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*United States v. Virginia* and Our Evolving "Constitution": Playing Peek-A-Boo with the Standard of Scrutiny for Sex-Based Classifications

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UNITED STATES v. VIRGINIA AND OUR EVOLVING "CONSTITUTION": PLAYING PEEK-A-BOO WITH THE STANDARD OF SCRUTINY FOR SEX-BASED CLASSIFICATIONS

INTRODUCTION

The Virginia Military Institute ("VMI"), founded in 1839 and located in Lexington, Virginia, is the first state-supported college in the United States. With an enrollment of about 1,300 male cadets, all of whom live in barracks, the all-male military institute's mission is "to produce educated and honorable men, . . . ready as citizen-soldiers to defend their country in time of national peril." VMI's educational method is based on the "adversative" model. It emphasizes "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." Under the intensive VMI program, new cadets, called "rats," are subjected to a process known as the "rat line," "an extreme form of the adversative model," designed to exact a level of physical rigor and

3. Barrack life is viewed as crucial to the VMI experience. See id. at 1423.
4. Id. at 1425. Despite the military focus of VMI's program, only about 15% of its cadets actually pursue a career in military service. See id. at 1432.
5. Id. at 1421.
mental stress comparable to the Marine Corp’s boot camp.\textsuperscript{6} In addition, VMI cadets are subjected to a rigid hierarchical “class system” composed of privileges and responsibilities,\textsuperscript{7} an all-encompassing honor code,\textsuperscript{8} and a pervasive military system of regulations, etiquette, and drill.\textsuperscript{9} Finally, the VMI experience includes a “dyke system” that operates in conjunction with the rat line and assigns to each “rat” a mentor, or “dyke,” in order to facilitate cross-class bonding and to provide guidance and support.\textsuperscript{10} By 1996, VMI was the only remaining single-sex public college or university in Virginia.\textsuperscript{11} Then came the Supreme Court’s decision in \textit{United States v. Virginia}\textsuperscript{12} (“VMI”), which held that VMI’s male-only admissions policy—a policy that had remained constant for over 150 years—violated the Fourteenth Amendment’s Equal Protection Clause.\textsuperscript{13}

This Comment focuses on the \textit{VMI} decision and explores what it portends for the Court’s sex-based equal protection jurisprudence. Part I traces the history of the \textit{VMI} litigation and analyzes the \textit{VMI} majority opinion. Part II argues that \textit{VMI} represents the Court’s final step to strict scrutiny for sex-based classifications. In order to demonstrate how \textit{VMI} has the potential to significantly disrupt the political process in the future, Part III tests the constitutionality of the military’s combat exclusion rules under the \textit{VMI} analysis. In conjunction with this analysis, Part IV examines how the Court’s military deference doctrine collides with \textit{VMI} and explores the implications this may have for the Court’s sex-based equal protection jurisprudence. Finally, Part V draws a parallel between \textit{VMI} and the Court’s 1970’s sex-based equal protection jurisprudence, both of which represent the Court derailing the political process all under the guise of the “Constitution.”

\textsuperscript{6} See id. at 1422.
\textsuperscript{7} See id. at 1422-23.
\textsuperscript{8} See \textit{Virginia}, 766 F.Supp. at 1423. The VMI honor code provides that a cadet “does not lie, cheat, steal, nor tolerate those who do.” \textit{Id.} The honor code is “stringently enforced,” with the solitary remedy being expulsion. See \textit{id}.
\textsuperscript{9} See \textit{id.} at 1424.
\textsuperscript{10} See \textit{id.}
\textsuperscript{11} By the mid-1970’s, all of Virginia’s public, single-sex colleges and universities had become coeducational, except for VMI. See \textit{id.} at 1418-19.
\textsuperscript{12} 116 S.Ct. 2264 (1996) [hereinafter \textit{VMI}].
\textsuperscript{13} See \textit{id.} at 2269.
I. VMI EVOLVES WITH THE TIMES

A. The Beginning of the End

The VMI case traces its genesis to 1990. Prompted by a letter from a female high school student who sought admission to VMI, the United States Department of Justice sued the Commonwealth of Virginia and VMI, claiming that VMI's male-only admissions policy violated the equal protection clause of the United States Constitution.\(^\text{14}\) In siding with VMI, the district court relied on the Supreme Court's heightened scrutiny jurisprudence for sex-based classifications, especially *Mississippi Univ. for Women v. Hogan*.\(^\text{15}\) *Hogan* places upon the state the burden of "showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"\(^\text{16}\) The district court held that VMI's single-sex program is "an important educational objective" that yields significant educational benefits. One of the program's primary benefits, the court said, was to add "a measure of diversity to Virginia's overall system of education that would be missing if VMI were coeducational."\(^\text{17}\) Consequently, Virginia satisfied the second prong of the *Hogan* test since the only means of achieving

\(^{14}\) *See id.* at 2271. Several attempts at employing the political process to effectuate a change in VMI's admissions policy were unsuccessful. *See William Devan, Note, Toward a New Standard in Gender Discrimination: The Case of Virginia Military Institute*, 33 Wm. & Mary L. Rev. 489, 496 (1992).

\(^{15}\) 458 U.S. 718 (1982). *Hogan* involved the Mississippi University for Women ("MUW"), a state-supported university that denied admission to a male who sought to enroll in the university's all female nursing program. *See id.* at 720. Mississippi argued that the nursing school's single-sex admissions policy was designed to compensate for discrimination against women. *See id.* at 727. The Court, applying intermediate scrutiny, held that Mississippi's program violated the equal protection clause. *See id.* at 731. It emphasized that the state must demonstrate an "exceedingly persuasive justification" for the sex-based classification, *id.* at 724, and found that MUW's single-sex policy was not designed for compensatory purposes but rather "to perpetuate the stereotyped view of nursing as an exclusively woman's job." *Hogan*, 458 U.S. at 729. Moreover, the state's sex-based classification was not substantially related to its compensatory objective since males could audit classes at the nursing school, thus refuting Mississippi's claim that the full admission of men would adversely affect the educational environment. *See id.* at 730-31.

\(^{16}\) *Id.* at 724 (citing *Wengler*, 446 U.S. at 150 (1980)).

\(^{17}\) *Virginia*, 766 F.Supp. at 1415. The district court added that "[t]he diversity is further enhanced by VMI's unique method of instruction which was applauded by all of the educational experts who testified [at trial]." *Id.*
the educational objective is to maintain VMI’s all-male status.\textsuperscript{18} The district court found “that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests.”\textsuperscript{19}

On appeal, the Fourth Circuit vacated the district court’s judgment. While it agreed with the district court that VMI’s unique methodology would be substantially altered by coeducation,\textsuperscript{20} it disagreed with the district court’s conclusion that the program advanced the state’s policy of encouraging diversity. In the Fourth Circuit’s view, the state policy of encouraging diversity could not be reconciled with the fact that the unique educational benefit provided by VMI is available only to males.\textsuperscript{21} The Fourth Circuit thus remanded the case in order to allow Virginia to devise a remedial course of action, offering three options in particular: (1) admit women to VMI and adjust the program accordingly, (2) establish parallel institutions or programs, or (3) abandon state support of VMI, while allowing VMI to pursue its policies on a private scale.\textsuperscript{22}

Virginia responded with a proposed state-supported, all-female version of VMI at Mary Baldwin College, a private liberal arts institution for women. The proposed program, called Virginia Women’s Institute for Leadership (“VWIL”), would share VMI’s underlying mission of producing “citizen-soldiers.”\textsuperscript{23} Yet unlike VMI, the proposed program would offer fewer academic courses,\textsuperscript{24} use a different educational method,\textsuperscript{25} and employ “a facul-

\textsuperscript{18} See \textit{id.}
\textsuperscript{19} \textit{Id.} at 1411.
\textsuperscript{20} In particular, the Fourth Circuit agreed that at a minimum “three aspects of VMI’s program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI’s training.” United States v. Virginia, 976 F.2d 890, 896-97 (4th Cir. 1992).
\textsuperscript{21} See \textit{id.} at 899. If diversity was indeed the justification for the all-male policy at VMI, the Fourth Circuit found it problematic that Virginia had not explained the movement toward coeducation in all other public colleges and universities in Virginia. See \textit{id.}
\textsuperscript{22} See \textit{id.} at 900.
\textsuperscript{24} See \textit{id.} at 477.
\textsuperscript{25} Most notably, VWIL would not employ VMI’s “adversative” method. Rather, VWIL would follow a “cooperative method which reinforces self-esteem rather than the leveling process used by VMI.” \textit{Id.} at 476. In the opinion of one educational expert, “an
ty holding significantly fewer Ph.D's than the faculty at VMI."26 Despite the differences between VMI and WVIL, the district court ruled in favor of VMI.27 The Fourth Circuit affirmed, finding the educational institutions to be "substantively comparable" and thus consistent with equal protection.28 The Supreme Court, however, in a 7-1 decision,29 dismissed the lower court holdings and held that both VMI's all-male admissions policy and Virginia's proposed remedy violated the Fourteenth Amendment.

B. The Supreme Court Opinion

The Court's United States v. Virginia decision was one of the most significant equal protection cases decided during its 1995-96 Term.30 Some commentators have hailed the decision as "a watershed decision for women's rights."31 Other Court watchers, however, have criticized VMI as yet another example of the Court's unrestrained judicial activism.32 Justice Scalia noted as much in dissent when he lamented that the Court had, once again, narrowed the sphere of self-government.33 Feminists were no doubt elated to learn that the VMI majority opinion was written by Justice Ginsburg, especially given her past equal protection advocacy.34 In ruling against VMI, Justice

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26. Id. at 502. Sixty-eight percent of Mary Baldwin's faculty hold Ph.Ds, whereas 86% of VMI's faculty hold such degrees. See id.
27. See id. at 473.
30. Another significant decision was Romer v. Evans, 116 S.Ct. 1620 (1996), which declared Colorado's anti-homosexual state constitutional amendment unconstitutional.
32. See, e.g., Stuart Taylor, Jr., Is Judicial Restraint Dead?, N.J. L.J., Aug. 26, 1996, at S-1 (questioning whether we have "all implicitly decided that Herbert Wechsler was just plain wrong when he wrote in 1959 that the Court should never be a mere 'naked power organ,' freely substituting its policy preferences for those of elected representatives").
33. See VMI, 116 S.Ct. at 2308 (Scalia, J., dissenting).
34. See, e.g., Ely, supra note 31, at 6 ("When the Supreme Court's VMI decision was announced . . . I suspect that I was not alone in breathing a sigh of relief—and experiencing an excited rush of adrenaline—upon hearing the simple fact that Justice Ginsburg was the author"). Indeed, Ruth Bader Ginsburg has long advocated heightened scrutiny for sex-based classifications and in fact drafted the ACLU brief in Reed v. Reed, 404 U.S. 71 (1971), which urged the Court to adopt strict scrutiny for sex-based classifications. See
Ginsburg considered the two justifications advanced by Virginia to support the male-only educational program. First, Virginia argued that single-sex educational programs provide "important educational benefits" and promote "diversity in educational approaches," and thereby advance a legitimate and important governmental objective. Second, Virginia argued that the admission and accommodation of women at VMI would drastically modify its unique adversative method of training. VMI's mission, therefore, could only be accomplished through a single-sex environment.

In rejecting Virginia's justifications, Justice Ginsburg began by emphasizing the "exceedingly persuasive justification" that governmental actors must advance to justify sex-based classifications. Justice Ginsburg explained that beginning with Reed v. Reed, the Court's case law has "evolved" to the point that the state must demonstrate "at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Moreover, the state's justification must be "genuine," as opposed to being "hypothesized or invented post hoc in response to litigation" and it must not rely on "overbroad generalizations" or stereotypes about the differences between men and women.

Justice Ginsburg was careful to note that under the Court's jurisprudence, governmental classifications based on sex are subject to "heightened review," as the Court has "thus far" reserved strict scrutiny for classifications based on race or national origin. Consequently, while the state is prohibited from perpetu-

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36. Id. at 25.

37. See id.

38. See id. at 33-36.

39. See VMI, 116 S.Ct. at 2274.


42. Id. at 2275 (quoting Hogan, 458 U.S. at 724) (emphasis added).

43. See id. at 2275.

44. Id. at 2276.

45. See id. at 2275 n.6.
ating the inferiority of women in legal, social, and economic spheres, it may draw sex-based classifications to promote equal opportunity in employment, or “to advance full development of the talent and capacities of our Nation’s people.” In the end, Justice Ginsburg found, Virginia failed to show an “exceedingly persuasive justification” for excluding all women from the citizen-soldier training afforded by VMI.

In noting that Virginia’s claims of beneficial educational opportunities and diversity were uncontested in the case, Justice Ginsburg undertook a “searching analysis” of the relation between Virginia’s alleged objective and its actual purpose. Under the Court’s jurisprudence, a “close resemblance” is demanded between a state’s “alleged objective” and its “actual purpose underlying the discriminatory classification.” Placing this “actual purpose” template over Virginia’s alleged objective, Justice Ginsburg found no persuasive evidence in the record that supported Virginia’s asserted interest in promoting educational diversity. In essence, Virginia’s alleged interest was seen as a pretext for sexual discrimination against women. Specifically, Justice Ginsburg pointed to the historical record in Virginia that revealed that all of the state’s other public colleges and universities, except for VMI, had abandoned single-sex educational programs. Justice Ginsburg argued that “[a] purpose genuinely to advance an array of educational options ... is not served by VMI’s historic and constant plan [of an all-male educational program because] [h]owever ‘liberally’ this plan serves the State’s sons, it makes no provision whatever for her daughters. That is not equal protection.”

46. Justice Ginsburg acknowledged that physical differences between men and women still prevail, and that inherent differences between the sexes “remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” VMI, 116 S.Ct. at 2276.
47. See Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam).
49. VMI, 116 S.Ct. at 2276.
50. Id.
51. See id. at 2277 (citing Hogan, 458 U.S. at 727). In Hogan, for example, the Court found no close resemblance between Mississippi’s alleged objective of conducting “educational affirmative education” to compensate women for discrimination (as its justification for maintaining an all-female nursing school) and Mississippi’s actual purpose. Hogan, 458 U.S. at 730.
52. VMI, 116 S.Ct. at 2277 (quoting Hogan, 458 U.S. at 730).
53. See id. at 2279.
54. See id.
55. Id. at 2279. Justice Ginsburg also referred to a VMI Mission Study Committee that
In similar fashion, Justice Ginsburg rejected Virginia's argument that admitting women to VMI would drastically modify (so as to destroy) the adversative method of training that uniquely characterizes VMI. Justice Ginsburg conceded that the admission of women to VMI would require accommodations in housing and physical training for female cadets. However, she also noted that it is indisputable that at least some women would like to attend VMI and that at least some women have the capabilities—physical and otherwise—to perform all of VMI's required activities. The district court had made findings on sex-based developmental differences, but Justice Ginsburg disregarded them. In Justice Ginsburg's view, those findings simply "restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female 'tendencies.'" Justice Ginsburg argued that even assuming that most women would not choose VMI's adversative method, the real

reexamined, from October 1983 until May 1986, VMI's all-male admissions policy in light of Hogan. Justice Ginsburg found that "[w]hatever internal purpose the Mission Study Committee served—and however well-meaning the framers of the report were—we can hardly extract from that effort any state policy evenhandedly to advance diverse educational options." Id. at 2279. Justice Scalia, in dissent, criticized the majority's charge that Virginia's perpetuation of VMI's all-male policy was simply a "pretext" for sexual discrimination, arguing that the majority would have to impute such a motive to the Mission Study Committee. Id. at 2298. Justice Scalia argued that "whether it is part of the evidence to prove that diversity was the Commonwealth's objective . . . is quite separate from whether it is part of the evidence to prove that anti-feminism was not" and the Committee's mere creation and its study and analysis "utterly refute the claim that VMI elected to maintain its all-male study-body composition for some misogynistic reason." Id. Justice Scalia also sharply criticized Justice Ginsburg's claim that there was no evidence in the record supporting Virginia's interest in diversity, arguing that a 1990 Report of the Virginia Commission on the University of the 21st Century to the Governor and General Assembly, a source stipulated by the parties, specifically "notes that the hallmarks of Virginia's educational policy are 'diversity and autonomy.'" Id. at 2299 (citation omitted).

56. See id. at 2279. That is, "neither the goal of producing citizen-soldiers,' VMI's raison d'etre, 'nor VMI's implementing methodology is inherently unsuitable to women."' Id. (quoting Virginia, 976 F.2d at 899).

57. VMI, 116 S.Ct. at 2279. On this point, Justice Scalia was extremely critical of the Court. With obvious disdain, he said:

How remarkable to criticize the District Court on the ground that its findings rest on the evidence (i.e., the testimony of Virginia's witnesses)! That is what findings are supposed to do. . . . The Court simply dispenses with the evidence submitted at trial—it never says that a single finding of the District Court is clearly erroneous—in favor of the Justices' own view of the world. . . . It is not too much to say that this approach to the case has rendered the trial a sham.

Id. at 2300-01 (Scalia, J., dissenting).
issue is whether Virginia “can constitutionally deny women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.” On that basis, it was “hardly proved” that women would destroy VMI’s adversative method.

In Justice Ginsburg’s assessment, such a prediction was more consonant with other self-fulfilling prophecies that had been used to deny women rights and opportunities in the past. It was clearly inconsistent with the success of women in federal military academies or their effective participation in our country’s military services—both indicating that “[Virginia’s] justification for excluding all women from ‘citizen-soldier’ training for which some are qualified . . . cannot rank as ‘exceedingly persuasive.’” Ultimately, then, Justice Ginsburg found that VMI’s underlying mission of producing “citizen-soldiers” was a great enough goal to accommodate women. Justice Ginsburg thus concluded that Virginia had not established an “exceedingly persuasive justification” for its sex-based classification.

58. Id. at 2280 (emphasis added).
59. See id.
60. See id.
61. Id. at 2281. Justice Ginsburg explained that Virginia and VMI misconstrued the Court’s precedent—and in the process engaged in circular reasoning—when they focused on “means” rather than “ends.” In other words, VMI’s single-sex educational policy was claimed to be an “important governmental objective” and thus excluding women from VMI was obviously “substantially related” since it was the only way to achieve the objective. By such reasoning, Justice Ginsburg argued, the Hogan test was “bent and bowed.” Id.
62. See VMI, 116 S.Ct. at 2281. Justice Scalia, however, viewed the majority opinion more as a bald public policy choice than a constitutional decision. This was made clear in his dissent as he lambasted the VMI majority for choosing sides in the same-sex educational debate at VMI when it is clear that the Constitution, “the old one,” as he put it, leaves the controversy to the political process. Id. at 2292 (Scalia, J., dissenting) (“Since it is clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent.”). Indeed, while Justice Ginsburg was content to devote her opinion “to deprecating the close-mindedness of our forbears,” id. at 2291 (Scalia, J., dissenting), Justice Scalia pointed out that at least “they left us free to change.” Id. at 2292 (Scalia, J., dissenting). However, “[t]he same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of society (and in some cases only the counter-majoritarian preferences of the society’s law-trained elite) in our Basic Law.” Id.
63. See id. at 2282. Justice Ginsburg went on to reject VMI’s remedial proposal of establishing a separate “VMI” at Mary Baldwin College, arguing that Virginia did not demonstrate “substantial equality” in the separate educational programs. See id. at 2285-86 (citing Sweatt v. Painter, 339 U.S. 629 (1950)). Justice Ginsburg contended that the Fourth Circuit, which approved Virginia’s remedial plan, was too deferential to the state, and she explained that the proper standard for sex-based classifications is “heightened
Curiously, Justice Ginsburg used the "exceedingly persuasive justification" phraseology to state her conclusion instead of the traditional "close and substantial relationship to important governmental objectives" formulation of the intermediate scrutiny test. That particular choice of words implicates more than mere semantics. In fact, those words may represent a substantive change in the Court's sex-based equal protection jurisprudence. What precisely was meant by the phrase "exceedingly persuasive justification" is worthy of more detailed consideration.

II. LOOKING TO THE FUTURE: "EXCEEDINGLY" UNCLEAR?

The peculiar wording in Justice Ginsburg's VMI opinion has generated much speculation over whether the Court is abandoning intermediate scrutiny in favor of strict scrutiny for sex-based classifications. For instance, Justice Scalia argued that the majority has "mudd[ied] the [constitutional] waters" by introducing "misleading" statements in its equal protection analysis, and has essentially worked a drastic revision in established precedent respecting sex-based classifications. Indeed, the United States, in its brief before the Court, urged the Court to adopt strict scrutiny for sex-based classifications. While Justice Ginsburg never expressly referred to the Government's argument in her majority opinion, several factors support Justice Scalia's contention that the Court "effectively accept[ed]" the Government's position.
The first factor centers on the manner in which the majority formulated the equal protection test. Under the intermediate scrutiny test, a governmental classification must be "substantially related to an important governmental objective." While Justice Ginsburg recited the intermediate scrutiny formulation two times in her analysis, she "never answer[ed] the question presented in anything resembling that form [and] instead prefer[ed] the phrase 'exceedingly persuasive justification' from Hogan," significantly, Justice Ginsburg invoked the phrase "exceedingly persuasive justification" a total of nine times in her majority opinion. Justice Scalia remarked that this "would be unobjectionable if the Court acknowledged that whether a 'justification' is 'exceedingly persuasive' must be assessed by asking '[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives.'" Unfortunately, as Justice Scalia, and Chief Justice Rehnquist in concurrence, pointed out, Justice Ginsburg used the phrase as an expression of the test itself, thereby signaling a shift in the equal protection standard.

Perhaps more important than the formulation of the test itself, however, is the manner in which it was applied in the case—the second, and stronger, factor supporting Justice Scalia's contention that the majority had adopted a standard that "amounts to (at least) strict scrutiny." In reaching its decision, the majority argued that VMI's all-male educational methodology failed the intermediate scrutiny test because it is "not inherently unsuitable to women." In other words, some women could thrive under the adversative

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70. VMI, 116 S.Ct. at 2294 (Scalia, J., dissenting).
71. See id. at 2271, 2274, 2274, 2274, 2275, 2276, 2281, 2282, 2287.
72. Id. at 2294 (Scalia, J., dissenting).
73. As Chief Justice Rehnquist argued:

While terms like "important governmental objective" and "substantially related" are hardly models of precision, they have more content and specificity than does the phrase "exceedingly persuasive justification." That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself.

Id. at 2288 (Rehnquist, C.J., concurring) (emphasis added).
74. Id. at 2298 (Scalia, J., dissenting).
75. Id. at 2279 (quoting Virginia, 976 F.2d at 899).
model. Yet as Justice Scalia correctly pointed out, intermediate scrutiny is not governed by a least-restrictive-means analysis or some “perfect fit” paradigm. While intermediate scrutiny demands a closeness of fit between means and ends, the governmental classification need not satisfy the “narrowly tailored” test set out in strict scrutiny cases. Rather, intermediate scrutiny is satisfied if the classification is “substantially related” to the achievement of the state’s objectives; or, put another way, if the classification advances the governmental objective “in the aggregate.” The Court, applying intermediate scrutiny in the past, has upheld sex-based classifications even though they were not perfect and did not relate to characteristics holding true in every case. Thus, the fact that a single woman, or even several women, are qualified to participate at VMI would not by itself invalidate VMI’s single-sex educational program. This led Justice Scalia to object that “[o]nly the amorphous ‘exceedingly persuasive justification’ phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield [the] conclusion that VMI’s single-sex composition is unconstitutional.”

Despite Justice Scalia’s protestations to the contrary, however, there is no definitive evidence that the VMI majority has actually pushed sex-based classifications into the strict scrutiny realm. In fact, there is evidence in Justice Ginsburg’s opinion weighing against Justice Scalia’s claims. For one thing, Justice Ginsburg never invoked any “strict scrutiny” language in her opinion, nor did she employ any “compelling interest” language. However, she twice referred to and recited the “important governmental objective/substantial relationship” nomenclature. Moreover, Justice

76. *Id.* (quoting Virginia, 976 F.2d at 896).
77. *See id.* at 2295 (Scalia, J., dissenting).
80. *VMI*, 116 S.Ct. at 2295 (Scalia, J., dissenting).
81. *See Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) (upholding male-only draft registration because even “assuming that a small number of women could be drafted for non-combat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans”); *Califano v. Webster*, 430 U.S. 313, 318 (1977) (upholding Social Security Act provision providing higher benefits to women than men because “women on the average received lower retirement benefits than men”) (emphasis added).
82. *VMI*, 116 S.Ct. at 2294-95 (Scalia, J., dissenting).
83. *See id.* at 2271, 2275.
Ginsburg explicitly stated that sex-based classifications warrant only "heightened scrutiny," not the strictest scrutiny. Finally, Justice Ginsburg did not pioneer the phrase "exceedingly persuasive justification" in VMI but instead extracted the phrase from several of the Court's previous cases dealing with sex-based classifications. In other words, Justice Ginsburg was not constructing a new constitutional parlance; she was just manipulating the old.

Nevertheless, it is difficult to understand why Justice Ginsburg used the phrase "exceedingly persuasive justification" as an expression of the basic equal protection test itself, rather than as a description of the difficulty in satisfying the basic test. Moreover, even if this part of Justice Ginsburg's opinion can be finessed away, it is impossible to overlook several of Justice Ginsburg's other statements. For example, Justice Ginsburg claimed that the Court has, as of yet, simply declined the invitation to "equate[s] gender classifications, for all purposes, to classifications based on race or national origin." Then, in a footnote, Justice Ginsburg wrote that "[t]he Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin." The deceptive quality of these statements did not escape Justice Scalia, who observed:

The wonderful thing about these statements is that they are not actually false. . . . But the statements are misleading, insofar as they suggest that we have not already categorically held strict scrutiny to be inapplicable to sex-based classifications. And the statements are irresponsible, insofar as they are calculated to destabilize current law. Our task is to clarify the law—not to muddy the waters, and not to exact over-compliance by intimidation. The States and the Federal Government . . . [should not be] compelled to guess about the outcome of Supreme Court peek-a-boo.

84. Id. at 2286 (quoting J.E.B. v. Alabama, 114 S.Ct. 1419, 1425 (1994)).
86. Justice Rehnquist was also perplexed by this. See VMI, 116 S.Ct. at 2288 (Rehnquist, C.J., concurring).
87. Id. at 2275.
88. VMI, 116 S.Ct. at 2275 n.6 (emphasis added).
89. Id. at 2295 (Scalia, J., dissenting) (citations omitted).
Peek-a-boo, indeed. While Justice Scalia overstates things a bit when he says the Court has "categorically" disavowed strict scrutiny for sex—since the Court has expressly reserved that question on three separate occasions\(^9\)—the point is that the general understanding has been that intermediate scrutiny was the established standard of review. This understanding has been undermined by \textit{VMI}.

The statements, formulations, and descriptions in the \textit{VMI} majority opinion may presage the Court's final "evolution" to strict scrutiny for sex-based classifications. The word "exceedingly" suggests that, over time, the states and federal government will have an increasingly heavy burden in justifying sex-based classifications. It is not unrealistic to expect that \textit{VMI} will be to strict scrutiny what \textit{Reed v. Reed}\(^9\) is to intermediate scrutiny. In \textit{Reed}, the Court struck down a sex-based classification by purportedly applying rational basis review.\(^2\) Yet, as later cases confirmed, \textit{Reed} was in essence heralding in heightened scrutiny for sex.\(^93\) Thus, just as \textit{Reed} was the esoteric instrument for establishing intermediate scrutiny, so \textit{VMI} may be the instrument for establishing strict scrutiny.\(^94\) In this manner, the Court can make it appear as if strict scrutiny for sex-based classifications was always compelled by the Constitution. In the process, it can clothe itself with an appearance of legitimacy—that it is simply interpreting the Constitution, not \textit{creating} one.\(^95\)


\(^{91}\) 404 U.S. 71 (1971).

\(^{92}\) See id. at 76.

\(^{93}\) See generally \textit{Laurence H. Tribe, American Constitutional Law} § 16 (2d ed. 1988).

\(^{94}\) See Udell, supra note 34, at 560 (arguing that \textit{VMI} has raised the intermediate scrutiny formulation close to the strict scrutiny realm).

\(^{95}\) While the Court is busy table setting, the states and federal government are forced to guess where the Court is really headed in its equal protection jurisprudence. Indeed, \textit{VMI} peek-a-boo has already generated speculation among lower courts. See, e.g., \textit{Nabozny v. Padesny}, 92 F.3d 446, 456 n.6 (7th Cir. 1996) (stating that \textit{VMI} does not employ "conventional heightened scrutiny parlance" but it is unclear how this affects the level of scrutiny); \textit{Engineering Contractors Ass'n of South Florida v. Metropolitan Dade County}, 943 F.Supp. 1546, 1556 (S.D. Fla. 1996) (asserting that it is unclear whether \textit{VMI} signals greater scrutiny for sex-based classifications). The peculiar wording in the \textit{VMI} majority opinion may not be fortuitous. Ruth Bader Ginsburg is well-known for having advocated strict scrutiny for sex two decades ago and, in fact, drafted the ACLU brief in \textit{Reed v. Reed} that urged the Court to adopt \textit{strict scrutiny} as the governing equal protection stan-
Given that the Court may be on "the cusp of strict scrutiny," it is appropriate to explore how a potentially "exceedingly" more stringent equal protection standard will impact other areas of law. In particular, the next part of this Comment examines how VMI could eventually affect the military's combat exclusion laws and policies as they restrict the role of women in combat. This focus is particularly appropriate given that the Constitution explicitly grants the President, and especially Congress, significant power over the military, but is conspicuously silent as to the Court's role in military affairs. Nevertheless, the Court may have positioned itself, at least in the context of sex, to upset the role of the other two branches of government in the area of military personnel.

III. THE COMBAT EXCLUSION RULES

Women in the military have traditionally been restricted from serving in combat roles. In recent years, Congress has modified
some of the combat exclusion rules by permitting women to fly aircraft in combat missions and to serve onboard naval vessels that engage in combat. Despite this modicum of change, however, women today continue to be excluded from the vast majority of combat positions.

Under intermediate scrutiny or strict scrutiny (which, as this Comment has argued, is equivalent to VMI's exceedingly persuasive justification analysis), the objectives served by the government classification must be advanced to some degree. The precise degree to which those objectives must be advanced depends, of course, on which standard of review is chosen. The following sections will define the objectives of the combat exclusion rules through a description of the arguments for and against them. It will then test these objectives under the VMI standard and explore how the results compare with those under the traditional intermediate scrutiny approach.

A. Objectives Served by the Combat Exclusions Rules

Several justifications have been advanced to support the combat exclusion rules. The traditional, and primary, argument against women in combat focuses on the physical abilities of women. Simply put, proponents of combat exclusion contend that women do not possess the same level of physical strength as their male coun-

At the Army's request, Congress gave the Army discretion to promulgate its own policy. 10 U.S.C. § 3013(g) (1988). The Army, acting consistent with the statutory restrictions of the other branches, drafted a policy excluding women from combat positions. U.S. Department of Defense, Office of the Secretary of Defense, Military Women in the Department of Defense (6th ed. 1988). The elimination of the "risk rule" in 1994 by Secretary of Defense Lee Aspin did open up 15,000 positions for women in combat-related capacities, but they were not direct ground combat units. See James Kitfield, Women Warriors, Gov't Executive (Nat'l Journal ed., Mar. 1994) (National Security Section).


105. See Frevola, supra note 102, at 626.
terparts.'06 Pentagon studies, in fact, have confirmed that men possess greater endurance and muscular strength than women.107 Accordingly, there is a general concern that women would be unable to endure the physical rigors of combat and, in turn, could be overwhelmed by the enemy.108

A related argument supporting the combat exclusion rules deals with pregnancy.109 Proponents point out that pregnant women would have to be granted an absence from their assigned duties that would, in turn, affect military preparedness and effectiveness.110 It is estimated that ten to fifteen percent of women in the military become pregnant,111 thus necessitating their eventual absence as they approach childbirth. Pregnancy may also affect a woman's ability to perform strenuous tasks while they are still serving.112 Moreover, it is possible that the costs involved with replacing pregnant women113 would be quite significant. Economic constraints may thus represent an independent argument supporting the exclusion of women from combat units.


107. See Office of the Assistant Secretary of Defense, Use of Women in the Military 26 (2d ed. 1978) (finding that "[w]omen have about 67% of the endurance of men and 55% of the muscular strength of men").

108. See Frevola, supra note 102, at 636-37.

109. Indeed, critics of the combat exclusion rules readily admit that pregnancy affects the ability of women to perform their military responsibilities. See Milko, supra note 102, at 1318 (citing Mady W. Segal, The Argument for Female Combatants, in Female Soldiers—Combatants or Noncombatants? Historical and Contemporary Perspectives 272 (Nancy L. Goldman ed., 1982)). See also Frevola, supra note 102, at 646 (conceding that "[t]he concern that women will not be available for combat duty if they become pregnant is warranted").

110. See Milko, supra note 102, at 1318.

111. See id. at 1317.

112. See id. at 1318 (citing Karst, supra note 106, at 535 n.144). But see Segal, supra note 109, at 272 (noting that some women can perform strenuous physical activities early in pregnancy).

113. See Frevola, supra note 102, at 647 (noting "staggering" financial costs).
Still another justification for the combat exclusion rules concerns combat readiness. It is argued that unit cohesion would be destroyed if women were assigned to combat units. Male bonding, it is contended, is a key component for an effective fighting force. The presence of women may “diminish[] the desire of men to compete for anything but the attentions of women,” thus resulting in a unit of “rivals in a sexual contest.” Further, since bonding is produced through uniformity, the differences in treatment of men and women would work against cohesion. The bonding process in the entire unit would further be destroyed since women, it is claimed, do not bond with men or each other.

It is also argued that women cannot function in a combat unit from a psychological standpoint. Women, it is often claimed, are passive, not aggressive, emotional, not composed, and nurturers, not killers. Even if female submissiveness is culturally conditioned rather genetically-imposed, proponents of the combat exclusion rules point out that, even so, “the fact remains that women are less aggressive.” Proponents express fears that if women are subjected to combat stress, they would be far less capable than males of carrying out their assigned duties and could actually suffer psychological breakdowns. As a result, combat effective-

115. MITCHELL, supra note 106, at 190.
116. Jones, supra note 114, at 265.
118. See id. at 266.
119. MITCHELL, supra note 106, at 188.
120. See Jones, supra note 114, at 263-64.
121. See Tuten, supra note 106, at 254-55 (suggesting that male hormones may play a key role in aggression).
122. See Jones, supra note 114, at 253 (explaining the claims of combat exclusionists “that women would lose their composure on the battlefield and either break down and cry or abandon their posts”).
ness would be jeopardized as men would have to come to the rescue of women.\textsuperscript{124}

Finally, proponents of combat exclusion rules advance a panoply of other arguments, including that the American public is not prepared to deal with female combat deaths,\textsuperscript{125} and that a cultural consensus exists over the desire to protect women from the crude prospects of war.\textsuperscript{126}

Thus, the general objective of combat readiness would be limited by the inferior physical or psychological disposition of women, the costs associated with adapting to the presence of women, the damage done to unit cohesion, and societal concerns about female casualties.

**B. Finding a Substantial Relationship: The Arguments Against Combat Exclusion**

The articulation of the government’s objective is the first step in intermediate scrutiny. Once it is defined, the Court will assess if the means used (here, combat exclusion) are substantially related to that end. The arguments against combat exclusion mirror how a challenge to the “substantial relationship” would be framed.

Opponents of the combat exclusion rules challenge each of the arguments advanced to support the exclusion of women from combat. First, with respect to physical abilities, opponents argue that even if most women cannot satisfy the military’s physical strength requirements, the combat exclusion rules are overbroad because they impose a per se exclusion in a setting where at least some women could satisfy the requirements.\textsuperscript{127} Women, they argue,

\begin{itemize}
  \item \textsuperscript{124} See Snyder, supra note 114, at 434 (explaining that one argument advanced by combat exclusionists is that “men would instinctively try to protect [women]”).
  \item \textsuperscript{125} See Frevola, supra note 102, at 642; Milko, supra note 102, at 1322; Christopher Horrigan, Comment, The Combat Exclusion Rule and Equal Protection, 32 Santa Clara L. Rev. 229, 257 (1992); Snyder, supra note 114, at 442. Critics, however, point to recent polls that indicate that the American public supports the introduction of women into combat on a voluntary basis. See Dean, supra note 102, at 439 n.57.
  \item \textsuperscript{126} See Jones, supra note 114, at 268. Critics respond that women already become wounded, killed, or prisoners of war, despite the existence of the combat exclusion rules. Id.
  \item \textsuperscript{127} See Frevola, supra note 102, at 639; Jones, supra note 114, at 262; Milko, supra note 102, at 1314; Snyder, supra note 114, at 433.
\end{itemize}
should at the very least be afforded the opportunity to satisfy the physical requirements.\textsuperscript{128}

Some opponents have argued that merely because class statistics reveal that more men than women can qualify for combat duty based on physical ability, this does not satisfy the substantial relationship test under intermediate scrutiny.\textsuperscript{129} Equal protection rights are individual rights; consequently, the use of class statistics to exclude women is improper.\textsuperscript{130} Because a closer means/ends fit can be established, the combat exclusion rules are said to be overbroad.\textsuperscript{131}

In any event, opponents argue that the development of modern weaponry has significantly minimized the importance of physical strength for combat.\textsuperscript{132} As a result, "the formerly paramount attribute of overpowering physical strength needed by the warriors of yore has been replaced in importance by the superior technical skill, intelligence and training required in modern combat troops."\textsuperscript{133} In short, critics argue, modern technology has become a great equalizer that eliminates the justification for drawing artificial distinctions between men and women.

Critics also challenge the argument that pregnancy should be a disqualifying factor for women in combat. For one thing, men are not disqualified from combat positions simply because they can contract illnesses (and thus are forced to miss time on duty); there-

\begin{itemize}
\item \textsuperscript{128} See Milko, supra note 102, at 1314. In fact, there may be circumstances where physical differences actually favor women, such as where effective maneuverability in constricted areas requires smaller body frames, or where extra fuelage for aircraft carrier landings favors pilots with lower weights. See id. at 1314 n.58.
\item \textsuperscript{129} See, e.g., G. Sidney Buchanan, Women in Combat: An Essay on Ultimate Rights and Responsibilities, 28 Hous. L. Rev. 503, 527-30 (1991). By contrast, maintaining security through combat effectiveness and efficiency has never been questioned as an "important governmental interest." See Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (holding that the "interest in raising and supporting armies is an 'important governmental interest'").
\item \textsuperscript{130} See id. at 530 (arguing that "[e]ven assuming that almost all women are not qualified for combat duty, the small number of women who were so qualified could still persuasively assert that class statistics should not be used to bar them from the status they seek").
\item \textsuperscript{131} For example, the military could promulgate certain physical requirements that both men and women would have to satisfy, as opposed to maintaining the absolute exclusion of women. See Frevola, supra note 102, at 639 (arguing that "[c]urrent regulations permit some men who are lighter and possibly weaker than women to fill a combat position merely because they are men").
\item \textsuperscript{132} See, e.g., Frevola, supra note 102, at 637.
\item \textsuperscript{133} See id. at 637 (footnotes omitted).
\end{itemize}
fore critics ask why women should be disqualified simply because they can bear children. Moreover, while pregnancy is the leading cause of absenteeism among military women, critics argue that it is only for a relatively short period of time. Even more important, men actually miss more time than women on average each year. During the Persian Gulf War, for example, more women were able to carry out their assignments than men, the leading disability among men being, of all things, sports-related injuries. Finally, critics argue that while some women become pregnant while serving, policies that exclude all women from combat positions are overinclusive. This overbreadth parallels that of an exclusion based on physical ability.

As to the validity of the unit cohesion argument, critics draw attention to military studies involving sex integration in combat support units as evidence that the concerns about the destruction of unit cohesion are overblown. Critics argue that bonding between men and women in combat units is not only possible but in fact is enhanced, as it is in any closely associated group, when the unit shares responsibility under a stressful environment. Critics also point to the successful integration of men and women in civilian contexts, such as in police and fire departments. If male

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134. See Segal, supra note 109, at 273.
135. See Komblum, supra note 106, at 419 n.412.
136. See Jones, supra note 114, at 263.
137. See, e.g., Frevola, supra note 102, at 647.
138. See id. at 648; Milko, supra note 102, at 1319.
139. See Snyder, supra note 114, at 440. Moreover, given the general availability of birth control and the fact that eroticism is sharply abated during stressful combat situations, the likelihood of pregnancy during service itself is much reduced. See id.
140. See supra notes 130-131 and accompanying text. In fact, it is argued that when Congress opened up certain combat positions for women aboard aircraft and naval vessels—positions that are very much affected by pregnancy—Congress undercut its own argument that the risk of pregnancy justifies the exclusion of women from combat. See Frevola, supra note 102, at 649-50.
141. See Milko, supra note 102, at 1324 (citing an Air Force Study questioning the effect that women would have on unit cohesion).
142. See Karst, supra note 106, at 543 (arguing that "[m]ost of what has been called 'male bonding' surely is not different from the close tie that any group of people will form when they feel a strong sense of mutual responsibility under conditions of extreme stress").
143. See Frevola, supra note 102, at 650-51 (noting that "[c]ivilian organizations have survived, and even thrived, after the introduction of women into their ranks"); Snyder, supra note 114, at 434-35 (observing that "there are many female policewomen who are working everyday with their male counterparts in combat-like situations").
troops truly have difficulty bonding with female troops, critics argue, the fault lies with the men and their misperceptions of women; consequently, it is a problem that men themselves need to resolve. After all, similar arguments about “bonding” were advanced to prevent the integration of blacks into combat units.

Finally, critics charge that theories about women being psychologically unfit to engage in combat are no more than stereotypical, antiquated notions about the proper role of women in society. Examples in both military and civilian contexts, they argue, dispel the notion that women cannot perform in combat-like situations. Critics further add that, as explained above, the nature of modern warfare demands technical competence before a “killer instinct.” For these reasons, some commentators have argued that the military’s combat exclusion rules violate the equal protection component of the Fifth Amendment’s Due Process Clause, even under intermediate scrutiny. VMI will only strengthen the challenge.

C. Intermediate Scrutiny of Sex-Based Classifications After VMI—Strengthening the Case Against Combat Exclusion

As Justice Scalia pointed out in dissent in VMI, intermediate scrutiny has never been viewed as requiring the application of a

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144. See Jones, supra note 114, at 266 (explaining that if a bonding problem does exist, “it is not female soldiers’ incapacity to bond but male soldiers’ perceptions about female soldiers that lead to the destruction of camaraderie between men and women”).

145. See Frevola, supra note 102, at 615 n.178 (adding that the weaknesses of such arguments is exposed once combat units—whether they be black and white or male and female—get closer to actual battle).

146. See Jones, supra note 114, at 264.

147. See Frevola, supra note 102, at 652-53 (citing examples from military history as well as the civilian world to dispel myths about women); Jones, supra note 114, at 264 (noting the positive performance of women in simulated combat and also adding that men have also suffered psychological breakdowns). But see Tuten, supra note 106, at 252 (arguing that the combat effectiveness of women cannot be accurately measured since it is impossible to simulate an actual combat environment).

148. Id. at 652 (arguing that “[t]he contention that combat troops are, by nature, killers is . . . fallacious”).

149. See id. at 632 n.80 (arguing that the combat exclusion rules are invalid under intermediate scrutiny); G. Sidney Buchanan, Women in Combat: An Essay on Ultimate Rights and Responsibilities, 28 Hous. L. Rev. 503, 541 (1991) (“exclusion of women as a class from combat positions does not constitute a means that is substantially related to the government’s important interest in raising and supporting armies”).

150. To date, the combat exclusion rules have never been directly challenged at the Supreme Court. See Milko, supra note 102, at 1309 n.42.
least-restrictive-means analysis. Rather, only a "substantial relation" between the classification and the state interest is required. Thus, the fact that some women could satisfy the physical and strength requirements for combat positions, for example, should not invalidate the combat exclusion rules under intermediate scrutiny. In this respect, the VMI decision may bolster the equal protection argument immensely by bumping up the analysis to something resembling strict scrutiny in practice (even though not formally announced as such).

In VMI, the Court assumed "that most women would not choose VMI's adversative method." It nevertheless held that VMI could not constitutionally maintain a single-sex educational program because there were at least some women—or, as Justice Scalia speculated, because there was at least one woman—who could competently undertake the VMI program. The VMI majority seemed to be embarking on the least-restrictive-means analysis that corresponds with strict scrutiny, or at least something close to it. Thus, the combat exclusion rules are constitutionally vulnerable under the VMI analysis because at least some women could presumably meet the military's physical and strength requirements.

151. See VMI, 116 S.Ct. at 2295 (Scalia, J., dissenting).
152. See id. But see Sunstein, supra note 65, at 75 (arguing that intermediate scrutiny has already "operated quite strictly 'in fact'").
153. It is enough that women, on the average, cannot satisfy the military's physical and strength requirements. For example, in Califano v. Webster, 430 U.S. 313, 318 (1977) (per curiam), the Court upheld a Social Security benefits scheme that provided higher benefits to women because "women on the average received lower retirement benefits than men."
154. VMI, 116 S.Ct. at 2280.
155. See id. at 2295 (Scalia, J., dissenting) (arguing that VMI's admissions policy was held to be unconstitutional "because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program").
156. See id. at 2281.
157. See id. at 2295 (Scalia, J., dissenting) (criticizing the majority for "execut[ing] a de facto abandonment of the intermediate scrutiny that has been our standard for sex-based classifications for some two decades").
158. In fact, some commentators have suggested that even if it is true that most women could not satisfy the military's physical requirements for combat duty, that result may be due to "a conception of combat duty that embraces physical requirements which are not truly job-related." Buchanan, supra note 129, at 536. This may be especially true in a modern military where technical competence is quickly becoming the paramount asset. See supra notes 132-33, 148 and accompanying text.
The other arguments advanced to support the combat exclusion rules are also vulnerable. The pregnancy argument, for example, was already deficient on two levels. First, while it is true that pregnancy is the leading cause of absenteeism among women soldiers, men actually have a higher absentee rate than their female counterparts, as described above. Second, even though maintaining the combat exclusion rules reduces the military’s administrative costs (since the military does not have to adjust to accommodate women), the Court has stated that administrative convenience alone cannot constitute an adequate constitutional justification under intermediate scrutiny. Thus, the pregnancy justification may have already been vulnerable to constitutional attack under intermediate scrutiny.

However, even accepting that genuine concerns exist over the ability of women to adequately perform their jobs while pregnant, only ten to fifteen percent of military women become pregnant while on duty. While under intermediate scrutiny those figures might justify classifying women differently from men under the substantial relationship test, the possible emergence of a least-restrictive-means analysis of VMI forecloses that possibility. Just as Virginia could not constitutionally exclude all women from VMI because some women were willing and able to undertake its educational program, Congress cannot exclude all women from combat positions merely because some women become pregnant. Congress cannot exclude all women from combat positions merely because some women become pregnant. Thus, VMI closes any gap that may have been left open by prior decisions.

Finally, the arguments dealing with women’s effect on unit cohesion or their psychological make-up are likely to be given greater scrutiny after VMI. Even if the government produced

159. See supra note 135 and accompanying text.
160. See Frontiero v. Richardson, 411 U.S. 677 (1973). In Frontiero, the Court struck down federal statutes, under the Due Process Clause of the Fifth Amendment, that required a servicewoman to establish that her husband was dependent upon her for support whereas for a serviceman, it was presumed that his wife was dependent upon him for support. The Court made clear that sex-based classifications cannot be justified on the basis of administrative convenience alone. See id. at 690.
161. See VMI, 116 S.Ct. at 2281.
162. In fact, the combat positions Congress has recently opened up to women in both the Air Force and Navy are very much affected by pregnancy. See Frevola, supra note 102, at 649. Thus, “the argument that a compelling state interest exists due to pregnancy risk which allows Congress to exclude women from combat assignments is not consistent with Congress’ prior actions.” Id. at 650.
163. Some of these arguments were already vulnerable under the older equal protection
credible evidentiary support demonstrating inherent psychological differences between men and women, it is unlikely that such evidence would satisfy the government’s burden under the amplified equal protection scrutiny of \textit{VMI}. In \textit{VMI}, at the district court level, Virginia generated substantial evidentiary support that outlined several sex-based psychological and sociological differences between men and women. In addition, expert testimony also established different learning and developmental needs between men and women.\textsuperscript{164} The evidence was generated to lay a predicate for justifying a single-sex educational program and to refute any claim that the state was driven by stereotypes.\textsuperscript{165} Cumulatively, the evidence suggested that the adversative model is not suitable to women and thus \textit{VMI}’s all-male composition is justified. The \textit{VMI} majority, however, completely dismissed the evidence, arguing that courts must “take a ‘hard look’ at generalizations or ‘tendencies’ of the kind pressed by Virginia”\textsuperscript{166} to ensure that states do “not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’”\textsuperscript{167}

Perhaps the majority’s rejection of the expert testimony was unwarranted—especially when the evidence was “virtually uncontradicted.”\textsuperscript{168} In fact, the United States never even challenged the expert witnesses.\textsuperscript{169} Alternatively, however, the Court’s heavy skepticism may have been more a product of its shifting—and more demanding—equal protection standard than any of its misgivings in cases like \textit{Hogan}. There, the Court emphasized that intermediate scrutiny must be conducted “free of fixed notions concerning the roles and abilities of males and females [and] [c]on must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.” \textit{Hogan}, 458 U.S. at 724-25. Thus, mere assertions that women would collapse under the stress of combat and that men would have to rush to their sides to save them, or mere assertions that women would adversely affect male bonding in combat units, for example, would likely be classified as archaic and stereotypic notions about women’s “place” in society under the pre-\textit{VMI} analysis. Indeed, \textit{Hogan} emphasized that intermediate scrutiny must be conducted “through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.” \textit{Id.} at 726.

\textsuperscript{164} See \textit{id.} at 1434-35.
\textsuperscript{165} United States v. Virginia, 766 F.Supp. at 1432-34.
\textsuperscript{166} \textit{VMI}, 116 S.Ct. at 2280.
\textsuperscript{167} \textit{id.} (quoting \textit{Hogan}, 458 U.S. at 725). The majority added that “generalizations about ‘the way women are,’ estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.” \textit{Id.} at 2284.
\textsuperscript{168} \textit{Virginia}, 766 F.Supp. at 1415.
\textsuperscript{169} See \textit{VMI}, 116 S.Ct. at 2280.
ings with the accuracy of expert testimony. Thus, if the Court has in fact arrived at strict scrutiny after VMI, the combat exclusion rules are constitutionally infirm under a normal equal protection analysis. Unfortunately, the analysis is not so simple. A definitive answer to the equal protection question is not possible without considering the application of the military deference doctrine. As will be detailed in the next part of this Comment, conventional equal protection analysis does not apply to constitutional challenges involving matters touching upon military affairs.

IV. THE MILITARY DEFERENCE CASES—COLLIDING WITH VMI

In a series of cases stretching back to 1974, the Court has struggled with the articulation of a standard of review respecting the degree of deference the Court must afford Congress and the President in cases involving constitutional challenges to military laws and policies. The basic justification for such judicial deference stems from a conception of the military as a “specialized community” that implicates different considerations from those in the civilian context. Accordingly, the Court has recognized that it must defer to the political branches of government in cases involving military matters because, as was expressed long ago, “judges are not given the task of running the Army.” An equal protection analysis of the combat exclusion rules is thus necessarily conjoined with the military deference cases.


172. Id. at 93-94 (determining that “[t]he responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates”).
The combat exclusion rules have never been challenged directly in the Supreme Court, primarily because of the perceived futility in the face of the military deference cases. However, the combat exclusion rules figured prominently as the backdrop for *Rostker v. Goldberg*. In *Rostker*, the Court addressed the constitutionality of the Military Selective Service Act ("MSSA"), a congressional statute authorizing the President to order the registration of males—but not females—for military service. In 1980, President Carter reactivated the draft and requested that Congress amend the MSSA to permit the registration of women. Congress refused, however, and several men challenged the MSSA as unconstitutionally discriminating between men and women under the Fifth Amendment’s Due Process Clause.

Then-Justice Rehnquist, writing for the majority in *Rostker*, upheld the validity of the MSSA and reiterated the "healthy deference" that the judiciary must afford Congress in the context of national defense and military affairs, as defined in earlier cases. At the same time, however, Justice Rehnquist emphasized that judicial deference does not equal total abdication. While "the tests and limitations to be applied may differ because of the military context," Justice Rehnquist argued, "[n]one of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs." Justice Rehnquist made his
point clear when he addressed the arguments of the Solicitor General who contended that the constitutionality of the MSSA should be scrutinized under rational basis, not heightened scrutiny, because judicial deference is mandated in the context of military affairs and national security. Justice Rehnquist responded:

We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further "refinement" in the applicable tests as suggested by the Government. Announced degrees of "deference" to legislative judgments, just as levels of "scrutiny" which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result. . . . Simply labeling the legislative decision "military" on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result.

Unfortunately, while criticizing the Solicitor General's attempt at "refining" the test for equal protection as being a superficial abstraction, Justice Rehnquist substituted his own superficiality by failing to precisely articulate how the degree of deference to the military should be adjusted when applied against the different tiers of equal protection scrutiny that the Court employs. By this default, Justice Rehnquist essentially muddied the waters of the military deference doctrine. Ironically, if VMI is the liberal version of Supreme Court peek-a-boo in the context of sex-based equal protection challenges, the military deference doctrine is the conservative version of Supreme Court peek-a-boo in the context of challenges to military laws and policies.

Perhaps the confusion over the proper standard of review in Rostker is attributable to the fact that Justice Rehnquist found that

182. See id. at 69.
183. Id. at 69-70.
184. See Bilello, supra note 171, at 488 (noting "[t]he irony of the Court's assertion is that while the Court was castigating the Government for its 'facile abstractions,' its refusal to establish a clear standard of review left unanswered the question of what should guide a court to a 'correct constitutional result'").
185. See Bilello, supra note 171, at 491 (observing that since 1974, "the Court has repeatedly failed to formulate a clear and coherent statement of the proper relationship between the political branches of government and the judiciary in defining servicemembers' constitutional rights").
men and women were simply not similarly situated with respect to registration for the draft. Thus a full equal protection analysis was never even joined. In *Rostker*, Justice Rehnquist argued that the purpose of registration is to prepare for a potential draft of combat troops. Since Congress and the Executive had decided that women would not be eligible for combat positions, Congress was "fully justified" when it rejected the President's proposal to authorize their registration. Thus, for the Court to have fully applied an equal protection analysis in *Rostker*, it should have addressed the constitutionality of the combat exclusion rules. If the combat exclusion rules were found unconstitutional, men and women would be similarly situated. Consequently, limiting registration to males could violate the Equal Protection Clause. The constitutionality of excluding women from combat positions, however, was not before the Court and, in fact, the majority seemed to assume the constitutionality of the combat exclusion rules.

The Court has continued to apply deference to military laws and policies in cases following *Rostker*, and several justifica-
tions have emerged to support the military deference doctrine. In one such case, for example, the Court expressed a separation of powers justification when it declared that “the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment... and Congress and the courts have acted in conformity with that view.” Indeed, power over the military is textually committed to Congress and the President, whereas the Constitution is silent about the judiciary’s role over military affairs. As yet another justification, the Court itself has noted that the judiciary lacks institutional competence when it comes to dealing with military affairs, observing that “[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional judgments subject always to civilian control of the Legislative and Executive Branches.” Finally, there is also some evidence that the Framers may enough, the military deference cases as a whole are of relatively recent vintage, with the first real articulation of the military deference doctrine in 1974 in Parker v. Levy, 417 U.S. 733 (1974). In this respect, the military deference cases share a commonality with the heightened scrutiny cases for sex-based classifications which owe their own origin to Reed v. Reed just three years later. What emerges is that just as the Court has been shifting its equal protection jurisprudence (as culminating “thus far” in VMI) to demand a higher level of judicial scrutiny of governmental classifications based on sex, the Court has simultaneously been articulating a standard of review that instructs the judiciary to afford the political branches significant deference when dealing with military affairs.

192. Chappell, 462 U.S. at 301. At the same time, however, the Court in Chappell was careful to clarify that “[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.” Id. at 304-05. Justice Rehnquist in Rostker emphasized a similar theme. Rostker, 453 U.S. at 67 (arguing that “Congress [cannot] disregard the Constitution when it acts in the area of military affairs”).

193. On the other hand, the Court is the final arbiter of the Constitution. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Thus, it has been argued that while the Constitution grants Congress and the President broad powers over military affairs, “the role played by those branches does not deny the power and duty of the courts to protect the constitutional rights of military personnel.” C. Thomas Dienes, When the First Amendment Is Not Preferred: The Military and Other “Special Contexts,” 56 U. Cin. L. Rev. 779, 822 (1988).

194. Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (“[I]t is difficult to conceive of an area of governmental activity in which courts have less competence”). Of course, a distinction should be drawn between the Court’s foray into those areas of military affairs that directly implicate the minitiae of military decision making and the Court’s authority over constitutional questions that only indirectly affect that decision making. See Linda Sugin, Note, First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them, 62 N.Y.U. L. Rev. 855, 875 (1987) (“There is no principle to explain why the courts are less able to evaluate the relationship between a military regulation and its pur-
have believed that judicial deference in the military context is appropriate. In fact, Alexander Hamilton in *The Federalist No. 23* suggested that there should be no limitation on the authority of the political branches over the military.\textsuperscript{195}

In addressing the constitutionality of the combat exclusion rules in light of *VMI*, the sex-based equal protection cases and the military deference cases present a collision of precedent that is not immediately resolved, especially when the standards in both lines of cases are so nebulous. On the one hand, a “healthy” application of the military deference doctrine could modify—so as to significantly lower—the equal protection scrutiny, resulting in the Court upholding the combat exclusions. On the other hand, it is possible that the Court would be extremely hesitant and thus decline to apply the military deference doctrine to a suspect group. After all, if Congress enacted a race-based combat exclusion rule today, it is hard to imagine the Court applying the military deference doctrine so as to preclude virtually any equal protection review.\textsuperscript{196} Ultimately, it is unclear how the equal protection analysis would proceed, especially when the Court so often “substitutes hollow shibboleths about ‘deference to [the military]’ for constitutional analy-


\textsuperscript{196} True, during World War II in *Korematsu v. United States*, 323 U.S. 214 (1944), the Court deferred to the judgment of military authorities and upheld the internment of 120,000 individuals of Japanese descent under a strict scrutiny analysis. However, *Korematsu* has been roundly criticized and it is extremely unlikely that the same result would follow today. See, e.g., Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1690-91 (1985). On the other hand, in the 1970s during the debates over the ratification of the Equal Rights Amendment ("ERA"), a constitutional amendment that would have subjected sex-based classifications to strict scrutiny, even some of the most ardent supporters of the ERA suggested that the military could ultimately decide whether to send women to the front lines in combat. See 118 Cong. Rec. S. 9332 (daily ed. Mar. 21, 1972) (statement of Senator Bayh). And this was a few years before the military deference doctrine was articulated in *Parker v. Levy*, 417 U.S. 733 (1974).
What is clear, though, is that VMI has potentially serious implications for the constitutionality of the combat exclusion rules.

V. THE COURT'S EVOLVING CONSTITUTION: DERAILING THE POLITICAL PROCESS

The VMI decision represents the Court's most recent disruption of the political process in the sex-based classification domain—all carried on under the guise of an evolving "Constitution." It is a disruption that can be traced back to the 1970's. Some commentators, for example, argue that the Court's development of heightened scrutiny for sex-based classifications in the early 1970's, at the same time that the debate over the ratification of the Equal Rights Amendment ("ERA") was raging, led to the demise of the ERA because a constitutional amendment was seen as unnecessary after the Court became involved. Whether the ERA would have been ratified had the Court not interfered can never be known, but what is evident is that the Court essentially derailed both the political and constitutional processes.

198. See Allan Ides, The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function, 50 WASH. & LEE L. REV. 35, 44 n.26 (1993) (claiming that "a decent argument can be made that but for the development of the intermediate scrutiny test, the [ERA] would have been ratified").
199. See id. (noting that "the Court's creative activism undermined an important part of the constitutional and political process"). In fact, Justice Powell, concurring in Frontiero, in expressing his concern about subjecting sex-based classifications to strict scrutiny, argued:

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

Frontiero, 411 U.S. at 691 (Powell, J., concurring). The ERA, of course, would have instituted strict scrutiny for sex-based classifications, whereas the Court (at least during the 1970's) eventually settled on intermediate scrutiny. See Ides, supra note 198, at 44 n.26. However, the VMI majority has closed even that gap and has, essentially, written the ERA into the Constitution by judicial fiat, without having to resort to the amendment
Regrettably, just as it did in the 1970's, the Court today threatens to derail the political process—this time in the context of military affairs. While the balance of power between the President and Congress has often been the subject of prominent debate, the Court in the context of women and the military is poised to make that debate a purely academic exercise. This is a gloomy outcome when one considers the strong policy arguments on both sides of the combat exclusion debate, a debate that should play itself out in the political process. Amazingly, the locus of power today resides in the judiciary even though the Constitution grants power over the military to the President and Congress, not the judiciary, and even though women are capable of influencing the political process—as evidenced by the recent modifications to the combat exclusion rules.

VMI, moreover, not only unjustifiably derails the political process of today but it also contributes to a line of jurisprudence that is wholly inconsistent with the constitutionalism of yesterday. The paragon example of substituting contemporary values for the fixed principles of the past, as is readily admitted, is the Court's modern equal protection jurisprudence for sex-based classifications. No one today genuinely claims that the Equal Protection Clause of the Fourteenth Amendment, when it was ratified in 1868, was designed to deal with sexual discrimination, even granting its general equal protection language. Rather, the primary purpose of the amendment was to deal with the problem of race. In fact, the

201. See Ides, supra note 198, at 41 (observing that “[n]o one seriously argues that the purpose or even one of the purposes of the Fourteenth Amendment was to prevent gender discrimination [but that] [r]ather the incorporation of gender discrimination doctrine into the Equal Protection Clause was a judicially created extrapolation from the law that had been developed in the context of race discrimination”). Indeed, just four years after the passage of the Fourteenth Amendment, the Supreme Court upheld a sex-based classification denying a woman a license to practice law, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), thus providing further evidence that the amendment was generally understood as not speaking to sex-based classifications, at least not in any heightened sense.
202. See Lino A. Graglia, “Constitutional Theory:” The Attempted Justification for the Supreme Court’s Liberal Political Program, 65 TEX. L. REV. 789, 795 (1987) (“there is no real doubt that the purpose of the equal protection clause was to prohibit certain discrimination by states on the basis of race”) (footnote omitted); ROBERT BORK, THE TEMPTING OF AMERICA 180 (1990) (“all commentators are agreed that [the Fourteenth Amendment’s] primary purpose was the protection of the recently freed slaves”).
Fourteenth Amendment explicitly refers to protecting the vote of "male inhabitants." Thus, based on the original understanding of the Fourteenth Amendment, it is fair to say that even the Court's intermediate scrutiny test has no constitutional foundation.

Nevertheless, Justice Ginsburg and the majority in VMI sought fit to elevate the level of review to strict scrutiny—or put differently, to have the Constitution "evolve" to strict scrutiny based on changing contemporary perceptions of the role of men and women in society. However, if the current Court is really bent on re-evaluating and shifting its sex-based equal protection doctrine, the real shift should be to rational basis, not to strict scrutiny, as Justice Scalia in dissent suggested. After all, it is difficult to maintain that women, as a majority of the electorate, are somehow a "discrete and insular minority" entitled to heightened scrutiny under equal protection review. Women are hardly outcasts in the political process, which "a long list of legislation proves."

203. U.S. CONST. amend. XIV, § 2. This provision, in fact, was relied on by the Court in a nineteenth century case to deny a woman the right to register to vote. See Minor v. Happersett, 88 U.S. 162 (1874). Although the reference to "male" is in a separate section of the amendment (section 2), it would be highly incongruous, to say the least, to claim that the Framers of the Fourteenth Amendment intended to institute heightened scrutiny for sex-based classifications yet at the same time would deny women a fundamental right of self-governance—namely, the right to vote.

204. Professor Ides, for example, writing in the context of intermediate scrutiny, describes the evolution of the equal protection clause as "[taking] place during a time when social perceptions about proper gender roles were changing rapidly and radically" and that the intermediate scrutiny test was the Court's response "to conform governmental practices to those developing mores." Ides, supra note 198, at 41. Apparently, the VMI majority's attempt to elevate the level of review to strict scrutiny must be a further refinement of the Court's equal protection doctrine to conform to society's changing mores.

205. Justice Scalia argued that "[t]he Court's intimations [about shifting to strict scrutiny for sex-based classifications] are particularly out of place because it is perfectly clear that, if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review." VMI, 116 S.Ct. at 2295-96 (Scalia, J., dissenting).

206. See id. at 2296 (Scalia, J., dissenting). The "discrete and insular" minority reference is from United States v. Carolene Products, 304 U.S. 144 (1938), the famous footnote four case, see H. Jefferson Powell, Carolene Products Revisited, 82 COLUM. L. REV. 1087, 1087 (1982) (calling footnote four "the most celebrated footnote in constitutional law"), where Justice Stone argued that stricter scrutiny may be justified for certain "discrete and insular minorities" because "prejudice [against them] may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." Carolene Products, 304 U.S. at 152 n.4.

207. VMI, 116 S.Ct. at 2296 (Scalia, J., dissenting) (citing long list of legislation demonstrating political power of women).
The recent modifications to the combat exclusion rules following the Persian Gulf War are just further proof of women's political influence.

Despite this reality, however, the VMI majority is shifting its equal protection standard to further narrow the scope of the political sphere. Strangely enough, the Court's jurisprudence is upside down because at the same time that women are becoming more powerful in the political sphere, the Court's scrutiny is becoming "exceedingly" stricter in the legal sphere under equal protection. In the end, VMI aggravates an error the Court made in the 1970's when it instituted heightened scrutiny for sex-based classifications. VMI carries on, and this time strengthens, the Court's practice of forbidding sex-based public policy choices that are not forbidden by the Constitution—"the old one," as Justice Scalia put it.

CONCLUSION

Undoubtedly, the Court's recent VMI decision has wide-ranging implications for sex-based equal protection law, beyond just the single-sex education context. Given that VMI marks the Court's final step to strict scrutiny for sex-based classifications, the constitutionality of the combat exclusion rules is in serious question, even when paired with the military deference doctrine. Sadly, the dynamic debate over women in combat threatens to be wiped out by the Supreme Court, despite the persuasive arguments on both sides of the public policy issue. Once again, an activist Supreme Court threatens to derail the political process and further narrow the sphere of self-government, just as it did in the 1970's when it first entered the sex-based classification domain—all in the name of the "Constitution."

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208. VMI, 116 S.Ct. at 2292 (Scalia, J., dissenting).