI's mission, was not substantially advanced by the categorical exclusion of women from VMI.[147] In the Court's words, "Surely that goal is great enough to accommodate women."[148] Thus, the Court concluded that Virginia had not established a legitimate governmental objective for employing a gender-based classification for admission into VMI.[149]

Chief Justice Rehnquist agreed with the majority's conclusion in the case, but wrote separately to express different views on the analysis.[150]

same arguments were used to deny admission of women into the medical field. *Id.* at 2281. The Court found the arguments unpersuasive and instead found it instructive that the federal military academies had successfully accepted women. *Id.*

142. *Id.* at 2279. It was accepted by the court of appeals that three aspect's of VMI's method would require alterations—physical training, the absence of privacy, and the adversative approach. *Id.*

143. *Id.* at 2279. The question for the Court turned on whether Virginia could constitutionally deny to those women that had the will and the capacity the unique opportunity of a VMI education. *Id.* at 2280.

144. *Id.* (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)). The Court opined that the district court had made findings based on expert testimony that exemplified the typical thinking about men and women, such as: men thrive in an atmosphere of adversativeness but women need a cooperative environment. *Id.* at 2279.

145. *Id.* at 2281.

146. *Id.*

147. *Id.* at 2282. The Court pointed out that in 1968, VMI had successfully integrated black men into the school, and that this integration had little effect on VMI's method of accomplishing its mission. *Id.* n.16.

148. *Id.* at 2282.

149. *Id.* Since the Court held that the proposed justifications for VMI's male only admission policy were not important governmental objectives, the Court did not consider whether a substantial relationship, the second prong of the intermediate scrutiny test, had been proven. *See id.* (noting that Virginia had not established an "exceedingly persuasive justification" for its use of a gender-based classification).

150. *Id.* at 2287 (Rehnquist, C.J., concurring). Chief Justice Rehnquist also differed in the way the Court defined the constitutional violation. *Id.* at 2291. It was his view that the violation was not the "exclusion of women" from VMI, "but the maintenance of an all-men school without providing any—much less a comparable—institution for women." *Id.* Thus, Chief Justice Rehnquist was not as limited in his formulation of a remedy, he thought it sufficient if the state prove it was dedicated to single-gender education for males and females by providing two institutions that offered the same quality of education and were of the same overall calibre. *Id.*

First, the Chief Justice took issue with the majority's reliance on the phrase "exceedingly persuasive justification."[151] In his view, the Court had introduced an element of uncertainty to the test for gender-based classifications.[152] Chief Justice Rehnquist opined that the phrase was best confined to an observation on the difficulty of surviving the intermediate scrutiny test and not as a formulation of the test itself.[153]

Second, Chief Justice Rehnquist believed that it was improper to draw any negative inferences from VMI's history before the case of *Mississippi University for Women v. Hogan*.[154] His opinion was that VMI was not on notice that its male-only admissions policy violated equal protection until a case actually involving a single-sex admission policy in higher education had been decided.[155]

B. DEVELOPING A REMEDY FOR THE CONSTITUTIONAL VIOLATION

After concluding that VMI's admission policy did indeed violate the Equal Protection Clause, the Court turned to the issue of reviewing the remedy presented by Virginia.[156] Virginia's remedial plan maintained VMI as an all-male program and created a separate program, VWIL, for women.[157]

In developing a remedy for a constitutional violation, the Court instructed that the remedy chosen should eliminate the discriminatory effects of the past and prohibit discrimination in the future.[158] The court defined the constitutional violation as "the categorical exclusion of women from an extraordinary educational opportunity afforded men."[159] The Court stated that the creation of a separate program did not eliminate the discriminatory effects of the past.[160] Thus, it was incum-

151. *Id.* at 2288.

152. *Id.*

153. *Id.* The Chief Justice would have preferred to adhere to the traditional test of that demands a gender-based classification to "bear a close and substantial relationship to important governmental objectives." *Id.* (quoting Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979)). Obviously he was concerned that the lower courts potentially would use the "exceedingly persuasive justification" as a new standard of review. *See id.*

154. *See VMI III*, 116 S. Ct. at 2289-90.

155. *VMI III*, 116 S. Ct. at 2289. Chief Justice Rehnquist explained that in 1839 it was not unconstitutional to limit admissions to men since the interpretation of the Equal Protection Clause to require heightened scrutiny for gender discrimination was over a century away. *Id.* at 2288. Likewise, none of the cases leading up to *Hogan*, 458 U.S. 718 (1982), were sufficiently on point to put VMI on notice. *Id.* at 2288-89.

156. *Id.* at 2282.

157. *Id.*

158. *Id.* The Court stated that the constitutional violation present was the categorical exclusion of women from an extraordinary educational opportunity afforded only to men. *Id.* Thus, Virginia was obligated to create a remedy directly addressed to this violation. *Id.* But, as the Court noted, Virginia had left untouched VMI's admissions policy. *Id.* Instead, it proposed a separate program that was both different in kind and unequal in tangible and intangible benefits. *Id.*

159. *Id.*

160. *Id.* at 2283.

bent upon Virginia to prove that VWIL would bar like-discrimination in the future.[161] After comparing the VMI and VWIL programs, the Court recognized that substantial differences existed.[162] Due to these differences, the Court did not believe that VWIL could achieve the goal of eliminating discrimination in the future.[163]

In addition to not providing VWIL students with a military training, VWIL lacked a comparable student body, faculty, course offerings, and facilities.[164] Furthermore, VWIL would not provide its graduates with the history, prestige, and connections of a VMI degree.[165] In the end, the Court concluded that Virginia's remedy did not address the constitutional violation of denying to women a unique educational opportunity.[166] Thus, the Court stated that Virginia must genuinely provide those women that want and are fit for a VMI education with nothing less.[167]

161. *Id.* Virginia asserted that since VWIL shared VMI's mission to produce "citizen-soldiers" and VMI's goals of providing education, military training, mental and physical discipline, character and leadership development, it would bar like discrimination in the future. *Id.*

162. *Id.* at 2283-84. VWIL did not provide a rigorous military training, instead the program stressed a "cooperative method" which would reinforce self-esteem. *Id.* at 2283. VWIL student's exposure to the military education would be mostly ceremonial. *Id.* The VWIL house did not contain barracks or "the spartan living arrangements that were designed to foster an 'egalitarian ethic.'" *Id.* Moreover, the women would not be required to live together for the four-year program, eat meals together, or wear the uniform during the school day. *Id.* The leadership training for VWIL students would come mostly from seminars, speaker series, and externships; VWIL students would not be exposed to "physical rigor, mental stress, minute regulation of behavior, and indoctrination in desirable values" the hallmark of VMI's citizen-soldier program. *Id.*

163. *See id.* at 2284 (explaining that since this suit was brought on behalf of those women that wanted to attend, and were capable of being VMI cadets, a remedy had to be crafted to suit them).

164. *Id.* VWIL students would graduate with a Mary Baldwin College (MBC) degree. *Id.* MBC enrolls first-year students with an average combined SAT score about 100 points lower than first-year students at VMI. *Id.* MBC faculty has significantly fewer Ph.D.'s, and the faculty earns lower salaries than VMI. *Id.* The MBC curriculum is more limited than VMI's, as it lacks a math and science focus. *Id.* MBC athletic facilities includes two multi-purpose fields and one gymnasium, while VMI has an "NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer, and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium." *Id.* at 2284-85. Financially, MBC has a current endowment of $19 million and will gain an additional $35 million based on future commitments; VMI has a current endowment of $131 million and will gain $220 million. *Id.* at 2285.

165. *Id.* at 2285. The Court explained that the VMI alumni are exceptionally close to the school and actively recruit VMI graduates, whereas this network of alumni would not necessarily be as receptive to the untested VWIL graduates. *Id.*

166. *Id.* at 2287. In the last portion of the Court's opinion, the Fourth Circuit Court of Appeals was chastised for engaging in a deferential review of Virginia's remedial plan, instead of the exacting standard that the precedent required. *Id.* at 2286.

167. *Id.* at 2287. The sole dissenting voice was that of Justice Antonin Scalia. *Id.* at 2291 (Scalia, J., dissenting). Justice Scalia believed that the majority had not honestly applied the test applicable to gender-based classifications. *Id.* at 2293. Fairly applying the intermediate level of review would have led to the conclusion that VMI's admission policy did not violate equal protection according to Justice Scalia. *Id.* at 2296-97. He opined that Virginia had an important state interest in providing effective college education to it citizens, and that single-sex education was an approach substantially related to that interest. *Id.* at 2296.

IV. IMPACT

As with most United States Supreme Court cases, the full impact of *United States v. Virginia* is yet to be realized.[168] From a factual perspective, at least two substantial advances were made by *United States v. Virginia*: both VMI[169] and the Citadel,[170] an all-male military college in South Carolina, decided to admit women into their ranks.[171] From a legal perspective, at least two points are worthy of recognition. First, in *United States v. Virginia*, the United States Supreme Court stressed the importance of the individual in structuring a remedy for an equal protection violation.[172] Second, the Court left open the question of whether the standard for gender-based classifications was implicitly changed.[173]

A. THE EQUAL PROTECTION CLAUSE PROTECTS INDIVIDUALS

The Court's insistence that the VMI methodology could be used to educate women who were capable of the individual activities required of cadets demonstrated the Court's dedication to protecting individual rights within the Equal Protection Clause.[174] Even though the Court assumed that most women would not want a VMI education, it was

168. In fact, the unknown impact was what Justice Scalia feared. *Id.* at 2305. He was of the opinion that the Court's decision left single-sex public education functionally dead. *Id.* at 2306. However, the Court responded to this concern by stating that the Court did not question the state's prerogative evenhandedly to support diverse educational opportunities, the only question here was an educational analysis that was considered "unique." *Id.* at 2276 n.7.

169. Donald P. Baker, *By One Vote, VMI Decides to Go Coed*, WASH. POST, Sept. 22, 1996, at A1. The Board of Visitors of VMI could have opted to privatize the school instead of going co-educational. *Id.* However, by a vote of one, the Board of Visitors decided to go co-educational. *Id.* The cost of privatization was estimated between $200 million and $400 million, which included buying the campus and making up for state support. Ellen Nakashima & Spencer S. Hsu, *Allen to VMI: Admit Women Or Be a Pariah*, WASH. POST, Sept. 19, 1996, at B1.

170. Catherine S. Manegold, *Citadel Adopts Positive View of Its Female Cadets*, N.Y. TIMES, Aug. 24, 1996, at A1.

171. The admission of women into these two all male military colleges requires a significant change that was not directly addressed by the Court: the tradition of hazing along gender lines. As one commentator notes, part of the hazing ritual of both schools is to "castigate [new cadets] for being 'sissies,' 'pussies,' or 'fucking little girls.'" Lucinda M. Finley, *Sex-Blind, Separate But Equal, or Anti-Subordination? The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination*, 12 GA. L. REV. 1089, 1116 (1996). In fact, the author argues that had the courts taken into consideration the "pathologically gendered aspects of VMI and Citadel culture" the prospect of changing the culture would have been the best argument for admitting women. *Id.* at 1117. The legacy that "real men" are aggressive, assaultive, and demeaning to others, must necessarily change with women arriving. *Id.* at 1116-17. The change will be beneficial to all, since the male cadets are less likely to come out of VMI and the Citadel as "walking sexual harassment liability nightmares for prospective employers, or as potentially abusive intimate partners, or hated ogre bosses." *Id.* at 1117.

172. *See infra* notes 175-81 and accompanying text.

173. *See* Brake, *supra* note 75, at 958 (stating that the Court may be indicating a willingness to reconsider strict scrutiny for gender-based classifications after J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994)).

174. *See VMI III*, 116 S. Ct. at 2279 (discussing the lower court findings).

enough that some women would choose the adversative method to hold that VWIL did not cure the constitutional violation.[175]

The problem with VWIL was that it was created for women as a *group,* with the Task Force concentrating on what the average woman would prefer.[176] The effect of the Task Force's concentration on women as a group was that it overlooked that "estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[177] As the Court pointed out, "Virginia had never asserted that VMI's method of education suits *most men*."[178] Since VMI was not constructed for the average group of *men*, it was startling that Virginia constructed VWIL for the average group of *women.*[179]

The Court's focus on the individual was reminiscent of *Regents of the University of California v. Bakke.*[180] The lesson learned from *Bakke* was that the focus of equal protection analysis must be on protecting *individuals* against classifications based upon racial or ethnic considerations because those classifications impinge upon personal rights.[181] The lesson to be learned from *United States v. Virginia* is the importance of protecting individuals when crafting a remedy for a constitutional violation.[182] Since women's personal individual constitutional rights had been infringed, the remedy must go to the heart of the constitutional wrong.[183] In this case the heart of the wrong was denying women admission into a state sponsored school, thus the remedy, admission into VMI, was directed at that wrong.[184]

175. *See id.* at 2280 (explaining that education is not a "one size fits all" business).

176. *See id.* at 2283.

177. *Id.* at 2284 (emphasis original). It is worthy of recognition that former North Dakota Supreme Court Justice Beryl Levine's work was cited by the United States Supreme Court in *VMI III. See id.* at 2286 n.20. Justice Levine had explained that in the days of Plato the question of whether women should be afforded the equal opportunity to become guardians of Platonic society did not center on women's abilities; their ability to perform was not seriously questioned, instead the concern was over women performing the nude exercises that were prerequisites to becoming a guardian. Levine, *Closing Comments,* 6 LAW & INEQ. J. 41, 41 (1988) (presentation at Eighth Circuit Judicial Conference, Colorado Springs, Colo., July 17, 1987). The Court compared this with the more prevalent view that women just were not fit for occupations in society. *See VMI III,* 116 S. Ct. at 2286 n.20.

178. *VMI III,* 116 S. Ct. at 2284 (emphasis original).

179. As explained by Senior Circuit Judge Phillips in his dissent in the remedial phase of *VMI II,* the adoption of VWIL may not be that startling since "the primary, overriding purpose [was] not to create a new type of educational opportunity for women, . . . but [was] simply . . . to allow VMI to continue to exclude women in order to preserve its historic character and mission . . . ." VMI II, 44 F.3d 1229, 1247 (4th Cir. 1995) (remedial phase) (Phillips, J., dissenting).

180. 438 U.S. 265 (1978).

181. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978). The Court in *Bakke* made clear that the Constitution does not provide less protection to racial classifications that disadvantage the "white majority." *Id.* at 295-96.

182. *See VMI III,* 116 S. Ct. at 2282-83.

183. *See id.*

184. *See id.* at 2286-87. A separate option would be for VMI to abandon all state financial support for the school.

B. HAS THE STANDARD CHANGED FOR GENDER-BASED CLASSIFICATIONS?

It may be ironic to some and poetic to others that the opinion in *Virginia* was authored by Justice Ruth Bader Ginsburg.[185] Before becoming a judge and a justice, Ruth Bader Ginsburg had devoted her legal profession to gaining equality for women.[186] As director of the Women's Rights Project, Ginsburg endeavored to have the Court declare gender as a suspect classification.[187] Only when it was clear that the Court was unlikely to adopt strict scrutiny, did Ginsburg relent and adjust her objective toward an intermediate standard of review.[188]

Even though the Court has never stated that the strict scrutiny test applies to gender-based classifications, the language and analysis used in *United States v. Virginia*, seemed to betray the Court's assurance that gender is not a proscribed classification.[189] Furthermore, Chief Justice Rehnquist's concurrence hinted at this concern when he suggested that the Court's reliance on the phrase "exceedingly persuasive justification" introduced an element of uncertainty into the standard of review used in gender-based classifications.[190] Justice Scalia also voiced his concern that precedent had been drastically changed because the Court had effectively accepted strict scrutiny as the standard for reviewing gender-based classifications.[191] A traditional application of intermediate scrutiny does not require a classification to hold true in all instances.[192] However, the Court's focus on the individual over most women in developing a remedy implies that the Court was looking for more than a *substantial relationship* between means and end. Indeed, it appears that the Court was searching for a *necessary relationship* between the two. Considering the Court's announcement that strict scrutiny is not inevita-

185. *See id.* at 2269 (delivering the opinion of the Court).

186. *See* Markowitz, *supra* note 66, at 337. Ginsburg was the first director of the Women's Rights Project (WRP), a division of the ACLU. *Id.* at 337. Ginsburg, through the ACLU and the WRP, was involved in over half of the 63 gender-based cases decided by the Supreme Court between 1969 and 1980. *Id.*

187. *See id.* at 340-46 (outlining Ginsburg's involvement in the gender-based discrimination cases).

188. *Id.* at 346. Ginsburg's litigation strategy of building a body of precedent to lead the Court to adopt a heightened level of scrutiny for gender-based classifications was a success. *Id.* at 357. Although a few cases did set back Ginsburg's progression, overall she was successful in convincing the Court that the classification in question relied on disadvantaging stereotypes about women and thus was impermissible. *Id.* at 359.

189. *See VMI III*, 116 S. Ct. at 2275. In fact, the Court says in a footnote that "thus far" the most stringent scrutiny has been reserved for classifications based on race or national origin. *Id.* at 2275 n.6.

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

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

192. *See id.* at 2294-95 (Scalia, J., dissenting) (discussing that a true application of intermediate scrutiny does not require a least restrictive means analysis, but only a "substantial relation" between the state's interest and means).

bly fatal in fact,[193] and the concern of two members of the Court, one wonders if Justice Ginsburg is still persuading the Supreme Court to announce that gender is a suspect classification.

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193. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995).