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I. INTRODUCTION

This comment shows the path race and gender discrimination have traveled to arrive at our modern day understanding. The rulings in each case discussed are not necessarily as meaningful as the thought process behind the decisions. Just as race struggled to overcome stereotypes and gross generalizations, gender constantly encounters obstacles of invalid assumptions regarding the roles and abilities of males and females in society. Each case is a stepping stone towards uncovering the constitutional intent and fundamental truth behind the Equal Protection Clause, and whether the *separate but equal* doctrine, as it applies to athletics, exemplifies this truth. The comment uses the notion of scrutiny, first in the dictionary sense of the word, and then in the legal sense of the word, to explain the process by which constitutional disputes are adjudged. Throughout time, different levels of scrutiny have been used to evaluate gender discrimination claims, however, when viewed upon a continuum, gender segregation schemes are increasingly being invalidated. Resulting feelings of inferiority and stigmas are requiring courts to re-evaluate the constitutionality of gender-based sports programs. A new definition of equality is emerging that may forever change the interaction between males and females on and off the athletic field. *United States v. Virginia*[1] has created a necessity for exceedingly persuasive justification of gender separation arguments. This comment explores the fate of *separate but equal* in the world of athletics under this new skeptical scrutiny regime.

II. RACIAL SEGREGATION

As early as the mid-1870's, the black and white races had already begun to live in separate societies. Blacks constructed their own churches, schools, businesses, and neighborhoods and whites began to exclude blacks from white institutions.[2] The separation was partly a result of pressure and coercion from whites, and partly a result of the desire of blacks to develop their own independent culture. Whatever the reasons, however, segregation was largely in place by the end of the 1870's, continuing in a different form of racial separation established under slavery.

Most white Southerners never accepted the idea of blacks as equal citizens of their region. Any legal and political rights former slaves acquired

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1 United States v. Virginia, 518 U.S. 515 (1996).

2 ROBERT DIVINE ET AL., AMERICA PAST AND PRESENT 484, Harper Collins Publishers (1995).

after emancipation was in large part the result of federal support. However, that support all but vanished after 1877, and federal troops were no longer available to police polls to prevent whites from excluding black voters.[3] Furthermore, Congress was no longer taking an interest in the condition of the former slaves.

The courts were signaling a retreat as well. In a series of decisions in the 1880's and 1890's, the Supreme Court effectively stripped the Fourteenth and Fifteenth amendments of much of their significance. In deciding the Civil-Rights cases of 1883, the Court ruled that the Fourteenth Amendment prohibited state governments from discriminating against people because of race, but did not restrict private organizations or individuals from doing so.[4] Thus railroads, hotels, theaters, and the like could legally practice segregation. Eventually, the Court also validated state legislation that discriminated against blacks.

A. *Racial Discrimination Case Law*

1. *PLESSY V. FERGUSON*

The segregation laws of the 1890's did little more than codify an already established system. In 1896, the Supreme Court handed down a ruling that would perpetuate division of the races for over half of a century. In the infamous case of *Plessy v. Ferguson*,[5] the Court upheld a state law that mandated separate train cars for blacks and whites, and in so ruling, the doctrine of *separate but equal* was born. In what arguably may be called a superficial examination of the problem at hand, the Court avoided dissecting the issue of segregation by resorting to established notions of tradition and custom to find such a mandate reasonable. Instead of focusing on what was fair or just, the Court indicated that maintaining peace and order among the people was of the utmost importance.[6] Since these two notions are not interdependent, the Court posed the wrong question, and in so doing, applied a qualitative analysis to the system of segregation. The Court implicitly defined the term *separation* as a physical construct and ignored the mental and social inequities stemming from this definition of the term. Although the Court mentioned the idea of inferiority associated with this

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[3] *Id.* at 495.

[4] *Id.* at 584-85.

[5] Plessy v. Ferguson, 163 U.S. 537 (1896).

[6] *See id.* at 550 (In order to determine that the separation of accommodations based on race was reasonable, the Court referred to "established usages, customs, and traditions of the people [as well as] their comfort and the preservation of the public peace and good order.").

scheme, it quickly dismissed this concept by reasoning that separation based on race did not necessarily imply inferiority,[7] and even if it did, "any perceived badge of inferiority" existed "solely because the colored race choose to put that construction on it."[8] By defining inferiority as a self-inflicted wound, the Court rendered the power of the word ineffective and meaningless. Although the accommodations were technically symmetrical, the Court failed to achieve equality beyond that of the essential thing.[9]

2. *SWEATT V. PAINTER*[10]

As time progressed, the change in social attitudes toward the African-American race was reflected in the *Sweatt* decision. In *Sweatt*, a black man was denied admission to the University of Texas Law School solely on the basis of his race. Prior to the Supreme Court decision in the case, the state of Texas had opened Texas State University for Negroes, which offered a legal education to black students.[11] The state operated a dual system of schools providing a legal education. In form, this scenario presented an identical situation to that which we saw in *Plessy*, however, the Court chose not to merely employ the quantitative analysis previously outlined. Instead, the Court held that denying black students admission to the University of Texas Law School violated the *separate but equal* doctrine, because the state's law school for black students was not comparable in light of certain tangible and intangible qualities.[12] The newly formed black institution denied students the tangible rights to a legal education because of the schools inferior facilities, as well as instructional capabilities.[13] However, the Court extended this analysis when it stated:

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are capable of objective measurement but which make for greatness in a law school. Such qualities to name a few, include reputation of the

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7 *See id.* at 544.

8 *See id.* at 551.

9 Dana Robinson, Comment, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. CONTEMP. LEGAL ISSUES 321, 327 (1998).

10 Sweatt v. Painter, 339 U.S. 629 (1950).

11 *Id.* at 634.

12 *Id.* at 632-34.

13 *See id.* at 632-33. The University of Texas Law School offered a faculty of sixteen full-time and three part-time professors, a student body of 850, a library with 65,000 volumes, while the newly formed black school had only five full-time professors, a student body of twenty-three, and a library with 16,500 volumes.

> faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.[14]

In addition, the Court stated that few students would chose to study in an environment that excludes the exchange of viewpoints and that excludes from its population a large percentage of citizens with whom those students must deal with after graduation.[15] The Court's powerful language indicated that the definition of equality extends beyond that of the fundamental entity. Equality can no longer be determined by a visible examination, but by a multi-layered in-depth analysis of the totality of the situation. In recognizing such great differences between the two schools, the Court's decision signaled a departure from the *separate but equal* doctrine.

3. *BROWN V. BOARD OF EDUCATION*[16]

In 1954, the legality of segregation lost all validity in the eyes of the Supreme Court. *Brown* ignited a period of enlightenment not only regarding judicial actions, but also social behaviors. In *Brown*, black students sought to attend the white schools because the segregated schools were not equal,[17] and so deprived the students of their Fourteenth Amendment rights.[18] Despite the fact that the segregated schools were concededly equal,[19] the Court held that separate schools for black children were inherently unequal because it denied all students access to intangible benefits, similar to those expressed in *Sweatt*.[20] In condemning racial segregation in education, the Court recognized that classifying students based on their race reinforced their exclusion from social and economic opportunities in life.[21] The concept of intangible benefits was necessary for the Court to finally address the sense of wrong and inferiority associated with segregation when it stated: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of

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14 *Id.* at 634.

15 *See id.*

16 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

17 *Id.* at 486-8.

18 *See* U.S. CONST. amend. XIV (providing that "no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws").

19 *See Brown*, 347 U.S. at 492. The schools were equal in terms of building facilities, curriculum, teacher qualifications, and salaries.

20 *Id.* at 495.

21 *Id.* at 493-94.

inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[22]

The Court recognized that education, which encompasses social, intellectual, and mental growth, is a foundation for success in life.[23] Since the social science data indicated that the feelings of inferiority attendant on enforced segregation affected a child's motivation and ability to learn, this sort of segregation violated the Equal Protection Clause of the Fourteenth Amendment.[24]

B. Scrutiny Analysis for Racial Separation

It can be seen that the Supreme Court played a role in the changing social attitudes towards racial segregation. The judicial process utilized different levels of scrutiny in order to determine the outcomes of various cases. The progression of African-American acceptance in white communities paralleled the increase in leniency utilized by the courts concerning issues of racial tension. The judgment given in *Plessy* maintained that *separate but equal* is a perfectly legitimate social concept, as long as both parties in question have access to equivalent types of transportation. What *Plessy* did not address was the qualitative inconsistencies involved with the racial separation. The Court analyzed the case using a loose level of scrutiny, thereby establishing the legality of *separate but equal.* The type of scrutiny employed denoted a quantitative equality of the races but not necessarily ensuring equivalent quality, conditions, or treatment. Since *Sweatt* accounted for the disparate degrees of education between the black and white law schools, the courts applied an increased level of scrutiny to the circumstances of the situation. In this case, the courts were not only concerned with the level of education but also the reputation and ease with which one could obtain a professional position immediately following graduation. However, this degree of scrutiny continues to permit the separation of the races as an allowable practice, with the stipulation that all things separate are equivalent in all aspects. This notion is expanded on in *Brown.* The scrutiny employed was that of a much stricter nature. The terms of equality become irrelevant as the Court elucidates the inherent wrongness of the *separate but equal* doctrine. The Court introduced the revolutionary concept that the separation of the races directly undermines the fundamental principle of equality.

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22 *See id.* at 494.

23 *Id.* at 493.

24 *Id.* at 493-95.

Under *Brown*, all racial classifications are now treated as inherently suspect and suspicious, and so must be decided under a strict scrutiny standard of review.[25] The strict scrutiny analysis consists of two lethal prongs. First, the government must establish a compelling state interest, and second, the remedy must be narrowly tailored to further that state interest.[26] The second component of the test indicates that there must be no less discriminatory means to advance that particular interest.[27] In other words, the two-prong test ensures a tight fit between means and end and allows the court the option to dispel any notions of suspicion that it may harbor. History has proven that racial classifications have been used as a tool to disfavor and purposely harm a particular group because of existing stereotypes and biases. Rarely is race relevant to a government action or regulation.[28] In addition, racial minorities may have much difficulty redressing their wrongs through a political system that is often motivated by prejudice or indifference.[29] The protection afforded to race is necessary to remedy the evils of past discrimination and any remaining vestiges that might escape into the future. The demanding nature of the strict scrutiny analysis almost always results in the invalidation of the governmental policy.[30]

III. GENDER DISCRIMINATION

A. *Overview*

Race was not the only classification that required a degree of protection from the oppressive past of social inequity. "For most of its history, the Supreme Court has interpreted the Equal Protection Clause to provide no special protection to women."[31]

> Throughout much of the 19th century, the position of women in our society was, in many respects, comparable to that of blacks

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[25] Jon Allyn Soderberg, *The Virginia Military Institute And The Equal Protection Clause: A Factual And Legal Introduction*, 50 WASH. & LEE L. REV. 15, 20 (1993).

[26] *Id.* at 20.

[27] *See id.*

[28] Paul E. McGreal, *Alaska Equal Protection: Constitutional Law Or Common Law?*, 15 ALASKA L. REV. 209, 219 (1998).

[29] *Id.* at 219.

[30] *Id.* at 225. The stringency of this test has led some commentators and judges to complain that strict scrutiny is "strict in theory but fatal in fact." Only once in our constitutional history, has the court upheld a racial classification under strict scrutiny. *See* Korematsu v. United States, 323 U.S. 214 (1944).

[31] *See* McGreal, *supra* note 28, at 227.

> under the pre-Civil War slave codes. Neither slave nor women could hold office, or bring suit in their own names, and married women were traditionally denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right.[32]

Until the 1960's, courts consistently upheld the government's authority to classify by sex, and any attempt to invade gender lines was futile.[33] The Court had decided these sex classifications as reviewable under the mere rationality test. In order to survive this level of scrutiny, the government must have a legitimate state interest, and the relationship of the means employed must only be rational.[34] This is not a difficult standard to comply with, since only an irrational or capricious approach to an objective will not survive.

As early as 1892, women were rebelling against their assigned station in life in order to experience the same autonomy as males. In the case of *Bradwell v. the State*,[35] a woman tried to obtain a license to practice law, but the court denied her application and wrote:

> The natural and proper timidity and delicacy that belongs to the female sex, evidently, unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views that belong, or should belong, to the family institution, is repugnant to the idea of a woman adopting a distinct an independent career from that of her husband.[36]

Again, in the case of *Hoyt v. Florida*,[37] the all-male court imputed its notions of what a woman's place in society was, in order to exempt women

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[32] Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make The Grade?*, 4 DUKE J. GENDER L. & POL'Y 69, 72 (1997).

[33] Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451,451 (1978).

[34] Elizabeth A. Douglas, United States v. Virginia*: Gender Scrutiny Under An "Exceedingly Persuasive Justification" Standard*, 26 CAP. U.L. REV. 173, 173 (1997).

[35] Bradwell v. State, 83 U.S. 130 (1872).

[36] *See id.* at 141.

[37] Hoyt v. Florida, 368 U.S. 57 (1961).

from serving on juries.[38] A similar analysis was used in *Goesaert v. Cleary*[39] to exclude women from tending bar.[40] The Court stated that its intention was to protect women from the foul tavern culture, to which tending bar would expose them.[41] Such a classification by the Court was devoid of rationality. However, stereotypical generalizations provided the justification for restricting the spheres of life of which women could be a part. It is evident that such archaic reasoning was unable to identify any real postulate for why such stereotypes formed, and so these theories were just presumed to be valid. As time passed, people's view of gender classifications slowly changed, and it became apparent that later courts would need to seize upon the blatant flaw left exposed by *Bradwell*, *Hoyt*, and *Goesart*.

B. *Modern Era Case Law*

1. *REED V. REED*[42]

Reed was the first case to wage a winning battle against the Supreme Court's consistent rejection of gender discrimination complaints by women. In *Reed*, the Court dealt with an Idaho statute that established a hierarchy of persons entitled to administer the estate of a decedent who died intestate, giving the preference to the male where two or more persons were entitled to administer the estate.[43] In her first major amicus brief, Justice Ginsburg argued for a heavier burden of proof because the legislature often based judgments on "inaccurate stereotypes of the capacities and sensibilities of a woman."[44] Her brief's main points highlighted race and gender classification similarities, and stressed the adoption of gender as a suspect class.[45] She explained that gender, like race, was an unalterable identifying trait over which the individual had no control.[46] Similar to suspect classifications, she reasoned that gender usually had no relation to the individual's ability to perform or contribute to society, and therefore, such a classification

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38 *Id.* at 61-2 (stating that the woman is still regarded as the center of home and family life).

39 Goesaert v. Cleary, 335 U.S. 464 (1948).

40 *Id.* at 465-66.

41 *Id.* at 466.

42 Reed v. Reed, 404 U.S. 71 (1971).

43 *Id.* at 72.

44 Scott M. Smiler, Note, *Justice Ruth Bader Ginsburg and the Virginia Military Institute: A Culmination of Strategic Success*, 4 CARDOZO WOMEN'S L. J. 541, 547 (1998).

45 *See id.*

46 *See id.*

connotes inferiority.[47] Similar to the strategy employed in *Brown,* Ginsburg presented empirical data on the number of working women in order to demonstrate that the status of working women was separate and unequal.[48] She "pragmatically attempted to persuade the Supreme Court to adopt the strict scrutiny test."[49]

This was a classic case of discrimination because the law differentiated solely on gender lines. The Idaho court attempted to justify the discriminatory statute on the grounds of administrative convenience.[50] However, the Supreme Court found Idaho's administrative convenience rationale insufficient to justify the gender-based classification, stating that the law was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."[51] Thereafter, the Court facially invalidated the statute under a rational basis review, but the language in *Reed* indicated that the Court was applying a higher level of scrutiny. There is no doubt that Idaho's objectives of reducing probate contests and intrafamily wrangling were legitimate, and preferring men as administrators was certainly not without rationality because men were more active in business. The language used in the opinion may be the technique the Court employed in order to avoid defining or redefining the existing standard. Although there was no explicit shift of a scrutiny standard, the rational basis test took on new meaning, which acted as an oracle signaling the end of the rational basis review for gender discrimination. The fight against gender discrimination transformed into a crusade to uncover fundamental truths that had never been explored inside a courtroom.

2. *FRONTIERO V. RICHARDSON*[52]

Seizing upon the language enunciated in *Reed, Frontiero* continued on the quest for a gender-neutral society, as well as a justice system which prohibits the classification of gender differently than to that of race.[53] In *Frontiero*, a servicewoman in the United States Air Force sought to claim her husband as a dependent so that she could obtain increased quarter allowances, and medical and dental benefits.[54] Under military statutes, a serviceman is able

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47 Tony J. Ellington, et al., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 HAWAII L. REV. 699, 725-26 (1998).

48 *See id.*

49 Smiler, *supra* note 44, at 549.

50 *Reed*, 404 U.S. at 76.

51 *See id.*

52 Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion).

53 Smiler, *supra* note 44, at 549.

54 *See Frontiero*, 411 U.S. at 680.

to 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.[55] As in *Reed*, the government's sole justification for the gender classification was an "administrative convenience."[56] The government argued that it was entirely possible that Congress determined that it would be cheaper and easier to presuppose that wives are dependent upon their husbands, and so placed the burden on wives to establish dependency in fact.[57] There was some statistical evidence in support of the government's policy. However, the Court struck down the law in an effort to continue on the path that *Reed* built. Justice Brennan, writing for the plurality, condemned the use by courts of "romantic paternalism" because it had the effect of individually relegating females to inferior legal status, without regard to actual capabilities.[58] In line with this notion, the plurality held that sex classifications were inherently suspect, and so should be decided according to a strict scrutiny standard.[59] In support of this position, the plurality adopted much of the same language that Justice Ginsburg laid forth in her briefs when she analogized race to gender. First, they reasoned sex does not usually bear any relation to ability to perform.[60] Second, sex is a visible characteristic and is more easily open to attack.[61] Third, sex is an "immutable characteristic and cannot be altered."[62] Fourth, sex has been subject to discrimination and retardation for centuries.[63] Last, women have been underrepresented in the political arena and government for many years.[64] Despite the plethora of rationales offered in support of a strict scrutiny regime, a majority of the Court could not be convinced to label gender as a suspect class. Perhaps the majority was not ready to accept the definition of strict scrutiny that had been formulated because the standard could not accommodate uniformly accepted gender classifications. In turn, the Court remained uncertain as to what level of review is necessary to adequately address gender classifications.

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55 *Id* at 679.

56 *See id.* at 688.

57 *Id.* at 689.

58 *Id.* at 684-87.

59 *Id.* at 688.

60 John Galotto, Comment, *Strict Scrutiny For Gender, Via Croson*, 93 COLUM. L. REV. 508, 520 (1993).

61 *See id.*

62 *See id.*

63 *See id.*

64 *See id.*

3. *KAHN V. SHEVIN*[65] AND *SCHLESINGER V. BALLARD*[66]

In *Kahn*, a case decided in the wake of *Frontiero*, the Court upheld a property tax-exemption for widows that was not available to widowers,[67] because "there can be no dispute that the financial difficulties concerning the lone woman in Florida, or in any other state, exceed those facing the man."[68] The Court found that the tax exemption had a fair and substantial relationship to the legislative concern for the inequality of opportunity of women. In upholding this statute, the Court found dispositive statistics that indicated that a widowed woman working full-time would make significantly less than a similarly situated male.[69] The effect would inevitably place a greater burden of economic hardship on a widow compared to that of a widower.

Schlesinger was also decided shortly after the *Frontiero* case and once again shed light on the notion of generalizations. In *Schlesinger,* the Court upheld a statutory scheme whereby male naval officers who failed to receive promotion from lieutenant to lieutenant commander for a second time were subject to mandatory discharge from the Navy without regard to length of service.[70] However, female officers were allowed thirteen years to advance between the levels.[71] The Court stated that the differences reflect the fact that the male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service.[72] Therefore, the statute was not based on overbroad generalizations concerning the ability of women to achieve advancement, but rather societal impositions that hindered such an achievement.

Kahn and *Schlesinger* reflect the fact that determining whether a classification perpetuates a stereotype is an extremely difficult exercise. Such an inquiry invites a subjective notion into the analysis, and so produces no hard and fast rule. In both cases, the Court upheld statutes that favored one gender over another, and effectively narrowed the impact of *Frontiero.* Together, *Kahn* and *Schlesinger* sanction this type of classification if it intentionally and directly compensates the gender that has been disproportionately burdened by past discrimination. This use of rational

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65 Kahn v. Shevin, 416 U.S. 351 (1974).

66 Schlesinger v. Ballard, 419 U.S. 498 (1975).

67 *Id* at 352.

68 *See id.* at 353.

69 *Id.* at 353-54

70 *Id.* at 499-500.

71 *See id.*

72 *Id.* at 508.

scrutiny evaluates the case on an extremely specific level. The arguments apply narrowly to a particular person or event. No detailed pattern of scrutiny can be seen since varying social factors largely influence the rational conclusions reached. *Kahn* and *Schlesinger* do not account for the idea that a woman has the inherent capability to earn the same amount of money or perform as well as a male, providing the same work ethic and ability pertain, but chooses to regard the societal inequalities that apply. *Kahn* introduces a new concept for gender equality. In order for the public to eventually accept equality among sexes, society must first suppose that this equality can exist. The Court used rational scrutiny in *Reed, Kahn*, and *Schlesinger* to improve the noticeable gender inequalities in society. If, and when, the general public's perception of gender roles was augmented, the judicial system could then mold interpretations of the Equal Protection Clause in favor of an appropriate gender equality. Subsequently, the standard necessary to address gender discrimination has been, and remains, unable to locate any stability among prior opinions.

4. *CRAIG V. BORON*[73]

The mere rationality standard was delegated as the starting point of evaluation, and when flaws were discovered within this approach, the Court began to speak of the heightened strict scrutiny standard. Early on, the Court had developed two extremes, neither of which was equipped to solve the dilemma at that point in time. The Court continued to flush out these two standards, until a new tier of review was explicitly created and condoned in *Craig*.

In *Craig*, the challenged classification of an Oklahoma statute prohibited sale of 3.2% beer to men under the age of twenty-one, and women under the age of eighteen.[74] The *Craig* Court applied a two prong test that requires a governmental actor to show: first, that a gender based classification serves an "important governmental objective," and second, that the classification is "substantially related to achievement of that objective."[75] Oklahoma offered traffic safety as its justification for the differences and produced statistics showing that changing the statute would adversely affect traffic safety.[76] Traffic regulations are devised to ensure the good of the public. The Court was presented with surveys indicating that males between the ages of eighteen and twenty-one were arrested more often for alcohol related

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73 Craig v. Boron, 429 U.S. 190 (1976).

74 *Id.* at 191-92.

75 *See id.* at 197.

76 *Id* at 200.

offenses, were involved in more injurious related car accidents, and were more likely to drink and drive, than females.[77] While agreeing that traffic safety was an important government objective, the Court did not find the sex classification to be substantially related to that objective.[78] The Court noted that "even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here."[79] The Court did not reject the use of statistical evidence to support gender discrimination, but it admonished that proving "broad sociological propositions" by using statistics can be deceptive and unclear.[80] The burden of proof now resides in the government to justify the means it employed to attain its objectives. "The question remains whether a statistical correlation between gender and the government's purpose would dispel the Court's suspicion," and if so, then in what instances would this occur.[81] Recalling that the Court accepted public safety as an important public purpose, the statistics showed that 2% of men aged eighteen to twenty-one were arrested for drunk driving, while only .18% of women the same age were arrested for the same offense.[82] The Court needed to determine whether this information provided sufficient justification for the statute to discriminate by gender. These statistics clearly showed that men aged eighteen to twenty-one were arrested for drunk driving substantially more often than women in that age group. The Court addressed whether or not gender had an inherent connection with the government's purpose, and disregarded the obvious discrepancy in the percentages. Thus, instead of asking whether men posed a greater drunk driving risk than women, the Court asked whether men aged eighteen to twenty-one as a class are necessarily predisposed to drive while drunk.[83] A showing that 2% of men were arrested for drunk driving did not suffice.[84] It was obvious that loose-fitting generalizations would not be able to overcome the power of the new standard. The *Craig* Court had set forth what has become the modern "intermediate scrutiny" test for evaluating the constitutionality of gender based classifications.[85]

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77 *Id.* at 200-01.

78 *Id.* at 204.

79 *See id.* at 201.

80 *See id.* at 201, 204. "While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device."

81 McGreal, *supra* note 28, at 233.

82 *See Craig*, 429 U.S. at 201.

83 *See id.*

84 *See id.*

85 Elizabeth A. Douglas, Note, United States v. Virginia*: Gender Scrutiny Under An "Exceedingly Persuasive Justification" Standard*, 26 CAP. U.L. REV. 173, 177-78 (1997).

In order to reach this conclusion, the *Craig* Court relied extensively on the reasoning of *Reed*. *Reed* had given the power to the Court necessary to invalidate statutes that used gender as a tool to achieve particular objectives. The dissent criticized the Court's analysis, and argued that the Oklahoma statute needed only to pass a rational basis standard of review.[86] The dissent felt that the new scrutiny standard would create many problems and "would invite subjective judicial preferences or prejudices relating to particular types of legislation."[87] In so doing, the dissent had confirmed that the majority was using some form of heightened scrutiny to decide the case.

Reed, Frontiero, and *Craig* illustrate how the Court uses the second part of the test as a check to confirm or dispel the apprehension of basis discrimination. This series of cases demonstrates how each level of scrutiny loses its identity to another level. Oftentimes, particular interests do not fit within an absolute category, and those interests are given a mismatched label that perpetuates confusion and inequity. A subjective analysis of the fit question can result in a multitude of opinions, which inevitably blur the dividing lines of scrutiny. For this reason, the Court would continue to expand as well as retract upon scrutiny levels in an effort to locate the perfect solution.

5. *MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN*[88]

Up to this point, the outcome of cases were dependent upon whether or not there was a close relationship between the government interest and the means. However, this narrow analysis began to take on new meaning. In *Mississippi*, the state of Mississippi maintained one single-sex public institution of higher education. Mississippi University for Women (M.U.W.) operated a nursing school that limited its enrollment to women.[89] Joe Hogan was a male registered nurse who resided close to M.U.W. and sought to enroll in the school's nursing degree program.[90] Attending either of the two coeducational programs to achieve his degree was too inconvenient for him and his family.[91] He would have had to endure a daily commute and spend a great deal of time away from his home.[92] Hogan was denied admission to M.U.W. on the basis of his sex, and brought suit

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86 *See Craig*, 429 U.S. at 201.

87 *See id.*

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

89 *Id.* at 720.

90 *See id.*

91 *See id.* at 724.

92 *See id.*

to prevent the school from maintaining its all-female policy.[93] Hogan did not ask for the establishment of an all-male college that offered the degree he was seeking, he merely requested that he be allowed to attend M.U.W.

In holding that such a policy did violate constitutional guarantees, the Court subtly announced a new standard that would change the fate of gender discrimination for future cases. In *Hogan*, the Supreme Court wrote that their "decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of gender must carry the burden of showing an *exceedingly persuasive justification* for the classification."[94] The Court then explained that such a burden could only be met by showing, at least, that the classification serves important governmental objectives, and that the discriminatory means involved are substantially related to the achievement of those objectives.[95] "Therefore, instead of focusing exclusively on the important government interest, skeptical scrutiny focuses primarily on the exceedingly persuasive justification burden and uses the traditional intermediate scrutiny language as a starting point in proving the classification justification."[96] This standard of scrutiny ensures that a reasoned analysis is used to determine the validity of gender-based classifications. Surprisingly, *Hogan* did not cite *Craig* for the traditional intermediate scrutiny language. Most likely, this was an attempt to downplay the importance of *Craig* without overruling it.

Using this new framework, the Court analyzed the validity of the policy. The state argued that maintaining an all-female institution compensated for discrimination among women and was merely educational affirmative action.[97] Despite this benign purpose, Justice O'Connor found this proffered justification unpersuasive because women had historically dominated the field of nursing.[98] The Court further stated that even if the state's purpose was to compensate women for past inequalities, the policy was not substantially related to the compensatory goals.[99] In fact, the classification "perpetuates the stereotyped view of nursing as an exclusively woman's job."[100]

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93 *See id.* at 720.

94 *See id.* at 724 (emphasis added).

95 See *id.*

96 Christina Gleason, Comment, United States v. Virginia*: Skeptical Scrutiny and the Future of Gender Discrimination Law*, 70 ST. JOHN'S L. REV. 801, 813-14 (1996).

97 *Hogan*, 458 at 727.

98 *Id.* at 729

99 *Id.* at 730.

100 *See id.* at 729.

The *Hogan* Court was faced only with deciding the factual issue before it, and so was able to avoid addressing the question of *separate but equal*.[101] Analogous to the method of *Sweatt*, *Hogan* undermined the genuine relevance of *separate but equal* by highlighting that the definition of equality encompassed both tangible and intangible aspects. Although the Court stopped short of expressly stating its opinion was based upon an analysis of intangible factors, like that in *Brown*, the outcome of the case reflects a reliance upon these elements. Hogan simply requested that he have the same choice as to which nursing school to attend, as similarly situated females in the state of Mississippi. Since there was no claim the two coeducational schools were unequal in any identifiable way, the Court afforded much deference to Hogan's personal preference. In addition, the *Hogan* Court announced that by ensuring that more women than men are furnished with opportunities at nursing schools, old stereotypes insinuating that nursing is a typically female profession are reinforced.[102] Therefore, admitting men to the school eradicates such stereotypical notions. In declaring the all-female facility unconstitutional, intangible factors were made reference to in an equal protection analysis, and used to create an ominous cloud around the notion of *separate but equal*.

Just as *Sweatt* was the precursor of the *Brown* decision, *Hogan* may prove to attain a similar prestige in gender equity. The *Hogan* case implicitly rejected the doctrine of *separate but equal*, while continuing to reinforce the new standard annunciated. While Justice O'Connor promulgates the exceedingly persuasive justification for gender classifications, the language of the opinion is imbued with a willingness to revisit this standard. "Because we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect."[103] This carefully crafted language implies that an even higher level of scrutiny will be employed when necessary to achieve a particular result.

Although a new unclear heightened standard had been uncovered, the Court still stopped short of evaluating the classification in terms of tangible and intangible factors, like that in *Brown*. However, it is likely that an analysis of intangible qualities will be revisited in future cases in order to eliminate the historical underpinnings and to admit men.

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101 *See id.* at 723 n.7. The Court claims that the holding of the case was very narrow because Hogan's only harm was being denied admission to the nursing school, not the undergraduate part of the campus. However, the Court could have extended the opinion to the entire University.

102 *See id.* at 730 (concluding that the effect of the University's policy is to perpetuate the field of nursing as a female profession, not to compensate for discrimination against women).

103 *See id.* at 724 n.9.

6. *J.E.B. V. ALABAMA*[104]

Finally, in 1994, the Court decided *J.E.B.*, which held that the Equal Protection Clause forbade discrimination on the basis of gender, and that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[105] Recognizing gender classifications must be reviewed under an *exceedingly persuasive justification* to withstand constitutional scrutiny, the Court invalidated the state's use of preemptory strikes to exclude women from a jury.[106] The Court held that classifications on the basis of gender in jury selection do not substantially further the state's legitimate interest in achieving fair and impartial trials. Although there was empirical evidence that lent support to the generalization, the Court refused to rely on that fact alone to justify discrimination. As in *Hogan*, because the preemptory challenges failed under the test, the Court did not need to address "whether classifications based on gender are inherently suspect."[107] Although the Court directly avoided answering this question, it was impossible to ignore the comparison of race and gender highlighted in the opinion. The Court subtly scolds the state for assuming that generalizations, impermissible in the context of race, would be permissible in the context of gender.[108] Two years after the *J.E.B.* decision, the Supreme Court laid down its more recent step in the stairway toward a heightened standard of scrutiny.

IV. *UNITED STATES V. VIRGINIA*

The Virginia Military Institute (VMI) was established in 1839 and has a distinguished reputation for producing leaders.[109] VMI has an extremely large endowment fund and its alumni consist of very influential beings.[110] It is not surprising that women have taken interest in the school. The unique experience of a VMI education has contributed to the schools long standing success. Since its inception, VMI's admission policy refused to admit women, and remains Virginia's only single-sex public college.[111]

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104 J.E.B. v. Alabama, 511 U.S. 127 (1994).

105 *See id.* at 129.

106 *Id.* at 137.

107 *See id.* at 137, n.6.

108 *See id.* at 139-140.

109 United States v. Virginia, 976 F.2d 890, 893 (4th Cir. 1992).

110 United States v. Virginia, 518 U.S. 515, 520 (1996). *See Virginia*, 976 F.2d at 892-93 (noting VMI's graduates have distinguished themselves in the 150 years since its founding). Military leaders and distinguished businessmen are among the alumni.

111 United States v. Virginia, 766 F.Supp. 1407, 1415 (W.D. Va. 1991).

VMI's mission is to produce male citizen soldiers who are "educated and honorable men, prepared for the varied work of civil life, imbued with the love of learning, confident in the functions and actions of leadership, possessing a high sense of public service, and ready as citizen soldiers to defend their country in time of national peril."[112] VMI trains its students through the "adversative method" which employs physical and mental stress in order to break down the confidences of a cadet so as to make him acutely aware of his limits.[113] A system of peer pressure is used to instill VMI's values. The cadet's experience is devoid of privacy, and fraught with torment and punishment intended to create bonds between the students. The barracks are designed with stark rooms, and the windows and doors are always open to reduce cadets to the lowest level.[114]

A. *VMI I*

1. DISTRICT COURT OPINION

The suit began in 1990, when a female student from northern Virginia applied to the VMI and was rejected admission solely on the basis of her gender.[115] The United States Justice Department (DOJ) ordered VMI to admit the female applicant, but when they refused, Richard Thornburgh, the Attorney General under George Bush's Administration, filed the U.S. government's lawsuit on the student's behalf.[116] The DOJ claimed that since the school was state supported, its all-male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.[117] 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 education system.[118] Virginia contended that women, by their very nature, tend to be unsuited for and would not benefit from the school's unique style of teaching.[119] Virginia emphasized the physical and developmental differences between men and women that would mandate a new regime of physical education.

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112 *Id.* at 1425.

113 *Id.* at 1421.

114 *Id.* at 1424.

115 *Id.* at 1408.

116 *See id.*

117 Julie M. Amstein, Comment, United States v. Virginia: *The Case of Coeducation At Virginia Military Institute*, 3 AM. U. J. GENDER SOC. POL'Y & L. 69, 70 (1994).

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

119 *Id.* at 1412-13.

The United States District Court looked to *Hogan* for guidance in how to apply the intermediate standard of scrutiny.[120] The court required a party seeking to uphold a statute, which classifies individuals on the basis of their gender, to show an important governmental objective reached by substantially related means.[121] In support of single-sex education, the court was presented with data on the benefits of this practice, as well as expert testimony. Testimonial evidence supported the proposition that if women were allowed to attend VMI, the adversative method of teaching would be obliterated and replaced by a system that emphasizes nurture.[122] The judge placed much importance on the unique environment that VMI had offered for over a century. By transforming VMI into a coeducational institution, he expected changes that would in large part alter the environment, an environment that had proved so successful. Judge Kaiser addressed the fact that a woman may be able to undergo the physical and psychological rigors of the current system, however, he stated "her introduction into the process would change it."[123] "The very experience she sought would no longer be available."[124] "Diversity in education has been recognized both judicially and by education experts as being a legitimate objective and the sole way to obtain single gender diversity is to maintain a policy of admitting only one gender to an institution."[125] Both VMI's single-sex status, and its special, unrivaled methods, were legitimate contributions to diversity, and excluding women was substantially related to this mission. Therefore, the *Hogan* test had been met; thus, VMI's policy did not violate the Equal Protection Clause.

2. FOURTH CIRCUIT COURT OF APPEALS OPINION

In 1992, the Justice Department appealed to the Fourth Circuit of Appeals.[126] Judge Niemeyer, writing for the court, concurred with the district court finding that Virginia made an adequate showing of the benefits of a single-gender education.[127] In reaching this conclusion, the appellate court accepted the notion that VMI's unique system justified a single gender policy. Analogous to the fears expressed in the district court opinion, the Appellate Court also envisioned coeducation as a catastrophic event. Chaos

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120 *Id.* at 1411.

121 *See id.*

122 *Id.* at 1413.

123 *See id.* at 1414.

124 *See id.*

125 *See id.* at 1415.

126 *See Virginia*, 976 F.2d 890.

127 *See id.*

and confusion would inevitably take its place by replacing order, and so the cornerstone of VMI's methodology would be substantially affected, if not completely obliterated, by the influx of female students.[128] The court recognized VMI's educational method as an important government objective and upheld the single gender admission policy as a substantially related means.[129] However, the court did not end its analysis there. The court seemed to suggest that single gender institutions could pass muster under an intermediate scrutiny analysis, if and only if, both genders had substantially the same opportunity available to them. "A policy of diversity which aims to provide an array of educational opportunities, including single gender institutions, must do more than favor one gender."[130] The court then remanded the case to allow Virginia to explain how the maintenance of one single-gender institution, an all male institution and not an all female institution, gives effect to the governmental objective of diversity.[131] The court suggested three options for Virginia to remedy its constitutional violation: 1) "Properly decide to admit women to VMI and adjust the program to implement that choice, 2) Establish parallel institutions or parallel programs, or 3) Abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution."[132]

B. *VMI II*

1. DISTRICT COURT OPINION

In accordance with the Fourth Circuit's recommendations, Virginia opted to present a Proposed Remedial Plan to the District Court.[133] The plan consisted of a parallel program for women, a residential, all female college program, that would be known as The Virginia Women's Institute

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128 *See id.* at 896-97 (discussing the impact of the decision to admit women into VMI). The court noted that VMI would have to convert to a dual track physical training program in order to provide women with a program equivalent to the men. Such a female program would be perceived as unequal by both of the sexes, and inevitably lead to feelings of jealousy and resentment between the sexes. In addition, the court announced that changes to the existing program would be necessary to protect the degree of privacy between men and women. Cross-sexual confrontation would necessarily stem from the adversative method of training, and introduce additional elements of stress and distraction for the cadets.

129 *Id.* at 892. Although most of Virginia's public schools historically were single gender, by the mid-1970's, but VMI had turned co-educational.

130 *See id.* at 899.

131 *Id.* at 892.

132 *See id.* at 900.

133 United States v. Commonwealth of Virginia, 852 F.Supp. 471, 476 (W.D. Va. 1994).

for Leadership (VWIL).[134] VWIL was to be located at Mary Baldwin College, and was to resemble VMI in its preparation of leaders for civilian and military life.[135] It was designed to provide women with opportunities parallel to those afforded VMI cadets.[136]

Once again, Judge Kiser faced the *VMI* decision. The United States argued that any difference in VMI compared to the remedial plan would be destructive and unconstitutional.[137] In contrast, Virginia argued that VWIL need only offer the same comparable outcome for women.[138] However, the means employed by VWIL to achieve this objective need not mimic that of VMI.[139] Judge Kiser forewarned that his opinion must be read in light of Judge Niemeyer Fourth Circuit justification of single-sex education.[140] Assuming that the Fourth Circuit would not be prodigious in assigning the Commonwealth an impossible task, he gave deference to Virginia's argument. Therefore, Judge Kiser removed the *separate but equal* argument from influencing his opinion, because it was obviously not meant to be litigated on remand.[141]

Judge Kiser confronted the task, and compared and contrasted the two institutions at length. Expert testimony approved the VWIL program, and lack of contradictory evidence helped solidify the decision. Recognizing the task at hand was all encompassing, he stated, "the VWIL program cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years."[142] Reasoning that Virginia was not required to "provide a mirror image VMI for women," he concluded that the plan was satisfactory because it would essentially achieve similar outcomes.[143] The District Court accentuated its holding when it stated that, "if VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."[144]

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134 *See id.*

135 *See id.*

136 *See id.*

137 *Id.* at 473.

138 *See id.*

139 *See id.*

140 *Id.* at 473-74.

141 *Id.* at 475.

142 *See id.*

143 *See id.* at 481.

144 *See id.* at 484.

2. FOURTH CIRCUIT COURT OF APPEALS OPINION

Once again, the United States appealed. Judge Niemeyer, who appeared neutral in his original decision, reentered the scene with a different mindset. This time, he applied a "heightened intermediate standard of scrutiny test specifically tailored to the circumstances," in order to hold VWIL's program constitutional. Another new and more rigidly defined level of scrutiny had been created from its predecessors.

In reviewing single-gender education, the court gave deference to the state legislation, so long as the purpose is not pernicious and does not violate traditional notions of the role of the government, while recognizing that education is perhaps the most important functions of state and local governments.[145] From this language, the court had no difficulty concluding that providing a single-gender education is an acceptable government objective, and meets the first part of the intermediate scrutiny test.

The Fourth Circuit then moved to an examination of the second prong, determining the only way to achieve a single-sex environment is to exclude one gender.[146] Obviously, this is a necessary and direct relationship between means and purpose, and needs no further analysis. The new third prong enabled the court to ask whether the VMI and VWIL programs were substantially comparable. Similar to the logic seen in the district court opinion, the court of appeals held that the programs must be comparable "in substance but not form or detail."[147] This was an obvious conclusion considering that the admission of women into VMI would effect the existing program. The court did not address the question of whether women would be able to survive such a program, but held that the programs were substantially comparable because of their identical mission and goal. The United States proceeded to appeal to the Supreme Court.

C. *Supreme Court Opinion*

The Supreme Court had finally been presented with the opportunity to address the issues associated with gender discrimination. Justice Ginsburg was given the honor of writing the majority opinion in which the Court invalidated Virginia's policy of excluding women from VMI, holding that VMI's attempt to provide equivalent training at a private women's college

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145 Collin O'Connor Udell, Comment, *Signaling A New Direction in Gender Classification Scrutiny:* United States v. Virginia, 29 CONN. L. REV. 521, 534-536 (1996).

146 *See id.*

147 *See id.* at 537.

was inadequate, and violated the Equal Protection Clause.[148] The admission of women to VMI was the necessary remedy for three reasons.

> First, Virginia was unable to offer an exceedingly persuasive justification for the classification. Second, the Court rejected Virginia's objective of diversity because there was no historical evidence that this had ever been the Commonwealth's intent in maintaining the school. Finally, the Court rejected the Proposed Plan of VWIL because it was inferior.[149]

Justice Ginsburg's opinion began by clarifying the appropriate scrutiny standard. The opinion drew a timeline of the history and development of gender based classifications from its rational review in *Goesart*, through its heightened intermediate scrutiny in *J.E.B.*[150] It was obvious that the intermediate standard of review which dominated the scene for many years had been modified from its original form. The Court, under the mandate of *Hogan* and *J.E.B.*, 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.[151] Justice Ginsburg designated the "exceedingly persuasive justification" language as the "core instruction of the Court's pathmaking decision."[152] This phrase adds new meaning to the standard by allowing it to take on its own identity, above and beyond that of the intermediate standard. To meet this burden, Virginia had to show that the classification served "important governmental objectives and that the discriminatory means employed were substantially related to the achievement of those objectives."[153]

Virginia maintained that its exclusion of women was motivated by its interest in furthering the diversity of an all-male school. Analogous to the district court and the court of appeals, the Court concurred that diversity was indeed an important government interest.[154] However, the government

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148 *Virginia*, 518 U.S. at 534.

149 Carey Olney, *Better Bitch Than Mouse: Ruth Bader Ginsburg, Feminism, and VMI*, 9 BUFF. WOMEN'S L.J. 97, 139 (2000/2001).

150 *Virginia*, 518 U.S. at 530.

151 *See id.*

152 *See id.*

153 *See id.* at 533.

154 *Id.* at 536.

did not believe that this was the real reason for VMI's policy.[155] The Court recognized that single-sex education is the means of achieving diversity. However, the exclusion of women must be substantially related to the achievement of diversity, not to the achievement of single-sex education.[156] Rather, Virginia's policy was in place to preserve one of the last all male institutions.

Virginia also argued that permitting women into the system would force VMI to modify its adversative training method, which would weaken its system.[157] In response to this argument, the Court noted that some women would benefit from this type of training, and were perfectly capable of enduring the requirements.[158] Although already expressed in *Hogan* and *J.E.B.*, the Court reiterated that state actors may not exclude qualified individuals based upon stereotypes and generalizations concerning the roles and abilities of men and women.[159] For these reasons, the exclusion of women was not related to VMI's asserted interest.

The Court similarly rejected Virginia's VWIL's proposal to create a parallel women's program. Virginia created this program in an unsatisfactory effort to provide a remedy for historical discrimination of women. The female alternative did not offer rigorous and stressful military training, but instead provided a cooperative method of learning in order to reinforce self-esteem. Virginia justified this design by preying upon the developmental differences between men and women. The Court quickly dismissed this argument because generalizations about women do not justify excluding a qualified woman applicant. In addition, VMIL's student body, faculty, course offerings, and facilities hardly compare to that of VMI's.[160] VWIL also lacks the prestige, connections, and influential alumni that VMI has to offer, and so cannot be considered to be equivalent to VMI.[161] The Court held that Virginia failed to justify the exclusion of qualified women from the VMI, and therefore, a state may not prohibit qualified women from an education program, even if women on the average are not suited for the

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155 *See id.* When VMI was established, higher education was "considered dangerous for women," however, the movement of all other Virginia State colleges away from single-sex education weakened the state's claim of a policy of diversity.

156 *Id.* at 545.

157 *Id.* at 538.

158 *Id.* at 541.

159 *See id.*

160 *Id.* at 533.

161 *Id.* at 551. Justice Ginsburg addresses many tangible and intangible inequities in the schools. The average SAT scores for freshmen at Mary Baldwin were about 100 points lower than at VMI. The faculty at Mary Baldwin held fewer PH.D.'s than at VMI and received lower salaries. Mary Baldwin did not offer degrees in science or engineering. *Id.* at 526.

program.[162] Gender found itself sharing a similar moment as race, when the principles of *Sweat* were declared once again. The issue was the degree of equality between the two institutions. The black law school and the women's military academy both displayed a large level of inadequacy in comparison to their counterparts. Therefore, *separate but equal* remains in existence, however, equality must exist in the strictest sense of the word.

The Court now scrutinizes gender discrimination by regarding the tangible and intangible factors involved in each individual case. This new practice results from implications of inferiority towards the female gender in certain gender separation situations. Similar to *Brown*, *VMI* introduces the concept that classifications can connote inferiority. However, the *VMI* opinion made no mention of *Brown*, a tactic most likely used to avoid a complete indoctrination of the *separate but equal* notion as it currently applies to gender. Society, like the judicial system, is not ready for such an absolute circumvention. It would be inaccurate to make a direct association between the separation of races and the separation of sexes. The classification of race is based solely on the external color of one's skin, whereas there are various psychological and physiological differences between males and females. Therefore, certain settings necessitate gender classification and the burden lies on the judicial system to determine under what circumstances a separation is legitimate. The athletic arena is a primary example.

V. ATHLETICS IN THE PAST, PRESENT, AND FUTURE

Sex discrimination in athletics has been pervasive, and in some respects, inevitable.[163] Since the beginning of time, men and women have differentiated their activities on the basis of their gender. As early as the 1800's, sports captured and took hold of the male audience. It was not until the time of industrialization coupled with the first national women's movement, did male dominance become threatened.[164] As middle class farmers, the majority of the men worked at home and engaged in laborious physical labor in order to tend to the fields as well as the home.[165] The man earned the salary for the household and was in total control of the daily activities of his wife as well as his children. However, this male dominated structure could not withstand the demanding power of progress.

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162 *Id.* at 550.

163 Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 400-04 (2000).

164 *Id.* at 400.

165 *See id.*

The age of machines and newly formed corporations called the males away from the security of their home in order to survive and earn a living. The process of industrialization had weakened the physical and psychological strength of the male race.[166] The men entered a new, unstable employment realm, and the females were forced to exclusively devote themselves to their home and their children.[167] "With no frontier to conquer, with physical strength becoming less relevant in work, and with urban boys being raised and taught by women, it was feared that males were becoming soft, that society itself was becoming feminized."[168] In addition, the feminist movement had gained momentum.[169] Through valiant efforts, women were gradually gaining political and economic strength. The idea that society was losing the essence of masculinity created history among the male population.

Sports provided the remedy to this fear.[170] Playing hard, physical, violent sports allowed males to regain the leadership skills that they once commanded in their home. Athletics resulted in male camaraderie and was the venue for a resurgence of male testosterone. Physical conditioning had returned and became the primary mode for promoting health and preventing criminality among the working class and immigrants.[171] These sports were designed to eliminate the inclusion of the female into the male sphere of life. Such rules perpetuated the division between males and females because brute strength was contrary to the assigned role of the caretaker. Organized sport was successful in creating the unity of an entire gender.

A. *Generalizations for Gender Separation in Athletics*

Many reasons exist in support of separating the sexes in team sports and athletics competition. These gender based explanations focus on sexual stereotypes concerning the accepted norms of men and women throughout the years. Psychological and physiological differences are listed as determining factors for isolating male and female sports events.

If gender separation did not exist, male members of the team would dominate the competition and overshadow the contributions of their female counterparts. The physical attributes of males are considered a justifiable

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166 *See id.*

167 *See id.*

168 *See id.* at 402.

169 *See id.*

170 *See id.*

171 *See id.*

reason for separate but equal teams. In *Bucha v. Illinois High School Association*,[172] the high school stated that: "men are taller than women, men have greater muscle mass, men have larger hearts, deeper breathing capacity, and men can run faster."[173] Society believes that females are less coordinated and react less quickly than the average male, and are therefore more likely to be severely injured. Some schools also believe that women should be denied access to team play because it is too difficult to protect their physical attributes from harm whereas, cups and other protective devices are available for the men.

Psychological beliefs also impact athletic performance. Women feel they need to overcome the image that they are less competitive and motivated when in the athletic arena and lack the physical capabilities to become victorious. The notion that males are potentially better athletes and mentally stronger prevent many women from competing on an equal level. Conversely, if a male lost to a female opponent, the emotional setback would be significant. This type of psychological devastation would inhibit the male athlete's future ability and desire to compete.

B. *The Importance of Athletics*

1. ATHLETICS AND EDUCATION INTERTWINED

In *Brown*, the court recognized that "education is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[174] "Although education is not a fundamental right in the sense of requiring strict scrutiny, a student's interest in public education is subject to constitutional protection."[175] Education is the cornerstone of our society. It allows children to grow and develop intellectually, mentally, and socially, while simultaneously preparing them for future endeavors. The experience of an in school education is a total one, and it encompasses academic classes, gatherings in the hallway, social functions, and the like.

A major component of a student's daily activities is often times athletic practice. A large percentage of students play sports on organized teams. Such teams foster camaraderie and encourage healthy competition among

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172 Bucha v. Illinois High Sch. Ass'n, 351 F.Supp. 69 (N.D. Ill. 1972).

173 Tracy J. Johnson, *Throwing Like A Girl: Constitutional Implications of Title IX Regarding Gender Discrimination in High School Athletic Programs*, 18 N. ILL. U. L. REV. 575, 591 (1998).

174 *See Brown*, 347 U.S. at 493.

175 Karen L. Tokarz, *Separate but Unequal Educational Sports Programs: The Need for a Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201, 229 (1985).

friends. Students use sports as a vehicle to obtain academic scholarships and make social contacts. Usually, a successful athlete is happy and is better able to cope with the rigors of school and academics. Therefore, it is extremely difficult to separate out an interest in sports from an interest in education.

2. THE IMPACT OF THE DIVISION

Equality in the sphere of male and female athletics is usually predicated upon a numerical comparison. Evaluation of items such as funding, clothing, and equipment can determine whether tangible equality exists between male and female teams. Absent a finding of sameness, addition or subtraction of the numbers on the balance sheet can provide parity. However, addressing the tangible aspects of athletics will no longer end the inquiry into equality.

The *VMI* Court has recaptured the definition of equality set forth by the Court in *Brown*. Intangible equality is also part of the equation, although it is not as precise. The segregation of males and females in sports is primarily based upon the inferiority of females, as a class, and at the same time has the effect of reinforcing the exclusivity of the male role in sports as aggressive and violent.[176] The separation is not the result of differences in skill or ability, but upon gender. Therefore, because of the traditional stereotypes associated with sports, the doctrine of *separate but equal* perpetuates sex role stereotypes on females that inhibit their learning, deny them important athletic status and prestige, negatively affect their chances of obtaining financial aid, and in turn eliminate some employment opportunities.[177] It is inevitable that sex role stereotyping in athletics will condition the decisions that females choose to govern their role and place in society.[178] "Studies reveal that sex role conditioning in America directly affects the motivation, achievement, and eventual job choices of students.[179] Thus, the initial stigma of inferiority incites a chain of immeasurable harsh realities.

C. *Modern Era: The Division in a State of Flux*

The Equal Protection Clause of the Constitution has been used to decide nearly all sex discrimination cases. However, there are conflicting federal and state court decisions concerning sex discrimination in athletics.

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176 *Id.* at 232.

177 *See id.*

178 *See id.*

179 *See id.* at 232-33.

1. *SEPARATE BUT EQUAL* IS UNCONSTITUTIONAL

Some courts have held that girls should be able to play on boys teams even if a girls team is available.

a. Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n[180]

In *PIAA*, a lower appellate court invalidated the PIAA by-laws which stated, "Girls shall not compete or practice against boys in any athletic contest."[181] The plaintiffs challenged the by-law as a violation of the Fourteenth Amendment because it denies to females the same athletic opportunities which are available to male athletes.[182] The PIAA sought to justify the exclusion by explaining how the by-law protected and encouraged female participation in sports.[183] Absent such a rule, male athletes would dominate the sports arena because of their high degree of athletic ability.[184] In response to this defense, the court resoundingly rejected the doctrine of *separate but equal*, and recognized that "the most talented girls still may be denied the right to play at that level of competition which their ability might otherwise permit them."[185] Using a rational standard of review to analyze the constitutional concern, the court reasoned that an individual girl may be excluded from competition because she is weak or unskilled, but she cannot be excluded solely on the basis of her sex.[186] The potent language of the court indicated that classifications based on sex are unsound.

b. Darrin v. Gould[187]

In *Darrin*, two high school females were prohibited from playing on the boys football team. WIAA regulations mandated that girls were not allowed to participate in interscholastic contact football on boys' teams.[188] WIAA

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180 Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839 (Pa. 1975) (PIAA).

181 *See id.* at 840. The PIAA is an unincorporated association whose members include every public senior high school in the Pennsylvania Commonwealth, except for those in Philadelphia.

182 *See id.*

183 *Id.* at 842.

184 *See id.*

185 *See id.*

186 *Id.* at 843.

187 Darrin v. Gould, 540 P.2d 882 (Wash. 1975).

188 *Id.* at 884. The WIAA is an association that comprises most of the high schools in the state. The members of the WIAA have adopted rules governing sports and other activities.

justified the regulation by stating "the majority of girls are unable to compete with boys in contact football, and the potential risk of injury is great."[189] The WIAA continued to defend the exclusionary rule by envisioning a disrupting influx of boys onto girls' athletic teams if the rule was eliminated.[190] The court's analysis responded to each of these arguments in order to reach its conclusion. In the case at hand, both girls passed the required physical examination, met the insurance requirements, and played in the required number of practices.[191] In addition, both of the girls had successfully competed with the boys in practice sessions.[192] The risk of injury to the "average girl" could be reduced by the invention of protective equipment designed for females.[193] After all, boys too run the risk of physical injury, and still are not denied the opportunity to participate on the team.[194] Therefore, the WIAA rule was declared invalid.[195] The court announced that rules forbidding girls from playing on the football team are unconstitutional because girls have the right to participate as members of that team.[196] "This is all the more so when the school provides no corresponding girls' football team on which girls may participate as players."[197]

PIAA and *Darrin* were revolutionary decisions for their time. Using the rational standard of review as a tool, the courts stripped the proffered justifications of the government of any real potency. Announcing that discrimination on account of sex is forbidden, the courts implicitly applied a much stricter standard of review than that annunciated. By effectively shifting focus from the concept of the majority or the average, to that of the individual, the courts obliterated the notion of the generalization. Concentrating on the harm and defeat inflicted upon the individual female athlete, the opinions addressed the physical and emotional setbacks suffered in stunting athletic growth by a practice of exclusion. The *PIAA* court highlighted that a government's objective may purport to serve female athletes, however, it may be inherently laced with a stereotypical notion. It follows from these cases that few, if any, objectives will be acceptable to condone the doctrine of *separate but equal*.

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189 *Id.* at 892.
190 *See id.*
191 *Id.* at 884.
192 *See id.*
193 *Id.* at 892.
194 *See id.*
195 *Id.* at 893.
196 *See id.*
197 *See id.*

2. *SEPARATE BUT EQUAL* IS CONSTITUTIONAL

Although no case discussing the doctrine of *separate but equal* in athletics has reached the Supreme Court, the weight of authority in the lower courts supports the constitutionality of separate but equal sports teams.[198]

a. Hoover v. Meiklejohn[199]

In *Hoover*, one female high school student had participated on the male varsity soccer team and engaged in the conditioning and skills drills with the team.[200] The principal of the high school then removed the female from the team because of a rule that excluded women from playing on the male soccer team.[201] However, no women's soccer team existed.[202] The defendants argued the incredible dangers associated with athlete collisions during playtime and offered various physiological differences that could cause a greater severity of injury in women than in men.[203] Also established is the notion that "the range of differences among individuals in both sexes is greater than the average differences between sexes"[204] and therefore, since sex is the only criteria for participation in league soccer, then "any male of any size and weight has the opportunity to be on an interscholastic team and no female is allowed to play, regardless of her size, weight, condition, or skill."[205] The court held that excluding women from the team for protectionary purposes was invalid. The same comparison could be made to weaker males who participate in the sport with stronger males, therefore destroying "the credibility of the reasoning urged in support of the sex classification."[206] The court conceded the injustice of the situation and declared that separate but equal teams would be necessary in order to

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198 *See* Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F.Supp. 1117, 1122 (E.D. Wis. 1978), where the court held that there is no violation of the Equal Protection Clause when talented girls were prohibited from swimming on the boys team when both boys and girls teams were offered, and explicitly approved the use of *separate but equal*; Ritacco v. N. Sch. Dist., 361 F.Supp. 930, 932 (W.D. Pa. 1973), where *separate but equal* athletic teams for boys and girls are justifiable when the opportunities for engaging in sports are equal.

199 Hoover v. Meiklejohn, 430 F.Supp. 164 (D. Colo. 1977).

200 *Id.* at 165.

201 *See id.*

202 *See id.*

203 *Id.* at 166.

204 *See id.*

205 *See id.*

206 *See id* at 169.

promote fairness and equality between genders. "Given the lack of athletic opportunity for females in past years, the encouragement of female involvement in sports is a legitimate objective and separation of teams may promote that purpose."[207] The court determined that rationally defined scrutiny was a reasonable tool since gender was not suspect in the eyes of the Supreme Court.[208] Therefore, the judgment propagating separate but equal teams was sufficient to satisfy the terms of the Equal Protection Clause.

b. O'Connor v. Board of Education School District #23[209]

In *O'Connor,* an eleven year old girl, known to be an exceptional basketball player, was not permitted to try out for the sixth grade boys basketball team.[210] She had played on organized boys basketball teams since she was seven.[211] The girl felt that only the boy's team could provide her with the necessary rigor and competition to improve her skills.[212] The court relied on the standards set forth in *Reed, Craig,* and *Hogan* in order to evaluate the classification. In the opinion of the court, the objective of the government was to maximize the amount of participation in sports and that "sex-based classification substantially furthered the governmental objective, thus satisfying the equal protection clause."[213] The school board conceded that there is no reason to keep Karen off of the team apart from the general policy of separate teams. However, the policy is bottomed on a generalization that the relative skills of females are not as great as those of males.[214] Although the female claimed that the generalization did not apply to her, she never attempted to prove that the generalization is sufficiently unreliable so that it should not be given conclusive weight.[215] Therefore, when separate teams are available for both sexes in a sport, the female must play on the female team.

D. *The Impact of VMI On Athletics*

Separate but equal has existed in various settings throughout American history, however, its application towards athletics is all encompassing.

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207 *See id.* at 170.

208 *Id.* at 167, 170.

209 O'Connor v. Bd. of Educ. of Sch. Dist. No. 23, 545 F.Supp. 376 (N.D. Ill. 1982).

210 *Id.* at 378.

211 *See id.*

212 *See id.*

213 *See id.* at 381.

214 *Id.* at 379.

215 *See id.*

Sports competitions are founded on the principle that boys play boys and girls play girls. To disrupt this precedent would cause havoc on not only the athletic community but also the plethora of spectators. Therefore, applying Justice Ginsberg's heightened level of scrutiny to athletics has caused immense controversy. In Justice Scalia's dissent of *VMI*, he accused the Court of ignoring past case law and employing an unprecedented use of strict scrutiny in a case of gender separation.[216] Justice Scalia's view that strict scrutiny was utilized is not supported by Justice Ginsberg's opinion or by any other documentation concerning *VMI*. Justice Ginsberg acknowledges her level of evaluation as "exceedingly persuasive" or a "skeptical scrutiny," having a greater potency than intermediate scrutiny but not achieving a level of strict scrutiny.[217] As can be seen from Justice Scalia's dissent, precedent favors the separation of gender in all applications that accommodate the legislature. Therefore, Justice Ginsberg must have realized that a usage of strict scrutiny would never have gained a majority. On account of this knowledge, Justice Ginsberg intentionally refers to an upgraded intermediate scrutiny, which requires the proponent of the discriminatory action to provide a heightened level of justification. This new scrutiny, similarly to intermediate scrutiny, does not desire gender generalizations to be offered as legally supportive reasonings for gender separation or gender exclusion. The controversy shows quite evident when attempting to determine whether skeptical scrutiny will completely deny overbroad generalizations in a courtroom, or will such applications still exist on an individual basis.

Although the scrutiny tiers still remain an intertwined enigma, Justice Ginsburg has found another piece to the puzzle. She has created a flexible standard that can adjust itself on an individualized basis, and has freed the courts from the concept of the absolute. For this reason, the exceedingly persuasive inspection of a situation may become an incredible threat to the separate but equal philosophy that has presided over athletics since the appearance of female sports.

Skeptical scrutiny has the potential power to invalidate guidelines that support implications of inferiority against a certain class, as well as discrimination based upon overboard generalizations. For these reasons, exceedingly persuasive justification supersedes the power of intermediate scrutiny, along with older rational basis evaluations. In *Hoover*, a rational

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[216] *Virginia*, 518 U.S. at 566. Scalia accuses his colleagues of "rejecting the factual findings of the courts below, sweeping aside the precedents of the court, and ignoring the history of our people."

[217] *Id.* at 533. Justice Ginsburg noted that thus far, the court has reserved strict scrutiny for classifications based upon race or national origin. She then employed the intermediate scrutiny standard in her analysis of the record.

basis was used to determine that separate teams were sufficient to satisfy constitutional intent. The problem in Hoover centered on the absence of a female soccer team. The judgment provided for the equal opportunity among genders to play the sport in question, if and only if, the separate teams were given substantially equal support as well as comparable programs. The court implied that no stigma of inferiority was to be placed on the women's team and that if no separate team was established, then the female could continue to play on a mixed-sex team. Although a *separate but equal* stance was concluded to be the proper action, the absence of an equal team allowed for the female to play on an co-educational team. Therefore, no implication of inferiority or overbroad generalization was cast upon the plaintiff. Consequently, the requirements to overturn the notion of *separate but equal* are not met. Since tangible and intangible factors were taken into account and generalized assumptions were ignored, the only factor that might impede the necessity for separate but equal teams, in this case, would be the inherent wrongness of such a separation and skeptical scrutiny does not offer this to be fact. The technicality lies in the interpretation of what actions imply inferiority.

In *O'Connor*, the school board, as well as the court, rationalized the sex-segregation as necessary to prevent the male domination of the sports program and to increase girl's overall participation in sports. This theory is conditioned on the assumption that on the average, it is inherently impossible for girls to compete on the same level with boys, and will be discouraged from participating in sports if forced to battle against superior males. The court spoke of this overbroad generalization addressing the abilities of women and noted that the plaintiff failed to discredit this broad statement with any sufficiency. The language of *VMI* leaves no doubt that such a generalization would not be tolerated. The concept that the skills of women are inferior to those of men is not absolute by any means. Therefore, since the separate but equal teams in this case are founded on a principle that suggests inferiority, the doctrine would never survive on constitutional grounds and *separate but equal* would disappear. The reasoning employed in the *PIAA* case, as well as the *Darrin* case could reenter the legal scene with new vigor and support. *VMI* explicitly sanctions a standard that *PIAA* and *Darrin* had fabricated to correct the inequality of sex segregation. In essence, because of the tangible and intangible harm inflicted upon individual females or females as a class in sex segregated sports, most governmental justifications will not survive the new threshold of scrutiny articulated. There is no room for false pretense.

The question then becomes, even if protecting participation of females in the world of athletics survives on a case by case basis, is the classification of *separate but equal* tailored narrowly enough to fit the governmental

objective? In order to have an "exceedingly persuasive justification" for the policy of *separate but equal*, there must be a close fit between the means employed and the pronounced end. However, there are several alternatives to the present scheme of *separate but equal*, that appear to be less discriminatory in nature.

The school can provide three teams, one based on ability, and the other two segregated by sex.[218] This program would allow exceptional athletes to compete against one another, while simultaneously maintaining overall equality.[219] Another option is to provide both male and female teams, but allow a talented female to participate on the boys' team.[220] In essence, such a configuration would create a tiered system, similar to that of varsity and junior varsity teams already in place at most schools.[221] Finally, a sex-neutral team based upon factors such as competitive skill and ability would create groups based upon potential, and would maximize equitable competition. Whether any of these alternatives would be feasible for a particular school will depend on the facts of the case. However, will these alternatives have the power to loosen the fit of *separate but equal* as it exists today?

Although not as revolutionary as the *Brown* decision, Ginsberg's opinion intentionally allows for the possibility that present scrutiny and future scrutiny could be applied more stringently.[222] Such an occasion would not be surprising. In trying to formulate the correct standard of review, many opinions have made reference to the likeness of gender discrimination to that of racial discrimination. Most notable was the recent case of *J.E.B. v. Alabama*. The employment of a strict scrutiny could have enormous implications in the world of athletics. Ginsberg is providing the means in which to bury the *separate but equal* doctrine permanently within the confines of athletics. In such a finding, the level and quality of competition would be forever transformed.

VI. CONCLUSION: THE FUTURE OF *SEPARATE BUT EQUAL* IN ATHLETICS

The question is yet to be answered whether gender and athletics will ever come to a clear, defined understanding of what is justifiable under the

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218 *See* Johnson, *supra* note 164, at 594.

219 *See id.*

220 *See id.*

221 *See id.*

222 *Virginia*, 518 U.S. at 533. The majority opinion did not overtly embrace classic strict scrutiny as the standard of review for gender classifications. However, Justice Ginsburg observed that strict scrutiny is not inevitably "fatal in fact," and she proceeded to point out that the court has recently paid careful attention to actions which deny opportunities based on sex.

Equal Protection Clause. *Separate but equal* found a new home after *Brown* dismissed its relevance towards racial classifications. Athletics is based on single-sex competition, in which the assumption exists to support that the participants will be more justly balanced. This assumption may apply to the general population, but will it ever be an absolute notion? The answer must be a definitive no. Exceptions will always exist where a woman's physical and mental strength is equal to or greater than that of a male opponent. The judicial system faces the dilemma of supporting the generalization or the exception when considering whether or not athletics should be separated by gender.

The fate of *separate but equal* lies in the interpretation of a new level of scrutiny expounded in the Supreme Court decision of *VMI*. The importance of an education, the implication of inferiority, and the use of overbroad generalizations has become sufficient to tear down the familiar concept of *separate but equal* as it is applied to the context of gender. However, one must pose the question as to whether the Court will use this power to rid the athletic world of single-sex competition. Although, gender separation seems to be following a similar pathway as racial segregation, do the two different types of classifications truly deserve the same fate?[223]

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[223] *Id.* at 531-32. Note the parallels to the race discrimination cases. The court refers to the history of gender discrimination as well as recounts the political exclusion of women throughout most of American history.