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VMI Essays: The Virginia Military Institute And The Equal Protection Clause: A Factual And Legal Introduction

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VMI ESSAYS

THE VIRGINIA MILITARY INSTITUTE AND THE EQUAL PROTECTION CLAUSE: A FACTUAL AND LEGAL INTRODUCTION

> [T]his case is of historic importance because it will test whether the sweep of the Equal Protection Clause is so broad, blind, and unbending as to mandate absolute sameness of treatment for males and females in higher education, even where it would mean the destruction of an educational program of immense value to the Commonwealth and the Nation, and even where no meaningful enhancement in the educational opportunities available to women would result.[1]

The United States Court of Appeals for the Fourth Circuit's decision in *United States v. Virginia*[2] engendered a diversity of opinion regarding the compatibility of state supported single-sex educational institutions with the United States Constitution. Following the court's decision, an onslaught of editorials and letters to editors appeared in the national newspapers, each author either attacking the "invidious discrimination and stereotyping" perpetuated by publicly funded all-male educational institutions, or championing the merits of a single-gender educational experience.[3] Caught in the cross-fire of this debate is the Virginia Military Institute (VMI). Most of the editorial writers focused on the red herring issue of whether the differences in physical, mental, and emotional capabilities between men and women are sufficiently significant to necessitate single-sex admissions policies at military schools.[4] The dispositive issue in the case, however, was whether

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1. VMI Defendants' Pre-Trial Memorandum at 4, United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991) (No. 90-0126-R), *vacated*, 976 F.2d 890 (4th Cir. 1992), *petition for cert. filed* (Jan. 19, 1993).

2. 976 F.2d 890 (4th Cir. 1992).

3. *Compare* Douglas W. Kmiec, *Single-Sex Schools Aren't Unconstitutional*, WALL ST. J., Oct. 14, 1992, at A15 (arguing that State funded single-sex military school is constitutional because it serves important public purpose by providing better learning environment for some students and some purposes and because State already provides ample coeducational options); *with A Legal Lesson for VMI*, N.Y. TIMES, Oct. 14, 1992, at A24 (arguing that single-sex admissions policy of State funded military college is unconstitutional and that school should open up program to women because women "warrant the chance to show, as women have shown at the service academies, that women can be every bit as good soldiers and ready to answer a call to battle [as men]") [hereinafter *Lesson for VMI*].

4. *See, e.g.*, R.C. Copeland, Jr., *Mixing the Sexes in Military Modes*, WASH. TIMES, Oct. 14, 1992, at G2 (arguing that admission of females to previously all-male military college would require drastic changes to accommodate women and would prohibit institution from

the Equal Protection Clause permits a state to provide a single-sex higher education institution for males while not providing a similar institution for females.

FACTUAL BACKGROUND

VMI is located in Lexington, Virginia. It was established by an act of the state legislature in 1839 as the nation's first state military college.

Since its founding, VMI has admitted only males to its four-year undergraduate degree program. VMI offers undergraduate degrees in liberal arts, the sciences, and engineering; it offers no graduate or post-graduate degree programs. The student body at VMI is composed of a corps of cadets. All cadets must live in the VMI barracks.

The educational program at VMI pervades all aspects of the cadets' lives. During the first seven months at VMI, all new cadets, called "rats," are subjected to a stressful orientation process referred to as the "rat line." The rat line is designed to be comparable to the Marine Corps boot camp in terms of its physical rigor and mental stress. The rat line includes indoctrination, minute regulation of individual behavior, frequent punishments, rigorous physical education, and military drills. VMI's catalogue describes the rat system as "equal and impersonal in its application, tending to remove wealth and former station in life as factors in one's standing as a cadet, and ensuring equal opportunity for all to advance by personal effort and enjoy those returns that are earned."[5]

The class system at VMI involves the peer assignment of privileges and responsibilities, including supervisory roles, to classes of cadets based on rank. The "dyke" system, which closely interfaces with the rat line, assigns each rat to a first classman or "senior" in conventional collegiate nomenclature, who serves as a mentor ("dyke") to the rat. The dyke system functions to create cross-class bonding and provide an infrastructure for leadership and support.

All VMI cadets are subject to the institution's honor code which is pithily stated in the same austerity that characterizes all aspects of the VMI experience: "[A cadet] 'does not lie, cheat, steal nor tolerate those who do.'"[6] There is a single sanction for honor code violations: expulsion from the institution. The barracks life at VMI is considered essential to VMI's

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"train[ing] young men to their full potential"); Bruce Fein, *What VMI Ruling Could Have Added*, WASH. TIMES, Oct. 14, 1992, at G1 (arguing that because of fundamental differences between sexes, all combat positions in Army, Navy, Marines, and Air Force should be limited to males).

Interestingly, both sides of the debate pointed to the experiences at the national service academies in support of their respective arguments. *See, e.g., Lesson for VMI, supra* note 3 at A24 (arguing that experience at service academies demonstrate that women soldiers can be as effective as male soldiers).

5. VIRGINIA MILITARY INSTITUTE, 1990-91 CATALOGUE 7.

6. United States v. Virginia, 766 F. Supp. 1407, 1423 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *petition for cert. filed* (Jan. 19, 1993).

program, especially in creating an egalitarian environment. Each cadet class is assigned to one floor in the four-story barracks. Three to five cadets are assigned to one room. The rooms in the barracks are stark and unattractive. There are no locks on the doors to the rooms and the windows are uncovered. Access to bathrooms is provided by outside corridors visible to the quadrangle, and there is a complete lack of privacy in the barracks, where cadets are subjected to complete scrutiny and minute regulation of behavior. This complete absence of privacy and behavioral regulation is designed to foster an egalitarian ethos and maintain a stressful environment.

The military program and its emphasis on regulation, etiquette, and drill, is inextricably intertwined with the educational experience at VMI. Each cadet must participate in an ROTC program throughout his four years at VMI. Because VMI's educational program is physically intense and requires a complete deprivation of privacy, both the district court and the Fourth Circuit recognized that the admission of women would necessitate fundamental changes in the VMI program due to the different social dynamics between men and women.

Although the trial court transcript was replete with testimony regarding the benefits of single-sex environments in higher education and although members of both sexes seem to recognize the advantages conferred by single-sex educational institutions,[7] currently, VMI is one of only four public state supported single-sex institutions of higher education in the country. The other three institutions are the Citadel, which is a military college for men located in Charleston, South Carolina and is a substantially similar institution to VMI,[8] Texas Women's University in Denton, Texas, and Douglas College in New Jersey, which is a women's college and is part of the Rutgers University system.

VMI is financially supported by the Commonwealth of Virginia and is subject to the control of the General Assembly.[9] VMI is governed by a Board of Visitors, which is responsible for determining "the terms upon which cadets may be admitted [to VMI], their number, the course of their instruction, the nature of their service, and the duration thereof."[10] Virgi-

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7. The Fourth Circuit noted that "all parties appear to acknowledge, as did the district court, the positive and unique aspects of [VMI]." United States v. Virginia, 967 F.2d 890, 894 (4th Cir. 1992); *see* Suzanne Fields, *Assault on VMI Could Backfire on Feminists*, ATLANTA J. & CONST., Oct. 8, 1992, at A12 (explaining that those who support single-sex education for women believe that women thrive as leaders in all fields at colleges where they do not have to compete with men and that this realization is reflected in increasing enrollment at women's colleges). Approximately 64,000 women and 11,400 men attend single-sex colleges. *Id.*

8. The Citadel has come under similar fire for its all-male admissions policy. Three female veterans have sued the school for access to some of its classes. In response, South Carolina's Higher Education Commissioner has asked the Citadel to admit women to avoid a court battle to defend the school's admissions policy which, according to the Commissioner, the school would inevitably lose. *The Citadel Told to Admit Women*, WASH. TIMES, Oct. 31, 1992, at A2.

9. VA. CODE ANN. § 23-92 (Michie 1985).

10. VA. CODE ANN. § 23-104 (Michie 1985).

nia's fifteen state supported institutions of higher education are generally supervised by the State Council of Higher Education. The Virginia General Assembly assigns various responsibilities to the Council of Higher Education, including the responsibility "[t]o review and approve or disapprove any proposed change in [a Virginia institution of higher education's] statement of mission," however, the General Assembly delegates each institution the authority to change its mission and to establish admissions criteria.[11] According to the May 16, 1986 final report of the Mission Study Committee of the VMI Board of Visitors, which was cited by the Fourth Circuit, VMI's mission is to produce "citizen-soldiers . . . educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary."[12] As the Fourth Circuit noted in its opinion, VMI's mission focuses on character development and leadership training through a unique and intense adversative process that "emphasizes physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values."[13]

PROCEDURAL BACKGROUND

On March 1, 1990, the United States filed suit against the Commonwealth of Virginia, the Governor of Virginia, VMI, its Superintendent and Board of Visitors, and the State Council of Higher Education and its members and director. The suit alleged that the defendants, "by maintaining a policy of limiting admission to the four year undergraduate degree program of VMI to males only," had discriminated on the basis of sex in violation of the Title IV of the Civil Rights Act of 1964, 42 U.S.C. section 2000c-6, and the Equal Protection Clause of the Fourteenth Amendment.[14] The action, filed in the United States District Court for the Western District of Virginia, sought to enjoin permanently the defendants from discriminating on the basis of gender in the operation of VMI.

The ironies in the VMI case are pronounced. Virginia's Governor, Douglas Wilder, the nation's only black governor, was cast against the forces of gender integration when only a few decades before the forces of racial segregation forced him to attend law school out of state. The attorney general for the Commonwealth of Virginia, Mary Sue Terry, the first woman elected to statewide office in Virginia's history, was catapulted into the middle of this controversy as a defender of VMI's all-male admissions policy by virtue of her position as Attorney General.

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11. VA. CODE ANN. § 23-9.6:1(b) (Michie 1985).

12. United States v. Virginia, 766 F. Supp 1407, 1425 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *petition for cert. filed* (Jan. 19, 1993).

13. United States v. Virginia, 976 F.2d 890, 893 (4th Cir. 1992). The adversative process, as adopted at VMI, "is designed to foster in VMI cadets doubts about previous beliefs and experiences and to instill in cadets new values which VMI seeks to impart." *Id.*

14. Brief for the United States as Appellant, at 2, United States v. Virginia, 976 F.2d 890 (4th Cir. 1992) (No. 91-1690).

The VMI foundation and Terry clashed at the outset of the litigation. Terry's legal strategy for defending VMI was criticized by some who suggested that she was intentionally pursuing a tack that would placate VMI alumni by appearing to vigorously defend VMI's single-sex admissions policy, while ultimately satisfying her female supporters by insuring that VMI would lose the law suit. The VMI foundation's argument was premised on the contention that forced admission of women to VMI would fundamentally alter the educational experience that VMI provides to young men. The experience "combines a demanding academic program with a rigid disciplinary system in the classroom and in the barracks," and arguably cannot be duplicated in a coeducational environment.[15]

Terry's argument was predicated upon the assertion that Virginia has an important interest in preserving the diversity of the state supported system of higher education and maintaining a balance in the educational choices offered to its citizens.[16] Terry argued that VMI's admissions policy is substantially related to the achievement of the Commonwealth's interest because (1) VMI's residential military program for men contributes to this diversity and balance, and (2) admission of women would eliminate one of only two institutions within Virginia that offer a single gender experience for men.[17] Terry's argument also asserted that VMI's program is not inherently superior to educational programs offered at other institutions within the state system.[18] The evidence elicited at trial revealed that the experience offered at VMI is "unique," however, VMI supporters argued that VMI's uniqueness does not render it inherently superior.

On March 26, 1990, Terry filed an answer on behalf of the Commonwealth, VMI, and its Board of Visitors and Superintendent. Terry also filed a counterclaim seeking declaratory relief that VMI's male-only admissions policy was lawful. Governor Wilder filed a motion to dismiss himself as a defendant from the case. After the trial judge denied Governor Wilder's motion, Wilder filed an answer to the United States' complaint stating that the failure of VMI to admit females to the institution was against his personal philosophy and that it was his opinion that no person should be denied admittance to a state supported school because of his or her gender.[19] Governor Wilder also stated, however, that despite the fact that VMI's admissions policy was against his personal philosophy, he would abide by the court's decision to the full extent of his authority.[20]

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15. VMI Foundation Complaint at 4.

16. VMI Complaint at 4.

17. *Id.* at 16.

18. *Id.* at 6. Terry's complaint pointed out that the ROTC program at Virginia Tech provides females with the benefits of a military-disciplined lifestyle, including the opportunity to develop leadership skills within an organized and uniformed cadet corps residing in a dormitory barracks. *Id.*

19. Joint Appendix at 42.

20. Brief of Appellees, at 9, United States v. Virginia, 976 F.2d 890 (4th Cir. 1992) (No. 91-1690).

In November 1990, United States District Judge Jackson Kiser granted permissive intervention to the VMI Foundation and the VMI Alumni Association to defend VMI's all-male admissions policy. Judge Kiser also dismissed the State Council of Higher Education and its members and director from the case and stayed the proceedings as to the Commonwealth which, along with Governor Wilder,[21] agreed to be bound by the litigation. On November 28, 1990, Virginia Attorney General Mary Sue Terry sought to withdrawal as counsel for the Commonwealth, VMI, and its Superintendent and Board of Visitors. Terry based this motion upon the assertion that a conflict of interest existed between the positions of the Commonwealth and the other named defendants. In a letter to Governor Wilder, Terry explained that in the absence of a statute expressing the Virginia General Assembly's view on the policy issue, Governor Wilder's position was "persuasive" as to the Commonwealth's policy and inconsistent with VMI's position. Terry also asserted that she could not continue to represent the Commonwealth because she had received confidential information in connection with her representation of VMI. Judge Kiser granted Attorney General Terry's motion to withdraw, and counsel for the VMI Foundation and Alumni Association were appointed as substitute counsel for the remaining defendants.[22] Terry appointed private counsel to represent the Commonwealth of Virginia pro bono, stating in the letter of appointment that '[t]his appointment is necessitated as a result of the Governor's articulation of an educational policy position on behalf of the Commonwealth contrary to that of the VMI Board of Visitors."[23]

LEGAL BACKGROUND

Because genuine psychological and physiological differences exist between gender groups, the Constitution tolerates laws that discriminate between the two sexes. 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. The problem posed to legislatures and courts is to determine correctly whether these fundamental differences are substantial enough in a given context to justify discriminatory treatment under the law.

In the context of equal protection, both through the Fourteenth Amendment and as embodied in the Fifth Amendment Due Process Clause, the courts assess different types of classifications under varying standards of judicial review. For equal protection problems involving suspect classifications such as classifications based upon race, the classification is assayed

21. Governor Wilder was represented by counsel at trial, but he did not testify, present any evidence, or cross-examine any witnesses. *Id.*

22. District Court Docket Sheet at 2.

23. Brief For United States As Appellant, at 5, United States v. Virginia, 976 F.2d 890 (4th Cir. 1992) (No. 91-1690).

under a "strict scrutiny" standard. The strict scrutiny standard is two-pronged: (1) the discrimination or classification must be justified by a compelling state or governmental interest; and (2) there must be no less discriminatory means to advance that interest.[24] The strict scrutiny test almost inexorably leads to the invalidation of the governmental policy or objective because courts are suspicious that such classifications are more often than not based on prejudice, stereotype or animus toward the group being discriminated against. Under the strict scrutiny test, little or no deference is given to the government and the strong tendency is to strike the classification.

The United States Supreme Court's application of the Equal Protection Clause towards gender-based classifications is considerably more flexible than its application of the Equal Protection Clause to race-based classifications.[25] Under the mid-level scrutiny test, the Court neither prohibits the use of all gender classifications (as it does in cases involving race-based classifications under the strict scrutiny test), nor does it defer to legislative decisions (as it does in cases involving economic-based classifications). The Court's application of the Equal Protection Clause to gender-based classifications are essentially ad hoc evaluations that depend on whether justices view the challenged law as one that is based upon gender stereotypes or is designed to advance an "important" governmental interest.[26] The second prong of the mid-level test, the determination of whether the challenged law bears a "substantial relationship" to the achievement of an important governmental objective, is in essence an ad hoc balancing test that allows the justices to adjust the necessary relationship in light of the substantiality of the asserted governmental interest at stake. In actuality, the more important the asserted governmental interest at stake, the more likely the

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24. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that when government makes differentiations between persons exercising fundamental rights such differentiations cannot be upheld unless government can demonstrate that classification is necessary to promote compelling interest).

25. The "strict scrutiny" or "compelling interest" that the Court applies in cases involving race-based classifications almost inexorably results in the invalidation of the challenged law. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (holding that state court could not remove infant child from custody of its natural mother simply because mother had married person of different race); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (striking down doctrine of separate but equal in context of public education).

26. *Compare* Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that no legitimate reason for denying female member of uniformed services right to claim her spouse as dependent for purposes of obtaining increased quarters allowances and medical and dental benefits) *and* Reed v. Reed, 404 U.S 71 (1971) (finding no legitimate interest served by preferring male applicants over female applicants for position of administrator of intestate estates); *with* Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding statutory requirement that provided for discharge of male naval line officers passed over for promotion after nine years of service, while women officers passed over for promotion were not discharged until after thirteen years, because statute compensated for fewer opportunities for women line officers for promotion [due to exclusion of women from all combat and most sea duty]).

Court will find that a law that creates a gender-based classification is sufficiently related to the achievement of that interest.

In *Craig v. Boren*,[27] the Supreme Court defined the intermediate scrutiny test appropriate for the examination of sex-based classifications. "To withstand constitutional challenge, previous cases establish that classifications by gender must serve [sic] important governmental objectives and must be substantially related to achievement of those objectives."[28] 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.'" [29] The state's proffered interest must be examined carefully to determine whether it "reflects archaic and stereotypic 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."[30] Moreover, even if the asserted interest is legitimate and important, there must still be shown a "direct, substantial relationship between objective and means."[31] The burden is met only by showing at least that the discrimination serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.[32]

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. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "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.[33] 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 class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.[34]

Controlling Precedent

In *Brown v. Board of Education*,[35] the Supreme Court overturned the race-based doctrine of "separate but equal," declaring that "education is

27. 429 U.S. 190 (1976).

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

29. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)); *see* Personnel Admin. v. Feeney, 442 U.S. 256 (1979).

30. 458 U.S. at 725.

31. *Id.*

32. *Id.* at 730.

33. *Id.* at 724-25.

34. *Id.* at 731 n.17.

35. 347 U.S. 483 (1954).

perhaps the most important function of state and local governments."[36] The *Brown* Court noted that the quality of education is determined by more than equality among tangible factors.

Thus, the *Brown* Court based its determination, that separate but equal educational facilities for students based upon race was anathema to the Constitution, upon the psychological harm inflicted upon children denied the right to attend school with other children solely on the basis of race.[37]

Although the *Brown* Court's sweeping pronouncement that "in the field of public education the doctrine of 'separate but equal' has no place,"[38] suggests a categorical ban on the use of separate but equal educational facilities, subsequent to *Brown* courts 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. For example, in *Vorchheimer v. School District*,[39] the United States Court of Appeals for the Third Circuit considered a policy of the City of Philadelphia which maintained a school system that involved four types of high schools with different admissions requirements.[40] These schools were denominated as technical, magnet, and comprehensive high schools that were generally open to both sexes. The school system included two single-sex academic high schools that offered only college prepatory classes.[41] Approximately seven percent of the school-age population was eligible to attend the academic schools. 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. Both Central High School and Girls High School, its female equivalent, were "comparable in quality, academic standing, and prestige."[42] The Third Circuit held that although the plaintiff had a valid interest in an expanded freedom of choosing the high school that she would attend, the expansion of her choice was outweighed by the harm that providing her 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

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

37. *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 racial[ly] integrated school system.

Id. at 494.

38. *Id.* at 495.

39. 532 F.2d 880 (3rd Cir. 1976), *aff'd per curiam*, 430 U.S. 703 (1977).

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

41. *Id.* at 881.

42. *Id.* at 882.

> 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.[43]

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 squarely address the constitutionality of single-sex public education until 1982 when it decided *Mississippi University for Women v. Hogan*.[44] Both sides in the VMI litigation agreed that the Supreme Court's decision in *Hogan* controlled the outcome of this case. In *Hogan* the Supreme Court addressed whether Mississippi's justification for the policy of allowing men to audit nursing courses but not grant 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. Mr. Hogan was a registered nurse and a Mississippi resident who applied for admission to the school of nursing, which offered baccalaureate and graduate programs in nursing. Hogan met the qualifications for admission to the nursing program on all counts except one, he was a male and the school restricted admissions to females only. Thus, Hogan was denied admission to the school of nursing solely because of his gender. Mississippi statutes, which included the charter of the University, restricted the enrollment at MUW to women. The Supreme Court, in a five to four vote, invalidated the exclusion of males from the state nursing school.

The *Hogan* Court left unanswered the question of whether MUW could deny men admission to other schools within the University: "we decline to address the question of whether MUW's admissions policy, as applied to males seeking admissions to schools other than the school of nursing, violates the Fourteenth Amendment."[45] 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

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43. *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 sole basis of sex where male plaintiffs had complete range of other state institutions to attend), *aff'd*, 401 U.S. 951 (1971).

44. 458 U.S. 718 (1982).

45. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982).

related to the achievement of those objectives.[46] Mississippi justified the school's single-sex admissions policy on the grounds that it compensated for discrimination against women. Justice O'Connor found this proffered justification unpersuasive because of the fact that women were not underrepresented in the field of nursing. 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.[47]

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 limited to the context of a professional nursing school.[48] 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."[49] Justice Powell, joined by Justice Rehnquist, offered the most compelling dissent. Justice Powell determined that "this is simply not a sex discrimination case. The Equal Protection Clause was never intended to be applied to this kind of case."[50] Justice Powell argued that the majority's opinion invariably would prohibit states from providing single-sex schools. 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. Thus, Justice Powell found no justification for judicial intervention because Hogan could have received a similar education at another school.[51]

UNITED STATES V. VIRGINIA

District Court's Opinion

The United States first challenged VMI's all-male admissions policy in the United States District Court for the Western District of Virginia. The United States argued that as a state supported college, VMI's refusal to admit females to the institute regardless of their qualifications violates the Equal Protection Clause of the Fourteenth Amendment. After a six-day trial beginning on April 4, 1991, United States District Judge Jackson Kiser concluded in a memorandum opinion that VMI's male-only admissions policy existed within the bounds of the Fourteenth Amendment.[52] Judge

46. *Id.* at 724.
47. *Id.* at 729.
48. *Id.* at 734 (Burger, C.J., dissenting).
49. *Id.* at 734-35 (Blackmun, J., dissenting).
50. *Id.* at 745 (Powell, J., dissenting).
51. *Id.* (Powell, J., dissenting).
52. United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991).

Kiser held that VMI's practice of excluding women passed muster under the Equal Protection Clause.[53] In reviewing VMI's admission policy, the district court applied the intermediate scrutiny test that requires the state to establish an *important* governmental objective and mandates that the means of furthering that objective are *substantially* related to its achievement.[54]

The district court found *Hogan* factually distinguishable from the VMI facts. According to Judge Kiser, unlike the situation in *Hogan*—where the majority of the Court found that the admission of men to nursing classes did not affect teaching style, the performance of female students, or otherwise frustrate the Mississippi University for Women School of Nursing's educational goals—the record abounded with evidence that VMI's educational goals would be drastically altered by the admission of women.[55] The district court also noted two other factors that distinguished *Hogan* from the case at bar. First, Judge Kiser stated that the reasons proffered to justify the discrimination were different:

> In *Hogan*, Mississippi maintained that a female-only admissions policy at MUW was affirmative action which was justified to compensate women for past discrimination whereas here, Virginia urges that a male-only admissions policy at VMI promotes diversity within its statewide system of higher education.[56]

The district court observed that in *Hogan* the Court found that Mississippi's policy failed both prongs of the intermediate scrutiny test. In contrast, Judge Kiser explained, Virginia's policy satisfied the intermediate scrutiny test because diversity in higher education is an important governmental objective and maintaining a single-sex admissions policy at an institution is the only way to attain single-gender diversity.[57] Second, the district court noted that unlike the plaintiff in *Hogan* who was a resident of the town where the nursing school was located and thus would not have an opportunity to study nursing within commuting distance of his home if not admitted to MUW's nursing school, VMI does not provide a commuting option because all cadets are required to live in barracks. Judge Kiser also noted that VMI's policy did not deny females the opportunity to study any particular academic program because Virginia Polytechnic Institute State University, located in Blacksburg, Virginia, offers all of the same courses and military instruction to both male and female students.[58]

The district court was impressed with the evidence elicited at trial which supported the contention that both male and female students benefit from

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53. *Id.* at 1415.
54. *Id.* at 1410.
55. *Id.* at 1411.
56. *Id.*
57. *Id.*
58. *Id. But see id.* at 1421 (finding that VMI experience is dramatically different from experience offered at Virginia Tech).

attending single-sex colleges.[59] Judge Kiser found that converting VMI from a single-sex institution to a coeducational institution would result in changes in methods of instructions and living conditions. Judge Kiser further observed that, as the West Point experience bears out:

> the presence of women would tend to distract male students from their studies. . . . It would also increase pressures relating to dating, which would tend to impair the *esprit de corps* and the egalitarian atmosphere which are critical elements of the VMI experience.[60]

The district court noted that physical changes would be necessitated by coeducation at VMI. Allowing for personal privacy by placing locks on doors and covers on windows, Judge Kiser observed, would change the adversative environment. The court also observed that the introduction of women at VMI would detract from the rigor of the physical education requirements currently imposed on cadets.[61] Finally, the court found that expert testimony supported the observation that the adversative model of education is not conducive to the developmental needs of women who typically thrive in a system that "provides more nurturing and support for the students."[62]

The district court also considered the extent to which women were deprived of an educational opportunity by VMI's all-male admissions policy. Judge Kiser acknowledged that "[n]o other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI."[63] However, the court aptly observed that if VMI were to admit women its uniqueness would be lost and it would become substantially similar to the military barracks at Virginia Tech. To a certain degree, Judge Kiser foreshadowed the Fourth Circuit's opinion stating that:

> Gender discrimination, as a rule, works to the benefit of one group and to the detriment of another. . . . Consequently, it seems to me that the criticism which might be directed toward Virginia's higher educational policy is not that it maintains VMI as an all-male institution, but rather that it fails to maintain at least one all-female institution.[64]

The district court determined that VMI could remain all-male notwithstanding the fact that there were no comparable public institutions available to females only. Thus, Judge Kiser concluded that Virginia's maintenance of an all-male military institute comported with equal protection requirements.

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59. *See id.* at 1411-12 (reciting testimony elicited at trial which explained beneficial effects of single-sex education).

60. *Id.* at 1412.

61. *Id.* at 1413.

62. *Id.*

63. *Id.* at 1413-14.

64. *Id.* at 1414.

Specifically, the court found that VMI's admission policy did not violate the equal protection rights of females denied admission to the institute because (1) the institute supported the substantial government interest of maintaining diversity throughout the state educational system by preserving "adversarial" and "barracks-oriented" educational opportunity, and (2) because the exclusion of females was the only way to achieve this goal.

Fourth Circuit's Opinion

The Fourth Circuit heard arguments on April 8, 1992 and issued its opinion on October 5. The court began its opinion by acknowledging the uniqueness of the VMI experience, the success of the VMI program, and the accomplishments of its alumni.[65] Perhaps the fact that the court gave judicial notice to the accomplishments of VMI made the end-result of its decision more palatable to supporters of VMI's all-male admissions policy. Indeed, the court's obeisance to the merits and accomplishments of VMI caused considerable confusion as to whether VMI could ultimately remain a single-sex institution and led several commentators to believe that VMI had "won" the case.[66]

As introduction, the Fourth Circuit referred to the opening sentence in Judge Kiser's opinion below which noted that in May 1864, during the Civil War, VMI bravely fought Union troops at New Market, Virginia and that in this litigation "the combatants have again confronted each other but this time the venue is in this court."[67] Judge Neimeyer aptly noted:

> What was not said [in the district court's introduction] is that the outcome of each confrontation finds resolution in the Equal Pro-

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65. United States v. Virginia, 976 F.2d 890, 892-93 (4th Cir. 1992). The court noted that:

> [VMI's] graduates have distinguished themselves in the 150 years since [its founding]. A VMI professor, Thomas "Stonewall" Jackson, achieved notoriety as a confederate general during the Civil War. The VMI cadet corps fought Union troops at New Market, Virginia, and almost 1800 alumni (constituting 94% of all VMI graduates at the time) fought in the Civil War. Among the thousands of alumni who have served this country during war is General of the Army George C. Marshall, and six have been awarded the Congressional Medal of Honor. VMI graduates have achieved similarly in civilian life. The school's success and reputation are uncontroverted in this case.

Id. at 893.

66. *See, e.g.*, R.C. Copeland, Jr., *No Curtains for VMI*, WASH. TIMES, Oct. 13, 1992, at F2 (arguing that VMI won under Fourth Circuit's ruling); Fields, *supra* note 7, at A12 (stating that "[i]n politically correct America, this decision is a refreshing affirmation of common sense, validating the lower court's judgment that women would wreck [VMI's educational program]" in order to satisfy a superficial interpretation of equal rights); Kmiec, *supra* note 2, at A15 (interpreting Fourth Circuit's decision as victory for VMI stating that "VMI won because it proved that VMI's single-sex policy serves an important public purpose: namely, providing a better learning environment for some students and some purposes"); *VMI Should Remain All-Male*, WASH. POST, Oct. 23, 1992, at A20 (arguing that Fourth Circuit's praise for VMI's program means that VMI won its case).

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

> tection Clause. When the Civil War was over, to assure the abolition of slavery and the federal government's supervision over that policy, *all* states, north and south, yielded substantial sovereignty to the federal government in the ratification of the Fourteenth Amendment, and every state for the first time was expressly directed by federal authority not to deny any *person* within the state's jurisdiction "equal protection of the laws"(citation omitted). The government now relies on this clause to attack VMI's admissions policy.[68]

After reviewing the appropriate analytical framework for gender classifications, the court stated in dicta:

> [W]e must first decide whether VMI's male-only admissions policy, maintained pursuant to state-delegated authority, is a classification justified by a fair and substantial relationship with the institution's mission of developing citizen soldiers, and this in turn leads to an examination of whether VMI's mission would be materially altered by the admission of women.[69]

This question is irrelevant in terms of the ultimate disposition of the case. However, by including this dicta, the Fourth Circuit gave the VMI foundation a Pyrrhic victory, agreeing with the VMI foundation's position that the admission of women to VMI would fundamentally change the type of educational experience that VMI now offers,[70] while ultimately ruling against VMI on the underlying equal protection issue.

Single-sex colleges, the court acknowledged, are positive for both sexes: Students become more academically involved, interact with faculty frequently, show enhanced intellectual self-esteem, and are generally more satisfied with college life than coeducational enrollees. The court further stated that the admission of women to VMI would detract from attributes that make attending VMI a unique experience. The court found that the admission of women to VMI would lower physical training standards, require accommodations for privacy, and reduce the level of psychological and emotional hardening. Male exclusiveness at VMI, according to the court, is substantially related to sound pedagogical objectives.[71] However, the substantiality of this

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68. *Id.* at 895.

69. *Id.* at 896.

70. *Id.* at 898. The Fourth Circuit noted:

> [T]he record supports the district court's findings that at least three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation, leading to a substantial; change in the egalitarian ethos which is critical aspect of VMI's training. . . . The district court's conclusions that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology are adequately supported.

Id. at 896.

71. *Id.* The focus on the fundamental changes that coeducation would visit upon VMI has given rise to the VMI conundrum. The conundrum is that VMI's uniqueness must necessarily

relationship is insufficient for equal protection purposes because of the context in which male exclusiveness at VMI exists. The relationship between the male exclusiveness at VMI and the important state interest in diversity is not satisfied, according to the Fourth Circuit, until the state justifies its decision not to offer females a single-sex military education of the type available to male students.

The court rejected the government's argument that VMI's admissions policy was based upon impermissible stereotyping and overly-broad generalizations. Recognizing that there are fundamental physiological and psychological differences between men and women, the court found that single-genderness in education can be "pedagogically justifiable."[72] The court noted that "the data suggests that differences between a single-gender student population and a coeducational one justify a state's offering single-gender education."[73]

After acknowledging VMI's uniqueness, however, the Fourth Circuit shifted gears and addressed itself to the real legal question in the case: whether the unique benefit offered by VMI can be denied to women under an asserted state policy of diversity. Thus, the court found that in order for VMI to prevail, it needed to show why Virginia offers the unique type of VMI experience to men and not to women. The court noted that although VMI's program is tailored to males, it is possible to provide a single-sex female institution that was tailored to females.

The court rejected Judge Kiser's legal conclusion that VMI's all-male admissions policy contributed to a state policy of gender diversity although there were no similar public institutions for females. The court observed that

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deprive women of an educational opportunity. For to admit women to VMI would forever destroy the educational environment that differentiates VMI from other institutions supported by the Commonwealth. The overwhelming evidence presented at trial and accepted by the Fourth Circuit suggests that the rat system for first year cadets, barracks life with its absence of personal privacy, and the requirement of uniform treatment are integral features of the VMI experience that would be impossible to recreate in a coeducational institution. In theory, Judge Neimeyer's suggestion that the Commonwealth establish a comparable institution for women is the best solution. This would enhance educational diversity. In reality, however, this proposed solution is infeasible. There are intangible factors that make a separate but equal program for women infeasible. For example, any new all-female institution would be devoid of VMI's "old boys" network, as the VMI alumni association is derisively referred to by proponents of a co-educational VMI. The "old boys" network offers strong bonds of loyalties and "connections" to alumni who occupy some of the most powerful and influential positions in Virginia. Further, as Judge Kiser noted in his memorandum opinion, there is much speculation but very little evidence concerning the demand amongst females to attend VMI. Also, it is unlikely that Virginia would invest in the establishment of a new all-female military institution without strong evidence indicating a substantial demand amongst females for such an opportunity. Furthermore, the expense of establishing a new institution is prohibitive, especially considering the fact that the Fourth Circuit's opinion was vague as to what type of institution would suffice.

72. *Id.* at 898 (citing ten-year empirical study which found that single-sex colleges have advantages over coeducational colleges in numerous areas).

73. *Id.*

while providing diversity in higher education through the maintenance of single-gender institutions may rise to the level of an important governmental interest, VMI's all-male admissions policy did not pass the second prong of the intermediate scrutiny test because by not offering a similar opportunity for women, VMI's single-gender admissions policy was not substantially related to an important governmental objective.[74] The court did note, however, that diversity was an important governmental objective. But it rejected the concept advanced by Judge Kiser that VMI passed the important governmental interest test by showing that the admission of women to VMI would reduce the diversity of educational options offered by the Commonwealth.

The court determined that a sufficient level of diversity, that is, a level of diversity that would qualify as "important" under equal protection analysis, could not be achieved by providing a single-sex educational experience to members of one sex without offering a similar experience to members of the other sex. Thus, the Fourth Circuit determined that, assuming arguendo that the Commonwealth offered a similar experience to females and diversity was achieved, VMI's single-gender admissions policy would be constitutionally justified. The court explained that a policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender. Accordingly, under the Fourth Circuit's rationale, an all-male state-supported college or university without an all-female counterpart does not sufficiently contribute to diversity so as to satisfy the Equal Protection Clause.

After observing that VMI had "adequately defended a single-gender education and training program . . . but it has not adequately explained how the maintenance of one single-gender institution gives effect to, or establishes the existence of, the governmental objective advanced to support VMI's admissions policy, a desire for educational diversity,"[75] the court reached three conclusions. First, the court concluded that the single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex. Second, the court concluded that the introduction of women at VMI would materially alter the very program in which women seek to participate. Finally, the court concluded that the Commonwealth of Virginia, despite its announced policy of diversity, failed to articulate an important policy that substantially supports offering

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74. The court cast doubt upon VMI's contention that its male-only admissions policy is part of a state announced policy. The court cited statements made by Governor Wilder and Attorney General Terry, which indicated their respective lack of support for VMI's all-male admissions policy, in support of its proposition that VMI's single-sex admissions policy is not an official state policy. *Id.* at 899. VMI's lawyers were highly critical of Mary Sue Terry after the Fourth Circuit ruling. VMI's lawyers claimed that the comments Mary Sue Terry made when dropping out of the case in November 1990 were "inappropriate and legally incorrect." *VMI Appeals Ruling on Admissions*, WASH. POST, October 20, 1992, at D5. In their request for a rehearing en banc, VMI claimed that Terry's "inaccurate and prejudicial statements" were made only to give herself a way of bailing out of "politically charged litigation." *Id.*

75. United States v. Virginia, 976 F.2d 890, 899-900 (4th Cir. 1992).

the unique benefits of a VMI-type of education to men and not to women.[76]

It is because of the fundamental differences between the sexes that the Fourth Circuit has apparently recognized an exception, in the area of gender discrimination, to the venerable rule established in *Brown v. Board of Education*[77] that separate but equal in the field of public education is repugnant to constitutional principles. Because of the genuine differences between the sexes that make single-gender institutions of higher education beneficial to members of both sexes, and because such institutions provide educational diversity within a state system of higher education, the court did not directly order VMI to admit women. But because Virginia and VMI failed to articulate an important government objective that supports the offering of the unique VMI experience to men only, the Fourth Circuit vacated the district court's judgment and remanded the case to the district court to require the Commonwealth to "formulate, adopt, and implement a plan that conforms" to the constitutional principles which govern gender-based classifications.[78] The court further explained that "VMI's continued status as a state institution is conditioned on the Commonwealth's satisfactorily addressing the findings we affirm and bringing the circumstances into conformity with the Equal Protection Clause of the Fourteenth Amendment."[79]

The court did not prescribe a specific remedial measure for the Commonwealth and VMI to undertake in order to comply with equal protection requirements. Rather, the court suggested three possible measures that the Commonwealth might undertake to satisfy the guarantees of the Fourteenth Amendment: (1) admit women to VMI and adjust the program accordingly; (2) establish a parallel institution or parallel programs to those offered at VMI; or (3) abandon state support of VMI. The court explained that these were merely suggestions and that VMI and the Commonwealth might be able to come up with "other more creative options or combinations."[80]

CONCLUSION

The Fourth Circuit left Virginia with the seemingly impossible task of divining an acceptable option that would render VMI's single-gender admissions policy constitutional. The court suggested that the Commonwealth search for "creative options" for equal opportunity for women. The inherent ambiguity of the term "creative option" leaves the Commonwealth in an untenable position. If the Commonwealth were to eschew the court's first two options, for example, accepting female applicants or taking the school private, and attempt to come up with its own alternative—a venture that

76. *Id.* at 900.

77. 347 U.S. 483 (1954) (holding that in field of public education doctrine of separate but equal has no place and that separate educational facilities are inherently unequal).

78. 976 F.2d 890, 900.

79. *Id.*

80. *Id.*

would undoubtedly require substantial state funds—it would not be guaranteed equal protection compliance without judicial ratification. And the uncertainty as to whether an alternative approach would suffice under the constitutional requirements would discourage the Commonwealth form attempting this option. The lawyers for VMI, probably realizing the precariousness of the Commonwealth's position under the Fourth Circuit's opinion, petitioned for an en banc rehearing which was denied on November 19, 1992.[81] Judges Widener and Hamilton voted to rehear the case, Chief Judge Ervin and Judges Russell, Hall, Phillips, Murnaghan, Wilkins, Niemeyer, and Williams voted to deny a rehearing en banc. Judges Wilkinson and Luttig abstained from the decision.[82] VMI filed a petition for certiorari on January 19, 1993.[83]

The following two essays by Allan Ides, Professor of Constitutional Law at Washington and Lee and Mary Cheh, Professor of Constitutional Law at the George Washington University National Law Center address the controversial and provocative issues surrounding VMI's all-male admissions policy.

Professor Ides first discusses the scope of judicial review in the enforcement of judicially created constitutional rights. Particularly, Professor Ides examines VMI's admissions policy under the intermediate scrutiny test, applicable to gender discrimination cases, as described by the Supreme Court's equal protection jurisprudence. Professor Ides then points out that "focusing exclusively on the absence of an all-female VMI-style institution or program . . . 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?"[84]

Professor Cheh criticizes the Fourth Circuit's opinion in the VMI case for erroneously applying the intermediate scrutiny test, acquiescing to certain separate male and female roles, and "want[ing] to affirm that sex-segregated education is not only allowable but desirable."[85] Professor Cheh then explores why an all-male VMI is not a benign educational choice and suggests that a separate VMI for men and women is constitutionally impossible because of historical discrimination against women in the military.

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81. United States v. Virginia, 1992 U.S. App. LEXIS 30490 (Nov. 19, 1992).

82. *Id.*

83. 61 U.S.L.W. 3590 (Feb. 23, 1993).

84. Allan Ides, *The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function*, 50 WASH. & LEE L. REV. 35, 45 (1993).

85. Mary M. Cheh, *An Essay on VMI and Military Service: Yes, We Do Have to Be Equal Together*, 50 WASH. & LEE L. REV. 49, 54-55 (1993).