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Two Decades of Intermediate Scrutiny: Evaluating Equal Protection for Women Centennial Pannel

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CENTENNIAL PANEL†
TWO DECADES OF INTERMEDIATE SCRUTINY:
EVALUATING EQUAL PROTECTION FOR WOMEN

PANELISTS

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PROF. SHALLECK: I am Ann Shalleck and I teach here at the Washington College of Law. I welcome you to this Centennial Panel. This year is the 20th anniversary of *Craig v. Boren*,¹ the Supreme Court case that announced intermediate scrutiny as the level of scrutiny to be applied in evaluating conditions claimed to constitute sex discrimination.² First, “thank you” to my colleague, Nancy Polikoff,³ who came up with the idea for this panel as a way to examine the constitutional doctrine studied in the first-year classroom as a question of both constitutional theory and practice. This case was a part of a strategy developed in the 1970’s to bring constitutional scrutiny to conditions of inequality and oppression in women’s lives.⁴

†Editor’s note: The following is an edited transcript with annotations of a panel discussion held in honor of the Centennial Celebration for the Washington College of Law. The panel was held on April 8, 1996 at the Washington College of Law of American University. After this panel was held, the Supreme Court decided the *VMJ* case on June 26, 1996.

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1. 429 U.S. 190 (1976) (holding that statistical evidence of incidents of drunken driving among males and females was insufficient to support gender-based discrimination arising from Oklahoma statute prohibiting the sale of 3.29% beer to males under the age of 21 and females under the age of 18).

2. *Id.* at 197 (holding that statutory classifications based on gender must serve important governmental interests and must be substantially related to those interests).

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4. BARBARA ALLEN BABCOCK, ANN E. FREEDMAN, SUSAN DELLER ROSS, WENDY WEBSTER WILLIAMS, RHODA COPELON, DEBORAH L. RHODE AND NADINE TAUB, *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* 161-63, 191-211 (2d ed. 1996) (discussing *Craig v.*

That strategy arose out of a complex social and political movement, that we then called the women's movement. Constitutional litigation strategies developed in and were part of the conflicts within the movement at that time. *Craig v. Boren*⁵ was a significant legal development, a piece of political strategy and social theory carried out by lawyers and activists.⁶

Since that case was decided, there has been continued litigation, continued development of constitutional doctrine, and also continued social and political development within what we now call the feminist movement.⁷ Those developments have been shaped by lawyers both within and outside those movements, by judges at all levels of the federal judiciary, and by the many activists who have continued to struggle to address issues of inequality and oppression within our society.⁸ Today this panel we will examine the development of intermediate scrutiny since *Craig* and its implications for the lives of women.

We have on the panel litigators both who are also activists, who, in their daily work with this constitutional doctrine, see both its possibilities and its limitations, and who seek to restrict the limitations and extend the possibilities. We also have academics, who, in their teaching and writing about this doctrine—and their involvement in litigation, too—see other aspects of its possibilities and its limitations. First, we will hear from Donna Lenhoff, General Counsel and Director of the Work and Family Programs at the Women's Legal Defense Fund, where she has been for almost twenty years struggling against sex discrimination and making great gains. Next to her is Deborah Brake, Senior Counsel at the National Women's Law Center, where she also has been very active litigating these issues. Donna will give some background on the current state of the intermediate scrutiny doctrine, how we got here from *Craig v. Boren*,⁹ and the issues we face

Boren and the establishment of the intermediate standard of review).

5. 429 U.S. 190 (1976).

6. See DONALD G. MATHEWS & JANE SHERRON DE HART, *SEX, GENDER AND THE POLITICS OF ERA: A STATE AND THE NATION* 141 (1990) (asserting that in 1982 supporters of *Craig v. Boren* continued to seek the Equal Rights Amendment).

7. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982) (holding that a state-supported university violated the Equal Protection Clause by limiting enrollment to women, thus denying qualified men admission); *United States v. Commonwealth of Virginia*, 116 S. Ct. 2264, 2329 (1996) (holding that the Commonwealth of Virginia committed an equal protection violation by maintaining exclusively male military colleges).

8. See, e.g., JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 397-407 (1991) (summarizing relevant case law and other factors important to women's rights in United States history between 1963 and 1990).

9. 429 U.S. 190 (1976).

twenty years after the doctrine was established.¹⁰ Debbie will analyze differing interpretations of the intermediate scrutiny standard as enunciated by the Supreme Court.¹¹ Seeing the lower federal courts' handling of intermediate scrutiny will give us some perspective on the ways that doctrine is not only enunciated at the Supreme Court level, as most of us have studied it in law school, but becomes reality in peoples' lives through the actions of judges at different levels of the federal judiciary.¹² Sharon Rush is a professor of law at the University of Florida and has visited with us as a professor at the Washington College of Law, and at Cornell. She writes and teaches about feminist theory and constitutional law. Sharon will look at the intermediate scrutiny doctrine regarding sex discrimination for other groups, principally gays and lesbians seeking constitutional scrutiny of their claims of discrimination and oppression.¹³ Finally, Elizabeth Schneider, Professor of Law at Brooklyn Law School and a Visiting Professor at Harvard Law School, and long-term activist in the women's movement, who teaches Civil Procedure, Constitutional Law, Women and the Law, and Battered Women and the Law will offer some concluding observations on the past and future of intermediate scrutiny.¹⁴ Donna.

MS. LENHOFF: When I was in law school twenty-five years ago, it was a basic tenet of feminist legal doctrine that what we wanted was strict scrutiny for sex discrimination.¹⁵ And here we are twenty-five years later, and we have not gotten strict scrutiny for sex discrimination.¹⁶ We have got an awful lot of things that are not quite strict scrutiny. And we have a shot at getting strict scrutiny right at the moment. I want to give you a little bit of the context and the background to explain where we are. But let me start with the news.

10. See *infra* pp. 3-13 (comments of Donna Lenhoff).

11. See *infra* pp. 13-21 (comments of Deborah Brake).

12. See *infra* pp. 13-21.

13. Because of a copyright conflict, Sharon Rush's comments are not included in this transcript. For a commentary by Professor Rush about this panel, please see Sharon Rush, *Diversity: The Red Herring of Equal Protection*, 6 AM. U. J. GENDER & L. 41 (1997).

14. See *infra* pp. 21-26 (Comments of Professor Elizabeth Schneider).

15. See Karen Lazarus Kupetz, Note, *Equal Benefits, Equal Burdens: "Skeptical Scrutiny" for Gender Classifications after United States v. Virginia*, 30 LOY. L.A. L. REV. 1333, 1361 (1997) (describing how now Justice Ruth Bader Ginsburg began paving the way for gender-based strict scrutiny in her brief for *Reed v. Reed*, 404 U.S. 71 (1971)).

16. See ELIZABETH F. DEFEIS, *The Legal Impact of the Equal Rights Amendment in RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA 97*, 100-101 (Joan Hoff-Wilson, ed., 1986) (stating that the Supreme Court applied a strict-scrutiny analysis to a gender classification in *Frontiero v. Richardson*, 411 U.S. 677, 686-88 (1973), however, it backed down and ultimately adopted a "middle-tier" scrutiny in *Craig v. Boren*, 429 U.S. 197 (1976)).

When Nancy [Polikoff] called way back last fall with the idea of this panel, the Supreme Court had not yet agreed to review the decisions from the Fourth Circuit in the *VMI*¹⁷ case, the Virginia Military Institute case. So I was thinking what an interesting academic exercise, to review intermediate scrutiny and its impact.

But in the intervening six months, this has turned into a very real question because the Court granted certiorari and has now heard arguments on the question of the constitutionality of a state-run, essentially a separate and unequal military institution run by a state for women, not equal to another military institution run by that same state that is reserved for men only. That is the issue presented in *VMI*.¹⁸ We now have the consequences and the importance of this issue right before us in not at all an academic way. This is a very "real world" problem.

As of course you remember, the historic equal protection doctrine was that legislative classifications only had to be "rationally related"¹⁹ to a governmental purpose. And as late as 1948, the Supreme Court applied that standard of equal protection review to a sex classification.²⁰ In *Goesaert v. Cleary*,²¹ the Court upheld a Michigan law that prohibited women from serving behind a bar unless their husbands or fathers owned the bar.²² In that case, I guess, women were sufficiently protected by the legality of their husbands or fathers owning the bar²³—regardless, of course, of whether the husband or father was physically present. But the Court said it is rational; because the state has an interest in protecting women.²⁴ That is the end of the analysis,

17. *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992), *aff'd* 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996). The *VMI* case was decided subsequent to this panel discussion. The Supreme Court held in June of 1996 that *VMI*'s exclusion of women violated the Equal Protection Clause.

18. *Virginia*, 44 F.3d at 1232.

19. *See Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949) (applying the rational basis test to a legislative classification in a New York traffic regulation).

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

21. *Id.*

22. The Court noted:

The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.

Id. at 466 (citations omitted).

23. *See id.*

24. *Id.*

basically. It is rather amazing to think that it was only in the early '70s when such a revolution had occurred, that the Court no longer could consider so easy an analysis.

And it was early in the 70's, first, in 1971 in the *Reed*²⁵ case, and then in 1973 in the *Frontiero*²⁶ case, which were the cases that next present the question of how to review sex based classifications, that the Court applied a standard much higher than simple rational basis review.²⁷

In the interim, of course, the doctrine that race-based classifications are inherently suspect and therefore must be given strict scrutiny had become well established in both the Court "psyche" as well as in the public "psyche." Not only that, but a strategy—which now Justice Ruth Bader Ginsburg and other early feminist legal theorists were the prime architects—was developed, that sex-based classifications ought to be treated the same as race-based classifications for equal protection purposes.²⁸ This idea had gotten pretty far as well.²⁹ Indeed, if you apply the criteria that the Court used to determine that race and ethnic origin ought to be suspect classifications to the classification of gender, you see that it is hard to come up with much of a distinction.

First, the Court in the race-based classification cases pointed out that race was an immutable characteristic with no relationship to ability.³⁰ This is, of course, also true for sex.³¹

25. *Reed v. Reed*, 404 U.S. 71, 77 (1971) (holding that an automatic preference for males in choosing between two equally qualified people to administer an estate violates equal protection).

26. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (striking down a statute that classified on the basis of sex for the sole purpose of administrative convenience).

27. See *DEFELIS*, *supra* note 16, at 100-101.

28. One way they asserted this was through advocating the Equal Rights Amendment. See Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 474 (1978) (arguing that the Equal Right Amendment would ease the court's hesitation in giving a higher scrutiny for sex discrimination).

29. See, e.g., *Arizona Governing Comm. for Tax Deferred Annuity v. Norris*, 463 U.S. 1073, 1083-84 (1983) (proposing that use of sex-based actuarial data would be unlawful if race-based actuarial data were unlawful under Title VII, which places sex-based distinctions on equal footing with race-based distinctions); see also *Frontiero*, 411 U.S. at 682 (agreeing with the proposition that classifications based on sex are similar to race-based classifications in that both are suspect).

30. See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (noting that race was an immutable characteristic that did not affect people's ability to serve on juries); Fullilove v. Klutznick, 448 U.S. 448, 516 (1980) (Powell, J., concurring) (reiterating that race should be irrelevant in government decisions and that no government decisions should be based on immutable characteristics).

31. *Frontiero*, 411 U.S. at 686 (commenting that both sex and race are immutable characteristics).

The second criterion, that people of color have a long history of discrimination even unto the present; also is true of gender.³² Third, people of color were underrepresented in the political process, and the same is true for women.³³ And indeed, those three major criteria apply not only to gender, but to sexual orientation,³⁴ to illegitimacy,³⁵ and to a number of other classifications that the court might be somewhat hesitant to extend "suspect classness" (if you will) to. There is an apparent exception. Actually, one of the considerations that applies to race and ethnic origin that does not apply to gender is minority status. But it is not really clear that minority status is required in order to get to suspect classification. For example, the Court recently held in *Adarand*,³⁶ the affirmative action decision of last Term, that whites are entitled to strict scrutiny—that is, that discrimination against whites on the basis of race was entitled to strict scrutiny.³⁷ Obviously, whites in this country—at least in the current demographics—are not a minority. So having minority status is not necessarily required of the protected group.

The strategy of Ruth Bader Ginsburg when she was the Chair of the Board of the ACLU Women's Rights project in the late '60s and early '70s, when this theory was being developed, was to seek to have sex declared a suspect classification and therefore make sex-based discrimination subject to strict scrutiny and therefore, to have most sex-based classifications struck down.³⁸ In 1971 in *Reed v. Reed*,³⁹ sex-based discrimination was in fact struck down, although the Court

32. See *Califano v. Webster*, 430 U.S. 313, 317 (1977) (pointing out that economic disparity between the sexes is caused by a "long history of discrimination against women") (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974)).

33. See *Frontiero*, 411 U.S. at 686 n.17 (1973) (asserting that women have been underrepresented in the political process at the state as well as the federal levels).

34. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986) (finding no fundamental right for homosexuals to engage in sodomy and denying homosexuals strict scrutiny review); *Romer v. Evans*, 116 S. Ct. 1620, 1641 (1996) (using the rational relationship test to determine whether homosexuals' rights as persons were violated).

35. See, e.g., *Michael M. v. Gerald D.*, 491 U.S. 110, 131 (1989) (upholding the state court's use of rational review in deciding whether an illegitimate child's equal protection rights were violated).

36. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that all governmental racial classifications must be analyzed under strict scrutiny).

37. *Id.* at 227.

38. See *Kupetz supra* note 15 at 1360 (noting that now-Justice Ginsburg used strict scrutiny analysis in her brief for *Reed v. Reed*, 404 U.S. 71 (1970) as part of her strategy for the Women's Rights Project of the American Civil Liberties Union).

39. 404 U.S. 71, 76 (1971).

was unclear about whether it was using strict scrutiny in fact. It used, in many ways, “rational basis” language.⁴⁰

Two years later in *Frontiero*,⁴¹ a plurality of the Court—four Justices—said yes, strict scrutiny is required; sex is the same as race for the purposes of this analysis.⁴² However, since then we have never reached by five Justices voting for strict scrutiny, instead, the Court essentially has taken a middle-tier scrutiny, also known as intermediate scrutiny. The clearest articulation of intermediate scrutiny was in 1976 in *Craig v. Boren*,⁴³ when the Court held that sex is considered a classification that requires heightened scrutiny.⁴⁴ Under that heightened scrutiny, to be upheld, the classification need only be substantially related to an important state interest⁴⁵—substantially, not narrowly tailored, and an important state interest, not a compelling one. Among other things, this leaves the following anomaly in the difference between race and sex discrimination: women of color often face a dilemma because they have to be classified as one or the other in order to figure out what the right level of analysis is for them. But the Court has not had to deal with that anomaly at all.

By 1982, Justice O’Connor had made intermediate scrutiny her own. She adopted and used it in *Mississippi University for Women v. Hogan*,⁴⁶ in which a man challenged Mississippi University for Women, a state-institution nursing school program which did not admit men.⁴⁷ Justice O’Connor struck that program down under intermediate scrutiny.⁴⁸ She suggested, though, in her opinion, that the issue of what is the appropriate level of scrutiny and what is the appropriate analysis for sex discrimination was actually still open.⁴⁹

40. *See id.* (“[T]he question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective . . .”).

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

42. *Id.* at 682 (Justices Brennan, Douglas, White and Marshall formed the four-justice plurality).

43. 429 U.S. 190 (1976).

44. *Id.* at 197 (“[T]o withstand constitutional challenges, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

45. *Id.*

46. 458 U.S. 718 (1982).

47. *See id.* at 719-21.

48. *See id.* at 728-30 (finding that MUW’s policies violated the Equal Protection Clause because (1) they did not “intentionally and directly assist” women; and (2) the state did not show that the classification furthered a “compensatory objective” in educating women).

49. *See id.* at 724 n.9. Justice O’Connor’s footnote reads, in part, as follows:

Our past decisions establish, however, that when a classification expressly discrimi-

O'Connor's hint was picked up by Justice Ginsburg once she was appointed to the Court. For example, in a Title VII case in which there was no need to address the constitutional issue, Justice Ginsburg dropped a footnote completely unnecessarily,⁵⁰ stating that this question was still open.⁵¹ Justice Ginsburg clearly wanted to make this point. She raised the same point again in 1994 in *J.E.B.*,⁵² a constitutional case.

In the meantime, during all of this period, we still did not get strict scrutiny analysis for sex-based classifications. We had heightened scrutiny and a number of sex discrimination statutes were struck down, though not all of them.⁵³ Statutory rights established by Congress were getting women pretty close to strict scrutiny in a number of contexts governed by those statutes, most important Title VII of the 1964 Civil Rights Act, which protects women from sex discrimination in employment,⁵⁴ and Title IX of the Education Amendments of 1972, which protects women from discrimination in federally funded education programs.⁵⁵ So, in those contexts, the statutory rights had

nates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.

Thus, we apply the test previously relied upon by the Court to measure the constitutionality of gender-based discrimination. 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.

(citing *Stanton v. Stanton*, 421 U.S. 7, 13 (1975)).

50. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 26 n. * (1993) (Ginsburg, J., concurring).

51. *Id.* ("Indeed, even under the Court's equal protection jurisprudence, which requires 'an exceedingly persuasive justification' for a gender-based classification, *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (internal quotation marks omitted), it remains an open question whether 'classifications based upon gender are inherently suspect.' See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)").

52. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137 n. 6 (1994) (citing *Harris*, 510 U.S. at 26 n. *) (Ginsburg, J., concurring) (considering "whether peremptory challenges based on gender stereotypes" considerably assist a party's attempt to ensure a fair and impartial jury).

53. See, e.g., *Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that an Idaho statute, which provides that where males and females are equally qualified to administer estates, males must be preferred, violates the Equal Protection Clause under heightened scrutiny); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (holding that an Oklahoma statute which had disparate drinking ages for men and women was unconstitutional); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (holding that gender-based distinctions against female wage earners under Social Security violated the Equal Protection Clause); *Caban v. Mohammed*, 441 U.S. 380, 391 (1979) (holding a sex-based distinction in a New York Domestic Relations law provision invalid under the Equal Protection Clause).

54. See 42 U.S.C. § 2000e-2 (1994).

55. 20 U.S.C. § 1681 (1994).

gone probably about as far as strict scrutiny would have gone—indeed further, since they covered private action as well as state action.⁵⁶ The question, as a practical matter at least for me as a practitioner—of whether we were ever going to get strict scrutiny was becoming more and more symbolic. Of course, there was also the Equal Rights Amendment, which failed to pass the number of states required for ratification.⁵⁷ Passage of the ERA would essentially have given strict scrutiny to sex-based governmental classifications.⁵⁸ Nevertheless, as a practical matter, heightened scrutiny and the statutory protections against discrimination were getting women pretty far. The symbolic question, though, remained an important one and had never really been resolved.

Last term, the Court decided in *Adarand*⁵⁹ that as strict scrutiny is to be applied to statutes that discriminate against blacks and other ethnic minorities, it should also be applied to classifications that worked to the detriment of whites, essentially to affirmative action programs.⁶⁰ And that left a real anomaly. Present law, post-*Adarand*, holds that race-based affirmative action—“reverse” discrimination against whites, to use the Court’s language—is harder to justify than sex-based discrimination—that is, discrimination against women.

Do they really mean that? And do they really mean another logical extension of *Adarand*—that, as a few courts have held sex-based affirmative action is harder to justify than sex-based discrimination by applying *Adarand* and its strict scrutiny to affirmative action programs that discriminate against *men*, but still not applying strict scrutiny to discrimination against *women*.

Well, then, along comes *VMI*.⁶¹ Here is a real live example of something that has not been reached by Title IX and that requires a

56. See 42 U.S.C. § 2000e-2(a)(1) (1994) (“[I]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex or national origin.”); See also 20 U.S.C. § 1681 (1994) (“[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . .”).

57. In 1982, the deadline for ratification of the Equal Rights Amendment ran, but with only 35 of the required 38 states having ratified it. See HOFF *supra* note 8, at 401.

58. See HOFF, *supra* note 8, at 125 (quoting the basic text of the ERA as: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”).

59. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

60. See *id.* at 227.

61. *United States v. Virginia*, 976 F.2d 890, 892 (4th Cir. 1992) (finding that a gender

constitutional analysis. It requires somebody to look at the constitutionality of this state action.⁶² Debbie [Brake] knows much more about the details of the case, and I am going to let her talk about them as she also talks about some of the lower court decisions. But the context of *VMI* is that first, it is a case with "great facts"—in that there is blatant discrimination in which women are clearly disadvantaged and do not get the benefits that their male counterparts get, benefits that are clearly provided by the state.⁶³ Whatever you think of those benefits, women don't get them and men do. Second, we are in the position of having as sympathetic a Court as we are likely to see; and Justice Ruth Bader Ginsburg is on this Court. If anybody is going to be able to get Justice O'Connor as a fifth vote for strict scrutiny for sex discrimination, presumably it is Justice Ginsburg. Third, we have an administration willing to make the argument that sex-based discrimination ought to be viewed with strict scrutiny. And finally, we have the circumstance that this comes up right after *Adarand*,⁶⁴ which squarely presents the anomaly between the Court's treatment of race and sex discrimination.

It seems a great opportunity to try to convince the Court that gender classifications should get strict scrutiny at last. However, in *VMI*, how could we convince the Court to use strict scrutiny when we could in all likelihood win the *VMI*⁶⁵ case with intermediate scrutiny? We certainly weren't going to concede that under intermediate scrutiny, *VMI*'s program was constitutional. Of course, effectively, that is what happened in the lower courts.⁶⁶ The lower courts upheld, under their application of intermediate scrutiny, the separate program that Virginia set up, which was called the Virginia Women's Institute for Leadership—a program that was at a separate campus, did not confer the same engineering and science degrees that *VMI* did, and that uses a quite a different educational methodology, specifically designed for women—which was supposed to be a kind of soft,

distinction is justifiable in this instance if "adequate alternatives" are available to women), *aff'd* 44 F.3d 1229 (4th Cir. 1995), *rev'd* 116 S. Ct. 2264 (1996).

62. *See id.* at 890.

63. *See, e.g.,* United States v. Virginia, 766 F. Supp. 1407, 1415-43 (W.D. Va. 1991), *aff'd* 976 F.2d 890 (4th Cir. 1992), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996).

64. *Adarand*, 515 U.S. 200 (1995) (evaluating statute awarding ten percent of federal contract funds to "socially and economically disadvantaged individuals" considered to be minorities and women).

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

66. *See* United States v. Virginia, 44 F.3d 1229, 1233 (4th Cir. 1995).

touchy-feely leadership growth experience for women, as opposed to the rigorous, adversarial, educational methodology that VMI uses.⁶⁷

Surely that blatant difference ought to fail under even intermediate scrutiny. We certainly wanted to make that argument, and we thought we would win that argument. So how and why should the Court take the next step and apply strict scrutiny? This is really a species of the larger problem that is posed by this panel, which is what does strict scrutiny get us that intermediate scrutiny does not? How is strict scrutiny going to help us at this point? The answer that we came up with, in our briefs to the Court, was to say that intermediate scrutiny is essentially unworkable, as *VMI*⁶⁸ illustrated. Look at how much trouble the lower courts have had with intermediate scrutiny.⁶⁹

Debbie Brake is going to tell you more about this trouble the lower courts have had with intermediate scrutiny,⁷⁰ and because of the lower courts' trouble, we argued, the Court needs to lead the way, to establish strict scrutiny once and for all, so that this confusion and litigation and the awful results that we have had so far with intermediate scrutiny won't recur. Essentially we are saying, "Look, you tried calling it something less than the real thing, but it is not working, and let's just do this right once and for all. And here is a perfect example of why you need to do it."

I will tell you that at the oral argument in *VMI*,⁷¹ one's hopes for the Court's adopting this line of reasoning were dashed—dashed hard, actually, against the rocks. Justice O'Connor, whose vote we need, basically said to Paul Bender—the attorney for the government—in a not very friendly tone, "Why do I even have to get to this question of strict scrutiny? We have decided this. Why are you even bringing it up?" To which Mr. Bender replied, "Well, you know, you have left it open." Justice O'Connor then answered, "What are you talking about? We have not."⁷² Essentially, of course, it is her footnote that leaves it open.⁷³ And Justice Ginsburg did not jump into the breach

67. See *id.* at 1233-35.

68. See Brief *Amici Curiae* of National Women's Law Center, et. al., *United States v. Virginia*, 116 S. Ct. 2264 (1996) (No. 94-1941), available in 1995 WL 703392 (Nov. 16, 1995).

69. See *infra* pp. 13-21.

70. See *infra* pp. 13-21.

71. See Petitioner's Oral Argument, *United States v. Virginia*, 116 S. Ct. 2264 (1996), available in 1996 WL 16020, 10-11 (paraphrasing official court transcript).

72. See *supra* note 49.

73. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982) (stating that because this case did not pass intermediate scrutiny muster, the Court need not decide whether

to say in her very understated way, "Well, actually, we have kind of left it open. Don't you remember?"⁷⁴ Maybe that is because she didn't want to embarrass Justice O'Connor and figured that she was going to have plenty of opportunity to do it later, in the gym or the bathroom or wherever they have such discussions. I hope that was what she was thinking. But she did not leave a lot of room for hope along those lines.

Even if we got strict scrutiny, it is not a panacea. Let me talk a minute about what strict scrutiny won't do under the Constitution. The first thing that strict scrutiny will not do is regulate private action. It is only state action that we are talking about; there must be governmental discrimination to begin with.⁷⁵ Another thing that strict scrutiny will not do is establish that there is sex discrimination to begin with. In order to even get to the level of scrutiny, you have to convince the Court that there is discrimination.⁷⁶ *Geduldig*,⁷⁷ for example, would not be overturned, even if strict scrutiny were to be adopted. In fact, in my more optimistic days before the *VMI* argument I had been thinking of *VMI* as step one: first, let's get to strict scrutiny, and then after we do that, we'll overturn *Geduldig*.⁷⁸ Now, I am less optimistic that we are ever going to get to that. So, in any event, pregnancy-based classifications, and therefore abortion-based classifications, are still, under constitutional doctrine, not even sex discrimination to begin with and therefore not even subject to strict scrutiny, even if it were required, a third limitation is that there is also no disparate-impact analysis under the Constitution, whether we have strict scrutiny or not.⁷⁹

gender classifications are inherently suspect).

74. See *supra* note 49.

75. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978). See *United States v. Guest*, 383 U.S. 745, 754 (1966).

76. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that California's disability insurance program did not violate the Equal Protection Clause by refusing to cover work loss resulting from pregnancy. The Court held that a state may, without violating equal protection, address itself to whatever problem it decides is most acute, neglecting others, in this case, disability coverage for work loss due to pregnancy).

77. *Id.*

78. *Id.*

79. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (the court noted that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."); see also *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (finding that a study that showed that the death penalty in Georgia was imposed more often on black defendants and killers of white victims failed to establish that any decision makers in defendant's case acted with discriminatory purpose in violation of the Equal Protection Clause); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (holding that the

Finally, even if we do get to strict scrutiny, what is the Court going to mean by “compelling state interest?”⁸⁰ And how is the addition of sex discrimination to the pantheon of classifications that must be justified by a compelling state interest going to affect the definition of the term? For example, state interests to preserve privacy, to preserve other constitutional rights, and to remedy past discrimination all have been held to be compelling state interests. And indeed, in *Adarand*,⁸¹ O’Connor said that strict scrutiny is not fatal in fact, that is even without gender-based classification being considered. So presumably, there will still be things that will survive the strictest scrutiny.

Certain affirmative action programs should survive the strictest scrutiny under current race discrimination doctrine, and presumably also under sex discrimination doctrine if we get to that point. And there are a lot of things that we might be interested in preserving—single sex women’s education, for one. And you can imagine the women’s colleges were a little bit nervous about *VMI*⁸² itself, because some of them were afraid that strict scrutiny would put them out of business.

My bottom line on the question of whether the pros outweigh the cons is yes, it is very easy to criticize a construct of equal constitutional scrutiny when society hasn’t caught up. Legal standards of equality all too easily can be viewed as punishing women because women are not, in fact, equal yet, but this is a kind of 1996 version of why women are better off without strong rights. The logic says, “don’t worry, it’s better for women to be protected than to have rights.” And I think it is really a mistake. Of course society hasn’t caught up, but do you give up and accept the status quo? That does not seem to me to be an adequate solution either. We’re talking about a constitutional standard that is right for all times, even if there isn’t a lot of overt sex discrimination now, and even though we need

plaintiffs failed to show racially discriminatory intent or purpose when local authorities refused to rezone a tract of land from single-family to multi-family when that rezoning was requested in order to build racially integrated low and moderate income housing); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 198 (1973) (finding that intentionally segregated school board actions created a prima facie case of unlawful segregated design on the part of school authorities); *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1964) (finding that plaintiffs failed to prove racially discriminatory intent or motivation in apportionment of congressional districts in New York County); *Hernandez v. New York*, 500 U.S. 352, 372-73 (1991) (holding that the prosecutor’s reasoning behind striking two Hispanic prospective jurors was racially neutral).

80. See *Craig v. Boren*, 429 U.S. 190, 221 (1976).

81. 515 U.S. 200 (1995).

82. 976 F.2d 890 (4th Cir. 1992), *aff’d*, 44 F.3d 1229 (4th Cir. 1995), *aff’d*, 116 S. Ct. 2264 (1996).

affirmative action and remedial action. In ten to twenty years the landscape may be very different, and the need for a tough standard to deal directly with discrimination against women as a backstop to any backsliding—to all of the backsliding that we expect – I think outweighs the potential losses that we might see even if we got some strict scrutiny. Debbie, do you want to pick up from here?

MS. BRAKE: Good afternoon. I'm Deborah Brake with the National Women's Law Center. I want to talk about what I would call the misuse, or abuse, of intermediate scrutiny in the lower courts, with an eye towards asking the same question Donna [Lenhoff] is asking. And that is, should the correct standard be one of strict scrutiny rather than intermediate scrutiny? I do want to make clear that I strongly believe the examples that I am going to talk about are misapplications of intermediate scrutiny. I don't believe that under a proper reading of intermediate scrutiny these cases should have come out the way that they have come out in the lower courts. But, like Donna [Lenhoff], I think we need a constitutional standard that is clear for the lower courts. I think a constitutional standard should be one that is likely to be interpreted correctly and one that is appropriate in the long haul.

When intermediate scrutiny was first developed in *Craig v. Boren*⁸³ in 1976, Justice Rehnquist, not surprisingly, dissented from the opinion. Of course, his conclusion was that sex discrimination should receive the lowest level of constitutional scrutiny rather than the highest. But in talking about the intermediate scrutiny standard and criticizing it, he stated that intermediate scrutiny is "so diaphanous and elastic as to invite subjective judicial preferences or prejudices."⁸⁴ This may be the first and last time that I quote Justice Rehnquist on a sex discrimination issue approvingly. But I think if we look at what has happened in the lower courts, to some extent, this has been the case. It is a little difficult for judges to determine whether a state interest is important enough to satisfy intermediate scrutiny. It is even more difficult for judges to determine whether the gender classification is substantially related to that important governmental interest. There is some fudge room in deciding what is substantially related to an important state interest.

In talking about the lower courts I want to focus on the *VMI*⁸⁵ case, both because it is at the forefront of the consciousness of sex dis-

83. 429 U.S. 190 (1976).

84. *Id.* at 221.

85. 976 F.2d 890 (4th Cir. 1992), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *aff'd in part and rev'd*

crimination law right now, having been argued before the Supreme Court on January 17, 1996, and because it is a showcase example of the misuse of intermediate scrutiny and of judges letting gender-based stereotypes infect their thinking and their analysis of whether a gender classification is substantially related to an important state interest.

First, I will briefly discuss some of the history of the *VMI*⁸⁶ case. This case was brought by the United States government as the Plaintiff after the government received several hundred letters of inquiry from young women or the parents of young women who were interested in attending the Virginia Military Institute, which is based in Lexington, Virginia. If any of you have been out that way in central Virginia or have spent any time in the state government in Richmond, you know that VMI is an extremely prestigious institution in the state of Virginia and that many of the most powerful people in the state have some connection with that institution. It has been a stepping-stone to power in Virginia, and nationally as well. It is a very highly recognized and regarded school.

The U.S. government sued Virginia under the equal protection clause. I think Donna mentioned that the case was not brought under Title IX, which is the federal law that prohibits sex discrimination in federally funded education programs, because Title IX exempts undergraduate institutions that are traditionally and historically single-sex.⁸⁷ Thus, the case was brought under the Constitution and under an intermediate scrutiny analysis. And it has gone through several stages of litigation. The first district court opinion was issued a few years ago in 1991.⁸⁸ The district court said that VMI's exclusion of women was constitutional because single gender education was pedagogically justifiable and because the admission of women would destroy the very unique nature of VMI.⁸⁹ That decision was appealed to the Fourth Circuit, and the Fourth Circuit reversed. But it agreed with the district court's finding that single gender education, in itself, was pedagogically justifiable—i.e., an important state interest—and agreed that the admission of women would destroy what is fundamentally unique about the Virginia Military

in part, 116 S. Ct. 2264 (1996).

86. *Id.*

87. 20 U.S.C. §1681(a)(5).

88. *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 891 (1992).

89. *Id.* at 1411-15.

Institute.⁹⁰ But the Fourth Circuit nevertheless found that there was no real rationale for denying women the same benefits that the state had chosen to provide men—that is, there was nothing equivalent for women who wanted a military education in the state because women couldn't go to VMI.⁹¹ And VMI was the only game in town, basically, in the state of Virginia. So the Fourth Circuit said that the state had three options.⁹² The state could choose to make VMI a private institution, in which case there would be no state action, so it would not fall under the equal protection requirements.⁹³ Second, it could admit women,⁹⁴ or third, it could create a separate, parallel program for women that would give women the benefits of a VMI education.⁹⁵ Or, in lieu of these three alternatives, the court suggested, the state could seek a more creative option.

The state chose the last alternative and created the Virginia Women's Institute for Leadership, or VWIL, which looks absolutely nothing like the Virginia Military Institute.⁹⁶ VWIL is attached to Mary Baldwin College, a small, private liberal arts women's college which is in Stanton, Virginia, thirty miles away from VMI.⁹⁷ VWIL is not based on the military model on which VMI is based.⁹⁸ VWIL does not have the adversative method, or what Justice Breyer called in oral argument in the Supreme Court, "[T]hat adversative thing."⁹⁹ At VWIL, you cannot get an engineering degree or a bachelor of science degree because Mary Baldwin does not offer those degrees. At VMI, on the other hand, you can get an engineering degree and a bachelor of science degree.

There is no barracks life or military training at VWIL other than the ROTC¹⁰⁰ program, which you can get in virtually any college around the country.¹⁰¹ And perhaps, most importantly, all of the

90. *United States v. Virginia*, 976 F. 2d 890, 897-899 (4th Cir. 1992).

91. *See id.* at 899-900.

92. *Id.* at 900.

93. *Id.*

94. *Id.*

95. *United States v. Virginia*, 976 F. 2d 890, 900 (4th Cir. 1992).

96. *See United States v. Virginia*, 44 F.3d 1229, 1233 (4th Cir. 1995), *aff'd in part and rev'd in part*, 116 S. Ct. 2264 (1996).

97. *See id.*

98. *See id.*

99. 1996 WL 16020, at 20 (U.S. Oral Arg.)

100. Reserve Officer Training Corps

101. *See United States v. Virginia*, 44 F.3d 1229, 1234 (4th Cir. 1995), *aff'd in part and rev'd*, 116 S. Ct. 2264 (1996).

intangible things that go into making an institution great will be very different for VWIL than they are for VMI.¹⁰² VMI has the largest endowment of any school in the country on a per student basis.¹⁰³ It has been around for over 150 years.¹⁰⁴ It is extremely prestigious, and has some of the most highly placed alumnae of any school in the country, particularly in the state of Virginia.¹⁰⁵ No brand new institution, regardless of its merit, is going to be able to measure up to that. It simply doesn't have all of those intangible characteristics that make VMI unique.

The state of Virginia, in justifying what it had created for women, was not in the position to argue that these things were the same. And in fact, they did not argue that these things were the same. Instead, they argued that the differences between the two programs were justified by the gender-based differences between men and women, and that even though these two programs were different, the differences are justified because women and men are different.¹⁰⁶ Because Virginia believed that VMI would not work for most women, it created VWIL, which Virginia's experts said would work for most women.

I want to read to you, just to make this a little more concrete, some of these gender-based differences that the district court relied on. These are all direct quotes from the district court's summary of the state's experts' testimony to the district court to justify the differences between the two programs:

"Young women, by the time they reach college, have less confidence in themselves than men. Young women do not need to have uppitiness and aggression beaten out of them."¹⁰⁷

102. See *United States v. Virginia*, 976 F.2d 890, 892-893 (4th Cir. 1992).

103. See David M. Henry, *VMI Faces Another Tough Battle in the Equal Protection War as U.S. Challenges School's Men Only Policy*, WEST'S LEGAL NEWS, April 16, 1996, at 2064 ("[VMI] has an endowment of \$131 million Based on future commitments, the endowment is projected to rise to more than \$350 million"); Lucile M. Ponte, *United States v. Virginia: Reinforcing Archaic Stereotypes About Women in the Military Under the Flawed Guise of Educational Diversity*, 7 HASTINGS WOMEN'S L.J. 1, 72 & n. 481 (1996) (noting that Mary Baldwin College [MBC] has an endowment of \$19 million with commitments for \$35 million more. However, this amount includes all MBC, not just VWIL).

104. *United States v. Virginia*, 976 F.2d 890, 892 (4th Cir. 1992).

105. See *id.* at 892-93 (alumni include General of the Army, George C. Marshall, and six alumni have received the Congressional Medal of Honor). See Henry, *supra* note 104, at 2064 (noting that Thomas "Stonewall" Jackson, a VMI professor, was a famous confederate General during the Civil War).

106. See *id.* at 895-97.

107. *United States v. Virginia*, 852 F. Supp. 471, 480 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *aff'd in part and rev'd in part*, 116 S. Ct. 2264 (1996).

"[A]norexia is rampant among young college women, in part because they doubt themselves and so they want to exercise control."¹⁰⁸

"[W]omen do not need the leveling experience of a rat line and adversative methods [because] women are generally raised with a lower self-image than men."¹⁰⁹

"Due to sex-based developmental differences, males tend to need an atmosphere of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor, while females tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students."¹¹⁰

"If we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of adversative training, any sense of decency that still permeates the relationship between the sexes."¹¹¹

"If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife"¹¹²

"Aggressiveness and fear of failure are not incentives that propel women to want to succeed and to achieve success to the same extent as in males."¹¹³

"Women are not capable of the ferocity requisite to make the program work. And they are also not capable of enduring without psychological trauma if they went through the rat program."¹¹⁴

"Women basically have not the same threshold on emotion as men do. They break down emotionally."¹¹⁵

"In the rat line, with a bunch of upperclassmen all over her, a woman would break down crying."¹¹⁶

"Even those women who are more macho than that would not make up a cohort who would be able to deal with rats and the invariant way that VMI now deals with rats."¹¹⁷

108. *Id.*

109. *Id.* at 481 n.10.

110. *United States v. Virginia*, 766 F. Supp. 1407, 1434 (W.D. Va. 1991).

111. *Id.* at 480-81.

112. *United States v. Virginia*, 852 F. Supp. at 484.

113. *Id.* at 480-81.

114. *Id.*

115. *United States v. Virginia*, 852 F. Supp. at 481 n.10.

116. *Id.*

117. *Id.*

"VMI would be inappropriate for women because women develop through a relationship of connection and a sense of community rather than through self-discipline and self-reliance."¹¹⁸

And my personal favorite:

"Admission of women would impair the VMI system because of the dating and young women's aspirations to marry that are still, in the South, very common."¹¹⁹

Well, I guess we in the North know better. In an opinion that surprised a lot of people, the Fourth Circuit upheld the VWIL program as constitutional, and applied what it called a special intermediate scrutiny test.¹²⁰ There were three parts to this special intermediate scrutiny test. The first part of the test asked whether the state's objective in providing single-gender education was a legitimate government objective.¹²¹ The second part of the test asked whether the classification adopted by the state—that is, the exclusion of men from VWIL and the exclusion of women from VMI—was substantially related to the state purpose of providing single-gender education.¹²² As you can see, the first two parts of the test are automatically satisfied by any single-gender program, regardless of the reasons underlying the exclusion of women from the program. The third part of the test asks whether the educational benefits provided to men and women are substantively comparable.¹²³ The court held that in the case of VMI and VWIL they were.¹²⁴

There are a number of problems in the way the Fourth Circuit interpreted intermediate scrutiny here. The first problem is that it significantly watered down the first prong of traditional intermediate scrutiny analysis by asking only whether the state interest was legitimate rather than important.¹²⁵ And in talking about whether it was legitimate, the Court basically equated a legitimate interest with one that was not pernicious.¹²⁶ Thus, the court accepted single-gender education itself as the legitimate state interest, mistaking the gender classification for the permissible state objective. So then, at that

118. *United States v. Virginia*, 852 F. Supp. at 480-81.

119. *Id.*

120. *United States v. Virginia*, 976 F.2d 890-92 (4th Cir. 1992).

121. *Id.* at 895-97.

122. *Id.* at 897-99.

123. *Id.* at 898-99.

124. *Id.* at 898-900.

125. *United States v. Virginia*, 976 F.2d at 895-97.

126. *Id.*

point, the question of whether the classification is substantially related is a pretty illusory test because you are asking if the classification is substantially related to itself. The court found that the exclusion of women and the exclusion of men from each institution is substantially related to the state's interest in providing single-gender education.

The Court proceeded to the third part of the test, which simply requires that the two programs provide substantively comparable benefits.¹²⁷ In analyzing whether the two programs were substantively comparable, the Court first compared the goals of the two programs and it defined the goals of the two programs very broadly, finding them similar because each program wanted to develop leaders and educated citizens. The Court found that the goals were substantially comparable.

The Court next looked at the means of attaining the programs' goals and, in evaluating the means, acknowledged that the means were very different, but found that each programs' means worked best for the gender it served, based again on group generalizations and approving of the district court's reliance on the gender stereotypes that I just read you. The Fourth Circuit also found that there was no demand for a women's VMI, so that it was permissible for women as a group to be channeled into this VWIL program.¹²⁸ But there are a couple of problems with looking at "demand" in this way. One is, how do you measure demand in a context where there is discrimination and lack of opportunity?

VMI spends significant amounts of money dredging up demand for men by going to high schools, recruiting, and having powerful male alumni talk to the male recruits. Through its history, accomplishments and continuing efforts, VMI has created a demand for itself among men. This has never been done for women. Women have never been admitted to VMI, so measuring demand for a women's VMI in that context is, at best, speculative. Making women's admission to VMI contingent upon the demand for VMI among women as a group would simply perpetuate that discrimination.

It is particularly odd that the court accepted Virginia's assertion of a lack of demand for a women's VMI given that over three hundred women had written to the United States government expressing their interest in attending VMI in the two years prior to the litigation.¹²⁹

127. *Id.* at 898-99.

128. *United States v. Virginia*, 852 F. Supp. at 481 n.12.

129. *United States v. Virginia*, 976 F. 2d 890, 894 (4th Cir. 1992).

Another problem with the Fourth Circuit's rationale is that the focus on the absence of demand by women as a group, as a justification for denying a woman's individual rights is contrary to the very essence of equal protection law under the Constitution. The Supreme Court, as Donna mentioned, especially in some of the later cases like *J.E.B. v. Alabama*¹³⁰ and *Mississippi University for Women v. Hogan*,¹³¹ ruled that a state cannot use gender as a proxy for group generalizations, and cannot take away someone's individual rights by telling them that "Well, women aren't supposed to want that," or "Not enough women want that, therefore you can't have that state-sponsored benefit."¹³²

I think it is very clear to all of us that this case would not have come out the same way under strict scrutiny. Even before *Brown v. Board of Education*,¹³³ which held that separation of the races in schooling is inherently unequal, this inequality accepted by the Fourth Circuit in the *VMI* would not have been accepted under the "separate but equal" doctrine established in the race-discrimination context. This doctrine originated in *Plessy v. Ferguson*¹³⁴, which held that separate facilities and/or travel accommodations for different races are permissible as long as they are equal, because the separation does not necessarily imply the inferiority of either race to the other.

A case decided in 1950, four years before *Brown v. Board of Education*¹³⁵ struck down the separate but equal doctrine as applied to race and applied a much stronger equal protection scrutiny to race discrimination than the Fourth Circuit applied to sex-based discrimination in *VMI*. The state in *Sweatt v. Painter*¹³⁶ attempted to exclude African-Americans from the state law school, while creating a separate law school for African-Americans. The Supreme Court ruled that such a separate school would not be equal because even if

130. 511 U.S. 127 (1994) (holding that intentional discrimination on the basis of gender by state actors in use of peremptory strikes in jury selection violates equal protection).

131. 458 U.S. 718 (1982) (holding that policy of state-supported university, which limited its enrollment to women, of denying otherwise qualified males to enroll for credit in its nursing school violates equal protection clause).

132. *Id.* at 724-25 (explaining that gender-based classifications cannot be based on "fixed notions concerning the roles and abilities of males and females," or on "archaic and stereotypic notions" with the purpose of excluding or "protecting" members of one gender because "they are presumed to suffer from an inherent handicap or to be innately inferior."); *accord*, *Craig v. Boren*, 429 U.S. 190 (1976).

133. 347 U.S. 483 (1954), supplemented by 349 U.S. 294 (1955).

134. 163 U.S. 537 (1896).

135. 347 U.S. 483 (1954).

136. 339 U.S. 629 (1950).

you could create the same resources, the same qualifications of teachers and everything else to make the program equal, the intangible qualities that make an institution great could never be replicated.¹³⁷

Another example of intermediate scrutiny gone wrong is the Fourth Circuit's decision in the *Citadel*¹³⁸ case, where again the Fourth Circuit suggested that a separate women's program might be constitutional, and said that even though an absence of group demand might not justify depriving women of their socio-political rights, it might justify denying some economic benefits such as education.¹³⁹ There is no citation for this statement of the Fourth Circuit by the *Citadel* case. But, again, it shows that the courts have more leeway to misinterpret intermediate scrutiny than strict scrutiny.¹⁴⁰

Where does this leave us? I think certainly intermediate scrutiny itself, at least as applied by the Supreme Court in recent years, is a standard that has a lot of teeth to it. But because the Court has not gone that extra step and adopted strict scrutiny, the lower courts have a lot more room to import their own prejudices and biases in determining the existence of a relationship and the importance of the state interest involved.¹⁴¹

And with that in mind, I will turn it over to the next panelist to talk about how intermediate scrutiny has worked in other areas.

PROF. SCHNEIDER: Hi. I'm Liz Schneider and I am very happy to be here. I want to thank Ann Shalleck for inviting me. I know that this panel is a particularly important way to celebrate your Centennial because of American University Law School's history with respect to women in legal education. The Women and the Law Program that Ann [Shalleck] directs has been very important to many law teachers and other programs around the country in facilitating discussion of gender issues in legal education. For this reason, I am especially delighted to be here.

Today I want to provide an overview on the history of litigation on and theory about equal protection and intermediate scrutiny over the last twenty-five years and comment on the previous presentations. I

137. *Id.* at 634 (citing such qualities as reputation of the faculty, experience of the administration, prestige, traditions, position and financial support from alumni).

138. *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) (holding state-supported male-only military college has to admit female student to comply with the Equal Protection Clause).

139. *Id.* at 445.

140. *Id.*

141. *See Craig v. Boren*, 429 U.S. at 221.

agree with many of the views expressed by the previous panelists—that intermediate scrutiny has substantial teeth, if applied properly, but allows lower courts to import their prejudices; that VMI could easily be decided on grounds of intermediate scrutiny, and that the race-sex analogy is problematic. I want to offer some additional perspectives on the problem, and raise some questions that I hope we can discuss at the end as we open the panel to dialogue with all of you.

I think about the last twenty or twenty-five years of intermediate scrutiny very concretely. As a law student I worked on many of the cases that we're talking about now —*Reed v. Reed*,¹⁴² *Frontiero v. Richardson*,¹⁴³ and then, as a lawyer, on *Craig v. Boren*.¹⁴⁴ There is no question in my mind that, historically, the struggle to have gender treated as strict scrutiny was, as Ann suggested in her introductory comments, a crucial aspect of the political history of the second wave of the American women's movement in the 1960's.¹⁴⁵ The move for strict scrutiny of gender also grew out of and built on the experience and treatment of racial discrimination, as a vehicle for political analysis of gender.¹⁴⁶ This link was not only intellectual but political and personal, for the women's movement in the 1960's had emerged out of the civil rights struggle.¹⁴⁷ Many women's rights activists saw a close political connection between issues of racism and sexism, even though we now recognize that the analogy of race and gender is problematic.

The evolution of strict scrutiny over the last twenty years, however, raises important questions for us to consider concerning increasingly complex understandings of gender discrimination and the intersection of gender and other forms of discrimination.

First, I don't think there is any question that the Supreme Court's articulation of intermediate scrutiny in *Craig* was a pure compromise.

142. *Reed v. Reed*, 404 U.S. 71 (1971) (holding Idaho statute, providing that as between persons equally qualified to administer estates, males must be preferred to females to violate the Equal Protection Clause).

143. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding statutes providing that spouses of male members of military are dependents for purposes of obtaining increased quarters allowances and medical/dental benefits, but spouses of female members are not unless they are dependent for over one-half of support to violate the Due Process Clause).

144. *Craig v. Boren*, 429 U.S. 190 (1976) (holding gender-based classifications must serve important governmental objectives and must be substantially related to the achievement of those objectives in a case where the court decided that an Oklahoma statute prohibiting sale of 3.2 percent beer to males under the age of 21 and females under the age of 18 denied males between 18 and 21 years of age equal protection of the laws).

145. See *supra* pp. 1-3 and accompanying notes (comments of Professor Ann Shalleck).

146. See *supra* pp. 1-3 and accompanying notes (comments of Professor Ann Shalleck).

147. See *supra* pp. 1-3 and accompanying notes (comments of Professor Ann Shalleck).

Clearly a plurality of the Court in *Frontiero v. Richardson* supported suspect classification.¹⁴⁸ There were not enough Justices to get strict scrutiny, so they settled on intermediate scrutiny as a compromise. But from the beginning of the Court's treatment of gender discrimination, it was clear that the Court's characterization of the standard was not the same as what it did in applying that standard. In *Reed v. Reed*,¹⁴⁹ the first case in which the Supreme Court held that gender was within the purview of equal protection, the Court said that it was applying a rational relationship standard when it struck down the mandatory preference for male executors in the Idaho statute.¹⁵⁰ This preference, however, was likely to be viewed as highly rational in 1971. This contradiction between what the Court says it is doing and what it actually does has continued to characterize the Supreme Court's treatment of gender.

I agree with others on the panel that intermediate scrutiny has not gone far enough. Intermediate scrutiny has been misapplied by the lower courts, and has not sufficiently emphasized the serious harm of gender discrimination. In addition, since the Court ruled that pregnancy was outside the reach of equal protection in *Geduldig v. Aiello*,¹⁵¹ equal protection has not touched core issues of gender discrimination.

Others on this panel have already addressed the problems of analogizing gender to race for purposes of strict scrutiny. One critical problem is that this analogy of gender to race assumes that gender and race are distinct categories, and does not take account of the problem of intersectionality and of multiple experiences of discrimination. As Sharon was talking about this issue, I thought about work that I have been doing recently, which puts this problem of intersectionality into some perspective—work in South Africa around the development of the new South African Constitution. The equality provision of this Constitution covers virtually every kind of discrimination: not only sex and gender, race, ethnicity, sexual orientation and language, but birth, class, wealth, status, etc. In the South African context, I have been working with others to consider how to bring various dimensions of discrimination together in an intersectional way.

148. 411 U.S. 677, 678 (1973).

149. 404 U.S. 71 (1971).

150. *Id.* at 75-77.

151. 417 U.S. 484 (1974) (holding that denial of disability insurance benefits for normal work loss resulting from pregnancy did not violate the Equal Protection Clause).

VMI is an important case not only for some of the reasons suggested by other panelists, but because issues of education and gender are incredibly complex. Let me give you some examples.

As I have taught *VMI* over the last several years, many students analogized the argument made by *VMI* concerning the “adversative” training in the military context to their law school experience. Those of you sensitive to problems of gender bias in legal education can, I think, easily make this leap. The arguments made by *VMI* concerning the rigor of the “rat” system and the need for the military model are similar to, for example, messages in law schools about the “toughness” of the Socratic method. Significantly, this analogy was raised and was the subject of much interest at the *VMI* oral argument. Yet, strands of “difference” feminism arguably have inadvertently supported the notion of the separate, supposedly more nurturing women’s environment, represented by VWIL.

I am a graduate of a women’s college, Bryn Mawr College, and wrote an article twenty-five years ago raising questions about the degree to which elite women’s colleges affirmatively addressed and taught students to grapple with women’s common experiences of discrimination, across class, race, ethnicity.¹⁵² Arguments now made on behalf of VWIL are arguments not far off a continuum of arguments that have been made regarding the importance of women’s colleges. Issues that now emerge around *VMI* have been made more complex because of deepening experiences with the problem of gender bias, with male institutions and the way in which “difference” feminism has been interpreted to mean a warm, fuzzy, feminist alternative.

The article also makes arguments that were made by *VMI* concerning women’s “lack of interest” in attending *VMI*, that Debbie referred to, as important to rebut. We saw this similar argument about women’s “lack of interest” in the *Sears*¹⁵³ case: that women didn’t want high paying, commission jobs selling appliances because they really preferred to be selling non-commission lingerie. Powerful arguments have been made in critiquing the claim of women’s “lack of

152. Elizabeth M. Schneider, *Our Failures Only Marry: Bryn Mawr College and The Failure of Feminism*, in *WOMEN IN SEXIST SOCIETY* 419 (V. Gornick & B. Moran eds., 1971).

153. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d*, 839 F.2d 302 (7th Cir. 1988) (holding that Sears did not engage in a nationwide pattern or practice of sex discrimination by failing to hire females for commission selling on the same basis as males, or by failing to promote females into commission sales on same basis as males, and basing decision on females’ purported lack of interest in such positions).

interest" in *Sears* concerning the fact that women make choices, not in a vacuum, but in circumstances of enormous constraint.

I want, however, to question the assumption implicit in some of the previous presentations that strict scrutiny inherently and necessarily provides greater clarity and more workable legal doctrine to lower courts. I have certainly made those same arguments, and supported those arguments in the range of briefs submitted to the Supreme Court in *VMI*. But here, reflecting on twenty years of intermediate scrutiny, I want to say that I am not sure that the assumption is true. Even if strict scrutiny were applied to gender, even if we had a federal Equal Rights Amendment, judicial interpretation of strict scrutiny by lower courts would likely be watered down. There are numerous examples of cases in which lower courts have upheld facial gender-based classifications, in the face of judicial declarations of strict scrutiny or state Equal Rights Amendments purporting to do the same.¹⁵⁴ Assuming that if the federal ERA had been ratified it would have constituted strict scrutiny—which was certainly the argument that women's rights advocates made to Congress and the rest of the country—even then the Fourth Circuit might not have held *VMI's* remedy of separate schools to be unconstitutional.

Why? First of all, the notion of coherence in legal doctrine is somewhat overdrawn. There is considerable unworkability in lower court interpretations of intermediate scrutiny. It is not only or even necessarily because of the inherent elasticity of the concept of "substantial governmental interest," or "important governmental interest." Rather, it is because of profound judicial resistance to understanding issues of gender discrimination in their complexity and to eradicating gender discrimination. The doctrine of "compelling state interest" is not, by definition, less elastic. Legal doctrine is, to some degree, inherently elastic.

That does not minimize my commitment to strict scrutiny. But as strategists, as thinkers, and for you in the audience who I hope will continue the legacy of this law school in women's rights, I think it is important to explore these questions.

Saying that strict scrutiny is the standard for gender discrimination is certainly an important political and moral statement. However, getting past that moral statement, it will still be the daily work of state

154. For example, in *Michael M. v. Superior Court of Sonoma County*, 601 P.2d 572, 574-76 (Cal. 1979), California's Supreme Court, applying strict scrutiny, upheld a state statutory rape law that facially discriminated on the basis of sex. The United States Supreme Court affirmed without using strict scrutiny. *See, Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981).

and federal courts to determine what strict scrutiny means in concrete cases, and whether it will be applied rigorously and without the baggage of stereotyping. The Fourth Circuit *VMI* opinion is rife with that kind of stereotypical generalization. It is rife with that generalization because of deep contradictions in the way that judges, decision-makers and policy makers think about gender, in the confusion of the biological and social, and in the way that feminist theory and feminist articulation get misused by judges and turned around and interpreted to reinforce the status quo.

Another example of this problem of judicial misuse is in an area in which I have worked a great deal, the problem of what has been called the "battered woman syndrome."¹⁵⁵ Feminist lawyers sought to admit evidence of battering in a range of different cases in order to explain women's experiences as reasonable. This evidence, however, is frequently interpreted by judges in ways that contribute to the pathologizing of women. Judicial evaluation of gender is more complex than simply determining what standard of review should apply.

Gender is a complex area for judicial decision-making because of the largely heterosexual structure of our culture. Notions of intimacy between men and women shape the personal and political—shape relationships, judicial attitudes and social generalizations. We see this reflected in the concept—which has surfaced in intermediate as well as strict scrutiny—that where there are "real differences" between the sexes, those differences are not reachable through equal protection.¹⁵⁶ We see the repetition of this "difference" rhetoric in the form of height and weight requirements,¹⁵⁷ the notion of certain jobs that women can not perform,¹⁵⁸ and in the rationales for the separate educational programs approved by the Fourth Circuit in *VMI*.

155. See generally, Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477 (1996); Elizabeth M. Schneider, *Describing and Changing: Women's Self Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN'S RTS. L. REP. 213 (1992).

156. See *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (holding in statutory rape cases that because men and women were differently situated the discrimination at issue was benign).

157. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329-30 (1977) (acknowledging that evidence that one-third of the women between 18 and 79 would be excluded from employment as correctional officers by virtue of the height requirement, one-fifth of the women would be excluded by virtue of minimum weight requirement, and that only one and that two percent of the men would be excluded by height and weight requirements establishes prima facie case of discrimination but nonetheless holding that requirements were a bona fide occupational qualification).

158. *Id.* at 334-37 (concluding that women are not suited to be prison guards where their presence might encourage sexual assault by inmates).

We are also seeing, and I do not think it is unrelated to *VMI*, an extraordinary backlash concerning gender issues.¹⁵⁹ I see this as part of a resistance to a notion of gender interchangeability, a notion of equal protection based on interchangeability of gender roles which is very much at the heart of what strict scrutiny approaches have tried to develop. For all these reasons, adoption of strict scrutiny as a legal standard is increasingly complex.

Where does this leave us? It suggests that the issue of the standard of review must be understood in light of the way in which law and social attitudes deeply and dialectically interrelate. Even with all of the questions I am raising, I still absolutely believe in the need for strict scrutiny as firmly as I did twenty-five years ago. As a political and moral statement, it is one of the ways in which we can help change attitudes that will make judicial interpretation in concrete contexts more careful, more thoughtful and more discerning.

Law, or the legal standard that is developed, whether strict or intermediate scrutiny, does not do this by itself. A judge who is thoughtful and open to being educated can be rigorous with intermediate scrutiny as well. It is important to continue to argue that strict scrutiny is necessary. It is a crucial aspect of our work, of our strategy. The point is, however, that strict scrutiny is not enough. Only the efforts of lawyers like yourselves will determine whether the promise of the standard of strict scrutiny is realized.

Thanks.

PROF. SHALLECK: Thank you to all of the panelists. And we have a few minutes for questions or comments. Nancy.

SPEAKER: I would like to ask for comments from the practitioners and the theorists about the Hawaii Supreme Court decision in *Baehr v. Lewin*.¹⁶⁰ Although people sort of colloquially know that the Hawaii Supreme Court said something good about gay marriage, I do not think most people, if they have not read the decision, know that the Hawaii Supreme Court said that it was sex discrimination to prohibit two men or two women from getting married. The decision had nothing to do with gay people at all. Preventing two men or two women from getting married was sex discrimination, and under the

159. See generally, SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991).

160. 852 P.2d 44 (Haw. 1993) (holding sex is a "suspect category" for equal protection purpose under section of Hawaii's Constitution and classification based on sex is subject to strict scrutiny test).

Hawaii Supreme Court, it had to withstand strict scrutiny.¹⁶¹ I am wondering how from a theoretical standpoint you would respond to that, and also whether those of you speaking as practitioners are made unhappy by this decision that requires you to no longer say that sex discrimination and gays and lesbians are two completely separate issues.

MS. LENHOFF: I think I'll start. Having thought about this, Nancy, you will not be surprised to know, I was delighted with the decision because I felt it made my job easier. We can no longer pretend that these are separate issues. As Liz [Schneider] said, what is really going on here is not merely a matter of constitutional analysis. Rather, the question is how judges view sex discrimination. One of the reasons that the courts have been so nervous, one of the reasons for the grand compromise of intermediate scrutiny, has been precisely this—judges' fear of the consequences of truly striking down sex discrimination. For example, if sex discrimination is unconstitutional, then discrimination against abortions ought to be unconstitutional. *Geduldig*¹⁶² is wrong. Everybody knows it's wrong. It's sophistry at best. So you achieved strict scrutiny, states would have to have on equal protection grounds a compelling interest for abortion restrictions.

They similarly would have to have a compelling state interest for discrimination against gays and lesbians as this is also sex discrimination. That is also part of what is going on. In fact, I spent a fair amount of my winter making sure that the various equal protection briefs filed not only in *VMI*, but also in the Colorado Amendment II case¹⁶³ allowed for the arguments that equal protection analysis applies both to sex discrimination and to sexual orientation discrimination. I was very interested in Sharon's [Rush] argument,¹⁶⁴ that it might be better to analogize sexual orientation to race discrimination does appear that a lot of what is going on is that the resistance to a more searching scrutiny for sex discrimination is concern about sexual orientation-based classifications. I think that

161. *Baehr*, 852 P.2d at 63-66.

162. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that California's disability insurance program did not violate the equal protection clause by refusing to cover work loss resulting from pregnancy).

163. *Romer v. Evans*, 116 S. Ct. 1620 (1996) (holding an amendment to Colorado's Constitution prohibiting all legislative, executive or judicial action designed to protect homosexuals from discrimination violated the equal protection clause).

164. Due to a copyright conflict, Sharon Rush's comments are not included in this transcript. For a commentary by Professor Rush about this panel, please see Sharon Rush, *Diversity: the Red Herring of Equal Protection*, 6 AM. U. J. GENDER & L. 41 (1997).

sex and sexual orientation discrimination are going to rise and fall together; that is the subtext, and the Hawaii case¹⁶⁵ just puts that on the table.

MS. BRAKE: I just want to say a word. I agree with what Donna said. I sense from your question that you expected the practitioners to want to distance themselves from the movement towards equal rights based on sexual orientation.

SPEAKER: Well, there was a lot of that in the ERA debate.

MS. BRAKE: Right. In my opinion, I do not think that that is what the women's legal community should be doing. It is not what my organization or Donna's organization is doing. I think the two forms of discrimination are very intertwined and mutually overlapping. I acknowledge that there are differences, but certainly if you read the far right attack on gay people, a lot of it is based on the same types of sexist notions that are used against women. Namely, that these people are stepping outside of their gender roles and not being masculine the way they are supposed to be or feminine the way they are supposed to be. And I think, although there are differences, there are a lot of similarities. At a doctrinal level as well, I think at sort of a simplistic level, it can be looked at as "sex-plus" analysis: someone's gender plus the gender of the person they are attracted to. This is not much different from a lot of the traditional sex discrimination analysis.

Anyway, I just wanted to make clear that the National Woman's Law Center and I think a lot of people today in the women's legal community are very much in support of the movement toward equality based on sexual orientation.

PROF. SHALLECK: Unfortunately, we are out of time. I thank all the panelists both for placing *Craig v. Boren* in historical perspective and for identifying ways, twenty years later, to understand the significance of the constitutional standard of intermediate scrutiny.

165. *Baehr*, 910 P.2d at 112 (Haw. 1996).