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The "Constitutional" Assault on the Virginia Military Institute

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> A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system. At stake in this case as I see it is the preservation of a small aspect of this diversity. But that aspect is by no means insignificant, given our heritage of available choice between single-sex and coeducational institutions of higher learning.[1]

I. Introduction

In early 1991, the Civil Rights Division of the U.S. Justice Department received a letter from a female high school student in Northern Virginia complaining that the Virginia Military Institute's (VMI's) 150-plus-year-old admissions policy denied her the right to attend the institution because of her sex. Subsequently, the Justice Department filed suit against VMI, claiming that the publicly financed, all-male admissions program violated the Equal Protection Clause of the Fourteenth Amendment. The ensuing litigation has had both a liability stage (*VMI I*),[2] at which VMI lost, and a remedy stage (*VMI II*),[3] at which VMI won. The liability stage dealt with whether VMI's all-male admissions policy, in the context of the Commonwealth of Virginia's system of higher education as presently constituted, violated the Equal Protection Clause. The remedy stage dealt with the Commonwealth's proposal to establish a publicly funded, all-female leadership program within Mary Baldwin College to remedy the constitutional violation identified at the liability stage.

After a six-day trial on liability commencing on April 4, 1991, the U.S. District Court for the Western District of Virginia entered judgment for the Commonwealth.[4] In reaching this judgment, the district court reviewed the expert testimony presented pertaining to the benefits of single-sex education

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1. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 745 (1982) (Powell, J., dissenting).

2. *VMI I* comprises the cases encapsulated in the citation United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

3. *VMI II* comprises the cases encapsulated in the citation United States v. Virginia, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

4. United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993). For a more extensive discussion of the district and appeals courts opinions at the liability stage, see generally Jon A. Soderberg, *The Virginia Military Institute and the Equal Protection Clause: A Legal and Factual Introduction*, 50 WASH. & LEE L. REV. 15 (1993).

and found that "[v]iewed in the light of this very substantial authority favoring single-sex education, the VMI board's decision to maintain an all-male institution is fully justified even without taking into consideration the other unique features of VMI's method of teaching and training."[5]

The Justice Department appealed the district court's judgment, and subsequently, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded the case.[6] The appeals court held that, although the Commonwealth had adequately demonstrated the benefits of single-sex education in its public military institution component, it had failed to explain why the benefits were only available to men. Thus, the court reasoned that VMI failed to show that its "all-male" admissions policy was "substantially related" to obtaining the benefits of "single-sex" education.[7] The court stated that "[i]t is not the maleness, as distinguished from the femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI."[8] In remanding the case to the district court, the appeals court directed the Commonwealth to adopt a remedy to address the constitutional violation. The appeals court instructed:

> [W]e do not mean to suggest the specific remedial course that the Commonwealth should or must follow hereafter. Rather, we remand the case to the district court to give the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied. Consistent therewith, the Commonwealth might properly decide to admit women to VMI and to adjust the program to implement that choice, or it might establish parallel programs, or it might abandon state support of VMI leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be more creative options or determinations.[9]

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5. *Virginia*, 766 F. Supp. at 1412.

6. United States v. Virginia, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

7. *Id.* at 898-900.

8. *Id.* at 897.

9. *Id.* at 900. The Commonwealth's petition for a rehearing en banc was denied. United States v. Virginia, No. 91-1690, 1992 U.S. App. LEXIS 30490, at *1 (4th Cir. Nov. 19, 1992). The Commonwealth then petitioned for a writ of certiorari to the United States Supreme Court, which the Court denied. Virginia Military Inst. v. United States, 113 S. Ct. 2431, 2431 (1993). Justice Scalia wrote a brief opinion respecting the denial of the petition for writ of certiorari wherein he stated:

> Whether it is constitutional for a State to have a men-only military school is an

Subsequently, at the remedy stage of the litigation, the Commonwealth established a publicly funded, all-female military program within Mary Baldwin College, a private all-female college. Because the Commonwealth now provided single-sex military education to both male and female students, the district court and the Fourth Circuit upheld Virginia's single-sex admissions policy under the Equal Protection Clause.

Two important issues emerge from the VMI litigation. The first issue pertains to how the United States Supreme Court will tinker with the imprecise and troublesome "intermediate scrutiny" standard developed to assay cases of gender discrimination falling under the Equal Protection Clause. The second issue relates to the fate of the nation's private, single-sex institutions should the Court rule VMI's all-male admissions policy unconstitutional.

This Article begins with a framework for a discussion of these two issues by explaining the legal and factual background of the litigation over VMI's admissions policy. This Article then explores two permutations of the intermediate scrutiny test, one that could be used to strike down VMI's admissions policy and another that could be used to affirm the Commonwealth's higher education system as presently constituted. This Article assesses the intrinsic constitutional validity of each test. Then, assuming arguendo that the Court strikes down VMI's all-male admissions policy, this Article discusses the implications of such a ruling for the nation's private, single-sex colleges. This discussion will not focus on the Supreme Court's troubling state action doctrine; rather, it will examine the factual and practical similarities between VMI and private, single-sex institutions.

II. Equal Protection Jurisprudence

The text of the Fourteenth Amendment's Equal Protection Clause provides simply: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[10] When the states ratified the Equal Protection Clause in 1868, numerous state and federally supported, single-sex institutions existed. These institutions continued to exist without legal challenge for over a century. This is because the Equal Protection Clause was intended to protect blacks in the reconstructed South from the depriva-

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issue that should receive the attention of this Court before, rather than after, a national institution as venerable as the Virginia Military Institute is compelled to transform itself. This present petition, however, seeks our intervention before the litigation below has come to final judgment.

Id.

10. U.S. CONST. amend. XIV, § 1.

tion of their civil rights. Thus, there is no plausible argument that the Equal Protection Clause was intended by its drafters or those who ratified it as a means of eliminating state-sponsored, single-sex education for either male or female students.

It was the ratification of the proposed Fourteenth Amendment by the duly elected representatives of the people that forged the Equal Protection Clause into the fundamental law of the United States. Without this ratification, or as Thomas Jefferson called it "the Consent of the Governed,"[11] the Equal Protection Clause would be merely a philosophical and political argument, not the "supreme Law of the Land."[12] This crucial "Consent of the Governed," or the sanction of the electorate, should serve as the talisman of the intrinsic validity of the Constitution because this sanction serves best to preserve the liberty of the individual by limiting the unaccountable action of government.

Given that the Equal Protection Clause was incorporated into the Constitution to protect the newly emancipated blacks, the question arises, "How did VMI's valid pre- and post-Fourteenth Amendment admissions policy end up in the courts?" Clearly, there has been no ratification of an amendment to the Constitution that would evidence an expansion of the national electorate's ratifying consent to proscribe single-sex education. Further, there has been no vote by the Commonwealth's duly elected representatives to proscribe VMI's all-male admissions policy. In fact, as the district court observed in *VMI II*, the Commonwealth's elected representatives wholeheartedly support the continuance of VMI as an all-male institution.[13]

Moreover, the continued existence of many private single-sex educational institutions demonstrates clearly that the factual benefit of single-sex education, implicitly recognized by the framers of the Equal Protection Clause, is still vibrantly alive today. Stated differently, when the Supreme Court struck down the separate but equal doctrine in the context of racial

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11. THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776).

12. U.S. CONST. art. VI.

13. To highlight the Commonwealth's support of VMI's all-male admissions policy, the district court referenced affidavits filed by Governor George F. Allen, former Governor L. Douglas Wilder, Lieutenant Governor Donald S. Beyer, Jr., Attorney General James S. Gilmore, III, as well as other Commonwealth officials endorsing the Commonwealth's system of higher education as currently constituted. United States v. Virginia, 852 F. Supp. 471, 483-84 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995). Thus, the district court found that "[i]n short, every person in Virginia officialdom who has or ever has had the authority to affect Virginia's policies on higher education has spoken in favor of diversity by offering single-sex education to men and women of the Commonwealth and have [sic] strongly supported VWIL." *Id.* at 484.

segregation, the Court based its decision on a factual paradigm in which the white majority imposed an inferior educational system on a politically powerless minority.[14] In stark contrast, the continued popularity and striking success of all-female institutions such as private, all-female Wellesley College and public, all-female Douglas College and of all-male institutions such as VMI and the Citadel demonstrate continued private and electoral support for an educational system enjoyed by both women and men. Furthermore, given that women constitute over 50% of the enfranchised population, they ipso facto cannot be considered a political minority as are blacks in the racial paradigm.

Instead of allowing the sanction of the national electorate to amend the Equal Protection Clause or allowing duly elected legislative bodies to decide the policy issue of whether to support all-male and all-female educational institutions with tax dollars, the Supreme Court has taken it upon itself to engraft the expansive concepts of the failed Equal Rights Amendment into the "supreme Law of the Land." Although such judicial action abandons "Consent of the Governed" as the ultimate legitimizing source of law and thus circumscribes the liberty of the governed, it is nonetheless binding under the Supremacy Clause. How did this wholesale and unratified change in the Constitution take place? One step at a time.

From the Fourteenth Amendment's ratification in 1868 until 1971, the Supreme Court never held that the Amendment's Equal Protection Clause mandated certain treatment of men or women by state governments. In 1971, however, the Supreme Court decided *Reed v. Reed*,[15] wherein it struck down an Idaho statute that provided for the selection of an administrator for an estate whereby males would be chosen over females without regard to individual qualifications as testator.[16] In *Reed*, the Court applied a standard of review stricter than the rational basis test but less strict than the virtually insurmountable strict scrutiny test.[17] The rationale behind this flexible standard is that the Constitution tolerates some laws that discriminate between the two sexes because genuine psychological and physiological differences exist between gender groups. Unlike laws that discriminate on the basis of race — which are usually born of invidious stereotyping and racial animus — laws that discriminate on the basis of gender may result from fundamental psychological and physiological differences between males and females. Thus, the problem posed to legislatures and courts is to determine

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14. *See generally* Brown v. Board of Educ., 347 U.S. 483 (1954).

15. 404 U.S. 71 (1971).

16. Reed v. Reed, 404 U.S. 71, 74 (1971).

17. *Id.*

correctly whether these fundamental differences are substantial enough in a given context to justify discriminatory treatment under the law.

In *Craig v. Boren*,[18] the Supreme Court rearticulated the intermediate scrutiny test appropriate for the examination of sex-based classifications, stating that "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[19] Thus, a sex-based admissions policy may be upheld in the face of constitutional challenge "only by 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.'"[20] The state's proffered interest must be examined carefully to determine whether it "reflects archaic and stereotypical notions" of the sexes and will be found illegitimate if its purpose is to "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior."[21] Moreover, even if the asserted interest is legitimate and important, the state must still show a "direct, substantial relationship between objective and means."[22] The state meets its burden only by showing, at a minimum, that the discrimination serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.[23]

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females.[24] Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypical notions.[25] Thus, if the statutory objective is to exclude or to "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.[26] The issue is not whether the benefitted class profits from the classification, but whether the state's decision to confer a benefit only upon one

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18. 429 U.S. 190 (1976).

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

20. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

21. *Id.* at 725.

22. *Id.*

23. *Id.* at 730.

24. *Id.* at 724-25.

25. *Id.* at 725.

26. *Id.*

class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.[27]

In *Brown v. Board of Education*,[28] the Supreme Court overturned the race-based doctrine of "separate but equal," declaring that "education is perhaps the most important function of state and local governments."[29] The *Brown* Court noted that the quality of education is determined by more than equality among tangible factors.[30] Thus, the *Brown* Court reasoned that separate but equal educational facilities for students based upon race was antithetical to the Constitution because of the psychological harm inflicted upon children denied the right to attend school with other children solely on the basis of race.[31]

Although the *Brown* Court's sweeping pronouncement that "in the field of public education the doctrine of 'separate but equal' has no place"[32] suggests a categorical ban on the use of separate but equal educational facilities, courts subsequent to *Brown* have recognized exceptions to *Brown*'s apparent ban on separate but equal in the context of education when the classifications are based upon gender rather than upon race. In *Vorchheimer v. School District*,[33] for example, the U.S. Court of Appeals for the Third Circuit considered a policy of the City of Philadelphia that maintained a school system involving four types of high schools with different admissions requirements.[34] These schools were denominated as academic, technical, magnet, and comprehensive high schools that were generally open to both sexes.[35] The school system included two single-sex academic high schools that offered only college preparatory classes.[36] Approximately 7% of the

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27. *Id.* at 731 n.17.

28. 347 U.S. 483 (1954).

29. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

30. *Id.*

31. *Id.* at 493-95. The Court stated:

> [T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of . . . the benefits they would receive in a racially integrated school system.

Id. at 494 (second alteration in original) (quoting from lower court's findings in Kansas case).

32. *Id.* at 495.

33. 532 F.2d 880 (3d Cir. 1976).

34. Vorchheimer v. School Dist., 532 F.2d 880, 881 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977).

35. *Id.*

36. *Id.*

school-age population was eligible to attend the academic schools.[37] The plaintiff was a gifted teenage girl who graduated from her junior high school class with honors and who would have been eligible to attend Central High School, the boys' academic high school, but for her gender.[38] Both Central High School and Girls High School, its female equivalent, were "comparable in quality, academic standing, and prestige."[39] The Third Circuit held that, although the plaintiff had a valid interest in an expanded freedom to choose the high school that she would attend, the expansion of her choice was outweighed by the harm that providing her an expanded choice would cause. The court stated:

> [A]ll public single-sex schools would have to be abolished. The absence of these schools would stifle the ability of the local school board to continue with a respected educational methodology. It follows too that those students and parents who prefer an education in a public, single-sex school would be denied their freedom of choice. The existence of private schools is no more an answer to those people than it is to the plaintiff.[40]

Thus, the Third Circuit implicitly endorsed the concept of separate but equal for gender classifications in education because such classifications enhanced educational opportunities available to the benefitted class that may not have been available otherwise.

Although the Supreme Court affirmed the Third Circuit's decision in the *Vorchheimer* case, it did not address squarely the constitutionality of single-sex, public education until 1982, when it decided *Mississippi University for Women v. Hogan*.[41] In *Hogan*, the Supreme Court addressed whether Mississippi's justification for the policy of allowing men to audit nursing courses but of not granting men academic credit for courses at Mississippi University for Women (MUW), a state-supported institution, violated the equal protection rights of males wishing to receive academic credit for courses at MUW.[42] Mr. Hogan was a registered nurse and a Mississippi resident who applied for admission to the school of nursing, which offered

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37. *Id.*

38. *Id.*

39. *Id.* at 882.

40. *Id.* at 888; *see also* Williams v. McNair, 316 F. Supp. 134, 138-39 (D.S.C. 1970) (holding that all-female, public liberal arts college can constitutionally deny male applicants admission to school solely on basis of sex when male plaintiffs had complete range of other state institutions to attend), *aff'd*, 401 U.S. 951 (1971).

41. 458 U.S. 718 (1982).

42. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 719 (1982).

baccalaureate and graduate programs in nursing.[43] Hogan met the qualifications for admission to the nursing program on all counts except one: He was a male, and the school restricted admission to females only.[44] Thus, Hogan was denied admission to the school of nursing solely because of his gender.[45] Mississippi statutes, which included the charter of the university, restricted the enrollment at MUW to women.[46] The Supreme Court, in a five-to-four vote, invalidated the exclusion of males from the state nursing school.[47]

The *Hogan* Court left unanswered the question of whether MUW could deny men admission to other schools within the university: "[W]e decline to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the school of nursing, violates the Fourteenth Amendment."[48] Thus, the *Hogan* majority declined to adopt a categorical approach against the dispensation of educational benefits by gender.

Justice O'Connor's majority opinion in *Hogan* was written within the framework of the Court's post-*Craig*, mid-level scrutiny analysis. Thus, the school's policy would be upheld only if it served important governmental objectives and only if the discriminatory admissions policy was substantially related to the achievement of those objectives. Mississippi justified the school's single-sex admissions policy on the grounds that it compensated for past discrimination against women.[49] Justice O'Connor found this proffered justification unpersuasive because of the fact that women were not underrepresented in the field of nursing.[50] According to Justice O'Connor, the school's single-sex admissions policy "perpetuate[s] the stereotyped view of nursing as an exclusively woman's job" instead of compensating for discriminatory barriers faced by women.[51]

Justices Blackmun, Rehnquist, Powell and Chief Justice Burger dissented. The dissenters, with varying degrees of conviction, suggested that equal protection principles tolerate states providing separate but equal educational benefits and opportunities based upon gender. Chief Justice Burger dissented to emphasize that the Court's holding was very narrow and was

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43. *Id.* at 720.
44. *Id.* at 720-21.
45. *Id.*
46. *Id.* at 720 & n.1.
47. *Id.* at 733.
48. *Id.* at 723 n.7.
49. *Id.* at 727.
50. *Id.* at 727, 729.
51. *Id.* at 729.

limited to the context of a professional nursing school.[52] Justice Blackmun dissented, musing that "I hope that we do not lose all values that some think are worthwhile . . . and relegate ourselves to needless conformity."[53] Justice Powell, joined by Justice Rehnquist, offered the most compelling dissent. Justice Powell determined that "[t]his is simply not a sex discrimination case" and that "[t]he Equal Protection Clause was never intended to be applied to this kind of case."[54] Justice Powell argued that the majority's opinion invariably would prohibit states from providing single-sex schools.[55] According to Justice Powell, as long as Hogan was provided some opportunity to receive a similar educational benefit, although at a different location and in a slightly different form, he was treated substantially equally.[56] Thus, Justice Powell found no justification for judicial intervention because Hogan could have received a similar education at another school.

What is apparent from this evolution from posited political theory to unratified constitutional law is that the Supreme Court now requires a fact-specific inquiry into the legitimacy of an all-male admissions policy at the Virginia Military Institute. This inquiry requires not an examination of single-sex education in the abstract but a fact-specific inquiry into the Commonwealth's system of higher education that provides, through VMI, a unique educational opportunity to men but not to women. The dispositive inquiry, therefore, is whether the differences between men and women permit the Commonwealth to favor men over women in admission to VMI.[57] Under the intermediate scrutiny test as it is presently applied, in order for the Commonwealth to provide a VMI education for its male citizens only, it must demonstrate some legitimate difference between men and women to justify granting men, and not women, this special opportunity. This is why the Fourth Circuit ruled against the Commonwealth in *VMI I*, and this is why the same result should obtain in the Supreme Court unless the Court adjusts its equal protection analysis to accommodate publicly funded, single-sex schools.[58]

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52. *Id.* at 733 (Burger, J., dissenting).

53. *Id.* at 734-35 (Blackmun, J., dissenting).

54. *Id.* at 745 (Powell, J., dissenting).

55. *Id.* at 735 (Powell, J., dissenting).

56. *Id.* at 741-42 (Powell, J., dissenting).

57. Allan Ides, *The Curious Case of the Virginia Military Institute: An Essay of the Judicial Function*, 50 WASH. & LEE L. REV. 35, 38 (1993).

58. *See infra* notes 139-54 and accompanying text (discussing current equal protection analysis and its deficiencies in the context of gender distinctions).

III. Single-Sex Education

At the core of the VMI litigation is the important question of whether single-sex educational institutions can receive public financial support even when such institutions necessarily exclude students on the basis of gender. The evidence presented in the VMI litigation shows unambiguously that single-sex education is an effective and, in many cases, preferable method for educating some students.[59] The factual findings of the district court, affirmed by the court of appeals, show that all-female institutions are particularly successful at advancing women into traditionally male-dominated fields such as science, politics, and business.[60] For example, 42% of the female members of Congress attended private women's colleges, as did one-third of the women on the boards of Fortune 1000 companies.[61] In *VMI I*, the Fourth Circuit noted that both males and females were more likely to pursue nontraditional, nonstereotypical careers if they attended single-sex schools.[62] Thus, single-sex education advances, rather than inhibits, the expanding role of women and men in our society.

The evidence concerning single-sex education demonstrates that single-sex education is a desirable and legitimate method of educating certain students. If one accepts the premise that government should strive to provide the best educational opportunities possible, then the government has a legitimate interest in funding single-sex educational opportunities. The legislative branch, where such policy decisions were made prior to the Supreme Court's expansion of equal protection jurisprudence, has recognized the value of single-sex institutions in enacting Title IX.[63] The overarching question posed in the VMI litigation, however, is whether the judicial gloss applied to the Equal Protection Clause permits the government to continue providing the same desirable and beneficial opportunities it did when the Equal Protection Clause was ratified. Accordingly, under the

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59. For a thorough discussion of the benefits of single-sex education, see Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARVARD J.L. & PUB. POL'Y 227, 241-51 (1994). *See also* United States v. Virginia, 766 F. Supp. 1406, 1412 (W.D. Va. 1991) (discussing empirical studies on educational experiences in single-sex colleges), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

60. *See* Sharon K. Mollman, *The Gender Gap: Separating the Sexes in Public Education*, 68 IND. L.J. 149, 171 (1992).

61. Edward B. Fiske, *Lessons*, N.Y. TIMES, June 14, 1989, at B8.

62. United States v. Virginia, 976 F.2d 890, 897 (4th Cir. 1992) (citing Marvin Bressler & Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. HIGHER EDUC. 650, 652 (1980)), *cert. denied*, 113 S. Ct. 2431 (1993).

63. *See infra* note 141 and accompanying text (discussing rationale behind exemptions for single-sex schools in Title IX).

Court's existing equal protection doctrine, it is necessary to evaluate the differences between VMI and the Virginia Women's Institute for Leadership (VWIL) to determine whether there is a sufficient fit between the Commonwealth's asserted goal in preserving diversity in higher education and the means used to attain this goal.

IV. Comparison of VMI and VWIL

In *VMI II*, the Commonwealth proposed the reservation of VMI exclusively for men and the creation of VWIL for women. As implemented, VWIL is a separate program located on the campus of a private women's liberal arts college. Although it is unlikely that the Supreme Court will resolve the VMI case based upon the differences between the VWIL program and VMI, the Court could issue a narrow opinion finding the proposed remedy, the VWIL program, insufficiently comparable to VMI because of its design. The significance of such a holding would lie in the tacit recognition that a more carefully tailored all-female program could justify VMI's all-male admissions policy. This would have to be the result of a new equal protection analysis, one that focused on the Commonwealth's system of higher education as a whole and not just on VMI's all-male status. A comparison of the VMI and VWIL programs is therefore appropriate. The following provides an overview of the different features of the VMI and VWIL programs that could be significant should the Supreme Court decide to issue a narrow holding striking down the Commonwealth's proposed remedy on the grounds that the Commonwealth, through the VWIL program, does not provide a sufficiently comparable single-sex experience for women as it does for men through VMI. For the reasons given below, however, it is unlikely that the Court will decide the case on these grounds.

A. VMI

VMI, founded in 1839, is a small, public four-year college with an enrollment of about 1300 men.[64] It offers majors in the liberal arts, sciences, and engineering. All of its academic offerings are also available at other public colleges and universities in Virginia.[65] VMI's mission is "to produce educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary."[66] VMI

64. United States v. Virginia, 44 F.3d 1229, 1232 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

65. United States v. Virginia, 766 F. Supp. 1407, 1424 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

66. *Id.* at 1425.

employs an "adversative" method of education which is designed to develop character and leadership in young men. That method is intended to cause students to question their past convictions, values, and experiences and thereby to prepare them to accept the values and behaviors VMI teaches.[67]

Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient nonacademic attributes of the VMI educational experience.[68] First-year VMI students are subjected to an extreme form of the adversative model that captures the physical rigor and mental stress of the Marine Corps boot camp.[69]

VMI uses a "class system" that assigns specific privileges and responsibilities to each class of cadets in order to develop character and leadership. Thus, the first class, or seniors, are responsible for providing overall leadership, writing the standard operating procedures for aspects of the adversative system, and serving as mentors to new cadets. "The class system is a very highly-developed system for cultivating leadership," and it "teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote."[70]

Cadets at VMI are bound by an honor code, which provides that a cadet "does not lie, cheat, steal nor tolerate those who do."[71] The honor code "dominates all facets of institutional life" and is enforced by an honor court comprising cadets elected by their classmates.[72] VMI cadets live in a four-story barracks housing one class per floor. "There is a total lack of privacy" in the barracks: [T]here are no door locks or window shades, and the doors to the students' rooms contain windows that permit the officer in charge to view every cadet in their rooms.[73] The barracks features group bathrooms and "close and intimate quarters."[74] In short, "there is literally no place in the barracks that physically affords privacy," and students are thus "under constant scrutiny."[75] This total lack of privacy and constant supervision by the entire corps is an integral part of the VMI experience.[76]

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67. *Id.* at 1421.
68. *Id.*
69. *Id.* at 1422.
70. *Id.* at 1423.
71. *Id.*
72. *Id.*
73. *Id.* at 1424.
74. *Id.*
75. *Id.* at 1423-24.
76. *Id.*

Strict egalitarianism is a central and essential attribute of the VMI method. The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way,[77] and the spartan and public nature of life in the barracks is reflective of the egalitarian ethic at VMI, as is the fact that VMI imposes the same physical requirements on all students, regardless of ability.[78] Every effort is made to subordinate physical or material distinctions among cadets by requiring all cadets to wear the same uniforms, live in the same spare quarters, attain the same level of physical fitness, and undergo the same constant scrutiny by the other cadets.

Unlike the federal military academies, which exist to prepare their graduates for career service in the armed forces, VMI strives to prepare its students for both military and civilian life.[79] Thus, VMI's military emphasis is regarded primarily as a teaching device. Although each VMI student must participate in a Reserve Officers Training Corps (ROTC) program that provides the same training for a military career as the ROTC programs offered at other undergraduate institutions in Virginia, only 15% of VMI graduates choose military careers.[80]

B. VWIL

The VWIL program was created in response to the Fourth Circuit's ruling in *VMI I*. VWIL, designed to reflect "the differences and the needs of college-age men and women,"[81] is based on "a cooperative method which reinforces self-esteem rather than the leveling process used by VMI."[82] The VWIL program was specially designed to develop character and leadership in young women.[83]

The Commonwealth established VWIL within Mary Baldwin College, a women's liberal arts college founded in 1842 in Staunton, Virginia, about thirty-five miles from VMI. Although Mary Baldwin College is a private institution, the VWIL program is publicly funded. The VWIL program, as constructed, is the by-product of a task force chaired by Dr. James D. Lott,

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77. Brief for the Cross-Petitioners at 12, United States v. Virginia, No. 94-1941 (S. Ct. brief filed Nov. 16, 1995) [hereinafter Cross-Petitioners' Brief].

78. *Id.*

79. *Id.*

80. *Id.*

81. Brief for the Petitioner at 8, United States v. Virginia, No. 94-1941 (S. Ct. brief filed Nov. 16, 1995).

82. *Id.*

83. United States v. Virginia, 44 F.3d 1229, 1233-35 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

dean of Mary Baldwin College. The task force's stated goal was to design a program at Mary Baldwin College to produce citizen-soldiers who are educated and honorable women, prepared for varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service.

Because VWIL's mission was modeled after VMI's mission, VWIL students pursue the same five goals as those pursued at VMI: education, military training, mental and physical discipline, character development, and leadership development. In developing the VWIL program at Mary Baldwin College, however, the task force eschewed aspects of VMI's military model, especially the adversative method, because it concluded that certain of VMI's methods would not be effective for women as a group, even though the task force concluded that some women would be suited to and interested in an all-female VMI-type experience. The task force determined that VWIL's mission and goals could better be achieved by designing a program that de-emphasized the military methods associated with the rat line, using instead a structured environment emphasizing leadership training.

In addition to the standard bachelor of arts program offered at Mary Baldwin College, the VWIL program requires its students to complete, as a "minor," core and elective courses in leadership. Students in the VWIL program must take courses in leadership communications; theories of leadership; ethics, community, and leadership; and a leadership seminar or semester of independent research on a topic relevant to women and leadership. VWIL students are also required to participate in Saturday seminars sponsored by upperclass students on designated subjects. In addition to the VWIL program's classroom component, VWIL students are obligated to complete a leadership externship during which they work off-campus in the public or private sector for up to one semester. VWIL students are also required to participate in a speaker series in which each VWIL class is responsible for bringing outstanding leaders to speak on campus. In addition, all VWIL students are required to organize and participate in community service projects.

Students at VWIL must participate in four years of ROTC and in a ROTC summer camp. The VWIL program is not organized under the pervasive military regimen that exists at VMI; however, in addition to standard ROTC training, VWIL students are required to conduct "leadership laboratory activities" that might incorporate aspects of military training, and they participate in a newly established Virginia Corps of Cadets, a largely ceremonial uniformed military corps comprising the all-female VWIL, the all-male VMI, and the coeducational Virginia Tech ROTC corps.

Finally, VWIL students are required to complete successfully eight semesters of physical education, a portion of which is devoted to health education courses. These programs include athletics, which comprise physical training in a "cooperative confidence building" program held twice a week.

The VWIL program is implemented with Mary Baldwin College faculty, although VMI faculty conduct some ROTC training and teach some ROTC courses at VWIL. The Commonwealth funds the program, providing a per student payment equal to the current annual appropriation paid per cadet at VMI. The task force expected the VWIL program to have approximately twenty-five to thirty students in the first year and also to receive a permanent endowment of $5.45 million. The out-of-pocket expenses for students who attend VWIL is expected to be no greater than those of students attending VMI, and VWIL students should be eligible for the same financial aid programs as are available to VMI cadets.

V. VMI II

A. The District Court's Opinion

On remand, the district court conducted a six-day trial on the Commonwealth's proposed remedy, the VWIL program, which was offered as a single-sex alternative for women. In late April 1994, the district court issued an opinion finding that the Commonwealth's system of higher education with the new VWIL component passed constitutional muster.

The district court observed that the United States and the Commonwealth were bound up in a fundamental disagreement over the meaning of the Equal Protection Clause. The United States argued that the Constitution and the remand instructions from the Fourth Circuit demanded that if the Commonwealth attempted to establish a separate program for young women, it must be in all respects a facsimile of the VMI program.[84] The Commonwealth maintained that the mandate of the Fourth Circuit, as well as the demands of the Equal Protection Clause, required Virginia only to provide a state-supported, all-female college program that would achieve an outcome for women that is comparable to that received by young men upon graduation from VMI.[85]

The district court noted that the United States' reading of the Fourth Circuit's remand instructions required the creation of a "mirror image" or

84. United States v. Virginia, 852 F. Supp. 471, 473 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

85. *Id.*

a separate but equal institution.[86] The district court observed, however, that the separate but equal concept was debunked in *Sweatt v. Painter*[87] and that the appeals court did not contemplate such a remedy.[88] The district court further found that if separate but equal is a standard by which the Commonwealth's plan is to be assayed, then it must fail because, even if the VWIL program were equal on an objective level to VMI, the VWIL program "cannot supply the intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years."[89]

In ruling that the Commonwealth's proposed remedy passed constitutional muster, the district court concluded that equal protection did not require the Commonwealth to admit women to VMI but rather to provide a state-supported, all-female college program that would attain an outcome for women comparable to that received by young men upon graduation from VMI and that the Commonwealth's plan to offer comparable-outcome education through the new all-female institution on the campus of Mary Baldwin College satisfied constitutional standards.[90]

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86. *Id.* at 475. The district court remarked that the United States finds support for this position in the Fourth Circuit statement "whether the unique benefit offered by VMI's type of education can be denied to women by the state under a policy of diversity . . . ." *Id.* (quoting United States v. Virginia, 976 F.2d 890, 898 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993)).

87. 399 U.S. 629 (1950). In *Sweatt*, the Supreme Court struck down the University of Texas Law School's admissions policy, which categorically denied admission to blacks. Although Texas offered a newly established all-Negro law school that it claimed remedied any constitutional violation occurring by virtue of the University of Texas Law School's admissions policy, the Supreme Court, after reviewing the tangible qualities that made the University of Texas Law School superior to the proposed new law school for Negroes, noted:

> What is more important, the University of Texas Law School possesses, to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.

Sweatt v. Painter, 399 U.S. 629, 634 (1950).

88. The district court reasoned that the Fourth Circuit, in light of the *Sweatt* decision, would not have assigned the Commonwealth the impossible task of establishing a "separate but equal" VMI. *Virginia*, 852 F. Supp. at 475.

89. *Id.*

90. *Id.* at 473. The district court noted at the outset that the Commonwealth's proposed plan differs substantially from the VMI program and thus, if the United States' position regarding the Fourth Circuit's mandate on remand and the dictates of the Equal Protection Clause are correct, then the Commonwealth's plan fails to pass constitutional muster. *Id.*

B. The Fourth Circuit's Opinion

The U.S. Department of Justice appealed the district court's ruling on the Commonwealth's proposed remedy to the U.S. Court of Appeals for the Fourth Circuit. In *United States v. Virginia*,[91] the Fourth Circuit affirmed the district court's opinion and remanded the case to the lower court for implementation of the Commonwealth's proposed remedy. The Fourth Circuit considered whether the Commonwealth's proposal (1) to continue to provide a single-gender, military-type college education for men at VMI; (2) to provide, beginning in 1995, a single-gender education with special leadership training for women at Mary Baldwin College; and (3) to continue to provide other forms of college education, including military training, for both men and women at other colleges and universities in the state is constitutionally permissible.[92]

1. The Majority Opinion

The Fourth Circuit found that application of the standard intermediate scrutiny test to the case at bar, in which the classification is not directed per se at men or women but at homogeneity of gender, presents a unique problem because once the state's objective is found to be important, classification by gender is — by definition — necessary for accomplishing the objective.[93] The court, therefore, found that the second prong of the intermediate scrutiny test would "provide little or no scrutiny of the effect of the classification directed at homogeneity of gender."[94] Thus, the Fourth Circuit determined that in order to evaluate the legitimacy of a classification based upon the homogeneity of gender against the Equal Protection Clause, it is necessary to resort to an additional measure that carefully weighs the alternatives available to members of each gender denied benefits by the classification.[95] The Fourth Circuit, therefore, created a third step in the intermediate scrutiny inquiry, which it deemed the "substantive comparability" prong.[96]

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91. 44 F.3d 1229 (4th Cir.).

92. United States v. Virginia, 44 F.3d 1229, 1232 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

93. *Id.* at 1237.

94. *Id.*

95. *Id.*

96. *Id.* The Fourth Circuit focused on the substantive comparability of the mutually exclusive programs provided to men and women in order to resolve the equal protection issue, framing the issues presented on appeal as follows:

> [I]n this case, we will examine a state-sponsored educational scheme offered by the Commonwealth of Virginia, under which the state provides a single-gender military-type college education to men and single-gender college education with

With regard to the first part of the intermediate scrutiny test, the Fourth Circuit found that single-gender education constitutes a legitimate and important governmental objective.[97] The Fourth Circuit stated that providing the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education[98] and that single-gender education at the college level is beneficial to both sexes.[99]

The court next considered whether the classifications existing in the Commonwealth's system of higher education are substantially related to the state's purpose.[100] The court noted, "When combined with a third part of the test, *i.e.*, the inquiry into whether excluded men and women have opportunities to obtain substantively comparable benefits, this inquiry scrutinizes the *means* by which the state chooses to obtain its objective."[101]

The court found that the importance of classifying students by gender in higher education flows from having a student body of the same sex rather than from having a student body that is male or female.[102] The only way to realize the benefits of homogeneity of gender is to limit admission to one sex.[103] The court, therefore, further found that the classification for single-gender education at VMI is directly related to achieving the results of an adversative method in a military environment.[104]

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special leadership training to women, and determine (1) whether the state's objective of providing single-gender education to its citizens may be considered a legitimate and important governmental objective; (2) whether the gender classification adopted is directly and substantially related to that purpose; and (3) whether the resulting mutual exclusion of women and men from each other's institution leaves open opportunities for those excluded to obtain substantively comparable benefits at their institutions or through other means offered by the state.

Id.

97. *Id.*

98. *Id.* at 1238.

99. *Id.* The court noted that a brief submitted to the court by the parties and amici curiae included a multitude of professional articles describing the benefits of single-gender education, especially for late adolescents coming out of high school. *Id.* Given the growing consensus in the professional community that a sexually homogeneous environment yields concrete educational benefits, the court was willing to defer to the Commonwealth's selection of educational techniques when the purpose of providing single-gender education was not pernicious and fell within the range of the traditional governmental objective of providing citizens higher education. *Id.* at 1239.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* The adversative method, according to the Court of Appeals, is predicated on

The necessity of a gender-discriminatory classification to achieve homogeneity of gender notwithstanding, the court reasoned that in order for such exclusions to pass constitutional muster, the excluded men and the excluded women must have reasonable opportunities to obtain benefits substantively comparable to those they are denied.[105] The court, therefore, reasoned that the equal protection violation could be remedied by providing comparable benefits to both sexes based on substance but not on form and detail.[106]

The court then looked to whether VMI and the VWIL program at Mary Baldwin College offered the same substantive benefits to both genders. The court touched upon the salient similarities between the two programs, such as the provision of a single-gender environment, the offering of a bachelor's degree, and the presence of a program designed to produce discipline and honor among students who are well suited for leadership.[107] The court further pointed out that the missions and goals of both programs are similar and that, although the mechanisms for achieving the goals differ between the two programs, the differences are attributable to demonstrated pedagogical differences between the sexes as reflected in the record.[108]

In the final analysis, the appeals court found that, given that the mission and goals are the same for both VMI and the VWIL program and notwithstanding the difference in methodologies for attaining the goals, the institutions' differences and methodologies are constitutionally acceptable because they are both reasonably calculated to succeed at each institution.[109] The

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a sexually homogenous environment which allows for aggressiveness, conflict, egalitarianism, lack of privacy, and both physical and mental stress. *Id.*

105. *Id.* at 1239-40.

106. The court rejected the United States' interpretation of the Equal Protection Clause, finding that equal protection does not require identical programs for men and women. *Id.* at 1240. The court stated that "the alternative of allowing a state to provide benefits only when they could be provided in identical form to all of its citizens, regardless of whether they are similarly circumstanced is justified only by a needless, and indeed baseless, demand for conformity." *Id.*

107. *Id.*

108. *Id.* at 1240-41. The court reflected on the differences in opinions among education experts as to whether the adversative and pervasive military method applied to men at VMI should be applied to women at VWIL. *Id.* at 1241. The court accepted as accurate and persuasive the testimony of educational experts for the Commonwealth that women may not respond similarly to the adversative method as men respond at VMI and that a women's VMI-type program would thus not be best suited to attaining the similar goals and objectives as are obtained at VMI. *Id.*

109. *Id.* With regard to the intangible qualities of VMI that are necessarily unavailable at VWIL, such as the deep history and prestige behind a degree from VMI, the court noted

court therefore affirmed the judgment of the district court, but remanded the case with instructions that the district court conduct "a specific review to ensure that (1) the program is headed by a well-qualified, motivated administrator, attracted by a level of compensation suited for the position; (2) the program is well-promoted to potentially qualified candidates; (3) the program includes a commitment for adequate state funding for the near term; and (4) the program includes a mechanism for continuing review by qualified professional educators so that its elements may be adjusted as necessary to keep the program aimed not only at providing a quality bachelor's degree, but also at affording the additional element of taught discipline and leadership training for women."[110]

2. *Judge Phillips's Dissent*

Judge Phillips, a Senior Fourth Circuit Judge from North Carolina, wrote a dissenting opinion in which he expressed skepticism with regard to the state's proposed remedy.[111] Judge Phillips argued that the only constitutional remedy to VMI's male-only admissions policy is either ordering coeducation at VMI or forgoing further state support for VMI.[112] Acknowl-

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that such benefits must be the "by-product of a longer-term effort." *Id.* The court found that the equal protection violation found in *VMI I* was remedied because the programs offered at both institutions can be substantively comparable if VWIL is "undertaken with a persistently high level of commitment by Virginia and that men and women mutually excluded by the two programs will not be denied the opportunity for an undergraduate education with discipline and special training and leadership." *Id.* The court further observed that Virginia offers a diverse menu of opportunities in higher education through additional state-supported colleges and universities, including the coed ROTC program at Virginia Tech. *Id.*

110. *Id.* at 1242.

111. Expressing his skepticism, Judge Phillips remarked, "I do not believe the proposed remedial plan, whose judicial adoption in unrealized form obviously does not bring Virginia into present compliance with equal protection guarantees, has any real and effectively measurable capacity to do so over foreseeable time." *Id.* at 1243 (Phillips, J., dissenting).

112. *Id.* (Phillips, J., dissenting). Judge Phillips further observed that when VMI was founded in 1839 as a state-supported military school for men only, there could be no question that the founders did not consider the possibility that women should be considered for admission to the institution. *Id.* (Phillips, J., dissenting). He also pointed out that no conscious governmental choice between alternatives in higher education drove the original decision leading to VMI's male-only admissions policy and that VMI's all-male admissions policy reflected historical stereotypical notions of the different rules in society of men and women. *Id.* (Phillips, J., dissenting). Judge Phillips further observed that until the Justice Department brought suit against the Commonwealth in 1981, Virginia had not undertaken any re-examination of VMI's original all-male admissions policy. *Id.* (Phillips, J., dissenting).

edging the novelty of the legal issue raised by the VMI case, Judge Phillips queried whether separate, state-supported educational institutions for men and women, like those for white and black students, are so "inherently unequal" by reason of their stigmatic implications that gender classification violates equal protection per se and warrants no further scrutiny — that is, whether such classifications should be subject to the same strict scrutiny as race-based classifications.[113]

Judge Phillips agreed with the majority's characterization of the basic structures of both the VWIL and VMI programs, but found "real problem[s]" in the Commonwealth's identification of its important interest used to justify its classifications.[114] Judge Phillips identified three separate objectives asserted by the Commonwealth: (1) providing separate single-gender education facilities for both men and women because of the intrinsic value to some members of both genders of such a social environment for education ("intrinsic value"); (2) producing both men and women particularly suited for leadership roles as "citizen soldiers" by providing separate, single-gender educational programs for each that are designed to accommodate the different psychological and emotional strengths and weaknesses in becoming effective leaders in either domain ("gender-adapted leadership training"); and (3) providing separate, single-gender educational facilities for men and women as part of an overall objective of providing a diverse array of state-supported, higher-education opportunities ("system-diversity").[115] Judge Phillips then examined the genuineness of the proposed governmental objectives asserted by the Commonwealth, and he concluded that the legitimacy of the asserted governmental objectives suggested by the Commonwealth failed the *Hogan* standard.[116] He instead determined that the asserted governmental interests "are rationalizations compelled by the exigencies of

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113. *Id.* at 1244 (Phillips, J., dissenting). Judge Phillips noted that "[e]ach of these inescapable problems raises for us issues of first impression and application of equal protection jurisprudence to the resolution of this case." *Id.* at 1245 (Phillips, J., dissenting). Judge Phillips found it unnecessary to address that question because, in his opinion, the proposed VWIL plan clearly fails to pass equal protection muster. *Id.* (Phillips, J., dissenting). Judge Phillips remarked at the outset that "[b]ecause I believe that even were the VWIL proposal to be substantially consummated in foreseeable time the resulting two-component arrangement would not pass equal protection muster, I would proceed on that assumption . . . ." *Id.* (Phillips, J., dissenting).

114. *Id.* at 1246 (Phillips, J., dissenting).

115. *Id.* (Phillips, J., dissenting).

116. Judge Phillips reasoned that "[t]his was exactly what the Supreme Court did in rejecting the State of Mississippi's assertion in *Hogan* that its primary objectives in maintaining its School of Nursing for women only was to compensate for past discrimination against them." *Id.* (Phillips, J., dissenting).

this litigation rather than an actual overriding purpose of the proposed separate-but-equal arrangement."[117]

Judge Phillips's skepticism over the Commonwealth's proposed remedial plan was expressed with full force in his discussion of the genuineness of the Commonwealth's asserted important interest used to justify the gender classification.[118] Judge Phillips observed that the Commonwealth did not actively defend VMI's men-only policy in *VMI I*.[119] Given that the current classification is merely a means by which the Commonwealth can achieve the end of maintaining VMI's original 1839 policy of excluding women, according to Judge Phillips, the Commonwealth's proposed remedy should be struck down for this reason alone.[120]

Accepting arguendo the importance of the governmental objectives asserted by the Commonwealth, Judge Phillips turned to the second prong of the intermediate scrutiny equal protection test — whether the Commonwealth has made an "exceedingly persuasive" demonstration that the classification embodied in its VMI and VWIL programs is "substantially and directly related to its proposed remedial objectives."[121] Noting that the

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117. *Id.* at 1247 (Phillips, J., dissenting).

118. *Id.* (Phillips, J., dissenting). Judge Phillips opined, "I think [the record] would support a confident and fair conclusion that the primary, overriding purpose [of the gender classifications] is not to create a new type of educational opportunity for women, nor to broaden the Commonwealth's educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth's higher education system — though all of these might result serendipitously from the arrangement — but is simply by this means to allow VMI to continue to exclude women in order to preserve its historic character and mission as that is perceived and has been primarily defined in this litigation by VMI and directly affiliated parties." *Id.* (Phillips, J., dissenting).

119. *Id.* at 1247 n.7 (Phillips, J., dissenting) (citation omitted). In the same footnote, Judge Phillips stated:

> [T]aking judicial notice of matters surely of common knowledge in the Commonwealth, I would be prepared to conclude that (1) the perception underlying the policy justification advanced by VMI officials and alumni organizations remains alive and strongly held by those parties, and that (2) the prestige and influence of VMI and its justly loyal alumni and their organization in influencing any political decision affecting VMI's interest is sufficiently powerful to ensure that their overriding purpose in this matter effectively defines the actual governmental objective of the Commonwealth's proposed remedial plan. That overriding purpose remains the preservation of VMI as a state-supported educational institution for men only, with all other asserted purposes of the plan merely a secondary means to that end.

Id. (Phillips, J., dissenting).

120. *Id.* at 1248 (Phillips, J., dissenting).

121. *Id.* (Phillips, J., dissenting) (citing Mississippi Univ. for Women v. Hogan, 458

question of whether a challenged classification is substantially related to its asserted goals is an opaque one, Judge Phillips looked back at the three asserted governmental objectives that he identified in short form as "intrinsic value," "gender-adapted leadership training," and "system-diversity." Judge Phillips observed that, as a threshold matter, no separate, single-gender school arrangement "could be found *substantially* related to any conceivable governmental objective unless the benefits to be separately distributed by the arrangement were *substantially* equal across the board of the relevant criteria for evaluating educational institutions."[122] Given that a newly established all-women's program could not possibly offer the same benefits that an institution established before the Civil War could offer, under Judge Phillips's interpretation of the intermediate scrutiny standard, the inexorable conclusion was that VMI's historical, discriminatory admissions policy could be remedied only through either (1) abandonment of state support for the VMI or (2) admission of women to VMI.[123] Judge Phillips concluded that, although a state could constitutionally establish separate, single-sex institutions, it could do so only if those institutions were established simultaneously and provided substantially comparable curricular and extracurricular programs, funding, physical plant, administration and support services, and faculty and library resources.[124] The arrangement for constitutionally permissible public, single-sex institutions that Judge Phillips posited in his dissent clearly could not accommodate any remedial proposal that would preserve the single-sex admissions policy of VMI or any other pre-existing single-sex institution for that matter. Thus, Judge Phillips concluded that "[n]o separate single-gender arrangement that involved VMI as the all-men school and any newly founded separate institution (whether free-standing or an appendage) as the all-women's component could pass equal protection

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U.S. 718, 724, 730 (1982)).

122. *Id.* at 1249 (Phillips, J., dissenting). To support this position, Judge Phillips looked at the separate but equal educational arrangements that were approved in the context of race-based classifications under the Equal Protection Clause as articulated by the Supreme Court in *Sweatt*, which required "substantial equality and educational opportunities." *Id.* (Phillips, J., dissenting). Judge Phillips observed that "[t]hough race is a 'suspect' classification and gender so far is not, I see no reason why the same requirement of *substantial* equality of benefits that was thought at one time to justify separate-but-equal schools for different races should not apply to separate schools for men and women if that classification now does, as race formerly but no longer does, permit separate but equal arrangements." *Id.* (Phillips, J., dissenting).

123. Although Judge Phillips acknowledged some difference between strict scrutiny and intermediate scrutiny under the Equal Protection Clause, he found the distinction to be a very narrow one. *Id.* (Phillips, J., dissenting).

124. *Id.* at 1250 (Phillips, J., dissenting).

muster" because "[i]t could not provide substantially equal educational benefits or opportunities to both genders."[125]

VI. VMI in the Supreme Court

In *United States v. Virginia*,[126] the U.S. Supreme Court granted the federal government's petition for certiorari,[127] which challenged the decision of the U.S. Court of Appeals for the Fourth Circuit that upheld the constitutionality of the Commonwealth's higher education system as presently constituted with its predominantly coeducational emphasis and with its single-sex components for men and women.

The U.S. Justice Department's petition for certiorari asked the Court to use the VMI case as a vehicle for declaring that actions that discriminate on the basis of sex should be subject to the same strict constitutional scrutiny that the court applies to official distinctions on the basis of race. In its briefs before the Supreme Court, the government reiterated the position it had taken throughout the litigation that the Commonwealth be ordered to admit women to VMI or to discontinue funding for VMI.

The Court also granted the Commonwealth's conditional cross-petition for certiorari, which challenged the initial determination by the Fourth Circuit Court of Appeals that Virginia could not continue VMI as a male-only public college without establishing a comparable facility for women. In its cross-petition, the Commonwealth argued that the Supreme Court's equal protection jurisprudence does not require the Commonwealth to provide the VWIL program and that the Fourth Circuit's ruling in *VMI I* "will unduly and unnecessarily inhibit states in the development of programs to meet the special and demonstrated needs of their citizens."[128]

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125. *Id.* (Phillips, J., dissenting). Judge Phillips remarked:

> [Even] if every good thing projected for the VWIL program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI in terms of the great bulk, if not all of those criteria. Particularly is this obvious with respect to the intangible such as prestige, tradition and alumni influence which the Supreme Court, looking for substantial equality of educational opportunities in *Sweatt*, thought 'more important' even than the tangible resources.

Id. (Phillips, J., dissenting) (citations omitted).

126. 116 S. Ct. 281 (1995).

127. United States v. Virginia, 116 S. Ct. 281, 281 (1995).

128. Cross-Petitioners' Brief, *supra* note 77, at 3. The Commonwealth argued in its cross-petition that the court of appeals ruling in *VMI I*

> has the effect of precluding government-sponsored single-sex education for students of one gender, absent a parallel program for students of the other gender. That standard does not permit states to take into account the pedagogical value of single-sex education

Although it challenged the court of appeals decision in *VMI I*, the Commonwealth stated that, regardless of the position taken in the cross-petition, it was committed by legislation to single-sex education as a beneficial pedagogical option for both men and women and intended to continue offering this option through VMI and VWIL even if the Supreme Court held that parallel programs are not a prerequisite to a state's ability to offer the benefits of single-sex education to its citizens.[129]

During oral arguments held before the Supreme Court on January 17, 1996, most of the Justices seemed skeptical of the constitutionality of Virginia's system of higher education as presently constituted, and the questions posed by the Justices during oral arguments indicated little support for the alternative women's program at Mary Baldwin College.

Justice Ginsburg's pessimism over the Commonwealth's higher education policy was particularly strident.[130] At one point during the arguments, she remarked that women in the military are a *fait accompli* and that "men better get used to taking orders from women."[131] Counsel for the federal government argued in response to a question posed by Justice O'Connor that a separate women's program, even one designed to duplicate an all-male VMI, "wouldn't work" because it would continue to deny women "the opportunity to show they can succeed" at VMI itself.[132]

Counsel for the Commonwealth stressed at the argument that, should the Justices rule against VMI in this case, they might well be condemning all single-sex education, including private, single-sex institutions that receive government benefits such as tax-exempt status and student financial aid.[133]

> for some students, the differing educational needs and interest of students, the judgment of educators in developing programs, the overall mix of educational options made available to students in the public and private sectors, or the importance of state and local discretion in devising beneficial and effective means of education for students of both genders within the financial constraints imposed on funding for education.

Id.

129. *Id.* at 3 n.1. The Commonwealth reasoned in its cross-petition that it is "merely seek[ing] to preserve the discretion of state and local governments to improve and diversify all levels of their educational systems through innovative and successful programs similar to those of VMI and VWIL." *Id.*

130. Justice Ginsburg staked out her position on equal protection early in her tenure on the Supreme Court, writing in Harris v. Forklift, 114 S. Ct. 367 (1993), that "it remains an open question whether 'classifications based upon gender are inherently suspect.'" *Id.* at 373 (Ginsburg, J., concurring).

131. United States Supreme Court Official Transcript, United States v. Virginia (Nos. 94-1941, 94-2107), 1996 WL 16020, at *26-*27 (Jan. 17, 1996).

132. *Id.* at *29.

133. *Id.* at *35-*36.

When asked whether the newly established VWIL program would also be rendered unconstitutional if the Court were to strike down VMI's all-male admissions policy and order coeducation, counsel for the Commonwealth responded that such a ruling by the Court as to VMI's all-male admissions policy would effectively render the VWIL program unconstitutional as well. Justice O'Connor, however, was unpersuaded that the issue posed was an all-or-nothing proposition, stating that "we are only deciding issues in this case, on these facts."

Justice Souter remarked that serving distinctiveness cannot in and of itself justify VMI's admissions policy, and Justice Breyer followed up by stating that, under the Commonwealth's rationale, people of different races or ethnic backgrounds could be excluded on the ground that their presence would change a distinctive environment.[134] Justice Breyer stated that the test under intermediate scrutiny requires a state to show why it is important for VMI to remain an all-male institution and that the state must point to what it is that is so important "about this hard-to-grasp adversative kind of thing that enables you to say to women who want to go there 'you can't come.'"[135] Counsel for the Commonwealth replied that the expert opinions presented in the case indicated that the "young men who want a single-sex education succeed in that [adversative] environment" and that the VWIL program "will produce the same results."[136]

As for the Justice Department's urging of the adoption of the strict scrutiny standard to assay the VMI case, the Justices — especially Justice Scalia — appeared almost as skeptical of this contention as they were of the Commonwealth's policy of providing diversity in its higher education offerings.[137] Under questioning, counsel for the United States departed from the Justice Department's urging the adoption of strict scrutiny in gender discrimination cases and argued that the application of a strict scrutiny standard to this case was not necessary for the United States to prevail.[138]

VII. Discussion

A. Equal Protection Analysis

The VMI case is interesting because it demonstrates several different ways in which the courts have struggled with the Supreme Court's newly created application of the Equal Protection Clause to gender classifications.

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134. *Id.* at *49-*51.
135. *Id.* at *12.
136. *Id.* at *55.
137. *Id.* at *12-*13.
138. *Id.* at *11-*12.

As one commentator observed, the district court in *VMI I* attempted to inject some flexibility into the intermediate scrutiny test in order to reflect the practical and historical factors surrounding single-sex education and the evolution of the Court's Equal Protection Clause jurisprudence.[139] The Fourth Circuit, in *VMI II*, developed a modified intermediate scrutiny analysis that also attempts to impart some flexibility to the intermediate scrutiny equal protection analysis. Judge Phillips, in his dissent in *VMI II*, adhered to the Court's articulated test for resolving constitutional cases involving gender discrimination.

The case for a reassessment of the Supreme Court's equal protection jurisprudence in the context of gender-based classifications is particularly strong when viewed against the backdrop of the VMI case. As Professor Ides aptly states, "By focusing exclusively on the absence of an all-female VMI-style institution or program, the question overlooks a much more significant and complicated question — the one that really ought to be most pertinent: Overall, does the system of higher education provided by the Commonwealth of Virginia discriminate on the basis of gender?"[140] As an analogy, Professor Ides offers:

> If a state university fields a Division I all-male football team, a challenge to the legality of that practice would not turn on whether the university sponsored an identical women's team, but on whether the university provided women with equivalent opportunities to engage in interscholastic athletics. Similarly, in the context of the VMI case, the question is not whether the state provides an all-female version of VMI, but whether the Commonwealth provides equivalent opportunities in higher education for women.[141]

Clearly, if the Equal Protection Clause requires a women's school identical to VMI, the Commonwealth's remedial plan fails for the very reasons asserted by Judge Phillips in his dissent.[142] As the Justice Depart-

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139. *See* Ides, *supra* note 57, at 38-39.

140. *Id.* at 45.

141. *Id.* The legislative branch has given its imprimatur to preservation of single-sex private schools, and statutory enactment has provided a possible rationale for the courts to preserve the historically single-sex public schools. In 1972, Congress passed Title IX of the Education Amendments, which prohibits sex discrimination in educational programs or activities receiving federal financial assistance. 20 U.S.C. § 1681(a) (1994). Although Title IX prohibits institutions receiving federal funds from denying admission to a person based on gender, the drafters took care to exempt certain institutions from the statute's prohibitions. *Id.* In particular, the Act exempts "any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex." 20 U.S.C. § 1681(a)(5) (1994).

142. *See supra* notes 111-25 and accompanying text (discussing Judge Phillips's dissent

ment stressed repeatedly throughout *VMI I*, no parallel program could possibly capture the same experience and benefits that VMI's 157 years of history and accomplished alumni have added to the institution. A parallel institution simply cannot duplicate the intangible factors such as VMI's alumni network, reputation, tradition, and history. Thus, an all-female VMI-type institution would be per se separate and unequal.

Judge Phillips's logic, however, is not compelling. A new VMI-type experience for women would be separate and unequal, not in the sense that an all-female education is *inferior* to an all-male education but simply because "new" is not *identical* to "old." Such a stilted test delivers its own answer regardless of the facts or law. Further, although casting the issue in separate but unequal verbiage appears to endow the government's argument with the moral force of *Brown v. Board of Education*, an actual reading of *Brown* underscores the illegitimacy of this approach.

In *Brown*, the Supreme Court made clear that the touchstone of constitutional infirmity embodied by a separate but equal educational experience was the inherent inferiority of all-black schools. "To separate [Negro students] from others of similar age and qualifications solely because of their race generates a feeling of *inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[143] In stark contrast, the VWIL program, like other public and private all-female schools, is designed to produce leadership and character in women in a manner *superior* to coeducational institutions. Thus, a rigid application of intermediate scrutiny to require identical education for all, instead of to proscribe inferior education for some, ignores both the consent of the national and state electorate and the logic of *Brown* itself.

Moreover, unlike the separate but equal argument rejected in *Brown v. Board of Education*, the allowance of all-male and all-female state schools would not be inherently unequal because of the political under-representation of the challengers. Because the current majority of the electorate is composed of women, women in the 1990s, unlike blacks in the 1950s, have the political power to choose whether to support a state's single-sex education.[144] Further, unlike the black students of the 1950s, who were legally barred from choosing coracial education, women students of the 1990s are free to choose a single-sex or coeducational education. Justice Powell, dissenting in *Hogan*, drew the distinction between sexual segregation in education and the separate but equal racial segregation typified by the decision in *Plessy v.*

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in *VMI II*).

143. Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (emphasis added).

144. U.S. CONST. amend. XIX.

Ferguson,[145] noting that "[i]t was characteristic of racial segregation that segregated facilities were offered, not as alternatives to increase the choices available to blacks, but as the sole alternative." This is distinguishable from public single-sex colleges in which students are "free to select a coeducational environment for themselves if they so desire; their attendance at [a single-sex institution] is not a matter of coercion."[146] A flexible intermediate scrutiny test would thus preserve the intrinsic legitimacy of the Equal Protection Clause as applied, protect the political power of women, and allow female students to exercise their own choices in the inherently personal and intimate decision about the educational experience to which they will commit four years of their lives.

In the context of VMI and VWIL, the Court should look to the broader menu of educational opportunities that the Commonwealth offers at the college level and focus on whether comparable single-sex educational opportunities exist for men and women. Such a flexible, or "pro-choice," version of intermediate scrutiny would allow women to choose superior leadership training or opt for the traditional coeducational experience. The use of such a flexible intermediate scrutiny test that views the Commonwealth's system of higher education as a whole would have the benefit of retaining some of the intrinsic validity of the Equal Protection Clause as it was ratified and before the courts added their judicial gloss to the clause. The policy decision of whether to provide all-male and all-female education would still rest with the state legislatures. Thus, the Supreme Court would not mandate by judicial fiat that a type of education that existed both before and after the Fourteenth Amendment was ratified, and after the Equal Rights Amendment was rejected, is now unconstitutional.

B. Implications for Single-Sex Institutions

VMI and the Citadel are the only state-supported, all-male military colleges in the nation, and the Justice Department has sued them both over their admissions policies. By focusing on the military aspect of VMI, one could overlook the overarching implications of the VMI case for public and private nonmilitary institutions. As one commentator has observed:

> The introduction of public funds into the dispute highlights and aggravates all of the other criticisms because it legitimizes an educational method, which is grounded in the necessity of segregating the sexes, with a governmental stamp of approval. However, publicly-supported single-sex school is the best,

145. 163 U.S. 537 (1896).

146. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 741 n.9 (Powell, J., dissenting).

> perhaps only, way to ensure that all students, especially those who cannot afford to attend private schools, can gain from the educational experience.[147]

Elizabeth Fox-Genovese, a prominent feminist scholar and expert witness for the Commonwealth in *VMI II*, emphasized at the remedial trial the particular benefit of single-sex education for students who come from lower income families. However, it may be more than those students who cannot afford to attend private single-sex institutions who will be denied the option to attend single-sex colleges if VMI's all-male admissions policy is struck down. A major issue that may emerge if VMI and the Citadel are forced to admit women is the fate of private women's colleges in America. VMI's potential destruction is a commentary on all single-sex education. The controversy over VMI's all-male admissions policy is not an isolated problem, but reflects an emerging trend in this country toward conformity and sameness. The VMI litigation embodies the quintessential symbolic lawsuit. As one of the last remaining public single-sex institutions, VMI represents a last line of defense against those who wish to challenge the gender discrimination at private women's colleges.

The distinction between public and private in the realm of state action is illusory, and there is no precise test for finding state action.[148] As one commentator notes, "In the last decade, the Supreme Court has found that public/private distinctions may be blurred in the context of higher education."[149] For example, although VMI receives approximately 30% of its operating budget from the Commonwealth, Hollins College, a private women's college in Roanoke, receives approximately 20% of its operating budget from the Commonwealth.[150] As a commentator has noted, "Individuals and entities, at one time considered private, now find themselves in jeopardy of falling into the public sphere as a result of very minimal contact with state government."[151] Further, "The uncertainty associated with the scope of state action threatens the status of all private women's colleges. Today, private institutions and their students depend significantly upon state and federal funding. Private women's schools receive approximately 20%

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147. Caplice, *supra* note 59, at 228.

148. Ronna G. Schneider, *State Action — Making Sense out of Chaos — an Historical Approach*, 37 U. FLA. L. REV. 737, 737 (1985).

149. Brian Scott Yablonski, *Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute*, 47 U. MIAMI L. REV. 1449, 1476 (1993).

150. Suzanne Fields, *Assault on VMI Could Backfire on Feminists*, ATLANTA J. & CONST., Oct. 8, 1992, at A12.

151. Yablonski, *supra* note 148, at 1482 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding that requisite state action existed where private restaurant that discriminated against Blacks leased space from government parking lot)).

of their operating costs from government entities."[152] The Commonwealth provides over $38 million in state financial assistance to five private single-sex colleges for women and one private single-sex college for men. In addition, most states, including Virginia, provide loans to students attending private institutions of higher learning through tuition assistance grant programs.[153] According to the Virginia Council on Higher Education report for 1986-87, female students received $109 million in state support, while male students received approximately $91 million.[154]

VIII. Conclusion

The case of VMI is indeed a perplexing one. In *VMI II*, the lower courts attempted to harmonize the Supreme Court's intermediate scrutiny test with the justifications and benefits of single-sex education as embodied in VMI's all-male admissions policy. In the field of education, the strict scrutiny test, which the Court used to strike down racially segregated school systems, emerges from an entirely different set of imperatives than those underlying the intermediate scrutiny test. The Court struck down separate but equal racially segregated schools because of their inherent inferiority. No similar imperative exists with regard to single-sex schools that have been shown to be highly beneficial to many students. Because the evolution of the equal protection intermediate scrutiny test has gravitated toward the stricter scrutiny standard used to assay racial classifications rather than toward the rational basis standard used to assay nonsuspect classifications, the Court's current permutation of the intermediate scrutiny test is inappropriate for evaluating single-sex schools.

The Court should develop a more flexible approach to equal protection challenges based upon gender classifications that, in the context of single-sex colleges, would take into account a state's entire menu of higher education options, rather than focusing on a particular institution's policy. Such an approach would allow states to continue to offer publicly funded single-sex opportunities in higher education, which have been shown to be successful methods for educating men and women. Notwithstanding Justice O'Connor's remark at oral argument suggesting that the Court would issue a holding confined to VMI, as one of the last public, single-sex institutions left in the country, VMI's fate may be a portent for the future of all single-sex schools as the public/private distinction in institutions of higher education blurs.

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152. *Id.* (citing Fields, *supra* note 150, at A12).

153. *See, e.g.*, VA. CODE ANN. § 23-38.12 (Michie 1993).

154. *An All-Male VMI*, WASH. POST, Nov. 7, 1992, at A22.

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