United States v. Virginia: Skeptical Scrutiny and the Future of Gender Discrimination Law

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UNITED STATES v. VIRGINIA: SKEPTICAL SCRUTINY AND THE FUTURE OF GENDER DISCRIMINATION LAW

The legal war between the sexes dates back to the origin of our country and its common law legal system which promoted the idea of treating men and women differently. Over the last twenty-five years, United States Supreme Court decisions have continually challenged the traditional notion that women, based solely on their gender, were not entitled to the same rights and liberties as men. Through the extension of equal protection guarantees, the nation's highest court has struck down many of the legal bases for gender discrimination. This jurisprudential

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1 Under the common law, women were not treated equally. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §14.20, at 772 (5th ed. 1995) (tracing historical treatment of women and gender-based discrimination in United States); DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 19 (1989) ("The United States inherited a common-law tradition in which women were more separate than equal."). Originally, the Supreme Court interpreted the Fourteenth Amendment's Equal Protection Clause as applying to only racial classifications. See NOWAK & ROTUNDA, supra, §14.20, at 772. Therefore, legislatures continued to pass laws discriminating on the basis of gender, particularly in the areas of labor law and jury duty. Id.; see Goesaert v. Cleary, 335 U.S. 464, 467 (1948) (sustaining law prohibiting women from obtaining bartender's license unless she was wife or daughter of male owner); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1872) (upholding law which denied women right to practice law).

2 See, e.g., Reed v. Reed, 404 U.S. 71, 76 (1971) (addressing traditional view that men were more qualified to administer estates than women). Through Reed and its progeny, the Supreme Court began to break down notions that men were more capable than women to perform tasks and roles outside the home.

3 The Equal Protection Clause of the Fourteenth Amendment provides, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Supreme Court extends equal protection to members of both sexes by subjecting any gender based classifications to equal protection scrutiny. See Craig v. Boren, 429 U.S. 190, 210 (1976) (striking down state provision setting legal drinking age at 18 for women but 21 for men); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (Brennan, J., plurality opinion) (holding that United States military cannot discriminate between male and female service members by allowing wives, but not husbands, to automatically be considered dependents).

4 The Supreme Court first applied the equal protection analysis to gender discrimination in Reed. Reed, 404 U.S. at 76 (applying Equal Protection Clause to case involving Idaho statute which provided that as between two persons equally quali-
shift continually forces the courts and legislatures to closely examine the equal protection ramifications of policies in order to ensure that laws, by policy or practice, do not discriminate on the basis of gender.

fied to administer estates, men received preference over women; see also NOWAK & ROTUNDA, supra note 1, §14.20, at 773. The Reed decision sparked a five year period in which the Court struggled with the appropriate standard to be applied in situations of sex discrimination. Id. This period ended with the Court's decision in Craig v. Boren, 429 U.S. 190 (1976), and the adoption of an intermediate scrutiny standard. Id. The women's rights movement and its push for legal reform pressured courts to begin applying the equal protection analysis to gender discrimination cases. The slow movement of the court with regard to sex discrimination resulted in the proposal of the Equal Rights Amendment. See MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION 62-63 (1986). See generally RHODE, supra note 1, at 53-62 (discussing development of women's rights movement of 1960s). Rhode explained the different ideologies comprising the women's rights movement. One faction promoted a unified movement of both men and women to achieve gender equality while another believed that only through the alienation of men could women succeed. Id. at 59-60. Additionally, the author described the interests of different races of women. Id. at 60 (emphasis supplied). Race often divided women when determining a strategy to advance their movement. Id.

Initially, the Court considered gender discrimination cases under the rational relationship test of the Equal Protection Clause. If the law involved was rationally related to a legitimate governmental interest, it was valid. See Reed, 404 U.S. at 76 ("The question presented by this case, then, is whether a difference in the sex ... bears a rational relationship to a state objective that is sought to be advanced ... ."); HERMA HILL KAY & MARTHA S. WEST, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 29 (4th ed. 1996) (observing that courts applied rational relationship test in gender discrimination cases through 1971). This rational relationship test is the basic standard applied in most equal protection cases. Id. (noting that rational relationship test served as easier of two tests applied in equal protection cases); see also RHODE, supra note 1, at 86-87. In Reed, the Supreme Court rejected the argument that there was a "rational basis" in a sex based preference because it minimized expense and controversy in estate administration. Reed, 404 U.S. at 76.

Eventually, the Supreme Court created a new test to be applied in cases of gender discrimination—the intermediate scrutiny test. See Craig, 429 U.S. at 197 (holding that classifications based on gender must "serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand constitutional challenge); see also Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (holding that intermediate scrutiny test applies, regardless of which gender is target of discriminatory policy).

The intermediate scrutiny test applies not only in cases of gender discrimination, but also when the legitimacy of children or alienage are at issue. See Clark v. Jeter, 486 U.S. 456, 461 (1988) (stating intermediate scrutiny standard has, in fact, been used in illegitimacy issues); see also Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that laws denying public education to those not legally admitted into this country fail intermediate scrutiny test and violate Equal Protection Clause); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (using intermediate scrutiny standard in holding that government cannot discriminate against illegitimate children to punish parent's illicit relations).
Founded in 1839, the Virginia Military Institute ("VMI") was the only single-sex public college in Virginia and the last state-funded, all-male military institution in the country.\(^7\) The institution's original objective was to turn young men into citizen-soldiers.\(^8\) VMI's admissions policy reflected the all-male status of the armed forces at the time of the school's inception.\(^9\) Despite the integration of women into the armed forces and other public colleges in Virginia, the Board of Visitors, VMI's equivalent of a Board of Trustees, continued to retain an all-male Corp of Cadets.\(^10\) The desire of the Board of Visitors to retain its all-male

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\(^7\) United States v. Virginia, 116 S. Ct. 2264, 2269 (1996); see also Julie M Amstein, United States v. Virginia: The Case of Coeducation at Virginia Military Institute, 3 AM. U. J. GENDER & L. 69, 72 (1994) (examining VMI's all-male admissions policy, equal protection guarantees, and history of 'separate-but-equal' concept in order to analyze constitutional claims against Commonwealth of Virginia).


\(^9\) Id.; see Transcript of Oral Arguments at *4, United States v. Virginia, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107), available in 1996 WL 16020 ("While restricting VMI to men might have been inevitable, indeed required at the time VMI was initially established because the military at that time was all male, as VMI's mission has broadened that's [sic] obviously no longer true."). Id.

admissions policy led to a head-on clash between the Supreme Court's interpretation of the Equal Protection Clause and a state's power to fund single-sex colleges. The battle ended with the Supreme Court's ruling in *United States v. Virginia*¹¹ that the Board of Visitors' all-male admissions policy violated the Equal Protection Clause¹² and that the proposed remedy—the Virginia Women's Leadership Institute ("VWIL") at Mary Baldwin College, did not remedy the constitutional violation.¹³ On September 21, 1996, the Board of Visitors of VMI voted to admit women cadets into the class of 2001, upending 157 years of an all-male admissions policy.¹⁴

Responding to a complaint filed by a female high school student interested in attending VMI, the United States brought suit against the Commonwealth of Virginia, VMI, the school's president, its superintendent, and the Board of Visitors, seeking to force the end of VMI's all-male admissions policy.¹⁵ The Supreme

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¹² Id.

¹³ Id. at 2269 ("Valuable as VWIL may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade."). "A remedial decree must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of [discrimination]." Id. at 2282 (brackets in original).

¹⁴ The Supreme Court remanded the case to the U.S. District Court to ensure compliance with the Court's decision. *United States v. Virginia*, 116 S. Ct. at 2287. By a 9 to 8 vote, VMI's governing body voted to admit women. Lorrie Grant, *Virginia Military Institute Votes to Admit Women*, ROCKY MTN. NEWS, Sept. 22, 1996, at 64A.

¹⁵ Initially, the suit named Governor Lawrence Douglas Wilder, the Commonwealth of Virginia, Virginia Military Institute, its president, superintendent, and members of the Board of Visitors, Virginia's State Council of Higher Education, and its members as defendants. *United States v. Virginia* (VMI I), 766 F. Supp. 1407,
Court decided two critical issues: whether VMI’s admission policy violated the Equal Protection Clause, and whether the creation of the VWIL remedied the alleged violation. In a 7-1 decision, the Supreme Court affirmed the United States Court of Appeals for the Fourth Circuit’s decision holding that VMI’s admissions policy violated equal protection guarantees, but reversed the lower court’s decision, finding that the VWIL program remedied the constitutional violation.

1408 (W.D. Va. 1991), vacated, 976 F. 2d 890 (4th Cir. 1992), aff’d, 116 S. Ct. 2264 (1996). The State Council of Higher Education and its members were dismissed from the suit and Former Governor Wilder and the Commonwealth were granted leave of any duty to appear on the condition that the Commonwealth would be bound by the decision of the Court. Id. The VMI Foundation, the VMI Alumni Association and other private organizations intervened as defendants in the case over the objection of the United States. Id.

United States v. Virginia, 116 S. Ct. 2264, 2287 (1996). When Virginia petitioned for certiorari in VMI I in May, 1993, the Supreme Court refused to hear the case, because it had been remanded to the District Court by the United States Court of Appeals for the Fourth Circuit and the Fourth Circuit had not yet decided the case. United States v. Virginia, 508 U.S. 946, 946 (1993). When the Court granted the United States petition for certiorari in VMI II, Virginia submitted a cross-petition maintaining that VMI’s admissions policy does not violate equal protection guarantees. United States v. Virginia, 116 S. Ct. at 2274.

Justice Ginsburg wrote for the majority, which included Justices Stevens, O’Connor, Kennedy, Souter, and Breyer. Chief Justice Rehnquist wrote in concurrence, while Justice Scalia dissented. Justice Thomas recused himself from the case because his son is a cadet at VMI. See id. at 2269; Robert Marquand, Male-Only Military School Must Admit Female Cadets, CHRISTIAN SCI. MONITOR, June 27, 1996, at 1 (discussing Supreme Court’s decision in United States v. Virginia).

United States v. Virginia, 116 S. Ct. at 2287. At trial, the United States District Court for the Western District of Virginia focused on the question of whether VMI’s all-male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. United States v. Virginia (VMI I), 766 F. Supp. 1407, 1408 (W.D. Va. 1991), vacated, 976 F.2d 890 (4th Cir. 1992), aff’d, 116 S. Ct. 2264 (1996). District Judge Jackson Kiser found VMI’s admissions policy to be substantially related to the state’s legitimate interest in diversity of educational opportunities and held the policy to be within constitutional parameters. Id. at 1413 (“I find that both VMI’s single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia education system, and that excluding women is substantially related to this mission. VMI met its burden under Hogan ... ”). Id. The Fourth Circuit reversed, holding that VMI failed to show “how the maintenance of one single-gender institution gives effect to, or establishes the existence of, the government objective advanced to support VMI’s admissions policy, a desire for educational diversity.” United States v. Virginia (VMI I), 976 F.2d 890, 899 (4th Cir. 1992), aff’d, 116 S. Ct. 2284 (1996).


While the Fourth Circuit found that the admissions policy of VMI violated the
Justice Ginsburg, writing for the Court, stated that VMI failed to show an "exceedingly pervasive justification" for excluding women from the Corp of Cadets, thus, the all-male admissions policy violated the Constitution's Equal Protection Clause.20

Equal Protection Clause, the court suggested that VMI could retain their tradition of a male-only Corp of Cadets if the Commonwealth offered a comparable military program for women. United States v. Virginia (VMI I), 976 F.2d at 900 ("[T]he Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution."). aff'd, 116 S. Ct. 2264 (1996). The Commonwealth responded by establishing the first state-run, all women's military program, the Virginia Women's Leadership Institute on the campus of Mary Baldwin College. See Soderberg, supra note 8, at 441-45 (comparing qualities of VMI with its female counterpart VWIL); see also Juliette Kayyem, The Search for Citizen-Soldiers: Female Cadets and the Campaign Against the Virginia Military Institute, 30 HARV. C.R.-C.L. L. REV. 247, 259-61 (1995) (examining court decisions on VWIL as remedy of constitutional violations). The United States challenged the validity of the VWIL as a proper remedy for VMI's constitutional violation, taking the position that the only way a parallel program could remedy the equal protection violations caused by VMI's admissions policy was only if the program was, in all respects, a mirror image of VMI. United States v. Virginia (VMI II), 852 F. Supp. 471, 473 (W.D. Va. 1994) (holding that proposed VWIL program served as adequate remedy to constitutional violations in VMI I), aff'd, 44 F.3d 1229 (4th Cir. 1995), rev'd, 116 S. Ct. 2264 (1996); see Amstein, supra note 7, at 70-71 (reciting history of VMI litigation before Judge Kiser's decision on VWIL program).

Differences between VMI and VWIL cited by the United States included: differences in academic degrees offered, differences in the qualification of faculty, differences in residential life requirements, and differences in the level of military training. See United States v. Virginia, 116 S. Ct. 2264, 2284 (1996); see also Kayyem, supra, at 260-61 (discussing view of district court concerning differences in academic offerings, residential life and military training pointed out by United States).

District Judge Kiser heard the case on remand and ruled in favor of the Commonwealth and VMI, finding that as long as the goal of producing "citizen-soldiers" was the same for both institutions, the means of achieving the goal did not have to be identical. Concluding, Judge Kiser wrote, "[i]f VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination." United States v. Virginia (VMI II), 852 F. Supp. at 484.

The United States appealed again to the Fourth Circuit, but this time the Court of Appeals upheld the lower court's ruling, based in part on a special intermediate scrutiny test:

the alternatives left available to each gender by a classification based on a homogeneity of gender need not be the same, but they must be substantively comparable so that ... we cannot conclude that the value of the benefits provided ... to one gender tends, by comparison to the benefits provided to the other, to lessen the dignity, respect, or societal regard of the other gender.


20 Justice Ginsburg flatly rejected both of the Justifications offered in defense of VMI's exclusion of women: 1) single-sex education contributes to diversity in educa-
According to Justice Ginsburg, in order to meet the skeptical scrutiny standard and its "exceedingly pervasive justification" burden, a state must show "at least that the [gender based] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" In examining the validity of the VWIL as an appropriate remedy, Justice Ginsburg stated that "the Commonwealth has created a VWIL program fairly appraised as a 'pale shadow' of VMI in terms of the range of curricular choices and faculty station; and 2) VMI's unique adversarial training would have to be modified if women were admitted to the Corp of Cadets. See United States v. Virginia, 116 S. Ct. 2264, 2282-84 (1996) ("Virginia, in sum, 'has fallen far short of establishing the "'exceedingly persuasive justification" ... that must be the solid base for any gender-defined classification.' "); Brief for Cross-Petitioners at 24-27, United States v. Virginia, 116 S. Ct. at 2264, (Nos. 94-1941, 94-2107), available in 1995 WL 681099. But see William A. DeVan, Note, Toward a New Standard in Gender Discrimination: The Case of Virginia Military Institute, 33 WM. & MARY L. REV. 489, 519 (1992) (questioning "whether men and women are similarly situated with respect to admissions to a military college").

21 See United States v. Virginia, 116 S. Ct. 2264, 2274 (1996) ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."); see also Coyle, supra note 19, at A12 (arguing that Justice Ginsburg's skeptical scrutiny standard represents heightened standard of review); Samborn, supra note 19 (discussing mixed reaction and debate over relative strength of skeptical scrutiny test).

22 United States v. Virginia, 116 S. Ct. at 2275. The court makes it clear that the burden of justification rests entirely with the state and that justifications cannot be based in whole or part "on overbroad generalizations about the different talents, capacities, or preferences of males and females." Id. The Court takes much of the language of the "skeptical scrutiny" test from earlier gender discrimination cases, many of which Justice Ginsburg argued before the Court as an attorney. The "exceedingly persuasive justification" language originated in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979). Language placing the burden of justification entirely on the state can also be found in Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982), which struck down a public nursing school's all-female admissions policy as violating the Equal Protection Clause of the Fourteenth Amendment. The Court stated that "the State has fallen far short of establishing the 'exceedingly persuasive justification' needed to sustain the gender-based classification." Id. at 731. Furthermore, the intermediate scrutiny language ("important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives") is derived from language in Craig v. Boren, 429 U.S. 190, 197 (1976) (establishing and applying intermediate scrutiny test in striking down state law setting legal drinking age at 18 for women and 21 for men). See also Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980) (applying intermediate scrutiny and citing to Craig v. Boren). But see Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (limiting case holding to MUW's policy of denying males admittance to School of Nursing as violative of Equal Protection Clause).
ure, funding, prestige, alumni support and influence." The Court, applying the skeptical scrutiny test, found that the only viable solutions to remedy the constitutional violation were either the admission of women into the Corp of Cadets or the conversion of VMI into a private institution.

Writing in concurrence, Chief Justice Rehnquist stated that the holding was justified because the Commonwealth and VMI should have taken actions much sooner to conform with the equal protection guarantees laid out in 1982 in *Mississippi University for Women v. Hogan.* He did not, however, favor the creation of a new test in the area of sex discrimination. Chief Justice Rehnquist argued that the "skeptical scrutiny test" is even more complex and confusing than the original intermediate scrutiny test.

Justice Scalia served as the sole dissent in support of the

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23 United States v. Virginia, 116 S. Ct. 2264, 2285 (1996). Additionally, the Court noted that the Fourth Circuit "clearly erred" by granting judicial deference and holding the VWIL proposal to a standard lower than the heightened scrutiny standard applicable in all cases of gender discrimination. Id. at 2286. The Fourth Circuit held that deferential analysis was appropriate because the case centered not around discrimination against men or women specifically, but rather on "a classification based on homogeneity of gender." United States v. Virginia (VMI II), 44 F.3d 1229, 1237 (4th Cir. 1995), rev'd, 116 S. Ct. 2264 (1996).

24 Justice Ginsburg, in her opinion for the Court, favored the admission of women to VMI as the best solution to the crisis, but she did not preclude the alternative of transforming VMI into a private school. See United States v. Virginia, 116 S. Ct. 2264, 2287 (1996) ("There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the 'more perfect Union.'").

25 Id. at 2289. According to Chief Justice Rehnquist, the Court's decision in *Mississippi University for Women v. Hogan* should have placed VMI on notice that its categorical exclusion of women might violate the Equal Protection Clause. Id. at 2289. Had VMI moved sooner to remedy the constitutional violations, Chief Justice Rehnquist might have decided differently. Id. at 2290.


28 See United States v. Virginia, 116 S. Ct. at 2288 ("While terms like 'important governmental objective' and 'substantially related' are hardly models of precision, they have more content and specificity than does the phrase 'exceedingly persuasive justification.'"); see also Samborn, supra note 19 (analyzing positions taken by Justices Ginsburg, Chief Justice Rehnquist, and Justice Scalia).
“history of our people” and the tradition of single-sex education.29
Justice Scalia argued that despite the language borrowed from
the Court’s prior decisions, Justice Ginsburg redefined the in-
termediate scrutiny standard so as to make it indistinguishable
from the strict scrutiny test.30 Justice Scalia further argued that
the majority created the skeptical scrutiny test because VMI’s
admissions policy would not have violated the intermediate
scrutiny standard as applied in prior decisions.31 Justice Scalia
contended that the Court, in the process of ensuring that women
could attend VMI, has made it nearly impossible for government
to sponsor single-sex education on any level.32

This Comment examines whether Justice Ginsburg’s opinion
for the Court established a new, stricter test for gender discrimi-
nation.33 It is submitted that Justice Ginsburg did not adopt the
strict scrutiny standard, but rather attempted to strengthen the
intermediate scrutiny test and move the Court closer toward the
eventual acceptance of strict scrutiny in gender discrimination.
Part I examines past gender discrimination decisions in search

Justice Scalia argued that the decision handed down by the Court serves counter-
majoritarian principles and fundamentally changes our Constitution by interpreting
that it takes a side in the debate over single-sex education. Id. at 2291-92. Citing
recent developments in admissions policies of state-funded military colleges, such as
The Citadel in South Carolina, and federal military service academies, Justice
Scalia argued that the legislature, and not the courts, was the only proper forum to
change the traditional admissions policy of “an institution that has served the peo-
ple of the Commonwealth of Virginia with pride and distinction for over a century
and a half.” Id. at 2291-93.
30 See id. at 2294 (“[T]he United States urged us to hold in this case that strict
scrutiny is the correct constitutional standard for evaluating classifications that
deny opportunities ... based on ... sex .... The Court, while making no reference to
the Government’s argument, effectively accepts it.”).

Thus, Justice Scalia maintained that the creation of a new test was the only
way for the Court to justify its decision. Id. at 2294-95 (Scalia, J. dissenting).

32 See United States v. Virginia, 116 S. Ct. 2264, 2306 (Scalia, J., dissenting)
(“[R]egardless of whether the Court’s rationale leaves some small amount of room
for lawyers to argue, it ensures that single-sex public education is functionally
dead.”); see also Stuart Taylor, Jr., Closing Argument: A Threat to Single-Sex Edu-
cation, TEX. L. W., Jan. 15, 1996, at 27, available in LEXIS, News Library,
Current File (arguing U.S. position in VMI case was part of larger scheme to end
single-sex public education outside of affirmative action framework).

33 While there is much concern in the legal community about the impact of
United States v. Virginia on single-sex education in America, this comment focuses
upon gender discrimination law and does not address the separate issue of single-
sex education cases. Cases relating to single-sex education, therefore, will only be
discussed as they relate to the development of gender discrimination law and the
creation of the skeptical scrutiny standard.
for a sound basis for a new skeptical scrutiny standard. Part II
analyzes the flaws in Justice Scalia's argument that skeptical
scrutiny is the equivalent of strict scrutiny. Finally, Part III
looks to the impact of *United States v. Virginia* on future gender
discrimination cases.

I. FROM RATIONAL RELATIONSHIP TO SKEPTICAL SCRUTINY

A. Extending Equal Protection Guarantees to Gender
Classifications

When the Fourteenth Amendment to the United States Con-
stitution was ratified in 1868, it was not expected that the appli-
cation of the Equal Protection Clause would extend beyond the
bounds of racial discrimination. Discrimination based on sex
was not considered within the perview of equal protection scrut-
iny until 1971 when the Supreme Court, in *Reed v. Reed*, first
applied equal protection scrutiny to gender discrimination. The
Court analyzed equal protection guarantees in light of the strict
scrutiny and the less stringent rational relationship tests. Orig-
inally, it chose to apply the rational relationship test to
classifications based on sex.

The Supreme Court temporarily changed course during the
following term when, in the plurality opinion of *Frontiero v.*
Richardson, Justice Brennan applied the strict scrutiny standard to a case where the husbands of service members were denied dependency benefits given to wives. While Justice Brennan was never able to persuade a majority of the Court to hold that gender was a suspect class, the Supreme Court eventually created the intermediate scrutiny standard for cases involving gender discrimination.

B. The Supreme Court's Creation of Intermediate Scrutiny Through Prior Decisions

In Craig v. Boren, the Court turned to the language of prior decisions in support of its creation of the intermediate standard of review. Justice Rehnquist, writing for the dissent, took issue with the lack of precedent to support the "important government interest" standard, and argued that the less demanding rational relationship test was appropriate in gender discrimination cases.

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38 411 U.S. 677 (1973) (holding that benefits granted to spouses of soldiers must be given without regard to gender).
39 See id. at 690. The decision to extend strict scrutiny caused division among Justices of the Court and changed Justice Brennan's opinion from a majority decision to a plurality opinion. Justice Powell, joined with Justice Blackmun and Chief Justice Burger in a concurring opinion, stated that the application of strict scrutiny would be premature in light of the debate concerning the impending adoption of the Equal Rights Amendment. These Justices did not wish to preempt a national political decision with their own judicial pronouncements. Instead, the Justices believed that the law was unconstitutional under both the rational relation test and Reed. See BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 301-03 (1979) (detailing process by which Justices ultimately decided Frontiero and Brennan's decision to apply strict scrutiny); Amstein, supra note 7, at 82 (characterizing Frontiero as brief interlude between Court's application of rational relationship test and creation of intermediate scrutiny standard). Justice Brennan's decision in Frontiero may be considered the "high-water mark of gender discrimination Equal Protection Clause analysis." DeVan, supra note 20, at 504. Also of note, Justice Ginsburg, before joining the Court, argued the case before the Court urging a reversal of the law on behalf of the American Civil Liberties Union. Frontiero, 411 U.S. at 678 (listing parties involved in suit).
40 See Craig v. Boren, 429 U.S. 190, 197 (1976) (applying new intermediate scrutiny standards in striking down law establishing different drinking ages for men and women). Justice Ginsburg, then representing the American Civil Liberties Union, filed an amicus brief urging reversal of the District Court's decision upholding the statute. Id. at 191 (listing all parties before Court). See also DeVan, supra note 19, at 505-06 (examining Court's decision in Craig v. Boren and establishment of intermediate scrutiny test).
41 429 U.S. 190 (1976).
42 Id. at 197-98 (creating intermediate scrutiny test without citing to precedent, but stating that "previous cases establish" grounds for new intermediate scrutiny standard).
Despite Justice Rehnquist's misgivings about intermediate scrutiny, the Court later applied the test to eliminate double standards in applying for workers' compensation benefits, granting survivors' benefits, and assigning alimony payments. The intermediate scrutiny test remained in effect for twenty years; its reign ended with the Supreme Court's decision in *United States v. Virginia*.

C. Strengthening Intermediate Scrutiny Through the Creation of Skeptical Scrutiny

After re-examining several cases concerning equal protection analysis, Justice Ginsburg chose to redefine the meaning of intermediate scrutiny and, in the process, replace it with a tougher test. Justice Ginsburg did not cite specific cases to support the change from the intermediate scrutiny test to the skeptical scrutiny language; however, Justice Ginsburg, using tactics similar to those used by the Court in *Craig v. Boren*, adopted language to those used by the Court in *Craig v. Boren*, adopted language from landmark decisions in gender equity law.

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43 Id. at 218-20 (Rehnquist, J., dissenting) (noting lack of authority cited by Court to support new intermediate scrutiny standard). Justice Rehnquist stated, "[t]he Court's conclusion that a law which treats males less favorably than females 'must serve important governmental objectives and must be substantially related to achievement of those objectives' apparently comes out of thin air." *Id.* at 220 (Rehnquist, J., dissenting).
48 Justice Ginsburg began by noting that *Reed v. Reed*, 404 U.S. 71 (1971), marked the first time that the Court ruled in favor of a woman complaining of equal protection violations. Justice Ginsburg then went on to cite *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), *Stanton v. Stanton*, 421 U.S. 7 (1975), and additional case law to establish the premise that post-*Reed* cases have demonstrated the Court's desire to "carefully inspect [...] official action that closes a door or denies opportunity to women (or to men)." *United States v. Virginia*, *116 S. Ct. 2264, 2275 (1996).*
49 *See United States v. Virginia*, *116 S. Ct. 2264, 2274-76 (1996)* (reviewing gender discrimination law creating skeptical scrutiny standard). Justice Ginsburg stated that "the heightened review standard our precedent establishes does not make sex a proscribed classification." *Id.* at 2276. The Justice, however, then noted "such classifications may not be used as they once were ... to create or perpetuate the legal, social, and economic inferiority of women." *Id.* (citations omitted).
50 Neither Justice Ginsburg in the VMI case nor Justice Brennan in *Craig v.*
Justice Ginsburg's move to skeptical scrutiny was not sudden or unexpected.\textsuperscript{51} The Court noted in \textit{J.E.B. v. Alabama}\textsuperscript{52} that the issue of whether classifications based on gender were inherently suspect remained an open question.\textsuperscript{53} In \textit{Mississippi University for Women v. Hogan},\textsuperscript{54} the Supreme Court discussed the "exceedingly persuasive justification" burden as one which is only met by proving the intermediate scrutiny standard.\textsuperscript{55}

It was this exceedingly persuasive justification language which is the heart of Justice Ginsburg's skeptical scrutiny test. Instead of focusing exclusively on the "important governmental interest,"\textsuperscript{56} skeptical scrutiny focuses primarily on the exceed-
ingly persuasive justification burden and uses intermediate scrutiny language as a starting point in proving the classification's justification. Skeptical scrutiny then strengthens the old standard by placing the entire burden of this "demanding" justification on the state. As Justice Ginsburg pointed out, courts must apply this standard not only when evaluating the law or policy facing scrutiny, but also to the proposed remedy.

While United States v. Virginia may have signaled the end of the intermediate scrutiny doctrine, the Court continued to ban the use of stereotypes in proving constitutionality. The Court first gave notice that parties could not rely on stereotypes in sex discrimination cases in Stanton v. Stanton, when the Court struck down a law based on stereotypes of the role of women in the home. The Court strengthened and extended its position in

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58 While it appears that placing the entire burden on the state was not a revolutionary concept in equal protection cases, the decision by the Fourth Circuit created a new, lower-level test to be applied with respect to the remedial portion of a gender-based Equal Protection Clause case. See United States v. Virginia (VMI II), 44 F.3d 1229, 1237 (4th Cir. 1995) (creating "special intermediate scrutiny" standard which was applied analyzing validity of VWIL remedy), rev'd, 116 S. Ct. 2264 (1996). The creation of the "special intermediate scrutiny" standard by the lower court forced the Supreme Court to clarify which level of scrutiny must be imposed during the remedial stage of equal protection litigation. United States v. Virginia, 116 S. Ct. 2264, 2286 (1996). Ginsburg asserted that the Fourth Circuit "plainly erred in exposing Virginia's VWIL plan to a deferential analysis," which was based upon "a brand of review inconsistent with the more exacting standard our ... precedent requires." Id.

59 See United States v. Virginia, 116 S. Ct. at 2286 (finding Fourth Circuit erred in granting any type of deference to VMI and Commonwealth of Virginia when evaluating validity of VWIL as constitutional remedy).

60 See Stanton v. Stanton, 421 U.S. 7, 10 (1975) (holding that statute which provided that females reach age of majority at 18 and that males reach age of majority at 21 could not survive equal protection analysis); see also J.E.B. v. Alabama, 114 S. Ct. 1419, 1422 (1994) (noting that classifications cannot be based on archaic and overbroad generalizations about gender or outdated misconceptions concerning role of women in home or work); Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985) (remarking that statutes often reflect misconceptions concerning women's roles); Craig v. Boren, 429 U.S. 190, 198 (1976) (noting that "old notions" of role typing were not valid governmental classifications).
this area when in *Mississippi University for Women* it stated, "the test ... must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." Justice Ginsburg, again reemphasized the Court's stance by holding that the justification must be genuine, rather than created in response to litigation, and cannot "rely on overbroad generalizations" about the differences between men and women. The end product is a test which is grounded in existing precedent, but which strengthens the level of equal protection guarantees for women, and further emphasizes the ban on the use of stereotypes to defend sexist classifications.

II. DISSenting FROM JUSTICE SCALIA'S DISSent

A. Why Not Strict Scrutiny Now?

Justice Scalia focused the weight of his dissent on arguing against what he perceived to be Justice Ginsburg's adoption of the strict scrutiny test. One of the facts relied upon by Justice Scalia was the posture taken by the United States in its brief supporting the extension of strict scrutiny review to cases involving sex discrimination. Specifically, the United States argued

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61 *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). Again, if one views the *Mississippi University for Women* decision as the mid-point in the intermediate scrutiny doctrine, it is important to note that Justice O'Connor treated the use of stereotypes to prove the validity of gender-based classifications as just another requirement on the intermediate scrutiny list. *Id.*


63 *See United States v. Virginia*, 116 S. Ct. at 2293-96 (Scalia, J., dissenting) (analyzing flaws in Court's decision and reasoning, with emphasis on creation of skeptical scrutiny test).


that “[s]pecial judicial vigilance [was] required to prevent sex from serving as a convenient, but harmful and constraining, proxy for actual abilities and needs.”

It is clear, however, that the United States did not rely solely on their strict scrutiny stance when arguing before the Court. In fact, the United States made it clear that while their ultimate goal was the adoption of the strict scrutiny standard, their case sub judice was equally persuasive under the existing intermediate scrutiny framework.

Even if the United States had insisted on strict scrutiny, it was clear from the transcript of the oral argument that a majority of the Court would have been unwilling to take that step in the VMI case. Legal analysts and “Supreme Court watchers” observed a reluctance among some members of the Court to accept the government’s position and adopt the strict scrutiny standard. Justice Ginsburg made it clear in her opinion for the Court that strict scrutiny was not adopted in the VMI case. It is clear to legal analysts that Justice Ginsburg could not risk making strict scrutiny the issue because such a drastic step would not have received majority support, thus, any move to accept strict scrutiny would have jeopardized the outcome of the VMI case itself.

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66 See id. at *36 ("[W]e show in the balance of this brief, that VMI's policy of excluding women cannot stand under the 'intermediate' scrutiny applied by this Court in its prior cases."); Transcript of Oral Argument, supra note 9, at *12 (United States responding “yes” to question of whether case could be decided on basis of intermediate scrutiny); Brief for the Cross-Respondent at *16-17, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-2107), available in 1995 WL 745010.

67 See Transcript of Oral Argument, supra note 9, at *12-14 (questioning of Paul Bender, Deputy Solicitor General for the United States, by Justices concerning appropriate standard for gender discrimination cases and evincing hostile stance toward United States' suggestion that strict scrutiny is potentially appropriate standard).

68 See Coyle, supra note 19, at A12 ("During oral argument ..., it seemed clear the justices were not prepared to replace the intermediate standard with strict scrutiny ... .

69 "The Court has thus far reserved most stringent judicial scrutiny for classification based on race or national origin .... " United States v. Virginia, 116 S. Ct. 2264, 2275-76 n.6 (1996).

70 See supra note 67; see also Kathleen M. Sullivan, Decisions Expand Equal Protection Rights, NAT’L L.J., July 29, 1996, at C7 (questioning tactical decision by federal government to argue for strict scrutiny in VMI case).
B. Skeptical Scrutiny is not Strict Scrutiny

Justice Scalia focuses most of his attention on opposing Justice Ginsburg's de facto adoption of the strict scrutiny test for sex discrimination cases. It appears that Justice Scalia's worries are, at least for the moment, misplaced. Although skeptical scrutiny does significantly strengthen the ability of women's groups to challenge state actions as violative of equal protection guarantees, this new test does not equal the strict scrutiny review employed in cases of racial discrimination. The skeptical scrutiny test neither purports to reach the level of scrutiny applied by the Court in Frontiero v. Richardson, nor borrows any of the language used repeatedly by the Court when applying strict scrutiny.

The easiest way to uncover the differences between strict scrutiny and skeptical scrutiny is through an examination of the language of both tests. Skeptical scrutiny, like strict scrutiny, places a heavy burden on the state to prove constitutionality instead of forcing others to prove a constitutional violation. Outside of the burden placed by these two standards, however, the tests are noticeably different. The acceptance of strict scrutiny would imply that all Justices signing onto a Court's opinion had accepted gender as an inherently suspect classification. In this regard, it is important to remember that the Court has never

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71 See United States v. Virginia, 116 S. Ct. at 2294 (Scalia, J., dissenting) (arguing that Court essentially accepted United States' argument).
72 See, e.g., Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (explaining strict scrutiny test and its application in racial discrimination cases); see also infra note 76 (noting Justice Ginsburg's concession that skeptical scrutiny standard applied in present case is not same standard as in racial discrimination cases).
73 Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (Brennan, J., plurality opinion) (invoking strict scrutiny analysis to female plaintiff's equal protection claim); cf. infra note 81 (noting that Court never followed and ultimately abandoned Frontiero).
74 See Frontiero, 411 U.S. at 688 (extending strict scrutiny to gender discrimination cases); DeVan, supra note 19, at 502-04 (analyzing strict scrutiny standard as applied in Frontiero decision).
firmly held that gender is an inherently suspect classification.76

Most importantly, in defining the parameters of the strict scrutiny test, the Court refers to the “compelling state interest” which must be proven.77 On its face, it appears that proving a state interest “compelling” is more difficult than proving that a governmental objective is “important,” which is the basic requirement needed to probe that the justification is “exceedingly persuasive.”78 The language of the two standards makes clear that no matter how tough the skeptical scrutiny standard may be to prove, it is certainly an easier burden than strict scrutiny. Therefore, it is asserted that Justice Scalia had little reason to worry about de facto recognition of strict scrutiny by the Court in the VMI case.

III. CAN STRICT SCRUTINY SUCCEED FOLLOWING UNITED STATES V. VIRGINIA?

Although the aforementioned fears of Justice Scalia regarding the Court’s analysis in United States v. Virginia are unfounded, opponents of the strict scrutiny standard have reasons to be concerned.79 By creating a skeptical scrutiny standard and moving more slowly in the direction of strict scrutiny, Justice Ginsburg has helped prevent another Frontiero decision form occurring.80 Justice Ginsburg’s skeptical scrutiny test helps to

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76 United States v. Virginia, 116 S. Ct. at 2276 (identifying that Court’s skeptical scrutiny standard does not make gender proscribed classification); see also NOWAK & ROTUNDA, supra note 1, at 778.
77 See SPANN, supra note 75, at 31 (explaining that strict scrutiny requires proof of compelling governmental interest).
78 See United States v. Virginia, 116 S. Ct. 2264, 2275 (1996) (stating that state must show classification serves important governmental interest and “the means employed are ‘substantially related’ to the achievement of those objectives in order to be ‘exceedingly persuasive’ ”); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (noting that proof of “important governmental interests” is requirement in proving “exceedingly persuasive justification”).
79 Given the current trend in favor of single-sex education, critics argue that the VMI case will leave lasting damage in single-sex public schools. See Soderberg, supra note 8, at 460 (arguing that VMI case threatens legal status of private women’s colleges); Taylor, supra note 32, at 27 (speculating about impact of United States v. Virginia on state-supported single-sex education both at and below college level). But see Brief of Twenty-Six Private Women’s Colleges as Amici Curiae in Support of Petitioner, United States v. Virginia, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107), available in 1995 WL 702837 (arguing that reversal of VMI II would not undermine or threaten maintenance of private single-sex educational institutions).
80 The Court’s decision as articulated in Justice Brennan’s plurality opinion in Frontiero v. Richardson held that strict scrutiny was the proper test in gender dis-
promote the eventual adoption of strict scrutiny by giving other Justices time to adjust to tougher standards in sex discrimination cases, while reminding legal practitioners and scholars that the issue of strict scrutiny in these cases is not dead.

It is important to consider the political leanings of Court members when evaluating the viability of strict scrutiny as the test of the future, as it takes a majority of the Justices of the Supreme Court to adopt any concept. The creation of skeptical scrutiny edges the Court closer to strict scrutiny without equating gender classifications to race classifications. The new test allows the Court to be tougher on states continuing to discriminate on the basis of gender, while avoiding an undoubtedly controversial "strict scrutiny" label. This will help lawyers in the future to push the Court toward a final adoption of the strict scrutiny standard since all ideas embodied in this toughest equal protection test will already have been accepted in some form by a majority of Court members.

Footnotes never decide cases, but they often contain hidden clues about future leanings of the Court in areas of the law. This truism is confirmed in Justice Ginsburg's decision. While footnote six helps disprove Justice Scalia's theory that the Court adopted strict scrutiny in the VMI case, the language of the footnote also shows that Justice Scalia does have cause for concern. By reminding "court watchers" that the issue of strict scrutiny is not dead, the Court invites the legal community to continue to

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Footnotes:

81 See generally Woodward & Armstrong, supra note 39, at 300-02 (noting importance of both external national politics and internal court politics on Frontiero decision).

82 See discussion supra Part I-C (arguing skeptical scrutiny is stronger standard than intermediate scrutiny). In this connection, it should be noted that courts are reluctant to apply heightened standards of review to new classes. See Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (stating that Court has in past declined to use heightened standards to review treatment based upon age).

83 NOWAK & ROTUNDA, supra note 1, at 386 (analyzing importance of footnote four in United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938)).

84 The text of footnote six of Justice Ginsburg's decision states, "[t]he court has thus far reserved most stringent scrutiny for classifications based on race or national origin ...." United States v. Virginia, 116 S. Ct. 2264, 2276 n.6 (1996). As Judith Lichtman of the Women's Legal Defense Fund, told the National Law Journal, "[w]hy put in two words that mean nothing?" Coyle, supra note 19, at A12.
push for its adoption in future cases and insures that gender equality and sex discrimination will not be placed on the Court’s back burner.

CONCLUSION

The Supreme Court’s decision in United States v. Virginia symbolizes the rejuvenation of heightened equal protection guarantees for both men and women. Through the adoption of the skeptical scrutiny standard the Court placed all public actors on notice that gender discrimination will not be tolerated. The Court did not set out to destroy the institution of single-sex education, or to threaten the hundreds of private, single-sex colleges that provide exceptional educational opportunities to men and women throughout the country. Justice Ginsburg’s decision focused on those few institutions, including VMI, that held themselves out as offering unique educational experiences, while excluding one sex on the basis of archaic gender stereotypes.

The VMI decision did more than provide a few exceptional women the opportunity to attend one of the most prestigious military colleges in the country; it re-enforced the ideal that those who work hard and strive for their goals may achieve them regardless of their gender.

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