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I. INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment is currently the most important concept in the Constitution for the protection of an individual's rights. Recently, the Supreme Court again defined new boundaries as to when and how the Equal Protection Clause will apply to gender. In United States v. Virginia (VMI),¹ the United States Supreme Court held that the Equal Protection Clause required the Virginia Military Institute (VMI) to admit women into its program.² The Court noted that Virginia failed to show an "exceedingly persuasive justification" for the disparate treatment of women.³ The implications of the VMI decision are far-reaching for both future gender classifications and higher educational institutions.

This note examines the history of the Equal Protection Clause as it applies to gender classifications. It thoroughly discusses the facts of VMI and then analyzes the rationales underlying the precedent leading up to the VMI case. After examining the reasoning of the Court, this note addresses the significance of the VMI holding.

II. FACTS

Virginia Military Institute was founded in 1839 as an all-male, state-supported, military college.⁴ From its inception, VMI remained a male-only institute with the primary goal of producing citizen-soldiers, young men competent as honorable leaders in both civilian and military life.⁵ To obtain this goal, VMI uses a unique system known as the adversative method which is distinguished by extreme stress, complete absence of privacy, continuous regulation, and equality of treatment.⁶ VMI is currently the only school of

2. See id. at 2287.
3. See id. at 2276.
5. See VMI, 116 S. Ct. at 2269. VMI's mission is "to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril." Id. at 2270 (quoting Mission Study Committee of the VMI Board of Visitors Report, May 16, 1986).
6. See id. at 2269. The adversative method consists of six parts: the rat line, the class system, the dyke system, the honor code, barracks life, and the military system. See Petitioner's Brief at 4, VMI (No. 94-1941). One of the most important parts of the adversative system is
higher education in the United States utilizing the adversative method.\textsuperscript{7} This rigid method pushes the young men to their individual limits in an effort to discover unknown capabilities.\textsuperscript{8} In addition to employing the adversative system, VMI offers a rigorous curriculum with degrees in sciences, engineering, and liberal arts.\textsuperscript{9}

Although VMI's admission policy remained untouched for nearly a century and a half, in 1990 an anonymous female seeking admission to VMI filed a complaint with the Attorney General of the United States.\textsuperscript{10} In response, the United States sued Virginia and VMI claiming violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{11} The United States District Court for the Western District of Virginia\textsuperscript{12} relied on precedent established in \textit{Mississippi University for Women v. Hogan},\textsuperscript{13} and applied an intermediate scrutiny test to review the equal protection violation claim.\textsuperscript{14} Finding that diversity in education was an important governmental interest and that single-sex colleges contributed to diversity, the court held that Virginia met the
intermediate scrutiny test; therefore, the exclusion of women from VMI was justified.\(^{15}\)

The United States appealed to the United States Court of Appeals for the Fourth Circuit,\(^{16}\) and argued that providing men with a unique educational opportunity as one component of educational diversity was not an important state objective.\(^{17}\) The court of appeals rejected the argument and agreed with the district court that diversity in education was a legitimate state interest and that the exclusion of women from VMI was a legitimate means to achieve that objective.\(^{18}\) The court also held, however, that although Virginia provided diversity in education to young men, the state had not provided the same opportunity to young women and failed to reasonably justify the male favoritism.\(^{19}\) Thus, the court of appeals specifically refused to order VMI to admit women but remanded the case to district court in order for Virginia to devise a plan that would provide women an opportunity for diverse education consistent with the requirements of the Fourteenth Amendment.\(^{20}\)

To comply with the Fourth Circuit’s decision, Virginia organized a task force consisting of experts in women’s education.\(^{21}\) The task force developed, and the state approved, a plan for an all-female program known as the Virginia Women’s Institute for Leadership (VWIL).\(^{22}\) VWIL is a state-funded program conducted at Mary Baldwin College, a private liberal arts college in Virginia.\(^{23}\) Like VMI, VWIL’s mission is to produce citizen-soldiers competent as leaders in both civilian life and the military; however, VWIL’s method of education is extremely different.\(^{24}\) Although VWIL is a public education program with military training designed exclusively for women,\(^{25}\) VWIL uses a cooperative method that supports self-esteem and self-confidence rather than the adversa-

\(^{15}\) See id.
\(^{16}\) See United States v. Virginia, 976 F.2d 890 (4th Cir. 1992).
\(^{17}\) See id. at 892.
\(^{18}\) See id. at 896.
\(^{19}\) See id. at 899. The Commonwealth of Virginia maintains fifteen public colleges of which only VMI is single-sex. See United States v. Virginia, 766 F. Supp. 1407, 1418 (W.D. Va. 1991). Therefore, the Commonwealth of Virginia provides no publicly funded all-female colleges or universities. However, there are five private women-only colleges and one private all-male college. See id. at 1420.
\(^{20}\) See Virginia, 976 F.2d. at 900.
\(^{21}\) See VMI, 116 S. Ct. at 2272.
\(^{22}\) See id.
\(^{23}\) See id.
\(^{24}\) See id. VWIL’s mission is to produce “citizen-soldiers who are educated and honorable women, prepared for the varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service.” United States v. Virginia, 852 F. Supp. 471, 494 (W.D. Va. 1994).
\(^{25}\) See VMI, 116 S. Ct. at 2272.
tive method. Women at VWIL are not required to eat together, live in barracks, or wear uniforms, and the training does not induce the physical or mental stress created by the training at VMI.

The district court approved the plan, noting that the programs at VMI and VWIL were substantially different but that the Constitution does not require identical programs for men and women to meet the mandates of the Fourteenth Amendment. In response, the United States again appealed to the Fourth Circuit, contending that VWIL did not meet the requirements of the Equal Protection Clause and that women were still denied the opportunity to participate in a unique state-supported educational program. The United States further argued that any program designed to remedy the violation would have to be identical to the program at VMI. The Fourth Circuit rejected the United States's argument. Relying in part on Mississippi University for Women v. Hogan, the court designed a revised intermediate scrutiny test called "substantive comparability." Under this test, in addition to showing that the classification based on gender was substantially related to an important governmental interest, VMI must also show that VMI men and VWIL women gained "substantially comparable benefits." Upon review, the Circuit Court concluded that although there were differences in intangible benefits, the programs were substantially comparable because both men and women would be offered an education program that stressed leadership and discipline. The United States promptly appealed to the United States Supreme Court. The Court, in a majority opinion by Justice Ginsburg, held that Virginia had not shown an exceedingly persuasive justification for excluding women from VMI and that the creation of VWIL did not remedy the constitutional violation.

26. See id. at 2273. The task force "determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training most women for leadership roles." See Petitioner's Brief at 9, VMI (No. 94-1941).
27. See VMI, 116 S. Ct. at 2282-83.
28. See id. at 2273.
29. See United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995).
30. See id. at 1235.
31. See id.
32. See id.
33. See id. at 1235-36.
34. See id. at 1236.
35. See Virginia, 44 F.3d at 1241. The court recognized that the benefits of reputation and prestige were absent from VWIL, but that these intangible benefits must be developed over a period of time and are impossible to remedy at this time. See id.
36. See VMI, 116 S. Ct. 2264.
37. See id. at 2286-87.
III. BACKGROUND

The foundation for VMI was laid at the start of American history. From the country’s inception, women were denied access to education. Though no one realized the significance of the event, women achieved a major victory with the passing of the Fourteenth Amendment. Although years would pass before the full breadth of the Amendment was realized, the Fourteenth Amendment eventually brought gender discrimination to its knees. Most recently the Fourteenth Amendment delivered another strike against gender discrimination in VMI. To adequately develop the Court’s reasoning in VMI, this background section briefly explores the history of discrimination against women, the history of the Fourteenth Amendment, and finally the development of gender equality and the law through the Privileges and Immunities Clause and the Equal Protection Clause.

A. The History of Discrimination Against Women in America

Although women today have achieved equal recognition in almost all areas of society and the law, originally women rarely possessed any legal rights. For example, women had no right to enter into contracts or to convey property, and women could not be responsible for any criminal acts done at a husband’s direction.

Education, in particular, was one area of society where women suffered from discrimination and exclusion. In colonial America, women were merely trained for domestic work. Women were to possess modest and delicate characteristics, and any type of education quickly disposed of such desirable traits.

Although progress was slow, women gradually became visible in the educational arena, and finally in 1833 Oberlin College opened its doors to women, becoming the first co-ed college. Later, in 1861, Vassar College founded the first women’s college. As astounding as this progress was,
women were still far from equal. For example, Oberlin did not allow women to take the same courses as their male peers and frequently required them to wash the male students' laundry, serve the men at meals, and clean the men's rooms.

Just as women gained some progress in higher education, Dr. Edward Clarke, a prominent physician, wrote *Sex in Education* and warned of the devastating effects learning may have on young women's bodies. Because Dr. Clarke delivered his attack by describing women's physiological unfitness for the strenuous college curriculum, Dr. Clarke's book had a lasting effect on American women and established women's lack of stamina as a convenient rationale for denying them access to education.

B. Early Attempts at Gender Equality Under the Fourteenth Amendment

Prior to passage of the Fourteenth Amendment, state sovereignty was the prevalent theory concerning the relationship between the federal and state governments. States freely regulated and restricted the rights of their citizens. In 1868, the Fourteenth Amendment passed. Since the primary purpose of the Fourteenth Amendment focused on the issue of race, the courts initially interpreted the Fourteenth Amendment to apply exclusively to the treatment of African-Americans. The Court applied the Equal Protection clause narrowly, trying to advance the rights of African-Americans while avoiding taking power away from states.

46. *See Sexton, supra* note 38, at 47.
47. *See Sexton, supra* note 38, at 47. Until 1841, women at Oberlin could only enroll in a "literary" course and were not allowed to study law, theology, or medicine. *See Eva Cary & Kathleen W. Peratis, Woman and the Law* 5 (1979).
48. *See Liva Baker, I'm Radcliffe! Fly Me!: The Seven Sisters and the Failure of Women's Education* 65 (1976). For example, Dr. Clarke warned that "[t]here have been instances of females... who have graduated from school or college excellent scholars, but with undeveloped ovaries. Later they married, and were sterile." *Id.* at 68.
49. *See id.* at 67-68, 70.
50. *See Wortman, supra* note 39, at 7.
51. *See Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)* (holding that the Court could not intervene if the states chose to deny to any class of persons the liberties enumerated in the Bill of Rights).
53. *See id.* at 136. Warsoff maintains that although the primary purpose of the Fourteenth Amendment was racial, additional purposes included punishment for the South, preservation of the Republican Party, and establishment of congressional authority over the states and against the President. *See id.* at 149.
54. *See id.* at 199. *See also Barbier v. Connolly, 113 U.S. 27, 31 (1885)* (stating that "neither the [Fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State. . . .").
Although the main purpose of the Fourteenth Amendment was to protect the basic rights of African-Americans, courts found the Amendment easy to expand in applying it to other situations. This ease in application was based on the idea that the country was founded on a concept of equality.

As the interpretation of the Fourteenth Amendment expanded and state legislatures were not permitted to limit individual rights arbitrarily, women began to challenge state laws under the Amendment. These early challenges to gender classifications were not brought under the Equal Protection Clause. In *Bradwell v. Illinois*, Mrs. Myra Bradwell challenged Illinois's refusal to grant her an attorney's license based on her gender. The Court, holding that the denial of the license to practice law was constitutional, decided the issue under the Privileges and Immunities Clause. The Court found that admission to the bar was not a right of United States citizenship. Thus, Illinois possessed the power to deny her admission to the bar. Although Mrs. Bradwell failed in her quest to practice law, this case laid the foundation for later challenges to gender-based classifications.

Not only did the Court find that the Fourteenth Amendment failed to protect a woman's right to enter the legal profession; the Court also found that the Fourteenth Amendment did not give women the right to vote. In *Minor v. Happersett*, the Supreme Court held that provisions in state constitutions which granted the right to vote only to male citizens of the United States did not violate the Constitution. Although the Court found that women were citizens, it concluded that voting was not a right of all citizens.

55. See WARSOFF, supra note 52, at 163.
56. See WARSOFF, supra note 52, at 163-64. See also Holden v. James, 11 Mass. 396 (1814) (stating that "manifestly contrary to the first principles of civil liberty and natural justice, and the spirit of our constitution and laws, [is] that any one citizen should enjoy privileges, and advantages which are denied to all others under like circumstances").
57. See WORTMAN, supra note 39, at 7.
59. See id. Illinois refused to issue Mrs. Bradwell a license to practice law on the basis that "as a married woman [she] would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client." *Id.* at 131. In addition, the Illinois Supreme Court found that the fact "that God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth." *Id.* at 132.
60. See id. at 138-39. The Privileges and Immunities Clause states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ..." U.S. Const. amend XIV.
61. See id. at 139.
62. See id.
64. See id.
65. See id. Women would have to wait until 1920 and the passage of the Nineteenth Amendment for the right to vote. See WORTMAN, supra note 39, at 294.
C. The Equal Protection Clause

Over time, the Privileges and Immunities Clause declined and the Equal Protection Clause established itself as the dominant force in the Fourteenth Amendment. As the Court applied the Equal Protection Clause to gender classifications, it showed great deference to the legislature, illustrated in *Goesaert v. Cleary*. In *Goesaert*, Michigan passed a statute forbidding a female from working as a bartender unless she was the wife or daughter of the male bar owner. Ms. Valentine Goesaert, who was the owner of a bar, her daughter Margaret, and two other female employees brought suit to maintain their livelihood. Ms. Goesaert argued that classifying wives and daughters of bar owners separately from wives and daughters of non-bar owners was a violation of the Equal Protection Clause. Holding that the classification was "not without a basis in reason" and that "Michigan could, beyond question" prohibit women from tending a bar, the Court quickly settled the question. Although Ms. Valentine lost, the Court used a rational basis test, which was significant in that the Court denied any special treatment or heightened scrutiny to classifications based on gender.

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67. See id. at 464-65 (citing MICH. STAT. ANN. § 18.990(1) (Law. Co-op. Supp. 1947)).
68. See id. at 464-65 (citing MICH. STAT. ANN. § 18.990(1) (Law. Co-op. Supp. 1947)).
70. See "Goesaert", 335 U.S. at 465.
71. See id. at 465-66. The Court’s tone toward the case can be noted in Justice Frankfurter’s statement, "[b]eguiling as the subject is, it need not detain us long." Id. at 465.
72. See id. Currently, equal protection issues are analyzed under one of three levels of scrutiny. First, the rational basis standard of scrutiny asks only whether the classification bears a rational relationship to a constitutionally permitted governmental goal. See NOWAK, supra note 40, § 14.3, at 574-75. As long as the legislature had a basis for creating the classification, the law will not be invalidated. See NOWAK, supra note 40, § 14.3, at 575. The second level of review is the strict scrutiny standard. See NOWAK, supra note 40, § 14.3, at 575. Under this standard, the Court determines whether the relationship between the classification and the governmental interest is sufficiently compelling, rather than deferring to the decision of the legislature. See NOWAK, supra note 40, § 14.3, at 575. The level of scrutiny applies to classifications based on race, national origin, and alienage. See NOWAK, supra note 40, § 14.3, at 576. The final level of review is the intermediate level which first appeared in *Reed v. Reed*, 404 U.S. 71 (1971). See infra note 73. This standard shows less deference to legislatures than the rational basis level but is not as stringent as the strict scrutiny standard. See NOWAK, supra note 40, § 14.3, at 576. As dictated in *Craig v. Boren*, the classification must be substantially related to an important governmental interest. See Craig v. Boren, 429 U.S. 190, 197 (1976). This level is applied to classifications based on gender and illegitimacy. See NOWAK, supra note 40, § 14.3, at 576.
For the next twenty-three years, the Court analyzed gender classifications under the rational basis standard until the landmark decision in *Reed v. Reed.*

*Reed* marked the emergence of a new path in the Court's analysis of gender classifications. In *Reed,* Cecil and Sally Reed, the adoptive parents of a deceased minor, both sought appointment as administrator of the minor's estate. The probate court appointed the father as administrator based on an Idaho statute that gave preference to men as administrators over women. Sally Reed brought an action claiming that the preference was a violation of the Equal Protection Clause. In an unanimous decision, the Court agreed with Ms. Reed and held that the gender classification did not bear a rational relationship to the state's objective. Although the Court did not dictate a new standard, it quietly adopted what became the intermediate standard of review.

Had the Court used the traditional rational basis standard, it probably would have found that the classification was sufficiently related to the legitimate objective of the state.

Although the decision in *Reed* was unanimous, cases after *Reed* indicate that the Court was not in agreement as to the precise level of scrutiny to be afforded gender classifications. In *Frontiero v. Richardson,* the plurality opinion of a sharply divided Court held that gender was a suspect class and therefore deserved strict scrutiny treatment. In *Frontiero,* a military service...
woman challenged a federal statute that allowed servicemen to claim their wives as dependents and receive related benefits without having to provide proof of actual dependency.\textsuperscript{83} Servicewomen could not claim their husbands as dependents without first proving that the husband was, in fact, a dependent.\textsuperscript{84} Writing the plurality opinion, Justice Brennan found that gender was a suspect class, and thus easily rejected the state's argument that administrative convenience was a sufficient ground for the disparate treatment.\textsuperscript{85} Justice Brennan found support for the strict scrutiny standard in Reed.\textsuperscript{86}

Although Justice Brennan managed to gather support for the strict scrutiny analysis in a plurality decision, Justice Powell's concurrence would prevail and establish the intermediate scrutiny standard for gender classifications in Craig v. Boren.\textsuperscript{87} In Justice Powell's opinion, not only did Reed not declare gender to be a suspect class, but the adoption of strict scrutiny was inessential to a decision favorable to servicewomen.\textsuperscript{88}

Although Frontiero pushed gender classification to the strict scrutiny level, it would not remain there. Three years later, the case that expressly established the modern intermediate scrutiny test was decided in Craig v. Boren.\textsuperscript{89} Craig involved an Oklahoma statute that permitted females eighteen years old or older to purchase 3.2% beer but prohibited the sale of the beer to males until they reached twenty-one years of age.\textsuperscript{90} The Court applied a two-
part test in striking down the statute and for the first time articulated the intermediate scrutiny standard.91 The test established by the Court dictated that first, a state must show an important governmental interest, and second, the classification based on gender must be substantially related to the achievement of the objective.92 The Court found support for this intermediate standard in Reed.93

Not only did Craig establish the intermediate scrutiny standard, but the case also firmly established that "archaic and over broad" generalizations94 could not justify use of a gender classification.95 Likewise, the Court stated that "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'" were incapable of legitimizing state statutes.96

Finally, Craig is important because the statute violated the Equal Protection Clause through its discrimination against men.97 This clearly shows that the Court meant to apply the intermediate standard in all gender classifications regardless of which gender is disadvantaged.98

After Craig, the middle level of review was generally accepted as applying to gender classifications.99 However, because each case the Court decided was based on a fact-intensive analysis, the Court continued to struggle to apply the new standard.100 In Michael M. v. Superior Court,101 the Supreme Court decided whether a California statutory rape law violated the Equal Protection Clause.102 Michael M., a seventeen-year-old male, was charged with having sex with a sixteen-year-old female in violation of the statutory rape law.103 The Court again rejected a strict scrutiny analysis and applied the

unlawful for any person who holds a license to sell and dispense beer . . . to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) per cent of alcohol measure by weight." Id. at 191-92 n.1 (citing OKLA. STAT. tit. 37, § 241 (1958 & Supp. 1976)). Section 245 defined a minor as "a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years.” Id. at 191-92 n.1. (citing OKLA. STAT. tit. 37, § 245 (1958 & Supp. 1976)).

91. See id. at 197-98.
92. See id.
93. See id.
94. See id. at 197-98.
95. See id. at 198 (citing Schlesinger v. Ballard, 419 U.S. 498 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973)).
96. Craig, 429 U.S. at 198-99 (citing Stanton v. Stanton, 421 U.S. 7 (1975)).
97. See id. See also Corbera, supra note 74, at 769.
100. See Corbera, supra note 74, at 769.
102. See id. at 466.
103. See id. The statute made men criminally liable for having sexual intercourse with "a female not the wife of the perpetrator, where the female is under the age of 18 years." Id.
intermediate level of review. The Court found that protecting young women from illegitimate pregnancies was a legitimate legislative goal, and that the disparate treatment by the statute served as a valid means of achieving that goal. Significantly, the Court showed the flexibility of the intermediate standard by upholding the constitutionality of a criminal statute that provided for different treatment on the basis of gender.

Finally, in 1982 the Court decided a case that provided the ammunition the Court would need for VMI. In *Mississippi University for Women v. Hogan*, a state supported nursing school denied admission to Joe Hogan based on an all-female admissions policy. Hogan brought suit against the University claiming that the admissions policy violated the Equal Protection Clause. In response, Mississippi claimed that the admissions policy furthered the important governmental interest of compensating women for past discrimination. Justice O'Connor, writing for a five-to-four majority, applied an intermediate scrutiny analysis and found the admissions policy unconstitutional. First, the Court rejected the argument that compensating women for past discrimination was an important governmental interest in this instance. Although the Court agreed that in some instances compensation for past discrimination was an important governmental goal, in this case, admitting only women to the nursing program "reinforce[d] the stereotype that nursing is a woman's job." Next, the Court found that the gender-based classification was not directly related to Mississippi's stated compensatory objective.

Not only did the Court strike down the all-female admissions policy; it also opened the door for heightened scrutiny by implying a potential elevation

(citing CAL. PENAL CODE § 261.5 (West Supp. 1981)).

104. See id. at 468-69. "[T]he traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged." Id.

105. See id. at 470.

106. See Corbera, supra note 74, at 774 (emphasis added).


108. See id. at 720-21.

109. See id. at 721.

110. See id. at 727.

111. See id. at 730.

112. See id. at 727-28 (emphasis added).

113. *Hogan*, 458 U.S. at 729-30. The Court rejected the use of generalizations and stereotypes by stating that

[the purpose of requiring [a] close relationship [between the important governmental interest and the means of achieving that interest] is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."

Id. at 725-26.

114. See id. at 730.
of the intermediate standard emphasizing that the justification for the gender based classification must be "exceedingly persuasive." The holding in Hogan was limited, as the Court did not determine if publicly funded single-sex educational institutions were intrinsically unconstitutional. However, the Court hinted that single-sex education is constitutional if an extremely persuasive justification can be shown.

By 1991, when the United States brought the action against Virginia and VMI, the prior decisions of the Court provided a foundation upon which VMI could be decided. The intermediate standard was securely established, and the combination of the traditional intermediate standard and the new language of "exceedingly persuasive" was rooted in that foundation.

IV. REASONING OF THE COURT

In United States v. Virginia, the United States Supreme Court held that Virginia did not show an exceedingly persuasive justification for excluding women from the unique educational program offered at Virginia Military Institute. In addition, Virginia Women's Institute for Leadership, the all-women's program implemented to remedy the equal protection violation, did not pass constitutional muster because it did not afford both genders comparable benefits.

United States v. Virginia presented two issues to the Court: first, whether excluding women from VMI and its unique educational method violates the Equal Protection Clause of the Fourteenth Amendment; and second, if so, what is the constitutional remedy for the violation. The Court addressed the first issue by relying on the intermediate scrutiny test established in Mississippi

115. See id. at 724 (citing Kirchberg v. Feenstra, 450 U.S. 455 (1981) and Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979)).
119. See id. at 2269. Justice Ginsburg wrote the majority opinion in which five of the justices joined. See id. Justice Rehnquist wrote an opinion concurring in the judgment, see id. at 2287 (Rehnquist, C.J., concurring), while Justice Scalia wrote a dissenting opinion. See id. at 2291. Justice Thomas, whose son attends VMI, did not take part in the decision. See id. at 2269. See Paul Barrett, High Court to Hear Discrimination Case Over VMI's Policy of Excluding Women, WALL ST. J., Oct. 6, 1995, at B5.
120. See VMI, 116 S. Ct. at 22.
121. See id. at 2274.
University for Women v. Hogan122 and in J.E.B. v. Alabama ex rel T.B.123 Under this test, a state that defends a classification based on gender must present an “exceedingly persuasive justification” for the classification.124 In order to do so, the state must show that the classification is substantially related to an important governmental interest.125 Moreover, the justification cannot be in response to litigation, nor can it be based on traditional stereotypes or generalities.126 Rather, the justification must be sincere and valid.127

Virginia initially attempted to provide persuasive justification for the exclusion of women by arguing that the all-male program supplied essential diversity in education which is a substantial benefit to its citizens.128 Although the Court agreed that diversity in public education was an important governmental interest, it rejected the argument that diversity was the actual purpose for establishing the all-male policy at VMI.129 Relying on Mississippi University for Women v. Hogan, the Court distinguished between the actual reason for the exclusion of women and the asserted rationalization.130 Based on the history of public education and the institution, the Court concluded that diversity was not the primary objective of the exclusionary policy.131 The Court noted that traditionally public education has excluded women from opportunities based on gross misconceptions of women’s abilities, their proper roles in society, and the preservation of men’s rights.132

Next, Virginia attempted to justify VMI’s exclusionary policy by arguing that VMI’s adversative method of education provided important benefits to its

124. See VMI, 116 S. Ct. at 2274.
125. See id. at 2275.
126. See id. (citing Weinberger v. Wiensenfeld, 420 U.S. 636, 643, 648 (1975)). The Court has applied this standard for rejecting classifications based on gender time and again. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (finding that prohibiting men from the nursing program was based on the generalization that nursing was “an exclusively woman’s job”); Frontiero v. Richardson, 411 U.S. 677 (1973) (finding that the classification was based on the “archaic and overbroad” generalization that female spouses of military men would normally be dependent upon their husbands while male spouses of military women would not).
127. See VMI, 116 S. Ct. at 2275.
128. See id. at 2276.
129. See id. at 2277.
130. See id.
131. See id. at 2277-78.
132. See id. The Court refers to a common belief of the 1800’s where educated men opposed higher education for women based on the belief that education caused harmful physiological effects such as interference with the female reproductive organs and extreme detriments to women’s health. See id. at 2277 (citing E. CLARKE, SEX IN EDUCATION 38-39, 62-63 (1873); H. MAUDSLEY, SEX IN MIND AND IN EDUCATION 17 (1874); C. MEIGS, FEMALES AND THEIR DISEASES 350 (1848)).
cadets and that this method would be essentially destroyed if women were admitted to the program.\textsuperscript{133} Examining history, the Court found no persuasive evidence that VMI's program would be destroyed by admitting women.\textsuperscript{134} Therefore, the Court rejected the argument and held that even though certain aspects of the program would have to change,\textsuperscript{135} the adversative method could be used to train some women.\textsuperscript{136}

The Court concluded that although diversity in education was an important state interest, the diversity provided by VMI was not the opportunity to attend a single-sex school, but rather the opportunity to attend a school that uses the adversative method of learning.\textsuperscript{137} Moreover, the Court concluded that admitting women to VMI would not destroy the program. Because Virginia failed to establish that diversity was its primary goal in excluding women and that by admitting women the educational program at VMI would be destroyed, Virginia failed to show an exceedingly persuasive justification for the all-male policy. Thus, its actions violated the Equal Protection Clause.\textsuperscript{138}

The Court then turned to the issue of the proper remedy for Virginia's constitutional violation.\textsuperscript{139} Relying on \textit{Milliken v. Bradley},\textsuperscript{140} the Court held that persons who suffer from discrimination must be put in the position they would have attained if discrimination had not occurred.\textsuperscript{141} In addition, the state

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\item \textsuperscript{133} See \textit{VMI}, 116 S. Ct. at 2279. The argument that "the introduction of women at VMI will materially alter the very program in which women seek to partake" is known as the Catch-22 theory. \textit{Virginia}, 976 F.2d at 899, 897. See also Dianne Avery, Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case. S S. CAL. REV. L. & WOMEN'S STUD. 189, 199, 318 (1996).
\item \textsuperscript{134} See \textit{VMI}, 116 S. Ct. at 2280. The Court pointed out previous situations where women have entered careers that were exclusively male but are now freely open to both sexes, such as law, medicine, and law enforcement. \textit{See id.} at 2280-81. In addition, the Court noted the success of the nation's military academies, West Point, the Naval Academy at Annapolis, and the Air Force Academy at Colorado Springs. \textit{See id.} & n.13. These government-supported institutions became co-ed through the legislative process in 1976. \textit{See id.}
\item \textsuperscript{135} See \textit{id.} at 2279. The Court agreed that certain aspects of the VMI program would have to change, such as housing arrangements, privacy policies, and physical training requirements. \textit{See id.}
\item \textsuperscript{136} See \textit{id.} at 2272. The Court based this conclusion on expert testimony from both sides that the adversative method, although not suited for most women, would be effective for some women. \textit{See United States v. Virginia}, 766 F. Supp. 1407, 1434 (W.D. Va. 1991) (testimony of Virginia expert witness Dr. Richard C. Richardson). Because generalizations cannot be used in making classifications by sex, the issue is whether Virginia could constitutionally deny women who possess the will and ability to complete the activities of VMI, not whether a majority of women could complete the program. \textit{See Reed v. Reed}, 404 U.S. 71 (1971) (holding that classifications based on gender cannot be based on generalizations).
\item \textsuperscript{137} See \textit{VMI}, 116 S. Ct. at 2281.
\item \textsuperscript{138} See \textit{id.} at 2282.
\item \textsuperscript{139} See \textit{id.}
\item \textsuperscript{140} 433 U.S. 267 (1977).
\item \textsuperscript{141} See \textit{VMI}, 116 S. Ct. at 2282.
\end{itemize}
must show that the remedy is directly related to the violation and that it bars similar discrimination in the future. Although Virginia implemented the VWIL program for women, Virginia’s remedy failed because VWIL did not provide the same unique method of education; therefore, women who possess the will and ability to attend and participate in the adversative method still suffer discrimination. The Court rejected the argument that the differences in methods are pedagogically justified. In addition, the Court emphasized that the remedy to be created was not to be designed for the majority of women but for those women who have the desire and ability to participate in the adversative method. Furthermore, the Court stressed the importance of the intangible differences in the two programs. Based on precedent established in Sweatt v. Painter, the Court found that the two programs were not substantially equal and promptly rejected the Fourth Circuit’s analysis under a “substantive comparability” test.

In a concurring opinion Chief Justice Rehnquist agreed with the majority of the Court that VMI’s all-male admission policy violated the Equal Protection Clause and that VWIL is not a proper remedy for the violation. However, the Chief Justice took issue with the Court’s use of the phrase “exceedingly persuasive justification.” In Chief Justice Rehnquist’s view, “exceedingly persuasive justification” was not a test developed by the Court, but only a phrase that the Court had previously used to describe the test. Therefore, the Court should have analyzed the exclusionary policy by simply

142. See id. at 2282-83.
143. See id. at 2283 (citing Louisiana v. United States, 380 U.S. 145, 154 (1965)).
144. See id. at 2284-85. VWIL does not offer the opportunity to participate in strict military training, to live in barrack housing, or to complete a program of absolute mental stress and regulation. See id. at 2283. In addition, VWIL also does not provide the math and science emphasis in its curriculum that VMI offers, its $54 million endowment of VWIL is significantly less than the $131 million endowment of VMI, and VWIL lacks the network of alumni that VMI maintains. See id. at 2284-85.
145. See id. at 2283-84. The Court found that these differences were based on generalizations and stereotypes and therefore failed to support Virginia’s argument. See id. at 2284.
146. See id. at 2283-84.
147. See VMI, 116 S. Ct. at 2285.
148. 339 U.S. 629 (1950) (holding that an all-black law school established as a remedy for the exclusion of black students from a state-supported law school was not substantially comparable because the new school lacked intangible benefits such as reputation, experience of the faculty, influence of the alumni, and prestige).
149. See VMI, 116 S. Ct. at 2285-86.
150. See id. at 2287 (Rehnquist, C.J., concurring).
151. See id. at 2288 (Rehnquist, C.J., concurring).
152. See id. (Rehnquist, C.J., concurring) (citing Personal Adm’r. of Mass. v. Feeney, 442 U.S. 256 (1979)).
determining whether the exclusion of women from VMI was substantially related to an important governmental interest.\textsuperscript{153}

Although Chief Justice Rehnquist agreed that diversity was not Virginia's primary objective, in his view the Court erred in relying on history.\textsuperscript{154} According to the Chief Justice, until the Court's decision in \textit{Hogan}, VMI had no notice that its all-male admission policy might offend the Constitution.\textsuperscript{155} Prior to that decision the denial of admission based on gender was not necessarily unconstitutional.\textsuperscript{156} Therefore, only VMI's policy after \textit{Hogan} should be scrutinized.\textsuperscript{157} By applying this post-\textit{Hogan} analysis, Justice Rehnquist concluded that diversity was not Virginia's objective in maintaining an all-male public institution of higher learning.\textsuperscript{158}

Chief Justice Rehnquist also found that even if diversity was an actual objective, Virginia would still have violated the Constitution because the state offered no opportunity for diverse education to women.\textsuperscript{159} Had Virginia made an effort to provide women with a comparable opportunity after \textit{Hogan}, the effort would have supported Virginia's argument that diversity in education was an important state interest.\textsuperscript{160} However, Virginia did nothing to provide women a comparable opportunity in education, which sustained the finding that diversity was not an objective.\textsuperscript{161}

Finally, Chief Justice Rehnquist disputed the majority's analysis by concluding that admitting women to VMI may not have been the sole remedy.\textsuperscript{162} According to the Chief Justice, the majority framed the equal protection violation as the exclusion of women from VMI and this mistakenly implied that the only remedy was to require VMI to open its doors to women.\textsuperscript{163} Chief Justice Rehnquist believed that the constitutional violation was not the exclusion of women from VMI, but the denial of a comparable opportunity for women.\textsuperscript{164} Furthermore, a proper remedy does not require

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\item \textsuperscript{153} See id. (Rehnquist, C.J., concurring).
\item \textsuperscript{154} See id. at 2289 (Rehnquist, C.J., concurring).
\item \textsuperscript{155} See \textit{VMI,} 116 S. Ct. at 2289 (Rehnquist, C.J., concurring).
\item \textsuperscript{156} See id. (Rehnquist, C.J., concurring).
\item \textsuperscript{157} See id. (Rehnquist, C.J., concurring).
\item \textsuperscript{158} See id. (Rehnquist, C.J., concurring). Chief Justice Rehnquist pointed to the report produced by the Mission Study Committee that was created to review VMI's admittance policy in light of \textit{Hogan}. See id. (Rehnquist, C.J., concurring). The report did not cite diversity in education as a reason for maintaining the all-male policy, but credited the changes that would be made to the program as the reason why the women should not be admitted. See id. (Rehnquist, C.J., concurring).
\item \textsuperscript{159} See id. at 2290 (Rehnquist, C.J., concurring).
\item \textsuperscript{160} See id. (Rehnquist, C.J., concurring).
\item \textsuperscript{161} See \textit{VMI,} 116 S. Ct. at 2290 (Rehnquist, C.J., concurring).
\item \textsuperscript{162} See id. at 2291 (Rehnquist, C.J., concurring).
\item \textsuperscript{163} See id. (Rehnquist, C.J., concurring).
\item \textsuperscript{164} See id. at 2291 (Rehnquist, C.J., concurring).
\end{itemize}
every aspect of the schools to be identical, but rather an identical quality of education. Because Chief Justice Rehnquist found that VWIL was innately inferior, he concluded that women were still denied a comparable educational opportunity to that which the state provides for men through VMI.

Justice Scalia vigorously dissented. In his view there is no basis for striking down a practice that is deeply rooted in tradition and does not expressly violate the text of the Constitution. In Justice Scalia’s opinion VMI’s exclusion of women is a practice of long, unbroken tradition that did not violate the Constitution when implemented and thus, should not be found to violate the Constitution today.

As a basis for his dissent, Justice Scalia rejected any consideration of an “exceedingly persuasive justification” and looked only at whether the gender-based classification was substantially related to an important governmental interest. According to Justice Scalia, the majority incorrectly used the strict scrutiny standard by focusing on the fact that some women could successfully complete the VMI program. By applying the basic intermediate test, he found that Virginia had an absolute interest in providing effective college education to its citizens. He concluded that not only did the evidence show that single-sex education is beneficial, but the evidence also indicated that the adversative method is a unique and beneficial method of education. Therefore, the all-male VMI program was substantially related to the goal of providing well-rounded educational opportunities.

Although the majority found that Virginia’s asserted interest in diversity was pre-textual, Justice Scalia relied on the 1990 Report of the Virginia Commission on the University of the 21st Century to the Governor and General Assembly that stated that “diversity and autonomy” were the basis of Virginia’s education system. Therefore, diversity was Virginia’s true and legitimate purpose in maintaining VMI as an all-male institution.
Finally, Justice Scalia stated that VWIL as a remedy is not an issue under his analysis. As long as the all-male policy is substantially related to the important government interest, in this case education, no violation has occurred and no remedy is required. Therefore, Justice Scalia concluded that Virginia and the program at VMI are not in violation of the Constitution.

According to Justice Scalia, the implications of the majority opinion are drastic. First, Justice Scalia asserted that by increasing the standard of review the Court has made the intermediate standard indistinguishable from strict scrutiny. In addition, the majority rendered single-sex public education unconstitutional and, in his words, “functionally dead.” Not only are public single-sex institutions extinct, but private single-sex institutions are in great danger. Because private institutions are also dependent on government funds, an issue arises as to whether the government would violate the Constitution by providing state support to single-gender institutions.

V. Significance

By forcing Virginia Military Institute to open its doors to women, the Court raises tremendous questions about both the application of a heightened standard of scrutiny and the constitutionality of public and private single-sex schools. First, the Court moves the standard closer to strict scrutiny. After VMI, state governments and legislatures must satisfy a standard somewhere between intermediate and strict scrutiny when using gender-based classifications. However, if VMI is viewed only as defining the intermediate standard more precisely, this new heightened level may not be an extreme shift from past precedent, and may not produce different results from those that would have followed under the old standard. 

178. See id. at 2303 (Scalia, J., dissenting).
179. See VMI, 116 S. Ct. at 2303 (Scalia, J., dissenting).
180. See id. at 2299 (Scalia, J., dissenting).
181. See id. at 2305 (Scalia, J., dissenting).
182. See id. at 2306 (Scalia, J., dissenting).
183. See id. (Scalia, J., dissenting).
184. See id. at 2306 (Scalia, J., dissenting).
185. See VMI, 116 S. Ct. at 2306-07 (Scalia, J., dissenting). Justice Scalia cited Norwood v. Harrison, 413 U.S. 455 (1973), where the Court struck down a state program to buy books for schools that discriminate on basis of race, holding that state government cannot grant this type of aid if that aid has a significant tendency to facilitate and reinforce private discrimination. See VMI, 116 S. Ct. at 2306-07 (Scalia, J., dissenting).
187. See Sunstein, supra note 186, at 73.
188. See Sunstein, supra note 186, at 73.
In addition, the Court had never before found a state's alleged interest to be only a rationalization for gender-based classifications when, in actuality, the discriminatory classification promoted the interest.\textsuperscript{189} For example, in \textit{Hogan}, the Court deemed the gender-based classification a rationalization only after determining that the classification did not readily advance the asserted interest. By finding Virginia's interest in maintaining a gender-based classification to be a rationalization even though the Court found that the classification promoted the interest, the Court treads on new ground.\textsuperscript{190}

Finally, and possibly most significantly, \textit{VMI} has future implications for public and private single-sex schools. Although \textit{VMI} can be distinguished on the basis that the school provided a very unique method of education not available to women anywhere, the line the Court drew is unclear, and single-sex education may very well be in danger. However, although \textit{VMI} may imply that single-sex public schools are per se unconstitutional, the Court has not required lower courts to invalidate both public and private single-sex educational programs.\textsuperscript{191} Single-sex education is an effective and beneficial method of education providing opportunities for individual growth and experiences that are not found in co-ed institutions.\textsuperscript{192} Therefore, if the government is obligated to provide the best and most effective education to its citizens, a state would have an important interest in funding single-sex colleges and universities.\textsuperscript{193} On the other hand, when taxpayer dollars are spent to support an institution of higher education, a question arises as to whether the government can expressly deny women the right to participate. \textit{VMI} is a middle ground in this dilemma. First, \textit{VMI} denies states the right to provide an extremely unique opportunity to men while denying the same opportunity to women. But, second, the Court in \textit{VMI} based its decision on its finding that Virginia's rationalization was pre-textual and the state's purpose was not to promote diversity but to deny women admittance to \textit{VMI}.\textsuperscript{194} Therefore, the Court does not prohibit a state from providing single-sex education but only from denying one gender the opportunity to participate in a unique method of education.

Although many questions remain concerning the status of gender and education, \textit{VMI} is an extremely significant decision that will continue to be debated in the future. What is certain is that the Court has firmly set yet

\textsuperscript{190} \textit{See} \textit{Leading Cases}, supra note 189, at 181.
\textsuperscript{191} \textit{See} Sunstein, supra note 186, at 76.
\textsuperscript{192} \textit{See} \textit{VMI}, 116 S. Ct. at 2276-77.
\textsuperscript{194} \textit{See} Sunstein, supra note 186, at 76.
another stepping stone along the road to equal treatment between men and women.

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