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A Decade Later: United States v. Virginia and the Rise and Fall of "Skeptical Scrutiny"

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Notes & Comments

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I. INTRODUCTION

Justice Breyer: And even a woman who says, I understand that, but for me, she says, for me, I think it would work better at VMI, and it may be true as to her, irrespective of the majority, mightn't it?

Mr. Olson: A choice would have to be made, since the system would fundamentally have to be altered in the presence of coeducation. It will not work. It may work well with just women. It may work well with just men, and there's no stereotypes associated with that.

Justice Souter: No, but you say . . . there's no stereotype, but isn't it the case, as Justice Breyer said, that if you are going to justify your system by its distinctness, then you always have a built-in justification, because you can say, if you change it, it's no longer distinct, the value is gone, and that's why, it seems to me, under middle tier scrutiny, you've got to say the distinctness is worth it for some other reason.

Mr. Olson: The distinction – the distinctiveness is worth it because young people educate differently and we must, in this society, find ways to educate them successfully, and we must develop systems, not a student body for each

student, but systems that will attract people, and according to the experts, not the lawyers, work well for young people. Now, that is worth it . . . .

Justice Ginsburg: The question is, wouldn't something else work almost as well without denying opportunity to anyone?[1]

Thus was the scene before the United States Supreme Court a decade ago. The controversy at issue was *United States v. Virginia*,[2] a culmination of six years of intensely passionate litigation that sparked a maelstrom of media and scholarly attention.[3] The case was heralded as the beginning of a new era in gender-based equal protection jurisprudence.[4] And, for a time, it was.

The case involved the Virginia Military Institute (VMI), a small all-male, state-supported military institution in a small town in Virginia. It was a school that had, for over a century and a half, successfully produced an impressive record of alumni who had served both state and nation in distinguished civilian and military capacities. Unlike most colleges, VMI seeks to inculcate its pupils with character, that of a "citizen-soldier," in addition to education. Its method is unique. To achieve its end the school provides an atmosphere of total egalitarianism, strict discipline, total lack of privacy, and constant physical and mental stress. To VMI, homogeneity of gender was necessary for this chemistry to attain its proper objective.

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1. Transcript of Oral Argument at 53-54, United States v. Virginia, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107).

2. 518 U.S. 515 (1996).

3. The interested reader will find a comprehensive, and pleasantly readable, account of VMI and *United States v. Virginia* in PHILIPPA STRUM, WOMEN IN THE BARRACKS: THE VMI CASE AND EQUAL RIGHTS (2002). The effect of the U.S. Supreme Court's decision at VMI, and the changes made thereafter, is entertainingly retold in LAURA FAIRCHILD BRODIE, BREAKING OUT: VMI AND THE COMING OF WOMEN (2000). Deborah A. Widiss's note, *Re-Viewing History: The Use of the Past as Negative Precedent in* United States v. Virginia, 108 YALE L.J. 237 (1998), is an unrivaled analysis of the U.S. Supreme Court opinion and the use of history therein.

4. *See, e.g.*, Deborah L. Brake, *Reflections on the VMI Decision*, 6 AM. U. J. GENDER & L. 35, 35 (1997); Christina Gleason, Comment, United States v. Virginia: *Skeptical Scrutiny and the Future of Gender Discrimination Law*, 70 ST. JOHN'S L. REV. 801, 809 (1996).

In 1990, the Department of Justice challenged the all-male character of VMI as violative of the Equal Protection Clause of the Fourteenth Amendment. As has become well known over the last decade, the U.S. Supreme Court determined that VMI, although an honorable place, could not exist in its traditional form under an evolved Equal Protection Clause. The Court applied – to borrow a phrase provided by Justice Sandra Day O'Connor in her last, and unanimously supported, U.S. Supreme Court opinion – a "blunt remedy."[5] The phrase connotes the power of the High Court to terminate, or to drastically reform, that which the Court determines to be in conflict with an ever-developing constitutional law. VMI did not fit the Court's reading of the Equal Protection Clause and it would be made to do so. "VMI's story continued," the Court concluded, "as our comprehension of 'We the People' expanded."[6]

For lawyers and legal scholars alike, what was most profound about *United States v. Virginia* was the manner in which this "blunt remedy" was applied. Explicitly, the *Virginia* Court applied a standard, developed twenty years before *United States v. Virginia*, known as intermediate scrutiny. As the middle point of the U.S. Supreme Court's tripartite structure of equal protection analysis, intermediate scrutiny calls for a less convincing governmental justification for state action than for that which classifies persons according to race or national origin, but it is a more demanding test than that applied to classifications which do not distinguish persons according to such immutable characteristics. However, through *United States v. Virginia*, the Court would increase the rigor of intermediate scrutiny and give it a new name: "skeptical scrutiny."[7] As applied to the facts of *United States v. Virginia*, "skeptical scrutiny" would prove much more closely related to strict scrutiny – the standard used to review classifications based on race or national origin – than it would to the traditional intermediate scrutiny test. This, of course, the U.S. Supreme Court can do. After all, the three tiers of equal protection review were, in the words of Justice Scalia,

5. *See* Ayotte v. Planned Parenthood of N. New England, 126 S. Ct. 961, 969 (2006).

6. *Virginia*, 518 U.S. at 557.

7. *Id.* at 531.

"made-up" by the Court.[8]

But this emboldened standard of intermediate scrutiny would live, at the U.S. Supreme Court level, only a short time. Five years after its creation, two Justices who had supported "skeptical scrutiny" in *United States v. Virginia* would defect, forming a majority with three other Justices, two of whom opposed "skeptical scrutiny" in *Virginia* and one who recused himself from that case. Subsequently, the Court would deliver another opinion again restating intermediate scrutiny in its traditional form.

Standing in the present, and looking back at the thirty-five year development of U.S. Supreme Court gender-based equal protection jurisprudence, *United States v. Virginia* appears as an anomaly. In fact, it is. Neither before nor after *United States v. Virginia* had the U.S. Supreme Court required a gender classification to meet the rigors of "skeptical scrutiny." Accordingly, this Comment will present the case that after *United States v. Virginia*, the U.S. Supreme Court no longer requires the continued application of "skeptical scrutiny."

Many lower federal courts, however, continue to apply the test as it was put forth in *United States v. Virginia*. To be sure, the U.S. Supreme Court has held that lower courts should apply U.S. Supreme Court precedent if it directly resembles a case before the lower courts – even if some of the reasoning of that precedent appears rejected by later precedent – so that the U.S. Supreme Court alone may maintain the "prerogative of overruling its decisions."[9] But for most gender-based claims, the lower courts should also be aware that because of the decisions of a majority of the U.S. Supreme Court concerning gender classifications after *United States v. Virginia*, it seems clear that "skeptical scrutiny," like the all-male VMI, is now a piece of history.

This Comment is not intended to advocate what should or should not be. It is instead meant to view the evolution of U.S. Supreme Court gender-based equal protection jurisprudence as it stands today and to serve as a sober instruction to the lower federal courts. To meet this end, Part II of this Comment will describe the evolution of intermediate scrutiny in its traditional

8. *Id.* at 570 (dissenting opinion).

9. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

form. Part III will look closely at the VMI litigation and the issues involved, as this led to the creation of "skeptical scrutiny." Part IV will explain "skeptical scrutiny" in the context of *United States v. Virginia*, its one and only appearance on the High Court. Part V will describe the Court's shift to the traditional intermediate scrutiny at the expense of "skeptical scrutiny," and take into account the two new members of the Court, leading to the conclusion that, for the U.S. Supreme Court, "skeptical scrutiny" no longer exists.

II. TOWARDS A "MORE SEARCHING JUDICIAL INQUIRY"

> *Nature had injured [the Queen] in not making her a man, for, but for her sex, she would have surpassed all the heroes of history.*
>
> Thomas Cromwell, circa 1533[10]

> *Generalizations about the way women and men are, I have several times said, seem to me unhelpful in making decisions about particular individuals.*
>
> Justice Ruth Bader Ginsburg, 1996[11]

The above words of Justice Ginsburg were published in the *Georgetown Law Journal* one month before the U.S. Supreme Court ultimately decided *United States v. Virginia*. Her words are a distinct break from Thomas Cromwell's past; and they signify a refusal to accept the notion that one's sex predetermines the level to which one can aspire. As a litigator and later as a jurist, Justice Ginsburg succeeded in significantly influencing the evolution of gender equality jurisprudence by her determination to prevent antiquated notions of gender roles preclude individual women from attaining their full potential. As a litigator, the efforts of Ginsburg and her colleagues would result in two important landmarks: (1) judicial abandonment of the use of traditional norms based on the presumed societal roles of men and women as an acceptable governmental objective for gender discriminatory legislation; and (2) a heightened standard of judicial review for gender discrimination claims brought under the

10. MARY M. LUKE, CATHERINE, THE QUEEN 442 (1967).
11. *Foreword*, 84 GEO. L.J. 1651, 1654 (1996).

Equal Protection Clause of the Fourteenth Amendment.[12]

Before either landmark was achieved, the U.S. Supreme Court reviewed claims brought under the Equal Protection Clause under one of two levels of scrutiny. Claims brought due to legislation or government action which involved a "suspect classification," such as race or national origin, require courts to apply "the most rigid scrutiny."[13] A court presumes such action unconstitutional unless the government can justify the classification with a "compelling governmental interes[t]" and only if the classification is "narrowly tailored" to further that interest.[14] In contrast, when a "suspect classification" is not involved, equal protection claims are subject to the deferential "rational basis" review, whereby the classification is presumptively *constitutional* unless it "bear[s] no rational relationship to the State's [or Congress's] objectives."[15]

Courts traditionally analyzed gender classifications under rational basis review, causing the results of gender discrimination claims before the U.S. Supreme Court that relied upon the Equal Protection Clause to be initially disappointing.[16] A classic example occurred in 1873, where the Court refused to overrule an Illinois statute that denied women a license to practice law.[17] Justice Bradley, concurring in the judgment, held that "[t]he natural and proper timidity and delicacy which belongs to the female sex unfits it for many of the occupations of civil life."[18]

The efforts of feminist activists became the driving force behind the social and legal change towards gender equality. They cannot be reduced to a single, unified theory. Some are more radical than others and many seek to bring about change through different methodologies. Because the efforts of Ruth Bader

12. Of course, equal protection claims brought against the federal government are subject to the judicially created "equal protection component" of the Due Process Clause of the Fifth Amendment. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

13. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

14. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

15. *See* Washington v. Yakima Indian Nation, 439 U.S. 463, 501 (1979).

16. *See, e.g.,* Hoyt v. Florida, 368 U.S. 57 (1961) (upholding a state's exclusion of women on juries); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a statute preventing women from holding bartending jobs).

17. Bradwell v. Illinois, 83 U.S. 130 (1873).

18. *Id.* at 141.

Ginsburg, first as an ACLU litigator and later as the U.S. Supreme Court Justice who authored *United States v. Virginia*, were so instrumental in the Court's gender-related jurisprudence, her understanding of feminism shall be our focus.

Commentators have classified Ginsburg as an "egalitarian feminist."[19] The classification connotes the understanding that women and men are equals and that legislation designed to "protect" women inherently places them in an inferior position.[20] Whatever the classification, Ginsburg's own definition of "feminism" is the most telling: "It means freeing people, men as well as women, to be you and me, allowing people to pursue the talents and qualities they have without artificial restraints."[21] The "artificial restraints" Ginsburg spoke of sprang from age-old stereotypes about the place of women in society. She referred to this concept as the "'separate sphere' mentality" whereby men and women are accorded separate societal functions; and women, considered the weaker sex, are provided with "protective" legislation.[22] Such "protective" legislation enabled lawmakers to restrict women from a variety of professions, such as law[23] and even tending bar,[24] to "protect" them from "'the greed as well as the passion of man."[25]

Additionally, such "protective" legislation, based entirely upon stereotype, restricted the opportunities of individuals who may personify an exception to those stereotypes. The heart of Ginsburg's feminism concerns itself with such individuals, and would be a major influence in her drafting of "skeptical scrutiny" in *United States v. Virginia.* She believed that the development of one's "full, human capacit[y]" and the ability to "achieve according

19. *See* Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 867-68 (1997); Carey Olney, *Better Bitch Than Mouse: Ruth Bader Ginsburg, Feminism, and VMI*, 9 BUFF. WOMEN'S L.J., 118-20 (2001).

20. Olney, *supra* note 19, at 118.

21. Ruth Bader Ginsburg, *Excerpt from Remarks Given at the International Women's Forum Lunch*, 10 COLUM. J. GENDER & L. 25, 26 (2000).

22. Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 266, 269 (1997).

23. *Bradwell*, 83 U.S. at 130 (1873).

24. *See* Goesaert v. Cleary, 335 U.S. 464 (1948).

25. *See* Ginsburg, *supra* note 22, at 270 (quoting Muller v. Oregon, 208 U.S. 412, 422 (1908)).

to [one's] individual talent" is stymied by legislation that predetermines one's role according to gender.[26] A heightened standard of judicial scrutiny, used to review gender-based legislation, was, in the absence of an Equal Rights Amendment, the only way to ensure that individual women, and the nation that their talents would serve, could be developed to full capacity.[27]

As a litigator with the ACLU, Ginsburg was unfazed by the lack of any favorable precedent concerning gender classifications. She would later speak of the Founders' inability, due to contemporary cultural norms, to respect fully the ideals of equality proclaimed in the Declaration of Independence.[28] She believed, however, that those very ideals possessed "growth potential."[29] Yet, Ginsburg did not favor a bold, sudden strategy to encourage the U.S. Supreme Court to create a higher standard of judicial scrutiny for gender discrimination claims. Instead she prudently took on cases she deemed "'clear winners,'" with the aim of easing the Court, case-by-case, towards a heightened standard of scrutiny.[30] By doing so, Ginsburg believed, she would establish a foundation of gender equality law and from there prod the Court towards raising the standard of review well beyond rational basis.[31] One of her former colleagues described her strategy: "'Present the Court with the next logical step . . . and then the next and then the next. Don't ask them to go too far too fast, or you'll lose what you might have won.'"[32]

The first case that Ginsburg and her ACLU colleagues advocated later became the landmark decision of *Reed v. Reed*.[33]

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26. *Id.* at 270-71.

27. By constitutional mandate, the Equal Rights Amendment would have effectively required a strict scrutiny analysis for gender classifications. *See* Joan A. Lukey & Jeffrey A. Smagula, *Do We Still Need a Federal Equal Rights Amendment?*, 44 BOSTON B.J. 10, 10 (2000). Advocates of the proposed amendment would prove unable to convince the requisite three-quarters of the state legislatures to adopt the amendment by the time the ratification deadline arrived in 1982. *Id.* They fell short by three states. *Id.*

28. Ginsburg, *supra* note 22, at 265.

29. *Id.*

30. Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335, 337 (1992).

31. *Id.* at 337-38.

32. Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, (Magazine), at 64.

33. 404 U.S. 71 (1971).

The case involved an Idaho intestacy statute that granted preference to males over females as estate administrators in the event that they were otherwise "equally entitled to administer."[34] Sally Reed challenged the statute because it named her estranged husband, Cecil, administrator of their deceased son's estate on the simple basis that Cecil was male.[35]

In her brief on behalf of Sally Reed, Ginsburg began by arguing that gender discrimination was analogous to racial discrimination, and therefore, gender-based classifications should also be subject to strict scrutiny.[36] She likened the history of gender discrimination in this country to that of racial minorities.[37] Her attempt was to demonstrate to the Court the injustices of the past, and ask them to prevent further injustice in the case at hand and in the future.

Secondly, Ginsburg presented to the Court that traditional stereotypes, such as women as "keeper of the hearth," had become outdated.[38] She cited scientific advancements that now allow women to control reproduction; as well as the increased lifespan of women, which meant more of life was spent without caring for young children.[39] She also pointed to women's increased presence in the workplace and in institutions of higher learning.[40]

In a unanimous decision, the *Reed* Court refused to establish a standard of strict scrutiny for gender-based claims, but did hold that the Idahoan statute was unconstitutional.[41] The Court, however, also declined to apply a traditional rational basis review.

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34. *Id.* at 73.
35. *Id.* at 72.
36. Brief of Petitioner at 15, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4). In her own words:

> [A]lthough the legislature may distinguish between individuals on the basis of their ability or need, it is presumptively impermissible to distinguish on the basis of congenital and unalterable biological traits of birth over which the individual has no control and for which he or she should not be penalized. Such conditions include not only race, a matter clearly within the "suspect classification" doctrine, but include as well the sex of the individual.

Id.
37. *Id.* at 17-18.
38. *Id.* at 51.
39. *Id.*
40. *Id.* at 62-63.
41. *Reed*, 404 U.S. 71 at 76-77.

The Court recognized that the state's avowed rationale, that the statute was designed to limit the caseload of the probate courts, was not entirely irrational.[42] However, the Court was unable to view the state's rationale as compliant with the Equal Protection Clause's demand that the classifications have "'a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.'"[43] Indeed, the Court held, the statute's preference for one sex over the other, without any regard to their individual qualifications, "merely to accomplish the elimination of hearings on the merits, is . . . the very kind of legislative choice forbidden by the Equal Protection Clause. . . ."[44] *Reed*, therefore became the first case where the U.S. Supreme Court held a gender-based classification unconstitutional.[45] Ruth Bader Ginsburg had laid her foundation.

The success of *Reed* led Ginsburg to base all of her subsequent arguments on the *Reed* brief.[46] The next landmark decision, *Frontiero v. Richardson*, was decided only a year and a half after *Reed*; and there, a plurality of four Justices wholeheartedly adopted Ginsburg's argument that gender classifications, like race, should be reviewed under strict scrutiny.[47] The case arose as a challenge to a federal statute which provided that male members of the military could immediately receive fringe benefits for their dependents, but female members needed to prove that they were in fact providing their husbands with more than one-half of their support.[48] Because "'administrative convenience'" was the government's rationale, the statute was already doomed under the *Reed* standard; however, the plurality went further.[49]

Justice Brennan, writing for the plurality, adopted Ginsburg's assertion that gender-based discrimination was analogous to that

42. *Id.* at 76.
43. *Id.* (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
44. *Id.*
45. Olney, *supra* note 19, at 110.
46. Toni J. Ellington, Sylvia K. Higashi, Jayna K. Kim & Mark M. Murakami, *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 U. HAW. L. REV. 699, 727 (1998).
47. 411 U.S. 677, 682 (1973). The plurality would go so far as to include portions of Ginsburg's brief in the final opinion. *See* STRUM, *supra* note 3, at 66.
48. *Frontiero*, 411 U.S. at 677.
49. *Id.* at 688.

of race. In a now famous sentence, he wrote: "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination."[50] Sex, the plurality held, was an "immutable characteristic" an "accident of birth," and classifications based upon sex often destined an individual for an "inferior legal status without regard to [one's] actual capabilities."[51]

Therefore, if the plurality had their way, strict scrutiny would be applied to sex-based classifications; but a plurality is not a majority. The concurring Justices agreed that the statute should be stricken under the *Reed* standard, but restrained themselves from adopting strict scrutiny, largely because the people themselves were deciding the issue: the Equal Rights Amendment was contemporaneously touring the country asking acceptance from at least three-quarters of the state legislatures.[52]

Ginsburg later participated as an amicus in *Craig v. Boren*,[53] which established, almost as a compromise, an intermediate form of scrutiny as the standard of review for gender discrimination claims. There, an Oklahoma statute prohibited the sale of "3.2% beer" to males before twenty-one years and females before eighteen.[54] The Court began its analysis with what is now the classic statement of intermediate scrutiny: "[C]lassifications by gender must serve important governmental objectives and must be substantially related to [the] achievement of those objectives."[55] In other words, the state's objective must be something more compelling than that which would survive a rational basis review, and the means must be carefully designed to achieve that objective.

In *Craig*, the state's proffered justification was traffic safety, and, to demonstrate a "substantia[l]" relationship between the classification and that goal, the state provided statistical evidence that young men were more often arrested for drunk driving than young women.[56] The Court did find traffic safety to be an

50. *Id.* at 684.
51. *Id.* at 686-87.
52. *Id.* at 692. In addition to the concurring Justices, there was a lonely dissenter: Justice William H. Rehnquist. *Id.* at 691.
53. 429 U.S. 190, 210-11 (1976).
54. *Id.* at 191-92.
55. *Id.* at 197.
56. *Id.* at 199. The statistics demonstrated that 0.18% of females and 2% of males aged 18-20 were arrested for drunk driving. *Id.* at 200-01.

"important governmental objective" but the "broad sociological propositions" that the statistics sought to demonstrate did not "substantially relat[e]" to the prevention of drunk driving.[57] Thus, under intermediate scrutiny, the classification was "too tenuous" to justify a gender-based classification.[58]

Accordingly, the U.S. Supreme Court never adopted strict scrutiny for gender-based classifications during Ruth Bader Ginsburg's career as a litigator. Justice Brennan, in *Frontiero*, was the last U.S. Supreme Court Justice to attempt a coalition in favor of such a standard. Even Ginsburg, as herself a U.S. Supreme Court Justice, would not attempt that bold feat in *United States v. Virginia*. But Ginsburg's strategy had worked. She and her colleagues had successfully convinced the Court to include sex-based classifications under a higher standard of scrutiny. For her efforts, her appointer, President Bill Clinton, would describe her as "the Thurgood Marshall of the women's movement."[59] The *Craig* standard of intermediate scrutiny was not Ginsburg's ultimate goal. But Ginsburg has never believed that justice comes quickly. At her Senate confirmation hearing she invoked the wisdom of Justice Benjamin Cardozo: "'Justice is not to be taken by storm. She is to be wooed by slow advance.'"[60]

III. *UNITED STATES V. VIRGINIA* IN THE LOWER COURTS

A. *"A Singular Place"*

> *It is education that must give souls the national form, and so direct their tastes and opinions that they will be patriotic by inclination, passion, and necessity.*
>
> Jean-Jacques Rousseau[61]

As gender equality was steadily introduced into U.S. Supreme

57. *Id.* at 204.
58. *Id.*
59. DAN M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 82 (5th ed. 2000).
60. Olney, *supra* note 19, at 129.
61. *Considerations on the Government of Poland and Its Projected Reformation, in* THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 177, 189 (Victor Gourevitch ed., Cambridge University Press 1997) (1771).

Court equal protection jurisprudence in Washington, the Virginia Military Institute sat, as it had since 1839, almost 200 miles away in the small town of Lexington, Virginia. The forward thinking citizens of Lexington conceived the idea for a state-sponsored military institute around 1834.[62] The Virginia General Assembly chose their "'gentle town'" to host an arsenal left over from the War of 1812.[63] But the constant shenanigans of the Virginia militiamen selected for the task of guarding the arsenal prompted concerned Lexingtonians to propose to the General Assembly the creation of a school, which would use military discipline as its method, to instill values of education, honor, and public service among the militiamen.[64] The General Assembly agreed and by statute created the nation's first state-supported military educational institution.[65]

Although it is a military school, VMI is distinct from the federal military academies. The mission of the federal military academies, such as West Point and Annapolis, is to train young people to become professional soldiers; for VMI, its mission is to produce "citizen-soldiers."[66] The ideal of the citizen-soldier originated with the Roman hero Cincinnatus, a farmer who left his civilian life to defend Rome in a time of invasion, only to return to his four acres after victoriously defending his homeland.[67] To educate its pupils toward this ideal, VMI uses military style training, not as an end, but as a *means* of instilling its pupils with the character, honor, and leadership skills necessary for a productive civilian life, and if the need arises, "to defend their country in time of national peril."[68] Lieutenant General Josiah Bunting III, who served as an expert defense witness in the trial phases of *United States v. Virginia* and later

62. STRUM, *supra* note 3, at 9.

63. HENRY A. WISE, DRAWING OUT THE MAN: THE VMI STORY 9 (1978).

64. STRUM, *supra* note 3, at 10-11.

65. *Id.* at 13.

66. *See* Diane Diamond & Michael Kimmel, *"Toxic Virus" or Lady Virtue: Gender Integration and Assimilation at West Point and VMI, in* GOING COED: WOMEN'S EXPERIENCES IN FORMERLY MEN'S COLLEGES AND UNIVERSITIES, 1950-2000, at 263, 264-65 (Leslie Miller-Bernal & Susan L. Poulson eds., 2004).

67. GARY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 36 (1984).

68. *See* WISE, *supra* note 63, at 3; VMI NEW CADET HANDBOOK 2005-2006, at 7 (2005) [hereinafter CADET HANDBOOK].

as the Institute's superintendent, testified that the inculcation of the character of a citizen-soldier in VMI cadets serves the aim of creating "people who beyond their professional attainments will feel a larger obligation and responsibility to return something of what they have been given, to their community."[69] Consequently, where the federal military academies require mandatory commissioning in a branch of the military, about 40% of VMI graduates accept such commissions, and approximately 20-25% choose the military as a career.[70]

To imbue a teenager with the character of a citizen-soldier, VMI employs the "adversative method." The adversative method consists of several components; however, all components – namely, egalitarianism, stress, communal living, and a lack of privacy – work concurrently, creating a "holistic environment."[71] The concert of these components work to isolate a cadet into a closed egalitarian community, where VMI ethics of character, honor, and integrity replace contrasting, previously held attitudes and beliefs.[72] As one columnist described, the adversative method works to "bur[n] off such divisive, testosterone-induced aspects of personality as cockiness and sloth and replac[e] them with such social virtues as honor and loyalty."[73]

Central to the adversative system is the cadets' living quarters, or "Barracks." Cadets are required to live in Barracks for their entire VMI career.[74] Barracks is a spartan structure,

69. Transcript of Record at 988, United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991) (No. 90-0126-R). A "superintendent" in VMI terminology is the equivalent of a university president. As a unique military school, VMI possesses a distinct vocabulary. Rather than a campus, the VMI property is known as "the Post," the dean is known as "the Commandant," students are know as "cadets," vacations are known as "furloughs," and the cadet dormitory is known as "Barracks." For a more complete list of VMI vocabulary terms, see CADET HANDBOOK, *supra* note 68, at 55-62.

70. CADET HANDBOOK, *supra* note 68, at 8. One such graduate, Colonel James Hickey, class of '82, recently made his *alma mater* proud when his command located a certain former dictator in a hole in the ground near Tikrit, Iraq. *The Irishman Who Got Saddam; It Took the Son of Irish Immigrants to Finally Nail Saddam Hussein*, IRISH VOICE, Dec. 18, 2003, http://www.irishabroad.com/news/irishinamerica/news/saddam.asp.

71. Transcript of Record at 993, *Virginia*, 766 F. Supp. 1407 (No. 90-0126-R).

72. STRUM, *supra* note 3, at 40.

73. John Sedgwick, *Guess Whose Coming to VMI?*, GQ, July 1997, at 129.

74. *Virginia*, 766 F. Supp. 1407, 1421-22 (W.D. Va. 1991).

made up of four floors, known as "stoops," each facing inwards to a courtyard.[75] Within Barracks all components of the adversative method cohere and reduce new cadets to the "lowest common denominator."[76] Before they matriculate at VMI, new cadets may be diverse in terms of class, ethnicity, or academic achievement, but beginning on their first day they are all labeled "rats."[77] The goal is to create a community of complete egalitarianism.[78] A total lack of privacy within Barracks also serves this end. This lack of privacy has caused Barracks to be likened to the Panopticon, Jeremy Bentham's ideal prison designed to instill a feeling of constant surveillance among its inmates.[79] However, the lack of privacy inherent in Barracks is not, like the Panopticon, part of a punitive scheme. The purpose is to instill an ever-present feeling of belonging to a community beyond one's self.[80]

Stress, too, bears down on new cadets and creates a sense of communal suffering. The stress Rats endure is multiform, whether it be the constant harassment from upperclass cadets, intense physical exercise, long days and forced marches, or academics. In his expert testimony, General Bunting explained that the atmosphere of stress instills in cadets "a certain ability to function effectively under conditions of stress and demands and challenges later on in life."[81]

Understandably, the *New Cadet Handbook* is correct in its assessment that "VMI is not for everyone."[82] The stress of the Ratline causes attrition rates to be high, higher than that of the federal military academies.[83] Those who do survive the Ratline

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75. Jeffrey Rosen, *Like Race, Like Gender?*, THE NEW REPUBLIC, Feb. 19, 1996, at 21.

76. *Virginia*, 766 F. Supp. at 1423.

77. *Id.*

78. The extent to which egalitarianism is respected in Barracks was exemplified by the unusually smooth integration of African-American cadets in 1968. *See* WISE, *supra* note 63, at 287-88.

79. Rosen, *supra* note 75, at 21.

80. Transcript of Record at 993, *Virginia*, 766 F. Supp. 1407 (No. 90-0126-R). Traditionally bathrooms were communal, locks on doors nonexistent, and the glass windows on each room's door were at all times to be unobstructed.

81. *Id.* at 992.

82. CADET HANDBOOK, *supra* note 68, at 11.

83. STRUM, *supra* note 3, at 48. Historically, four percent of Rats drop out in the first week and up to twenty-five percent drop out before the first year is finished. *Id.*

graduate with a deep, lasting loyalty to their *alma mater*. In fact, the loyalty of alumni has made VMI the recipient of the highest per capita endowment of any other public university in the nation.[84]

The adversative method does more, however, than produce loyal alumni. VMI has an impressive history of producing alumni who achieve a "'disproportionately large number of influential positions'" in both the civilian and military spheres.[85] That the adversative method itself contributes to this success is buttressed by the fact that VMI is not exceptionally selective in its admissions.[86] General Bunting described the adversative method's success with those that endure it: "There is something almost chemical in [the adversative method's] attraction for a certain kind of kid. . . . He thrives."[87]

For over a century and a half only men could reap the benefits of VMI's success. Women, however, were becoming increasingly involved in traditionally male-dominated professions – the military is a pertinent example. It appeared to be only a matter of time before VMI's all-male character would be challenged. But VMI would not present a case which could fairly be described as a "'clear winne[r]'"[88] – the type Ruth Bader Ginsburg and her colleagues sought out in the past. And it would require, indeed cause, a reevaluation of what intermediate scrutiny really entailed.

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84. *See* United States v. Virginia, 518 U.S. 515, 520 (1996).

85. *See* STRUM, *supra* note 3, at 89. Notable alumni include a Nobel Peace Prize winner, Members of Congress, a Pulitzer Prize winner, seven Medal of Honor recipients, ten Rhodes Scholars, 39 college presidents, 266 generals and flag officers, and a Lesser Saint of the Episcopal Church. *See* VMI CATALOGUE 2003-2004, at 5, 6 (2002); *Virginia*, 518 U.S. at 520. Jonathan M. Daniels, class of '61, was named a Lesser Saint of the Episcopal Church after his efforts on behalf of African-Americans during the Civil Rights movement led to his murder by police in Alabama in 1965. *2003 Jonathan Daniels Ceremony*, Virginia Military Institute, http://www.vmi.edu/Show.asp?durki=1396&site=11&return=4892 (last visited Feb. 22, 2006).

86. *See* STRUM, *supra* note 3, at 33 (noting that VMI admitted seventy-six percent of its applicants in the late 1980s). For the 2005-2006 academic year, VMI accepted fifty percent of its applicants. *See* http:// www.princetonreview.com/college/research/profiles/admissions.asp?listing=1022822&ltid=1&intbucketid= (last visited Feb. 28, 2006).

87. Sedgwick, *supra* note 73, at 130.

88. Markowitz, *supra* note 30, at 337.

B. *Intermediate Scrutiny with Three More Words*

Ten years before the VMI litigation began, however, the U.S. Supreme Court decided a gender discrimination case, *Mississippi University for Women v. Hogan*,[89] which would prove directly controlling in *United States v. Virginia*.[90] But *Hogan* was also important for two more reasons. First, it associated three more words with the intermediate scrutiny test: "'exceedingly persuasive justification.'"[91] The phrase was born in *Personnel Administrator of Massachusetts v. Feeney*, and in that case, as in *Hogan*, it was used as a description of state objectives which had met the important objective/substantial means test.[92] In other words, if the state's justification passed both prongs it was labeled "'exceedingly persuasive.'"[93] As we shall see, the U.S. Supreme Court would increase its reliance upon these three words to reformulate the intermediate scrutiny test in *United States v. Virginia*.

Secondly, *Hogan* ended single-sex education at Mississippi University for Women (MUW) because it held that the state's justification did not rely upon "reasoned analysis" but the "application of traditional, often inaccurate, assumptions about the proper roles of men and women."[94] In other words, the Court's decision served to terminate outdated stereotypes. *United States v. Virginia* would bring this concept one step further.

The *Hogan* litigation began after an unusual event occurred in Mississippi: aspirant student Joe Hogan applied to the nursing

89. 458 U.S. 718 (1982).

90. *See, e.g.*, United States v. Virginia, 766 F. Supp. 1407, 1410 (W.D. Va. 1991) ("[*Hogan*] guides my decision in this case."); United States v. Virginia, 518 U.S. 515, 536 (1996) ("[*Hogan*] is immediately in point.").

91. *Hogan*, 458 U.S. at 731.

92. *See id.* ("[C]onsidering both the asserted interest and the relationship between the interest and the methods use by the State, we conclude that the State was fallen far short of establishing [an] 'exceedingly persuasive justification.'"); Pers. Admin'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) ("This Court's recent cases teach that [gender] classifications must bear a close and substantial relationship to important governmental objectives ... these precedents dictate that any state law overtly or covertly designed to prefer males over females ... would require an exceedingly persuasive justification.").

93. *Hogan*, 458 U.S. at 731.

94. *Id.* at 726.

program at MUW.[95] After his inevitable rejection, Hogan brought suit against the university, won, and MUW appealed.[96] In a 5-4 opinion, authored by the newly confirmed Justice Sandra Day O'Connor, the U.S. Supreme Court affirmed the lower court's decision.[97] The university could not, the Court held, deny Joe Hogan admission from MUW, its mission to promote the "'moral and intellectual advancement of the girls of the state'" notwithstanding.[98]

Applying the equal protection intermediate scrutiny test, the Court held that MUW's discriminatory classification must serve "'important governmental objectives'" and the "'discriminatory means employed'" must be "'substantially related to the achievement'" of its objective.[99] Under intermediate scrutiny, a state's justification is insufficient if it is based on "archaic and stereotypic notions" concerning the roles of men and women.[100] Mississippi offered an affirmative action justification, arguing that MUW's single-sex policy compensated women for other discriminatory barriers.[101] However, in a nation where 94% of nursing degrees were awarded to women, the Court held that the state's actual justification was not to compensate women, but to exclude men, using a "stereotyped view" of nursing as a "woman's job."[102]

The Court also held that MUW's policy failed the second prong of the intermediate scrutiny test, that the means employed to carry out the objective are of a "direct, substantial relationship."[103] Because the school allowed male students to attend some classes as "auditors," the school's claim that women would be "adversely affected" by men was "fatally undermine[d]."[104] The state's justification failed both prongs, thus

95. Hogan v. Miss. Univ. for Women, 646 F.2d 1116, 1117 (5th Cir. 1981).
96. *Id.*
97. *Hogan*, 458 U.S. at 733.
98. *Id.* at 720 n.1 (quoting Miss. Code Ann. § 37-117-3 (1972)).
99. *Id.* at 724 (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)).
100. *Id.* at 725.
101. *Id.* at 727.
102. *Id.* at 729, 729 n.14.
103. *Id.* at 725.
104. *Id.* at 730.

the Court did not consider it "'exceedingly persuasive.'"[105]

C. United States v. Virginia *Begins*

In 1989, the Justice Department's Civil Rights Division received word of a young woman who applied to VMI, but was denied admission based on her sex.[106] The United States brought suit against VMI and Virginia in her behalf, pursuant to Title IV of the Civil Rights Act.[107] Like Joe Hogan, the Government would argue that VMI could not constitutionally refuse to admit persons of a particular gender under the Fourteenth Amendment.

Hogan may have been controlling throughout *United States v. Virginia*, but Virginia and VMI's justification were distinct from MUW's. The interest that Virginia provided to meet the "important governmental objective" prong of the intermediate scrutiny test was not affirmative action, but educational diversity.[108] Virginia funded fifteen institutions of higher learning, each different from the other, whether it be in terms of size, location, or stated mission.[109] The service that this diversity provided was a choice to attend the university that best fulfilled an individual's interest.[110] Virginia considered VMI a vehicle for this diversity because it provided the state's only all-male military institute based on the adversative method.

Experts on both sides agreed that single-sex education provided unique benefits to its students.[111] Virginia argued that those who decided upon the type of education that VMI offered

105. *Id.* at 731.

106. STRUM, *supra* note 3, at 86. The identity of this woman remains undisclosed. *Id.*

107. United States v. Virginia, 766 F. Supp. 1407, 1408 (W.D. Va. 1991). *See also* 42 U.S.C. § 2000c-6 (2006) (permitting the United States itself to bring actions alleging discrimination by educational institutions that contravene the U.S. Constitution or federal statute when the aggrieved party is unable to "initiate and maintain appropriate legal proceedings").

108. *Virginia*, 766 F. Supp. at 1412.

109. *Id.* at 1418-19.

110. Transcript of Record at 984, *Virginia*, 766 F. Supp. 1407 (No. 90-0126-R).

111. *Virginia*, 766 F. Supp. at 1412. *See also* United States v. Virginia, 976 F.2d 890, 897 (4th Cir. 1992) (noting that single-sex education provides students with "advantages over coeducational colleges in numerous areas" and that "single-sex education also has been found to have salutary consequences for sexual equality in the job market.").

should have the choice to attend such an institution.[112] Yet, no state-supported single-sex education for women existed in Virginia.[113] Those that were founded as such had, by their own volition, chosen to become coeducational.[114] To ensure that Virginia's daughters could still reap the benefits of single-sex education, the state distributed scholarship funds to students who chose to attend one of the state's four private all-female colleges.[115]

The problem remained, however, that women in Virginia could not experience the adversative method if they so desired. They could receive military training in the Corps of Cadets at Virginia Polytechnic Institute, but that was not an adversative program.[116] Female demand for the adversative method remained too low to create a separate, all-female adversative military academy;[117] and VMI argued that the introduction of women into the Institute, as the Government had demanded, would destroy the very nature, and therefore greatness, of the Institute. Unlike MUW, VMI advanced that its system was unique and required homogeneity of gender; MUW possessed no unique qualities other than its single-sex status.

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112. *Virginia*, 766 F. Supp. at 1420.

113. *Id.* at 1418-19.

114. *Id.* The Commonwealth of Virginia grants the Boards of Visitors of its various universities autonomy in such decisions as "mission, curriculum, the composition of its faculty, and the composition of its student body." *Id.* at 1419.

115. *Id.* at 1420. As pointed out at oral argument before the U.S. Supreme Court, the total monies allotted for such scholarships were less than the total monies allotted to VMI. *See* Transcript of Oral Argument at 36, United States v. Virginia, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107).

116. *Virginia*, 766 F. Supp. at 1430-32.

117. *See id.* at 1436. Although the District Court's factual findings admitted that there was "a great deal of speculation, but very little evidence" on the demand for an adversative program among women, the findings also note that VMI had received, between 1988 and 1990, 347 requests for information from women. *Id.* Because the number of inquiries to a university over a two-year period is quite larger than the number of prospective students who will actually apply, become accepted, and decide to enroll, it seems safe to say that female demand in adversative training was, at the time of litigation, quite low. The fact that only fifty-one female cadets enrolled at VMI in the 2005-2006 academic year is further proof that demand among females for adversative training is minimal and would not warrant a separate facility. *See* Board of Visitors Meeting at 2 (Aug. 25 & 27, 2005), http://www.vmi.edu/media/bov/BOV%202005%20August%20Minutes.pdf.

It was this threat to the school's culture that sparked intense passion among VMI's defenders. General Bunting likened VMI's feelings on this point to a First Century adage: "Men bent on change, in the expectation that change will improve their lot, find often that their expectation was not gratified, and that they lost what they had."[118] VMI's supporters took this cautious approach, and were unwavering in their struggle to preserve what they had. Expert defense witness Dr. David Riesman, a Harvard sociologist, praised VMI's institutional character as "'the strongest assault'" on the "'rating, dating, mating, youth culture.'"[119] Dr. Riesman, like all of VMI's witnesses, believed that change at the Institute would fatally undermine its avowed purpose.[120] Although Dr. Riesman's testimony is not provided in the trial transcript because his testimony was given by *de bene esse* deposition, fellow expert witness General Bunting paraphrased his position on VMI's culture:

> [C]olleges that most decisively intervene in the lives of their students are those of an unusual, distinctive culture and ethos: singular places with long-serving teachers (many of whom are "characters"), cherished and ancient eccentricities, and adamant allegiance to the work of forming "character" as well as educating mind. [VMI] qualified as such a singular place; that singularity should not . . . be put at risk.[121]

If VMI admitted women, they argued, the Institute could not maintain key elements of Barracks life such as total absence of privacy, egalitarianism, and the strenuous physical standards.[122] If VMI lost its "distinctive culture" and "ethos" it would be incapable of providing educational diversity.[123] VMI would have

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118. Interview with Lieutenant General Josiah Bunting III, Superintendent Emeritus, Virginia Military Institute, in Newport, R.I. (Feb. 4, 2006).

119. STRUM, *supra* note 3, at 163.

120. *Virginia*, 766 F. Supp. at 1435-36.

121. JOSIAH BUNTING III, SINGULAR EMINENCE: A LIFE OF GEORGE CATLETT MARSHALL (forthcoming 2007) (manuscript at 47, on file with author).

122. *Virginia*, 766 F. Supp. at 1412, 1435. As for physical standards, the federal military academies have developed a program which assigns men and women different physical requirements in an effort to take into account "physiological differences." *See* Diamond & Kimmel, *supra* note 66, at 268.

123. *Virginia*, 766 F. Supp. at 1426.

to abandon its adversative method, as the federal military academies had done, ceasing that in which some women had desired to participate.[124] If the system remained in place, VMI ran the risk of creating an isolated minority within Barracks, which Bunting described as a "brutal disservice to young women."[125]

Judge Jackson Kiser, presiding over the trial, accepted Virginia's argument that educational diversity was an "important state educational objective" for VMI's single-sex admissions policy and that the justification was substantially related to that objective because only through this all-male adversative environment could that diversity be achieved.[126] "VMI," he wrote, "truly marches to the beat of a different drummer, and I will permit it to continue to do so."[127]

The Fourth Circuit Court of Appeals also held that VMI may march to its own beat, provided the state of Virginia offered some concessions.[128] VMI's mission, the court held, could only be achieved in a single-sex environment.[129] To the court, it was "not the maleness, as distinguished from femaleness, that provide[d] justification for the program" it was the "homogeneity of gender in the process" that led to the program's success.[130] Gender integration, therefore, would destroy VMI's ability to carry out its mission, dismantling that which young women sought to gain; or, as the court described it, a "Catch-22."[131] But the fact still remained that Virginia only offered this program to one gender. Thus, the court held VMI could remain single-sex only if "alternatives [were] available"; namely, privatization or the creation of "parallel programs."[132]

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124. *Id.* at 1412. The abandonment of the adversative model in the federal military academies was done largely in response to the creation of an all-volunteer military, for fears that adversative training would encourage cadets to quit. *See* STRUM, *supra* note 3, at 141.

125. Transcript of Record at 1000, *Virginia* 766 F. Supp. 1407 (No. 90-0126-R).

126. *Virginia*, 766 F. Supp. at 1415.

127. *Id.*

128. United States v. Virginia, 976 F.2d 890, 899-900 (4th Cir. 1992).

129. *Id.* at 897.

130. *Id.*

131. *Id.*

132. *Id.* at 900.

VMI and Virginia chose the latter. They looked to the private, all-female Mary Baldwin College (MBC), thirty-five miles to the north, as a partner. The new program was named the Virginia Women's Institute for Leadership (VWIL) and its mission was to produce citizen-soldiers, but in a manner that would both suit and attract a sufficient number of female enrollees.[133] The Virginia General Assembly and the VMI Foundation would provide funding on an equal, per capita basis.[134] Additionally, VMI would open its network of alumni to VWIL graduates.[135]

VWIL was to be planned and implemented largely by the faculty at MBC, drawing upon experts on the "'developmental psychology of women and the cognitive development of women.'"[136] These experts in women's education created a program that was not based on the adversative model because they determined that such a program was "inappropriate" and "counter-productive" for women.[137] Instead, these experts created a system that instilled leadership and character through cooperation and the reinforcement of self-esteem.[138] Although the experts agreed that some women could succeed in an adversative environment, market forces, determined by demand and finite state resources, mandated that an all-female version of VMI was imprudent.

Significant differences, however, existed between VWIL and VMI, and the Government seized upon these differences as evidence that gender discrimination in Virginia higher education could end only when VMI permitted females in the Ratline. Most obviously was that VWIL was not an adversative program.[139] VWIL cadets would live in conventional dormitories, not in Barracks – a lifestyle vital for proper adversative training.[140] Uniforms were not required on a daily basis and the military

133. United States v. Virginia, 852 F. Supp. 471, 476, 479 (W.D. Va. 1994).
134. Jeremy N. Jungreis, Comment, *Holding the Line at VMI and the Citadel: The Preservation of a State's Right to Offer a Single-Gender Military Education*, 23 FLA. ST. U. L. REV. 795, 818 (1996).
135. *Id.*
136. *Id.*; STRUM, *supra* note 3, at 203. Mary Baldwin College enthusiastically accepted this opportunity and viewed it as a remedy to declining enrollment. *See* STRUM, *supra* note 3, at 201.
137. *Virginia*, 852 F. Supp. at 476.
138. *Id.*
139. *Id.*
140. *Id.* at 497, 502.

component of VWIL took the form of ROTC, rather than the twenty-four hour a day military regimen of VMI.[141] Also, students entering MBC had an average SAT score of 100 points lower than those at VMI.[142] Compared to VMI, MBC's endowment was substantially lower and its facilities, particularly athletic facilities, were less extensive.[143] Moreover, differences existed academically: MBC was a liberal arts college with no engineering program; the engineering program at VMI was time-honored and reputable.[144]

In the second, remedial phase of the litigation, the District Court approved VWIL as a sufficient remedy. The District Court found that the differences in methodology between the two programs was pedagogically justified based on the findings of the experts; the differences in academic offerings and facilities were excused because in an educational system which strives for diverse offerings, an identical curriculum at each university is neither the goal nor a financial possibility.[145] "If VMI marches to the beat of a drum," Judge Kiser wrote, "then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."[146]

The Fourth Circuit affirmed, holding that although there were differences in the programs, the notion that "a comparable opportunity requires an identical program is not sustained by the Equal Protection Clause."[147] The two programs must be "sufficiently comparable," and to the court, they were.[148] The Government appealed and the U.S. Supreme Court granted certiorari.[149]

141. *Id.* at 498, 495.
142. *Id.* at 501.
143. *Id.* at 503.
144. *See id.* VMI was the first Southern school with an engineering program. *See* WISE, *supra* note 63, at 13.
145. *Virginia*, 852 F. Supp. at 476, 480-83.
146. *Id.* at 484.
147. United States v. Virginia, 44 F.3d 1229, 1240 (4th Cir. 1995).
148. *Id.* at 1241.
149. United States v. Virginia, 516 U.S. 910 (1995).

IV. A STANDARD IS RAISED

[T]he problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.*

Justice Benjamin N. Cardozo[150]

A. *"Skeptical Scrutiny"*

Through the pen of Justice Ginsburg, the U.S. Supreme Court handed down *United States v. Virginia* on June 26, 1996 with a judgment favoring the Government.[151] To VMI supporters it was a "'savage disappointment'"; interestingly, some women's advocates felt the same.[152] In a 7-1 opinion, the Court did not concede to either group something it wanted: an all-male VMI on the one hand, or an explicit grant of strict scrutiny for gender-based equal protection claims on the other.[153] Upon closer examination, however, the Court applied the intermediate scrutiny test in a manner much more rigorous than that of precedent. The analysis used was labeled "skeptical scrutiny"[154] and its application to the facts of *United States v. Virginia* would prove it to be more closely related to strict scrutiny than to conventional intermediate scrutiny.

To be sure, the Court made clear that gender was not to be

150. THE NATURE OF THE JUDICIAL PROCESS 28 (1921).

151. 518 U.S. 515 (1996).

152. *Compare* Joan Biskupic, *Supreme Court Invalidates Exclusion of Women by VMI*, WASH. POST, June 27, 1996, at A1 (quoting Superintendent Bunting, who described the ruling as "a savage disappointment for the alumni"), *with* Shayne R. Kohler, Note, *Dismantling a Relic of the Nineteenth Century: An End to Discrimination at the Virginia Military Institute*, 1996 UTAH L. REV. 717, 750 (1996) ("The Supreme Court should have declared that strict scrutiny applies to all classifications based on gender."), *and* Ellington et al., *supra* note 46, at 700 ("Women's rights groups from all camps hoped [Justice Ginsburg] would continue to argue for strict scrutiny in gender discrimination cases once she was appointed as an Associate Justice to the United States Supreme Court.").

153. The case involved only eight Justices because Justice Thomas recused himself; his son was enrolled at VMI. *See* STRUM, *supra* note 3, at 246.

154. *Virginia*, 518 U.S. at 531.

equated with race as a suspect class.[155] In fact, the Court observed that "'inherent differences' between men and women . . . remain cause for celebration."[156] Distinctions can be made along gender lines provided that they do not "perpetuate the legal, social and economic inferiority of women."[157]

At the outset, the Court's definition of the "skeptical scrutiny" test appeared very similar to the previous formulation of intermediate scrutiny: "the reviewing court must determine whether the proffered justification is 'exceedingly persuasive' ... [t]he State must show 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[158] But it was the Court's frequent application of the phrase "'exceedingly persuasive justification'" that served most to shift the standard to a higher level.[159] As Chief Justice Rehnquist noted in his concurrence, the phrase "'exceedingly persuasive'" was originally intended as an "observation on the difficulty of meeting the applicable test."[160] It was not, he argued, "a formulation of the test itself."[161] Indeed, the phrase was used in *Hogan* according to Rehnquist's analysis. There, the Court first determined whether the state's objective in maintaining an all-female nursing school was "important" and its means "substantially related" to the end; because the classification failed both prongs it could not be described as "'exceedingly persuasive.'"[162]

By contrast, the *Virginia* Court used the "'exceedingly persuasive justification'" language as the starting point of its analysis. The Court held that such a justification is "the solid base," indeed the "core instruction," required for all gender-based classifications.[163] The test as applied in *Virginia* requires the state to meet the "demanding" burden of "'exceedingly persua[ding]'" the Court that its classification is valid; and if so,

155. *Id.* at 532-33.
156. *Id.* at 533.
157. *Id.* at 534.
158. *Id.* at 533 (alteration in original) (citations omitted).
159. *Id.* at 524, 530, 531, 534, 556 (quoting *Hogan*, 458 U.S. at 724).
160. *Id.* at 559.
161. *Id.*
162. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9, 731 (1982).
163. *Virginia,* 518 U.S. at 531, 546.

then the classification's end is sufficiently "important" and its means "substantially related" to the end.[164] In other words, a classification must be "exceedingly persuasive" before it can be "important." The difference is subtle but connotes a more demanding test. A demonstration of how it was applied in the context of *United States v. Virginia* will illustrate.

First, however, the Court did not rely on this new formulation in reviewing Virginia's assertion that VMI's admissions policy served the "important governmental interest" of educational diversity. The Court did not dispute the experts that single-sex education possessed pedagogical benefits and that educational diversity itself was a public benefit.[165] But, to the Court, all of the expert testimony on this issue was irrelevant. Diversity in education was not, it held, the true justification for VMI's admission's policy.[166] Instead, it was "invented *post hoc* in response to litigation."[167]

To determine the nature of Virginia's proffered justification, the Court looked to that state's history of higher education. It found a pattern of gender discrimination in the form of "protection" – both for the sake of women against higher education, and for higher education against women.[168] When Virginia did create universities exclusively for women they lacked the "resources and stature" of male schools, and all had later become coeducational.[169] And the Court found only one mention of diversity officially pronounced by the state – in a 1990 report, which also mentioned that state universities must "'deal with . . . students without regard to sex, race, or ethnic origin.'"[170]

Thus, no matter how beneficial the experts may have agreed VMI's admission policy was toward the interest of educational diversity, the Court found "no persuasive evidence" that diversity

164. *Id.* at 533 (citations omitted).
165. *Id.* at 535.
166. *Id.* at 536-37.
167. *Id.* at 533.
168. *Id.* at 536-38 (noting that at the time of VMI's founding "[h]igher education was ... considered dangerous for women" and, later, that the admission of women at the University of Virginia would damage the school's stature).
169. *Id.* at 538.
170. *Id.* at 538-39.

was the state's true purpose.[171] Rather, to the Court, without an official state pronouncement of diversity, VMI's policy was a relic of earlier exclusionary policies that historically prevailed in the state, regardless of whether it actually happened to create diversity in the state's educational scheme.

The Court's emphasis on the "exceedingly persuasive" language is most pronounced in its review of VMI's assertion that the adversative method would not exist – for men or women – in a coeducational system. To the Court, the testimony of VMI's experts was akin to predictions made concerning other systems – such as law schools, medical schools, police forces, and the military – that gender integration would downgrade their stature.[172] However, the Court noted that gender integration had succeeded in these systems and that assertions to the contrary only "imped[ed] women's progress toward full citizenship stature."[173] In the Court's estimation, gender integration at VMI would "require accommodations," but based on the experience of these other, different institutions, the adjustments would be "manageable."[174] Thus, neither VMI's experts, nor the findings of the lower courts could "exceedingly persua[de]" the Court that change at VMI would bring a result more disastrous to the adversative system than what occurred at the service academies or other traditionally all male universities.

Inherent in VMI's argument that the system would be altered unrecognizably in the face of coeducation was that *most* women would either not want, or be unable to withstand, the adversative system.[175] Consequently, VMI argued that altering a system for a permanent, tiny minority was not required of the "substantial relationship" prong of the intermediate scrutiny test.[176] However, because experts on both sides stipulated that "some women" could survive in, and would desire, an adversative education, the Court held that VMI could not categorically exclude all women.[177]

This holding makes clear that the Court's standard of

171. *Id.* at 539.
172. *Id.* at 543-45.
173. *Id.* at 542 n.12.
174. *Id.* at 540, 550-51 n.19.
175. *Id.* at 541.
176. *Id.*
177. *Id.* at 546.

"skeptical scrutiny" was concerned, as Justice Ginsburg was in her career as a litigator, with the individual. This is where the "exceedingly persuasive justification" language heightens the standard. As Justice Scalia noted in his dissent, the standard as applied to VMI was much closer to the narrowly tailored requirement of a strict scrutiny means analysis.[178] Traditional intermediate scrutiny required only a "substantial relation" between the means and end of a classification, but the Court employed to the present case a "least-restrictive-means analysis."[179] Justice Scalia pointed to precedent where gender classifications were upheld, classifications which did not consider whether the distinction was true in "every instance," but whether by and large the classification substantially related to the government's objective.[180]

Furthermore, where such precedent as *Hogan* looked to whether gender classifications reflected "stereotypic notions,"[181] the *Virginia* Court added that a classification must also not be a "generalizatio[n] about 'the way women are.'"[182] As one commentator noted, the word "stereotypes" appeared only once in the Court's opinion, and only in quoting Virginia's brief that VMI's admission policy did not comprise such notions.[183] Throughout the litigation, VMI had argued that it had met the "reasoned analysis" requirement demanded by *Hogan* and by presenting expert testimony on the "'important differences between men and women in learning and developmental needs.'"[184] The *Virginia* Court, however, never mentioned any requirement of "reasoned analysis." Yet, the Court did not seem to dispute that there may be differences, on average, in the learning needs of men and women. But again the Court concerned itself with the individual. Because VMI's admissions policy was based on generalizations

178. *See id.* at 573.

179. *Id.*

180. *Id.* at 573-74 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Rostker v. Goldberg, 453 U.S. 57 (1981); Califano v. Webster, 430 U.S. 313 (1977)).

181. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

182. *Virginia*, 518 U.S. at 550.

183. Nina Pillard, *Plenary Power Underground in* Nguyen v. INS*: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835, 843 (2002).

184. *Hogan*, 458 U.S. at 726; *Virginia*, 518 U.S. at 549 (quoting Brief for Respondents at 28, *Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107)).

about "most women," at the expense of "some women," stereotypical or not, the generalization was deemed unconstitutional.[185]

Additionally, the Court held that VMI "trained their argument on 'means' rather than 'end,' and thus misperceived [the Court's] precedent."[186] Where VMI regarded its single-sex adversative system as its objective, the Court viewed the production of citizen-soldiers as the objective, an objective "great enough to accommodate women."[187] A difficult standard to meet indeed, as the dissent noted, because an argument could always be made that any state objective is "'great enough to accommodate women.'"[188]

Clearly, under "skeptical scrutiny" the relationship between the state's end and the means employed is much narrower than the traditional requirement of a "substantial relationship." If "some women" could participate, and a court determined change to the existing system was "manageable," the categorical exclusion of these individuals was violative of equal protection. The appropriate remedy, therefore, must concern itself with *these* individuals and put them in "'the position they would have occupied in the absence of [discrimination].'"[189] Under this standard, VWIL had no chance of survival as an adequate remedy. The inherent differences in VWIL's methodology, the Court held, may be pedagogically justified based on the learning needs of "most women," but "some women" – those willing and able to attend VMI – would not, at VWIL, find themselves in "'the position they would have occupied'" at VMI.[190] Professional educators created VWIL as a means of achieving the goal of citizen-soldier in a way deemed appropriate for the majority of women. But such studies were, to the Court, "generalizations about . . . what is appropriate for *most women*" and such "no longer justify denying opportunity to women whose talent and

185. *Virginia*, 518 U.S. at 550.
186. *Id.* at 545.
187. *Id.*
188. *Id.* at 587 (opinion of Scalia, J.).
189. *Id.* at 547 (alteration in original) (quoting Milliken v. Bradley, 433 U.S. 267, 280 (1977)).
190. *Id.* at 555-56.

capacity place them outside the average description."[191]

Moreover, the Court was particularly concerned with the intangible aspects of a university. A university's intangible qualities are "'incapable of objective measurement'" and include "'position and influence of the alumni, standing in the community, traditions and prestige.'"[192] To the Court, VWIL may be a valuable experience for some, but it simply did not have the intangible qualities of a VMI degree.[193]

The Court's decision left VMI with only two options: privatization or integration. No further remedy was possible in light of the Court's emphasis on the individual and an institution's intangible qualities. VMI's prestige and singularity made it impossible to replicate. A "blunt remedy" was applied, and in one way or another, a new era was to begin at VMI.[194]

A new era began in gender-based equal protection law as well. Many believed "skeptical scrutiny" was a clear break from past intermediate scrutiny analyses; and, in fact, it was.[195] The decision was a continuation of Justice Ginsburg's push towards establishing gender as a suspect class which began twenty-five years earlier in *Reed v. Reed.* In 1996, *United States v. Virginia* appeared nearly as important as *Reed.* Where *Reed* moved the standard for gender classifications to a heightened form of rational basis, and thus paved the way for intermediate scrutiny in *Craig v. Boren*; *United States v. Virginia* represented a move from traditional intermediate scrutiny to "skeptical scrutiny," opening the door to the possibility of strict scrutiny in the next round of U.S. Supreme Court equal protection jurisprudence. As we shall see, this did not become the case.

A question remains and should be answered: Why did Justice Ginsburg, in light of her career as a litigator, settle for "skeptical scrutiny" rather than author an opinion establishing strict scrutiny for gender classifications? After all, the judgment would have been the same; those who did not support her call for strict scrutiny could easily have joined Chief Justice Rehnquist's

191. *Id.* at 550 (emphasis in original).
192. *Id.* at 554 (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)).
193. *Id.* at 555.
194. For a discussion on the implementation of the Court's decision at VMI, see Interlude, *infra.*
195. *See, e.g.,* Brake, *supra* note 4, at 35; Gleason, *supra* note 4, at 809.

concurrence or written their own. Separate aspects of Justice Ginsburg's philosophy as a jurist provide a likely explanation of her restraint against strict scrutiny. First, Justice Ginsburg possesses a strong belief in collegiality among the Court.[196] To her, a Court fractured by concurrences and dissents threatens the "'[r]ule of law virtues of consistency, predictability, clarity, and stability.'"[197] Second, Justice Ginsburg has a reputation as a restrained jurist, one who dutifully adheres to precedent.[198] A sharp turn towards strict scrutiny would have undone two decades of intermediate scrutiny precedent.

Yet, Justice Ginsburg did increase the rigor of the intermediate scrutiny test. An explanation lies in the fact that Justice Ginsburg is still the same person who, in the 1970s, and from the opposite side of the bench, successfully prodded the U.S. Supreme Court, case-by-case, to review gender classifications at the mid-point between rational basis and strict scrutiny. "[S]keptical scrutiny" provided the key: through it Justice Ginsburg remained consistent with her philosophies as a jurist and as a former advocate. Exercising her characteristic and "terse, carefully worded way,"[199] she was able to enlist a majority of the Court to further raise the intermediate scrutiny standard. Interestingly, a footnote in *United States v. Virginia* provides a clue that Ginsburg's work towards strict scrutiny is not finished. She wrote: "The Court has *thus far* reserved most stringent judicial scrutiny for classifications based on race" and, by implication, not gender.[200] "[T]hus far" the Court has refused, she seems to say, but a new day will come.

B. *The Lower Courts Juggle "Skeptical Scrutiny"*

In his concurrence, Chief Justice Rehnquist lamented that the Court's use of the phrase "'exceedingly persuasive justification'"

196. *See* Rebecca L. Barhnhart & Deborah Zalesne, *Twin Pillars of Judicial Philosophy: The Impact of the Ginsburg Collegiality and Gender Discrimination Principles on Her Separate Opinions Involving Gender Discrimination*, 7 N.Y. CITY L. REV. 275, 276 (2004).

197. *See id.* (quoting Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1191 (1992)).

198. *See* Rosen, *supra* note 32, at 65.

199. *Id.*

200. *Virginia*, 518 U.S. at 532 n.6 (emphasis added).

would "introduc[e] an element of uncertainty" to lower court application of the intermediate scrutiny test.[201] He was right. Within the context *United States v. Virginia* the limits of intermediate scrutiny were expanded further than ever before, but, as a whole, the lower federal courts were inconsistent in their application of the standard.[202]

For instance, several circuit courts in the first few years following *United States v. Virginia* refused to either acknowledge or apply any form of intermediate scrutiny beyond the pre-*Virginia* standard. A divided First Circuit, in *Cohen v. Brown University*, determined that "*Virginia* adds nothing to the analysis" of gender classifications, and that the *Virginia* Court applied traditional intermediate scrutiny regardless of its "liberal use of the phrase 'exceedingly persuasive justification.'"[203] In a sexual harassment case, the Seventh Circuit noted that the *Virginia* Court's language may have heightened the level of scrutiny for gender classifications but expressed "no opinion" on whether that was so.[204] Instead, the court applied the traditional test, citing *Hogan*.[205]

By contrast, many lower courts interpreted *United States v. Virginia* to require a heightened form of scrutiny. For example, the Second Circuit Court of Appeals, in *Buzzetti v. City of New York*, relied exclusively on the "'exceedingly persuasive justification'" language from *Virginia*.[206] However, the challenge in that case was against an ordinance that placed different restrictions on strip clubs that feature male and female dancers.[207] Therefore, the court held that the city had provided an "'exceedingly persuasive justification'" because the ordinance was based on "clear sexual differences."[208] Additionally, the Third

201. *Id.* at 559.

202. For a thorough survey of lower court decisions in this area from 1996-2001, see Olney, *supra* note 19, at 149-65.

203. 101 F.3d 155, 183 n.22 (1st Cir. 1996). In a dissent, Judge Torruella argued that "the Supreme Court appears to have elevated the test applicable to sex discrimination cases to require an 'exceedingly persuasive justification.' This is evident from the language of both the majority opinion and the dissent in *Virginia*." *Id.* at 191.

204. Nabozny v. Podlesny, 92 F.3d 446, 456 n.6 (7th Cir. 1996).

205. *Id.* at 455-56.

206. 140 F.3d 134, 141 (2d Cir. 1998).

207. *Id.* at 137.

208. *Id.* at 141, 144.

Circuit Court of Appeals, in *Breyer v. Meissner*, began its equal protection analysis of a federal immigration statute with heavy reliance on the *Virginia* Court's instruction that an "'exceedingly persuasive justification'" was required by the Government; and, in the absence of one, the statute was rendered unconstitutional.[209]

INTERLUDE: "IN A SPIRIT OF ADDING ON"

A short digression may be in order if the reader is interested in how VMI implemented *United States v. Virginia*; if not, the legal analysis continues below.[210] After VMI's legal defeat, many alumni considered privatizing the school to escape the reach of the Fourteenth Amendment. However, privatization posed serious problems, primarily financial, but also concerning the public's view of VMI. Known as an institution that turned rowdy young men into a "crowd of honorable youths,"[211] privatization would make VMI a symbol of opposition to civil rights, and in the words of then-Virginia Governor George Allen, VMI would "be made by the media into a pariah."[212]

More compelling, however, was that the Department of Defense had indicated it may not grant VMI graduates commissions if the school privatized rather than integrated.[213] Former VMI Superintendent, General Bunting, explained how devastating such a decision would be: "For men who have successfully completed a VMI cadetship, not to be able to be commissioned would be the equivalent of Jesuit novitiates, having successfully fulfilled all the searching and stringent requirements of ten years in the seminary, being denied ordination."[214] The VMI Board of Visitors avoided all these negative possibilities by a 9-8 vote in favor of integration.[215]

When the VMI Board of Visitors made the decision, VMI's

209. *Id.* at 425-26.

210. For a complete account of the changes made at VMI after the U.S. Supreme Court's decision, see generally BRODIE, *supra* note 3.

211. *See generally* A CROWD OF HONORABLE YOUTHS: HISTORICAL ESSAYS ON THE FIRST 150 YEARS OF THE VIRGINIA MILITARY INSTITUTE (Thomas W. Davis ed., 1988).

212. *Alumni Present Case for Making VMI Private*, AKRON BEACON J., Sept. 21, 1996, § Nation, at A4.

213. Interview with General Bunting, *supra* note 118.

214. *Id.*

215. *Id.*

administration vowed to implement the U.S. Supreme Court's decision nobly.[216] It would not, however, radically alter its method, and it chose the word "assimilation" rather than "integration" to describe the introduction of women.[217] The school began a "year long conversation" with itself to determine how best to assimilate female cadets.[218] Change, however, would be done "in a spirit of adding on,"[219] a manner which would retain the traditional aspects of VMI's culture, altering only what was practically necessary to welcome female cadets.[220]

Today, VMI has been coeducational for nearly ten years. The school remains impressively high on college ranking lists,[221] and enrollment also remains high.[222] According to such indicators, VMI seems as if it indeed succeeded as a coeducational system. Perhaps, however, it may be too soon to definitively answer that question. A wiser response may be found in the trial transcript, voiced by General Bunting, as an expert witness:

> Education as a topic is a rather unsatisfying one for people that wish to attain demonstrable conclusions. We cannot in fact measure how successful most academic institutions are unless we look at the careers of the graduates after they left. . . . [U]nless we have some sense of what those students do in the 60 or 70 years of life they have left, we can't make really useful judgments about how good their educational experience, and by implication, how good their college has been.[223]

Interestingly, an indication that the U.S. Supreme Court would begin rethinking the "skeptical scrutiny" standard which mandated VMI's coeducation appeared only the next year after coeducation began.

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216. BRODIE, *supra* note 3, at 11.
217. *Id.* at 74.
218. *Id.* at 185.
219. Transcript of Record at 1003, United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991) (No. 90-0126-R).
220. BRODIE, *supra* note 3, at 43.
221. *See* http://www.vmi.edu/show.asp?durki=6607 (last visited March 20, 2006).
222. *See* http://www.princetonreview.com/college/research/profiles/generalinfomore.asp?listing=1022822&ltid=1 (last visited March 20, 2006).
223. Transcript of Record at 1013, *Virginia*, 766 F. Supp. 1407 (No. 90-0126-R).

V. THE DEMISE OF "SKEPTICAL SCRUTINY"

A change of mind from time to time is inevitable when there is a written constitution.

Edward H. Levi[224]

A. Miller v. Albright: *A Crack in the Balance*

Rumblings of the end of "skeptical scrutiny" first appeared at the U.S. Supreme Court level in *Miller v. Albright*.[225] The case involved § 1409(a) of the Immigration and Nationality Act, which governs the conferral of citizenship to children born out of wedlock, outside the United States, and where only one of the parents is a United States citizen.[226] The statute was challenged on equal protection grounds because § 1409(a) makes a distinction along gender lines.[227] If the citizen parent was the father, the requirements for the conferral of citizenship upon the child are more rigorous than if the citizen parent was the mother.[228] Here, the petitioner was the daughter of a U.S. citizen father, who

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224. AN INTRODUCTION TO LEGAL REASONING 58 (1949).
225. 523 U.S. 420 (1998).
226. *See* 8 U.S.C. § 1409 (2006).
227. *Miller*, 523 U.S. at 424.
228. If the citizen parent is the father, 8 U.S.C. § 1409(a) requires that the person seeking citizenship establish:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years –
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.

By contrast, if the citizen parent was the mother, §1409(c) requires only the second requirement, that she had U.S. citizenship at the time of the child's birth and "had previously been physically present in the United States ... for a continuous period of one year." 8 U.S.C. §1409(a), (c) (2006).

invoked third-party standing to assert the rights of her father, against whom the statute discriminated.[229]

A sharply divided Court upheld the statute. Justice Stevens, joined by Chief Justice Rehnquist, wrote the opinion of the Court. Their rationale was largely adopted in the context of *Nguyen v. INS*, and as that case concerned the same statute, both rationales will be discussed below.[230] What is important for present purposes is the standard applied by the respective opinions. Justice Stevens's opinion provided, for him, an unequivocal shift from the "skeptical scrutiny" analysis he subscribed to in *United States v. Virginia*. His opinion did not label the analysis "skeptical scrutiny" nor did he employ the phrase "'exceedingly persuasive justification.'" In a footnote, Justice Stevens mentioned that judicial deference is generally granted to Congress on issues of immigration and naturalization.[231] Such deference is known as the "plenary power doctrine" whereby the Constitution grants exclusive authority to the political branches in certain areas of government.[232] However, Justice Stevens's opinion does not seem to rely on a strict deference to Congress. Rather, Justice Stevens held that the statute served both important governmental interests and that the means employed were substantially related to that interest.[233]

Justice Scalia, an opponent of "skeptical scrutiny" in *Virginia*, saw no need to revisit the issue here. Joined by Justice Thomas, their concurrence asserted that applying any tier of equal protection scrutiny was irrelevant because, they believed, Congress's "plenary power" over immigration and naturalization allows for no judicial voice in such matters.[234]

Justices Ginsburg and Breyer each filed a dissenting opinion, and joined each other's, which were both joined by Justice Souter. Justice Ginsburg asserted that § 1409(a) created a gender distinction that must be reviewed under "skeptical examination."[235] Her analysis followed that of *Virginia*, and she

229. *Miller*, 523 U.S. at 445-46 (O'Connor, J., concurring).
230. *See* discussion *infra* Part V.B.
231. *Miller*, 523 U.S. at 434-35 n.11.
232. 3A AM. JUR. 2d *Aliens and Citizens*, § 282 (2006).
233. *Miller*, 523 U.S. at 442.
234. *Id.* at 453, 457.
235. *Id.* at 468.

held that the Government had not met the burden of establishing an "'exceedingly persuasive justification.'"[236] Justice Breyer's dissent also followed the standard as set forth in *Virginia*, which led to his conclusion the statute should be rendered unconstitutional.[237]

Justices Kennedy and O'Connor cast the deciding votes, which both upheld § 1409(a) and allowed "skeptical scrutiny" to survive, at least for another day. Their concurrence argued that the petitioner could not establish the third-party standing necessary to assert the rights of her father, against whom the statute discriminated.[238] Because § 1409(a) does not discriminate on the basis of the child's gender, the petitioner could not claim, as her father could have, gender discrimination.[239] Without a petitioner able to claim gender discrimination, the statute called only for a rational basis review. [240] It passed the test.[241] Justices Kennedy and O'Connor, therefore, presented a wildcard. Whether they would again apply "skeptical scrutiny," as they had in *Virginia*, or whether they would fold their hands as had Justice Stevens remained an open issue until *Nguyen v. INS*.

B. Nguyen v. INS: *Traditional Intermediate Scrutiny Restored*

A few weeks after VMI's first coeducational class received their diplomas, the U.S. Supreme Court decided *Nguyen v. INS*.[242] The case again challenged § 1409(a) of the Immigration and Nationality Act, but this time there would be no issues of third-party standing. Here, a U.S. citizen father, together with his alien child, would stand before the Court and allege gender discrimination contrary to the equal protection principles of the U.S. Constitution.[243] By a bare majority, the *Nguyen* Court upheld § 1409(a), and in doing so abandoned "skeptical scrutiny," thereby returning to the traditional intermediate scrutiny standard.

236. *Id.* at 469-70.
237. *Id.* at 482, 488.
238. *Id.* at 450-51.
239. *Id.* at 451.
240. *Id.* at 451-52.
241. *Id.*
242. 533 U.S. 53 (2001).
243. *Id.* at 57.

The petitioner in *Nguyen* challenged § 1409(a) on the grounds that a citizen mother need establish only a blood relationship with the citizenship seeking child, regardless of the child's age,[244] whereas the father must also establish one of three other requirements and before the child reaches eighteen years: 1) that the child was legitimated under the law of their domicile, 2) that the father acknowledge his paternity in writing or under oath, or 3) that paternity be established by a court order.[245] Here, the petitioner father established paternity under a court order based on a DNA sample provided when his son was twenty-eight years old.[246] The Board of Immigration Appeals denied citizenship because of noncompliance with the restriction that paternity must be established before the child's eighteenth birthday.[247] The lower federal courts rejected the petitioner's equal protection challenge.[248]

It was two key votes, votes that supported the establishment of "skeptical scrutiny" in *United States v. Virginia*, which signaled the demise of that standard in *Nguyen*: Justices Kennedy and Stevens. Justice Stevens's decision to join the majority was predictable in light of his decision in *Miller*; therefore, it was Justice Kennedy, the author of *Nguyen*, who officially shifted the balance to the pre-*Virginia* standard. Chief Justice Rehnquist and Justice Scalia, opponents of "skeptical scrutiny" in *Virginia*, unsurprisingly joined the majority. Justice Thomas's position on application of "skeptical scrutiny" in *Virginia* cannot be fairly ascertained because of his recusal from that case. His presence in the *Nguyen* majority, therefore, cannot, in itself, be described as a shift. The remaining proponents of "skeptical scrutiny" filed a dissent, authored by Justice O'Connor, and joined by Justices Ginsburg, Breyer, and Souter.[249] They not only advocated striking § 1409(a), but analyzed the statute under "skeptical scrutiny."[250]

For our purposes, the importance of *Nguyen* is its application of intermediate scrutiny. Where Justice Ginsburg carefully

244. *Id.* at 59-60. *See also* 8 U.S.C. § 1401(g) (2006).
245. *Nguyen*, 533 U.S. at 62. *See also* 8 U.S.C. § 1409(a).
246. *Nguyen*, 533 U.S. at 57.
247. *Id.* at 57.
248. *Id.* at 58.
249. *Id.* at 74.
250. *Id.* at 91.

constructed "skeptical scrutiny" through her use of the "'exceedingly persuasive justification'" language, Justice Kennedy deconstructed it through the elision of this language. Although *Virginia* was cited as authority, the Court began its analysis with the traditional "important governmental objective" and "substantially related" means test.[251] There was no initial mention that the Government must first establish an "'exceedingly persuasive justification.'" Nor did the Court label the analysis "skeptical scrutiny."

The *Nguyen* Court accepted the Government's assertions that § 1409(a) served "important governmental objectives" and that its means were "substantially related" to its end by finding that the classification rested on "biological differences."[252] The *Virginia* Court had held that "'[p]hysical differences between men and women . . . are enduring'" and the *Nguyen* Court held that the gender distinctions of §1409(a) were based upon such biological differences.[253]

An assurance of a "parent-child relationship," the Court held, was the important governmental interest served by § 1409(a).[254] To the Court, a distinction along gender lines was acceptable in this case because "[f]athers and mothers are not similarly situated with regard to proof of biological parenthood."[255] Biologically, a mother must be present at the birth of the child and therefore her name always appears on the birth certificate.[256] Biology does not require, however, that the father be present at birth, nor does his presence prove he is the true father.[257] While a DNA test may be near totally accurate in proving parentage, the Court held that Congress may have been concerned about the "expense, reliability, and availability" of such tests throughout the world.[258] Thus, the Court held, the additional affirmative steps required of citizen fathers "substantially relate[d]" to the Government's objective because of the biological requirement that the mother, and only

251. *Id.* at 60.
252. *Id.* at 73.
253. *Id.* at 68.
254. *Id.* at 62.
255. *Id.* at 54.
256. *Id.* at 62.
257. *Id.*
258. *Id.* at 63.

the true mother, be present at birth.[259]

The Court accepted as a second "important governmental objective" Congress's interest that there be some proof that the citizen parent and the child have had some opportunity to develop "real, everyday ties" with each other – and hence to the United States – rather than simply proof of biological parentage.[260] Affirmative steps toward proving such an opportunity is not necessary in the case of the mother, the Court held, because the "initial point of contact" at the child's birth provides this opportunity.[261] The father, on the other hand, may not be aware of the child's birth, or even of its conception.[262] The Court cited the high number of men deployed abroad in the armed forces, as well as the number of Americans who travel abroad, and was convinced that many children may be born extraterritorially without the knowledge of the father, or, even if the father is aware of the child's birth, he may not ever be present to experience the opportunity of developing a parental relationship.[263]

The petitioners argued – and the dissenters agreed – that these "important governmental objectives" were the product of a gender-based stereotype.[264] Only a stereotyped view of parental roles, the dissenters held, explained why Congress would presume that where a mother and father were both present at birth, they lacked equal opportunity to develop a relationship with the child.[265] The Court considered this a biological reality, rather than a stereotype.[266] What is important, however, is that the Court ceased its analysis after its determination that no gender stereotype existed. Unlike the *Virginia* Court, which went beyond an analysis of whether the state's action was based upon stereotype by further considering whether the statute was an overbroad generalization, the *Nguyen* Court never mentioned the word "generalization" in its opinion. Accordingly, the bar set by *Virginia* to all overbroad generalizations had been returned to whether or not a classification is based upon stereotype.

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259. *Id.* at 64.
260. *Id.* at 64-65 (citing *Miller*, U.S. at 438-40).
261. *Id.* at 65.
262. *Id.*
263. *Id.*
264. *Id.* at 68; *Id.* at 86-89 (O'Connor, J., dissenting).
265. *Id.* at 86.
266. *Id.* at 68.

Under the traditional intermediate scrutiny test, the Court also found the means employed by § 1409(a), the extra requirements for citizen fathers, were "substantially related" to the end of a meaningful parent-child relationship.[267] The father's potential absence at the child's birth and in its childhood prompted Congress to require at least proof of an opportunity for a meaningful relationship. Another alternative may be possible, and often times the father may have developed a meaningful relationship with the child that the mother did not. But, the Court held, a gender-based equal protection analysis does not require that the classification be "capable of achieving its ultimate objective in every instance."[268] This holding signifies another sharp break from "skeptical scrutiny." Unlike *Virginia*, where the focus was on the individuals who distinguished themselves from the majority, *Nguyen* reestablished only a "substantial relationship."[269]

After having determined that § 1409 served an "important governmental interest" and that its means were "substantially related" to its objective, the Court then described the Government's case as "'exceedingly persuasive.'"[270] Again, a pre-*Virginia* formulation.

Nguyen's dissenters applied "skeptical scrutiny" as they had in *Virginia*, and decried the Court's decision as an "aberration" in gender-based equal protection law.[271] To the dissenters, the Court not only shifted the standard back to traditional intermediate scrutiny, but in its application, the majority's standard was more akin to a rational basis review.[272] What is clear, however, is a majority had emerged without an interest in the further application of "skeptical scrutiny."

Commentators have speculated as to why Justices Stevens and Kennedy abandoned "skeptical scrutiny." Some have argued that the plenary power doctrine, though only endorsed in Justices Scalia and Thomas's short concurrence, was the true impetus

267. *Id.*
268. *Id.* at 70.
269. *Id.* at 68.
270. *Id.* at 70.
271. *Id.* at 74-76, 97.
272. *Id.* at 78-79.

behind the *Nguyen* decision.[273] But the Court, on two occasions, held that the plenary power issue need not be addressed because the statute could be upheld on equal protection grounds.[274] It seems fitting to take the Court by its word.

Another commentator argued that the *Nguyen* majority's true motivation was to "pull in the reins" on "skeptical scrutiny" out of concern that it would later result in strict scrutiny.[275] Whether this was the motivation or not, it was, surely, the decision's result. Perhaps, however cynically, Justices Kennedy and Stevens subscribed to "skeptical scrutiny" in *Virginia* because they were unwilling to provide deference to VMI, and did not believe, as Chief Justice Rehnquist did, that VMI's admissions policy could be stricken under traditional intermediate scrutiny. Such a notion would lend credence to an idea put forth in Justice Thomas's opinion in *Grutter v. Bollinger*.[276] There, he viewed the Court's decision to defer to the University of Michigan Law School's affirmative action program to be based on the school being that "of the elite establishment . . . rather than a less fashionable Southern military institution."[277]

Such speculation, however, may bring us to, as Tennyson said, "[b]elieving where we cannot prove."[278] For our purposes the import of *Nguyen* is that it did, in fact, reestablish a traditional intermediate scrutiny test after a five-year hiatus. Though the *Nguyen* dissenters averred that the decision was more akin to a rational basis review, the Court's formulation of the test, and thus its instruction to the lower courts, was that of a pre-*Virginia*, traditional intermediate scrutiny test. Therefore, looking back over the thirty-year history of intermediate scrutiny, it appears that *Nguyen* is not the "aberration" that its dissenters asserted it was; unfortunately or otherwise, *United States v. Virginia* appears

273. *See* Jung Kim, Comment, Nguyen v. INS*: The Weakening of Equal Protection in the Face of Plenary Power*, 24 WOMEN'S RTS. L. REP. 43, 43, 54 (2002); Pillard, *supra* note 183, at 846-47.

274. *Nguyen*, 533 U.S. at 61, 72-73.

275. Heather L. Stobaugh, Comment, *The Aftermath of* United States v. Virginia*: Why Five Justices are Pulling in the Reins on the "Exceedingly Persuasive Justification"*, 55 SMU L. REV. 1755, 1775 (2002).

276. 539 U.S. 306, 366 (2003).

277. *Id.*

278. ALFRED, LORD TENNYSON, *In Memoriam A.H.H.*, *in* THE WORKS OF ALFRED LORD TENNYSON 247, 247 (1893).

to be the true "aberration."

C. *Again, a Traditional Formulation*

While *Nguyen* remains the most recent gender-based equal protection decision since *Virginia*, the traditional intermediate scrutiny test was again restated two years later in *Nevada Department of Human Resources v. Hibbs*.[279] The case hinged not on equal protection itself but upon § 5 of the Fourteenth Amendment, which enables Congress to pass legislation aimed at enforcing that Amendment.[280] The case involved the Family Medical Leave Act (FMLA), passed pursuant to § 5, to protect persons from gender-based discrimination in the workplace.[281] Congress cannot, however, define the scope of rights included in the Fourteenth Amendment – that task resides with the U.S. Supreme Court.[282] To determine if the FMLA was a constitutional measure under § 5, the Court first determined if, in accordance with the Court's interpretation of equal protection, Congress had evidence that there was gender discrimination.[283] Congress's evidence must be consistent with what the Court previously established such discrimination was, which therefore made the FMLA necessary.

Chief Justice Rehnquist chose himself to author the opinion[284] and was joined by Justices O'Connor, Ginsburg, Souter, and Breyer; all voted to uphold the act on § 5 grounds.[285] Therefore, it was up to Chief Justice Rehnquist to restate the test appropriate for determining gender discrimination in violation of equal protection. In doing so, he cited *Virginia*, but, unsurprisingly, he omitted the "'exceedingly persuasive justification'" language, leaving only the important objective/substantial means

279. 538 U.S. 721 (2003).

280. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

281. *Hibbs*, 538 U.S. at 728.

282. *Id.* (citing City of Boerne v. Flores, 521 U.S. 507, 519-24 (1997)).

283. *Id.* at 729.

284. Columnist Jeffrey Rosen observed that "[t]he chief justice, like each of his colleagues, has one vote; his greatest power lies in choosing who will write an opinion when he's in the majority – himself or another justice who he thinks will best reflect his views." *Rehnquist the Great?*, ATLANTIC MONTHLY, Apr. 2005, at 79.

285. *Hibbs*, 538 U.S. at 723-24.

language.[286] He did mention, however, that a gender-based classification must not rely on "overbroad generalizations" (again citing *Virginia*), but his analysis throughout concerned itself only with "stereotype-based beliefs."[287] By implication, Congress did not have to consider "skeptical scrutiny" when debating its § 5 power.

Because *Hibbs* did not need to explore whether the act at issue was violative of the Equal Protection Clause, but rather of § 5, it will not be controlling over equal protection claims. This distinction is perhaps why Justices Ginsburg, Souter, O'Connor, and Breyer did not object to the standard's omission in their concurrence.[288] However, the case is pertinent because it signifies another post-*Virginia* formulation of the traditional intermediate scrutiny test, irrespective of "skeptical scrutiny."

D. *Where We Will Likely Go*

Today, both Chief Justice Rehnquist, an opponent of "skeptical scrutiny," and Justice O'Connor, a proponent of that standard, are no longer on the bench. The question arises, therefore, as to whether the delicate 5-4 balance opposed to "skeptical scrutiny" will shift once again in favor of that standard. We cannot, of course, be entirely sure. However, considering the two new members of the Court, the answer is likely no, and, moreover, the balance will probably shift even further from "skeptical scrutiny" to a 6-3 majority against.

If Justice Alito remains consistent with Judge Alito, he will not remain in step with Justice O'Connor on the issue of "skeptical scrutiny." As a Third Circuit Judge, Alito dissented from two opinions concerning gender discrimination under Title VII of the Civil Rights Act, arguing with the majority that it should be more difficult for plaintiffs to get to trial.[289] Such opinions imply that he would be unlikely to favor increasing the intermediate scrutiny test as applied to gender classifications. Moreover, had Justice Alito been present on the *Nguyen* Court, his Third Circuit record indicates that he would have concurred with Justices Scalia and

286. *Id.* at 728-29.
287. *Id.* at 729-34.
288. *See id.* at 741.
289. *See* Bray v. Marriott, 110 F.3d 986, 1000 (3d Cir. 1997); Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1078-79 (3d Cir. 1996).

Thomas on the issue of plenary power.[290]

As for Chief Justice John Roberts, he does not possess the lengthy judicial record of Justice Alito. However, there is a strong possibility Roberts will remain in accordance with his former mentor, Chief Justice Rehnquist. If so, the position of the Chief's seat against "skeptical scrutiny" will not be disturbed; if not, a 5-4 balance will still exist with Justice Alito.

E. *Lower Courts Post*-Nguyen

Among the lower federal courts, the additional rigors imposed by "skeptical scrutiny" on gender-based classifications can still be found, even after *Nguyen*. A couple of examples will illustrate. For instance, the District of Columbia District Court, in *AFL-CIO v. United States*, determined that *United States v. Virginia* stood for a more searching analysis than traditional intermediate scrutiny.[291] In an explication of the various levels of equal protection scrutiny, the court cited *Nguyen*, and restated the traditional important objective/substantial means test.[292] However, it also cited *Virginia*, labeled the analysis "quasi strict scrutiny," and determined that gender classifications are no longer analyzed under "traditional intermediate scrutiny."[293] Additionally, the Seventh Circuit Court of Appeals, in *Builders Association of Greater Chicago v. County of Cook*, reviewed a race and gender based affirmative action program.[294] That court noted, in light of *Virginia*, that the difference between strict scrutiny and intermediate scrutiny is "vanishingly small."[295]

United States v. Virginia, of course, has not been explicitly overruled, nor does that possibility seem likely. The lower courts, therefore, pursuant to the command of the U.S. Supreme Court, must apply *Virginia*, as with any other precedent, if it has a "direct application in a case," regardless if "appears to rest on

290. *See* Munroe v. Ashcroft, 353 F.3d 225, 227-28 (3d. Cir. 2003); Acosta v. Ashcroft, 341 F.3d 218, 226-27 (3d. Cir. 2003).
291. 195 F. Supp. 2d 4, 11 (D.D.C. 2002), *aff'd*, 330 F.3d 513 (D.C. Cir. 2003).
292. *AFL-CIO*, 195 F. Supp. 2d at 11.
293. *Id.* at 12.
294. 256 F.3d 642 (7th Cir. 2001).
295. *Id.* at 644.

reasons rejected in some other line of decisions."[296] This way, it is left to the U.S. Supreme Court "the prerogative of overruling its own decisions."[297] The lower courts, then, must be careful in their application of *Virginia*; it must "directly control" to be applicable.

The question over whether a given gender classification will be "directly" controlled by *Virginia* may sometimes be difficult. But to remain in line with the U.S. Supreme Court, the lower courts must be aware that the Court has not applied "skeptical scrutiny" since *United States v. Virginia*, and appears no longer interested, at least for the foreseeable future, in reviving that standard.

VI. EPILOGUE

Shortly after *United States v. Virginia* was decided, Justice Ginsburg, speaking at the University of Virginia, commented on the magnitude of that decision: "There is no practical difference between what has evolved and the [Equal Rights Amendment]."[298] She added, "I would still like it as a symbol to see the E.R.A. in the Constitution."[299] Today, however, it seems that more recent U.S. Supreme Court precedent has made an unequivocal shift back to the traditional standard of intermediate scrutiny, established thirty years ago, in *Craig v. Boren*. In essence, VMI's case was truly landmark, but the standard created within it has not endured at the U.S. Supreme Court level beyond the context of that case. Therefore, it seems today that an Equal Rights Amendment would serve as more than a "symbol." It is likely the only practical means to establish, as Justice Ginsburg set out to do over thirty-five years ago, strict scrutiny for gender classifications. At the moment, the U.S. Supreme Court seems less interested than it did a decade ago.

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296. Rodriguez de Quijas.v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).
297. *Id.*
298. Rosen, *supra* note 32, at 65.
299. *Id.*

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