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United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII

Candace S. Kovacic-Fleischer

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United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII

Candace Saari Kovacic-Fleischer

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In this Article, Professor Kovacic-Fleischer argues that the Supreme Court's recent decision in United States v. Virginia raises gender equal protection analysis to the level of strict scrutiny. Professor Kovacic-Fleischer asserts that the Court's refusal to accept as immutable VMI's single-sex institutional design, and the Court's requirement that VMI make adjustments and alterations that will enable qualified women to undertake VMI's curriculum evidences this shift in gender equal protection analysis.

Professor Kovacic-Fleischer then turns to the significance of the Court's citation to California Federal Savings & Loan Association v. Guerra. She asserts that this citation indicates that the Court effectively overruled Geduldig v. Aiello's holding that pregnancy discrimination is not necessarily sex-based discrimination. Further, she asserts that the Guerra citation also indicates that United States v. Virginia's adjustments and alterations model of gender equal protection analysis is applicable to Title VII. Under this analysis, workplaces would be required to make adjustments and alterations designed to accommodate pregnancy and parenting. Professor Kovacic-Fleischer concludes that such adjustments and alterations would prove economically beneficial to employers and would facilitate equal allocation of work and responsibilities within families.

***United States v. Virginia's* New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII**

*Candace Saari Kovacic-Fleischer**

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I. INTRODUCTION

The United States challenged Virginia Military Institute's ("VMI") male-only admissions policy in *United States v. Virginia*,¹ the latest gender equal protection case to reach the Supreme Court. The opinion, written by Justice Ruth Bader Ginsburg, is remarkable in several ways. It balances two debated viewpoints for achieving gender equality: whether governmental policies should provide equal treatment or equal results for men and women. It achieves this balance by requiring VMI to admit only capable women and, where necessary, to make adjustments and alterations to facilitate their admission. *United States v. Virginia's* balance between the different approaches for achieving equality appears to raise gender equal protection analysis to the level of strict scrutiny and to alter constitutional disparate impact analysis. In addition, the Court's citation to a Title VII² pregnancy leave case can be read both to apply Title VII's pregnancy analysis to the Constitution and to require the application of *United States v. Virginia's* institutional redesign for equality analysis to Title VII pregnancy and parenting cases. These developments could have significant ramifications for governmental and workplace policies.

Part II of this Article briefly describes both the VMI litigation and some of the viewpoints of policymakers and scholars with respect to gender equality and policies affecting reproduction and parenting.

1. *United States v. Virginia*, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996), rev'g, 44 F.3d 1229 (4th Cir. 1995), and 852 F. Supp. 471 (W.D. Va. 1994).

2. Pub. L. No. 88-352, 78 Stat. 24, codified as amended at 42 U.S.C. §§ 2000e et seq. (1994 ed.).

to gender equality and policies affecting reproduction and parenting. Part II then analyzes how *United States v. Virginia* balances viewpoints for achieving equality by requiring VMI to admit women who can succeed in its demanding environment, while at the same time requiring it to make changes to accommodate "celebrated" differences between men and women with respect to physical strength and privacy. This Part explains that requiring institutional accommodations for "celebrated" differences neither denigrates women nor makes them appear to be the "inferior" sex. These mandated institutional changes do not "lower standards" for women; rather, in order to maximize the talents of both genders they redesign standards that were initially, and unnecessarily, established only for men.

Part III analyzes how the requirement of institutional redesign changes gender equal protection analysis. This Part describes current midtier gender equal protection analysis and *United States v. Virginia's* departure from that analysis. The new analysis resembles both Title VII and strict scrutiny constitutional cases, and calls into question the continuing validity of some prior gender equal protection cases. This Part further describes how *United States v. Virginia's* reliance upon remedial racial equal protection cases is consistent with heightened gender equal protection scrutiny.

Part IV asserts that *United States v. Virginia* effectively overrules *Geduldig v. Aiello*,³ the Supreme Court case holding that pregnancy discrimination is not necessarily sex discrimination per se under the Fourteenth Amendment.⁴ The conclusion that pregnancy discrimination is now viewed as sex discrimination under the Constitution follows from the Court's reasoning that the Fourteenth Amendment is violated when "some women" are discriminated against and from the Court's citation to *California Federal Savings & Loan Association v. Guerra*,⁵ a Title VII pregnancy leave case.

Part IV further asserts that *United States v. Virginia's* institutional alteration analysis can be applied to Title VII. This result also follows from the Court's citation to *Guerra*, and because pregnancy can be compared to the physical gender characteristic of strength addressed by the VMI case. This would require employers to provide expectant mothers with paid leave so that they can retain

3. 417 U.S. 484 (1974).

4. *Id.* at 494.

5. 479 U.S. 272 (1987), cited in *United States v. Virginia*, 116 S. Ct. at 2276.

their jobs and pay, just as expectant fathers do when their children are born.

Part IV asserts, by analogizing parenting to privacy, both of which are based on a combination of physical differences between the sexes and social norms, that the institutional alteration analysis of *United States v. Virginia* requires employers to accommodate parenting obligations. The accommodations would be ordered first for mothers, who typically have more childcare responsibilities than men, and then for fathers, so that they would not be treated differently from women. The workplace thus would be restructured to accommodate the familial obligations of its workers and would internalize some of the costs of family work, which traditionally have been borne by families without recompense even though childcare benefits the workplace. This Part notes the potential problems for women that singling out family concerns in the workplace could have, but asserts that failure to address those concerns causes women greater problems.

Extending the analysis in *United States v. Virginia* to Title VII involves a departure from some of the legislative history of the Pregnancy Discrimination Act,⁶ but Part IV discusses precedents for applying Title VII broadly but consistently with its purpose. This Part briefly discusses possible alterations that courts or legislatures could require workplaces to make, or that employers could implement voluntarily. This Part also discusses possible defenses that employers might raise to court- or legislatively-ordered institutional changes. It concludes that institutional alterations made for societally imposed differences between the sexes will begin to eliminate those differences and will have enormous potential both for furthering equality for women and men, and for improving the lives of children.⁷

6. 42 U.S.C. § 2000e(k).

7. This Article does not discuss the ramifications of *United States v. Virginia* for single-sex education generally. With respect to education, the case appears to be limited to its facts. In a footnote, the opinion references the uniqueness of the educational opportunity at VMI, a premier male-only military institute. 116 S. Ct. at 2276 n.7 (citing *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407, 1413, 1432 (W.D. Va. 1991); *United States v. Commonwealth of Virginia*, 976 F.2d 890, 892 (4th Cir. 1992)). Pointing to the fact that VMI is Virginia's sole single-sex public university or college, *United States v. Virginia*, 116 S. Ct. at 2269, Justice Ginsburg quoted *Mississippi University for Women v. Hogan's* statement that it was "not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females." *Id.* at 2276 n.7 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720 n.1 (1982)). The footnote acknowledges that many amici supported single-sex education and quotes without comment from an amicus brief that single-

II. THE DEBATE BETWEEN EQUAL TREATMENT AND EQUAL RESULTS

A. *The VMI Litigation*

Virginia Military Institute is, as its name indicates, a military-styled school of higher education. It was founded in 1839 with an all-male admissions policy, and continues to be supported and controlled by the Commonwealth of Virginia. By the 1970s, VMI was the only single-sex public college in Virginia, and its "impressive record in producing leaders ha[d] made admission [to VMI] desirable to some women."⁸ VMI's exclusion of women became an issue of litigation in 1990. At the request of a potential woman applicant, the Department of Justice brought suit in the Western District of Virginia claiming that VMI's admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. After trial the district court rejected the claim, finding that the male-only school offered diversity to Virginia's higher educational system and that "that diversity was 'enhanced by VMI's unique method of instruction':⁹ the "adversative method."¹⁰ That method includes "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."¹¹ Cadets are housed "in spartan barracks where surveillance is constant and privacy nonexistent" and subjected to a seven-month "rat line."¹² In the rat line the cadets are tormented by upperclassmen to encourage bonding to "their fellow sufferers" and, after completion of the rat line, bonding to "their former tormentors."¹³ The district court found that

sex education can "dissipate, rather than perpetuate, traditional gender classifications." *Id.* (quoting Brief for Twenty-Six Private Women's Colleges as *Amici Curiae* at 5), *United States v. Virginia*, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (available on LEXIS, GENFED library, BRIEFS file). In its text, *United States v. Virginia* says that "[s]ex classifications may be used to compensate women 'for particular economic disabilities . . . [and] to 'promot[e] equal employment opportunity.'" *Id.* at 2276 (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977); *Guerra*, 479 U.S. at 289). That statement could support the constitutionality of the single-sex schools identified by the amici.

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

9. *Id.* at 2271 (quoting *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1415).

10. *Id.* at 2269.

11. *Id.* at 2270 (quoting *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1421).

12. *Id.* (citing *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1422, 1424).

13. *Id.* (citing *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1422). For further descriptions of the "adversative method," see Allan Ides, *The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function*, 50 Wash. & Lee L. Rev. 35, 36 n.6 (1993); Charles J. Russo and Susan J. Scollay, *All Male State-Funded Military Academies: Anachronism or Necessary Anomaly*, 82 Educ. L. Rep. (West) 1073, 1075-76 (1993); Jon Allyn Soderberg, Essay, *The Virginia Military Institute and the Equal Protection Clause: A Factual*

if women were admitted to VMI, " 'some aspects of the [school's] distinctive method would be altered' . . . 'Allowance for personal privacy would have to be made,' [and] '[p]hysical education requirements would have to be altered, at least for the women.' " ¹⁴

The Fourth Circuit reversed the district court's conclusion that diversity provided only to men was constitutional, but remanded for a determination of the appropriate remedy.¹⁵ The Fourth Circuit proposed three alternative remedies: admitting women; providing "parallel institutions or programs"; or privatizing VMI.¹⁶ On remand, the district court approved a "substantively comparable" program, the Virginia Women's Institute for Leadership ("VWIL") at Mary Baldwin College, a private women's college in Virginia.¹⁷ The Fourth Circuit then affirmed, over one dissent,¹⁸ and later denied rehearing en banc, with four judges dissenting.¹⁹ The Supreme Court, in a seven to one judgment, with Justice Clarence Thomas taking no part in the opinion,²⁰ reversed the Fourth Circuit.²¹ Justice Ruth Bader Ginsburg wrote the majority opinion for six justices.²² Chief Justice William Rehnquist concurred separately;²³ Justice Antonin Scalia dissented.²⁴

After detailing many inadequacies of the VWIL program as compared with VMI,²⁵ the Court held that Virginia did not prove that

and Legal Introduction, 50 Wash. & Lee L. Rev. 15, 16-17 (1993); Kristin S. Caplice, Note, *The Case for Public Single-Sex Education*, 18 Harv. J. L. & Pub. Pol. 227, 273-74 (1994); Brian Scott Yablonski, Comment, *Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute*, 47 U. Miami L. Rev. 1449, 1468-70 (1993); Melissa Taylor, Note, *The VMI Decision: A Look at the Balancing Process in Equal Protection Cases*, 60 UMKC L. Rev. 393, 393 (1991). See generally Susan Faludi, *The Naked Citadel*, *The New Yorker* 62 (Sept. 5, 1994) (describing in graphic detail life at the Citadel, a formerly all-male state-run military institute in South Carolina, before the admission of women).

14. *United States v. Virginia*, 116 S. Ct. at 2271 (quoting *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1413).

15. *Id.* at 2271-72.

16. *Id.* at 2272 (quoting *United States v. Commonwealth of Virginia*, 976 F.2d at 900).

17. *Id.* at 2273, 2286 (quoting *United States v. Commonwealth of Virginia*, 44 F.3d at 1237).

18. *United States v. Commonwealth of Virginia*, 44 F.3d at 1242 (Phillips, J., dissenting).

19. *United States v. Commonwealth of Virginia*, 52 F.3d at 90 (Motz, J., dissenting, joined by Hall, Murnaghan, and Michael, JJ.).

20. *United States v. Virginia*, 116 S. Ct. at 2287. News accounts reported that Justice Thomas's son attends VMI and speculated that that was the reason for the Justice's recusal. See, for example, Jeffrey Resen, *Like Race, Like Gender?*, *New Republic* 21 (Feb. 19, 1996).

21. *United States v. Virginia*, 116 S. Ct. at 2287.

22. *Id.* at 2269.

23. *Id.* at 2287 (Rehnquist, C.J., concurring).

24. *Id.* at 2291 (Scalia, J., dissenting).

25. *Id.* at 2283-86.

those "separate educational opportunities" were substantially equal.²⁶ The Court affirmed the Fourth Circuit's initial ruling that the single-sex admission at VMI violated equal protection, but reversed the Fourth Circuit's approval of VWIL as an appropriate remedy.²⁷ The remedy the Court suggested appears to combine two differing viewpoints about appropriate policies concerning gender.

B. Viewpoints on Gender Equality²⁸

1. Equal Treatment

One theory about how to achieve gender equality is the equal treatment model, also called the "sameness" or equal opportunity model. Under this model governmental policies must treat women and men equally in all respects. Any differential treatment based on gender, proponents of this viewpoint believe, can be used to denigrate women and deny them employment and other opportunities.²⁹ Even differential treatment that accommodates women for childbirth or breast feeding can harm women in the workplace by presenting them as inferior and ultimately restricting their opportunities in the workplace.³⁰ Thus, proponents of the equal treatment model advocate that governments and employers treat women and men equally.

26. *Id.* at 2286.

27. *Id.* at 2286-87.

28. This description, because of its brevity and focus on contrast, necessarily oversimplifies the various viewpoints and minimizes their commonalities. For excellent descriptions of the debate, see, for example, Herma Hill Kay and Martha S. West, *Ensuring Non-Discrimination, Sex-Based Discrimination* 767-73 (West, 4th ed. 1996); Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* 40-48, 56-60 (Cornell U., 1990); Tracy E. Higgins, "By Reason of Their Sex": *Feminist Theory, Postmodernism, and Justice*, 80 *Cornell L. Rev.* 1536, 1560-68 (1995); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 *Hastings L. J.* 471, 477-86 (1990); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 *Vand. L. Rev.* 1183, 1184-97 (1989); Anne-Marie Leath Sterey, Note, *An Analysis of the Doctrines and Goals of Feminist Legal Theory and Their Constitutional Implications*, 19 *Vt. L. Rev.* 137, 151-65 (1994); John D. Gibson, Note, *Childbearing and Childrearing: Feminists and Reform*, 73 *Va. L. Rev.* 1145, 1169-72 (1987).

29. Deborah L. Rhode, *Justice and Gender: Sex Discrimination and the Law* 117-25 (Harvard U., 1989); John E. Morrison, *Viva la Diferencia: A Non-Solution to the Difference Dilemma*, 36 *Ariz. L. Rev.* 973, 973-974 (1994); Nadine Taub, *Thoughts on Living and Moving with the Recurring Divide*, 24 *Ga. L. Rev.* 965, 965-69 (1990); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 *N.Y.U. Rev. L. & Soc. Change* 325, 351-70 (1985); Wendy W. Williams, *The Equality Crisis: Reflections on Culture, Courts and Feminism*, 7 *Women's Rts. L. Rptr.* 175, 195-200 (1982).

30. See generally Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 *Berkeley Women's L. J.* 1, 34 n.169, 35 n.174 (1985) (arguing for episodic recognition of necessary biological reproductive differences between men and women).

Equal treatment proponents argue that pregnancy is one of many "workplace disabilities" for which adequate fringe benefits are necessary for all people.³¹ Pregnancy should not be singled out for special treatment because that would create resentment in others with workplace disabilities. Some equal treatment proponents suggest that because human milk can be expressed and stored, babies can have the special nutritional value of human milk without employers having to make special arrangements for breast feeding.³²

Some proponents of the equal treatment model support gender neutral policies that accommodate the family,³³ while others fear that policies accommodating parenting will be used disproportionately by women, creating the same problems that gender specific policies create. For example, the Family and Medical Leave Act of 1993³⁴ allows both men and women to take up to twelve weeks of unpaid leave from companies of fifty or more employees to care for newborns or sick family members. Some argue that more women than men will use the leave, which will make employers reluctant to hire women or give them positions of responsibility.³⁵

31. See, for example, Williams, 13 N.Y.U. Rev. L. & Soc. Change at 327, 336, 357 (cited in note 29); Abrams, 42 Vand. L. Rev. at 1188 (cited in note 28); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1003-06 (1984).

32. See generally Kay, 1 Berkeley Women's L. J. at 35 n.174 (cited in note 30); Williams, 13 N.Y.U. Rev. L. & Soc. Change at 360 n.135 (cited in note 29) (expressing ambivalence about breast feeding as a difference to be taken into account, and suggesting it should not be a reason to oppress women, but should instead be a choice). This Author believes that breast feeding is an extraordinary and fleeting experience that should be available to all mothers who desire it, especially because expressing milk takes special efforts of time and privacy. Flexible scheduling or baby-at-work programs may facilitate breast feeding. See notes 325-26, 331.

33. See, for example, Mary Ann Mason, *Beyond Equal Opportunity: A New Vision for Women Workers*, 6 Notre Dame J. L. Ethics & Pub. Pol. 393, 408-14 (1992) (recommending structural changes in the workplace that benefit both parents); Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 Hastings L. J. 17, 63-79 (1994) (arguing that using concepts of fiduciary duty and implied covenants of good faith can equalize the workplace for men and women); Williams, 13 N.Y.U. Rev. L. & Soc. Change at 325 (cited in note 29).

34. 29 U.S.C. § 2601 et seq. (1994 ed.).

35. See Cristina Duarte, *The Family and Medical Leave Act of 1993: Paying the Price for an Imperfect Solution*, 32 U. Louisville J. Family L. 833, 846 (1994). See also Richard A. Posner, *Conservative Feminism*, 1989 U. Chi. Legal Forum 191, 197; Deirdre A. Whittaker, Note, *Should We Have a National Leave Policy: A Survey of Leave Policies, Problems and Solutions*, 34 Howard L. J. 411, 415 (1991) (describing and countering arguments against the FMLA). For a discussion of the "mommy track," see Cynthia Fuchs Epstein, Robert Sauté, Bonnie Oglensky, and Martha Gever, *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 Fordham L. Rev. 291 (1995); Abrams, 42 Vand. L. Rev. at 1237 n.197 (cited in note 28).

The equal treatment model is said to be assimilationist.³⁶ It assumes that existing governmental and workplace policies can assimilate the excluded gender because there are no relevant differences between the genders. This model for gender equality is consistent with that generally used to combat racial discrimination and is exemplified by much of Title VII of the Civil Rights Act of 1964.³⁷

2. Equal Results

Another theory is the equal results model, also called the "difference" or special treatment model. This model posits that in order to achieve equal results, governmental policies must recognize and accommodate inherent differences between the sexes. It assumes that these differences preclude assimilation, and that equal treatment in the face of these differences produces unequal results.³⁸ For example, although a woman must take time from work to give birth to a child, a man can continue to work while his child is born. Thus, proponents of the equal results model say that employment policies that do not provide pregnancy leave disadvantage women, but not men, for having a child.³⁹ While these proponents agree that employers should provide leave for all people with workplace disabilities, they believe

36. Equal treatment proponents believe that women should be assimilated into a world expanded to include their values. See, for example, Nadine Taub and Wendy W. Williams, *Will Equality Require More Than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 Rutgers L. Rev. 825, 832-44 (1985).

37. See generally Kay and West, *Ensuring Non-Discrimination* at 767 (cited in note 28). Even the assimilation model recognizes that the effects of past discrimination may prevent immediate assimilation. Much debate exists as to whether "affirmative action" can or should be taken under Title VII to rectify past discrimination. Compare the differing opinions in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

38. See, for example, Kay, 1 Berkeley Women's L. J. at 21-22 (cited in note 30) (advocating equal treatment except for recognition of physical differences between the sexes during the "episodic" times of the difference); Linda J. Krieger and Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate U. L. Rev. 513, 536-64 (1983); Judith Olans Brown, Wendy E. Parmet, and Phyllis Tropper Baumann, *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 Buff. L. Rev. 573, 573-83 (1987); Linda Hassberg, Comment, *Toward Gender Equality: Testing the Applicability of a Broader Discrimination Standard in the Workplace*, 40 Buff. L. Rev. 217 (1992) (arguing that formal equality ignores biological and cultural differences between men and women).

39. See Kay, 1 Berkeley Women's L. J. at 27, 35 (cited in note 30). See also Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Cal. L. Rev. 1279, 1299 (1987) ("[W]orking women and men share a right to procreative choice in addition to an interest in disability leave. In order to ensure equal exercise of procreative rights... an employer must provide leave adequate to the effects of pregnancy."); Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 Geo. L. J. 193, 198-202 (1993) (arguing that the workplace must accommodate pregnancy to secure women's participation in it). See also note 237 and accompanying text.

that employers will not provide, or be required to provide, such universal leave in the imminent future.⁴⁰ Maintenance of the status quo while waiting for the workplace to institute ideal policies continues the disadvantageous position of women. Policies that require acceptance of inherent differences between the sexes create the impetus for the implementation of policies providing greater benefits for workers of both sexes.⁴¹ Recognition that there are inherent differences between the sexes is not a recognition that women are inferior; it is merely a recognition that they are different. Requiring institutional changes for these differences is not a statement that women are not "good enough" to fit in; instead, it is a statement that the institution is not designed to maximize the talents of everyone.

Similarly, pointing to studies demonstrating that mothers currently do a disproportionate amount of childrearing, many equal results proponents argue that equal treatment of mothers and fathers will disadvantage mothers until fathers assume equal responsibility for parenting.⁴² Thus, employment policies that do not make alterations to accommodate parenting disproportionately disadvantage women. As a result, many women fall behind in pay, prestige, and job security, or they do not have children at all.⁴³ A Yale psychology professor found

40. Compare note 333 (discussing leave benefits provided in foreign countries and suggesting that it is unlikely that such benefits would be provided in the United States).

41. See, for example, text accompanying notes 93-98.

42. See, for example, Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. Family L. 1, 23-24 (1990) (stating that "after years of efforts [to make childrearing the equal responsibility of mothers and fathers] women still bear the major responsibility for children in two-parent households"); Scott Caplan-Cotenoff, Note, *Parental Leave: The Need for a National Policy to Foster Sexual Equality*, 13 Am. J. L. & Med. 71, 87-89 (1987); Krieger and Cooney, 13 Golden Gate L. Rev. at 515 (cited in note 38). See also notes 279-81 and accompanying text.

43. See, for example, Samuel Issacharoff and Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 Colum. L. Rev. 2154, 2215 (1994) (stating that women's discontinuity in work is a major factor in lowering women's wages); Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 Fordham L. Rev. 941, 952 (1989) (discussing the impact of motherhood on women's roles in the workplace); Jeremy I. Bohrer, Recent Development, *You, Me, and the Consequences of Family: How Federal Employment Law Prevents the Shattering of the "Glass Ceiling"*, 50 Wash. U. J. Urban & Contemp. L. 401, 419 (1996) (noting that when women have to choose between career and family they often resign themselves to low-paying jobs); Katbryn Branch, Note, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 Duke J. Gender L. & Pol. 119, 124-27 (1994) (arguing that women will not be equal until the workplace accommodates parenting and men choose to commit to family); Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 Fordham L. Rev. 699, 706 (1986) (stating that the workplace's reluctance to accommodate childbirth and parental responsibilities contributes to the differences in employment status of men and women); Duarte, 32 U. Louisville J. Family L. at 838, 865 (cited in note 35) (stating that stereotypes and business practices force women to choose between family and career). See also note 381.

from a pool of women with corporate-financial careers that "[a]bout half were unmarried, slightly more childless," and "[b]oth the benefits and the costs of this life were substantial."⁴⁴ Most men, however, can reap substantial employment benefits without having to pay the cost of childlessness.⁴⁵

The equal results model has been called "incorporationist."⁴⁶ It assumes that the workplace can incorporate biological, but not stereotypical, differences into the definition of equality.⁴⁷ It is consistent with some of the antidiscrimination statutes that recognize that current institutional norms have the effect of excluding talented people who do not fit the norm. These statutes require employers to make accommodations to provide job opportunities to people different from the traditional employee. An example is section 701(j) of Title VII,⁴⁸ which requires employers to make accommodations for people's religious practices. Another is the Americans with Disabilities Act,⁴⁹ which requires employers and others to make institutional alterations and accommodations for people with physical and mental differences. The incorporationist model is also seen in statutes requiring employers to protect the jobs of people in the military.⁵⁰

3. Other Debates and Theories

Within both theories debate exists as to the extent of inherent differences between men and women. While the existence of biologi-

President Clinton's first two nominees for Attorney General withdrew because they had hired illegal immigrants as nannies. The Attorney General finally appointed was Janet Reno, an unmarried woman without children. See Issacharoff and Rosenblum, 94 Colum. L. Rev. at 2154-55 (cited in this note).

44. Daniel J. Levinson, *The Seasons of a Woman's Life* 11 (Knoff, 1996).

45. See note 244. See Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L. J. 1373, 1382 n.46 (1986) ("Equality requires that a woman not be forced to choose between children and career, just as a man need not make that choice"); Krieger and Cooney, 13 Golden Gate U. L. Rev. at 533 (cited in note 38) (arguing that pregnancy leave "places women on an equal footing with men").

46. See Kay and West, *Enduring Non-Discrimination* at 770 (cited in note 28) (quoting Ann Scales, *Towards a Feminist Jurisprudence*, 56 Ind. L. Rev. 375 (1980-81)).

47. Dowd, 54 Fordham L. Rev. at 764 (cited in note 43).

48. 42 U.S.C. § 2000e(j).

49. Pub. L. No. 101-336, 104 Stat. 327, codified as amended at 42 U.S.C. § 12101 (1994 ed.).

50. See Veterans' Reemployment Rights Act, 38 U.S.C. § 4301 et seq. (1994 ed.). See generally Judith Bernstein Gaeta, *Kolkhorst v. Tilghman: An Employee's Right to Military Leave Under the Veterans' Reemployment Rights Act*, 41 Cath. U. L. Rev. 259 (1991) (discussing a Fourth Circuit case holding that employee-reservists have an unconditional right to military leave and subsequent reemployment); Annotation, *Re-employment of Discharged Servicemen*, 29 A.L.R.2d 1279 (1953) (discussing the history of reemployment legislation and cases).

cal reproductive differences generally is not debated,⁵¹ consensus ends regarding which policies, if any, should be implemented to accommodate those differences.⁵² Further debate exists as to whether men's and women's roles as parents differ beyond the context of birth and breast feeding, and, if so, whether the difference is biologically or societally imposed.⁵³ There is even further debate as to the existence and/or extent of physiological and psychological differences between the sexes.⁵⁴

Some scholars reject the "sameness/difference" dichotomy as based on a comparison with a male norm.⁵⁵ They suggest "equality as acceptance"⁵⁶ or equality as elimination of "domination, disadvantage and disempowerment."⁵⁷

51. Some people argue that technology will eliminate the need for human involvement in reproduction, minimizing the effect of reproductive differences. See Malina Coleman, *Gestation, Intent and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 *Cardozo L. Rev.* 497, 499-527 (1996) (discussing the impact of technology on the definition of motherhood); Alexia E. King, *Soloman Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 *UCLA Women's L. J.* 329 (1995) (same).

52. See, for example, Bender, 57 *Fordham L. Rev.* at 951 (cited in note 43) (discussing the difficulty of implementing social policies to "correct" gender differences); Williams, 13 *N.Y.U. Rev. L. & Soc. Change* at 326-27 (cited in note 29) (noting the difficulty of implementing policies according to difference theory); Sally J. Kenney, *Pregnancy Discrimination: Toward Substantive Equality*, 10 *Wis. Women's L. J.* 283, 291-99 (1995) (noting the lack of consensus in policy implementation).

53. See, for example, Scales, 95 *Yale L. J.* at 1375 (cited in note 45) (describing topics of debate); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 *U. Pa. L. Rev.* 1, 70-75 (1995) (discussing the origins of difference); Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 *Yale L. J.* 913, 918-22 (1983) (discussing the social and biological determinations of women's work); Dowd, 54 *Fordham L. Rev.* at 699 (cited in note 43) (discussing how biology and society interact to define women's reality). Contrast Franke, 144 *U. Pa. L. Rev.* at 1 (cited in this note) with Kingsley R. Brown, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 *Ariz. L. Rev.* 1 (1995) (suggesting that biological differences between the sexes are major factors causing the glass ceiling and gender pay gap).

54. See Rhode, *Justice and Gender* at 306-15 (cited in note 29); Susan Muller Okin, *Justice, Gender and the Family* 6-7 (Basic Books, 1989). For a discussion of the psychological differences between men and women, see Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard U., 1982); Carol Gilligan, *Mapping the Moral Domain: A Contribution of Women's Thinking to Psychological Theory & Education* (Harvard U., 1989); Deborah Tannen, *You Just Don't Understand: Women and Men in Conversation* (Morrow, 1990). But see Joan C. Williams, *Deconstructing Gender*, 87 *Mich. L. Rev.* 797, 802-13 (1989) (claiming that Gilligan's relational feminism is a critique of "possessive individualism" and not a description of men and women).

55. See, for example, Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 *Colum. L. Rev.* 1118, 1120 (1986) ("Our legal system . . . leaves unquestioned the notion that life patterns and values that are stereotypically male are the norm."); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 *Harv. L. Rev.* 10, 12-19 (1987).

56. Littleton, 75 *Cal. L. Rev.* at 1284 (cited in note 39). See also Scales, 95 *Yale L. J.* at 1376 (cited in note 45) (arguing that the legal system should make differences between men and

All of the theorists, regardless of viewpoint, view women as important, not marginal and not inferior to men. Many theorists suggest a restructuring of society, particularly with respect to the current separation between the workplace and the family.⁵⁸ *United States v. Virginia* can be read as a first step toward that restructuring.

C. *United States v. Virginia Balances Viewpoints Defining Equality*

1. Equal Treatment and Results Combined

The Fourteenth Amendment's Equal Protection Clause provides, "nor shall any state . . . deny to any person within its jurisdiction equal protection of the laws."⁵⁹ Thus, a determination of an equal protection challenge involves finding a state actor and comparing favored and disfavored classes. In the context of a state-run military institute, where there is a comparison between men and women who are capable of completing a harsh curriculum, Justice Ginsburg appears to combine both the equal treatment and the equal results models of equal protection analysis.⁶⁰ While prior Supreme Court equal protection cases generally have focused on one model or the other,⁶¹ *United States v. Virginia* brings these two lines of cases

women cause for celebration, not classification); Law, 132 U. Pa. L. Rev. at 955 (cited in note 31).

57. Catherine MacKinnon, *Sexual Harrassment of Working Women* 110 (Yale U., 1979); Scales, 95 Yale L. J. at 1394 (cited in note 45). See also Christina Brooks Whitman, *Feminist Jurisprudence*, in Frances E. Olsen, *Feminist Legal Theory: Foundations and Outlooks* 17 (New York U., 1995); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1529-60 (1983) (discussing MacKinnon's influence on other scholars).

58. See, for example, Olsen, 96 Harv. L. Rev. at 1499-508 (cited in note 57); Mason, 29 J. Family L. at 42 (cited in note 42); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 Harv. C.R.-C.L. L. Rev. 79, 90-92 (1989); Dowd, 54 Fordham L. Rev. at 699-700 (cited in note 43); Williams, 87 Mich. L. Rev. at 835-36 (cited in note 54); Littleton, 75 Cal. L. Rev. at 1334 (cited in note 39); Julie Novkov, Note, *A Deconstruction of (M)otherhood and a Reconsideration of Parenthood*, 19 N.Y.U. Rev. L. & Soc. Change 155, 202-03 (1992); Lisa A. Redensky, Note, *California Savings & Loan Association v. Guerra: Preferential Treatment and the Pregnancy Discrimination Act*, 10 Harv. Women's L. J. 225, 250 (1987); Abrams, 42 Vand. L. Rev. at 1186-95 (cited in note 28); Gibson, 73 Va. L. Rev. at 1179-82 (cited in note 28); Rhode, *Justice and Gender* at 123-25 (cited in note 29); Scales, 95 Yale L. J. at 1393-99 (cited in note 45); Williams, 13 N.Y.U. Rev. L. & Soc. Change at 352-59 (cited in note 29).

59. U.S. Const., Amend. XIV, § 1.

60. See Part II.B. and specifically note 28.

61. Equal treatment cases include *Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding state estate administration statute that had given automatic preference to males over females having same relationship to decedent must give men and women equal preference); *Stanton v. Stanton*,

together by requiring women to be "capable"⁶² of undertaking the rigorous VMI curriculum while simultaneously requiring VMI to make "alterations"⁶³ and "adjustments"⁶⁴ for "celebrated,"⁶⁵ inherent differences between the sexes. These institutional changes enable VMI to accept capable women.⁶⁶ That the differences referred to are described as "celebrated" indicates *not* that women are "inferior," but that the design of an institution built only for men took into account only one set of characteristics. The alterations cannot be viewed as "lower standards" because that view would assume that the institutional design was a "standard" and that any change in the design would be negative.⁶⁷ Rather, one should look at what

421 U.S. 7, 17 (1975) (holding that state statute providing age of majority must treat men and women equally); *Craig v. Boren*, 429 U.S. 190, 192 (1976) (holding that state statute providing an age requirement for purchasing 3.2% beer must treat men and women equally); *Weinberger v. Weisenfeld*, 420 U.S. 636, 653 (1975) (holding that widowers with children are entitled to equal treatment in statutory scheme that provided benefits to widows with children); *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (holding that widowers are entitled to equal treatment in a statutory scheme providing benefits to widows); *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (holding that wives are entitled to equal treatment in a statutory scheme giving property management rights to their husbands); *Hogan*, 458 U.S. at 731 (holding that men are entitled to enroll in a nursing school with a women-only admissions policy in a state with no nursing school with a men-only admissions policy); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that a peremptory challenge cannot be made by a prosecutor based on gender).

Equal results cases include *Kahn v. Shevin*, 416 U.S. 351, 355-56 (1974) (holding that because widows are more likely to be poor than widowers, a property tax exemption for widows only was justified); *Schlesinger v. Ballard*, 419 U.S. 498, 505-08 (1975) (holding that fewer advancement opportunities for women in the military justified more lenient "up or out" policy); *Califano*, 430 U.S. at 320 (holding that previous economic discrimination against women justified a different formula for computing women's and men's social security benefits); *Heckler v. Matthews*, 465 U.S. 728, 747-48 (1984) (holding that a widow's reliance on receiving both federal pension and social security when widowers received only pension justified five-year grace period before reducing social security by the amount of the pension).

Some cases, however, do not use either model in upholding discriminatory statutes. See, for example, *Michael M. v. Superior Court*, 450 U.S. 464, 470-73 (1981) (holding statutory rape law applicable only to men was justified because only women become pregnant); *Rostker v. Goldberg*, 453 U.S. 57, 72-83 (1981) (holding that draft registration applicable only to men was justified because women are excluded from combat); *Lear v. Robertson*, 463 U.S. 248, 267-68 (1983) (upholding different treatment of unmarried mothers and fathers with respect to the adoption of their children because the parents "are not similarly situated").

62. See Part II.C.2.

63. *United States v. Virginia*, 116 S. Ct. at 2284 n.19.

64. *Id.* at 2281 n.15.

65. *Id.* at 2276.

66. Professor Christine Littleton prefers the term "accept" over "accommodate," giving the example of "accommodating" women by bringing them a box to stand on when using a podium built for men and "accepting" women by building an adjustable podium. See Littleton, 75 Cal. L. Rev. at 1314 (cited in note 39).

67. Because Virginia did not have a woman's school with the history, prestige, and endowment of VMI, the opinion does not address whether two equally high standards, although separate, would be constitutional. Neither does this Article.

institutional designs would exist if women had not been historically discriminated against and what, if any, institutions necessarily would have to remain for only one sex.⁶⁸

2. Women Must Be Capable—The Equal Treatment Model of *United States v. Virginia*

Justice Ginsburg emphasizes equal treatment throughout her opinion, particularly in her characterization of one of the two issues presented in the cross-petitions. She asks: "Does Virginia's exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—deny to women 'capable of all of the individual activities required of VMI cadets,' the equal protection of the laws guaranteed by the Fourteenth Amendment?"⁶⁹ She repeats: "The issue . . . is not whether 'women—or men—should be forced to attend VMI'; rather, the question is whether the State can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."⁷⁰

More than a dozen times she stresses the capability of at least some women to endure the vigors of VMI. She emphasizes their equal capability with men in summarizing the parties' stipulations and the lower courts' findings,⁷¹ in rejecting VMI's defenses,⁷² and in discussing the remedy ordering admission.⁷³

68. See Catherine L. Fisk, *Employer-Provided Child Care Under Title VII: Toward an Employer's Duty to Accommodate Child Care Responsibilities of Employees*, 2 Berkeley Women's L. J. 89, 97 (1986); Williams, 13 N.Y.U. Rev. L. & Soc. Change at 364 (cited in note 29). See Part III.B for a discussion of how *United States v. Virginia* elevates gender equal protection analysis to the level of strict scrutiny.

69. *United States v. Virginia*, 116 S. Ct. at 2274 (quoting *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1412). The second issue involved the question of remedy: "Second, if VMI's 'unique' situation—as Virginia's sole single-sex public institution of higher education—offends the Constitution's equal protection principle, what is the remedial requirement?" *Id.* (quoting *United States v. Commonwealth of Virginia*, 776 F. Supp. at 1413).

70. *Id.* at 2280 (quoting *United States v. Commonwealth of Virginia*, 52 F.3d at 93 (Motz, J., dissenting from denial of rehearing en banc)).

71. She states, for example: "The parties agreed that 'some women can meet the physical standards now imposed on men . . .'" *Id.* at 2272 (citing *United States v. Commonwealth of Virginia*, 976 F.2d at 896) (emphasis omitted). "It is also undisputed, however, that 'the VMI methodology could be used to educate women.'" *Id.* at 2279 (citing *United States v. Commonwealth of Virginia*, 852 F. Supp. at 481). "[S]ome women are capable of all of the individual activities required of VMI cadets." *Id.* at 2271 (citing *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1412). "[T]he [Fourth Circuit] was satisfied that 'neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women.'" *Id.* at 2271 (citing *United States v. Commonwealth of Virginia*, 976 F.2d at 899).

She even repeats the same statements: "[S]ome women, at least, would want to attend [VMI] if they had the opportunity; the district court recognized, and 'some women,' the expert

One sees the equal treatment model in some of the cases Justice Ginsburg cites with approval: first *J.E.B. v. Alabama ex rel. T.B.*,⁷⁴ and *Mississippi University for Women v. Hogan*,⁷⁵ then, *Reed v. Reed*,⁷⁶ *Kirchberg v. Feenstra*,⁷⁷ *Stanton v. Stanton*,⁷⁸ *Weinberger v. Wiesenfeld*,⁷⁹ and *Califano v. Goldfarb*.⁸⁰ *J.E.B.* involved a prosecutor excluding men from the jury by use of peremptory challenges.⁸¹ In all of the other cases a woman or man was barred from doing something

testimony established, 'are capable of all of the individual activities required of VMI cadets.' The parties, furthermore, agree that 'some women can meet the physical standards [VMI] now imposes on men.' In sum, as the Court of Appeals stated, 'neither the goal of producing citizen soldiers,' VMI's *raison d'être*, 'nor VMI's implementing methodology is inherently unsuitable to women.'" *Id.* at 2279 (quoting *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1412, 1414; *United States v. Commonwealth of Virginia*, 976 F.2d at 896, 899).

72. She states, for example: "The State's justification for excluding all women from 'citizen-soldier' training for which some are qualified, in any event, cannot rank as 'exceedingly persuasive,' as we have explained and applied that standard [in equal protection cases]." *Id.* at 2281. "[T]he State's great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the State's premier 'citizen-soldier' corps." *Id.* at 2282 (footnote omitted). "[G]eneralizations about 'the way women are,' 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." *Id.* at 2284.

73. She states, for example: "Virginia was obliged to show that its remedial proposal 'directly address[ed] and related to' the violation, *i.e.*, the equal protection denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers." *Id.* at 2282-83 (citing *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)). She continues:

In contrast to the generalizations about women on which Virginia rests, we note again these dispositive realities: VMI's implementing methodology is not inherently unsuitable to women. . . . Some women, at least, would want to attend [VMI] if they had the opportunity, some women are capable of all of the individual activities required of VMI cadets, and can meet the physical standards [VMI] now imposes on men. It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted, a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit, a decree that will bar like discrimination in the future.

Id. at 2284 (internal quotation marks and citations omitted). "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." *Id.* at 2286. "Virginia's remedy does not match the constitutional violation; the State has shown no 'exceedingly persuasive justification' for withholding from women qualified for the experience premier training of the kind VMI affords." *Id.* at 2287. "Women seeking and fit for a VMI-quality education cannot be offered anything less . . ." *Id.* "There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Instituto rather than enhance its capacity to serve the 'more perfect Union.'" *Id.*

74. 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

75. 458 U.S. 718 (1982).

76. 404 U.S. 71 (1971).

77. 450 U.S. 455 (1981).

78. 421 U.S. 7 (1975).

79. 420 U.S. 636 (1975).

80. 430 U.S. 199 (1977).

81. 114 S. Ct. at 1421-22.

or receiving a benefit because of gender. All of the cited cases held that men and women must be treated equally.⁸²

But *United States v. Virginia* does not end as those cases do. They simply decided that the exclusion of women or men was invalid. *United States v. Virginia* is more complicated. The remedial aspect of this case involves admitting women to an institution designed for men's physical skills and unisex barracks living. The equal treatment model is insufficient to rectify those aspects of VMI with the simple remedy, "admit women." That instruction alone would put women in an impossible position. Many women otherwise capable of meeting VMI's goals might not be able to perform certain physical requirements designed for men. They also might resist living in barracks that provide no privacy protection.

While Justice Ginsburg stresses that the women admitted to VMI must be of equal talent with the men, it is unclear what this means. Does it require that women have the same height, weight, and muscle density as men and have no privacy concerns while nude and in the presence of nude males? To answer the questions left open by the equal treatment model, Justice Ginsburg appears to turn to the equal results model in a carefully limited manner.

3. "Alterations" and "Adjustments"—The Equal Results Model of *United States v. Virginia*

While stressing the equal treatment model, *United States v. Virginia* does not ignore "inherent differences"⁸³ between men and women. The opinion, however, does not use those differences to "denigrate"⁸⁴ women, to view them as inferior, or to deny them equal opportunities. Rather, the opinion "celebrates"⁸⁵ differences between the sexes and requires "alterations"⁸⁶ in housing arrangements and "adjustments"⁸⁷ in physical skills requirements to remove opportunity-limiting barriers. By requiring these limited alterations and adjustments, *United States v. Virginia* defines equality by eliminating gender-based definitions of ability that are made irrelevant by altering the institution. This definition of equality ensures that an institution cannot define unnecessarily qualifications in such a way as to

82. For brief descriptions of these cases, see note 61.

83. 116 S. Ct. at 2276.

84. *Id.*

85. *Id.*

86. *Id.* at 2284 n.19.

87. *Id.*

exclude women. For example, VMI cannot define capability as the ability to tolerate a nude male environment, which would require women to choose between privacy, safety, and social mores on the one hand, and equality on the other—a choice not required of the men currently attending VMI. Requiring VMI to alter and adjust its physical requirements and housing arrangements provides women equal results with men: the ability to enter VMI at the same level of comfort, or discomfort, that the men experience, neither more nor less.⁸⁸

Instead of portraying women as inferior, *United States v. Virginia* essentially looks to see how the institution originally would have been designed to maximize the talents of both genders. Justice Ginsburg says that the admission of women to VMI should “enhance its capacity to serve the ‘more perfect Union.’ ”⁸⁹ In this quotation Justice Ginsburg speaks of “women capable of all the activities required of VMI cadets.”⁹⁰ Earlier in the opinion, she speaks of the necessity of adjusting physical training requirements.⁹¹ While facially inconsistent, these statements reflect the possibility of removing a requirement geared to one gender, but unnecessary to the achievement of the goal of the institution, thus allowing the admission of qualified people of both genders whose combined capabilities will enhance the overall goal of the institution.⁹² The opinion marks a dramatic departure from the view that if women want male opportunities, they must look and behave like men to show that they deserve those opportunities.

The opinion does not return to the protectionism of *Muller v. Oregon*,⁹³ in which the Supreme Court justified limiting working hours for women, but not men, on the general theory that women’s health needed to be protected for the sake of their future children.⁹⁴ *Muller* was initially perceived by many as a progressive opinion, per-

88. The current physical program at VMI presumably does not require skills for which women are at an advantage because the program has been designed just for men.

89. *United States v. Virginia*, 116 S. Ct. at 2287.

90. *Id.*

91. *Id.* at 2284 n.19.

92. See Part III.B for a discussion of how *United States v. Virginia* elevates gender equal protection analysis.

93. 208 U.S. 412 (1908).

94. *Id.* at 421-22.

mitting states to end some of the worst of the sweat shop conditions.⁹⁵ Some negative consequences of the decision, however, were to limit the amount of money women could earn and to make employers reluctant to hire them.⁹⁶ Later, the Supreme Court affirmed the limitation of working hours⁹⁷ and, later still, a minimum wage⁹⁸ for both men and women.

Apparently to distinguish *Muller*, the Court in *United States v. Virginia* says, “[i]nherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”⁹⁹ Clarifying what is meant by “denigration,” the opinion instructs that sex-based classifications can no longer be used “to create or perpetuate the legal, social, and economic inferiority of women,”¹⁰⁰ and can no longer be based upon generalizations.¹⁰¹

The opinion uses the language of “accommodation,”¹⁰² “adjustment,”¹⁰³ and “alteration”¹⁰⁴ to describe the required institutional changes. Justice Ginsburg introduces the concept of changing

95. See Mason, 29 J. Family L. at 3-4 (cited in note 42). See also James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U. L. Rev. 1037, 1101-02 (noting that public opinion favored the regulation of the number of hours women could work).

96. See *Guerra*, 479 U.S. at 300 (White, J., dissenting) (noting that nineteenth-century protective legislation “impeded women in their efforts . . . in the workplace”). See also Williams, 13 N.Y.U. Rev. L. & Soc. Change at 334 (cited in note 29) (noting that in the 1940s some states passed, to protect women, mandatory pregnancy leave legislation that did not guarantee reemployment and therefore “‘protected’ pregnant women right out of their jobs”); Judith Olans Brown, Lucy A. Williams, and Phyllis Trooper Baumann, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA Women’s L. J. 457, 467-77 (1996) (critiquing *Muller* as accepting a maternal myth that denies other values for women).

97. *Bunting v. Oregon*, 243 U.S. 426, 438 (1917) (upholding an Oregon statute limiting working hours for both men and women).

98. *United States v. Darby*, 312 U.S. 100, 125 (1941) (upholding minimum wage for men and women in Fair Labor Standards Act). The Supreme Court had previously affirmed a minimum wage only for women, see *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-99 (1937), having invalidated it thirteen years before in *Adkins v. Children’s Hospital*, 261 U.S. 525, 559 (1923). Deborah Rhode theorizes that protective legislation may have laid the groundwork for protection for all, but it might also have delayed protection for all. Rhode, *Justice and Gender* at 121-22 (cited in note 29). She further argues that legislation for pregnant women might not have adverse consequences for them in today’s political climate and might lead to benefits for all, but that the best approach is to “push for more by refusing to settle for less.” *Id.* For the Author’s view, see Part IV.C.3.

99. 116 S. Ct. at 2276.

100. *Id.* (citing with disapproval *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948), a case holding that differences between men and women justified a state statute passed at the end of World War II that prohibited most women from tending bar).

101. *Id.* at 2284.

102. *Id.* at 2282.

103. *Id.* at 2281 n.15, 2284 n.19.

104. *Id.* at 2284 n.19.

the institution by noting that the parties did not dispute the necessity of making alterations if women were admitted. She says, "it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets."¹⁰⁵ She stresses the equal results model, saying that VMI's goal

to produce "citizen-soldiers," individuals 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 . . . to defend their country in time of national peril[,] [s]urely . . . is great enough to *accommodate* women, who today count as citizens in our American democracy equal in stature to men.¹⁰⁶

Justice Ginsburg details the necessary accommodations in two footnotes. Footnote fifteen states: "Inclusion of women in settings where, traditionally, they were not wanted inevitably entails a period of adjustment."¹⁰⁷ The "inevitability" of "a period of adjustment" is elaborated in footnote nineteen:

Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs. Experience shows such adjustments are manageable.¹⁰⁸

The experience to which Justice Ginsburg refers is the United States military academies' favorable experience admitting women.¹⁰⁹ The sentence that contains footnote nineteen uses, in text, the equal treatment model with the word "fit", and, in footnote, the equal results model with the words "alterations" and "adjustments." Thus, the opinion melds both models by requiring women to meet the high

105. Id. at 2279 (citation omitted).

106. Id. at 2281-82 (internal quotation marks and citations omitted) (emphasis added).

107. Id. at 2281 n.15.

108. Id. at 2284 n.19 (citations omitted). Footnote nineteen is in the middle of the following sentence:

It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted, [footnote nineteen] a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit, a decree that will bar like discrimination in the future.

Id. at 2284.

109. Footnote nineteen cites the note following 10 U.S.C. § 4342: "[A]cademic and other standards for women admitted to the Military, Naval, and Air Force Academies 'shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals.'" *United States v. Virginia*, 116 S. Ct. at 2284 n.19.

standards of the institution, and by requiring the institution to alter and adjust in order to accept the "celebrated" inherent differences between the genders.

One also sees melding of the models in *United States v. Virginia*'s citations, not only to the equal treatment cases described above, but also to two equal results cases: *Califano v. Webster*¹¹⁰ and *California Federal Savings & Loan Association v. Guerra*.¹¹¹ In both of those cases the Court upheld statutes containing gender classifications. *Webster* upheld a statute that permitted different computation of social security benefits for men and women to compensate women for economic disabilities.¹¹² *Guerra* upheld, against a Title VII preemption challenge, a state statute requiring employers to give employees unpaid pregnancy leave.¹¹³ In combining equal results and equal treatment in one opinion, *United States v. Virginia* goes beyond existing precedent to formulate a new approach to gender equal protection analysis.¹¹⁴

III. ELEVATION OF GENDER EQUAL PROTECTION ANALYSIS

A. Constitutionally Mandated Accommodations for "Celebrated" Differences

After holding that VMI violated equal protection in its admissions policies, Justice Ginsburg goes further than either the equal treatment or equal results cases that she cites. None of the equal treatment cases required governments to make institutional alterations. None of the equal results cases, such as the differential social security accounting system, the pregnancy leave statute, or the military academies' admission of women, had been instituted

110. 430 U.S. 313, 320 (1977).

111. 479 U.S. 272, 289 (1987).

112. 430 U.S. at 320.

113. 479 U.S. at 289-90.

114. In a law review article written in 1978, then Professor Ginsburg discussed the limits of a "genuinely compensatory classification" which "directly addresses discrimination and serves to remedy it." Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Content of Sex*, 10 Conn. L. Rev. 813, 823 (1978). She states: "*Webster* thus attempts to preserve and to bolster a general rule of equal treatment while leaving a corridor for genuinely compensatory classification." *Id.* She also describes "childbearing capacity," saying, "[i]f benign sex classification ever had a place, it is in this area." *Id.* at 825.

pursuant to court order. These were all legislative creations.¹¹⁵ *United States v. Virginia*, however, not only requires VMI to admit capable women, but also requires that it make institutional changes to accept them.¹¹⁶ Why did six of the eight justices hearing this case go this far? Presumably because, in the logical progression of equal protection case law, the cases have reached a stage of complexity where equal treatment analysis or equal results analysis alone will not achieve the equality mandated by the Fourteenth Amendment.

B. Mandating Institutional Alterations Requires Least-Restrictive-Means Analysis

1. History of Gender Equal Protection Analysis

Prior to 1971, the Supreme Court dismissed women's claims of unequal treatment on the ground that women are different from men. In particular, the VMI case cites with disapproval *Goesaert v. Cleary*,¹¹⁷ a case that noted that while the discrimination challenge was "beguiling,"¹¹⁸ the purported differences between men and women justified a state statute passed after World War II prohibiting most women from working as bartenders.¹¹⁹

In 1971 a legal sea change in gender equal protection cases occurred. In *Reed v. Reed*,¹²⁰ a unanimous Court refused to dismiss a woman's claim of unequal treatment because of her sex. The Court chose not to follow the Idaho Supreme Court's reasoning that men

115. Justice Scalia notes that the federal military colleges admitted women "because the people, through their elected representatives, decreed a change." *United States v. Virginia*, 116 S. Ct. at 2293 (Scalia, J., dissenting) (citation omitted).

116. This remedy assumed that VMI would remain a state institution. After investigating the possibility of one of the remedial options suggested by the Fourth Circuit, abandoning state support, VMI decided to remain a state-supported institution and admit women. Donald Baker, *By One Vote, VMI Decides to Go Coed; Nation's Last All-Male Military School to Enroll Women Starting in '97*, Wash. Post A1 (Sept. 22, 1996); Wes Allison, *First Female Rats to Have Mentors: Older Women Advisers to Be Part of VMI Corps*, Richmond-Times Dispatch (Sept. 9, 1997).

117. 335 U.S. 464 (1948), cited in *United States v. Virginia*, 116 S. Ct. at 2276. Justice Scalia cites *Goesaert* with approval in his dissent. *United States v. Virginia*, 116 S. Ct. at 2296 (Scalia, J., dissenting).

118. 335 U.S. at 464.

119. *Id.* at 466-67.

120. 404 U.S. 71 (1971).

were more likely than women to have business experience¹²¹ and held that a state statute preferring men over women in the administration of decedents' estates violated the Fourteenth Amendment.¹²² By 1976, the Court had articulated a "midtier analysis" for gender equal protection cases.¹²³ That analysis requires a state to justify classification by gender with a showing that the classification is "substantially related" to the achievement of "important governmental objectives."¹²⁴ The "midtier test" contrasts with "rational basis" equal protection analysis and "strict scrutiny" analysis for race and fundamental rights cases. Under rational basis analysis, a classification must rationally relate to some legitimate governmental purpose.¹²⁵ Under strict scrutiny, a government may classify individuals only upon a showing that there is no less discriminatory means available to achieve an essential or compelling purpose. Stated differently, a government must show that the classification is necessary to achieve that purpose.¹²⁶

Since 1971, the Court has invalidated many state and federal policies that treat men and women differently, but has occasionally upheld differential treatment to remedy past discrimination.¹²⁷ Some cases, however, continue to resemble those decided before 1971, upholding, because of physical differences between men and women, differential treatment, even though such treatment was not designed to create equal results.¹²⁸ This confusing conglomeration of "midtier"

121. The rationale given by the state, and accepted by the Idaho Supreme Court, that men are "better qualified," see 93 Idaho 511, 465 P.2d 635, 638 (1970), was not mentioned by the Supreme Court in *Reed*, but was in *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973).

122. *Reed*, 404 U.S. at 76-77.

123. *Craig*, 429 U.S. at 197-99.

124. *United States v. Virginia*, 116 S. Ct. at 2288 (Rehnquist, C.J., concurring) (quoting *Craig* and citing other cases that use the midtier articulation).

125. Under rational basis equal protection review, the burden is usually on the challenging party to prove that a classification is not rationally related to a legitimate government interest. Only if the application of a law is totally arbitrary, serving no legitimate government interest, will it fail under this deferential test. See, for example, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-17 (1976) (upholding as rational a state law requiring the retirement of police officers over fifty years old).

126. The Supreme Court applies strict scrutiny equal protection review when the government intentionally acts on the basis of a suspect classification such as race, see, for example, *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967); *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984), or national origin, see, for example, *Hernandez v. Texas*, 347 U.S. 475, 482 (1954), or acts to infringe some "fundamental rights," see, for example, *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (right to marry); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (right to interstate travel).

127. See equal treatment and equal results cases cited in note 61.

128. See cases employing neither model cited in note 61.

equal protection cases has evoked criticism from commentators¹²⁹ and from the justices themselves.¹³⁰ *United States v. Virginia's* requirement of accommodation adds a new dimension to these cases, which may serve to unify the analysis.

2. Application of Equal Protection Analysis in *United States v. Virginia*

a. Description of Traditional Analysis

The summary of gender equal protection law in the majority opinion begins with a familiar review. It quotes from prior fourteenth amendment case law stating that a court must determine that the justification for differential treatment is "exceedingly persuasive."¹³¹ The majority opinion cites prior equal treatment cases to point out that the state has the burden of proving that justification,¹³² which must be genuine and cannot rely on overbroad generalizations.¹³³

The Court quotes the midtier test: "The State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed

129. See, for example, Johnny C. Parker, *Equal Protection Minus Strict Scrutiny Plus Benign Classification Equals What? Equality of Opportunity*, 11 Pace L. Rev. 213, 225-26 (1991) (noting the "growing judicial disenchantment" with the Supreme Court's equal protection jurisprudence).

130. See, for example, *Craig*, 429 U.S. at 212 (Stevens, J., concurring) (arguing that "the two-tiered analysis" is not "a completely logical method of deciding cases"); *id.* at 210 (Powell, J., concurring) (asserting "there are valid reasons for dissatisfaction with the 'two-tier' approach. . . . I would not welcome a further subdividing of equal protection analysis"); *id.* at 220-21 (Rehnquist, J., dissenting) (asserting that "we have had enough difficulty with the two standards of review . . . so as to counsel weightily against the insertion of still another 'standard' between those two"). See also *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-42 (1985) (Stevens, J., with Burger, C.J., concurring) (asserting that levels of review are not a useful method of analysis but that the characteristics of groups may be "irrelevant to a valid public purpose," making the classification irrational); *Vorchheimer v. School Dist. of Philadelphia*, 400 F. Supp. 326, 340-41 (E.D. Pa. 1975) (stating that the Supreme Court's guidance in equal protection cases is like a shell game in which the players are "not absolutely sure there is a pea"), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd* by an equally divided Court, 430 U.S. 703 (1977).

131. *United States v. Virginia*, 116 S. Ct. at 2275. Chief Justice Rehnquist in concurrence and Justice Scalia in dissent note that the majority opinion uses this phrase nine times. *Id.* at 2288 (Rehnquist, C.J., concurring); *id.* at 2294 (Scalia, J., dissenting).

132. *Id.* at 2275 (citing *Hogan*, 458 U.S. at 724).

133. *Id.* (citing *Wiesenfeld*, 420 U.S. at 643, 648; *Goldfarb*, 430 U.S. at 223-24 (Stevens, J., concurring in judgment)).

are substantially related to the achievement of those objectives."¹³⁴ The inclusion of the phrase "at least" is a signal that this opinion may be going beyond that test.¹³⁵ Justice Scalia points out another signal, noting Justice Ginsburg's comment that "[t]he Court has *thus far* reserved most stringent judicial scrutiny for classifications based on race or national origin"¹³⁶ Justice Scalia argues that, contrary to its language, the majority opinion uses the "least-restrictive-means analysis."¹³⁷ Thus, he says the majority's "statements . . . are calculated to destabilize current law."¹³⁸ But the criticisms of the midtier test indicate that the test has hardly created stability or predictability in litigation.¹³⁹

Although Justice Ginsburg's use of the phrase "exceedingly persuasive" derives from prior equal protection cases, both Chief Justice Rehnquist¹⁴⁰ and Justice Scalia¹⁴¹ claim that she uses the phrase in a different context. They claim that she has elevated the midtier test when she says: "[W]e conclude that Virginia has shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI."¹⁴² An examination of how the majority rejects Virginia's defenses and orders a remedy indicates that Chief Justice Rehnquist and Justice Scalia probably are correct.

b. Rejection of Virginia's Defenses

Virginia first defended on the grounds that single-sex education was important and offered diversity. Second, Virginia argued that admitting women to VMI would require modification of the adversative method.¹⁴³ Trying to fit these claims into the articulated midtier rationale shows its clumsiness. Providing diversity in education is clearly important. The problem, however, is that there is no explanation for why the classification must be based on gender. In

134. *Id.* (internal quotation marks and citations omitted).

135. The same phrase is also used in *Hogan*, 458 U.S. at 724.

136. *United States v. Virginia*, 116 S. Ct. at 2275 n.6 (Scalia, J., dissenting) (emphasis in Justice Scalia's dissent). See *id.* at 2295 (Scalia, J., dissenting).

137. *Id.* at 2295 (Scalia, J., dissenting).

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

139. See notes 129-30.

140. *United States v. Virginia*, 116 S. Ct. at 2288 (Rehnquist, C.J., concurring).

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

142. *Id.* at 2276.

143. *Id.* (citation omitted). Chief Justice Rehnquist describes the same defenses, noting that Virginia sought to "justify" its male-only admissions policy with two defenses: "diversity in education," *id.* at 2289 (Rehnquist, C.J., concurring), and "maintenance of the adversative method," *id.* at 2290 (Rehnquist, C.J., concurring).

fact, besides holding that the evidence is insufficient to show that diversity in education was Virginia's "true reason" for the differential treatment,¹⁴⁴ the majority rejects the "diversity" defense because it does not explain why diversity was provided only to its "sons" and not to its "daughters."¹⁴⁵

Thus, whether a male-only (or female-only) admissions policy is closely related to diversity in education does not seem to be the proper question. The proper question is why single-sex diversity should be provided by the state only for men, or conversely, as Justice Ginsburg frames the question, why women must be excluded from the unique citizen-soldier program.¹⁴⁶ That raises a related question: does the reason for excluding women need to be rational, important, or essential? Since 1971 the Court has made clear that the reason must be more than rational.¹⁴⁷ Twenty-five years later the phrase Justice Ginsburg uses is "exceedingly persuasive."¹⁴⁸ Does "exceedingly pervasive" mean important or essential?

The Court's resolution of Virginia's second defense would indicate that a state's reason for excluding women must be essential, not merely important. Virginia's second defense, as quoted by the Supreme Court, is that "the unique VMI method of character devel-

144. *Id.* at 2277. Agreeing with the majority, Chief Justice Rehnquist rejects the defense on the ground that there is "scant evidence in the record that [diversity] was the real reason that Virginia decided to maintain VMI as men only." *Id.* at 2289 (Rehnquist, C.J., concurring) (footnote omitted). Chief Justice Rehnquist seems to depart from his earlier opinions in agreeing that the "real reason" for the government's differential policy is an element of midtier analysis. His opinion for the Court in *Michael M.* did not appear to give that "real reason" much importance. See *Michael M.*, 450 U.S. at 494 (Brennan, J., dissenting) (noting that states had only recently asserted that statutory rape laws were justified as a means to protect against pregnancy).

145. *United States v. Virginia*, 116 S. Ct. at 2279. Justice Scalia argues that Virginia is not discriminating against its daughters because it provides state support to private women's colleges. *Id.* at 2297, 2305 (Scalia, J., dissenting). Chief Justice Rehnquist responds to Justice Scalia's approach by saying that Virginia supports all private schools in the same manner; it "gives no special support to . . . women's single-sex education." *Id.* at 2290 (Rehnquist, C.J., concurring).

146. Justice Ginsburg says: "[D]oes . . . exclusion of women from . . . VMI . . . deny to women . . . equal protection . . . ?" *Id.* at 2274 (emphasis added). "Measuring the record in this case against the review standard . . . , we conclude that Virginia has shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI." *Id.* at 2276 (emphasis added). This formulation of the issue was first articulated in 1981 in *Rostker* by Justice Marshall, see *Rostker*, 453 U.S. at 90 (Marshall, J., dissenting) ("The government's task . . . is to demonstrate that excluding women . . . substantially furthers the goal . . ." (emphasis added)), and was restated one year later in *Hogan* by Justice O'Connor, see 458 U.S. at 731 (emphasis added) ("[T]he record is flatly inconsistent with the claim that excluding men . . . is necessary to reach any of MUW's . . . goals.").

147. See Part III.B.1.

148. See *United States v. Virginia*, 116 S. Ct. at 2273, 2274, 2275, 2276, 2281, 2282, 2287.

opment and leadership training,' the school's adversative approach, would have to be modified were VMI to admit women.'¹⁴⁹ Virginia argued that the modification would "destroy" VMI's program.¹⁵⁰

Applying that defense to the midtier test, one could either ask whether the adversative method is closely related to diversity of education or whether the adversative method is an important governmental interest and whether the differential treatment is closely related to that interest. The first approach does not explain the differential treatment. The second approach could explain it, but the majority, unlike Chief Justice Rehnquist, does not reach the issue whether the method is important. Chief Justice Rehnquist sees no support in the record for a finding that the adversative method, as opposed to single sex education generally,¹⁵¹ has pedagogical value.¹⁵²

149. *Id.* at 2276 (quoting Brief for Cross-Petitioners at 33-36, *United States v. Virginia*, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)) (available on LEXIS, GENFED library, BRIEFS file).

150. *Id.* at 2279 (quoting Brief for Cross-Petitioners at 34-36, *United States v. Virginia*, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)) (available on LEXIS, GENFED library, BRIEFS file). The Court summarized the district court's findings after the first trial, saying:

Women are [indeed] denied a unique educational opportunity that is available only at VMI. . . . But [VMI's] single-sex status would be lost, and some aspects of the [school's] distinctive method would be altered if women were admitted: Allowance for personal privacy would have to be made; [p]hysical education requirements would have to be altered, at least for the women; the adversative environment could not survive unmodified.

Id. at 2271 (internal quotation marks and citations omitted). The Court also quoted the district court's finding that "[t]he most important aspects of the VMI educational experience occur in the barracks." *Id.* at 2283 (quoting *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1423). The Court said further: "The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect 'at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach.'" *Id.* at 2279 (quoting *United States v. Commonwealth of Virginia*, 976 F.2d at 896-97).

Justice Scalia says the findings of fact indicate that "Virginia's options were an adversative method that excludes women or no adversative method at all." *Id.* at 2297 (Scalia, J., dissenting).

For commentators agreeing that changes to accommodate women would destroy VMI, see Caplice, 18 *Harv. J. L. & Pub. Pol.* at 274 (cited in note 13); Soderberg, 50 *Wash. & Lee L. Rev.* at 17 (cited in note 13); Yablonski, 47 *U. Miami L. Rev.* at 1470 (cited in note 13). For commentators who supported admitting women to state-run military institutions, see Mary M. Cheh, *An Essay on VMI and Military Service: Yes, We Do Have to Be Equal Together*, 50 *Wash. & Lee L. Rev.* 49 (1993); Laurie A. Keco, Note, *The Citadel: Last Male Bastion or New Training Ground?*, 46 *Case W. Res. L. Rev.* 479 (1996); Julie M. Arnstein, Note, *United States v. Virginia: The Case of Coeducation at Virginia Military Institute*, 3 *Am. U. J. Gender & L.* 69 (1994); Marcia Berman, *An Equal Protection Analysis of Public and Private All-Male Military Schools*, 1991 *U. Chi. Legal Forum* 211.

151. *United States v. Virginia*, 116 S. Ct. at 2290-91 (Rehnquist, C.J., concurring). As noted in the introduction to this Article, see note 7, the Court, in a footnote, appears to leave unresolved the general issue of the constitutionality of single-sex education in circumstances other than VMI's. *Id.* at 2276 n.7.

152. *Id.* at 2290 (Rehnquist, C.J., concurring).

The majority holds that the relationship, whether close or essential, between the exclusion of women and the successful application of the adversative method is unproven. The Court notes that Virginia failed to prove its second defense because its witnesses conceded that some women could do well under the adversative method, and because the remaining evidence was based on stereotypes and overbroad generalizations.¹⁵³ The Court says that “[t]he notion that admission of women would downgrade VMI’s stature, destroy the adversative system and with it, even the school, is a judgment hardly proved, a prediction hardly different from other ‘self-fulfilling prophecies]’”¹⁵⁴ The opinion discusses other situations in which catastrophic consequences have been predicted, but not materialized, from the inclusion of women, most notably in their admission to the legal and medical professions¹⁵⁵ and to the police and military academies and professions.¹⁵⁶ The remedy that the Court implies would be appropriate is for VMI to admit women who are fit and make the same or similar institutional changes as the military academies made when they admitted women.¹⁵⁷

c. *Strict Scrutiny*

By ordering a remedy for “some women” the Court is using, as Justice Scalia contends, a “least-restrictive-means analysis,”¹⁵⁸ hold-

153. *Id.* at 2279-82. Chief Justice Rehnquist believes the majority did reach the issue. He explains:

I agree with the Court that [maintenance of the adversative method] does not serve an important governmental objective. A State does not have substantial interest in the adversative methodology unless it is pedagogically beneficial. While considerable evidence shows that a single-sex education is pedagogically beneficial for some students, . . . there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies.

Id. at 2290-91 (Rehnquist, C.J., concurring) (citing *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1414).

154. *Id.* at 2280 (citing *Hogan*, 458 U.S. at 730) (footnotes omitted). Justice Scalia claimed that the majority ignored findings of fact that women have different educational needs from those of men. *Id.* at 2291, 2296-98, 2300-01 (Scalia, J., dissenting).

155. *Id.* at 2280-81.

156. *Id.* at 2281.

157. *Id.* at 2282-87. Chief Justice Rehnquist would have required a different remedy. Rather than remanding to order the admission of women to VMI, he would accept as a remedy “a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution.” *Id.* at 2291 (Rehnquist, C.J., concurring). He would not require “the creation of a VMI clone,” nor would he condone the creation of a women’s school based on stereotypes. *Id.* (Rehnquist, C.J., concurring).

158. *Id.* at 2295 (Scalia, J., dissenting).

ing that VMI can achieve its purpose in a manner less restrictive than excluding all women. The remedy goes further, however, than ordering "some women" to be admitted to VMI. The remedy does not require "some women" to benefit from the program as it is, with, among other things, total lack of privacy. The remedy, as discussed above,¹⁵⁹ requires alterations in housing and adjustments in physical skill requirements. Justice Scalia objects to this: "There should be no debate in the federal judiciary over 'how much' VMI would be required to change if it admitted women and whether that would constitute 'too much' change."¹⁶⁰ He is correct that requiring a remedy for "some women" and requiring institutional changes leaves discretion with the factfinder to determine which inherent differences justify institutional change, and for what subset of women the changes are to be made. The more alterations that are made in an institution originally geared toward gender-specific traits, however, the more likely that greater numbers of the other sex will attend. The problem with requiring *no* institutional alteration is that unnecessary inequality based on inherent differences will remain.

United States v. Virginia uses the language of necessity in stressing the limited nature of the alterations. In the footnote discussing the required institutional alterations, Justice Ginsburg states that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements. . . ."¹⁶¹ She quotes from legislation mandating that the military academies treat men and women the same "except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals."¹⁶²

By ordering changes to be made, the Court recognizes that there is an essential, but unnecessary, relationship between gender and the adversative method. If the relationship were not essential, no change would be necessary upon the inclusion of women. If the relationship between gender and adversative method were necessary, no change would be ordered and no women would be admitted, unless the adversative method itself were unnecessary. Thus, *United States v. Virginia* appears to use, but not articulate, a strict scrutiny analysis. An essential connection between differential gender treatment

159. See Part II.C.3.

160. *United States v. Virginia*, 116 S. Ct. at 2302 (Scalia, J., dissenting).

161. *Id.* at 2284 n.19.

162. *Id.* (quoting note following 10 U.S.C. § 4342). See also note 109 and accompanying text.

and a governmental purpose does not justify the treatment, but supports the need to consider altering the purpose. Only a purpose that cannot change, for which differential treatment is necessary, would now appear to survive equal protection gender scrutiny. Thus, the availability of institutional alterations as a remedy affects the necessity of excluding women. While looking to the availability of a remedy to determine liability appears to be a new method of analysis, it is, in fact, what the least restrictive means test has always done. It requires an examination of whether there is another means of achieving the same result. Noting that there is another means available is a recognition that a remedy could be ordered to implement that new means. By ordering change, or considering whether an institution can make changes to achieve its purpose in a less restrictive way, *United States v. Virginia* resembles both Title VII and strict scrutiny equal protection cases.

C. *United States v. Virginia's Least-Restrictive-Means Analysis Resembles Title VII Analysis*

1. Title VII's Bona Fide Occupational Qualification Defense to Intentional Discrimination

Under Title VII, an employer who intentionally discriminates on the basis of sex can defend on the ground that a gender qualification is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."¹⁶³ This is known as the "BFOQ" defense. Courts have held that the defense is narrow¹⁶⁴ and that the job qualification must relate to the "essence" of the business.¹⁶⁵

Additionally, a job qualification can be gender-based only if an employer can prove that all or substantially all members of the

163. 42 U.S.C. § 2000e-2(e).

164. See, for example, *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

165. See *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991); *id.* at 206 (concluding that protection of future children from lead exposure is not an essential aspect of the job or business of making batteries); *id.* at 207 (finding that employer failed to show that all women would be unable to perform the duties of the job safely and efficiently); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (noting that being female was not a BFOQ for job as flight attendant because being "soothing" is not reasonably necessary to the normal operations of the particular business).

excluded gender cannot do the work.¹⁶⁶ In some instances, a court requires employers to do a case by case screening designed to avoid the rejection of all women based on stereotypes of what substantially all women are thought to be unable to do.¹⁶⁷ If, on the other hand, the employer has job requirements that, while neutrally phrased, would eliminate a disproportionate number of one gender or the other, then under disparate impact analysis, the employer could be ordered to discontinue the practice, or otherwise accommodate the excluded gender.

2. Disparate Impact Claims Under Title VII and the Equal Protection Clause

Disparate impact and disparate treatment are two well-recognized types of discrimination claims. Disparate treatment involves intentional discrimination against someone because of race, sex, or some other forbidden factor.¹⁶⁸ The Constitution prohibits disparate treatment discrimination by the government,¹⁶⁹ while Title VII prohibits such conduct by a private or public employer.¹⁷⁰

Disparate impact discrimination involves a facially neutral practice that causes a disproportionate and adverse impact upon a protected class of people, here women.¹⁷¹ In Title VII litigation, where the employer's neutral practice causes the disparate impact, no showing of intent to discriminate is necessary for liability.¹⁷² In equal protection litigation, however, intent to discriminate must be proven. In the one equal protection disparate impact gender case to reach the Supreme Court, *Personnel Administrator of Massachusetts v. Feeney*,¹⁷³ the Court imposed the requirement of intentional discrimination found in racial disparate impact equal protection

166. See, for example, *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

167. *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1224-26 (9th Cir. 1971).

168. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

169. U.S. Const., Amend. V, Amend. XIV, § 1.

170. 42 U.S.C. § 2000e-2(a).

171. See *International Brotherhood of Teamsters*, 431 U.S. at 335 n.15 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). See also 42 U.S.C. § 2000e-2(k).

172. *Griggs*, 401 U.S. at 432. *Griggs* was reinterpreted by *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60 (1989) (holding intent required in Title VII disparate impact cases). *Wards Cove* was then legislatively overturned by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k) (providing that intent is not required in disparate impact cases).

173. 442 U.S. 256 (1979).

cases.¹⁷⁴ Thus, the plaintiff in *Feeney* had to prove, which she could not, that Massachusetts instituted veterans' preferences in state employment in order to exclude women. A showing that the veterans' preferences had that effect, or that Massachusetts could foresee that effect, was insufficient for liability.¹⁷⁵

In a Title VII case, once a plaintiff has made a prima facie disparate impact case, a defendant can defend by proving that the neutral practice is a "business necessity."¹⁷⁶ If the defendant is able to establish the defense, the plaintiff still has an opportunity to prove that the defendant could achieve the business necessity in a less discriminatory way.¹⁷⁷

3. BFOQ and Disparate Impact Analysis Applied to the Facts of *United States v. Virginia*

Although VMI is not an "employer" with respect to its students for Title VII purposes, application of Title VII's BFOQ defense and disparate impact analysis to *United States v. Virginia's* facts illustrates the similarity between these analyses and the case's least-restrictive-means analysis. The VMI case involves governmental disparate treatment based on gender because the Commonwealth of Virginia intentionally treated women differently from men by excluding them from a military college. In fact, the VMI case involves facial discrimination because VMI did not deny the discrimination: it had an explicit all-male admissions policy. When VMI argued that accommodating women would destroy its adversative method,¹⁷⁸ its attempted defense resembled a BFOQ defense in that it was arguing the "necessity" of not destroying a method that was "essential" to its institutional identity. The Court held that VMI had not met its burden of proving the defense because "some women" could benefit from the adversative program and because the projected negative

174. *Id.* at 272. See *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977); *Washington v. Davis*, 426 U.S. 229, 244-45 (1976); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

175. *Feeney*, 442 U.S. at 277. For an interesting thesis that gender equality permits a state to enact preferences with a negative disparate impact on women, such as in *Feeney*, so long as the state also enacts a "complementary" preference with a positive disproportionate impact on women, see Littleton, 75 Cal. L. Rev. at 1324-32 (cited in note 39).

176. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Griggs*, 401 U.S. at 431.

177. 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

178. See note 150.

consequences were speculative and based on stereotypes.¹⁷⁹ Both of these points are found in Title VII BFOQ cases.¹⁸⁰ Both create a defense difficult for the defendant to meet.

Although the VMI case is one of disparate treatment, it also addresses disparate impact discrimination. The decision requires not only that VMI admit women who are fit, but also that VMI make institutional changes in barracks living and physical skill requirements to provide equal opportunity to women.¹⁸¹ A remedy could have been fashioned that said, "all women willing to live without privacy in the military style barracks and able to perform feats of great upper body strength may apply." If the Court had ordered VMI to admit women without changing any of its practices, however, those practices could have been labeled neutral practices having a disparate impact on women. The practices would be neutral because they contain no explicit statement about women. They would cause a disparate impact upon women because few women would want to live without physical privacy from men, and fewer women than men have great upper body strength.

If women claimed that unchanged barracks practices and physical skill requirements had a disparate impact upon them, in the context of Title VII litigation, this showing would be sufficient to make the plaintiffs' prima facie case. The plaintiffs would not need to show that the practices were instituted with the intent of excluding women. VMI would need to defend by showing that the practices were necessary to its "business," and plaintiffs still would be entitled to show that there are less discriminatory ways to achieve the needs of that "business." Again, this is similar to how VMI defended against the equal protection claims.¹⁸² VMI argued that it provided diversity in education and that its unaltered adversative method was necessary for its institutional identity. By ordering institutional alterations, however, the Court acknowledged the stringent requirements for such a defense and implicitly accepted the United States' argument that there are less restrictive means to achieve VMI's purposes.¹⁸³ Diversity at the expense of Virginia's "daughters" was too restrictive.¹⁸⁴ Creating a parallel institution at this date was

179. See Part III.B.2.b.

180. See notes 166-67 and accompanying text.

181. See Part II.C.3.

182. See Part III.B.2.b.

183. See *United States v. Virginia*, 116 S. Ct. at 2294 (Scalia, J., dissenting).

184. *Id.* at 2279.

ineffective.¹⁸⁵ Dismantling VMI was unnecessary. Necessary and minimal alterations, however, can maintain VMI's purpose for both men and women.

United States v. Virginia obviously is not a Title VII case: it is a constitutional case that requires proof that the neutral practices were instituted intentionally to discriminate against women.¹⁸⁶ In the VMI case, the Fourth Circuit affirmed a finding by the district court that the adversative method "was not designed to exclude women,"¹⁸⁷ but had independent pedagogical value.¹⁸⁸ Without any court having found a contrary intent, however, the Supreme Court effectively required VMI, which intentionally discriminated against women, to "alter" and "adjust" ostensibly neutral housing arrangements and physical skill requirements to "accommodate" women.¹⁸⁹ Thus, *United States v. Virginia* requires a state actor that has intentionally discriminated against women to make institutional alterations without requiring that women prove that the practices to be altered were implemented intentionally by the defendant to exclude women. The defendant's policy of intentional discrimination appears to supply the requisite intent for a court to require alteration or elimination of neutral practices within a discriminatory framework.¹⁹⁰ This elimination of the requirement of intentional discrimination for neutral practices within a discriminatory institution changes a key aspect

185. Although Chief Justice Rehnquist would permit the creation of a separate but comparable women's school, see id. at 2291 (Rehnquist, C.J., concurring), he also noted VMI's 150 year history, and concluded that "[n]o legislative wand could instantly call into existence a similar institution for women," id. at 2290 (Rehnquist, C.J., concurring).

186. See Part III.C.2.

187. *United States v. Commonwealth of Virginia*, 44 F.3d at 1239.

188. *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1426, 1434. With respect to the adversative method, Chief Justice Rehnquist concluded there was no evidence that the adversative method was pedagogically beneficial. *United States v. Virginia*, 116 S. Ct. at 2291 (Rehnquist, C.J., concurring). Justice Scalia disagreed. Id. at 2304 (Scalia, J., dissenting). The majority opinion did not address that issue. See also notes 151-52 and accompanying text.

189. *United States v. Virginia*, 166 S. Ct. at 2281 n.15, 2284 n.19.

190. Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989). In *Price Waterhouse*, the Court held that a finding that an employer intentionally discriminated against a woman justifies shifting the burden of persuasion to the defendant to prove it would not have promoted her even had there been no discrimination, even though there was also a finding that the employer had legitimate reasons for not promoting the woman. Id. See also Candace S. Kovacic-Fleischer, *Proving Discrimination After Price Waterhouse and Wards Cove: Semantics as Substance*, 39 Am. U. L. Rev. 615, 641-43 (1990) (explaining that *Price Waterhouse's* analysis is consistent with established evidentiary rules for shifting burdens of proof). In intentional racial discrimination cases, such as school desegregation cases, the Court has also affirmed ordering changes in neutral practices such as transportation to school. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29-31 (1971).

of constitutional disparate impact gender equal protection analysis and makes it similar to Title VII disparate impact analysis.¹⁹¹

The defenses for Title VII disparate treatment and disparate impact cases, with their use of the words "necessary" and "essential," resemble the defense to strict scrutiny equal protection claims. To put this in familiar constitutional language, for a discriminatory practice to remain, a government must show that the practice is "narrowly tailored," and that no less discriminatory means will achieve the purpose.¹⁹² Although *United States v. Virginia* is neither a Title VII nor equal protection race case, its articulation of the level of scrutiny does not use "midtier" language. Rather, *United States v. Virginia* relies on strict scrutiny cases in discussing the remedy.

D. United States v. Virginia's Use of Race Cases Is Consistent with Heightened Scrutiny

The language of "accommodation," "adjustment," and "alteration" in *United States v. Virginia* is extraordinary.¹⁹³ Prior to this case, no gender equal protection case had required the defendant to make institutional alterations. Such alterations have been ordered to achieve equal protection in race cases.¹⁹⁴

Not only is *United States v. Virginia* the first gender equal protection case to order institutional alterations, but it is also the first to rely upon equal protection remedial race cases, specifically *Milliken v. Bradley*¹⁹⁵ and *Louisiana v. United States*.¹⁹⁶ In *Milliken*, the Court upheld court-ordered remedies requiring a variety of institutional changes, including remedial education, counseling, and teacher training, to end unconstitutional racial segregation in public schools.¹⁹⁷ In *Louisiana v. United States*, the Court upheld a decree to remedy unconstitutional voting procedures that included monthly

191. Whether this change would apply to race is beyond the scope of this Article. This change in analysis would have affected *Feeney* by permitting an inquiry into whether there was intentional discrimination in the state employment system, not just in the veteran's preference policy. See notes 173-75 and accompanying text.

192. See note 125 and accompanying text.

193. *United States v. Virginia*, 116 S. Ct. at 2281 n.15, 2282, 2284 n.19.

194. See *Swann*, 402 U.S. at 29-31 (authorizing the transportation of students as a means to desegregate schools); *Brown v. Board of Educ.*, 347 U.S. 483, 500 (1954) (holding that separate educational facilities are "inherently unequal"); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458-59 (1979) (ordering the dismantling of the dual system of racially segregated schools); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538-41 (1979) (same).

195. 433 U.S. 267 (1977), cited in *United States v. Virginia*, 116 S. Ct. at 2282.

196. 380 U.S. 145 (1965), cited in *United States v. Virginia*, 116 S. Ct. at 2282.

197. 433 U.S. at 272, 288.

reporting to the district court and postponing implementation of a neutrally imposed citizenship test.¹⁹⁸ Because the remedy in race cases follows a finding of liability under strict scrutiny analysis, reliance upon these cases for remedial analysis is consistent with *United States v. Virginia's* implicit use of strict scrutiny analysis to determine liability.

Although Justice Ginsburg relies upon remedial race cases, she is also aware that the assumptions in race and gender cases differ. In distinguishing cases involving race from those involving gender, Justice Ginsburg states: "Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" ¹⁹⁹ The differences between race and gender equal protection cases are accounted for in the purpose behind requiring institutional alterations. Alterations are ordered in racial cases to correct past inequities and to remove intransigence in the implementation of assimilation.²⁰⁰ Alterations are ordered in gender cases to facilitate equality between people with biological differences. In both types of cases, however, the availability of institutional alterations is a recognition that only necessary differential treatment is permissible. If there is a less discriminatory way in which the institution can achieve its result, then unequal treatment is unnecessary. This is strict scrutiny analysis.

The two race cases are cited in *United States v. Virginia* for the proposition that "[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].'" ²⁰¹ While *United States v. Virginia* refers to the race cases as requiring a remedy to be formulated that has a "close fit" with the constitutional violation, remedies in prior gender discrimination cases invalidating differential treatment have had not just a close fit, but an exact one: the courts have ordered, or remanded for an order, that the excluded gender be

198. 380 U.S. at 155-56.

199. *United States v. Virginia*, 116 S. Ct. at 2276 (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

200. See cases cited in note 194.

201. 116 S. Ct. at 2282 (citing *Milliken*, 433 U.S. at 280).

included, or the included gender be excluded.²⁰² Thus, the prior gender cases that have rejected stereotypical justifications for differential treatment did not need to discuss the possibility of institutional change to achieve equal treatment; they merely eliminated gender requirements from the statutes, permitting both sexes to be treated equally. Those cases, however, did not involve physiological differences between the sexes.²⁰³

Prior gender cases involving physiological differences upheld differential treatment, even when the discrimination was not intended to rectify past discrimination.²⁰⁴ Those cases did not discuss whether alterations could be made to provide equal treatment; they justified the classifications by focusing, among other things, on physiological differences between men and women. For example, in *Rostker v. Goldberg*,²⁰⁵ the Court upheld a male-only draft registration system on the ground that men and women were not "similarly situated"²⁰⁶ because women were statutorily excluded from combat. The combat exclusion was based, at least in part, on physiological differences.²⁰⁷

United States v. Virginia is more complicated than the decisions in prior gender equal protection cases. It is the first case to reject differential treatment based on physiological differences between the genders. It does so by ordering institutional alterations. The alteration requirement is a recognition that when an institution is designed specifically for men, its design may reflect their physiological characteristics. If the design were unmodifiable, it would perpetuate the exclusion of women. Requiring "alterations" and "adjustments" recognizes that "physiological differences" between men and women do not necessarily defeat equal treatment. This recognition adds a new level to gender equal protection analysis: consideration of whether a government can and should make alterations or adjustments before a court decides that inequality is permissible.

This new level of analysis for gender equal protection cases casts doubt on the continuing validity of prior cases upholding differential treatment not designed to "celebrate" inherent differences

202. For a description of remedies ordered in gender equal protection cases, see note 61.

203. For a description of the types of gender differences used in statutory classifications, see note 61.

204. Freedman, 92 Yale L. J. at 913 (cited in note 53) (describing the different types of equal protection gender cases).

205. 453 U.S. 57 (1981).

206. *Id.* at 78.

207. *Id.* at 81.

or remedy past discrimination.²⁰⁸ It is possible that the “not similarly situated”²⁰⁹ analysis found in those cases to justify differential treatment can no longer end the analysis. Courts will need to consider whether the government can make “alterations” or “adjustments” to eliminate the significance of the inherent differences between the sexes. Most notably, *Rostker* probably would be decided differently and according to Justice Marshall’s dissent.²¹⁰ Justice Marshall criticized the majority’s analysis, articulating the same focus for analysis²¹¹ later raised by Justice O’Connor in *Hogan*,²¹² and Justice Ginsburg in *United States v. Virginia*:²¹³ Why should one gender be excluded at all? Justice Marshall would have concluded that, with some alterations to the system of allocating draftees in the military, some women could be accepted in the military via the draft.²¹⁴

To summarize, by requiring VMI to make institutional adjustments to admit qualified women, the Court has elevated equal protection analysis to the level of the least-restrictive-means analysis of strict scrutiny. By rejecting as unproven VMI’s assertion that admission of women would destroy the institution, the Court has clearly placed the burden of proof upon the party seeking to uphold a statute that classifies by gender. From now on, courts faced with gender equal protection challenges will need to consider whether institutions can make changes, even in practices not intentionally discriminatory, before ruling that the exclusion of one or the other gender is permissible.

208. See note 61 (citing *Michael M.* and *Rostker* as examples of Supreme Court cases that upheld differential treatment for men and women on grounds of physical differences).

209. See, for example, *Rostker*, 453 U.S. at 78-89; *Michael M.*, 450 U.S. at 469.

210. See *Rostker*, 453 U.S. at 86-113 (Marshall, J., dissenting).

211. *Id.* at 94 (“[T]he Government’s task... is to demonstrate that *excluding* women... substantially furthers the goal...”) (emphasis added) (Marshall, J., dissenting).

212. 458 U.S. at 731 (“The second is... inconsistent with the claim that *excluding men*... is necessary...”) (emphasis added).

213. 116 S. Ct. at 2274 (“[D]oes... exclusion of women from... VMI... deny to women... equal protection...?” (emphasis added)). See also note 146 and accompanying text.

214. See *Rostker*, 453 U.S. at 112.

IV. *UNITED STATES V. VIRGINIA'S ANALYSIS APPLIES TO
CONSTITUTIONAL AND TITLE VII PREGNANCY CASES*

A. *United States v. Virginia Changes Constitutional Pregnancy
Discrimination Analysis*

1. History of Pregnancy Litigation

United States v. Virginia is significant not only because it raises gender equal protection analysis to the level of strict scrutiny, but also because it appears to include pregnancy in that analysis. Justice Ginsburg cites *California Federal Savings & Loan Association v. Guerra*²¹⁵ in her summary of equal protection law. *Guerra* is a Title VII pregnancy leave case. While Title VII's main focus is on prohibiting employers from discriminating "because of sex" or other characteristics,²¹⁶ the issue in *Guerra* was whether a state statute requiring employers to provide unpaid pregnancy leave was preempted by the Pregnancy Discrimination Act ("PDA"),²¹⁷ an amendment to Title VII. The PDA, codified as section 701 of Title VII, provides:

[T]he terms "because of sex" or "on the basis of sex" include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.²¹⁸

The employer in *Guerra* argued that the state pregnancy leave statute did not treat women "the same . . . as other persons . . . similar in their . . . inability to work" because it did not require the employer to give leave to anyone except pregnant workers.²¹⁹ The employer sought to have the California leave act invalidated on this ground.²²⁰

215. 479 U.S. 272 (1987), cited in *United States v. Virginia*, 116 S. Ct. at 2276.

216. Section 703(a) of Title VII provides: "It shall be an unlawful employment practice for an employer [to take described negative employment actions against an individual] because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

217. *Guerra*, 479 U.S. at 283-84.

218. 42 U.S.C. § 2000e(k).

219. 479 U.S. at 277-79 & n.6 (quoting 42 U.S.C. § 2000e(k)).

220. *Id.* at 279. Compare Candace S. Kovacic, *Remedying Underinclusive Statutes*, 33 Wayne L. Rev. 39, 76-80 (1986) (suggesting that repeal of California's pregnancy leave statute was not the only possible remedy: should that statute be preempted by section 701(k) of Title

In holding that California's pregnancy leave act was not preempted by the PDA, the *Guerra* Court reviewed the history of the PDA. Prior to its enactment, the Supreme Court reviewed two cases in which employers provided disability insurance that covered all conditions except pregnancy. One of the cases, *Geduldig v. Aiello*,²²¹ involved a governmental employer and was reviewed under the Equal Protection Clause. The other case, *General Electric Co. v. Gilbert*,²²² involved a private employer and was reviewed under Title VII. In both cases the Court held that discrimination against pregnant women was not sex-based discrimination. The Court reasoned that women are found in both of the compared classes: pregnant people and non-pregnant people.²²³ In *Geduldig*, the result of this reasoning was that the discrimination was reviewed under rational basis equal protection analysis, not gender-based heightened scrutiny.²²⁴ The Court held, in the context of a disability plan that had resulted in equal expenditures for men and women, that the pregnancy exclusion was a rational method for the employer to hold down the costs of disability coverage.²²⁵ Pregnancy was a unique condition.²²⁶ In *Gilbert*, the Court held that discrimination against pregnant women was not an unlawful employment practice covered by Title VII because Title VII prohibits only discrimination "because of sex."²²⁷

Many commentators criticized one or both of the cases, pointing out that there are no men in the category "pregnant people."²²⁸

VII, the Court could have ordered the statute's leave extended to others needing short-term leave provisions for physical inability to work). The Supreme Court in *Guerra* noted that the California statute did not prohibit employers from offering the leave to other employees. See *Guerra*, 479 U.S. at 286-89.

221. 417 U.S. 484 (1974).

222. 429 U.S. 125 (1976).

223. *Geduldig*, 417 U.S. at 496 n.20; *Gilbert*, 429 U.S. at 135-36, 138.

224. *Geduldig*, 417 U.S. at 494-95.

225. *Id.* at 495-97.

226. *Id.* at 496 n.20. The dissent in *Geduldig* noted that other "voluntary" conditions were covered by the plan, as were conditions unique to men. *Id.* at 499-500 (Brennan, J., dissenting).

227. *Gilbert*, 429 U.S. at 145-46.

228. See Steven Lee Lapidus, Note, *Pregnancy Discrimination, Equal Compensation and the Ghost of Gilbert: Medical Insurance Coverage for Spouses of Employees*, 51 Fordham L. Rev. 696, 709-11 (1983) (discussing congressional rejection of *Gilbert* by the enactment of the PDA and quoting congressional committees' recognition that the capacity to become pregnant is the primary distinction between men and women). For criticisms of the Court's conclusion that discrimination against pregnant women is not discrimination on the basis of sex, see Minow, 101 Harv. L. Rev. at 40-43 (cited in note 55); Marjorie Jacobson, Note, *Pregnancy and Employment: Three Approaches to Equal Opportunity*, 68 B.U. L. Rev. 1019, 1032-42 (1988); Kay, 1 Berkeley Women's L. J. at 30-32 (cited in note 30); Wendy S. Strinling, Comment, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking*

Congress reacted by amending Title VII with the addition of the PDA, quoted above, which was later at issue in *Guerra*. Congress made clear by passing the PDA that for purposes of Title VII the definition of discrimination "because of sex" included discrimination because of pregnancy, overturning the reasoning of *Gilbert*. Congress also overturned the result of *Gilbert* by requiring that employers include coverage for pregnancy in their benefits packages. In *Guerra*, the Court held that the PDA did not preempt the California pregnancy leave law because the PDA was "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."²²⁹ The Court reasoned that Congress had passed the PDA to overturn *Gilbert* legislatively and had not intended to prohibit states from requiring employers to provide pregnancy benefits.²³⁰

2. *United States v. Virginia* Effectively Overrules *Geduldig v. Aiello*

Although the challenge in *United States v. Virginia* involved neither pregnancy nor Title VII, the opinion cites *Guerra* in its summary of equal protection analysis as an example of permissible gender classifications.²³¹ By doing so, the Court recognizes that pregnancy affects men and women differently. Such a recognition by the Court indicates that it no longer accepts the reasoning that because not all women are pregnant, discrimination against pregnancy is not discrimination against women. This signals a rejection of *Geduldig's* reasoning.

Further, *United States v. Virginia* held that Virginia violated the Constitution by discriminating against "some women."²³² Discrimination against pregnant women is discrimination against "some women." Thus, the citations to *Guerra* and *United States v. Virginia's* reasoning in this regard should indicate that the constitutional analysis of pregnancy in *Geduldig* is no longer valid.

When Congress passed the PDA,²³³ it was unable, of course, to reverse *Geduldig's* constitutional holding. While the Court has not decided another constitutional challenge to pregnancy policies not involving abortion since *Geduldig*, five justices reaffirmed the

Geduldig After Cal Fed, 77 Cal. L. Rev. 171, 208-10 (1989); Brown, Parmet, and Baumann, 36 Buff. L. Rev. at 577-79, 604 (cited in note 38).

229. 479 U.S. at 280 (citation omitted).

230. *Id.* at 286-87.

231. 116 S. Ct. at 2276.

232. See Part II.C.2.

233. See Part IV.A.1.

reasoning in *Geduldig* in *Bray v. Alexandria Women's Health Clinic*²³⁴ in 1993. *Bray* held that a federal civil rights conspiracy statute²³⁵ does not provide women seeking abortions with a federal cause of action against people who obstruct access to abortion clinics.²³⁶ Among other reasons for that holding was Justice Scalia's discussion of *Geduldig's* holding that discrimination against pregnancy is not discrimination against women.²³⁷ Therefore, people who obstruct women's access to abortion clinics are not conspiring to deprive the women of the equal protection of the laws because they are women.²³⁸

United States v. Virginia raises a question about the continuing validity of *Geduldig*, notwithstanding *Bray*. *Geduldig* was not crucial to the result in *Bray*,²³⁹ nor was Justice Ginsburg a member of the Court when *Bray* was decided. She was appointed seven months later, replacing Justice White, one of five justices in the *Bray* majority.

Assuming that *Geduldig* is no longer good law after *United States v. Virginia*, governments can no longer discriminate against pregnant women. Governments should, as will be explained more fully below, make institutional alterations so that expectant women are not worse off than expectant men when each has a child.²⁴⁰

234. 506 U.S. 263, 271 (1993).

235. 42 U.S.C. § 1985(3).

236. *Bray*, 506 U.S. at 267-68.

237. *Id.* at 271.

238. *Id.* at 270 ("The record in this case does not indicate that petitioners' demonstrations are motivated by a purpose . . . directed specifically at women as a class . . ."). Justice Stevens, in a dissent joined by Justice Blackmun, replied that *Geduldig* needed to be read in context, saying "[c]entral to the holding in *Geduldig* was the Court's belief that the disability insurance system before it was a plan that conferred benefits evenly on men and women." *Id.* at 327-28 (Stevens, J., dissenting).

239. The Court in *Bray* reasoned that animus against women in general cannot be found from animus against women seeking an abortion because opposition to abortion does not necessarily mean "opposition (or paternalism) towards women . . . as is evident from the fact that men and women are on both sides of the issue." *Id.* at 270. Thus, the reasoning that discrimination against pregnant women is not sex discrimination is not necessary to the holding in *Bray*. People on both sides of the abortion issue include men and women and pregnant and nonpregnant women.

240. See Parts IV.B. and C.

B: United States v. Virginia Applies to Title VII

1. Title VII and the Fourteenth Amendment Use the Same Definition of Equality

Not only does the citation of *Guerra* indicate that *United States v. Virginia's* reasoning is applicable to constitutional pregnancy cases, but the citation also indicates that *United States v. Virginia's* reasoning is applicable to Title VII pregnancy cases. That reasoning includes requiring institutional alterations to achieve equality between the sexes. That reasoning is also consistent with the dictum in *Guerra* implying that pregnancy leave is required, not merely permitted, by Title VII. Justice Marshall, writing for the Court, said, "[b]y 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs."²⁴¹ This statement acknowledges the fact that women, unlike men, need to take time off when they have a baby. Thus, if an employer has no pregnancy leave policy, a man will not have to choose between having a job and having a child; a woman will.²⁴² It could follow from this dictum that private employers must provide pregnancy leave if women are to be treated as equals of men.²⁴³ Providing job protection for job interruption is not novel: employers must provide leave for military absence.²⁴⁴

241. *Guerra*, 479 U.S. at 289.

242. See Part II.B.2.

243. See Kay, 1 Berkeley Women's L. J. at 31 (cited in note 30) (arguing that pregnancy leave is required by both Title VII and the Constitution); Novkov, 19 N.Y.U. Rev. L. & Soc. Change at 172 (cited in note 58). See, for example, Rhode, *Justice and Gender* at 120 (cited in note 29); Abrams, 42 Vand. L. Rev. at 1227 (cited in note 28); Rodensky, 10 Harv. Women's L. J. at 228 (cited in note 58); Patricia M. Wald, *Glass Ceilings and Open Doors: A Reaction*, 65 Fordham L. Rev. 603 (1996) (contrasting women who need to make a choice between career and family with men who have wives at home and do not have to make that choice); Morrison, 36 Ariz. L. Rev. at 998 (cited in note 29). See also *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811 (D.C. Cir. 1988) (reversing summary judgment and holding, inter alia, that a leave of no more than ten days could disparately impact pregnant women). But see *Troupe v. May Dep't Stores*, 20 F.3d 734, 738 (7th Cir. 1994) (concluding that the PDA "does not, despite the urgings of feminist scholars, . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work"); *Wimberly v. Labor & Industrial Relations Comm'n*, 479 U.S. 511, 518 (1987) (holding that the Federal Unemployment Tax Act, which prohibits denying benefits because of pregnancy, permits denial of benefits to an employee who voluntarily quit work because of pregnancy).

Over ten years ago, Wendy Williams critiqued the theory that Title VII requires pregnancy leave, believing that the theory would justify the Court's reasoning in *Geduldig* by emphasizing women's "extra" needs. Williams, 13 N.Y.U. Rev. L. & Soc. Change at 366-69 (cited in note 29) (discussing Krieger and Cooney, 13 Golden Gate L. Rev. at 525-31 (cited in note 38); Andrew Weissman, Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 Colum. L. Rev.

While the issue of how to achieve equality was not before the Court in *Guerra*, it was in *United States v. Virginia*. The VMI case held that the male-only admissions policy violated the Equal Protection Clause.²⁴⁵ As discussed above,²⁴⁶ this case did not order women to be admitted to VMI as it functioned at the time of the litigation. Instead, it required VMI to adjust physical skills requirements and alter housing arrangements to provide women with the same opportunities that men have at VMI.²⁴⁷ That remedy appears to affirm the consequence foreseen by Justice Marshall's majority opinion in *Guerra* by requiring institutional alterations to accommodate both genders equally.²⁴⁸

In addition, while the Fourteenth Amendment and Title VII differ with respect to their coverage, they are similar in their requirement that men and women be treated equally. For example, if any employer covered by Title VII stated that women could not be admitted to the workplace, as VMI did in its admissions policy, the employer would be liable, as VMI was liable, unless the employer had a defense of a bona fide occupational qualification.²⁴⁹ The Title VII defendant would have the burden of proving that defense, just as VMI tried, unsuccessfully, to prove that the male-only admissions policy

690, 717 (1983)). Since that time, *Guerra* has characterized, without denigrating women, pregnancy leave as an employment practice that makes women equal to men. See *Guerra*, 479 U.S. at 284-85. *United States v. Virginia* cited *Guerra* with approval. In fact, it appears that *United States v. Virginia* has effectively overruled *Geduldig*. See Part IV.A.2.

Professor Williams also feared litigation focusing on a state's interest in women's reproductive roles could justify excluding women from hazardous workplaces. Williams, 13 N.Y.U. Rev. L. & Soc. Change at 371-72 (cited in note 29). See text accompanying notes 93-98 (discussing the negative ramifications of the Supreme Court's progressive *Muller* opinion). This was a real fear in the 1980s as *Johnson Controls* demonstrates. The Seventh Circuit held that Johnson Controls's employment practices did not violate Title VII, *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 901 (7th Cir. 1989), but the Supreme Court reversed, *Johnson Controls*, 499 U.S. at 200. Thus, the fears of the last decade have been put to rest.

Professor Williams's last criticism is that other workers will be resentful of pregnant women's "special" privilege. Williams, 13 N.Y.U. Rev. L. & Soc. Change at 368-69 (cited in note 29). A requirement that pregnant women be given leave, however, may lead to more liberal leave policies across the board. See notes 370-73 and accompanying text. Professor Williams would use a disparate impact theory to incorporate pregnancy leave into other worker protections. Williams, 13 N.Y.U. Rev. L. & Soc. Change at 368-69 (cited in note 29). See also notes 294 (discussing scholars advocating the use of disparate impact), and 220 (discussing this author's agreement with the desirability of providing leave for all).

244. See note 50.

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

246. See Part II.C.3.

247. See *id.*; *United States v. Virginia*, 116 S. Ct. at 2281 n.15, 2284 n.19.

248. See text accompanying note 241.

249. See Part III.C.1.

was necessary for its institutional identity.²⁵⁰ Thus, one could theorize that the same definition of equality applies in mandating “equal protection of the laws” under the Fourteenth Amendment,²⁵¹ or prohibiting “unlawful employment practice . . . because of sex” under Title VII.²⁵²

In fact, the majority in *Gilbert*, applying the reasoning of *Geduldig*²⁵³ to Title VII, concluded that “the Fourteenth Amendment standard of discrimination is coterminous with that applicable to Title VII.”²⁵⁴ The dissenters in *Gilbert* disagreed, seeking a higher definition of equality under Title VII.²⁵⁵ At the least, then, the lowest common denominator agreed upon by all in *Gilbert* is that Title VII provides as stringent a definition of equality as does the Fourteenth Amendment.

One could theorize, therefore, that *United States v. Virginia*'s model of capability combined with institutional alteration for celebrated, inherent differences between the sexes applies to Title VII. Distinctions between schools at issue in *United States v. Virginia*, and workplaces at issue in Title VII,²⁵⁶ would be taken into account, not by having different definitions of equality for different institutions, but by considering different defenses.²⁵⁷

For over thirty years, courts in Title VII cases have been requiring employers to hire and promote women who are capable of doing the work. Thus, part of the equality model of *United States v. Virginia* has long been implemented under Title VII's requirement that employers not discriminate “because of sex.” Now, under the analysis of *United States v. Virginia*, nondiscrimination “because of sex” should also require that institutional alterations accommodate celebrated differences between men and women. Just as a remedy in the VMI case saying “admit women,” with nothing more, would not be a complete remedy,²⁵⁸ so too Title VII remedies saying “hire” or “promote” women, with nothing more, have not been complete remedies. After thirty years of “equal treatment” under Title VII,

250. See Parts III.C.1. and 3.

251. U.S. Const., Amend. XIV, § 1.

252. 42 U.S.C. § 2000(e)-2(a).

253. See notes 221-30 and accompanying text for a discussion of *Gilbert* and *Geduldig*.

254. *Gilbert*, 429 U.S. at 133-34.

255. *Id.* at 153-55 (Brennan, J., dissenting).

256. Schools exist to educate students. The workplace is more complicated. Its primary purpose is not to care for the employees, although an employer may choose to do so. The workplace's primary purpose is to produce goods or services for its customers. It needs to generate revenue from those customers to pay the employees and other business expenses.

257. See notes 362-65 and accompanying text.

258. See Part II.C.2.

there is still a wage gap²⁵⁹ and a "glass ceiling."²⁶⁰ Though the causes of these gaps are the subject of debate,²⁶¹ it is a fair assumption that lingering discrimination and a workplace that does not adjust to celebrated differences between the sexes are significant factors.²⁶² That raises the issue as to exactly what the celebrated, inherent differences are and how the workplace can alter and adjust for them while still maintaining productivity.

259. See U.S. Census Bureau, U.S. Department of Commerce, *Current Population Reports, Series P60, Money Income of Households, Families and Persons in the United States: 1992* (U.S. G.P.O., 1993) (stating that in 1992 women earned seventy-one cents for every dollar earned by men); J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 Cal. L. Rev. 1091, 1190 (1992) (reporting that women without career interruptions earn only 69% of what men earn); Williams, 13 N.Y.U. Rev. L. & Soc. Change at 825-26 (cited in note 29).

260. For a thorough study of the glass ceiling for women in one profession, see generally Epstein, Sauté, Oglensky, and Gever, 64 Fordham L. Rev. (cited in note 35).

261. See, for example, Nancy K. Kubasek, Jennifer Johnson, and M. Neil Browne, *Comparable Worth in Ontario: Lessons the United States Can Learn*, 17 Harv. Women's L. J. 103, 103 (1994) (arguing that the wage gap is caused "by men's greater opportunities for education, training and work experience," women's choices to take "traditionally female jobs," and women's decisions to take time out to have children); Anne C. Levy, *Sexual Harassment Cases in the 1990s: "Backlashing" the "Backlash" Through Title VII*, 56 Albany L. Rev. 1, 48-49 (1992) (arguing that gender-based harassment and the effects it has on women may be one of the major causes of the glass ceiling); Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728, 1787 (1986) (arguing that the wage gap is caused by continuing responsibility of women for childcare); Branch, 1 Duke J. Gender L. & Pol. at 121-38 (cited in note 43) (asserting that a variety of factors contribute to lower wages for women); Gail C. Kaplan, *Pay Equity or Pay Up: The Inevitable Evolution of Comparable Worth into Employer Liability Under Title VII*, 21 Loyola L.A. L. Rev. 305, 306-07 (1987) (same); Joan Williams, *Is Coverture Dead: Beyond a New Theory of Alimony*, 82 Geo. L. J. 2227, 2237-39 (1994) (stating that women's family responsibilities help explain the pay gap); Randall K. Filer, *Male-Female Wage Differentials: The Importance of Compensating Differentials*, 38 Indus. & Labor Relations Rev. 692 (1995) (suggesting that women's choice of jobs with more non-pecuniary benefits and fewer physical risks than jobs chosen by men partly explains the wage gap); Jane Friesen, *Alternative Economic Perspectives on the Use of Labor Market Policies to Redress the Gender Gap in Compensation*, 82 Geo. L. J. 31, 37-38 (1993) (same); Solomon W. Polachek, *Occupational Self-Selection: A Human Capital Approach to Sex Differences in Occupational Structure*, 63 Rev. Econ. & Stat. 60, 64 (stating that women choose jobs that enable them to leave the workforce). But see Joan C. Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. Rev. 1559, 1594-632 (1991) (suggesting that "choice" is the wrong description for women's decisions to devote time to family because the decision is made in the context of current societal role expectations for both men and women). For those who argue that women's choices to raise children cause adverse employment consequences, one could answer that the workplace needs to be restructured to avoid imposing adverse consequences for those who have children. See Part IV.C.

262. See Epstein, Sauté, Oglensky, and Gever, 64 Fordham L. Rev. at 378-414 (cited in note 35).

2. Celebrated Differences Between the Sexes Under Title VII

a. Pregnancy

Inherent differences between the sexes, *United States v. Virginia* says, "remain cause for celebration."²⁶³ Sex classifications can be "used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' [and] to advance full development of the talent and capacities of our Nation's people."²⁶⁴ *Guerra* supports the latter statement that sex-based classifications can be used to promote equal employment opportunity to maximize talent.²⁶⁵ The inherent difference involved in *Guerra* is pregnancy, and the statute involved protects the jobs of pregnant women.²⁶⁶ It follows from *United States v. Virginia's* citation of *Guerra* in its discussion of celebrated differences that pregnancy is a "celebrated" difference requiring institutional alterations.²⁶⁷

It also follows that pregnancy is a celebrated difference when one analogizes pregnancy to physical strength, another celebrated difference in *United States v. Virginia*. Both pregnancy and physical strength involve biological differences between men and women. Fewer women than men have considerable upper body strength. Few, if any, women can give birth to a child without needing any leave from work,²⁶⁸ while men can have children without a pause. If the muscle density and upper body strength differentials between men and women can justify requiring institutional adjustments to achieve equality, then it is all the more clear that reproductive differences can justify such adjustments. Most men have more muscle density and upper body strength than most women, but some women are stronger than some men. No man, however, can be pregnant, and no man must take time from work to deliver his child.²⁶⁹ Thus, pregnancy is a

263. 116 S. Ct. at 2276.

264. *Id.* (citations and footnotes omitted).

265. *Id.* (citing *Guerra*, 479 U.S. at 289).

266. 479 U.S. at 277.

267. See Part II.C.3. As discussed above, celebrated differences between the sexes do not make one sex or the other inferior. See notes 89-101 and accompanying text.

268. See notes 38-39 and accompanying text.

269. Many men may wish to attend the delivery, but a man's presence obviously is not physically necessary in order for the child to be born. This Article does not advocate that leave not be given to men, or not be given to all disabled workers. If employers are going to be stingy with leave, though, they must at least provide it for the physical necessity of having a child in order for women to be on equal footing with men. See Part IV.C.1.

more "inherent" and also perhaps a more "celebrated" difference than is upper body strength.

b. Parenting

Just as pregnancy can be analogized to strength, parenting can be analogized to privacy. The differences between men and women with respect to both are based in part upon biological differences and in part upon social mores. The biological basis of privacy is obvious. The cultural aspect is seen by comparing traditional gatherings of men and women with others in some societies and in some circumstances in which nudity of both sexes together is not taboo and does not endanger either sex.²⁷⁰ Parenting, too, has both biological and societal components. The parenting difference between men and women that is based on biology is clear at the time of birth and during breast feeding.²⁷¹ The ability, however, to care for a small child or take a sick child to the doctor is not biologically determined.²⁷² These tasks and others are currently performed disproportionately by women.²⁷³

While privacy is a gender-neutral concept, *United States v. Virginia* requires VMI to make alterations to accept the privacy concerns of women²⁷⁴ because VMI was designed for men. VMI has traditionally provided barracks living for its cadets, all of whom were male, because part of the adversative method included lack of privacy at all times.²⁷⁵ By requiring institutional alterations for privacy, *United States v. Virginia* recognizes that an institution designed for one gender, such as VMI, cannot defend the exclusion of the other gender because of its self-selected gender-based design unless the design is necessary for achieving an essential purpose. Just as VMI was designed for one gender, the modern workplace was also initially designed predominantly for one gender.²⁷⁶ As VMI needs to change to

270. Note, for example, Finnish saunas, Japanese baths, certain tribal life, nudist colonies, and nude beaches on the Riviera, in the United States, and elsewhere. See Burton Caine, *The Dormant First Amendment*, 2 Temple Pol. & Civ. Rts. L. Rev. 227, 234 (1993).

271. Even if one argues that both parents can feed an infant breast milk if it is expressed and stored, see note 32 and accompanying text, it is still the mother who needs time and privacy to express the milk and facilities in which to store it.

272. See Fisk, 2 Berkeley Women's L. J. at 93 (cited in note 68); Williams, 13 N.Y.U. Rev. Law and Soc. Change at 354 (cited in note 29).

273. See note 281.

274. 116 S. Ct. at 2284 n.19.

275. See Part II.A.

276. See note 279 and accompanying text.

consider privacy concerns, so too the workplace needs to change to consider the parenting concerns of the previously excluded gender.²⁷⁷

Parenting, like privacy, is a gender neutral term. In order for a court to order workplace alterations based on Title VII, the court must find discrimination based on sex, not parenting. An order for institutional alterations for parenting would be a two-step process.²⁷⁸ First, alterations would be ordered for mothers for reasons discussed below. Then, also discussed below, the alterations would be ordered for fathers because men cannot be treated differently from women.

The reason motherhood is a celebrated difference under *United States v. Virginia*'s analysis is that the modern workplace, with its generally inflexible time and presence demands, is designed predominantly for men with wives at home to take care of children and other domestic needs of the family.²⁷⁹ As more women enter the workforce, they are not acquiring "wives."²⁸⁰ Nor are men typically shouldering half of the domestic work.²⁸¹

277. See note 68 and accompanying text for a discussion of institutional design. See Part IV.C for a brief discussion of how the workplace could make alterations.

278. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (using "[a] two-step analysis" to demonstrate that the Pregnancy Discrimination Act prohibits discrimination against pregnant employees and then that discrimination against a female spouse would discriminate against a male employee); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 Mich. L. Rev. 1155, 1179-80 (1991) (discussing the gendered structure of the workplace).

279. See, for example, Dowd, 54 Fordham L. Rev. at 700 (cited in note 43); Okin, *Justice, Gender and the Family* at 8-13 (cited in note 54) (discussing false gender neutrality in contemporary political theory and in notions of justice); Williams, 87 Mich. L. Rev. at 822-23, 836-42 (cited in note 54) ("the ideal worker"); Williams, 13 N.Y.U. Rev. L. & Soc. Change at 327, 331, 353 (cited in note 29) ("the 'real' workers"); Littleton, 75 Cal. L. Rev. at 1280 n.2 (cited in note 39); Abrams, 42 Vand. L. Rev. at 1186, 1189, 1191, 1195, 1221 (cited in note 28); Finley, 86 Colum. L. Rev. at 1126 (cited in note 55). The poor, often racial minorities, have rarely had the economic ability to allow the mother to stay home with the children and have had to make alternative arrangements for childcare. See Mary Frances Berry, *The Politics of Parenthood: Child Care, Women's Rights, and the Myth of the Good Mother* 39-41 (Viking Press, 1993). See also notes 43-44 and accompanying text.

280. See generally Terri Apter, *Working Women Don't Have Wives: Professional Success in the 1990s* (St. Martin's Press, 1993).

281. See Deborah J. Swiss and Judith P. Walker, *Women and the Work/Family Dilemma: How Today's Professional Women Are Finding Solutions* 21 (John Wiley & Sons, 1993); Arlie Russell Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (Viking Press, 1989); Dowd, 54 Fordham L. Rev. at 705-06 (cited in note 43); Linda Haas, *Equal Parenthood and Social Policy: A Study of Parental Leave in Sweden* 1-3 (State U. of New York, 1992) (discussing the biological and social reasons why more women care for children than men); Littleton, 75 Cal. L. Rev. at 1334 (cited in note 39) ("[R]eassigning childcare has not thus far meant assigning it to men or even sharing it with them; it has meant assigning it to poorer women."). Apparently because so many studies have shown that women do more childcare than men, whether for biological or societal reasons, the Family and Medical Leave Act codified that as a finding. See 29 U.S.C. § 2601(a)(5) ("[D]ue to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such

Workplaces, therefore, that treat fathers and mothers equally by ignoring the fact that the demands of the home disadvantage mothers. As mothers try to be "super women" trying to do two jobs, one at work and the other at home, they may fall behind in one or the other sphere. If they fall behind at home, the children or marriage may suffer, and there is probably dust under the bed and unpaid bills. If they fall behind at work, they lose pay, prestige, or job security. These work losses, in general, are ones that men with children do not suffer, at least not to the same degree.²⁸² Women, more than men, therefore, must make choices between work and family. As noted above, succeeding at work at the cost of not having children is a very high price to pay for economic autonomy and security, a price typically not paid by men.²⁸³ As with pregnancy, if an employer does not adjust for the fact that many workers raise children, women with children will be disadvantaged more than men with children. Therefore, until the workplace makes it possible for men and women to reallocate the division of labor in the family,²⁸⁴ motherhood should be seen as a celebrated difference between the sexes requiring the alteration and adjustment analysis of *United States v. Virginia* to be applied under Title VII.

While the portion of mothering that is not based on biology is celebrated, it is not inherent. It deserves, however, the *United States v. Virginia* institutional alteration analysis because, until society changes, socially entrenched differences are as real as biological ones.²⁸⁵ In addition, *United States v. Virginia* does not limit its analysis to inherent differences. It cites *Califano v. Webster*²⁸⁶ in its discussion of permissible sex-based classifications. *Webster* involves redressing past economic discrimination that is societally based.

Employers may argue that they are not responsible for remedying societal discrimination under Title VII, only their own inten-

responsibility affects the working lives of women more than it affects the working lives of men.").

282. See note 44 and accompanying text.

283. See note 45 and accompanying text.

284. See Williams, 13 N.Y.U. Rev. L. & Soc. Change at 333-54 (cited in note 29); Branch, 1 Duke J. Gender L. & Pol'y at 119 (cited in note 43) (arguing that women will not be equal until the workplace accommodates parenting and men can choose to commit to family).

285. See Fisk, 2 Berkeley Women's L. J. at 94 (cited in note 68). See also Swiss and Walker, *Women and the Work/Family Dilemma* at 185 (cited in note 281) ("Until men do their share at home . . . women will never be on a level playing field in their professions."); Littleton, 75 Cal. L. Rev. at 1296 (cited in note 39) ("[E]liminating the unequal consequences of sex differences is more important than debating whether such differences are 'real' . . .").

286. 430 U.S. 313 (1977) (per curiam).

tional discrimination. As they have argued in "comparable worth" cases that it is the marketplace, and not the employer,²⁸⁷ that determines discriminatory wage rates, so too may they argue that it is society, not the employers, that has structured the family. That argument cuts too far, however, because society also created the discrimination that Title VII is designed to eradicate. In addition, even if a majority of the Supreme Court would accept the marketplace defense in comparable worth cases,²⁸⁸ those cases are distinguishable from parenting cases. The comparable worth cases may not have been successful in the Courts of Appeals because judges cannot agree as to which jobs should be compared. Thus the courts would leave that task to the legislature.²⁸⁹

With respect to pregnancy and parenting, the classes for comparison are clear: men having children are compared with women having children, and men raising children are compared with women raising children. Without workplace recognition that employees raise children, Title VII has a cruel and tantalizing residue. Title VII's purpose is to make women equal with men in the workplace. It has succeeded in changing the structure of the workplace in part by enabling women to enter it. Women are now in the paid workforce in far greater numbers and in a far greater number of jobs than ever before.²⁹⁰ But what are women to do with their childrearing role if men do not or cannot shoulder their share of childrearing responsibilities because of inflexibility in the workplace? The answer is in the workplace.

Once there is an order requiring institutional alterations to accommodate parenting,²⁹¹ those alterations would need to be

287. Compare *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 722 (7th Cir. 1986).

288. This issue has not been addressed by the Supreme Court.

289. Judith Olan Brown, Phyllis Tropper Baumann, and Elaine Millar Melnick, *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 Harv. C.R.-C.L. L. Rev. 127 (1986) (discussing why plaintiffs have failed to recover under comparable worth); Norman Vieira, *Comparable Worth and the Gunther Case: The New Drive for Equal Pay*, 18 U.C. Davis L. Rev. 449, 476-82 (1985) (discussing the difficulties in comparing jobs). Compare Kaplan, 21 Loyola L.A. L. Rev. at 322-31 (cited in note 261) (asserting that comparisons can be made).

290. Marjorie Whigham-Desir, *Business & Child Care*, Black Enterprise 86, 86 (Dec. 1993) (reporting that demographers predict that women will comprise 57% of the new entrants in the job market and 50% of the workforce by the year 2005); Rochelle Kass, *Back-Office Bankers Benefit From On-Site Child Care*, Bank Systems & Tech. 26, 26 (Mar. 1993) (reporting that approximately 60% of the mothers of the 14 million preschool children in this country are now employed full-time outside the home). See also Mikel Glavinovich, *International Suggestions for Improving Parental Leave Legislation in the United States*, 13 Ariz. J. Int'l & Comp. L. 147, 163-64 (1996); Mona Schuchmann, *The Family and Medical Leave Act of 1993: A Comparative Analysis with Germany*, 20 J. Corp. L. 331, 340 (1995).

291. For a discussion of the types of institutional alterations and adjustments to accommodate parenting, see the next section.

extended to fathers for any characteristic that is not biologically based. The Constitution and Title VII do not permit unequal treatment between the sexes unless necessitated by biology or to correct past discrimination.²⁹² Because parenting, as opposed to pregnancy, is not predominantly biologically based, ordering alterations just for mothers would perpetuate the stereotypes that the alterations should alleviate. Thus, in a two-step, but simultaneous process, *United States v. Virginia's* analysis, applied to Title VII, would require workplace alterations and adjustments, first for mothers, and then for fathers.²⁹³

This two-step process is similar to the disparate impact analysis advocated by equal treatment proponents.²⁹⁴ They argue under that analysis that employer practices, such as lack of leave, that have a disproportionate impact on women would be invalidated and thereby would benefit both men and women. These commentators have expressed concerns about whether employers would justify their practices as business necessities and whether courts would order positive action, such as mandatory leave.²⁹⁵ By borrowing from constitutional race cases, *United States v. Virginia* does order positive action. Because its equality analysis can be read as applicable to Title VII,²⁹⁶ and because section 706(g) of Title VII gives courts broad authority to order positive injunctions,²⁹⁷ a court could order work-

292. See, for example, *Schafcr v. Board*, 903 F.2d 243, 247 (3d Cir. 1990) (holding that childrearing leave provided to women must be provided to men). The Family and Medical Leave Act makes this point in its section on purposes. See 29 U.S.C. § 2601(b)(4).

293. For a reference to the Court's use of a "two-step analysis," see note 278.

294. Riva B. Siegel, Noto, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L. J. 929, 940-56 (1985); Melissa Feinberg, *After California Federal Savings and Loan Ass'n v. Guerra: The Parameters of the Pregnancy Discrimination Act*, 31 Ariz. L. Rev. 141, 150 (1989) (showing that some courts have used disparate impact analysis to strike down policies that violate the PDA); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 Stetson L. Rev. 1, 42 (1995) (stating that disparate impact analysis can be used whenever pregnant workers are disfavored). Fisk, 2 Berkeley Women's L. J. at 107 (cited in note 68) (arguing that employers could be required to provide child care under Title VII disparate impact analysis, which would benefit both men and women); Williams, 13 N.Y.U. Rev. L. & Soc. Change at 366-69 (cited in note 29); Abrams, 42 Vand. L. Rev. at 1191, 1226-30 (cited in note 28). See also note 244.

295. See, for example, Williams, 13 N.Y.U. Rev. L. & Soc. Change at 364-74 (cited in note 29); Abrams, 42 Vand. L. Rev. at 1226-27 (cited in note 28).

296. See Part IV.B.1.

297. Section 706(g) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful unemployment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include,

place changes under Title VII. What changes are necessary, how many of them a court could realistically be expected to order, and which are more appropriate for legislation are considered below.

*C. Institutional Alterations and Adjustments Suggested Under
Title VII*

1. Pregnancy

a. Types of Alterations and Adjustments

For pregnancy, paid leaves and other adjustments will be required.²⁹⁸ As Justice Marshall indicated in *Guerra*, job protection after the birth of a baby helps put new mothers on an equal plane with new fathers in the workplace.²⁹⁹ Job security, however, is not enough. Mothers and fathers will not be equal in the workplace until mothers do not lose either jobs or pay while recuperating from the birth of a child. Fathers lose neither when their children are born. Many states and the federal government have passed statutes mandating pregnancy leaves. For example, the Family and Medical Leave Act of 1993³⁰⁰ mandates that employers having fifty or more employees provide unpaid pregnancy leave for up to twelve weeks each year.³⁰¹ Unfortunately, however, the statute does not mandate

but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g).

298. For articles discussing accommodations for pregnancy, see D'Andra Millsap, Noto, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 *Houston L. Rev.* 1411 (1996) (arguing that the ADA's reasonable accommodation provisions can apply to pregnancy); Laura Schlichtmann, Comment, *Accommodating Pregnancy-Related Disabilities on the Job*, 15 *Berkeley J. Employment & Labor L.* 335, 365-88 (1994) (arguing for the need for pregnancy leave and on the job accommodations for pregnancy); Matzzie, 82 *Geo. L. J.* at 218-35 (cited in note 39); Calloway, 25 *Stetson L. Rev.* at 1 (cited in note 294) (arguing that pregnancy leave and on the job accommodations for pregnancy are required to protect the health of children); Dowd, 54 *Fordham L. Rev.* at 699 (cited in note 43) (arguing for maternity leave); Issacharoff and Resenblum, 94 *Colum. L. Rev.* at 2214-16 (cited in note 43) (same); Dowd, 24 *Harv. C.R.-C.L. L. Rev.* at 79 (cited in note 58) (outlining the need for maternity and paternity leave); Mason, 29 *J. Family L.* at 45-48 (cited in note 42) (arguing for maternity leave).

299. See note 242 and accompanying text.

300. 29 U.S.C. § 2610 (1994 ed.). While statutes mandating employers to protect the jobs of pregnant women who take leave to have children are relatively new, statutes mandating that employers protect jobs for people, historically men, who take leave for military service are not new. See note 50.

paid leaves. In addition, not all states have mandatory pregnancy leave statutes,³⁰² and the federal act does not affect the majority of the workforce, as most businesses have fewer than fifty employees.³⁰³ While some employers voluntarily provide benefits,³⁰⁴ many do not.³⁰⁵

The logical consequence of *United States v. Virginia* and *Guerra* is that a court under section 706(g) of Title VII³⁰⁶ could order reinstatement and backpay for a mother fired for taking time off from work to have a baby. A court could also enjoin the employer from continuing to treat new mothers differently from new fathers. A court faces two hurdles in ordering this relief. First, such an order is a departure from some of the legislative history of the Pregnancy Discrimination Act. Second, a court may believe that a legislature is the appropriate body to authorize pregnancy leaves.

b. Departure from Legislative History of the PDA

When Congress passed the PDA to overturn the Supreme Court's decision in *Gilbert* and to require employers to include pregnancy in their already established benefit plans,³⁰⁷ the Senate and House Reports both contained statements that the PDA would not require employers to start providing benefits.³⁰⁸ The second provision

301. Lack of pay for leave does not help the poor, and carries an assumption that women are dependent upon men. See Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 Harv. J. on Legis. 335, 343 (1993) (saying that lack of wage replacement in the FMLA "reinstitutionaliz[es] patriarchy . . . and preserv[es] racial and class privilege"); Marion Cram, *Confronting the Structural Character of Working Women's Economic Subordination: Collection Action vs. Individual Rights Strategies*, 3 Kan. J. L. & Pub. Pol. 26 (1994) (stating that lack of wage replacement assumes "female dependence on a male bread winner").

302. See Schlichtmann, 15 Berkeley J. Employment & Labor L. at 394-99 (cited in note 298) (discussing state statutes and regulations that accommodate pregnancy).

303. Sylvia Ann Hewlett, *When the Bough Breaks: The Cost of Neglecting Our Children* 227-28 (Harper Perennial, 1991) (stating "that 95 percent of all employers and 44 percent of all employees" are not covered by the FMLA); Issacharoff and Rosenblum, 94 Colum. L. Rev. at 2190 (cited in note 43) (same).

304. See note 330.

305. See Hewlett, *When the Bough Breaks* at 227 (cited in note 303) (stating that only 20% of women are employed by companies offering family support benefits); Issacharoff and Rosenblum, 94 Columbia L. Rev. at 2190 (cited in note 43) (stating that small employers not covered by the FMLA are also less likely than large employers to provide family benefits).

306. See note 297 for the text of section 706(g).

307. For a discussion of the passage of the PDA, see Part IV.A.1.

308. Justice White, dissenting in *Guerra*, quoted from both Reports. The Senate Report states: "[T]he bill rejects the view that employers may treat pregnancy and its incidents as sui generis, without regard to its functional comparability to other conditions." *Guerra*, 479 U.S. at 298 (White, J., dissenting) (quoting Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 95-331, 95th Cong., 2d Sess. 4 (1977)). The House Report stated: "[T]his legislation . . . does not

in the PDA, that pregnant women "shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work," can be read consistently with the legislative history to mean that if no leave is given to any employee, none need be given to new mothers. A court order requiring an employer who provides no leave to reinstate, with back pay, a woman fired for having a child would be inconsistent with that legislative history and statutory language. *Guerra*, however, has undercut this reading of the PDA by emphasizing the broad purpose of Title VII and noting that, in passing the PDA, Congress focused on prohibiting employers from excluding pregnancy from benefits plans. Because of Congress's focus on ending discrimination, *Guerra* explicitly held that the second provision of the PDA did not limit the remedies available under the first provision.³⁰⁹

One could also give a new reading to the second sentence of the PDA to make it consistent with Title VII's broad purpose as discussed in *Guerra*. One could compare new mothers with new fathers, interpreting the PDA as follows: "Women affected by . . . childbirth (new mothers) . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected (new fathers are not affected by childbirth as are new mothers) but similar (some mothers and fathers both have new children)." The word "similar" is the comparative word. This reading, strained though it may be, is consistent with the statement of the purpose of the PDA given by one of its sponsors, Senator Williams. He said: "The entire thrust . . . behind this legislation is to guarantee women the basic right to participate

require employers to treat pregnant employees in any particular manner with respect to providing sick leave . . . [and] in no way requires the institution of any new programs where none currently exist." Prohibition of Sex Discrimination Based on Pregnancy, H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 4 (1978). Justice White stated that "[t]here is only one direct reference in the legislative history to preferential treatment. Senator Brooke stated during the Senate debate: 'I would emphasize most strongly that S.995 in no way provides special disability benefits for working women. They have not demanded, nor asked, for such benefits. They have asked only to be treated with fairness, to be accorded the same employment rights as men.'" *Guerra*, 479 U.S. at 300 (White, J., dissenting) (quoting 123 Cong. Rec. 29664 (Sept. 16, 1977)).

309. *Guerra*, 479 U.S. at 285. The majority said: "The reports, debates, and hearings make abundantly clear that Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers. In contrast to the thorough account of discrimination against pregnant workers, the legislative history is devoid of any discussion of preferential treatment of pregnancy, beyond acknowledgments of the existence of state statutes providing for such preferential treatment." *Id.* at 285-86. The Court also noted that Senator Brooke's statement, see note 308, was his opinion. *Guerra*, 479 U.S. at 286 n.20. The Court also said: "The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees." *Id.* at 285 (quoting *Newport News*, 462 U.S. at 678 n.14.)

fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”³¹⁰ *Guerra* quotes Senator Williams’s statement to support its holding that the California pregnancy leave statute enables women and men alike to have both jobs and families.³¹¹

There is other precedent ignoring statutory language that is inconsistent with Title VII’s broad purpose. The majority in *Newport News Ship Building & Dry Dock Co. v. EEOC*³¹² so analyzed Title VII. At issue in *Newport News* was whether the PDA required an employer to provide wives of employees with the same pregnancy benefits that it provided to female employees. The dissent argued that the word “individual” in section 703(a)(1) mandated equal treatment only for employees, not for spouses.³¹³ The majority held, however, that without the same benefits to wives of employees, the male employee’s family, as a unit, would not be equal to the female employee’s family, contrary to the purpose of Title VII.³¹⁴ *Newport News*, therefore, stands for the proposition that one method of equal treatment, even if supported by the letter of the law, does not necessarily provide equality. Applying this proposition to pregnancy, one sees that while a lack of leave in one sense treats all people equally, it produces inequality.

There is also precedent for courts to articulate theories of liability and concomitant remedies not specified explicitly in Title VII but based on its broad purposes. Most recently, after some lower courts dismissed similar claims, the Supreme Court recognized an action for sexual harassment under Title VII.³¹⁵

310. 123 Cong. Rec. 29658 (Sept. 16, 1977), quoted in *Guerra*, 479 U.S. at 288.

311. 479 U.S. at 289. See also Part IV.A.1.

312. 462 U.S. 669 (1983).

313. The dissent refers to the language of section 703(a)(1) which prohibits discrimination “because of [an] individual’s . . . sex,” and says “the word ‘individual’ refers to an employee or applicant. . . . As modified by the first clause of the [PDA] . . . [t]his can only be read as referring to the pregnancy of an employee.” *Newport News*, 462 U.S. at 687 (Rehnquist, J., dissenting) (emphasis added).

314. *Newport News*, 462 U.S. at 683-84.

315. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Earlier cases in which sexual harassment claims had been dismissed include *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), vacated, 562 F.2d 55 (9th Cir. 1977) (sexual behavior is personal); *Barnes v. Train*, 13 Fair Empl. Prac. Cases 123 (D.D.C. 1977), rev’d as *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (finding employer not liable for sexual harassment of employee); *Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), rev’d, 568 F.2d 1044 (3d Cir. 1977) (sexual harassment at work is not job related). For an interesting discussion about the implications of the Supreme Court’s

The most obvious example of judicial recognition of a theory of liability not specified explicitly in Title VII is the disparate impact theory of employment discrimination³¹⁶ created in 1971 in *Griggs v. Duke Power Co.*,³¹⁷ and codified by the Civil Rights Act of 1991.³¹⁸ That theory was created to fulfill the "objective" of Title VII and to eliminate "built in head winds" slowing the achievement of that objective.³¹⁹ Chief Justice Burger, for a unanimous Court, wrote that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation";³²⁰ therefore, employment practices having a disparate impact on a class protected by Title VII are unlawful, whether or not an employer intended to discriminate by using them. This disparate impact theory was judicially created despite language in the remedial section of Title VII providing a remedy only where the employer has "intentionally" discriminated.³²¹ *Griggs* did not discuss that provision of Title VII. *Griggs* also created a defense of business necessity for the disparate impact doctrine, also now codified in Title VII.³²² Thus, court-ordered paid pregnancy leave under Title VII is not inconsistent with the court-ordered action in *Griggs*.³²³ In fact, some have argued that pregnancy leave is required under *Griggs* because the lack of leave creates a disparate impact on women.³²⁴

c. *Judicial or Legislative Orders*

Another hurdle for a court seeking to order pregnancy leave to make new mothers equal with new fathers is the fact that pregnancy leaves are typically statutory creations.³²⁵ While a court could look to the alterations and adjustments ordered in *United States v. Virginia*

recognition of sexual harassment as an action under Title VII, see *Abrams*, 42 Vand. L. Rev. at 1197-220 (cited in note 28).

316. See Part III.C.2.

317. *Griggs*, 401 U.S. at 429-30.

318. 42 U.S.C. § 20003-2(k).

319. *Griggs*, 401 U.S. at 429-30.

320. *Id.* at 431. Justice Brennan took no part in *Griggs*.

321. Section 706(g) provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent. . . ." 42 U.S.C. § 2000e-5(g)(1).

322. *Griggs*, 401 U.S. at 431; 42 U.S.C. § 2000e-2(k)(2).

323. The remedy in *Griggs* was to order the employer to stop using certain hiring criteria. The remedy in pregnancy cases would be affirmative—order leave. But the remedy could be articulated in the negative—stop having policies (no leave) that penalize women who have children.

324. See note 294.

325. Military leaves are also statutory. See note 50.

for authority to order pregnancy leave to equalize men and women, a court might be reluctant to impose, in a statutory case, a remedy ordered in a constitutional case without explicit statutory authority. One answer to such reluctance is the broad statutory remedial language of section 706(g) of Title VII, which permits a court to order "affirmative action" such as reinstatement, hiring, and back pay, "or any other equitable relief as the court deems appropriate."³²⁶ It is possible, however, if courts were to use that broad language to order paid pregnancy leave, that the Supreme Court might overturn them as it did when courts required employers to make accommodations for employees' religious beliefs.³²⁷ On the other hand, it is possible to argue that the case reversing court ordered religious accommodations was wrongly decided, as evidenced by Congress's restoration of the results of the reversed cases. Thus, it could be further argued that courts would be correct to order paid pregnancy leaves under Title VII to achieve its broad purpose.

While a court might be concerned about its authority to order paid pregnancy leave, Congress would have no such concern, having recently enacted mandatory pregnancy leave as part of the Family and Medical Leave Act.³²⁸ Because that act has been favorably received by the public,³²⁹ Congress should have the political incentive to amend it or Title VII to require that employers provide paid pregnancy leave. While some employers might oppose such an amendment on the grounds of cost, other employers already provide paid pregnancy leave because it is in their economic interest to do

326. See note 297.

327. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

328. 29 U.S.C. § 2610. Among other things, the Family and Medical Leave Act provides that employers with fifty or more employees must provide new mothers and fathers with up to twelve weeks of unpaid leave for the birth or adoption of a baby. This act is expansive because it covers all parents; it is limited because it provides only unpaid leave and covers only large employers. See note 301.

329. A weakened version of the FMLA was passed only after two vetoes and a change in administration. See Ronald D. Elving, *Conflict and Compromise: How Congress Makes the Law* (Simon & Schuster, 1995) (describing the history of the enactment of the FMLA). The public's positive experience with the FMLA could have changed the political climate with respect to extending it. See generally Schlichtmann, 15 Berkeley J. Employment & Labor L. at 400-01 (cited in note 298) (discussing factors favoring passage of additional pregnancy accommodation laws). Senator Christopher Dodd, who chairs the Family and Medical Leave Commission, has introduced the "Family and Medical Leave Fairness Act" to expand the coverage of the FMLA to apply the employers having twenty-five or more employees, noting that the current law protects 57% of the private workforce and that over twelve million employees have used the provisions of the FMLA, and that 94% of the businesses incurred little or no additional cost from the FMLA.

so.³³⁰ These employers might welcome the amendment in that it would eliminate a competitive disadvantage. Nor is it necessarily clear that paid pregnancy leave would be a burdensome cost for employers. Some studies show that the costs of replacing workers and of productivity losses are greater than the costs of providing pregnancy leave.³³¹ If cost were a factor, a pregnancy leave statute could provide for an insurance pool to spread the costs of paid leave and substitute employees, as is done for unemployment insurance.³³² In addition, although politically unpopular in the United States at the moment, government subsidies for pregnancy leave, as are provided in many other countries,³³³ are also an option.

All progressive changes carry some risk of placing employers in the United States at a competitive disadvantage with employers in countries without progressive laws or customs.³³⁴ While this may make passage of progressive legislation difficult, the United States is not always governed by the lowest common denominator. With respect to pregnancy leave, however, the United States ranks near the

330. Hewlett, *When the Bough Breaks* at 26 (cited in note 303) (describing Merck's six month leave with partial pay and other benefits). See also Stephen D. Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 Cal. L. Rev. 465 (1987); Sheila B. Kamerman, Alfred J. Kahn, and Paul Kingston, *Maternity Policies and Working Women* (Columbia U., 1983) (describing existing maternity policies). See also note 337 (discussing existing family support benefits some companies are offering). But see note 305 (noting limited number of women working for companies with family benefits).

331. See sources cited in notes 330, 333, 337.

332. See Issacharoff and Rosenblum, 94 Colum. L. Rev. at 2214 (cited in note 43); Donna Lenhoff and Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 Am. U. J. Gender & L. 39, 53-54 (1994).

333. See, for example, Carol Daugherty Rasnic, *The United States 1993 Family and Medical Leave Act: How Does It Compare with Work Leave Laws in European Countries?*, 10 Conn. J. Int'l L. 105, 112-35 (1994) (surveying work leave laws of nineteen countries). Paolo Wright-Carozza, *Organic Goods: Legal Understanding of Work, Parenthood, and Gender, Equality in Comparative Perspective*, 81 Cal. L. Rev. 531 (1993) (comparing Italian family benefits law with that in the United States); Nancy E. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 Harv. J. on Legis. 311 (1989) (describing family leave policies in France and Sweden). See also Sabra Craig, Note, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 Drake L. Rev. 51, 79-80 (1995) (listing maternity leave policies in various European countries). Bureau of National Affairs, *Work & Family: A Changing Dynamic* 176-79 (1986) (providing chart describing statutory rights to family leave in Europe). See also Issacharoff and Rosenblum, 94 Colum. L. Rev. at 2215 (cited in note 43) (noting that the use of general government revenues to pay for leaves would make sense but its "political viability approaches absolute zero" in the United States); Williams, 13 N.Y.U. Rev. L. & Soc. Change at 376-79 (cited in note 29) (describing European plans but believing their implementation to be unlikely in this country); Fisk, 2 Berkeley Women's L. J. at 95 (cited in note 68) (arguing that governmentally funded child care is inadequate and not likely to increase).

334. See, for example, Hewlett, *When the Bough Breaks* at 246-57 (cited in note 303); Susan Baron Dynerman and Lynn O'Rourke Hayes, *The Best Jobs in America for Parents Who Want Careers and Time for Children Too* 38-39 (Rawson Associates, 1991).

bottom among industrialized Western countries in terms of benefits offered to workers with families.³³⁵

2. Parenting

a. Types of Alterations or Adjustments

The institutional alterations and adjustments employers would need to make to enable mothers to be on equal footing with fathers and to enable all parents to be on equal footing with the rest of the workplace are multifaceted.³³⁶ Many possible workplace alterations and adjustments can be made to accommodate parenting. Examples can be found in "family friendly" policies already instituted by some employers who have determined that those policies are cost effective.³³⁷ Unfortunately, many employers do not provide these

335. See Hewlett, *When the Bough Breaks* at 225-26 (cited in note 303); Ellen Zieve, *To Work or Not to Work, and What to do About the Kids?*, 3 S. Cal. Rev. L. & Women's Stud. 163, 179-81 (1993) (discussing programs in Sweden, France, and Canada). Zieve notes that "America stands alone with South Africa as the only industrialized nation without formal policies to enhance the well-being of the family . . . [while] virtually all [other developed nations] assist families by offering child care, health care, tax relief or cash benefits." *Id.* See also Jean Baker, *Child Care: Will Uncle Sam Provide a Comprehensive Solution for American Families?*, 6 J. Contemp. Health L. & Pol. 239 (1990). Haas, *Equal Parenthood and Social Policy* at 13-14 (cited in note 281) (discussing family policies in Sweden); Glavinovich, 13 *Ariz. J. Int'l & Comp. L.* at 167-73 (cited in note 290) (discussing the inadequacies of the Family and Medical Leave Act which would be improved by following examples from Canada and Europe). See also Ginsburg, 10 *Conn. L. Rev.* at 825 (cited in note 114) (stating that in not having legislation to help pregnant women, "the United States differs from almost every other western industrial country").

336. For discussions of workplace accommodations for parenting, see Mason, 29 *J. Family L.* at 39-48 (cited in note 42); Gibson, 73 *Va. L. Rev.* at 1145 (cited in note 28); Issacharoff and Resenblum, 94 *Colum. L. Rev.* at 2214-20 (cited in note 43); Dowd, 24 *Harv. C.R.-C.L. L. Rev.* at 79 (cited in note 58); Abrams, 42 *Vand. L. Rev.* at 1220-48 (cited in note 28).

337. Hewlett, *When the Bough Breaks* at 257-68 (cited in note 303); Dynerman and Hayes, *The Best Jobs in America* at 3-89 (cited in note 334). See also John H. Earl, Jr. and Jonathan B. Wight, *Baby-sitting: Good for Business*, *Mgmt. World* 11-13 (Feb. 1986) (reporting that Nyloncraft, Inc. implemented an on-site childcare center in 1981 that operates twenty hours per day and provides a 60% subsidy for employees); Gillian Flynn, *NationsBank Makes Child Care a Plus*, *Personnel J.* 25 (Jan. 1996) (reporting that NationsBank recently implemented a plan to subsidize childcare for non-managerial, lower paid workers because these workers tend to have the highest turnover rates); Toni A. Campbell and David E. Campbell, *Benefits: 71% of Employers Say They Could Be Part of the Child Care Solution*, *Personnel J.* 84 (Apr. 1988) (reporting that some employers already offer flexible work schedules and job sharing in an effort to help families balance work-family problems); Ian Springsteel, *It's A Family Affair*, *Magazine For Senior Financial Executives* 12 (May 1996) (noting that studies reveal increase in family-friendly policies in the workplace); Reberta Maynard, *Child-Care Options for Small Firms*, 82 *Nation's Bus.* 43, 45 (Feb. 1994) (reporting increase in family policies); Jaclyn Fierman, *Are Companies Less Family Friendly?*, *Fortune* 64, 64-67 (Mar. 21, 1994) (reporting that a recent

benefits.³³⁸ Family-friendly benefits include flexible scheduling, a variety of leaves and childcare.³³⁹ Flexible scheduling includes flexibility with respect to both the hours and days worked³⁴⁰ and the location of work. The latter can include the home as modern technology makes telecommuting possible for certain types of work.³⁴¹

Types of leave include hours or days of leave to take care of sick family members³⁴² or to attend school functions; leaves of a longer duration, as are accommodated for military obligations;³⁴³ part-time work with benefits;³⁴⁴ and job sharing.³⁴⁵ Provision of childcare includes baby-at-work programs,³⁴⁶ on-site or near-site day care,³⁴⁷ and

survey of U.S. businesses shows that 78% offer childcare support and referral programs; 60% offer some kind of flexible scheduling; 20% offer elder care programs; and 9% offer on-site childcare); Jennifer Laabs, *Family Issues Are a Priority at Stride-Rite*, Personnel J. 48 (July 1993) (describing Stride-Rite's intergenerational child and elder care on-site facility); *There Are No Bedtime Stories Here*, Fortune 88 (Aug. 21, 1995) (describing Toyota's on-site 24-hour care facility that allows children to attend a quality care facility while their parents work); Diane Harris, *Big Business Takes on Child Care*, Working Woman 50, 50-51 (June 1993) (reporting that about 10% of businesses have formal family-friendly childcare programs to help workers, and when combined with referral and reference programs, about 60% of major corporations and 10% of smaller businesses offer some manner of help). See Bureau of National Affairs, *Work & Family: A Changing Dynamic* (1986) (provides examples of family-friendly policies instituted by U.S. employers).

338. See note 305.

339. See generally Sheila Kamerman and Alfred J. Kahn, *Child Care, Family Benefits and Working Parents: A Study in Comparative Policy* (Columbia U., 1981) (discussing various child care options). See also Hewlett, *When the Bough Breaks* at 301-21 (cited in note 303) (arguing that the government must take a number of actions that value children).

340. Flexible scheduling is known as "flextime." Employees work the same number of hours per week, but have some flexibility in arranging when they work. For example, a worker will be required to work during a core block of time during the day (often 10:30 a.m. to 2:30 p.m.), but will be able to stretch forty hours over six days or compress forty hours into four days. Hassberg, 40 Buff. L. Rev. at 245 (cited in note 38). See also Coalition of Labor Union Women, *Bargaining for Family Benefits: A Union Member's Guide* 20 (1986) (defining flextime as an employee's ability to vary the start, finish, and/or length of the workday or workweek, provided that the employee work the "core hours" and fulfill a requirement to work a certain number of hours over a one or two week period).

341. Some employers allow employees to work from home. This is known as "flexplace work." Carol Ann Diktaban, *Employer Supported Child Care as a Mandatory Subject of Collective Bargaining*, 8 Hofstra Labor L. J. 385, 400 (1991).

342. While this Article focuses on parenting concerns, the same issues exist with respect to elder care and care of other family members. Some employers allow employees to use sick and/or personal days to attend to family needs, including the care of sick children. Coalition of Labor Union Women, *Bargaining for Family Benefits* at 17 (cited in note 340).

343. See note 50.

344. See Mason, 29 J. Family L. at 39-43 (cited in note 42) (discussing the importance of providing benefits to part-time workers); Ann Bookman, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 Wash. and Lee L. Rev. 799 (1995) (same).

345. Job sharing is when two people share work responsibilities for one full-time job, enabling them to reduce their hours. Diktaban, 8 Hofstra Labor L. J. at 400 (cited in note 341).

346. Dawn Gunsch, *A Baby-Friendly Company*, Personnel J. 16, 16-19 (Apr. 1993) (describing the "Babies in the Workplace Policy" at Capsco Sales, Inc. that allows parents to bring their children up to age six months into work with them); Laura Blumenfeld, *She's the*

subsidies for employee procured childcare. An indirect benefit of the corporate workplace becoming involved in providing childcare is that the prestige and pay of childcare workers should rise, raising the quality of childcare. For older children, public school eligibility rules could be changed, entitling children to go to school either where they live or where a parent works. In the latter situation, children could commute with parents, and parents could be nearby to respond to children's needs. Schools could also provide before-school, after-school, and summer programs.³⁴⁸

How various adjustments and alterations in the workplace would fit with tasks that cannot be interrupted, tasks that take extraordinary efforts to achieve within a deadline, tasks that have emergency schedules, or tasks that are otherwise apparently inflexible, would need to be worked out on a case by case basis. Genuine inflexibility would need to be distinguished from traditional inflexibility, and new, more flexible ways of accomplishing old tasks might be devised. For example, job sharing could make a work-only schedule into a family-and-work schedule, yet still maintain productivity.³⁴⁹

Life of the Party, She's Young, a Working Mom, Ethnic, and Oh, Yes, Republican, Wash. Post B1 (Aug. 13, 1996). The Keynote Speaker at the 1996 Republican convention, Representative Susan Molinari, has a young child, who sat in her father's and grandfather's arms during the speech and who has a crih in her office.

347. In-house childcare programs are child care centers run by the employer (or contracted out to a childcare management business) and located on the premises. Parent-run centers are located on or near the place of employment, but are run by the parents. Consortium centers are formed by several employers to provide childcare at a location convenient to all of their employees. Family day care networks are formed when employers contract with local childcare agencies to recruit and train individuals to become licensed day care providers in their homes. Diktaban, 8 Hofstra Labor L. J. at 394-96 (cited in note 341). Some employers currently provide programs to care for school-age children before and after regular school hours and during school vacations while their parents are at work.

348. While outside the scope of this Article, changes in public school eligibility might help solve the deteriorating public schools, as parents might increase their involvement in schools near the workplace. Employers also might become involved in local public schools if their quality were an incentive for employees to work in the locale.

349. For the individual worker sharing a job, a salary would also be shared. At times, workers might trade off higher earnings for time with family. Such a tradeoff for people with higher paying jobs might be beneficial both for children and for the extra worker sharing the job. Job sharing for all employees could also create incentives to combine work and other activities as a way to avoid burn-out and maximize life's pleasures.

b. Judicial or Legislative Orders

Justice Ginsburg implies that the institutional alterations and adjustments to be made at VMI, pursuant to court orders, would be alternations in housing and adjustments for physical skills similar to those made at the United States military academies.³⁵⁰ Thus, she had a model from which to draw. Courts in parenting cases similarly could look at what comparable employers are doing to avoid losing talented workers and to avoid the expense of training new ones.³⁵¹ If a court might be reluctant to order paid pregnancy leave under Title VII to make women equal with men, however, a court might be even more reluctant to order some of the workplace alterations described above.

Courts have on occasion issued orders in Title VII cases that resulted in major workplace restructuring. One example is *City of Los Angeles, Department of Water and Power v. Manhart*,³⁵² in which a federal district court ordered employers to stop taking sex into account in determining the amount of an employee's contributions for pensions. Noting the drastic change involved, the Supreme Court refused to make the remedy retroactive.³⁵³ Because courts have devised elaborate remedies to protect constitutional rights to desegregate schools,³⁵⁴ and because court-ordered workplace changes would address the problem of failure to integrate family needs into the workplace, a court might order, under the Constitution, a governmental employer to restructure the workplace. A court might not order the same changes under Title VII, however, even if Title VII's definition of equality is coterminous with the definition of equality in the Constitution, without explicit remedial authority. While theoretically a court might have power under section 706(g) of Title VII to order major workplace restructuring,³⁵⁵ its remedies are likely to be more modest, but nonetheless important as a recognition of parenting rights.

The context in which parenting lawsuits are brought could determine the appropriate judicial remedies. In a case in which a violation of Title VII has been found due to an employer's taking adverse action against a person exercising his or her parenting responsibilities, a court would be acting on familiar ground in

350. See notes 155-57 and accompanying text.

351. See note 337.

352. 435 U.S. 702 (1978).

353. *Id.* at 721-22.

354. See note 194 (citing school desegregation cases).

355. See note 297.

ordering remedies such as reinstatement and an injunction against further offending conduct. The likelihood that the injunction would include an order that an employer institute on-site day care, however, is small. Most major workplace adjustments to make mothers equal in the workplace to fathers likely will need legislative enactment³⁵⁶ or voluntary implementation.³⁵⁷ Obviously, changes involving public schools could not be ordered in the context of a lawsuit brought against an employer. The changes would need to be mandated legislatively and in some geographic regions would require cooperation among neighboring jurisdictions.

As mentioned above,³⁵⁸ because Congress has had political success with the FMLA, Congress could amend the FMLA or Title VII to provide further workplace adjustments for parenting. Some existing statutes, such as the religious accommodation provision of Title VII,³⁵⁹ the Americans with Disability Act,³⁶⁰ and the provisions of

356. Legislation would eliminate the need for long and costly litigation and could avoid making adversaries of employees and employers. Legislatures are usually better able than courts to design complicated remedial schemes. Legislatures can hold hearings to take testimony from many different sources. Legislation can be drafted to tailor solutions to of circumstances, phase in required changes over time, or provide defenses that phase out over time. Compare Ginsburg, 10 Conn. L. Rev. at 826-27 (cited in note 114) ("If Congress is genuinely committed to eradication of sex-based discrimination and promotion of equal opportunities for women, it will . . . provid[e] firm legislative direction assuring job security, health insurance coverage, and income maintenance for childbearing women.").

357. Since a number of employers have already instituted "family friendly" programs, see note 337, more may do so. Assuming antitrust laws do not prohibit firms from pooling resources to provide child care and other family benefits, smaller firms may wish to work together.

358. See note 329.

359. 42 U.S.C. § 2000e(j). Regulations specify some accommodations that can be made for religious practices: "voluntary substitutes," "flexible scheduling," "lateral transfer," and "change of job assignments." 29 C.F.R. § 1605.2(d). Two that might apply to pregnancy or parenting leaves are flexible scheduling, which includes "permitting an employee to make up time lost due to the observance of religious practices," and voluntary substitutes. *Id.* § 1605.2(d)(ii). An employee taking pregnancy leave, however, presumably will require more time off than an employee observing religious holidays. Requiring an employee to "make up time," means that a woman returning after giving birth will not be treated equally with a man whose spouse just had a child but did not take leave or took only a short leave. While the woman is being treated the same as the man with respect to work hours, she is not being treated the same with respect to combining work and parenting.

360. The ADA requires employers to make reasonable accommodations for employees with disabilities. 42 U.S.C. § 12112. "Reasonable accommodation" is defined by regulation as follows:

- (1) The term reasonable accommodation means:
 - (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
 - (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily

FMLA,³⁶¹ could offer guidance. New legislation should go much further, however, if Title VII's purpose is to be made complete.

Although cost is typically not a defense consideration under Title VII,³⁶² if "family friendly" workplace alterations costs more than the savings in turnover costs,³⁶³ an undue hardship defense could be created, either judicially, just as the business necessity defense was created in *Griggs*,³⁶⁴ or legislatively, as has been done in a variety of statutes.³⁶⁵ A court or legislature could also determine, however, that

performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o). See Matzzie, 82 Geo L. J. at 218-35 (cited in note 39) (arguing that the ADA requires workplace accommodations for pregnancy). See also Schlichtmann, 15 Berkeley J. Employment & Labor L. at 391-94 (cited in note 298) (discussing a limited analogy between ADA coverage and pregnancy needs).

361. See Part IV.C.1.a.

362. See, for example, *Manhart*, 435 U.S. at 716-17 (rejecting argument that higher retirement contributions required of women are justified by a higher pay-out to women because Title VII does not contain a cost justification defense).

363. Many argue that family friendly workplace policies are cost effective. See Coalition of Labor Union Women, *Bargaining for Family Benefits* at 13 (cited in note 340) ("Many employers are beginning to realize that parental leave is not only an inexpensive benefit to offer but also can result in considerable financial savings when turnover, absenteeism, and training costs are considered."). See also Karen Nussbaum, *Issues for Working Families*, 35 Labor L. J. 465, 468 (1984) (noting that a 1984 survey conducted for the American Management Association found that more than three-fourths of employers reported that the costs of employer-sponsored child-care programs were far outweighed by the benefits); Women's Bureau, U.S. Department of Labor, *Child Care Centers Sponsored by Employers and Labor Unions in the United States 2-8* (1980) (reporting that a 1980 survey found that the following benefits were received from family policies: "greater ability of the company to attract and keep good employees, less employee absenteeism, a lower job turnover rate, improved employee morale, favorable publicity for the employer and improved community relations"); U.S. General Accounting Office, *Parental Leave: Revised Cost Estimate Reflecting the Impact of Spousal Leave 1-2* (1989) (finding cost of unpaid leave less than cost of replacing workers).

364. 401 U.S. at 431.

365. Section 701(j) of Title VII, which requires accommodation for religious practices, provides an undue hardship defense. See 42 U.S.C. § 2000e(j). See also note 359. The regulations defining religious discrimination provide that upon notification by an employee of a

no hardship defense is appropriate, or is appropriate only for interim, transitional periods.

3. "Mommy Track" Concerns

Equal treatment proponents would prefer legislation that addresses all workplace disabilities.³⁶⁶ Some scholar suggests that employers be required to provide gender neutral "sabbaticals" for a variety of reasons to enlist broad-based worker support for leaves and to decrease the chance that employers become reluctant to hire women or create a "mommy track."³⁶⁷ Broad-based employment reform would be ideal. Waiting for the ideal, however, may disadvantage women. Failure to provide job security and other adjustments for parents disadvantages women and may disadvantage some of them right out of the workplace as they try to "do it all."³⁶⁸

Requiring employers to provide parental leaves will not necessarily result in women becoming more expensive to hire or

need for religious accommodation, an employer has an "obligation to reasonably accommodate the individual's religious practices. . . . [unless] an employer can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation." 29 C.F.R. § 1605.2(c)(1). The undue hardship defense is defined by regulation to be "more than a de minimus cost." *Id.* § 1605.2(e)(1). That cost is to be determined "in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." *Id.* There is a presumption that "the infrequent payment of premium wages for a substitute" will be a cost the employer will be required to bear. *Id.*

Another act with an "undue hardship" defense is the Americans with Disabilities Act of 1990. The ADA's undue hardship defense is found in the definition section of the ADA, which defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A). Undue hardship is defined as "significant difficulty or expense," 29 C.F.R. § 1630.2(p)(1), which is presumably more than the "de minimus" amount specified in Title VII's religious accommodation regulations.

The Family and Medical Leave Act provides an unusual hardship defense. The employer may use the defense only for "a salaried employee who is among the highest paid 10 percent of the employees," 29 U.S.C. § 2601, and only if the employer must deny that employee's return from leave because "such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer," *id.* § 2601.

One could note that the expenses the employer must show to avoid accommodation are becoming greater and greater as one goes from Title VII's religious accommodation defense, to the ADA's accommodation defense, to FMLA's leave defense. While one might argue that the FMLA is most analogous to court-ordered leave under Title VII because the FMLA mandates leave, a highest paid employees defense would have a danger of perpetuating the glass ceiling. 29 U.S.C. § 206(d).

366. See notes 29-31 and accompanying text.

367. See, for example, Abrams, 42 Vand. L. Rev. at 1233-48 (cited in note 28).

368. See note 98.

shunted into a "mommy track." Studies show that as the population ages, employers are concerned about shrinking labor pools.³⁶⁹ The interest of these employers may not be served by reducing their pool of talent, which failing to adjust for parental needs will cause. Rather, employment policies that are "parent-friendly" may make employers attractive to both genders. As more two income families have children, more men and women are realizing that workplace accommodations for childcare are needed.³⁷⁰ If a "mommy track" did emerge, perhaps it would be a transitional track until more fathers took advantage of it. Perhaps in time it may prove not to be a parental track, but a parental station, one of many along the track.

Instead of trying to solve all problems at once, focusing first on women's equality needs in the workplace may ultimately lead to a workplace responsive to all workers.³⁷¹ Avoiding the pursuit of child-friendly workplace policies because such policies are perceived as women's issues could be self-defeating to women by perpetuating, rather than eliminating, the perceived devaluation of "women's concerns."³⁷² Both men and women in the workforce are also facing serious elder care concerns with aging parents, which could create an additional demand for family-friendly work policies.³⁷³ Although almost three-quarters of the caregivers are women, the twenty-five percent who are men represent a large number of people.

4. Reduction of Societally Entrenched Differences Between the Sexes

Requiring institutional alterations to accommodate parenting under an equality model is initially based on the fact that mothers typically shoulder more childrearing than fathers do.³⁷⁴ Yet an equality analysis requires, ultimately, that both sexes be accommodated in carrying out parenting roles so that neither suffers a disadvantage due to gender. Once the workplace accommodates mothers, it would

369. See Part II.B.1.

370. Both men and women in the workforce are also facing serious elder care concerns with aging parents, which should create an additional demand for family-friendly work policies. See Susan Levine, *One in Four U.S. Families Cares for Aging Relatives*, Wash. Post A13 col. 1 (Mar. 24, 1997) (reporting the results of a nationwide survey about caregivers for the elderly and the costs to the workplace and also reporting that 72% of caregivers are women). See also Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 Rev. of Law and Soc. Change 381, 385 (advocating workplace policies to care for the elderly, as well as children and others).

371. See notes 42-45, 279-81 and accompanying text.

372. See note 29 and accompanying text. See also Brown, Parmet, and Baumann, 36 Buff. L. Rev. at 601 (cited in note 38) ("[G]ender equality necessarily requires conditions that support women's familial responsibilities.").

373. See notes 342, 370.

374. See notes 42-45, 279-81 and accompanying text.

then need to accommodate parents.³⁷⁵ Once the workplace accommodates parents, whether as the result of court orders, legislative mandate, or voluntary action, the differences between the roles of mothers and fathers should diminish,³⁷⁶ except for those that are biologically necessary. If the workplace were to accommodate parenting rather than penalize it, then more fathers might be willing and able to take on more childcare.

To the extent that mothering and fathering are not based on biological differences, it may be that mothers do more parenting because that is the way childcare has traditionally been done.³⁷⁷ Men may simply have followed tradition. In order for the tradition to change, men would need to resist societal role pressures as well as workplace pressures that present parental obligations as inconsistent with the obligations of committed workers.³⁷⁸

In addition, mothers may do more parenting because of the current gender pay gap.³⁷⁹ Women have traditionally been paid less than men, and in the aggregate, despite the Equal Pay Act,³⁸⁰ this continues to be the case. Thus, if only one parent retains employment, it will more than likely be the father. The mother's leave-taking, then, serves to exacerbate the pay gap.³⁸¹ If the workplace were to accommodate childcare without a financial penalty, it could help eliminate the gender pay gap. It could also encourage fathers to undertake more childcare. It is hard for individual fathers to chal-

375. For a discussion of extending accommodations from mothers to fathers, see notes 291-93 and accompanying text.

376. See Fisk, 2 Berkeley Women's L. J. at 97, 103, 108 (cited in note 68). See also notes 291-93.

377. Of course there have been a number of traditions, varying with place and time, class and culture. See Williams, 13 N.Y.U. Rev. L. & Soc. Change at 354-55 n.117 (cited in note 29).

378. Hassberg, 40 Buff. L. Rev. at 238 (cited in note 38) (reporting that men are reluctant to take paternity leave because of employer bias against men who use this benefit); Novkov, 19 N.Y.U. Rev. L. & Soc. Change at 171 (cited in note 58) (discussing underutilization of paternity leave in Sweden).

379. See note 259.

380. 29 U.S.C. § 206(d) (1994 ed.). The Equal Pay Act does not address wage discrepancies between jobs predominantly held by women and those predominantly held by men.

381. See Issacharoff and Rosenblum, 94 Colum. L. Rev. at 2161-62 (cited in note 43) (reporting that "work history patterns" explain much of the gender pay gap); Meredith K. Wadman, *Mothers Who Take Extended Time Off Find Their Careers Pay a Heavy Price*, Wall St. J. B1 (July 16, 1992). Some studies have found that the gap between men's and women's earnings narrows over time for women who reenter the workplace. See Mary E. Corcoran, *Work Experience Labor Force Withdrawals, and Women Wages: Empirical Results Using the 1976 Panel of Income Dynamics*, in Cynthia B. Lloyd, et al., eds., *Women in the Labor Market* (Columbia U., 1979); Jacob Mincer and Haim Ofek, *Interrupted Work Careers: Depreciations and Restoration of Human Capital*, J. Human Resources 3 (Winter 1982). See also note 43.

lunge the workplace if they will jeopardize the family income, which already may have been jeopardized by the mother's parenting. Challenges to the workplace by both parents may put the family at economic risk.

Even if economic and other workplace barriers to parenting are reduced or eliminated, psychological ones presumably will remain.³⁸² While those are significant barriers, they are more likely to be overcome once they are uncoupled from economic barriers. Allocation of work in the home is difficult to change while governmental and workplace policies penalize parenting by ignoring parenting and children. Thus, changes in the workplace making it more hospitable to parenting may enable parents to allocate family responsibilities more equally. Where the disparate allocation is biologically necessary, then no change in family allocation will occur. Where the disparate allocation of family work is societally imposed, a change in society, beginning with the workplace, could be a starting place for change in the family.

Workplace change should also benefit children.³⁸³ When the workplace ignores children's need for parental attention, it puts parents in a conflict between their work and their children.³⁸⁴ Many have called for a reorganization of the workplace to integrate families.³⁸⁵ *United States v. Virginia's* equality analysis and citation to *Guerra* could be a catalyst for this reorganization.

The fact that some adjustments are necessary in the workplace does not mean that women are less capable workers than men. It merely means that the industrial workplace was based on a model wherein someone other than the wage worker takes care of children

382. See, for example, Martin A. Malin, *Fathers and Parental Leave*, 72 Tex. L. Rev. 1047, 1049 (1994); Novkov, 19 N.Y.U. Rev. L. & Soc. Change at 155 (cited in note 58).

383. See Mason, 29 J. Family L. at 44 (cited in note 42) (noting that children benefit when parents work fewer hours). See generally Penelope Leach, *Children First* (Vintage Books, 1995).

384. See Arlene Johnson, *The Business Case for Work-Family Programs*, J. Accountancy 53, 53-54 (Aug. 1995) (noting that parents may have to choose between work and their children if their employer requires them to stay late or work an extra day); Diktaban, 8 Hofstra Lab. L. J. at 389-90 (cited in 341) (finding affordable child care poses an enormous problem for working parents).

A recent Department of Labor study explains further: "Conflicts arise between work and family responsibilities because our system of child care services does not provide the needed reliable care and because work requirements often do not allow the flexibility that parents need to provide care and emotional support for their children." Women's Bureau, Office of the Secretary, U.S. Department of Labor, *Employers and Child Care: Benefiting Work and Family* 8 (1989). A sample survey reported that child care problems were the "most significant predictors of absenteeism and unproductive time at work." *Id.* at 7.

385. See note 58 and accompanying text.

and takes care of them without pay.³⁸⁶ The once male-dominated workplace has changed. Most women now work in it.³⁸⁷ Women's work now has an economic value. That means that the employers, who used to be able to take advantage of a "free" resource, childcare, to support its workers, now need to recognize that the resource is no longer free.³⁸⁸ The employer has come to realize this in other contexts, recognizing that other "free" resources, such as air and water, are not really free. Employers now pay to use these resources by developing technology to keep them clean. So, too, they will need to pay in some manner for childcare.

V. CONCLUSION

The effect of *United States v. Virginia* is remarkable. It raises gender equal protection analysis to the strict scrutiny level. Its less-restrictive-means analysis requires courts to determine whether institutions can make alterations and adjustments to avoid excluding women. In addition, *United States v. Virginia's* citation to *Guerra* suggests that its analysis applies to Title VII, and that Title VII's pregnancy analysis applies to the Constitution. In all respects, the decision has far-reaching implications for restructuring the workplace to recognize and accommodate the parental need to raise children. Just as VMI, built for one gender, must now adapt to new views about women's roles and abilities, so too must the workplace adapt. Had the workplace initially been designed to include both men and women and to recognize that most people in the workplace also raise children, the design would be different today. The analysis in *United States v. Virginia*, requiring institutional adjustments and alterations, is a first step toward achieving the gender-free design necessary for achieving gender equality in the workplace.

386. See note 279.

387. See note 290.

388. See Scales, 95 Yale L. J. at 1396 (cited in note 45) (arguing that employers must compensate women for the benefits that have been gained because of them).

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