JUSTICE RUTH BADER GINSBURG AND THE VIRGINIA MILITARY INSTITUTE: A CULMINATION OF STRATEGIC SUCCESS

INTRODUCTION

In October 1993, Justice Ruth Bader Ginsburg became the second woman in history to serve on the United States Supreme Court, joining the Court's first female appointee, Justice Sandra Day O'Connor, who was appointed ten years earlier.[1] However, this judicial milestone in Supreme Court history pales in comparison to the myriad of landmark gender discrimination cases Justice Ginsburg had argued before the Supreme Court as the Nation's primary influential women's rights litigator.[2] While working for the American Civil Liberties Union ("ACLU") in the 1970s, Justice Ginsburg's reputation became synonymous with women's rights advancements and she was instrumental in pioneering a change in the Supreme Court's handling of gender-based classification.

At the beginning of her legal career, Justice Ginsburg encountered a Supreme Court conditioned to automatically apply a rational basis test to gender-related matters, which most often resulted in upholding the constitutional validity of the alleged gender discriminatory statute.[3] However, Justice Ginsburg aspired to increase the Court's standard of scrutiny from the conventional rational-basis test, and through a meticulously calculated gender discrimination case sequence,[4] set up a compelling foundation from which to establish a persuasive argument advocating an increased standard of scrutiny for gender-based classification. Justice Ginsburg's case sequence, which included *Reed v. Reed*,[5] *Frontiero v. Richardson*,[6] and *Craig v. Boren*,[7] has provided the argumentative staples in support of equal protection for gender-related matters. Justice

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1 *See* Deborah L. Markowitz, *Ruth Ginsburg: Women's Rights Advocate — Supreme Court Justice*, VT. B. J. & L. DIG., Oct. 20, 1994, at 9 [hereinafter Markowitz, *Ruth Ginsburg: Women's Rights Advocate — Supreme Court Justice*] (summarizing Justice Ginsburg's ACLU court victories).

2 *See* Duren v. Missouri, 439 U.S. 357 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Edwards v. Healy, 421 U.S. 772 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

3 *See* discussion *infra* Part II (discussing the Supreme Court's application of the rational basis test in several landmark gender discrimination cases).

4 *See* Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

5 404 U.S. 71 (1971).

6 411 U.S. 677 (1973).

7 429 U.S. 190 (1976).

Ginsburg's heartfelt desire was to persuade the Supreme Court to apply the same strict scrutiny test normally reserved for race-based classification, to that of gender-based classification as well.[8] Although she had not yet reached this ambitious pinnacle at the time of her appointment to the Supreme Court, her ten year ACLU tenure had caused the Court to alter its common practice of applying the rational basis test to gender-based classification.[9] Her efforts had introduced an intermediate standard of scrutiny for gender-related matters, and gave the Supreme Court a pragmatically equitable test to apply to future gender discrimination cases.[10]

More recently, for the first time in her Supreme Court career, Justice Ginsburg was granted the opportunity to write the majority opinion for the gender discrimination case *United States v. Virginia*,[11] a case befitting Justice Ginsburg's ACLU case sequence. This Note will examine whether Justice Ginsburg's opinion was consistent with her desired goal of increasing the Supreme Court's standard of scrutiny for gender-based classification. Part I will provide a brief biographical overview of Justice Ginsburg's legal education, employment history, and philosophical beliefs. Part II presents an in depth analysis of the Supreme Court's rational basis test, intermediate scrutiny test, and strict scrutiny test by showing their evolution through Justice Ginsburg's prestigious case sequence. Part III reviews Justice Ginsburg's achievements as a District of Columbia Appellate Court judge and Supreme Court justice prior to the *United States v. Virginia*[12] decision. Part IV specifically focuses on the events leading to *United States v. Virginia*[13] and the resulting district and appellate court activity. Finally, Part V analyzes Justice Ginsburg's *United States v. Virginia*[14] majority opinion.

I. JUSTICE RUTH BADER GINSBURG: BACKGROUND

A. Law School Education

It was Justice Ginsburg's enrollment at Harvard Law School in 1956, where as one of only nine women in a class of 400, she first

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[8] *See, e.g.*, Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335, 337-38 (1992) [hereinafter Markowitz, *In Pursuit of Equality*] (presenting an in-depth critical analysis of Justice Ginsburg's ACLU case strategy).

[9] *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (implementing a level of intermediate scrutiny for gender-related matters).

[10] *See id.*

[11] 116 S. Ct. 2264 (1996).

[12] *Id.*

[13] *Id.*

[14] *Id.*

encountered gender discrimination.[15] She was once asked by the Dean of the Harvard Law School, Erwin Griswold, at a welcoming dinner for the incoming women students, how she could justify occupying a space intended for a man.[16] Disregarding this comment as an unfortunate reminder of the prevalent male chauvinistic beliefs, Justice Ginsburg attempted to dispel any doubts about her inferior talent in the study and practice of law.[17] Wanting to be close to her husband who was employed in New York City, she transferred to Columbia Law School for her final year of law school and graduated first in her class.[18]

B. Employment

Despite her impressive academic accomplishments, Justice Ginsburg had difficulty securing a job in the male dominated legal profession.[19] Although one could argue that her Jewish heritage played a factor in her unsuccessful attempts at employment, she attributed her many rejections to motherhood.[20] She remarked in an interview, "[m]any law firms were just beginning to hire Jews and to be a women, a Jew and mother to boot was an impediment . . . [but] motherhood was the major impediment."[21] Even Supreme Court Justice Felix Frankfurter denied her employment on the basis of gender.[22] In 1959, however, Justice Ginsburg was offered a clerkship with the Honorable Edmund L. Palmieri for the United States District Court for the Southern District of New York, one of the only clerkships open to women at the time.[23] At the end

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15 *See* Elizabeth E. Gillman & Joseph M. Micheletti, *Justice Ruth Bader Ginsburg*, 3 SETON HALL CONST. L.J. 657, 658 (1993) (providing a brief biographical history of Justice Ginsburg's legal career); *see also* Markowitz, *Ruth Ginsburg: Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9; Joyce A. Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 4 (1994) (assessing Justice Ginsburg's performance as a circuit court judge and Supreme Court Justice); Sheila M. Smith, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's First Women's Rights Champion?*, 63 U. CIN. L. REV. 1893, 1896-97 (1995) (analyzing Justice Ginsburg's legal perspective on gender discrimination and sexual harassment).

16 *See* Baugh et al., *supra* note 15, at 4; *see also* Smith, *supra* note 15, at 1897; Gillman & Micheletti, *supra* note 15, at 658; Markowitz, *Ruth Ginsburg: Women's Rights Advocate— Supreme Court Justice*, *supra* note 1, at 9.

17 *See* Markowitz, *Ruth Ginsburg: Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9; *see also* Baugh et al., *supra* note 15, at 4.

18 *See* Gillman & Micheletti, *supra* note 15, at 658; *see also* Markowitz, *Ruth Ginsburg: Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9.

19 *See* Gillman & Micheletti, *supra* note 15, at 658; *see also* Markowitz, *Ruth Ginsburg: Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9; Baugh et al., *supra* note 15, at 4.

20 *See* Gillman & Micheletti, *supra* note 15, at 658.

21 *Id.*

22 *See id.*

23 *See id.* at n.14; *see also* Markowitz, *Ruth Ginsburg: Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9; Baugh et al., *supra* note 15, at 4.

of her clerkship she began teaching at Rutgers University Law School and, although earning tenure in 1969, she decided to teach briefly at Harvard Law School for two years, and later went on to become Columbia Law School's first female tenured faculty member.[24]

While a faculty member at Rutgers, Justice Ginsburg became involved with gender discrimination cases, first as a volunteer for the New Jersey affiliate of the ACLU and later as general counsel and founding director of the national ACLU's Women's Rights Project ("WRP").[25] The project's objective was to seek out gender discrimination cases appropriate for Supreme Court review and to prepare briefs and arguments accordingly.[26] Justice Ginsburg designed a litigation campaign determined to chip away at past legal precedent and lead the Supreme Court towards accepting a policy favoring gender equality.[27] She attempted to build a body of precedent that clearly established that each individual has a right to equal protection by the government regardless of gender.[28] Similarly, she hoped to present the Court with "easy" cases — those that factually appeared to be "clear winners" — which would allow her to establish a favorable foundation of equal protection guidelines.[29] It was this strategy for building a case- by-case precedent, combined with her relentless drive for the equal protection of women, that led commentators to describe Justice Ginsburg as the "Thurgood Marshall of gender equality law"[30] and "founding mother of the women's rights movement."[31]

C. Philosophy

Before discussing Justice Ginsburg's accomplishments as general counsel for the WRP, it is important to analyze the basic philosophical beliefs which guided her judicial career. Most of her work is emblazoned with her personal opinions of equal protection, and the briefs and arguments she drafted at the WRP are clear reminders that her beliefs and sentiments played an intricate part in her overall legal strategy. Justice Ginsburg believes that gender distinc-

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24 *See* Gillman & Micheletti, *supra* note 15, at 659.

25 *See* Baugh et al., *supra* note 15, at 4; *see also* Gillman & Micheletti, *supra* note 15, at 659; Markowitz, *In Pursuit of Equality, supra* note 8, at 337.

26 *See* Smith, *supra* note 15, at 1897.

27 *See* Markowitz, *Ruth Ginsburg: Women's Rights Advocate — Supreme Court Justice, supra* note 1, at 9.

28 *See* Markowitz, *In Pursuit of Equality, supra* note 8, at 337.

29 *Id.*

30 Baugh et al., *supra* note 15, at 4, 27. *See also* Gillman & Micheletti, *supra* note 15, at 659.

31 Gillman & Micheletti, *supra* note 15, at 659.

tions, even for the benefit of one gender, reflect a traditional way of thinking about women that often leads to unequal opportunities.[32] Although these distinctions in some cases are benign, she contends, they tend to reinforce outdated stereotypes and misconceived notions about an individual's actual ability and are inherently discriminatory.[33] She fears that the courts' attempts to preserve laws benefiting only women will deny them the opportunity to be judged on their own merits and capabilities.[34] The argument she puts forth in her work is that society should rarely employ gender classification if it is to realize its goals of equal protection and equal opportunity for all individuals.[35]

Special importance should be given to Justice Ginsburg's philosophical beliefs on the military and educational system. She takes the position that women must not be granted any special exemptions from military service, but rather, should be exposed to the same military experience as their male counterparts.[36] Her remarks within *Sex Bias in the U.S. Code*,[37] the 1977 book she coauthored with Brenda Feigen-Fasteau, clearly portray this expression: "Supporters of the equal rights principle firmly reject draft or combat exemption for women. . . . The equal rights principle implies that women must be subject to the draft if men are, that military assignments must be made on the basis of individual capacity rather than sex."[38] Furthermore, "[i]mplementation of the equal rights principle requires a unitary system of appointment, assignment, promotion, discharge, and retirement. . . ."[39]

Sex Bias in the U.S. Code continues with its feminist approach towards absolute equality by calling for the end to any single-sex educationally-related institution. For example, single-sex schools, colleges, and universities, along with single-sex school related activ-

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32 *See* Michael J. Confusione, *Justice Ruth Bader Ginsburg and Justice Thurgood Marshall: A Misleading Comparison*, 26 RUTGERS L.J. 887, 888 (1995) (contrasting Justice Ginsburg's gender-based equal protection achievements with Justice Marshall's race-based equal protection success).

33 *See* Confusione, *supra* note 32, at 890-91; *see also* Phyllis Schlafly, *How The Feminists Want to Change Our Laws*, 5 STAN. L. & POL'Y REV. 65, 66 (1994) (presenting Justice Ginsburg's vision of "gender equality" and its affect on various societal institutions such as the American family, military, educational system, English language, sexual freedom and privacy).

34 *See* Confusione, *supra* note 32, at 892.

35 *See id.* at 888.

36 *See* Schlafly, *supra* note 33, at 67-68.

37 *See id.* at 66 (citing U.S. COMM'N ON CIVIL RIGHTS, SEX BIAS IN THE U.S. CODE (1977) (combing of federal laws by Ruth Bader Ginsburg, then a Columbia University Law School professor, and her staff)).

38 *Id.* at 68.

39 *Id.*

ities, organizations, and clubs must all be integrated.[40] Moreover, "[t]he equal rights principle looks toward a world in which men and women function as full and equal partners, with artificial barriers removed and opportunity unaffected by a person's gender. Preparation for such a world requires elimination of sex separation in all public institutions where education and training occur."[41]

In summary, Justice Ginsburg's philosophy served as a guidepost throughout her career and continues to remain a valuable resource embedded within her judicial decision-making process. However, it is important to realize that Justice Ginsburg's collective works advocate gender equality and not an expansion "of women's rights per se."[42] This distinction should be noted and may better explain the reasons behind Justice Ginsburg's past and future decisions. In any case, Justice Ginsburg's philosophical undertone is felt throughout her judicial work and, in essence, is the controlling factor in her overall strategy to alter the Supreme Court's handling of gender protection.

II. THE SUPREME COURT'S STANDARD OF SCRUTINY FOR GENDER-BASED CLASSIFICATION: THE RATIONAL BASIS TEST'S EVOLUTION INTO INTERMEDIATE SCRUTINY

When Justice Ginsburg began her work with the WRP, she was faced with a Supreme Court which had only two standards of review to determine whether a statute violated the equal protection clause of the Fourteenth Amendment.[43] In deciding gender related issues, the court frequently turned to the "rational basis test" which was based on the theory that a statute will be deemed valid under judicial review if it bares a rational relation to a legitimate legislative objective.[44] Using this test, the statute's classification will always pass constitutional muster.[45]

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40 *See id.* at 69.

41 *Id.*

42 Baugh et al., *supra* note 15, at 27-28.

43 *See* Markowitz, *In the Pursuit of Equality, supra* note 8, at 338.

44 *See* Markowitz, *In Pursuit of Equality, supra* note 8, at 338-39; *see also Smith, supra* note 15, at 1900; Baugh et al., *supra* note 15, at 25; Heidi C. Paulson, Note, *Ladies' Night Discounts: Should We Bar Them or Promote Them?*, 32 B.C. L. REV. 487, 491-92 (1991) (examining the social consequences of gender-based pricing schemes and its continuing effect on promoting gender- based discrimination); Robert D. Stone, *The American Military: We're Looking For a Few Good [Straight] Men*, 29 GONZ. L. REV. 133, 141 (1993/1994) (criticizing President Clinton's "don't ask, don't tell" policy governing military treatment towards homosexuals and maintaining that homosexuals should be considered a suspect class for purposes of judicial scrutiny deserving the same equal protection under the Fifth and Fourteenth Amendments as race).

45 *See* Markowitz, *In Pursuit of Equality, supra* note 8, at 339; *see also* Smith, *supra* note 15, at 1900; Paulson, *supra* note 44, at 491-92; Stone, *supra* note 44, at 141.

The other test the Supreme Court enacted was the "strict scrutiny test," which is based on the notion that it is presumptively impermissible to distinguish between individuals 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.[46] This heightened scrutiny test is applied when the legislation interferes with the exercise of an individual's fundamental rights[47] and is perceived to target inherently "suspect" classes such as race, national origin, and alienage.[48] The chances of the statute remaining valid after judicial review is extremely rare since its proposed objective is usually not a compelling justification to trump an individual's fundamental rights.[49]

A. Reed v. Reed

The Supreme Court had reviewed gender discrimination using the "rational basis test," until its 1971 decision in *Reed v. Reed*,[50] which marked the first time the Supreme Court invalidated a sex-based classification as unconstitutional.[51] The Court, operating within a heavily politicized environment attributed to the proposed ratification of the Equal Rights Amendment ("ERA"), decided what would be the beginning of a new formulation of judicial review for gender discrimination cases.[52] Similarly, *Reed* was Justice Ginsburg's first major amicus curiae and was the first step in her goal of seeing gender-based classification reviewed the same way as race-based classification.[53]

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[46] *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 339; *see also* Smith, *supra* note 15, at 1900; Paulson, *supra* note 44, at 492; Stone, *supra* note 44, at 135-38; Markowitz, *Ruth Ginsburg; Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9.

[47] *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 339; *see also* Smith, *supra* note 15, at 1900; Paulson, *supra* note 44, at 492; Stone, *supra* note 44, at 135-38; Markowitz, *Ruth Ginsburg; Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9. Some fundamental rights include the right to privacy, the right to vote, the right to travel, and the right to have access to the courts.

[48] *See* Smith, *supra* note 15, at 1900; *see also* Paulson, *supra* note 44, at 492; Stone, supra note 44, at 135-38.

[49] *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 339; *see also* Smith, *supra* note 15, at 1900; Paulson, *supra* note 44, at 492; Stone, *supra* note 44, at 135-38; Markowitz, *Ruth Ginsburg; Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9; Baugh et al., *supra* note 15, at 25.

[50] 404 U.S. 71 (1971).

[51] *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 339; *see also* Smith, *supra* note 15, at 1899; Baugh et al., *supra* note 15, at 25.

[52] *See* John Galotto, *Strict Scrutiny for Gender, Via Croson*, 93 COLUM. L. REV. 508, 519 (1993) (arguing that the Supreme Court's decision in *Richmond v. J.A. Croson*, 488 U.S. 469 (1989), in which the Court applied strict scrutiny to race-based affirmative action legislation, should apply to gender-based as well as race-based affirmative action programs and compels the application of strict scrutiny to all forms of gender discrimination).

[53] *See* Markowitz, *Ruth Ginsburg; Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9.

Reed's facts were a clear portrayal of gender discrimination. Idaho citizens Sally and Cecil Reed were separated when their son Richard was a young child.[54] During Richard's child-hood years Sally was awarded custody, but according to Idaho custom at the time, once Richard reached adolescence, custody was transferred to his father, Cecil.[55] While under his father's custodial supervision, Richard had gotten himself into trouble with the law, spending some time in a juvenile home, and eventually committed suicide.[56] Sally blamed Cecil for Richard's death and opposed his position as administrator of Richard's estate, a position granted to him by Idaho statutes.[57] The Idaho statutes in question were sections 15-312[58] and 15-314,[59] and when read in conjunction with each other, revealed a compelling state preference for a male administrator.[60] The probate court held both statutes to be controlling and found in favor of the husband.[61]

Justice Ginsburg believed that *Reed* would be a clear winner.[62] The case reached the Supreme Court at the same time the women's rights movement was engulfing the nation, bringing with it an increased awareness of societal tendencies toward gender discrimination.[63] Similarly, the Idaho statutes were repealed before oral argument, preventing any immediate effect of the Court's de-

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54 *See Reed*, 404 U.S. at 71.

55 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 339.

56 *See id.*

57 *See Reed*, 404 U.S. at 71-72.

58 *See id.* at 73 n.2. Idaho Code § 15-312 provides as follows:

> Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order: (1) The surviving husband or wife or some competent person whom he or she may request to have appointed. (2) The children. (3) The father or mother. (4) The brothers. (5) The sisters. (6) The grandchildren. (7) The next of kin entitled to share in the distribution of the estate. (8) Any of the kindred. (9) The public administrator. (10) The creditors of such person at the time of death. (11) Any person legally competent. If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate.

Id. (designating both father and mother as equal members of the entitlement class).

59 *See Reed*, 404 U.S. at 73. Idaho Code § 15-314 provides as follows: "Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood." *Id.* (giving preferential treatment to males over females even if both are equally capable and entitled to the position of estate administrator).

60 *See Reed*, 404 U.S. at 72.

61 *See id.*

62 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 339-40; *see also* Markowitz, *Ruth Ginsburg; Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9.

63 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 339-40; *see also* Markowitz, *Ruth Ginsburg; Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9.

cision.[64] This, combined with the fact that the Idaho statutes were an archaic adoption of a California law from the 1800s, created an environment beneficial towards repealing the Idaho statute.[65]

Justice Ginsburg's strategy was to use the equal protection principle normally reserved for race discrimination to provide a change from the Supreme Court's rational basis test and to suggest an appropriate heightened scrutiny standard.[66] Her brief's main points emphasized race and gender classification similarities and stressed the adoption of gender as a suspect class.[67] She argued that "although the legislature may distinguish between individuals, on the basis of need or ability, it is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control or for which he or she should not be disadvantaged by the law."[68] Ironically, the discussion concerning the constitutionality of the Idaho statute under the rational basis test was secondary.[69]

Justice Ginsburg pragmatically attempted to persuade the Supreme Court to adopt the strict scrutiny test. She realized that the Court would not jump from a rational basis test to a strict scrutiny test in one decision, but understood this transition would occur gradually over time only after a comprehensive precedent was in place.[70] However, since the case was a clear winner on the merits, *Reed* was the perfect medium to suggest the adoption of strict scrutiny in the context of gender classification.[71]

Her second strategy was to discount the stereotypical notions concerning women's place in contemporary society.[72] Justice Ginsburg believed the acceptance of these often outdated stereotypes in both federal and state legislation were becoming too prevalent in American culture and had been casually and uncritically accepted as commonplace by the Supreme Court.[73] Prior to *Reed*, the Supreme Court upheld gender classification under the rational ba-

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64 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 339; *see also* Markowitz, *Ruth Ginsburg; Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9.

65 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 339-40.

66 *See id.*; *see also* Markowitz, *Ruth Ginsburg; Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9; Baugh et al., *supra* note 15, at 25.

67 *See* Markowitz, *In the Pursuit of Equality*, *supra* note 8, at 340-41; *see also* Markowitz, *Ruth Ginsburg; Women's Rights Advocate — Supreme Court Justice*, *supra* note 1, at 9; Baugh et al., *supra* note 15, at 25.

68 Markowitz, *In Pursuit of Equality*, *supra* note 8, at 340.

69 *See id.* at 341.

70 *See id.*; *see also* Baugh et al., *supra* note 15, at 25-26.

71 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 341.

72 *See id.*; *see also* Smith, *supra* note 15, at 1900.

73 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 341.

sis test,[74] concluding that "women are naturally, even divinely, ordained to be subordinate to men; and, second, that the laws that treat women differently from men are 'benign,' designed for women's protection, not their repression."[75] She believed that in order for the Supreme Court to realistically consider applying the strict scrutiny test to gender-based classification, these stereotypes would have to be dispelled.[76]

The Court did not adopt the strict scrutiny test, but did strike down the Idaho statute as unconstitutional despite the use of the rational basis test.[77] The Court held that the legislation's preference toward males, which in this case was to reduce the workload on probate courts and prevent intra-family controversy, was "forbidden by the Equal Protection Clause of the Fourteenth Amendment."[78] The Court further stated, "[b]y providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause."[79] The *Reed* decision was also successful since Justice Ginsburg convinced the Court it was arbitrary to legislate based on overgeneralized and stereotypical notions about women.[80] The Court held, "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"[81]

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74 *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding a statute that allowed women to serve on juries only if they volunteered and concluding that the statute had a rational basis in protecting women from being called away from their homes and families).

75 Smith, *supra* note 15, at 1899.

76 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 341.

77 *See* Reed v. Reed, 404 U.S. 71 (1971).

78 *Id.* at 76.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (guaranteeing that individuals who are similarly situated will be treated alike).

79 *Reed*, 404 U.S. at 77.

80 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 341.

81 *Reed*, 404 U.S. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (holding that Chapter 472 of Virginia's 1916 tax code,

> insofar as it imposes on a domestic corporation doing business both within and outside the State a tax with respect to its income derived from sources outside the State, denies such corporation the equal protection of the laws, in violation of the Fourteenth Amendment, in view of . . . [Chapter 495 of Virginia's 1916 tax code,] exempting domestic corporations doing no part of their business within the State from any tax on their income)).

Although the Supreme Court had not explicitly adopted the strict scrutiny test, it implied that gender classification warranted something more than a rational basis test and was subject to higher scrutiny.[82] The Court was slowly changing its direction in gender classification.

B. Frontiero v. Richardson

In 1973, *Frontiero v. Richardson*[83] continued in the tradition of *Reed*'s pursuit for a gender-neutral society and a justice system which classifies gender in the same manner as it does race — by applying a strict scrutiny test. *Frontiero* was a blatant example of the military's preferential treatment of men and specifically dealt with the military's health benefits policy which has traditionally favored males. The case involved a suit brought by a uniformed servicewomen in the United States Air Force who sought to claim her husband as a "dependent" for the purposes of obtaining increased quarter allowances and medical and dental benefits. Previously, these benefits were available only to wives claimed as "dependents" of their male servicemen husbands.[84] Under military statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him, but a servicewoman is denied the ability to claim her husband as a "dependent" unless he is in fact dependent upon her for more than one-half of his support.[85]

Justice Ginsburg continued her desire to persuade the Supreme Court to adopt a strict scrutiny test for gender discrimination cases but took a pragmatic and meticulous approach to accomplishing her goal. As previously mentioned, her strategy was to build precedent with cases that could have easily won on their facts under the rational basis test and to continually guide the Court towards accepting a heightened standard of scrutiny until the majority of Supreme Court justices felt comfortable in adopting a strict scrutiny test.[86] However, Justice Ginsburg realized that it would be unrealistic for a court which had automatically applied

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82 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 341.

83 411 U.S. 677 (1973).

84 *See id.* at 678.

85 *See id.* at 678-79. 37 U.S.C. § 401 provides in pertinent part: "In this chapter, 'dependent,' with respect to a member of a uniformed service, means — (1) his spouse; However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. . . ." *Id.* at 679 n.2.

10 U.S.C. § 1072(2) states in pertinent part: "'Dependent,' with respect to a member . . . of a uniformed service, means — (A) the wife; (C) the husband, if he is in fact dependent on the member . . . for over one-half of his support. . . ." *Id.*

86 *See* Smith, *supra* note 15, at 1901; *see also* Baugh et al., *supra* note 15, at 25-26.

the rational basis test to gender classification to immediately subscribe to the other end of the scrutiny standard spectrum; thus, she argued instead for an intermediate level of scrutiny.[87]

Justice Ginsburg attacked the military's preferential treatment of males by arguing that the laws were based on traditional gender stereotypes of the "male breadwinner" and the "female homemaker," two outdated concepts in a society which has witnessed a surge of females into the work field.[88] "As in the *Reed* brief, Ginsburg employed national statistics [and sociological and demographic studies] to show the court that the stereotypes of women as secondary and inconsequential earners did not reflect reality."[89] Justice Ginsburg believed female stereotypes "denied [women] equal opportunity to develop their individual talents and capacities and has impelled them to accept a dependent, subordinate status in society."[90]

In building upon the precedent she established in *Reed*, Justice Ginsburg used the language of that decision to influence the Court towards striking the military's male-preferential statutes. The Court followed *Reed* by holding the military statutes unconstitutional and restated the reasoning reminiscent of the *Reed* decision that, "any statutory scheme which draws a sharp line between sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the (Constitution). . . .'"[91] The Court went on to conclude that, "by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband."[92]

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87 *See* Smith, *supra* note 15, at 1901.

88 *Id.* at 1902. *See also* Markowitz, *Ruth Ginsburg; Women's Rights Advocate — Supreme Court Justice, supra* note 1, at 10; Lucille M. Ponte, *Waldie Answered: Equal Protection and the Admissions of Women to Military Colleges and Academies*, 25 NEW ENG. L. REV. 1137, 1147 (1991) (focusing on the Supreme Court's struggle regarding gender-based distinctions in a military setting).

89 Markowitz, *In Pursuit of Equality, supra* note 8, at 345. *See also* Markowitz, *Ruth Ginsburg; Women's Rights Advocate — Supreme Court Justice, supra* note 1, at 9.

90 Baugh et al., *supra* note 15, at 26.

91 Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (quoting Reed v. Reed, 404 U.S. 71, 76-77 (1971)).

92 *Id.* at 690-91.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in the time of

Justice Ginsburg was also successful in alerting the Court of the prevalence of traditional female stereotypes and its severe negative impact on society. The Court agreed with Justice Ginsburg and stipulated, "our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[93] The Court also recognized that "[a]s a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes. . . ."[94] In reaching its holding, the Court had incorporated the realization of these gender stereotypes and had given deference to the fact that "women still face pervasive . . . discrimination. . . ."[95]

After reviewing the Court's decision, the most notable discovery would be the Court's agreement that gender-based classification deserved the same strict scrutiny test as race-based classification. Nevertheless, the Court's eagerness over raising the standard of scrutiny was supported by only four Justices — Brennan, Douglas, White, and Marshall.[96] Chief Justice Burger and Justices Stewart, Powell, and Blackmun, although agreeing the military statutes in question were unconstitutional, refused to take the level of scrutiny beyond the one formulated in *Reed*.[97] Justice Rehnquist was the sole dissenter.[98]

Justice Brennan's opinion clearly referred to gender as a suspect class and explicitly agreed with Justice Ginsburg's contentions that "classifications based upon sex . . . are inherently suspect and must therefore be subjected to close judicial scrutiny."[99] Justice Brennan contended that gender, like race "is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual re-

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War or public danger; nor shall any person be subject for the same offense to be put in jeopardy of life or limb; nor shall be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty, or property, without the due process of law, nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

93 *Frontiero*, 411 U.S. at 684.

94 *Id.* at 685.

95 *Id.* at 686.

96 *See id.* at 677.

97 *See id.*

98 *See id.*

99 *Id.* at 682.

sponsibility. . . .'"[100] He found that "sex characteristic[s] frequently bear[] no relation to ability to perform or to contribute to society. As a result, statutory distinctions between sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."[101] He concluded by stating, "classification[s] based upon sex, like classification[s] based upon race . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[102]

However, Justice Brennan could not garner majority support for a heightened level of scrutiny for gender classification. Justice Powell's concurrence reasoned that the Equal Rights Amendment, which had received Congressional approval and was awaiting state ratification at the time *Frontiero* was being decided, should be the determinative factor in deciding the Court's scrutiny standard for gender discrimination cases.[103] He asserted the Court should not preempt the political process or disrespect the legislative methodology and argued that if adopted,

> [The Equal Rights Amendment] will represent the will of the people accomplished in a manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debat[ing] the proposed Amendment.[104]

Ironically, the Equal Rights Amendment, which was the national culmination of the feminist movement and a driving force behind Justice Ginsburg's judicial campaign to increase the scrutiny level of gender- based classification, had in *Frontiero* hindered the feminists' accomplishments since it was the deciding factor in Justice Powell's concurrence not to vote in favor of sex as a suspect criterion.[105]

The standard of scrutiny for sex classification had just fallen short of Justice Ginsburg's desired goal. Although the Court had determined the military statutes to be unconstitutional and made mention of the fact that the scrutiny standard for gender-based

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[100] *Id.* at 686-87 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (holding that Louisiana's workmen's compensation statutes violated the Fourteenth Amendment's Equal Protection Clause, in that the statute relegated dependent, unacknowledged illegitimates to a lesser status in priority)).

[101] *Id.*

[102] *Id.* at 688.

[103] *See* Galotto, *supra* note 52, at 521; *see also* Smith, *supra* note 15, at 1902.

[104] Frontiero v. Richardson, 411 U.S. 677, 692 (1973).

[105] *See id.*

classification could be equated to those used for race-based classification, Justice Ginsburg failed to have a majority of the Court adopt a clear scrutiny standard for declaring sex as inherently suspect. Although the Court's plurality opinion classified gender as a suspect class, the Court still showed signs of inflexibility and resistance towards a heightened level of scrutiny. As a result, Justice Ginsburg had learned that the Court was not yet ready to adopt a level of strict scrutiny and reorganized her judicial strategy to advocate an intermediate level of scrutiny.

C. Craig v. Boren

With *Reed* hinting at a need for a heightened standard of scrutiny and *Frontiero* blazing a path toward strict scrutiny, *Craig v. Boren*[106] was at the time the quintessential authority on the appropriate Supreme Court standard of scrutiny for gender classification. It was *Craig* which became the next foundation for Justice Ginsburg to launch her judicial crusade to persuade the Supreme Court to adopt a heightened level of scrutiny.

The case challenged an Oklahoma statute[107] which permitted 18-year-old women to purchase 3.2% beer (near-beer), but prevented men under the age of 21 from purchasing the beer.[108] Learning from her past experiences before the Supreme Court, Justice Ginsburg decided not to advocate an adoption of strict scrutiny, but rather suggested an intermediate level of scrutiny somewhere in between the rational basis test and the strict scrutiny test.[109] Although the Oklahoma statute in question benefited women, she continued proving that these statutes reflected outdated stereotypes, and albeit benign in nature, ultimately suffocated the women's equality movement.[110]

Craig was a success for Justice Ginsburg since the Court, relying on both *Reed* and *Frontiero*, clearly enunciated a new standard for gender classification — "intermediate scrutiny."[111] This stan-

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106 429 U.S. 190 (1976).

107 *See id.* at 191 n.1. Title 37 of Oklahoma Statute, § 241 provides in pertinent part:

> It shall be 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 percent of alcohol measured by volume and not more than three and two-tenths (3.2) percent of alcohol measured by weight.

Id. Title 37 of Oklahoma Statute § 245 provides in pertinent part: "A 'minor,' for purposes of Section . . . 241 . . . is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years." *Id.*

108 *See id.* at 190.

109 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 355.

110 *See id.*; *see also* Smith, *supra* note 15, at 1904.

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

dard of review is more stringent than the rational basis test, but does not reach the severity of being designated as a suspect class under strict scrutiny.[112] The test requires that "[t]o withstand [a] constitutional challenge, . . . gender must serve important governmental objectives and must be substantially related to [the] achievement of those objectives."[113] More importantly, the burden of proof now resides in the government to justify the means it employed to attain its gender distinct objectives.[114] Consequently, the Court held that "the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving"[115] and held the Oklahoma statute unconstitutional since it was not substantially related to the achievement of the asserted government objective.[116]

The test has been refined over the years, but courts continue to look towards *Craig* as the authority on intermediate scrutiny. It had been the culmination of Justice Ginsburg's relentless efforts to have the court increase its standard of scrutiny for gender-based classification and due to her fastidiously crafted judicial strategy and endless pursuit of her goals, her aspirations finally became a reality. Her accomplishments symbolically came to fruition when the Supreme Court acknowledged in *Craig* that the "[a]nalysis may appropriately begin with . . . *Reed*"[117] and made mention to other "[d]ecisions following *Reed*"[118] such as *Frontiero.* Justice Ginsburg had a significant impact on the Supreme Court's holding in *Craig,* which begs the question, would the Court have decided the case the same way if not for Justice Ginsburg's efforts?

III. JUSTICE RUTH BADER GINSBURG'S ROLE AS A FEDERAL JUDGE: APPELLATE COURT AND SUPREME COURT ACCOMPLISHMENTS

Justice Ginsburg's work with the ACLU gained her national acclaim and elevated the WRP as a leader in the pursuit for gender

112 *See* Paulson, *supra* note 44, at 493; *see also* Julie R. Steiner, *Age classification and the Fourteenth Amendment: Is the* Murgia *Standard too Old to Stand?,* 6 SETON HALL CONST. L.J. 263, 273 (1995) (arguing that the Fourteenth Amendment's standard of scrutiny for gender-based discrimination should be heightened from the lowest level of scrutiny imposed by *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307 (1976), to a level of intermediate scrutiny available under Congress' Age Discrimination in Employment Act of 1967).

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

114 *See* Baugh et al., *supra* note 15, at 26.

115 *Craig,* 429 U.S. at 204.

116 *See id.*

117 *Id.*

118 *Id.* at 198.

equality.[119] In 1980, President Jimmy Carter appointed Justice Ginsburg to the United States Court of Appeals for the District of Columbia Circuit, where she presided for thirteen years.[120] Her record on the bench was extremely conservative, compared to her reputation as a litigator, and most often she adhered to precedent.[121] Despite an uneventful performance on the circuit, her nomination to the Supreme Court by President Clinton in 1993 received overwhelming approval and eventual Senate confirmation by a vote of 96 to 3.[122]

At her confirmation speech, Justice Ginsburg made no prediction of her voting behavior and remarked,

> It would be wrong of me to say or preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.[123]

Justice Ginsburg remained steadfast in her conviction that judicial restraint is of utmost importance and believed "the judiciary was 'third in line' in the Constitution, that judges are to 'secure a steady, upright and impartial administration of the laws' and that they should not reach beyond cases immediately before them to decide other issues."[124] Her term on the Supreme Court had lived up to the claims she made at her confirmation speech specifically in regard to gender discrimination cases. However, most of the majority and concurring opinions she wrote as a Supreme Court Justice barely touched upon gender related issues, thus, averting the opportunity to analyze her voting behavior in her area of specialty.[125]

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119 *See* Gillman & Micheletti, *supra* note 15, at 660.

120 *See id.* at 660-61.

121 *See id.*

122 *See id.* at 663.

The three senators who opposed her nomination were: Jesse Helms (R-NC); Robert C. Smith (R-NH); and Don Nickles (R-OK). Overall, Justice Ginsburg received wide support, and was known as a "consensus" choice by both political parties. The Senate Republican Leader, Robert J. Dole (R-KS), praised the Justice and stated, "[b]y any measure, she is qualified to become the Supreme Court's ninth justice. . . . Some have criticized Judge Ginsburg for being more interested in the fine print rather than the big picture, and for being a legal technician rather than an interpretative philosopher — criticisms that Judge Ginsburg should wear as a badge of honor."

Id. at 663 n.40 (citation omitted).

123 Baugh et al., *supra* note 15, at 8.

124 *Id.*

125 *See id.* at 12.

One of the few opinions written by Justice Ginsburg which touched upon gender-related issues, was *Harris v. Forklift System*,[126] in which the Court unanimously held that in order to prove sexual harassment in the workplace, the plaintiff need not show a serious affect on an employee's psychological well-being or that the employee suffered an injury.[127] Strangely enough, Justice Ginsburg used a footnote to convey a significant point on gender classification rather than incorporating it into the main body of her concurrence.[128] In this footnote she states, "even under the Court's equal protection jurisprudence, which requires 'an exceedingly persuasive justification' for gender-based classification, it remains an open question whether 'classifications based upon gender are inherently suspect.'"[129] Justice Ginsburg might have been hedging on her original belief not to forecast her voting behavior and declaring an invigorated interest in raising the standard of scrutiny, although a footnote was an unusual way of doing so.[130] Whatever the reason, whether she was attempting to take the Court in a new liberal direction toward increased protection against gender discrimination, or whether she was merely providing lip service to women's rights organizations who were critical of her record as a justice, Justice Ginsburg changed the way the Supreme Court dealt with gender-related matters.[131]

IV. *UNITED STATES V. VIRGINIA*

A. Facts

It was the landmark case *United States v. Virginia*,[132] commonly know as the "VMI decision," which presented Justice Ginsburg with the opportunity to write the majority opinion on a case directly related to gender discrimination. She was now given the reins to direct the Court in a direction of gender-based classification. The inherent latitude of a majority opinion allotted Justice Ginsburg

126 114 S. Ct. 367 (1993).

127 *See id.* at 368.

128 *See id.* at 373 n.1 (Ginsburg, J., concurring).

129 *Id.* (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (holding that the Louisiana statute granting the husband the unilateral right to dispose of property jointly owned with his wife without his wife's consent, violated the Equal Protection Clause of the Fourteenth Amendment), and citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (holding that the policy of a state-supported university, which limited its enrollment to females while denying otherwise qualified males the right to enroll, violated the Equal Protection Clause of the Fourteenth Amendment)).

130 *See* Baugh et al., *supra* note 15, at 28.

131 *See id.* at 29.

132 116 S. Ct. 2264 (1996).

the chance to increase the gender scrutiny standard, and both her supporters and critics anxiously awaited the Court's decision.

Before analyzing the Court's holding, it is important to understand the facts. The suit began when a female student from northern Virginia applied to the Virginia Military Institute ("VMI") and was rejected admission solely on the basis of her gender.[133] The United States Justice Department ("DOJ") ordered VMI to admit the female applicant, but when they refused, Richard Thornburgh, the Bush Administration's Attorney General, filed the U.S. government's lawsuit on the student's behalf.[134] The DOJ claimed that since the school was state-supported, its all-male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.[135] In response, VMI defended its all-male admission policy and contended that an all-male military school promotes a legitimate state interest of diversity within Virginia's higher educational system.[136]

VMI, located in Lexington, Virginia, was established by an act of the Virginia State Legislature in 1839 as the Nation's first four-year military college. The school's admission policy since its inception has refused to admit women and remains Virginia's only single-sex public college. VMI's mission is to produce citizen soldiers who are "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, . . . and ready as citizen-soldiers to defend their country in time of national peril."[137]

VMI's unique educational system is unmatched throughout the country.[138] The inability to find a program similar to VMI's intensive adversative training model in the United States, has caused the school to be one of the most sought after military colleges in the nation.[139] VMI's educational curriculum incorporates "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values. . . ."[140] The adversative model seeks to

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133 *See* United States v. Virginia, 766 F. Supp. 1407, 1408 (W.D. Va. 1991).

134 *See id.*; *see also* Katia Hetter, *End of an All-Male Era in a Landmark Decision, the High Court Orders VMI to Let Women Enroll*, U.S. NEWS & WORLD REP., July 8, 1996 at *1, *available in* 1996 WL 7811085 (discussing the VMI decision's impact on other publicly-funded elementary and secondary schools).

135 *See Virginia*, 766 F. Supp. at 1408.

136 *See id.*

137 *Id.* at 1425.

138 *See id.* at 1421.

139 *See id.*

140 *Id.*

"creat[e] doubt about previous beliefs and experiences in order to create a mindset conducive to the values VMI attempts to impart"[141] and has been described as "literally dissect[ing] the young student that comes in there, kind of pull[ing] him apart . . . teach[ing] him to know everything about himself."[142]

The adversative model has four distinct elements absent from any other educational institution, all of which supplement each other to form the complete "VMI experience"— (1) the Rat Line, (2) the Class System, (3) the Dyke System, and (4) Barrack Life.[143] The Fourth Circuit also mentioned the Honor Code and ROTC as two other factors to consider, but these programs are not particular to VMI.[144] The following four sub-sections briefly describe VMI's unique attributes.

1. The Rat Line

All entering students at VMI are called rats because the rat is "probably the lowest animal on earth" and for the first seven months of college, endure rigorous mental and physical torment.[145] The Rat Line is an extreme form of educating new cadets by rewarding behavior consistent with VMI's objective and values, while punishing any behavior that detracts from it.[146] The collective nature of the system requires each "rat" to be responsible for their fellow "brother rat," thus, building class solidarity, camaraderie, team work and more importantly, individual responsibility.[147] The Rat Line includes "indoctrination, egalitarian treatment, rituals (such as walking the Rat Line), minute regulation of individual behavior, frequent punishments, and use of privileges to support desired behaviors."[148] Physical exercises are also an important aspect of the Rat Line's boot camp-like atmosphere, and includes for example "stoop runs, fifteen-minute running and calisthenic events, rifle runs, training marches, and the like. . . ."[149] The Rat Line, as described in VMI's catalog, is best summed up as being "equal and impersonal in its application, tending to remove wealth and former station in life as factors in one's standing as a cadet,

141 *Id.*
142 *Id.*
143 *See id.* at 1421-24.
144 *See id.* at 1423-24.
145 *Id.* at 1422.
146 *See id.*
147 *See id.*
148 *Id.*
149 *Id.*

and ensuring equal opportunity for all to advance by personal effort and enjoy those returns that are earned."[150]

2. The Class System

"After the Rat Line strips away [the] cadets' old values and behaviors, [through peer pressure,] the class system teaches and reinforces . . . the values and behaviors that VMI exists to promote."[151] It is a "system of privileges and responsibilities aimed at developing the character and leadership of cadets" while delegating to each of the remaining VMI classes (sophomores, juniors, and seniors) specific tasks and duties.[152] The catalyst for the program's success is the peer involvement since "[t]he degree and harshness of the regulations . . . is possible only through a peer system. Professionals working in the same environment could not duplicate the level of stresses without adverse consequences."[153]

3. The Dyke System

Closely linked to the Class System is the Dyke System, which is the "arrangement by which each rat is assigned a first classman as a mentor, called a 'dyke' . . . provid[ing] some relief from the extreme stress of the rat line."[154] This component of VMI training creates a support system built upon loyalty and trust and provides for "cross-class bonding."[155] The dyke becomes the rat's mentor, a sort of "big brother" drawing on his own past experiences of VMI's adversative training to help guide and lead the rat through VMI's punishing methodology.

4. Barrack Life

"The most important aspects of the VMI educational experience occur in the barracks."[156] It is witness to the culmination of the entire adversative training model and is the situs of the inspections, the rat-dyke relationship, administration of the class system, administration of the honor system, and much of the new cadet training, or rat line. The barracks are designed to reduce all cadets

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150 Jon A. Soderberg, *The Virginia Military Institute and the Equal Protection Clause: A Factual and Legal Introduction*, 50 WASH. & LEE L. REV. 15, 16 (1993) (presenting a factual and legal background of the Virginia Military Institute following the Fourth Circuit Court's first ruling, circa 1992).

151 United States v. Virginia, 766 F. Supp. 1407, 1423 (W.D. Va.).

152 *Id.* at 1422-23.

153 *Id.* at 1423.

154 *Id.*

155 *Id.*

156 *Id.*

to the lowest common denominator, from which the new cadet training system, class system, honor code, military system and academic system year-by-year builds the values, attitudes and behaviors expected from VMI graduates.[157]

The barracks themselves are stark and unattractive with poor ventilation and unappealing furniture, conditions purposely designed to induce stress and intermingling of cadets.[158] There are no locks on the doors, no windows in the barracks' doors, no window shades or curtains, and the rooms open up into large corridors leading to gang bathrooms, making privacy impossible and reminding each cadet they are never free from scrutiny or minute regulation of behavior.[159] The significance of the barracks life can be understood by analogizing that "a VMI graduate without the barrack experience would be equivalent to dressing someone up in the uniform of a Marine without first sending them to boot camp."[160]

It should now be clear why VMI's adversative training method is unmatched in the Nation. It is this uniqueness which makes VMI a so-called "diamond in the rough" among comparable military institutions, and has set the stage for what appears to be a prolonged and bitter court battle. The cadets of VMI, whom during the American Civil War had challenged Union troops at New Market, Virginia, had now begun their own battle.[161] Their Civil War experience was met with defeat and fell witness to the Union's ultimate victory and eventual adoption of the Fourteenth Amendment.[162] However, the cadets were once again called upon to battle the federal government, and although the confrontation took place in a different forum, the same emotions and desire seen on the battlefield close to one-hundred and thirty years ago, was ubiquitously felt in the courtroom.

B. District Court Level

In *United States v. Virginia*,[163] Judge Kiser of the Western District of Virginia tackled the issue of "whether the State's decision to

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157 *See id.*
158 *See id.* at 1424.
159 *See id.*
160 *Id.* at 1423.
161 *See* Brian S. Yablonski, *Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute*, 47 U. MIAMI L. REV., 1450-51 (1993) (analyzing the case of the Virginia Military Institute with regard to the Supreme Court's decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982)).
162 *See id.*
163 766 F. Supp. 1407 (W.D. Va. 1991).

confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal."[164] In reaching his decision, Judge Kiser implemented the intermediate scrutiny test established in *Craig* by requiring a party seeking to uphold a statute that classifies individuals on the basis of their gender to show an important governmental objective reached by substantially related means.[165] The court conceded that the test must be applied "free of fixed notions concerning the roles and abilities of males and females [and c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."[166] Judge Kiser concluded that VMI's all-male admission policy did not violate the Equal Protection Clause of the Fourteenth Amendment and maintained that VMI's objective of fostering an all- male military school promoted a legitimate state interest of diversity within Virginia's higher educational system and had been achieved by substantially related means.[167]

Judge Kiser explained that VMI's all-male admission policy satisfied the intermediate scrutiny test because "diversity in education has been recognized both judicially and by education experts as being a legitimate objective [and t]he sole way to attain single-gender diversity is to maintain a policy of admitting only one gender to an institution."[168] The court was presented with a myriad of exceedingly persuasive evidence supporting VMI's all-male admission policy and affirming the advantages of a single-sex education.[169] Testimony from expert witnesses in the field of education combined with the presentation and summation of empirical studies concerning the attributes of a single-sex education, concluded that the experience was a beneficial one and had a positive impact on post-graduate accomplishments.[170] As a result, the court concluded VMI's decision to maintain an all-male institution was fully justified and the only obvious means of attaining this goal was "to exclude women from the all-male institution — VMI."[171]

In the same vein, Judge Kiser found that converting VMI into a coeducational institution would significantly alter the unique ex-

164 *Id.* at 1410.
165 *See id.*
166 *Id.* at 1410.
167 *See id.* at 1415.
168 *Id.* at 1411.
169 *See id.* at 1411-12.
170 *See id.*
171 *Id.* at 1415.

perience and environment that VMI had sought to preserve.[172] He expected changes in educational instruction, physical training, and living conditions to "alter the adversative environment that VMI students must now endure."[173] VMI would be forced to modify its infamously known adversative training method and "lose one important part of the VMI system of education."[174] Judge Kiser cited expert testimony to support the fact "that if VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether, and adopt a system that provides more nurturing and support for the students."[175] Ironically, "[e]ven if the female could physically and psychologically undergo the rigors of the life of a male cadet, her introduction into the process would change it. Thus, the very experience she sought would no longer be available."[176]

Judge Kiser concluded that:

> [B]oth VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system, and that excluding women is substantially related to this mission. The single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women. VMI has, therefore, met its burden . . . of showing a substantial relationship between the single-sex admission policy and achievements of the Commonwealth's objective of educational diversity.[177]

The final paragraphs of Judge Kiser's opinion, were in essence, predictions of what was to come at the Appellate and Supreme Court levels. He wrote, "it seems to me that the criticism which might be directed toward Virginia's higher educational policy is not that it maintains VMI as an all-male institution, but rather that it fails to maintain at least one all-female institution. But this issue is not before the court."[178] Judge Kiser's final thoughts leave the reader with the unsettling feeling that the very issue he had forecast would eventually reemerge.

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172 *See id.* at 1412-13.
173 *Id.*
174 *Id.* at 1413.
175 *Id.*
176 *Id.* at 1414.
177 *Id.* at 1413.
178 *Id.* at 1414.

C. Appellate Court Level

In fact, the case was appealed to the Fourth Circuit,[179] where Judge Niemeyer, writing for the court, implemented the intermediate scrutiny test and concurred with Judge Kiser's findings that Virginia made an adequate showing of the benefits of a single-gender education.[180] However, the court remanded the case to require Virginia to explain how an all-male institution and not an all-female institution supported an important government objective.[181] On appeal, the United States continued to maintain that diversifying Virginia's educational system by solely offering an all-male institution "is not a legitimate state objective and that the Commonwealth and VMI has not established a sufficient justification for VMI's male-only admission policy."[182]

The Appellate Court, to the United States' dismay, stated that it "accepts the district court's factual determinations that VMI's unique methodology justifies a single-gender policy and material aspects of its essentially holistic system would be substantially changed by coeducation."[183] Similarly, the Appellate Court feared as the District Court had, that coeducation would drastically alter VMI's adversative training program and create a perception of unequal treatment among cadets — leading to jealousy, resentment, stress, confrontation, and distraction.[184] This egalitarian philosophy, a cornerstone of VMI's training, would be substantially affected, if not completely dismantled, by the influx of female students.[185] As a result, the Appellate Court endorsed the District Court's conclusions that VMI's mission could be accomplished only in a single-gender environment since a coeducational program would offer "neither males nor females the VMI education that now exist."[186] The Appellate Court referred to the situation as a "Catch-22" since the very "VMI experience" women desired, would no longer persist after their admission into the VMI program.[187]

However, the Appellate Court agreed with the United States' accusations that while both parties acknowledge the positive aspects of a single-sex education, the Commonwealth of Virginia had

179 *See* United States v. Virginia, 976 F.2d 890 (4th Cir. 1992).
180 *See id.*
181 *See id.*
182 *Id.* at 892.
183 *Id.*
184 *See id.* at 896.
185 *See id.*
186 *Id.*
187 *See id.* at 897.

not advanced any state policy justifying affording VMI's unique program exclusively to men and not women.[188] The Appellate Court found that "[i]t is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI."[189] The court therefore concluded that "while the data support a pedagogical justification for a single-sex education, they do not materially favor either sex."[190]

Consequently, the Fourth Circuit stated that Virginia had "not adequately explained how the maintenance of one single-gender institution gives effect to, or establishes the existence of, the governmental objective advanced to support VMI's [all-male] admission policy, a desire for educational diversity."[191] Therefore, the court vacated the judgment of the district court and remanded the case to the district court to require Virginia to "formulate, adopt, and implement a plan that conforms to the principles of equal protection. . . ."[192] The court concluded by suggesting three possible options for the Commonwealth that are consistent with the Equal Protection Clause of the Fourteenth Amendment: (i) "It might properly decide to admit women to VMI and adjust the program to implement that choice[;] or [(ii) I]t might establish parallel institutions or parallel programs[;] or [(iii) I]t might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution."[193] Although the court could not decide the Commonwealth's next choice of action, it seemed the VMI controversy was far from over.

D. Proposed Remedial Plan

The Commonwealth followed the Appellate Court's suggestion and established a parallel program for women located at Mary Baldwin College ("MBC") in Staunton, Virginia.[194] The Virginia Women's Institute for Leadership ("VWIL"), based on the VMI program in Lexington, is designed to be a publicly supported, four-year, single-sex education program incorporating similar aspects of

188 *See id.* at 892.
189 *Id.* at 897.
190 *Id.*
191 *Id.* at 899.
192 *Id.* at 892.
193 *Id.* at 900.
194 *See* Julie M. Amstein, *United States v. Virginia: The Case of Coeducation at Virginia Military Institute*, 3 AM. U. J. GENDER & L. 69, 94 (1994) (focusing on the development of equal protection in the realm of gender and education).

VMI's adversative training method and overall philosophy.[195] VWIL's mission is almost identical to VMI's, which 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."[196]

Supplemented with leadership externships and seminars, the admission standards and educational curriculum for VWIL would be the same as the current MBC requirements.[197] However, MBC's failure to provide an engineering degree along with other advanced math and physics course will require VWIL students to take additional courses at another institution in order to obtain the same degree currently offered at VMI.[198]

VWIL's ROTC program is the remedial plan's feature which most resembles VMI. All students are required to take four years of ROTC training conducted by VMI professors.[199] The students will comprise a corps of cadets, hold military rank, wear uniforms, and drill in ROTC as part of the Virginia Corps of Cadets.[200] However, unlike VMI students, they will not be required to wear uniforms outside of their involvement in the ROTC and Virginia Corps of Cadets, eat meals together, continue mentoring by an upper-class members beyond their freshmen year, or be required to live together in MBC's school residence halls beyond their sophomore year.[201]

Moreover, there are significant differences in VWIL's methodology specifically regarding how the program envisions the needs of female students.[202] VMI's adversative model was deemed inappropriate for educating and training most women for leadership roles and was substituted with a more holistic atmosphere.[203] Rather than the doubting process employed at VMI, VWIL is based on a cooperative method designed to reinforce self-esteem.[204] The program is based on nurturing a collective environment with techniques designed to promote self-esteem.[205] VWIL's exclusion of

195 *See* United States v. Virginia, 852 F. Supp. 471, 494 (W.D. Va. 1994).
196 *Id.*
197 *See id.*
198 *See id.*
199 *See id.*
200 *See id.* at 495.
201 *See id.* at 495-98.
202 *See id.* at 476.
203 *See id.*
204 *See id.*
205 *See id.*

VMI's Rat Line and Dyke System is consistent with this philosophy since these methods are believed to be counter-productive for most college-aged women, who are perceived to be less confident than college-age men.[206]

E. District Court Level — Review of the Virginia Women's Institute for Leadership Proposal

Once again, Judge Kiser was confronted with the VMI case.[207] This time, he focused on whether Virginia's remedial plan satisfied the requirements set out in Judge Niemeyer's opinion. The United States contended the remedial plan must be in all respects equivalent to the VMI program and even a minuscule deviation would be unconstitutional.[208] Virginia on the other hand, argued that the Fourth Circuit merely required that it provide a program that offered the same comparable outcome for women which men receive at VMI and the methodology used to obtain this result need not be the same as the one used as VMI.[209] Judge Kiser determined that:

> If the United States' position is the correct one, then the Commonwealth's proposed plan must fail because the Plan differs substantially from the VMI program. If the Commonwealth's position is the correct one, however, then an analysis of its proposed plan is necessary to determine whether it meets both the requirements of the Fourth Circuit's mandate and the requirements of the Equal Protection Clause.[210]

Judge Kiser cautioned that his opinion must be read in light of the Fourth Circuit's justification of single-sex education and should attempt to accurately interpret the meaning behind the Appellate Court's suggestions to the Commonwealth.[211] He took Virginia's position and immediately removed the United States' "separate but equal" argument from influencing his opinion.[212] Judge Kiser acknowledged the fact that the "VWIL program cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years"[213] and assumed the "Fourth Circuit [would] not assign the Commonwealth an impossible task

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206 *See id.*
207 *See id.*
208 *See id.* at 473.
209 *See id.*
210 *Id.*
211 *See id.* at 473-74.
212 *See id.* at 475.
213 *Id.*

when it suggested that the Commonwealth was free to establish 'parallel programs' . . . [since this] was requiring an exercise in futility."[214] Therefore, he concluded that the "separate but equal" concerns were not meant to be litigated on remand. Similarly, the court turned to the Fourth Circuit's decision in *Faulkner v. Jones*[215] to assist the court in deciphering VMI's remanded Appellate Court instructions. In *Faulkner*, the court alludes to the Appellate Court's VMI decision noting "[t]he order in VMI did not, however, direct that any parallel program which the state might choose to provide be identical for both men and women."[216] The *Faulkner* court offered guidance in reviewing proposed remedial plans by alerting the court that "distinctions in any separate facilities provided for males or females may be based on real differences between the sexes . . . so long as the distinctions are not based on stereotyped or generalized perceptions or differences."[217]

Judge Kiser was then presented with the VWIL proposal[218] and specifically analyzed the similarities and differences between VMI's and VWIL's programs.[219] Given the vast amount of persuasive expert testimony approving the VWIL program and the absence of any contradictory evidence, the court found that "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping."[220] The court went on to affirm *Faulkner's* insight, that "the controlling legal principles in this case do not require the Commonwealth to provide a mirror image of VMI for women. Rather, it is sufficient that the Commonwealth provide an all-female program that will achieve substantially similar outcomes . . . [and that] VWIL satisfies the Fourth Circuit's requirement[s]."[221]

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214 *Id.*

215 10 F.3d 226 (4th Cir. 1993) (finding that irreparable injury to a female student denied admission to South Carolina's Citadel based solely on gender, outweighed any minimal injury to the college caused by the presence of a female student). The Fourth Circuit Court affirmed the District Court's preliminary injunction ordering the female student admitted pending a decision on the equal protection claim. *See id.* Litigation in the Citadel case had been put on hold pending a decision in the VMI case.

216 *Id.* at 232.

217 *Id.*

218 *See infra* Part IV.D (discussing Virginia's VWIL proposal).

219 *See* United States v. Virginia, 852 F. Supp. 471, 476-81 (W.D. Va. 1994).

220 *Id.* 481.

221 *Id.*

F. Appellate Court Level — Review of the Virginia Women's Institute for Leadership Proposal

The United States appealed once again to the Fourth Circuit in an attempt to have Virginia's proposed VWIL program held unconstitutional.[222] Judge Niemeyer, who appeared to favor both parties in his original Appellate Court opinion, applied what he called "a heightened intermediate standard of scrutiny test specifically tailored to the circumstances" to find VWIL's program "substantially comparable" to VMI and affirmed its constitutionality.[223] The parties had offered the same arguments before the court as they had since the dispute's four year-old inception.[224] The United States contended VWIL's program must be equivalent to VMI in every aspect in order to pass constitutional muster;[225] whereas, Virginia argued its policy and subsequent parallel program had received District Court approval.[226]

Once more, the United States' argument was rejected by the court.[227] In coming to this conclusion, the court added an unprecedented requirement to *Craig*'s intermediate level of scrutiny.[228] The court believed that this was necessary since the classification in question was not directed at men or women per se, but rather, at the homogeneity of gender.[229] The court argued that once an important government objective is satisfied, which it was in this case, "the classification by gender is by definition necessary for accomplishing the objective and might thereby bypass any equal protection scrutiny."[230] In other words, if an important government objective is based on a discriminatory policy, the only obvious means of maintaining this policy is to discriminate; however, this "approved" discriminatory policy would circumvent an Equal Protection Clause review of whether the discriminatory practice itself is constitutional.[231] Therefore, the court "must take additional

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222 *See* United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995).

223 David M. Henry, *VMI Faces Another Tough Battle in the Equal Protection War as U.S. Challenges School's Men-Only Policy*, WEST'S LEGAL NEWS 2064, Apr. 16, 1996, at *10, *available in* 1996 WL 259760 (presenting a factual and legal background of the Virginia Military Institute following oral arguments before the Supreme Court, circa 1996).

224 *See* discussion *infra* Part IV.B, C, E (chronicling the case's progession from the district court, to the appellate court, and the remand to the district court).

225 *See Virginia*, 44 F.3d at 1235.

226 *See id.* at 1232-33.

227 *See id.* at 1235-37.

228 *See id.* at 1237.

229 *See id.*

230 *Id.*

231 *See id.*

steps of carefully weighing the alternatives available to members of each gender denied benefits by the classification."[232]

The court noted that:

> To achieve the equality of treatment demanded by the Equal Protection Clause, the alternatives left available to each gender by a classification based on homogeneity of gender need not be the same, but they must be substantively comparable so that, in the end, we cannot conclude that the value of the benefits provided by the state to one gender tends, by comparison to the benefits provided to the other, to lessen the dignity, respect, or societal regard of the other gender. We will call this third step an inquiry into the substantive comparability of the mutually exclusive programs provided to men and women.[233]

As a result, VWIL's program was reviewed under this newly contrived scrutiny test. In reviewing the matter of single-gender education, the court gave deference to the state's legislation "so long as the purpose is not pernicious and does not violate traditional notions of the role of government" while remaining cognizant of the fact that education is perhaps "the most important functions of state and local governments."[234] The court affirmed its original finding of a legitimate state interest and stressed the benefits of single-gender education.[235] The court concluded that "the purpose of providing a single-gender education is not pernicious and falls within the range of the traditional governmental objective of providing citizens higher education. Accordingly, we conclude that Virginia has met the first part of the intermediate scrutiny test."[236]

Similarly, the court concluded that the only way to realize the benefits of a single-gender education "is to [simply] limit admission to one gender."[237] The court confirmed that to preserve the benefits of single-gender education, "VMI and Mary Baldwin College would of necessity exclude persons of the opposite gender, men at Mary Baldwin College and women at VMI. No more direct means could be adopted to accomplish the state's objective. . . ."[238]

More importantly, the court went on to compare the two programs under the "substantive comparability" microscope.[239] The

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232 *Id.*
233 *Id.*
234 *Id.*
235 *See id.* at 1239.
236 *Id.*
237 *Id.*
238 *Id.*
239 *See id.* at 1240.

court found that "if the state desires to offer the benefits of single-gender education to its citizens, the state must mitigate the effects of the resulting gender classification by affording to both genders benefits comparable in substance, but not in form and detail."[240] VMI and VWIL both seek to achieve the same goals and although "[t]he mechanism for achieving the goals differ — VMI utilizes an adversative and pervasive military regimen and VWIL propos[ed] to utilize a structured environment reinforced by some military training and a concentration on leadership development — . . . the differences [are] attributable to a professional judgment of how best to provide the same opportunity."[241] In order to justify these dissimilarities, the court turned to educational experts and prevailing professional opinions, all of which supported the benefits of single-gender education and confirmed the fact that men and women respond differently to various types of training methods.[242] Educational experts from the Commonwealth testified that women may not respond similarly and that if the state were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work.[243] The United States did not offer sufficient evidence to lead us to conclude that the Commonwealth's expert testimony was clearly erroneous in this regard.[244]

The court concluded that the programs offered at both institutions "can be substantively comparable if VWIL is undertaken with a persistently high level of commitment by Virginia and that men and women mutually excluded by the two programs will not be denied the opportunity for an undergraduate education with discipline and special training in leadership."[245] To ensure VWIL will satisfy the Appellate Court's substantively comparable requirement, Judge Niemeyer closed his opinion with four instructions for the District Court that:

> (1) the program is headed by a well-qualified, motivated administrator, attracted by a level of compensation suited for the position; (2) the program is well-promoted to potentially qualified candidates; (3) the program includes a commitment for adequate funding by the state for the near term; and (4) the program includes a mechanism for continuing review by qualified

240 *Id.*
241 *Id.* at 1240-41.
242 *See id.* at 1234.
243 *See id.*
244 *See id.*
245 *Id.*

> professional educators so that its elements may be adjusted as necessary to keep the program aimed not only at providing a quality bachelor's degrees but also at affording the additional element of taught discipline and leadership training for women.[246]

G. Supreme Court Level

A case which had begun five years ago,[247] which had been litigated four times,[248] and had enraptured the entire Commonwealth of Virginia, was appealed to the United States Supreme Court in *United States v. Virginia*.[249] The Supreme Court was now granted the opportunity to significantly alter the Nation's policies concerning gender-related issues. For the Court, its decision could directly affect single-gender schools and the military's policy and philosophy on incorporating females into military service. Justice Ginsburg, who was given the honor of writing the majority opinion, could continue her crusade in persuading the Supreme Court to heighten the scrutiny standard for gender-based classification. More importantly, this was Justice Ginsburg's first opportunity as a Supreme Court justice to write an opinion having a direct impact on gender discrimination.[250]

Proceeding in its usual manner, the Supreme Court reviewed the District Court's and Appellate Court's holdings by concentrating most heavily on the proposed VWIL program.[251] However, this Court, unlike Judge Kiser's District Court and Judge Niemeyer's Appellate Court, found in favor of the United States' argument that VMI's all-male admission policy was unconstitutional and violated the Equal Protection Clause of the Fourteenth Amendment.[252] Justice Ginsburg's analysis began with clarifying the appropriate scrutiny standard.[253] The intermediate scrutiny standard established in *Craig*; which determined that "[t]o withstand [a] constitutional challenge, . . . gender [classification] must serve important governmental objectives and must be substantially re-

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246 *Id.* at 1242.

247 *See* discussion *infra* Part IV.A (summarizing the case's origin and material facts).

248 *See* discussion *infra* Part IV.A, B, C, E, F (reciting the cases material facts and discussing the initial district court action, the appeal, the remand to the district court, and the second appeal).

249 116 S. Ct. 2264 (1996).

250 *See* Baugh et al., *supra* note 15, at 12-13 ("Eight of the nine majority . . . opinions assigned to Justice Ginsburg [during her initial term] involved business related issues or criminal matters. Ginsburg's ninth majority opinion came in a civil rights case").

251 *See Virginia*, 116 S. Ct. at 2267-69, 2271-74.

252 *See id.* at 2269.

253 *See id.* at 2274.

lated to [the] achievement of those objectives,"[254] has been modified over the years. The Supreme Court had heightened this standard by placing the burden of justification on the proponent of the gender discriminatory practice and required this party to demonstrate an "exceedingly persuasive justification" for the action.[255] As a result, measuring VMI's all-male admission policy against this standard of review compelled the Court to conclude that "Virginia has shown no 'exceedingly persuasive justification' for excluding all women from . . . VMI."[256]

Justice Ginsburg's opinion went on to refute Virginia's "advancing state policy" arguments.[257] The Commonwealth maintained that single-gender education provided significant benefits and diversified Virginia's educational system, the latter of which had been deemed an important governmental objective by both the District and Appellate Courts.[258] Although the Supreme Court acknowledged the expert testimony supporting single-gender education and the positives aspects of diversification in Virginia's educational system, it disputed the presumption that this justified an all-male admission policy at the expense of an all-female one.[259] The Court noted that:

> Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the State. In cases of this genre, our precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically. . . .[260]

The Court emphasized the lack of priority given to diversification by the Commonwealth in designing the state's overall educational system.[261] The Supreme Court mentioned that "[n]either recent nor distant history bears out Virginia's alleged pursuit of

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254 Craig v. Boren, 429 U.S. 190, 197 (1976).

255 *See Virginia*, 116 S. Ct. at 2274 (citing J.E.B. v. Alabama ex rel. T. B., 511 U.S. 127, 136-37, (1994) (finding intentional discrimination on the basis of gender by state actors in use of peremptory strikes in jury selection to violate the Equal Protection Clause of the Fourteenth Amendment)); *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). Justice Ginsburg was not directly involved with these two cases which is why they were not discussed in Part II of this note. Justice Ginsburg was residing on the United States Court of Appeals for the District of Columbia Circuit at the time of *Mississippi Univ. for Women v. Hogan*; and in *J.E.B. v. Alabama ex rel. T.B.*, she merely joined Justice Blackmun's majority opinion.

256 *Virginia*, 116 S. Ct. at 2276.

257 *See id.* at 2276-79.

258 *See id.* at 2276.

259 *See id.* at 2277.

260 *Id.*

261 *See id.*

diversity through single-sex educational options."[262] Virginia's historical record is complete with examples portraying the state's interest for all-female schools as disgraceful.[263] The Commonwealth would explain the absence of public single-gender educational institutions for women as a "historical anomaly, but the historical record indicates action more deliberate than anomalous: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation."[264]

The Fourth Circuit's question as to "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions"[265] remained a prominent theme throughout the Court's analysis. The Court found VMI's all-male admission policy to be inconsistent with a legitimate educational purpose and in response concluded that there is "no persuasive evidence in this record that VMI's male-only admission policy 'is in furtherance of a state policy of 'diversity.'"[266]

The "Catch-22" argument that admitting women into VMI would radically modify the very adversative training method they desire was the next argument tackled by the Court.[267] Despite the expert testimony accepted by both the District and Appellate Courts that coeducation would materially affect unique aspects of the VMI methodology, it was also undisputed that the adversative training could be beneficial to women and that some women might specifically seek this type of educational environment and excel under these conditions.[268] Although these assumptions could not be proven unless women were actually admitted into VMI, the Court was still faced with the question of "whether the State can constitutionally deny women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."[269] The Court believed that the "notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophecies.'"[270]

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262 *Id.*
263 *See id.* 2277-78.
264 *Id.* at 2278.
265 *Id.* at 2279.
266 *Id.* (quoting United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992)).
267 *See id.* at 2279-82.
268 *See id.* at 2279.
269 *Id.* at 2280.
270 *Id.* (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982)).

The Court maintained that VMI's mission could certainly accommodate women and Virginia "has fallen far short of establishing the 'exceedingly persuasive justification' that must be the solid base for any gender-defined classification."[271]

The Supreme Court then reviewed the Commonwealth's VWIL proposal and the Fourth Circuit's so-called "sufficiently comparable test."[272] Supreme Court precedent has stated that a remedial decree "must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination."[273] The Commonwealth chose to leave VMI untouched but created a parallel program for women which the Supreme Court described as "different in kind from VMI and unequal in tangible and intangible facilities."[274] Virginia defended its argument that VWIL's program was parallel to VMI's and both followed the same mission of producing civilian soldiers and would eventually lead to the same result.[275]

However, the Supreme Court did not agree with Virginia's argument and found numerous inequalities between the two programs. Most dramatically was VWIL's inability to offer women the same military training reminiscent of VMI's adversative method.[276] Virginia defended VWIL's design by characterizing "these methodological differences a[s] justified pedagogically, based on important differences between men and women in learning developmental needs, psychological and sociological differences [which] Virginia describes as real and not stereotypes."[277] The Court countered by concluding that this suit was instituted on behalf of those women who want rigorous military experience, to pursue military careers, and can succeed under the adversative method, and "it is for them that a remedy must be crafted, a remedy that will end their exclusion from a state-supported educational opportunity for which they are fit. . . ."[278]

The Court criticized the differences between the programs and determined that VWIL had not qualified as VMI's equal.[279]

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271 *Id.* at 2282 (citing *Mississippi Univ. for Women*, 458 U.S. at 731 (1982)).

272 *See id.* at 2282-87.

273 *Id.* at 2282 (citing Milliken v. Bradley, 433 U.S. 267, 280 (1977) (holding, *inter alia*, that the United States District Court for the Eastern District of Michigan did not abuse its discretion in approving remedial educational measures)).

274 *Id.*

275 *See id.* at 2283.

276 *See id.*

277 *Id.*

278 *Id.* at 2284.

279 *See id.*

> VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network . . . Virginia, in sum, while maintaining VMI for men only, has failed to provide any comparable single-gender institution. Instead the Commonwealth has created a . . . 'pale shadow' of VMI. . . .[280]

Likewise, the Fourth Circuit's "substantive comparability" was deemed to have unjustly displaced the Supreme Court's appropriate scrutiny standard and to have "erred in exposing Virginia's VWIL plan to a deferential analysis, for all gender-based classification today warrants heightened scrutiny."[281] The Appellate Court should have determined whether the Commonwealth's proposal had placed the women who were denied admission to VMI in the same "position they would have occupied in the absence of discrimination."[282] The Court therefore concluded that Virginia's remedial plan simply did not muster an "exceedingly persuasive justification" to allow VMI's all-male admission policy to continue[283] and the case was "remanded for further proceedings consistent with this opinion."[284]

V. Majority Opinion Analysis: An Evaluation of Justice Ginsburg's Performance

As previously mentioned, until the VMI decision, Justice Ginsburg's performance as a federal judge had been characterized as lackluster at best.[285] Her thirteen year tenure as an Appellate Court justice combined with her three years serving as a current Supreme Court justice, lacked any significant achievements in the field of gender-related issues. Her judicial record concerning gender discrimination cases was extremely scarce with only a brief whisper of insight into her personal and judicial views on gender classification being found in a footnote of a concurring opinion.[286] Some might justify the absence of gender-related opinions by

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280 *Id.* at 2284-85 (citing United States v. Virginia, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting)).

281 *Id.* at 2286.

282 *Id.*

283 *See id.* at 2286-87.

284 *Id.* at 2287.

285 *See* discussion *infra* Part III (evaluating Justice Ginsburg's past judicial performance).

286 *See* Harris v. Forklift System, 114 S. Ct. 367, 373 n.1 (1993) (Ginsburg, J., concurring) (holding that in order to prove sexual harassment in the workplace, the plaintiff need not show a serious affect on an employee's psychological well-being, or that the employee suffered an injury); *see also* discussion *infra* Part III (evaluating Jutice Ginsburg's past judicial performance).

pointing to the fact that the majority of cases argued before Justice Ginsburg were simply unrelated to gender, while others might hypothesize a possible willingness on her behalf to respectfully concede the writing of opinions to her colleagues. Similarly, some might argue that her position as a justice and the inherent nature of the court system at both the Appellate and Supreme Court levels prevent her from specifically choosing the gender-related cases she was accustomed to and most noted for while working for the ACLU.[287] However, whatever the reasons behind Justice Ginsburg's behavior, the unfortunate realization was that her judicial achievements appeared gender-truant.

It is for this reason that *United States v. Virginia*[288] was not only a landmark case for gender-based classification, but was, strangely enough, Justice Ginsburg's first major case directly involving gender discrimination.[289] Justice Ginsburg herself, for the first time throughout her sixteen year career as a judge, was given an opportunity to write the majority opinion on a case directly concerning gender discrimination.[290] More importantly, this was the first occasion to observe Justice Ginsburg's Supreme Court perspective on gender-based classification and both her critics and supporters were thankful for this long awaited opportunity. The question which anxiously remained to be answered was whether Justice Ginsburg's VMI decision was consistent with her attempt to heighten the standard of scrutiny for gender-based classification? It would appear the answer is yes.

A. An "Exceedingly Persuasive Justification" Requirement

Justice Ginsburg's prelude to her VMI decision came with the infamous *Harris v. Forklift System*[291] footnote, which stated, "even under the Court's equal protection jurisprudence, which requires 'an exceedingly persuasive justification' for gender-based classification, it remains an open question whether classification based upon gender are inherently suspect."[292] This "inherently suspect" terminology was reminiscent of the strict scrutiny which the Supreme Court currently reserves for race-based classification, but

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287 *See* Duren v. Missouri, 439 U.S. 357 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Edwards v. Healy, 421 U.S. 772 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

288 116 S. Ct. 2264 (1996).

289 *See* Baugh et al., *supra* note 15, at 12.

290 *See id.*

291 114 S. Ct. 367, 373 n.1 (1993) (Ginsburg, J., concurring).

292 *Id.* at 373 n.1 (1993) (Ginsburg, J., concurring).

nevertheless, has always flirted with an application to gender-based classification.[293] However, Justice Ginsburg's VMI decision, riding on the coat-tails of her ACLU accomplishments and her *Harris* footnote, was aimed at one single goal — to make this flirtation a reality. Even the DOJ, in an uncharacteristic gesture, had formally requested the Supreme Court to apply the strict scrutiny test to the VMI suit.[294] Although Justice Ginsburg had not followed the DOJ's recommendation of providing "as much Constitutional protection for women as minorities,"[295] she had taken their suggestion into consideration. In concluding that VMI's all-male admission policy was unconstitutional, Justice Ginsburg had transformed intermediate scrutiny into "skeptical scrutiny" as she coined it,[296] and required an "exceedingly persuasive" justification for gender-based classification while placing the burden of justification solely on the states.[297] More specifically, justification would not be found persuasive if it relied on "overbroad generalizations about the different talents, capacities, or preferences of males and females."[298]

The decision was welcomed with excitement and applauded with praise and accolades. Janet Reno, the Clinton Administration's Attorney General, was quick to comment, "The Supreme Court overwhelmingly has given life to the promise in the Constitution that all deserve an equal shot at educational opportunity."[299] Judith Lichtman, president of the Women's Legal Defense Fund echoed the praises of many women's rights litigators and remarked: "There was a murkiness, a lack of clarity, within the federal system on this. By clarifying it and putting it into the historical context of Supreme Court law, she has made it the very strong standard we believed it to be."[300] Similarly, Janet Gallagher, head of the ACLU's Women's Rights Project described the standard as one "with teeth" and commended Justice Ginsburg's aggressive behavior in demanding more scrutiny.[301]

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293 *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

294 *See* Joan Biskupic, *Supreme Court Invalidates Exclusion of Women by VMI*, WASH. POST, June 27, 1996, at A1 (analyzing the VMI decision paying particular credence to Justice Ginsburg's majority opinion).

295 *Strong Statement on Women's Rights*, ST. LOUIS POST-DISPATCH, June 28, 1996, at 6B (applauding the Supreme's Court's VMI decision and Justice Ginsburg's forceful, but eloquent, majority opinion).

296 *See* United States v. Virginia, 116 S. Ct. 2264, 2274 (1996).

297 *See* Marcia Coyle, *High Court Goes for 'Skeptical' Scrutiny on Gender*, NAT'L L.J., July 8, 1996, at A12 (discussing the VMI decision's "exceedingly persuasive" justification in relation to the rational basis and strict scrutiny test).

298 *Virginia*, 116 S. Ct. at 2275.

299 Biskupic, *supra* note 294, at A1.

300 Coyle, *supra* note 297, at A12.

301 *See id.*

Justice Scalia, on the other hand, serving as the lone dissenter, did not view the Court's decision in the same complimentary light.[302] In a forty-page dissent, Justice Scalia relentlessly blasted the VMI holding and specifically criticized the Court's standard of scrutiny application.[303] He viewed the VMI suit as undoubtedly deserving of the Court's well-established intermediate scrutiny test, traditionally reserved for gender-based classification, and berated the Court's implementation of a "new" heightened version of scrutiny.[304] He characterized the Court's conduct as a "redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny."[305] Similarly, Justice Ginsburg's opinion has been criticized by those who maintain, unlike Justice Scalia, that the Court fell short of categorically equating gender-based classification with race- based classification.[306] Kathy Rodgers, executive director of NOW Legal Defense Fund, observed that "it's not quite the historical moment we hoped for. It's a lost opportunity because the court did not adopt the strict scrutiny approach."[307]

B. The Rudiments Behind the "Exceedingly Persuasive Justification" Requirement

Whether the rest of the Court perceived the VMI decision as justifying a heightened standard of scrutiny residing somewhere between intermediate scrutiny and strict scrutiny remains to be seen. Similarly, it is just as unclear whether gender can be equated with race, national origin, or alienage under the "exceedingly persuasive" requirement. As Justice Rehnquist noted in his concurring opinion, Justice Ginsburg's opinion introduced an "element of uncertainty" in how to evaluate gender discrimination cases.[308] However, Justice Ginsburg may once again provide some answers in a footnote of her opinion. Footnote six states that the court, "*thus far* reserved most stringent judicial scrutiny for classification based on race or national origin,"[309] seeming to imply that strict

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302 *See Virginia*, 116 S. Ct. at 2306 (Scalia, J., dissenting).

303 *See id.*

304 *See id.* at 2293-96 (Scalia, J., dissenting).

305 *Id.* at 2306.

306 *See* David G. Savage, *Court Strikes Down VMI's All-Male Policy*, L.A. TIMES, June 27, 1996, at A1 (emphasizing the VMI decision's "exceedingly persuasive" requirement).

307 *Id.*

308 *Virginia*, 116 S. Ct. 2264, 2288 (1996) (Rehnquist, J., concurring). *See also Supreme Court Orders Military School to Admit Women — Separate Program Deemed Inadequate*, FACTS ON FILE WORLD NEWS DIG., July 4, 1996, at *3, *available in* 1996 WL 8621315 (analyzing Justice Ginsburg's majority opinion and the skeptical scrutiny standard).

309 *Virginia*, 116 S. Ct. at 2275 n.6 (emphasis added).

scrutiny would *now* apply to gender-based classification.[310] As Ms. Lichtman perceived, "Why put in two words that mean nothing?"[311] Unfortunately, Justice Ginsburg's mysterious use of footnotes has once again left the reader in a precarious position of not exactly knowing where the Court stands on this matter.

In reviewing the Court's decision, it appeared that Justice Ginsburg herself was apprehensive about promoting a strict scrutiny test for gender-based classification, but for good reason. Her many years as the lead women's rights litigator at the ACLU had taught her to successfully work within the environment she had been given.[312] One reason behind her success was that the "ACLU had recognized early on that the Supreme Court appeared ready to reconsider previous interpretations of [the] equal protection doctrine in relation to sex discrimination, and it acted quickly to take advantage of the favorable judicial climate."[313]

However, *United States v. Virginia*[314] was argued before a different Supreme Court operating within a completely different political and social environment. Chief Justice Rehnquist, the only justice left from the Court who witnessed Justice Ginsburg's ACLU landmark victories, served as the lone dissenter in *Frontiero v. Richardson*,[315] the Court's closest attempt at applying strict scrutiny to gender classification.[316] Likewise, the Nation was not engulfed by the same pro-feminist movement characteristic of the 1970s and most notably exemplified by the emotional struggle to ratify the Equal Rights Amendment. The revolutionary protests and activities reminiscent of that era slowly began to lose their visibility and were eventually displaced. Today's Supreme Court is not nearly persuaded by outside influences as previous Courts have been. Some observers have described the Court's current surroundings and past term as headed in a direction toward "strict, individualistic, rights-based, nonprivileged, and nonclassificatory egalitarian-

310 *See* Coyle, *supra* note 297, at A12.

311 *Id.*

312 *See* Markowitz, *In Pursuit of Equality*, *supra* note 8, at 337 n.22.

313 *Id.*

314 116 S. Ct. 2264 (1996).

315 411 U.S. 677 (1973).

316 *See* Lyle Denniston, *The Lives of Four Women are Connected in the Fight for Parity between the Sexes; Fate Links Two Justices, a Novelist and a Student*, BALT. SUN, Jan. 14, 1996, at 10A (comparing Justice O'Connor's and Justice Ginsburg's women's rights accomplishments prior to obtaining their respective seats on the Supreme Court).

ism,"[317] an environment suitable for finding VMI's admission policy unconstitutional.

The beauty behind Justice Ginsburg's opinion lies in her handling of this environment.[318] As oral arguments in the VMI case began, "it was seemingly clear the justices were not prepared to replace the intermediate scrutiny standard with strict scrutiny. . . ."[319] The Court only recently declined to address the issue of whether gender-based classification deserved being categorized as "inherently suspect" in *J.E.B. v. Alabama ex rel. T.B.*;[320] and concluded it was unnecessary to decide if strict scrutiny should apply since gender-based peremptory challenges were reviewed under intermediate scrutiny.[321] Aware of the Court's reluctance to formally heighten the standard of scrutiny, Justice Ginsburg masterfully structured her argument to adapt to the Court's indecisiveness and advocated a strengthened intermediate scrutiny test. She had adeptly tailored her argument to capture the emotions of the VMI debate and persuaded the justices to concede to a somewhat heightened standard of scrutiny. The increased standard of scrutiny may be cloaked in new "skeptical scrutiny" or "exceedingly persuasive" language, but the undisputed fact is that the Court had adopted a new heightened standard of scrutiny.

Disregarding the critics and speculation of what the Court's decision will mean for future gender discrimination cases, the Court's VMI decision has inarguably added a stricter tone to its intermediate standard of scrutiny. Although the Court has not conceded to the Clinton Administration's recommendation of applying strict scrutiny,[322] its "exceedingly persuasive justification" measure is unquestionably an increased standard of scrutiny. Even though the Court has not quite equated race-based classification review with that of gender-based, the Court is clearly on its way towards accepting a strict scrutiny application to gender-based classification. Professor Douglas Kmiec, Constitutional law scholar of Notre Dame Law School, described Justice Ginsburg's actions as "laying the groundwork for a shift in the Court's approach should

317 Wilfred M. McClay, *Of "Rats" and Women. (End of an All-Male Education at Virginia Military Institute)*, AM. JEWISH COMMITTEE, Sept. 1, 1996, at *5, *available in* 1996 WL 9037808 (criticizing the VMI decision's "exceedingly persuasive" justification).

318 *See Virginia*, 116 S. Ct. at 2264-91 (1996) (Justice Ginsburg's majority opinion).

319 Coyle, *supra* note 297, at A12.

320 511 U.S. 127 (1994).

321 *See* Margo L. Ely, *Battle of Sexism has Military College Facing Siege*, CHI. DAILY L. BULL., Nov. 13, 1995, at *4, *available in* WESTLAW, 11/13/95 CHIDLB 6 (highlighting Justice Ginsburg's response to Virginia's arguments).

322 *See supra* notes 294-95 and accompanying text (discussing the DOJ's support for the application of the strict scrutiny test in gender discrimination cases).

its personnel change."[323] More dramatically, her opinion is characteristic of her undying intentions to one day persuade the Supreme Court to unconditionally apply strict scrutiny to gender-related issues, a task she set out to accomplish over twenty years ago. The VMI opinion is merely one more step in making her dream become a reality.

VI. CONCLUSION

Justice Ginsburg's legal accomplishments and encounters with gender-discrimination are part of a forty year love-hate relationship. Upon entering Harvard Law School, she experienced what would remain a steady influence throughout her life — the realization of gender discrimination's predominant role in society, and more importantly, its impact in the legal philosophical circle. Instead of falling victim to this unwelcome disposition, Justice Ginsburg used this event to serve as a driving force behind her legal career which eventually propelled her into the limelight as being the Nation's premier women's rights litigator.

Justice Ginsburg's claim to fame was her valiant attempt to persuade the Supreme Court to adopt a heightened standard of scrutiny for gender-based classification. Given a Court which had only envisioned applying a rational basis test to gender-related matters, Justice Ginsburg's unique advocacy style successfully introduced an intermediate standard of scrutiny and just fell short of convincing the Court to apply strict scrutiny to gender-based classification. Justice Ginsburg's strategy, similar to that of Justice Thurgood Marshall's civil rights ventures, built a powerful case sequence easing the Supreme Court's acceptance of an increased standard of scrutiny for gender-related issues.

While working at the ACLU, Justice Ginsburg's briefs and arguments were specifically designed and structured to attain this increased standard of scrutiny. Whether it was *Reed v. Reed*,[324] *Frontiero v. Richardson*,[325] or *Craig v. Boren*,[326] Justice Ginsburg had always brought attention to the need for a heightened standard of scrutiny. These cases represent the three landmark decisions in the Supreme Court's overall conversion from a rational basis test to one of intermediate scrutiny in dealing with gender-based classifi-

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323 Marcia Coyle, *In Focus: Supreme Court Review*, NAT'L L.J., July 29, 1996 at C2 (reviewing the Supreme Court's 1995-1996 term and analyzing the Justices' individual voting behavior).

324 404 U.S. 71 (1971).

325 411 U.S. 677 (1973).

326 429 U.S. 190 (1976).

cation; they stand as reminders of Justice Ginsburg's successful attempt at heightening the standard of scrutiny. Her involvement at the fore-front of gender discrimination issues did not end with her departure from the ACLU, but rather, took on new meaning with her appointment to the Appellate Court bench and her Supreme Court nomination and eventual confirmation.

In *United States v. Virginia*,[327] Justice Ginsburg sat on the other side of the bench and heard the same arguments she herself once uttered as an ACLU litigator. Justice Ginsburg was granted the opportunity to write the majority opinion and reached a cross-road in her judicial career. She could have easily chosen to hold the Supreme Court's standard of scrutiny at its current level, or could have courageously guided the Court towards an even higher standard of scrutiny; an endevor she began over twenty years ago. Choosing the latter, Justice Ginsburg, who was responsible for introducing the Court to an intermediate standard of scrutiny, implemented an even higher "skeptical scrutiny" standard requiring an "exceedingly persuasive" justification for a statute's constitutional validity. The unsettling union between gender discrimination and the law which first impacted Justice Ginsburg's life in 1956 at her Harvard Law School reception for incoming students had remained ever embedded in her psyche. Although the Supreme Court has not yet applied strict scrutiny to gender-based classification, *United States v. Virginia*[328] has made a monumental step in the continuing struggle to persuade the Court to equate gender discrimination with strict scrutiny.

Scott M. Smiler

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327 116 S. Ct. 2264 (1996).
328 *Id.*