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## Ruth Bader Ginsburg: Extending the Constitution, 32 J. Marshall L. Rev. 197 (1998)

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# RUTH BADER GINSBURG: EXTENDING THE CONSTITUTION

AMY WALSH\*

## INTRODUCTION

"A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded. VMI's [Virginia Military Institute's] story continued as our comprehension of 'We the People' expanded."<sup>1</sup>

This phrase, taken from the text of *United States v. Virginia*,<sup>2</sup> is part of Ruth Bader Ginsburg's reasoning as to why The Virginia Military Institute's (VMI) policy of denying admission to women was offensive to the Fourteenth Amendment of the United States Constitution.<sup>3</sup> It is fitting that Justice Ginsburg used this phrase, for Ginsburg's work itself is a prime part of the history of women achieving equality in the eyes of the fundamental law of our land. From litigating the first case to hold that discrimination on the basis of gender is inconsistent with the principles of the Fourteenth Amendment<sup>4</sup> to writing the opinion in the *Virginia* decision, Ruth Bader Ginsburg has been a central force in extending the protection of the Constitution to women.<sup>5</sup> By examining Ginsburg's core beliefs with respect to gender discrimination, and analyzing how those beliefs take shape in the broader context of the *Virginia* decision, this Comment examines how Ginsburg is likely to influence the U.S. Supreme Court on gender issues in decisions in the years to come. Part I of this Comment provides an overview of the progress Ginsburg has made

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1. *United States v. Virginia*, 518 U.S. 515, 557 (1996) (citing Richard Morris, *THE FORGING OF THE UNION*, 1781-1789, at 193 (1987)).

2. 518 U.S. 515, 557 (1996).

3. *Id.* at 546. The *Virginia* Court found that VMI failed to provide the "exceedingly persuasive" justification that is required of all gender-based classifications in order be constitutional under the Fourteenth Amendment. *Id.*

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

5. See generally Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335 (1992) (providing an overview of the gender discrimination cases Ginsburg litigated in the 1970's).

since she began fighting gender discrimination. Part II examines those core personal beliefs which motivate and shape Ginsburg's strategy to end gender discrimination in the law. Part III examines the major Supreme Court decisions in the area of gender discrimination claims under the Fourteenth Amendment. Part IV analyzes the *Virginia* opinion in terms of how that opinion potentially changed the standards for examining gender discrimination claims as well as how the opinion outlined the battles Ginsburg still must fight in order to accord women the full power of the Fourteenth Amendment.

#### I. FROM THE "EMPTY CUPBOARD" TO INTERMEDIATE SCRUTINY: A BROAD OVERVIEW

In 1971, armed with the Fourteenth Amendment to the United States Constitution, Ruth Bader Ginsburg began to wage a war in United States courtrooms on sex discrimination in our country.<sup>6</sup> Because there existed no historical basis for the premise that women were among the persons Congress meant to protect when they drafted the Fourteenth Amendment, it was in many ways a weak and unproven weapon with which to fight gender discrimination.<sup>7</sup> In fact, Ginsburg often referred to the Constitution as an "empty cupboard" for women.<sup>8</sup> By this she meant that apart from giving women the right to vote, the Constitution offered women no protections from sexual

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6. See *id.* at 336-37 (noting that in 1971, Ginsburg became the first director of the American Civil Liberties Union's Women's Rights Project). Further, 1971 marked the year *Reed v. Reed*, 404 U.S. 71 (1971), was decided. *Id.* at 338. Ginsburg was co-counsel for the appellant in this pivotal case which unanimously held that an Idaho statute which gave preference to males over females in the appointment of estate administrators was unconstitutional on the grounds that it was inconsistent with the Equal Protection Clause. *Id.* While the *Reed* Court did not apply the strict scrutiny test that Ginsburg advocated, they did determine that such a classification on the basis of sex was subject to scrutiny. *Id.* at 339. *Reed* was the first time the Supreme Court upheld a claim of sex-based discrimination. *Id.* at 338-39; David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. J. 33, 53 (1984) (providing an overview of Ginsburg's litigation strategy in the 1970's).

7. See Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 452-53 (1978) [hereinafter Ginsburg, *Sex Equality*] (pointing out that the legislative history of the Fourteenth Amendment indicates sex was one of three grounds legislators could base classifications upon without doing offense to the Equal Protection Clause). The word "male," found nowhere else in the Constitution, is also used three times in the Fourteenth Amendment, each time in relation to the word "citizen." *Id.*

8. Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 164 [hereinafter Ginsburg, *Fourteenth and Equal Rights Amendments*].

discrimination.<sup>9</sup> Cognizant that history and precedent were not on her side, Ginsburg became involved, as an attorney, in cases which would serve to awaken the Supreme Court to the reality that the law's "differential treatment of men and women," largely based on over broad and outdated notions about the way that women "naturally" are, served to "contribute to women's subordination - their confined 'place' in a man's world."<sup>10</sup> As part of her strategy, Ginsburg argued to the Supreme Court that legal classifications based solely on gender should be considered "suspect," thereby making them subject to the strictest scrutiny when challenged under the Equal Protection Clause.<sup>11</sup> Ginsburg's battle was successful on two fronts. First, she persuaded the Supreme Court to dynamically interpret the Fourteenth Amendment to include women, thereby giving women a new tool for combating gender discrimination.<sup>12</sup> Second, the Supreme Court adopted a

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9. *Id.* at 161.

10. See Ruth Bader Ginsburg and Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970's*, 1 U. CHI. LEGAL F. 11, 18 (1989) [hereinafter Ginsburg, *Feminist Legal Thought*] (noting that "[t]he Supreme Court needed basic education before it was equipped to turn away from the precedents in place . . . . A teacher from outside the club . . . knows she must keep it comprehensible and digestible, not too complex or intimidating, or risk losing her audience.").

11. See Brief for Appellant at 14-59, *Reed v. Reed*, 404 U.S. 71 (1971) (No.70-4) [hereinafter *Reed Brief*] (setting forth Ginsburg's argument that laws drawn on the basis of gender should be subject to strict scrutiny); Ginsburg, *Sex Equality*, *supra* note 7, at 468 (noting that at the time *Reed* was decided, the Court adhered to a two-tier standard of review for law challenged under the Equal Protection Clause). The lowest tier, which encompasses most legislation, requires only that the law is "rationally related to a legitimate governmental objective." *Id.* Most laws are able to survive this test. *Id.* The higher tier, reserved for challenged actions involving fundamental rights or suspect categorizations such as race, national origin and alienage, requires that the action in question is justified by a compelling governmental interest and that the classification is necessary to fulfill the interest. *Id.* See generally Cole, *supra* note 6, at 53-54; Markowitz, *supra* note 5, at 335 (detailing Ginsburg's litigation strategy with respect to sex discrimination claims).

12. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that a federal statute which allowed servicemen to automatically receive benefits for their wives, whether or not they were financially dependent, while requiring servicewomen to prove that their husbands relied on them for over one half of their support before they could qualify for the same benefits, was inconsistent with the constitutional guarantee of equal protection); see also Markowitz, *supra* note 5, at 342 (noting that while the *Reed* Court did not explicitly reveal that recognition of gender discrimination was a factor in overturning the law in question, *Reed* was the case which first gave women hope that sex-based classifications would be found to be inconsistent with the equal protection clause). But see Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 26 (1975) (expounding that the framer's intent to apply the Fourteenth Amendment only to racial discrimination may "deter boldly dynamic judicial interpretation in this area").

heightened standard of scrutiny for reviewing sex-based equal protection claims.<sup>13</sup> However, she was not able to convince the Supreme Court that gender-based classifications were inherently "suspect," and thus subject to the strictest form of judicial review.<sup>14</sup> Now, however, in her role as a Supreme Court Justice, Ginsburg is clearly in a position to influence the Court to accord women the full force of the Fourteenth Amendment and to take the final step of declaring all gender-based classifications "suspect." In fact, Justice Ginsburg had the first opportunity to speak on this subject of such great personal import when she penned the majority opinion in *United States v. Virginia*.<sup>15</sup> That decision, which arguably took the Court one step closer to adopting a strict scrutiny standard of review for gender-based claims, resounded with the themes Ginsburg advocated throughout her career as a scholar and litigator.<sup>16</sup>

## II. THE CORE BELIEFS

A. *Benign Classifications: "The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage"*<sup>17</sup>

One central theme that pervades Ruth Bader Ginsburg's work

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13. See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (holding that sex-based classifications must "serve important governmental objectives and must be substantially related to achievement of those objectives" in order to pass constitutional muster); Markowitz, *supra* note 5, at 356 (providing an analysis of the *Craig* holding).

14. Cole, *supra* note 6, at 63-64 (commenting that in *Frontiero v. Richardson*, the Supreme Court did use the strict scrutiny standard of review in striking down a federal statute which automatically labeled servicemen's wives as dependents but required servicewomen's husbands to prove that they relied on their wives for over one half of their support before they could be considered dependents). *Frontiero*, however, was merely a plurality opinion and the strict scrutiny standard was not used in subsequent cases. *Id.* at 64.

15. 518 U.S. 515 (1996).

16. See Karen Lazarus Kupetz, *Equal Benefits, Equal Burdens: "Skeptical Scrutiny" for Gender Classifications After United States v. Virginia*, 30 LOY. L.A. L. REV. 1333, 1366 (1997) (suggesting that the standard used in the *Virginia* decision, which Justice Ginsburg called "skeptical scrutiny," is a tougher standard to meet than the intermediate standard previously used); Kathryn A. Lee, *Intermediate Review "With Teeth" In Gender Discrimination Cases: The New Standard in United States v. Virginia*, 7 TEMP. POL. & CIV. RTS. L. REV. 221, 234 (1997) (submitting that the standard articulated in *Virginia* is a new, higher level of scrutiny).

17. Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813, 816 (1978) [hereinafter Ginsburg, *Benign Classification*] (noting that this quote, which was paraphrased in *Frontiero v. Richardson*, 411 U.S. 677 (1973), originally appeared in *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 20 (1971)).

as a scholar, a litigator, and a judge, is her deep distrust for any sort of labeling or pigeonholing of the female sex.<sup>18</sup> In fact, much of the litigation Ginsburg participated in during the 1970's centered on uncovering the way that the law perpetuates the subtle labels that society places on men and women.<sup>19</sup> In the beginning, the chief challenge was forcing the Supreme Court to understand that the law's preferential treatment of women was ultimately harmful and oppressive - not beneficial.<sup>20</sup> Originally, special treatment of women by the law, known as benign classification, was thought to favor and protect women.<sup>21</sup> In order to make the justices connect protection with oppression, Ginsburg had to awaken them to the reality that the labels they sought to perpetuate were outdated stereotypes, far from the reality of 1970's women, and that these stereotypes became self-fulfilling prophecies.<sup>22</sup>

Thus, it is fitting that Ginsburg believes the most important case of the 1971-1981 series of gender discrimination cases is *Weinberger v. Wiesenfeld*.<sup>23</sup> *Weinberger* is a case where the

18. See generally *id.* (outlining a number of cases which demonstrate the negative effects of the law's "preferential" treatment of women).

19. Ginsburg, *Feminist Legal Thought*, *supra* note 10, at 14. Ginsburg notes that her goal while working on the ACLU's Women's Rights Project was to "pursue a series of cases that might illuminate the most common instances of gender distinctions in the law." *Id.* Ginsburg further adds that the litigation of the 1970's helped dispel the notion that there were proper spheres in which men and women had to stay. *Id.* at 17.

20. Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 L. & INEQ. J. 17, 20 (1988) [hereinafter Ginsburg, *Remarks on Women*]. See also Ginsburg, *Gender and the Constitution*, *supra* note 12, at 15 (recounting a conversation Supreme Court Justice Potter had in 1973 with Harvard law students ruminating over why women who can "attack laws that unreasonably discriminate against her while preserving those that favor her" would feel the need for an Equal Rights Amendment). *Id.* Ginsburg also quotes Potter as saying that he "knows [unreasonable gender discrimination] when he sees it." *Id.*

21. See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961) (holding that a Florida statute setting forth that only women who volunteer for jury service shall be selected was not inconsistent with the Due Process or Equal Protection Clauses of the Fourteenth Amendment); *Kahn v. Shevin*, 416 U.S. 351 (1974) (holding that a Florida statute allowing widows but not widowers a property tax exemption did not violate the Fourteenth Amendment).

22. See Ginsburg, *Remarks on Women*, *supra* note 20, at 21 (observing that pervasive social changes in the 70's, including women taking jobs outside the home in large numbers, helped the Supreme Court confront the unavoidable reality that it was no longer safe to stereotype women as homemakers); Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 WOMEN'S RTS. L. REP. 361, 363 (1992) [hereinafter Ginsburg, *State of the Art*] (explaining that laws based on gender stereotypes keep men and women from making life choices based on their true talents and preferences).

23. 420 U.S. 636 (1975); Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause* 9 HARV. J.L. & PUB. POL'Y 41, 43 (1986).

Supreme Court finally demonstrated a willingness to “look beneath the surface of ‘benign’ or ‘compensatory’ rationalizations and to strike classifications based on the notion that social roles are preordained by sex.”<sup>24</sup> In *Wiesenfeld*, the widower of a working mother who died during childbirth applied for Social Security benefits to aid in the care of himself and his newborn son.<sup>25</sup> However, he was told that such benefits were available, per the Social Security Act, to mothers only.<sup>26</sup> Represented by American Civil Liberties Union (ACLU) attorneys, including Ginsburg, the widower challenged the Act.<sup>27</sup> Subsequently, the Supreme Court overturned the Act, agreeing with Ginsburg’s assessment that such a law denigrated the value of a female breadwinner’s support.<sup>28</sup> While the defense made a rational argument that widows as a group did in fact need more financial aid than widowers, the Court held that such generalizations reflecting the reality of the average person would no longer hold up under scrutiny.<sup>29</sup> This line of thinking echoed Ginsburg’s argument in the *Wiesenfeld* brief which stated that refusing assistance to a father/caretaker assumes that: “because male/breadwinner/female/child caregiver stereotypes are accurate for some individuals, the government has the right to apply them to all individuals – and, indeed, to shape its official policy toward the end that the stereotypes shall continue to be accurate.”<sup>30</sup>

Thus, *Wiesenfeld* encapsulated two of Ginsburg’s core arguments: first, laws based upon assumptions about how men or women “are” serve to oppress those who do not fit within the stereotype and become self-fulfilling prophecies; and second, legal classifications based on gender merit closer scrutiny to discern what their actual purpose is.

### B. Equal Treatment Under the Law

The reverse side of Ginsburg’s skepticism toward benign

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24. See Ginsburg, *Gender and the Constitution*, *supra* note 12, at 14 (setting forth Ginsburg’s belief that the *Wiesenfeld* holding potentially represented a new direction for gender discrimination cases).

25. *Wiesenfeld*, 420 U.S. at 636.

26. *Id.*

27. *Id.*; Markowitz, *supra* note 5, at 349-50.

28. *Wiesenfeld*, 420 U.S. at 636; Cole, *supra* note 6, at 75-76.

29. Ginsburg, *Remarks on Women*, *supra* note 20, at 22.

30. Brief for American Civil Liberties Union as Amicus Curiae at 23, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No. 73-1892); Markowitz, *supra* note 5, at 350. See also Ginsburg, *Benign Classification*, *supra* note 17, at 819 (discussing the importance of the fact that the Court also held that merely claiming that a statute has a benign or compensatory purpose will not stop courts from taking a second look to determine if the statute has an underlying purpose or effect that is perhaps not so benign).

classifications is her belief that the law should treat men and women equally.<sup>31</sup> Ginsburg acknowledges that she has been criticized for playing by men's rules and for providing opportunities only to those who were willing to be treated like men.<sup>32</sup> Clearly, asking for the laws to treat men and women the same fails to take into account that the laws are made largely by men and arguably could be characterized as "burdening both men and women."<sup>33</sup> However, Ginsburg believes that it would be dangerous to make laws and policies to incorporate an ostensibly womanly way of thinking or a feminine reality.<sup>34</sup> Ginsburg feels that admitting there is a particularly male or female approach to things, even if that approach is not being advanced in a negative way, is to pigeonhole individuals in yet another manner.<sup>35</sup> In an

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31. See Ruth Bader Ginsburg, *Some Thoughts on the 1980's Debate over Special Versus Equal Treatment for Women*, 4 LAW & INEQ. J. 143 (1986) [hereinafter Ginsburg, *Special Versus Equal Treatment*] (arguing that special treatment of women ultimately serves to disadvantage them); see also Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 865-67 (1997) (explaining that Ginsburg's approach is called the "equality theory" and is based on the idea that women are "functionally indistinguishable" from men). The criticism of this theory is that it does not fully appreciate the complex reality of women. *Id.* at 865. In particular, the "equality theory" may seem deficient when women, who secured their positions on the premise that they could perform just like men, became pregnant yet wanted to stay on at their jobs. *Id.* at 867. Women attempting to balance both family and professional responsibilities found themselves trying to fit into an institution that was not designed to meet their dual roles. *Id.*; Candace Saari Kovacic-Fleischer, *United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 851-58 (providing a short summary of "equal treatment," "equal results" and other prevalent models for achieving gender equality).

32. Ginsburg, *Special Versus Equal Treatment*, *supra* note 31, at 143-44.

33. Ginsburg, *Feminist Legal Thought*, *supra* note 10, at 17.

34. Ginsburg, *Special Versus Equal Treatment*, *supra* note 31, at 148-49. See also Abrams, *supra* note 31, at 867-71 (providing a summary of what is known as the "difference theory," which proposes that women's differences should be accommodated so that they can end up "as well off as their male counterparts"). *Id.* at 867. See also Kovacic-Fleischer, *supra* note 31, at 852 (noting that the difference theory does not claim that women are in any way inferior - just different - and that those differences should be recognized).

35. Ginsburg, *Special Versus Equal Treatment*, *supra* note 31, at 148. Appropriately, Ginsburg disassociates herself with either a typically male or female personality, and claims to have noticed no special sex-based propensities in all her years of practicing and teaching law. *Id.* at 148. Further, Ginsburg adheres to her belief in equal treatment under the law even when it comes to pregnancy issues. *Id.* at 144-46. In response to arguments that women deserve special favors because of their unique capacity as childbearers, Ginsburg asserts that any favoritism in the law has typically come back to haunt women and that she prefers a system which encourages men and women to jointly share in the responsibility for child care. *Id.* at 145-46. In Ginsburg's ideal world, men would be given incentives to equally



article she wrote on the special treatment/equal treatment debate, Ginsburg quotes Georgetown law professor Wendy Williams as saying, "[s]pecial treatment comes with strings attached. Historically, it comes with lower wages, employer skepticism and the resentment of co-workers."<sup>36</sup> Ginsburg firmly believes that while alert feminists may be able to ferret out a real favor from paternalistic policies disguised as favors, few judges and laypeople can.<sup>37</sup>

### C. Respecting the Original Intent: A Careful Revolutionary

Another defining characteristic of Justice Ginsburg is her understanding and respect for the limitations upon the judicial branch.<sup>38</sup> Justice Ginsburg strongly advocated the Equal Rights Amendment and saw it as the foundation the Supreme Court needed to boldly confront sex discrimination.<sup>39</sup> While Ginsburg does not believe the Court should be unduly constrained by the original framers' intent, she attributes the lack of historical basis for sexual equality as one factor that keeps the Court from eliminating all gender-based discrimination in the law.<sup>40</sup>

Without the amendment, Ginsburg has expressed her appreciation for the need to move slowly and build precedent: "[a]

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partake in the child-rearing process. *Id.* See also Ginsburg, *Gender and the Constitution*, *supra* note 12, at 34-36 (citing with approval then Director of the Department of Labor's Bureau Elizabeth Koontz's proposition that there is a big difference between child-bearing and child-rearing); *Remarks of the Honorable Ruth Bader Ginsburg, Conference on Civil Rights Developments*, 37 RUTGERS L. REV. 1105, 1110 (1985) [hereinafter Ginsburg, *Civil Rights Developments*] (stating that treating pregnancy as anything other than a temporary physical disability is to invite paternalistic treatment of women).

36. Ginsburg, *Civil Rights Developments*, *supra* note 35, at 1110.

37. *Id.*

38. See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) [hereinafter Ginsburg, *Judicial Voice*] (quoting Justice Holmes as saying, "judges do and must legislate" but "they are confined from molar to molecular motions").

39. Ginsburg, *Fourteenth and Equal Rights Amendments*, *supra* note 8, at 173. The Equal Rights Amendment was originally proposed by the National Woman's Party in 1923 and was designed as a correlative to the Nineteenth Amendment. *Id.* at 172. The amendment, which was "framed as a basic human rights norm," was meant to serve two purposes. For a two-year period, it was to order state and federal legislatures to revise sex-based laws. *Id.* at 173. At the close of the two-year period following ratification, the law would then serve as "a clear source for the constitutional principle [that] men and women are equal before the law." *Id.* While Ginsburg believed that the job of ridding sex-based classifications could be done without the proposed amendment, Ginsburg believes that history shows that such change will occur more slowly "absent the stimulus explicit constitutional commitment would supply." *Id.* at 174.

40. Ginsburg, *Remarks on Women*, *supra* note 20, at 17; Ginsburg, *Gender and the Constitution*, *supra* note 12, at 42.

court too sure of itself on these matters may, in its zeal, take a giant stride, only to find itself perilously positioned on an unstable doctrinal limb."<sup>41</sup> While Justice Ginsburg does not believe that the court should always lag behind the legislature in advancing constitutional doctrine,<sup>42</sup> she has remarked, uncritically, that with respect to changes in the area of gender discrimination, the Court has neither been in front of nor behind social change.<sup>43</sup> Instead, she likens the court's role to "an amplifier - sensitively responding to, and perhaps moderately accelerating" the move toward equality.<sup>44</sup>

### III. THE BUILDING BLOCKS: REED,<sup>45</sup> FRONTIERO,<sup>46</sup> CRAIG<sup>47</sup> AND HOGAN<sup>48</sup>

Having established Justice Ginsburg's respect for the need to build precedent, the next part of this Comment focuses on the key cases in the area of gender discrimination.

*Reed v. Reed*<sup>49</sup> was the first case to hold that a law which discriminated on the basis of gender was incompatible with the Fourteenth Amendment.<sup>50</sup> In *Reed*, the Supreme Court overturned an Idaho statute which preferred men over women as estate administrators.<sup>51</sup> *Reed* was groundbreaking in the sense that, although the government proffered a rational justification for preferring men over women: reducing the number of hearings necessary to determine who should be the estate administrator, the Court found that the statute did not meet the basic rational

41. See Ginsburg, *Remarks on Women*, *supra* note 20, at 25 (criticizing *Roe v. Wade* as an example of a decision that went "too far in the change it ordered with incomplete justification" for its actions). Ginsburg believes that this resulted in a legislative backlash. *Id.*; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 377-82 (1985) (contrasting the slow, careful steps the Supreme Court took in changing law in the area of gender discrimination with the huge leap the court took in legalizing abortion).

42. Ginsburg, *Judicial Voice*, *supra* note 38, at 1206.

43. Ginsburg, *Remarks on Women*, *supra* note 20, at 24.

44. *Id.* See also Ginsburg, *Feminist Legal Thought*, *supra* note 10, at 17 (stating that the litigation of the 1970's, which was largely a process of educating judges as to gender discrimination, accomplished about as much as could be expected for that early time and that now the most sensible battleground may be the legislature).

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

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

47. *Craig v. Boren*, 429 U.S. 190 (1976).

48. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

49. 404 U.S. 71 (1971).

50. *Id.* at 76-77; Ginsburg, *Gender and the Constitution*, *supra* note 12, at 10.

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

relationship test required under the Equal Protection Clause.<sup>52</sup> Further, the *Reed* Court seemed to make a break away from the bare-minimum rational relationship test by requiring that laws drawn on gender lines "rest upon some ground of difference having a fair and substantial relationship" to the legislative objective.<sup>53</sup>

Two years after *Reed* was decided, the Supreme Court took another big step in deciding *Frontiero v. Richardson*.<sup>54</sup> In that case, the Supreme Court struck down a statute which provided that servicewomen had to prove that their husbands were reliant on them for over one half of their support before they could qualify for benefits as dependents, whereas wives automatically qualified for benefits, whether or not they were truly dependent.<sup>55</sup> In *Frontiero*, four justices agreed that sex should be labeled a suspect criterion, meaning that it would be entitled to the strictest scrutiny under the Equal Protection Clause.<sup>56</sup> Four justices

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52. Ginsburg, *Sex Equality*, *supra* note 7, at 458 (citing Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1972)). But see *id.* (noting that Justice Burger, writing for a unanimous Court, did give the appearance of adhering to traditional equal protection analysis by saying that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment"); see also, Markowitz, *supra* note 5, at 341 (explaining that while the Court "ostensibly" used "rational basis review," application of a rational basis test would have prevented such a position); Cole, *supra* note 6, at 62-63 (noting that Court interpreters saw *Reed* as demanding "something more than the traditional deferential scrutiny").

53. Ginsburg, *State of the Art*, *supra* note 22, at 362.

54. 411 U.S. 677 (1973). See also Markowitz, *supra* note 5, at 343 (noting that Ginsburg filed an amicus curiae brief on behalf of the American Civil Liberties Union (ACLU) in *Frontiero*). Ginsburg and the ACLU filed the jurisdictional statement in *Frontiero*; however, Ginsburg later entered into disagreements with the attorneys for the Southern Poverty Law Center, the group that litigated *Frontiero* in the lower court, over who should argue the case in front of the Supreme Court. *Id.* Further, Ginsburg couldn't convince the Southern Poverty Law Center that they should argue for strict scrutiny. *Id.*

55. *Frontiero*, 411 U.S. 677, 690-91; Ginsburg, *Sex Equality*, *supra* note 7, at 462.

56. See *Frontiero*, 411 U.S. at 682; see also Ginsburg, *Sex Equality*, *supra* note 7, at 463 (explaining that classifications on the basis of race, national origin, religion and alienage are "suspect" and thus subject to strict scrutiny); Ruth Bader Ginsburg, *Women as Full Members of the Club: An Evolving American Ideal*, 6 HUMAN RIGHTS 1, 3-4 (1977) [hereinafter Ginsburg, *Full Members*] (observing that of the two ways one can trigger strict scrutiny: fundamental rights and suspect categorization, advocates of gender equality have focused on equating sex with suspect classifications such as race on the premise that sex, like race, "is a visible, immutable biological characteristic that bears no necessary relationship to ability"). Ginsburg further notes that equating sex with race has been questioned because of the fact that women,

however, is a mere plurality, and the fifth vote never materialized.<sup>57</sup> On the other hand, the decision did reinforce the tentative progress that was made in *Reed*.<sup>58</sup>

The Supreme Court finally articulated the standard by which gender discrimination claims would be measured in *Craig v. Boren*.<sup>59</sup> In *Craig*, a case in which Ginsburg filed an amicus curiae brief on behalf of the ACLU, the court struck down an Oklahoma statute which prohibited the sale of 3.2 percent beer to women under the age of 18 and men under the age of 21.<sup>60</sup> Ginsburg's brief explained that while at first glance the statute appeared to discriminate against men, "[u]pon deeper inspection, the gender line drawn by Oklahoma is revealed as a manifestation of traditional attitudes about the expected behavior of males and females, part of the myriad signals and messages that daily underscore the notion of men as society's active members, women as men's quiescent companions."<sup>61</sup>

In response, the Court in *Craig* explicitly established a heightened standard of review for gender-based classifications.<sup>62</sup> In order to meet the *Craig* test, the party seeking to uphold the challenged act must show that the gender classification promotes an important governmental objective and that the classification is substantially related to the important objective.<sup>63</sup> In *Craig*, the government's objective was to decrease incidents of drinking and

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unlike minorities, are a numerical majority - not a "discrete and insular minority" - subject to the whims of greater political powers. *Id.* at 4. Ginsburg points out that the "discrete and insular minority" argument fails to take into account that well into the twentieth century, women were denied the vote and were in effect politically silenced. *Id.* Further, being a discrete and insular minority has its advantages in that it is easier to organize small pockets of the population. *Id.* Women, on the other hand, are spread out in every region, race and economic class. *Id.*

57. See Ginsburg, *Sex Equality*, *supra* note 7, at 463 (noting that a major reason the Court stopped short of labeling sex as a suspect class is that the drafters of the Constitution showed no concern that men and women be equal in the eyes of the law). This sentiment was expressed by Justice Powell in his concurring opinion which warned that the Court must be careful to interpret the Constitution - not amend it. *Id.* See also Ginsburg, *State of the Art*, *supra* note 22, at 363 (postulating that the justices were waiting to see if the Equal Rights Amendment passed before they categorized sex as a suspect classification).

58. See Cole, *supra* note 6, at 62-63 (commenting that Ginsburg used the *Reed* holding to build her argument in *Frontiero*).

59. 429 U.S. 190, 204 (1976).

60. *Craig*, 429 U.S. at 210.

61. Brief for the American Civil Liberties Union as Amicus Curiae at 11, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628) [hereinafter *Craig Brief*]; Cole, *supra* note 6, at 81.

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

63. *Id.* at 197, 204; Ginsburg, *Sex Equality*, *supra* note 7, at 468.

driving, its theory being that men drink and drive more than women.<sup>64</sup> The court found, however, that only 2% of men aged 18-21 were arrested for drunk driving.<sup>65</sup> Thus, conditioning the ability to purchase alcohol on gender was not substantially related to the stated goal of preventing drinking and driving, and the statute was struck down.<sup>66</sup>

The *Craig* test was reaffirmed in *Mississippi University for Women v. Hogan*,<sup>67</sup> a case where a male plaintiff successfully challenged the admission policy of a state-supported nursing school which was designated for women only.<sup>68</sup> The majority opinion, written by Justice Sandra Day O'Connor, found that the school failed to meet the burden of showing an "exceedingly persuasive justification" for upholding a statute which discriminates on the basis of gender.<sup>69</sup> Justice O'Connor notes that burden can only be met by showing that the gender-based classification furthers an important governmental interest and that the discriminatory means used are substantially related to furthering that interest.<sup>70</sup>

Mississippi claimed that their objective in maintaining an all-women's nursing school was to compensate women for past discrimination.<sup>71</sup> In discrediting the proffered objective, O'Connor found that Mississippi did not prove that women faced any barriers in entering the field of nursing.<sup>72</sup> Rather, the Court found that the women-only admission policy served to perpetuate the

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64. *Craig Brief*, *supra* note 61, at 25-26.

65. *Craig*, 429 U.S. at 201; *Cole*, *supra* note 6, at 82.

66. *Craig*, 429 U.S. at 202.

67. 458 U.S. 718 (1982).

68. *Id.* at 720-21, 733.

69. *Id.* at 724.

70. *Id.* at 723. The *Hogan* opinion's interpretation of the *Craig* test underscored some important points about the test. For one, Justice O'Connor emphasizes that application of the two-prong *Craig* test must be performed without any "fixed notions concerning the roles and abilities of men and women." *Id.* at 724-25. Further, the governmental objective itself must be carefully examined to see if it reflects any inherent ideas about appropriate roles and behavior for women which would render it illegitimate. *Id.* at 724-25. O'Connor also stresses that in determining whether there is a substantial relationship between the governmental objective and the means chosen, one must use a "reasoned analysis" rather than a "mechanical application" of stereotypical ideas about appropriate roles for men and women. *Id.* at 726. Additionally, while an objective genuinely designed to compensate women for past wrongs can qualify as a legitimate objective, automatically claiming a compensatory purpose will not satisfy constitutional requirements. *Id.* at 728.

71. *Id.* at 727.

72. *Mississippi v. Hogan*, 458 U.S. 718, 729 (1982). In fact, O'Connor notes that the year before the Mississippi University for Women's nursing school opened its doors, 1970, women accounted for 94 percent of the nursing degrees awarded in Mississippi and 98.6 percent nationwide. *Id.*

idea that nursing is a woman's job.<sup>73</sup> Mississippi also claimed that excluding men from the nursing school protected women who were negatively affected by having males in the classroom.<sup>74</sup> However, this argument was discredited by the fact that men were allowed to audit the nursing courses.<sup>75</sup> In short, because Mississippi failed to set forth a legitimate objective, the Court found that the nursing school's admission policy violated the Fourteenth Amendment.<sup>76</sup>

#### IV. THE VMI DECISION: SKEPTICAL SCRUTINY UNVEILED

Twenty-five years after the *Reed* decision, *United States v. Virginia*<sup>77</sup> gave Ruth Bader Ginsburg occasion to speak from the other side of the bench on the appropriate standard of review for gender discrimination claims brought under Equal Protection Clause. Just as court watchers sensed that something new was in the wind after the *Reed* decision, it is clear that the *Virginia* decision also represented a subtle shift in the way gender-based classifications will be analyzed by the Supreme Court.<sup>78</sup>

##### A. *The Procedural History*

*Virginia* arose when the United States sued the Commonwealth of Virginia on the grounds that its maintenance of an all-male military academy violated the Equal Protection Clause.<sup>79</sup> The District Court, relying on *Mississippi v. Hogan*, set forth that the defendants must show an "exceedingly persuasive justification" for classifying on the basis of sex by demonstrating that the "discrimination serves important governmental objectives" and that the "discriminatory means employed are substantially related to the achievement of those objectives."<sup>80</sup> The District Court, reasoning that single-sex education is beneficial, found that Virginia's proffered objective, to provide diverse educational experiences, was a legitimate one which reaped measurable gains.<sup>81</sup> Having accepted single-sex education as an

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73. *Id.*

74. *Id.* at 730.

75. *See id.* at 730-31 (pointing out that men who audit courses at the nursing school are allowed to "participate fully" in classes). Justice O'Connor also points out that the record is devoid of any evidence that men's presence in nursing schools causes the teachers to alter their teaching styles or that men dominate the classroom in co-educational nursing schools. *Id.*

76. *Id.* at 732-33.

77. 518 U.S. 515 (1996).

78. *Id.* at 566 (Scalia, J., dissenting). In his dissent, Scalia claims that the majority's opinion "drastically revises our established standards for viewing sex-based classifications." *Id.*

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

80. *Id.* at 1410; *Hogan*, 458 U.S. at 730.

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

important governmental objective, the District Court necessarily found that excluding women was the only way to achieve that goal.<sup>82</sup> Thus, Virginia satisfied the traditional "important governmental objective with substantially related means test" at the District Court level.

In the Court of Appeals for the Fourth Circuit, however, Virginia's objective of providing diversity in education did not satisfy the first prong of the test. Essentially, the Fourth Circuit found that if Virginia's goal was really to provide diversity in its educational system, then the state should have provided such diversity for women too.<sup>83</sup> The Fourth Circuit remanded the case, providing Virginia three options: admit women, establish a comparable institution for women, or cease to maintain VMI with state funds.<sup>84</sup>

Virginia chose to develop a parallel institution for women called the Virginia Women's Institute for Leadership (VWIL).<sup>85</sup> VWIL, as proposed by Virginia, shunned the rigorous adversative method of teaching<sup>86</sup> used at VMI for a cooperative model which their educational task force felt would be more appropriate for women.<sup>87</sup> On remand, the District Court approved VWIL, finding that the VMI and VWIL could achieve "substantially similar outcomes."<sup>88</sup>

The Court of Appeals affirmed the District Court.<sup>89</sup> However, it altered its application of the important governmental interest/substantially related means test by deferentially reviewing the important governmental interest.<sup>90</sup> In determining what an important governmental interest is, the Fourth Circuit

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82. *Id.*

83. *United States v. Virginia*, 976 F.2d 890, 899 (4th Cir. 1992).

84. *Id.* at 900.

85. *Virginia*, 518 U.S. at 526 (noting that VWIL would be located on the campus of Mary Baldwin College). Mary Baldwin is an all-women's, private liberal arts school. *Id.* The program, which would be state-sponsored, would initially accept approximately 25-30 women. *Id.*

86. *See id.* at 522 (explaining that the adversative method includes "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values"). *Id.* The adversative method of training also entails using a "rat line," an intensified version of the adversative method, which is comparable to the Marine Corps boot camp experience. *Id.*

87. *Id.* at 526-27. The Supreme Court points out that Mary Baldwin is inferior to VMI in the SAT scores of its incoming freshmen, the salaries of its staff, the number of Ph.D's among professors and in the type of degrees offered. *Id.* at 551. Mary Baldwin does not offer degrees in the sciences or in engineering. *Id.* at 552.

88. *United States v. Virginia*, 852 F. Supp. 471, 481 (W.D. Va. 1994).

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

90. *Id.* at 1236-37.

held that a court should not substitute its values over those of a “democratically chosen branch.”<sup>91</sup> Instead of focusing on the end, the court held that the means should be more carefully scrutinized.<sup>92</sup> Applying this new formula, Virginia’s objective of providing single-sex education withstood the test, as did the means of excluding women.<sup>93</sup>

### B. The Supreme Court Decision

By using a subtly heightened form of the “important governmental interest with substantially related means test,” a level of review she labeled “skeptical scrutiny,”<sup>94</sup> Justice Ginsburg discredited both of Virginia’s proffered objectives and ruled that denying women admission to VMI violates the Equal Protection Clause of the Fourteenth Amendment.<sup>95</sup>

Ginsburg began the *Virginia* opinion by describing the “incomparable” opportunities available at VMI, opportunities that were, at the time of this decision, denied to women.<sup>96</sup> Ginsburg detailed the unique features of the adversative method, including the rigorous physical training, the total absence of privacy and the extreme regulation of behavior.<sup>97</sup>

Then, taking language from the *Hogan* opinion, Ginsburg set forth the “core instruction” which parties seeking to defend a gender-based classification must demonstrate: “an exceedingly

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91. *Id.* While the Fourth Circuit held that the will of a state’s legislature should be examined deferentially, the court did warn that a “pernicious” objective should never be upheld. *Id.*

92. *Id.*

93. *Id.* at 1239. Additionally, the Fourth Circuit put the proposed remedy to a third test: whether the men at VMI and the women at VWIL would receive “substantively comparable” benefits at their respective institutions. *Id.* at 1237. Despite the Fourth Circuit’s recognition that the two schools would use different educational approaches and that a VWIL degree would not come with the same prestige or connections that a VMI degree does, the court deemed them substantively comparable. *Id.* at 1241. *See also* *United States v. Virginia*, 518 U.S. 515, 555 (1996) (admonishing the Fourth Circuit for deferentially reviewing the purpose set forth by the State of Virginia).

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

95. *See id.* at 536-46. Ginsburg’s majority opinion delivered six votes: Breyer, Ginsburg, Kennedy, O’Connor, Souter and Stevens. *Id.* at 518. Justice Thomas did not partake in the decision. *Id.* Chief Justice Rehnquist filed a concurring opinion and Justice Scalia dissented. *Id.*

96. *Id.* at 520. Ginsburg makes it clear that the *Virginia* opinion is addressed only to an educational which is unique and available only at “Virginia’s premier military institute.” *Id.* at 534 n.7. Ginsburg specifically says that the opinion is not meant to question the State’s ability to support diverse educational opportunities if it supports such opportunities in an even-handed manner. *Id.*

97. *Id.* at 522.



persuasive justification.”<sup>98</sup> She further related that this “skeptical scrutiny” is necessary to uncover more than a century of discrimination against women.<sup>99</sup> Ginsburg also noted that while gender-based classifications are not subject to the same level of scrutiny that racially motivated classifications are, “the burden of justification is demanding and it rests entirely on the State.”<sup>100</sup> It is not until after this historical analysis that Ginsburg delineated that the State must show “at least” that the sex-based classification “serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”<sup>101</sup> Importantly, Ginsburg also stressed that the objective must be genuine and not based on stereotypical notions about women’s talents and proclivities.<sup>102</sup>

Performing a “searching analysis,” Ginsburg found that history does not corroborate Virginia’s alleged objective of promoting educational diversity.<sup>103</sup> In particular, Ginsburg pointed out that all of Virginia’s state-supported single-sex schools became co-educational in the past thirty years, leaving VMI as the only state-supported single-sex school.<sup>104</sup>

Second, Ginsburg dismissed Virginia’s argument that admitting women to VMI would mean altering the adversative method beyond recognition, finding such a contention to be overstated and based upon broad generalizations and assumptions about women.<sup>105</sup> Ginsburg pointed out that it is undisputed that some women are certainly capable of meeting the challenges of the adversative method as it is currently implemented and that the method is not “inherently unsuitable” for women.<sup>106</sup> Further, Ginsburg reminded Virginia that since the seminal *Reed*<sup>107</sup> case, individual qualified women may not be excluded from

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98. *Id.* at 531.

99. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

100. *Id.* at 533.

101. *Id.* (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

102. *Virginia*, 518 U.S. at 533.

103. *Id.* at 535.

104. *Id.* at 540-44.

105. *See United States v. Virginia*, 518 U.S. 515, 540-44 (1996) (noting that arguments and gloomy predictions of a similar nature were made when women first sought entry to federal military academies).

106. *See id.* at 540 (observing that some changes undoubtedly must be made to accommodate females in housing arrangements and physical training programs). Ginsburg readily noted that while the adversative method may not be the preferred mode of education for most women, many men would also not choose such an educational environment. *Id.* at 542 (citing the Fourth Circuit’s Justice Motz in her dissent from the Court of Appeals’ denial of a rehearing en banc).

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

opportunities on the basis of broad stereotypes.<sup>108</sup>

Finding that Virginia engaged in circular reasoning when it set forth single sex education as an important governmental interest that could only be achieved by the means of excluding women, Ginsburg asserted that Virginia wrongly focused their argument on “means rather than end.”<sup>109</sup> Thus, Ginsburg determined that Virginia failed to demonstrate an “exceedingly persuasive justification” for excluding women from VMI.<sup>110</sup> Instead, the Court found that VMI’s mission statement clearly spells out its true objective: “to produce citizen-soldiers, individuals imbued with love of learning . . . ready . . . to defend their country in a time of national peril.”<sup>111</sup> This goal, the court concluded, is surely broad enough to include women.<sup>112</sup>

Then focusing her attention on the remedy, Justice Ginsburg found that it fell far short of placing those disadvantaged by a constitutional violation “in the position they would have occupied in the absence of discrimination.”<sup>113</sup> Namely, the proposed parallel institution, VWIL, would not offer an opportunity for women to experience the demanding adversative method of training.<sup>114</sup> Instead, VWIL would be based on a cooperative method of teaching designed with a female’s special psychological needs in mind.<sup>115</sup> Further, the military component of VWIL would be

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108. See *Virginia*, 518 U.S. at 541-42 (citing *Hogan*, 458 U.S. at 725); (citing also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139, n. 11) (holding it is unconstitutional to use peremptory challenges to strike prospective jurors on the basis of gender).

109. *Id.* at 545.

110. *Id.* at 546.

111. *Id.* at 545.

112. *United States v. Virginia*, 518 U.S. 515, 545 (1996). See also *id.* at 586-87 (Scalia, J., dissenting) (opining that by defining true objective as creating individuals filled with love of learning and patriotism, the Court describes the mission of every school in Virginia). Justice Scalia’s argument is that VMI’s mission is more accurately described as imparting those values in a “military, adversative, all-male environment” and “that mission is not ‘great enough to accommodate women.’” *Id.* at 587.

113. See *id.* at 547 (citing *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (holding that a remedial education plan, requiring the state defendants to pay one half of the extra costs incurred by the plan, did not violate the Eleventh Amendment)).

114. *Id.* at 548.

115. See *id.* at 549 (describing the many ways in which VWIL is different and inferior to VMI). For example, women at VWIL would not be required to eat or live together, thus depriving them of an opportunity to bond in the barracks. *Id.* at 548. Also, VWIL students would learn their leadership skills through seminars and externships instead of through the stressful physical and mental training which is the hallmark of VMI. *Id.* at 549. The court also notes that VMI and VWIL would not be equals in prestige, connections, facilities, endowments, the types of degrees available or in the level of training among faculty members. *Id.* at 551-52.

“largely ceremonial.”<sup>116</sup>

Ginsburg firmly instructed that the remedy should be designed for the women who applied and were denied admission to VMI, in other words, it must accommodate the women who are “capable of all the individual activities required of VMI cadets.”<sup>117</sup> Ginsburg did explicitly recognize, however, that admitting women to VMI would require some changes in terms of allowing each sex privacy from the other in their living quarters and in altering some parts of the physical regimen for women.<sup>118</sup> In sum, Ginsburg found that the proposed remedy failed to compensate the injury of the women who had been denied the opportunity to be educated at VMI and that further, VWIL was a “pale shadow” of VMI.<sup>119</sup>

### C. Raising the Bar: An Exceedingly Persuasive Justification

The *Virginia* opinion, Ginsburg’s first opportunity to speak for the Court with respect to the proper standard of review for gender-based classifications under the Fourteenth Amendment, was richly influenced by the core beliefs that have motivated Ginsburg throughout her career.

First, the subtle maneuvering that gave the *Virginia* opinion its potency is demonstrative of Ginsburg’s understanding of the need to move slowly and build upon existing precedent in order to avoid finding oneself on a “doctrinal limb.”<sup>120</sup> The force behind the *Virginia* opinion is found in the ever so slight change in focus from the requirement that gender-based classifications are “substantially related” to an “important governmental objective” to

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116. See *id.* at 550 (pointing out that while Virginia justified watering down the militaristic component of VMI for VWIL students because VWIL graduates would not necessarily pursue a career in the military, only about fifteen percent of VMI’s graduates make a career in the service).

117. See *United States v. Virginia*, 518 U.S. 515, 550-51 (1996) (quoting *Virginia*, 976 F.2d at 896) (explaining that Virginia was not at liberty to fashion a remedy for the average woman because it is women who desire to and are capable of competing at VMI that instituted the lawsuit against Virginia, and thus the remedy must be created for them).

118. *Id.* at 551 n.19.

119. See *id.* at 553 (quoting *Virginia*, 44 F.3d at 1250 (Phillips, J., dissenting), and contrasting all the amenities and intangible benefits of VMI with VWIL as proposed by Virginia).

120. Ginsburg, *Remarks on Women*, *supra* note 20, at 25. See also Markowitz, *supra* note 5, at 346 (reporting that although Ginsburg always argued forcefully for strict scrutiny for gender-based classifications, Ginsburg felt that Justice Brennan moved hastily by using strict scrutiny in *Frontiero*). Because Justice Stewart was unwilling to embrace the strict scrutiny approach at that time, the strict scrutiny approach did not command a majority. *Id.* Ginsburg’s strategy in advocating strict scrutiny early and forcefully was merely to get the Justices used to the idea. *Id.*

the words immediately preceding that test: “exceedingly persuasive justification.”<sup>121</sup> While the phrase seemed to function more as an adjective describing the standard two-prong test in *Hogan*,<sup>122</sup> “exceedingly persuasive justification” becomes the focus of the test itself in *Virginia*.<sup>123</sup> Apart from labeling the requirement of establishing “an exceedingly persuasive justification” as the Supreme Court’s “core instruction,” the phrase is sometimes left to stand alone in such a way that it appears to function as the test itself.<sup>124</sup> The new prominence of the phrase is also indicated by the strong reaction to its usage prompted in Justice Scalia’s dissent.<sup>125</sup> While both Scalia and Rehnquist

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121. See *Virginia*, 518 U.S. at 523-24 (delineating the test a defendant classifying on the basis of sex must meet); see also Lee, *supra* note 16, at 235 (suggesting that the importance placed upon the phrase “exceedingly persuasive justification” may have formed a new level of equal protection scrutiny which Lee labels “intermediate review with teeth”); Collin Connor Udell, *Signaling a New Direction in Gender Classification Scrutiny: United States v. Virginia*, 29 CONN. L. REV. 521, 553 (1996) (theorizing that the focus on “exceedingly persuasive justification” is part of Ginsburg’s long-held strategy to move the Court toward endorsing strict scrutiny for sex-based classifications).

122. *Mississippi v. Hogan*, 458 U.S. 718, 724 (1982). The phrase “exceedingly persuasive justification” was first used in *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (holding that a veterans’ preference statute stipulating that all qualified veterans must be considered for civil service positions before non-veterans did not violate women’s right to equal protection). The statement reads, “any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.” *Id.* at 273; Lee, *supra* note 16, at 235.

123. See *United States v. Virginia*, 518 U.S. 515, 531 (1996) (providing an example of the way “exceedingly persuasive justification” is allowed to stand on its own as a representation of the requirement a party seeking to classify on the basis of gender must meet); see also Udell, *supra* note 121, at 541.

124. See *id.* at 532-33 (providing a prominent example of the new independence of “exceedingly persuasive justification”). But see *id.* at 524 (offering an example of an instance where “exceedingly persuasive justification” reverts to its status as an adjective).

125. See *id.* at 570-71 (Scalia, J., dissenting) (claiming that Ginsburg’s majority opinion dishonestly applies precedent). Scalia notes that Ginsburg uses the phrase “exceedingly persuasive justification” nine different times in the opinion. *Id.* at 571. Further, Scalia takes issue with Ginsburg designating that phrase as the Court’s “core instruction.” *Id.* See also *id.* at 559 (Rehnquist, C.J., concurring) (commenting that the phrase “exceedingly persuasive justification” “is best confined . . . as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself”). Rehnquist perceives that the while the phrases “important governmental objective” and “substantially related” are not “models of precision,” they are at least more specific than “exceedingly persuasive justification,” the use of which Rehnquist feels further confuses the intermediate level of scrutiny. *Id.*

objected to the shift in focus, Ginsburg's opinion, with its designation of the "exceedingly persuasive justification" as the chief requirement of intermediate scrutiny, did garner six votes.<sup>126</sup>

Ginsburg's use of the phrase "exceedingly persuasive justification" also gave her a tougher weapon to use in exposing benign justifications and in combating the use of generalizations about women. For one, in determining if a justification is exceedingly persuasive, it is clear from Ginsburg's opinion that the Court can and will look back to the time the classification was first used to determine if the rationalization being offered now for such a classification is the same one that was in mind when the classification was first established.<sup>127</sup> By searching Virginia's "recent and distant history" for the actual purpose behind excluding women from VMI, Ginsburg gave some indication that the basis for the classification at the time it was established must be valid under today's equal protection analysis in order to qualify as exceedingly persuasive.<sup>128</sup>

This indication becomes stronger when one considers that Ginsburg may have been able to disqualify Virginia's proffered objective of providing diversity in education just by looking at recent history.<sup>129</sup> After the *Hogan* decision came down, VMI formed a Mission Study Committee to reexamine its single-sex admission policy.<sup>130</sup> In reporting its decision to remain all male, the committee focused largely on the potential difficulties with attracting women.<sup>131</sup> Tellingly, the report did not list diversity in education as a reason for remaining an all-male institution.<sup>132</sup> Further, as Ginsburg briefly touches upon and as Rehnquist's concurring opinion notes, even if promoting diversity was Virginia's motive for establishing VMI, such a motive still violated the Equal Protection Clause because the diversity favored only one

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126. Udell, *supra* note 121, at 540.

127. See *id.* at 536-37 (explaining that at the time VMI was founded in 1839, diversity in education was hardly a concern for state leaders).

128. See *id.* at 536 (observing that "neither recent nor distant history bears out Virginia's alleged pursuit of diversity . . .").

129. See *United States v. Virginia*, 518 U.S. 515, 559-63 (1996) (Rehnquist, C.J., concurring) (noting that while Virginia ultimately fails to prove that diversity in education is their actual purpose, it was improper for Ginsburg to look back to 1839, when VMI was founded, to discern what their actual purpose in excluding women was). Rehnquist notes that it was not until far into this century that differential treatment of men and women by the law was even thought to violate the Equal Protection Clause. *Id.* at 560. Further, even if VMI's classification is unconstitutional by today's standards, it was clearly not unconstitutional in 1839. *Id.*

130. *Id.* at 539.

131. *Id.*

132. *Id.* at 562, n.\*\*\* (Rehnquist, C.J., concurring).

sex.<sup>133</sup>

Thus, the availability of other arguments with which Ginsburg could have discredited Virginia's alleged objective suggests that Ginsburg fully intended to make the exceedingly persuasive requirement tougher to meet by demanding that the objective be the actual one in mind at the time the discriminatory classification was devised. Such an intent on Ginsburg's part would be completely consistent with her long-held goal to expose benign justifications.<sup>134</sup> Further, demanding that the proffered justification is borne out by history is a way to make the "exceedingly persuasive justification" even more difficult to prove even without the benefit of implementing a "strict scrutiny" form of review.<sup>135</sup>

Writing the *Virginia* opinion also gave Ginsburg the opportunity to condemn a practice she fought throughout her career as a litigator: trapping women with stereotypes and generalizations.<sup>136</sup> In *Virginia*, Ginsburg held that attempts to exclude individual women by setting forth what the average woman can or cannot do will not qualify as an exceedingly persuasive justification.<sup>137</sup> In *Virginia*, Ginsburg conceded that most women would not want to attend VMI.<sup>138</sup> However, she shifted the focus of the opinion onto the women who would want to attend VMI. By making the relevant question "whether the State can constitutionally deny to women who have the will and capacity, the training and attendant opportunity that VMI uniquely affords," Ginsburg precluded the State from discriminating against women based upon broad generalizations about what most women are good at or prefer.<sup>139</sup>

133. *Id.* at 540, 562 (Rehnquist, C.J., concurring).

134. See generally Ginsburg, *Benign Classification*, *supra* note 17 (analyzing cases which attempted to expose the myth that the law's differential treatment of women helps or benefits them).

135. In some ways, Ginsburg was following O'Connor's method of analysis in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 727 (1982). In *Hogan*, O'Connor looked back to 1971, the year Mississippi University for Women's nursing school enrolled its first class, to see if women at that time were disadvantaged from entering nursing school as a means of discrediting Mississippi's alleged objective of compensating women for past discrimination. *Id.* at 729-30. Ginsburg, however, took such analysis a step further in reaching all the way back to 1839, the year VMI was founded. *United States v. Virginia*, 518 U.S. 515, 536 (1996).

136. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (holding that a provision of the Social Security Act which provided funds for child care when the male breadwinner dies, but not when the female breadwinner dies, was unconstitutional).

137. *Virginia*, 518 U.S. at 541-42.

138. *Id.* at 542.

139. *Id.*

It is not clear that the use of the exceedingly persuasive justification standard was necessary to debunk the various arguments Virginia made based upon the average tendencies of women.<sup>140</sup> Since the turning point at *Reed*,<sup>141</sup> the Court has warned that differential treatment of women by the law cannot be justified by "fixed notions concerning the roles and abilities of males and females."<sup>142</sup> However, Ginsburg did seem to take the Court's prohibition on excluding women based on generalizations one step further. Apart from reiterating that excluding on the basis of stereotypes of how women "are" is unacceptable, Ginsburg made it clear that excluding women on the basis of real, inherent physical differences between men and women is also unacceptable.<sup>143</sup> Ginsburg explains that "inherent differences" between men and women may not be used as grounds for belittling women or as an "artificial constraint on an individual's opportunity."<sup>144</sup> Bearing this in mind, Ginsburg found that even though VMI would have to make accommodations for women with respect to providing privacy from the other sex in their living quarters and also in adjusting physical training programs, the need for such changes could not stand as a barrier to admitting women.<sup>145</sup> The important

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140. See Udell, *supra* note 121, at 553 (commenting that Scalia's "hyberbolic" dissent ignores that ignores that "sex-based differences in the average do not justify gender discrimination"); see also *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (providing an example of a case not decided under the "exceedingly persuasive justification" standard in which the Supreme Court held that legal classifications cannot be based on stereotypes of the average woman). Despite precedent such as *Wiesenfeld*, directing that women cannot be discriminated against on the basis of stereotypical notions and generalizations, Justice Scalia commented in his dissent that: "only the amorphous 'exceedingly persuasive justification' phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women willing and able to undertake VMI's program." *Id.* at 2294 (Scalia, J., dissenting). Further, Scalia believes that in focusing on the minority of women who are willing and able to attend VMI, instead of upon the majority who are not, Ginsburg engages in a least-restrictive means analysis, thus far reserved for examinations under "strict scrutiny." *Id.* at 2295.

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

142. See *United States v. Virginia*, 518 U.S. 515, 541 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)); see also *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (holding that male plaintiff could not be denied Social Security benefits normally allocated to women in order to care for his newborn son).

143. *Virginia*, 518 U.S. at 533-34 (reminding that "sex classifications" can be used as a grounds for compensating women for past wrongs, but not "to create or perpetuate the legal, social and economic inferiority of women").

144. *Id.* at 533.

145. *Id.* at 540. Ginsburg notes that while men and women joining the Military, Naval and Air Force Academies had to meet identical criteria in terms of academics, "minimum essential adjustments" were made because of

point for Ginsburg is that the adversative method is not inherently unsuitable for women, and as such, can be used to train them.<sup>146</sup> By requiring VMI to adjust their program to women's physical needs, Ginsburg ensures that differences in a woman's physiology will not be used as a means of keeping women from enjoying all the opportunities that men do when those physical differences do not form the crux of an opportunity.

While Ginsburg's analysis of Virginia's proffered objectives gave her the opportunity to reaffirm the fact that those objectives cannot be based on generalizations about women, her analysis of the proposed remedy, VWIL, gave Ginsburg the opportunity to institute her belief in equal treatment of men and women under the law.<sup>147</sup> In evaluating VWIL, Ginsburg specifically noted that the program was "unequal in tangible and intangible facilities."<sup>148</sup> In finding such inequality, Ginsburg went so far as to compare the schools in terms of the SAT scores of incoming students, the number of Ph.D's among faculty members, the size of the schools' endowments, the networking opportunities available, and even the number and type of athletic fields.<sup>149</sup> By scrutinizing such aspects of VWIL, Ginsburg sent a clear message that if a state wishes to maintain separate institutions for men and women, those institutions must be equal in a very specific sense of the word.<sup>150</sup> By requiring such equality, Ginsburg makes it so that a State would need to have a serious commitment to its goal of separateness in order to make it worthwhile to create a roughly identical facility for women.<sup>151</sup>

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"physiological differences" between male and females. *Id.* at 551 n.19.

146. *Id.* at 540.

147. See generally Ginsburg, *Special Versus Equal Treatment*, *supra* note 31 (expounding upon the pitfalls of treating women differently, as opposed to equally, to men).

148. *United States v. Virginia*, 518 U.S. 515, 547 (1996).

149. *Id.* at 551-53.

150. See *id.* at 565 (Rehnquist, C.J., concurring) (disagreeing that an adequate remedy for VMI's constitutional violation needed to be a "VMI clone for women"). Rehnquist stated in his opinion that an adequate remedy would have been a demonstration by Virginia that they have an equal interest in providing single-sex education for men and women. *Id.* In order to show that interest, "[t]he state does not need to create two institutions with the same number of faculty Ph.D's, similar SAT scores or comparable athletic fields." *Id.* Rather, Rehnquist feels it would be sufficient to create two institutions of the same calibre. *Id.*

151. See *id.* at 553 (likening VWIL to the solution proposed by the State of Texas in *Sweatt v. Painter*, 339 U.S. 629 (1950)). In *Sweatt*, subsequent to a ruling that said denying African Americans entry to a state-run law school violates the Equal Protection Clause, the State of Texas attempted to keep African Americans from attending the University of Texas Law School by setting up a separate institution for them. *Sweatt*, 339 U.S. at 631-32. In comparing the law school for African Americans with the one available to



One main area upon which Ginsburg based her finding of VWIL's inequality is the fact that VWIL would deny women the opportunity to experience the sense of accomplishment that comes with enduring the rigors of the adversative treatment.<sup>152</sup> Instead of using a military-style method of educating, VWIL would have instituted a cooperative method.<sup>153</sup> The reasons proffered by VWIL proponents for implementing the cooperative method at VWIL, as opposed to the adversative method, are the supposed differences in women's and men's psychological makeup as well as their dissimilar developmental needs.<sup>154</sup> While Justice Ginsburg refuted this argument on the grounds that women whose abilities "place them outside the average description"<sup>155</sup> cannot be discriminated against based on stereotypes, Virginia's use of supposed feminine "differences" to women's disadvantage underscores the wisdom of Ginsburg's belief that women must be treated equally, and not specially.<sup>156</sup>

Ginsburg herself does not treat men and women as *interchangeable* equals. She necessarily allows that at VMI women must have privacy from men and concedes that minimal changes will have to be made in women's physical regimen.<sup>157</sup> In

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whites, the Court found that the former was sorely lacking in resources. *Id.* at 632-33. The *Sweatt* Court also compared the two schools in terms of intangible resources "which are incapable of objective measurement but which make for greatness" such as faculty reputation and the standing in the community. *Id.* at 634. In conclusion, the Court found that Texas failed to show "substantial equality" in the two institutions. *Id.* at 633.

152. *Virginia*, 518 U.S. at 548. As Ginsburg put it, "Kept away from the pressures, hazards and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the 'feeling of tremendous accomplishment' commonly experienced by VMI's successful cadets." *Id.* at 549.

153. *Id.* at 548.

154. See *United States v. Virginia*, 852 F. Supp. 471, 476-77 (W.D. Va. 1994) (explaining that a study of women's psychological needs confirms that because women "generally" have less self-confidence than men, the adversative method would be an ineffective method and even counterproductive method of educating women).

155. See *United States v. Virginia*, 518 U.S. 515, 550 (1996) (setting forth the proposition that the proposed remedy must be tailored to the women who want to attend VMI and are capable of all its rigors).

156. See *Virginia*, 518 U.S. at 576 (Scalia, J., dissenting) (arguing that research documenting women's different and "deep-seated" developmental needs supports the proposition that it is beneficial to educate men and women in different environments).

157. *Virginia*, 518 U.S. at 551 n.19. See also *Abrams*, *supra* note 31, at 880 (commenting that while Ginsburg does a commendable job of depicting the complexities of women and gender discrimination, she never says that women are "indistinguishable from men"); Ginsburg, *Full Members*, *supra* note 56, at 6 (pointing out that the Equal Rights Amendment would have prohibited gender as a basis of legal classification with two exceptions). The exceptions

allowing for such differences, Ginsburg in no way says that women have any special sensibilities or developmental needs which would better respond to an educational method other than the adversative method.<sup>158</sup> Rather, Ginsburg merely does not want undeniable physical differences between the sexes to prevent women from enjoying opportunities otherwise available.

*D. A Woman's Work is Never Done: Future Battles Outlined in the Concurring and Dissenting Opinions*

While the Virginia opinion provided Ginsburg with the opportunity to raise the standard of review for gender-based discrimination claims one step closer to the strict scrutiny she set out to establish in *Reed v. Reed*,<sup>159</sup> the opinion fell short of instituting such a level of review.<sup>160</sup> The concurring and particularly the dissenting opinion offer some insights into some of the opposition Ginsburg has to face before she can take the final step of instituting strict scrutiny.

While Justice Rehnquist's concurring opinion recognizes and takes issue with the fact that Ginsburg used the phrase "exceedingly persuasive justification" as the test litigants must meet when they classify on the basis of gender, his disagreement

"relate to personal privacy and physical characteristics unique to one sex." *Id.* The first is what Ginsburg terms the "potty problem." Ginsburg, *Fourteenth and Equal Rights Amendments*, *supra* note 8, at 175. Ginsburg explains that the "ERA would coexist peacefully with separate public restrooms, separate sleeping and bathroom facilities for male and female military personnel and prisoners." *Id.* Second, legislation dealing with subjects such as sperm donation or pre-natal care could discriminate on the basis of sex. *Id.* Note that these categories of exceptions are very similar to the ones Ginsburg is allowing in Virginia. See *Virginia*, 518 U.S. at 533 (emphasizing that "inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration. . . .")

158. But see Kupetz, *supra* note 16, at 1364-65 (arguing that as a lawyer Ginsburg sought to totally eliminate stereotypical treatment of women in the law, but that in the *Virginia* opinion, Ginsburg "called upon a Gilliganesque model of gender differences, pointing out that inherent differences between men and women would 'remain cause for celebration'"); Kovacic-Fleischer, *supra* note 31, at 863 (observing that the *Virginia* opinion is a drastic change from the view that "if women want male opportunities, they must look and behave like men"). However, Kovacic-Fleisher does note that, in her opinion, Ginsburg's willingness to make changes in women's physical regimen "reflect(s) the possibility of removing a requirement geared to one gender, but unnecessary to the achievement of the goal of the institution" and thus allows qualified persons of either gender to partake in VMI. *Id.*

159. 404 U.S. 71 (1971).

160. See *Reed Brief*, *supra* note 11, at 14 (outlining in detail the reasons that sex should be a proscribed classification, subject to strict scrutiny); Udell, *supra* note 121, at 558-59 (noting that while the door is open to implementing strict scrutiny for gender-based classifications, the *Virginia* court did not walk through it).

centered upon the ambiguity of the term.<sup>161</sup> However, he did not specifically disagree with the idea of raising the level of required scrutiny.<sup>162</sup> Rehnquist merely says that for clarity purposes, he would have clung more closely to the "firmly established" intermediate scrutiny test.<sup>163</sup> Thus, it is unclear from this opinion exactly how Rehnquist would react to the idea of raising the level of scrutiny for gender-based claims.

Scalia's dissenting opinion, on the other hand, clearly outlines some of the ideological obstacles Ginsburg may face on the road to implementing strict scrutiny as the standard of review for gender-based discrimination claims. Scalia makes it clear in his dissent that he believes Virginia's proffered objective of providing diverse and effective education by maintaining a single-sex school satisfied the "important governmental objective with substantially related means" test.<sup>164</sup> According to Scalia, only the application of a least-restrictive means analysis could have yielded the majority's conclusion that Virginia's maintenance of VMI violated the Equal Protection Clause.<sup>165</sup> Most importantly, Scalia states that the

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161. See *United States v. Virginia*, 518 U.S. 515, 559 (1996) (acknowledging that while terms like "important governmental interest" and "exceedingly persuasive justification" from the traditional intermediate scrutiny test are not very well-defined terms themselves, Rehnquist believes they have more specificity than does exceedingly persuasive justification).

162. *Id.* (Rehnquist, C.J., concurring). While Rehnquist does not specifically come out against raising the level of scrutiny, the other areas of Ginsburg's opinion with which he takes issue indicate areas of potential resistance. *Id.* at 565. For example, Rehnquist does not believe that VMI's constitutional violation should have been defined as excluding women from experiencing a unique and extraordinary method of education. *Id.* (Rehnquist, C.J., concurring). Rather, he believes that Virginia could have met the demands of the Constitution by merely demonstrating "that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution." *Id.* Further, Rehnquist does not believe that the all-women's school would have to be substantially similar in terms of curriculum or facilities to the all-men's school. *Id.* Rehnquist believes that the two schools would only need to be equal in "quality of education" and "calibre." *Id.*

163. *Id.* at 559.

164. *Id.* at 576 (Scalia, J., dissenting). Scalia believes that it is "beyond question" that the State of Virginia has an interest in providing a good education for its citizens. *Id.* Scalia then cites to findings made at the district court level which state that undisputed studies show that single-sex schools provide a superior education than their co-educational counterparts. *Id.* at 576-66 (citing *United States v. Virginia*, 766 F. Supp. 1407, 1412 (W.D. VA. 1991)). Scalia believes that the strength of these statistics documenting the benefits of single-sex education should have been enough on their own to show that VMI met the constitutional requirements. *Id.* at 577.

165. See *id.* at 579 (arguing that the majority opinion's biggest error was to find that VMI was unconstitutional because there were some women who were capable of handling all the rigors of VMI). According to Scalia, this is an "unacknowledged adoption" of strict scrutiny which does not have basis in

Court has held outright that strict scrutiny is inapplicable to sex-based classifications, and that further, he does not believe that there is a strong argument for applying strict scrutiny to such classifications.<sup>166</sup>

As support for his argument, Justice Scalia cites to a footnote in *United States v. Carolene Products Co.*,<sup>167</sup> which intimates that strict scrutiny may be called for where there is a “discrete and insular minorit[y].”<sup>168</sup> The famed footnote says that being a member of such a minority may constitute a “special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>169</sup> Justice Scalia believed, however, that it was “hard to consider women a ‘discrete and insular minority’ unable to employ ‘the political processes ordinarily to be relied upon,’ when they constitute a majority of the electorate.”<sup>170</sup>

Scalia’s argument is not a new one, and Ginsburg answered such criticisms in the past.<sup>171</sup> For one, Ginsburg wrote that “[s]ex,

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precedent. *Id.*

166. *United States v. Virginia*, 518 U.S. 515, 574-75 (1996) (Scalia, J., dissenting). As support for the proposition that the Court has explicitly refused to apply strict scrutiny for classification based on gender, Scalia cites such cases as *Heckler v. Matthews*, 465 U.S. 728 (1984) (holding through the application of intermediate scrutiny, that a pension offset provision which applied to nondependent men but not to similarly situated nondependent women did not violate the due process clause of the Fifth Amendment) and *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464 (1981) (holding through the application of intermediate scrutiny, that a statutory rape law which applied only to men, did not unconstitutionally discriminate on the basis of gender). Additionally, Scalia states that if the level of scrutiny for gender-based classifications should change at all, there is a better argument for changing it to the easier rational-related standard of review than there is to change it to strict scrutiny. *Virginia*, 518 U.S. at 574-75 (Scalia, J., dissenting). Scalia’s personal philosophy regarding strict scrutiny is that the Court has said that strict scrutiny is reserved for race and national origin-based classifications and for “classifications affecting fundamental rights.” *Id.* at 567 (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)). In Scalia’s opinion, fundamental rights should be limited to those rights which are “traditionally protected by our society.” *Id.*

167. 304 U.S. 144 (1938).

168. *Virginia*, 518 U.S. at 575 (Scalia, J., dissenting) (citing *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)).

169. *Id.*

170. See *Virginia*, 518 U.S. at 575 (arguing that treating women as a minority who is unable to exercise its political power is to treat women in the same solicitous manner that the majority opinion is denouncing in *Virginia*).

171. See, *Brief for Appellee* at 15-18, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694) (demonstrating that in *Frontiero*, the Solicitor General made three arguments as to why sex, unlike race, should not be considered a suspect classification). For one, Scalia argued that race distinctions have been

like race, is a visible, immutable biological characteristic that bears no necessary relationship to ability."<sup>172</sup> Further, Ginsburg pointed out that although women were given the vote earlier this century, it cannot be ignored that women did not have this privilege until well into this century.<sup>173</sup> Additionally, in response to the charge that gender classifications should not be ranked a suspect classification because women are a numerical majority, not a discrete and insular minority, Ginsburg points out that being a discrete and insular minority can be advantageous in the sense that it makes political organization and mobilization more simple.<sup>174</sup> Further, even though women may be strong in number, their power is diluted because women are separated by class, economics, and geography.<sup>175</sup> These same arguments still ring true today, and it is clear from Scalia's dissent that Ginsburg will need to make them again in her quest to implement strict scrutiny for gender-based classifications.

### CONCLUSION

While Justice Ginsburg has not yet succeeded in convincing

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treated more disfavorably than sex distinctions in Constitutional history. *Id.* Second, being that women are a numerical majority, they are better able to exercise their political power to protect their rights than are minorities. *Id.* Third, while the legislation affecting minorities is "commonly perceived as implying a stigma of inferiority or a badge of opprobrium," the same is not true of the legislation affecting women. *Id.*; Udell, *supra* note 121, at 554-56 (setting forth that arguments likening gender to race retain their validity, and that further, Ginsburg has responded to *Carolene Products* arguments before).

172. Ginsburg, *Full Members*, *supra* note 56, at 3-4. In comparing race and gender as classifications in the *Reed Brief* Ginsburg wrote, "[b]oth classifications create large, natural classes, membership in which is beyond the individual's control . . . . Arguments justifying different treatment for the sexes on the grounds of female inferiority, need for male protection, and happiness in their assigned role bear a striking resemblance to the half-truths surrounding the myth of the 'happy slave.'" *Reed Brief*, *supra* note 11, at 15-16. In her brief for *Frontiero v. Richardson*, Ginsburg left out the detailed comparisons of racial discrimination to gender-based discrimination because she had become more in tune with the fact that different groups are discriminated against in different ways. Markowitz, *supra* note 5, at 344.

173. Ginsburg, *Full Members*, *supra* note 56, at 4.

174. *Id.*

175. *Id.* In her *Reed Brief*, Ginsburg thoroughly outlined the reasons why sex should be treated similarly to race. *Reed Brief*, *supra* note 11, at 15. Ginsburg wrote: "As other groups have been assisted toward full equality via the suspect class doctrine, women lack political power to remedy the discriminatory treatment they are accorded in the law and in society generally." *Id.* at 25. Further, Ginsburg listed some of the ways that women were still treated as inferiors in the law, even in the 1970's. *Id.* at 32. For example, a wife's domicile is generally legally dictated to be that of her husband's. *Id.* Also, in 1971, women were required to serve on juries on an equal basis with men in only 28 states. *Id.* at 35.

the Supreme Court to implement strict scrutiny for legal classifications made on the basis of gender, there is no question that under her leadership, women have made great strides toward achieving equality in the eyes of the law. From convincing the Supreme Court that the Fourteenth Amendment should extend its protections to women, to handing women their strongest weapon yet to fight gender discrimination in the law, Ginsburg has helped bring about an extraordinary amount of change in the last 28 years. Clearly, from atop her position on the highest court in the land, Ginsburg is now in a better position than ever to influence the Court to dynamically interpret the Fourteenth Amendment to accord its fullest protections to women.<sup>176</sup>

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176. See Ginsburg, *Full Members supra* note 56, at 3 (commenting that the Fourteenth Amendment has been dynamically interpreted to include two other classifications, alienage and national origin). Alienage and national origin were not originally meant to be protected under the Fourteenth Amendment. However, like race and gender-based classifications, they are classifications that distinguish persons "on the basis of who they are, rather than what they have done or are capable of doing." *Id.*

