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THE CURIOUS CASE OF THE VIRGINIA MILITARY INSTITUTE: AN ESSAY ON THE JUDICIAL FUNCTION

ALLAN IDES*

The Virginia Military Institute (VMI), an all-male military college located in Lexington, Virginia, is one of fifteen institutions of higher education directly supported by the Commonwealth of Virginia. In March of 1991, the Department of Justice filed a civil rights enforcement action against the Commonwealth, claiming that VMI's all-male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. After a trial on the merits, the district court ruled in favor of the Commonwealth, finding that the discriminatory admissions policy was substantially related to an important government interest—namely, the promotion of diversity in higher education.[1] The United States Court of Appeals for the Fourth Circuit reversed and remanded the case with instructions to implement an appropriate remedy.[2]

Given the state of current constitutional doctrine, the decision of the court of appeals was far from surprising. Yet, despite the predictable nature of the outcome and regardless of one's views on the admission of women to VMI, the VMI case does raise interesting and important issues regarding the scope of judicial review in the enforcement of judicially created constitutional rights. In what follows, I will first discuss the application of doctrine developed through precedent as that doctrine applies to the VMI admissions policy; in the second section, I offer an alternative approach to the adjudication of gender discrimination cases arising under the Fourteenth Amendment. That alternative is, of course, placed in the context of the VMI litigation. My primary point in presenting this alternative, however, has less to do with the jurisprudence of gender discrimination than it does with an exploration of the judicial role in the adjudication of judicially created constitutional rights.

CONSTITUTIONAL LAW AS DOCTRINE: APPLYING THE ESTABLISHED FORMULA

The intermediate scrutiny test[3] is the judicially created method for assessing claims of gender discrimination arising under the Equal Protection

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* Professor of Law, Washington and Lee University School of Law. I am indebted to my students in Constitutional Law, Fall '91 and Fall '92, for their many insights into the issues discussed in the text. Also my thanks to Denis Brion whose critical comments on an earlier draft improved the overall project tremendously, and to Lash LaRue for sharing his intriguing perspectives on judicial review.

1. United States v. Virginia, 766 F. Supp. 1407, 1413 (W.D. Va. 1991), *vacated and remanded*, 976 F.2d 890 (4th Cir. 1992).

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

3. *See* Rostker v. Goldberg, 453 U.S. 57, 69 (1981) (discussing heightened scrutiny for gender-based classifications); Craig v. Boren, 429 U.S. 190 (1976).

Clause.[4] Regardless of which linguistic formula one adopts, the essence of intermediate scrutiny, as applied in the context of gender discrimination, boils down to a simple proposition: the government is usually forbidden from discriminating on the basis of gender, but in rare cases may do so if the government asserts a sufficiently important reason for the discrimination and devises a statute or program that is carefully designed to advance the asserted interest. The latter qualification is sometimes phrased in terms of demonstrating a substantial relationship between the gender classification and the interest to be advanced.[5]

Obviously, this test gives the judiciary a certain degree of latitude in determining the legitimacy of any particular gender discrimination. There is no mathematical formula for measuring importance or for calculating the degree to which a statute must be appropriately tailored. However, the concept of substantial relationship is not completely elastic. To survive intermediate scrutiny, a law favoring one gender over the other must, at a minimum, be based upon a real distinction between the sexes. Moreover, that distinction must be directly related to the governmental interest to be advanced by the discrimination, and that interest must be deemed sufficiently important to overcome what has become a strong presumption against gender classifications. Perhaps most importantly, the means-ends analysis of intermediate scrutiny narrowly focuses the attention of the court on a finite set of factors, the consequence of which is to limit the court to a somewhat microscopic view of what may be a macroscopic problem.

The district court applied the intermediate scrutiny test and concluded that the VMI admissions policy presented that rare case of permissible gender discrimination. The court's conclusion was premised on a series of interrelated findings, none of which were challenged by the Department of Justice at trial: 1) the promotion of diversity in higher education is an important state goal; 2) single-sex schools, such as VMI, are educationally sound and contribute to diversity; 3) VMI's adversative system[6] of education also contributes to diversity; and, 4) transforming VMI to a coeducational institution would undermine the goal of diversity by eliminating the school's single-sex status and by drastically altering the school's unique adversative system of education. Based on the foregoing, the district court concluded that VMI's single-sex status was substantially related to the advancement of diversity in higher education.

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4. U.S. CONST. amend. XIV, § 1.

5. Another way of viewing intermediate scrutiny is as a mid-point between rational basis analysis, which gives almost complete deference to legislatively created classifications, and strict scrutiny analysis, which strongly presumes the unconstitutionality of certain suspect classifications. In actual application, however, the intermediate scrutiny "mid-point" falls much closer to the strict scrutiny side of the analytical spectrum.

6. *See* United States v. Virginia, 766 F. Supp. 1407, 1421 (W.D. Va. 1991), *vacated and remanded*, 976 F.2d 890 (4th Cir. 1992) (stating that "[t]he VMI method conforms generally to an adversative, or doubting, model of education. Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience").

In arriving at this conclusion, the district court distinguished the leading precedent, *Mississippi University for Women v. Hogan*,[7] a case in which the Supreme Court upheld the claimed right of a man to enroll in a degree program at an otherwise all-female nursing school. In that case, the Court found that there was nothing about the educational mission of the nursing school that would be undermined by permitting a man to matriculate into the program. Among other things, men were already permitted to attend and participate in classes, and there was no showing that the presence of men undermined the educational experience of the women nursing students. The Court also rejected, as implausible, the state's asserted interest in promoting affirmative action for women.

The district court distinguished *Hogan* in two ways. First, relying on a series of detailed findings, the district court concluded that the presence of women in the VMI cadet corps would significantly alter the school's unique adversative system of education.[8] Second, the district court found that the claimed interest in diversity was both plausible and legitimate.[9] Moreover, that diversity interest would be directly undermined if the adversative system were altered significantly. In short, unlike the situation in *Hogan*, gender discrimination by VMI was directly relevant to advancing a plausible and legitimate (and given the result, presumably "important") state interest.

The United States Court of Appeals for the Fourth Circuit, applying the same intermediate scrutiny test within the context of the same findings, came to a very different conclusion. Although the Fourth Circuit recognized both the legitimacy of single-sex education and the value of VMI's unique adversative system of education, the appellate court nonetheless concluded that VMI's single-sex admissions policy could not survive intermediate scrutiny in the absence of some substantial reason for conferring this benefit upon men and not upon women.[10] One is tempted to conclude that the difference between the decision of the court of appeals and that of the district court is the result of a perceived malleability of the intermediate scrutiny test. Such a conclusion, however, misses a very important distinction between the two opinions, a distinction that underscores the relatively rigid nature of ends-means analysis, a rigidity that is more pronounced when the ends-means analysis is applied in the context of an elevated level of scrutiny.

In upholding the authority of VMI to discriminate, the district court's reasoning operated at a level of generality that actually avoided an application of the substantial relationship test. That reasoning went something like this: single-sex schools make a valuable contribution to educational diversity; VMI is a single-sex school; therefore VMI directly contributes to educational diversity. Of course, it follows that admission of women to VMI would undermine educational diversity. The district court followed a

7. 458 U.S. 718 (1982).
8. United States v. Virginia, 766 F. Supp. at 1413.
9. *Id.*
10. United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992).

similar line of reasoning with respect to VMI's unique, adversative system of education: the adversative system of education makes a valuable contribution to educational diversity; the adversative system can only function in a single-sex setting; VMI offers an adversative system of education in a single-sex setting; therefore VMI's method of education, which is necessarily single-sex, directly contributes to educational diversity. Again it follows that admission of women to VMI would undermine educational diversity.

At the above level of generality, and assuming one accepts the unchallenged findings, the logic of the district court's opinion appears quite reasonable. Moreover, the placement of that logic within the context of intermediate scrutiny ostensibly leads to the district court's conclusion that the test has been satisfied: an important government interest, diversity in higher education, is directly advanced by VMI's single-sex admissions policy—by the gender challenged discrimination. The problem with the district court's reasoning is not a failing in logic; rather the problem lies the lower court's implicit assumption that the substantial relationship test operates as a method for assessing generalized policy concerns—the legitimacy of single-sex schools. The opposite is true. The substantial relationship test requires a fact-specific inquiry into the precise issue presented, and the issue presented by VMI's admissions policy is not the legitimacy of a single-sex admissions policy. The issue is the legitimacy of an all-*male* admissions policy. This distinction is more than a clever play on words; it requires the analysis to shift from a somewhat abstract examination of single-sex education, to a more precise examination of the facts presented in this case, namely, a system of higher education that provides a unique educational opportunity to men. This shift in attention also forces one to apply the concept of substantial relationship—to search for the sex difference that permits the state to favor men in this context.

Applying the substantial relationship test, the question is not if a state can provide single-sex education for its citizens generally, but, under the given facts, if a state can provide such education for only its male citizens. In order to answer this question affirmatively one must show that there is some legitimate difference between men and women that permits the state to grant men, and not women, this special opportunity. With respect to single-sex education, nothing in the district court opinion suggests any basis for favoring men in this regard. In fact, the opinion explicitly states that both men and women benefit from single-sex education. Similarly, although the adversative system of education apparently functions best in a single-sex setting; it does not necessarily require an all-male setting. Thus, although the district court's opinion adequately justifies the single-sex status of VMI, it does not adequately justify the all-male status; it does not demonstrate the necessary substantial relationship between the gender discrimination and the asserted state interest of diversity in education.

From a practical perspective, the lesson is simple. In a case of gender discrimination, a court must apply the substantial relationship test to the actual discrimination practiced by the state actor. The attempted justification

must focus upon a genuine difference between the sexes that relates to the advancement of an asserted government interest. If a law favors one gender over the other, the justification for that favored status must bear upon a relevant distinction between the two genders, and relevance must be established in the context of the government interest being advanced. *Rostker v. Goldberg*[11] presents a perfect example. In *Rostker*, the Court found no violation of the equal protection principle when only men were required to register for the draft.[12] The underlying premise of the Court's opinion was that only men were eligible for combat and that the draft was designed for combat readiness. That being the case there was a necessary and substantial relationship between the government's interest—combat readiness—and the status of being a male.

In the context of the VMI case, there was no necessary relationship between educational diversity and the status of being a male. The district court's more abstract examination of the legitimacy of single-gender schools did not address this critical point, and to that extent the district court's resolution of the case appears to be flawed. But before condemning the district court's opinion, one ought to dig a little deeper into the constitutional milieu surrounding this litigation. The district court's intuitive effort to import some flexibility into the substantial relationship test appears more defensible if the litigation is examined from the context of constitutional judgment rather than constitutional doctrine.

Constitutional Judgment: Judicial Guardians and Judicial Creators

The Constitution lays the foundation for the structure of our government and sets limitations upon the exercise of governmental power. Any significant deviation from that structure or transgression of those limits is unconstitutional and void. In essence, the Constitution sets the general rules of the game by proclaiming a fundamental and binding body of principles. The judiciary, under the legacy of *Marbury v. Madison*[13], enforces that fundamental law through the power of judicial review. The judicial function, under *Marbury*, is that of a guardian. Seen as such, the Constitution and the exercise of judicial review operate as a somewhat conservative, stabilizing check upon the preferences and innovations of an evolving society.

This does not mean, however, that the Constitution has or must remain static in the absence of amendment. Much of the language of the Constitution is stated in generalities, and the ideas animating that language bespeak fluidity and invite accommodation. All branches and levels of government interpret and give meaning to that language and those ideas. Interpretation necessarily means change. Indeed, once one accepts the legitimacy or simply the practical reality of the power of judicial review, it follows that what we perceive as constitutional law will evolve through the common-law process of interpretation and application. But given the underlying premise

11. 453 U.S. 57 (1981).
12. Rostker v. Goldberg, 453 U.S. 57, 83 (1981).
13. 5 U.S. (1 Cranch) 137 (1803).

of a constitution as the embodiment of fundamental, enforceable principles, the guardian function of judicial review is not to rewrite the Constitution, but at most to mediate between the text and the political resolution of contemporary problems.

Examples of this process of mediation abound: the development of the Commerce Clause over the course of the nineteenth and twentieth centuries;[14] the evolution of principles involving the separation of powers;[15] and the shift from rules of territoriality to principles of reasonableness in the context of personal jurisdiction.[16] There is, of course, an inherent danger in this process. At some point the accommodation may break the fundamental boundaries of constitutional structure. The relative desuetude of federalism is a case in point. An overly accommodating judiciary ceases to function as a proper guardian. Viewed from the opposite perspective, an overly rigid judiciary may abuse the guardian function by preventing the natural evolution and continuing vitality of our political system. But overall, the process appears both necessary—a static Constitution would collapse—and basically sound—modern political problems ought to examined against the backdrop of experience premised upon fundamental, but somewhat flexible principles. This guardian function does not, however, adequately describe the full breadth of judicial power.

As discussed in the previous section, the Equal Protection Clause, as interpreted by the Supreme Court, prohibits states from engaging in invidious discrimination based on gender. Placing this principle within the reasoning of the foregoing discussion, one might suppose that in enforcing the gender discrimination component of the Equal Protection Clause, the judiciary simply acts as a constitutional guardian, exercising its normal checking function upon an exercise of governmental power. Specifically, in the context of VMI's all-male admissions policy, the Commonwealth of Virginia has exceeded the fundamental principles of law that serve as a foundation for all government action, and, as a consequence, the all-male admissions policy must fall. But such a supposition overlooks a potential distinction between the source of this particular exercise of judicial review and those exercises in which the judiciary actually does function as a guardian.

When VMI was founded in 1839 as an all-male military institute, the Constitution provided no grounds for challenging the school's all-male status. Nor did the ratification of the Fourteenth Amendment in 1868 alter the basic constitutional landscape with respect to gender discrimination.[17] The idea that the Equal Protection Clause, or any other substantive provision of the Fourteenth Amendment, provided special protection against gender

14. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

15. *See* United States v. Nixon, 418 U.S. 683 (1974).

16. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

17. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (upholding state refusal to grant law license to woman).

discrimination did not take hold until the Supreme Court's 1971 decision in *Reed v. Reed*.[18] In that case, the Court took the first step toward incorporating gender discrimination into the Constutition and establishing the intermediate scrutiny test as the appropriate method for assessing state-based gender discriminations.[19] Neither that step nor the subsequent steps leading up to the Court's decision in *Mississippi University for Women v. Hogan* were premised upon a newly discovered insight into the original intent of the authors of the Fourteenth Amendment. No one seriously argues that the purpose or even one of the purposes of the Fourteenth Amendment was to prevent gender discrimination. Rather the incorporation of gender discrimination doctrine into the Equal Protection Clause was a judicially created extrapolation from the law that had been developed in the context of race discrimination. Most importantly, this judicial reworking of the Equal Protection Clause took place during a time when social perceptions about proper gender roles were changing rapidly and radically. The intermediate scrutiny test operates, in effect, to conform governmental practices to those developing mores. Seen as such, the jurisprudence of gender discrimination is not a product of the guardian function, *i.e.*, the preservation of previously established fundamental law, but the product of what one may call a creative function, *i.e.*, the creation of new fundamental law.

One could argue that the jurisprudence of gender discrimination did not involve an exercise of the creative function, but was a result of an interpretation of the Equal Protection Clause and, therefore, more akin to the guardian function. After all, the difference between guardian interpretation and creation will more often than not be a question of degree, not quality. Such an argument would be difficult to sustain. The Fourteenth Amendment was not designed to prevent gender discrimination; and even if the amendment can be construed to provide some judicial oversight of laws that discriminate regardless of the nature of the classification, nothing in the history of the amendment suggests any special status for discrimination based on gender. The inclusion of gender discrimination into the equal protection guarantee and the elevated scrutiny applied to such discriminations were the result of the Court's incorporation into the Constitution of its own perceptions of appropriate contemporary values. Instead of adjusting the Constitution to permit the political resolution of contemporary problems by mediating as an exercise of its guardian function, the Court forced the preferences and innovations of an evolving society into the Constitution, creating a new constitutional text that conformed to emerging ideas about the proper roles of men and women. In essence, the judiciary forced the adoption of the Equal Rights Amendment.[20]

I do not mean to suggest that such exercises of constitutional creativity are inherently "illegitimate." They are, however, different from guardianship in the pure sense, and, perhaps, at least somewhat troubling. Of course,

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18. 404 U.S. 71 (1971).

19. Reed v. Reed, 404 U.S. 71, 75-77 (1971).

20. There is one possible distinction. The gender discrimination test under the Equal

at some point on the spectrum between pure guardianship and pure creation, there is a realm in which the distinction between the two functions blurs. This is as it ought to be. The continuing vitality of the Constitution depends upon interpretive exercises of the guardian function that permit the political resolution of contemporary problems; such interpretive exercises will, from time to time and depending on one's interpretive perspective, verge on the creative function. Similarly, the Court may successfully exercise an independent creative authority only because the legitimacy to do so depends ultimately on some relationship between that authority and the concept of guardianship. In short, there is no all-purpose or self-evident demarcation between the two functions in this mid-range, and, more generally, if the legitimacy of an exercise of either function is to be measured at all, that measurement will turn more on judgment and experience than on any more specific criterion. Still the functions are, at least at the furthest extremes, quite different.

The guardian function traces its legitimacy to *Marbury* and can be rationally defended as a component of a system of government premised upon a body of fundamental principles. If those principles are to retain the force of law, there must be some mechanism of enforcement. The judiciary provides that mechanism in our system. And even though the guardian function inevitably leads to a gradual evolution of fundamental principles, the function remains essentially conservative and quite consistent with the idea of the Constitution as the embodiment of first principles.

The authority to create new constitutional principles, however, traces its lineage to *Marbury* in a more circuitous fashion. Certainly, nothing in our constitutional system designates the judiciary as the equivalent of modern-day constitutional drafters with an uninhibited power to amend the basic text.[21] Nor does the vitality of our constitutional system depend upon any such designation. The judicial power to create constitutional law beyond the confines of interpretation and accommodation derives from or is inherent in the process of constitutional guardianship. If the guardian function requires the interpretation and application of constitutional text, it follows inevitably that each act of guardianship is an independent act of creation. There does arrive a point when the relationship between guardianship and creation becomes attenuated or even nonexistent. That variable point defines the act of pure creation. However, the distinction between exercises of this pure creative function and the more clearly legitimate interpretive guardianship is more a question of judgment than of mathematical certainty. The point is that the creative function finds its source as a byproduct of the guardian function.

A brief discussion of *Brown v. Board of Education (Brown I)*[22] may add clarity to the foregoing. Certainly one could argue, as some have, that

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Protection Clause uses intermediate scrutiny. However, if the Court had permitted the Equal Rights Amendment to pass, strict scrutiny would likely have been the standard. *See infra* note 26.

21. *Cf.* U.S. CONST. art. V (providing for amendment of constitution by states).

22. 347 U.S. 403 (1954).

the *Brown* decision extended the reach of judicial power beyond its normally accepted bounds, that the judicial rejection of the separate but equal doctrine fell well outside the guardian function. But I believe such an argument misreads the import of the *Brown* decision. Regardless of what one ultimately concludes about the precise purpose of the substantive provisions of the Fourteenth Amendment—privileges or immunities, due process, equal protection—there is no doubt that the amendment was designed to address problems of racial discrimination in some fashion. Had the Court not obliterated the relevance of the Privileges or Immunities Clause in the *Slaughterhouse Cases*,[23] that clause would seem to have provided a most appropriate vehicle for examining challenges to Jim Crow in all its various guises. And whether the precise formula proclaiming separate as unequal was part of the original drafter's thinking is less important than the fact that the judiciary was granted some warrant to interpret and apply this clause in the context of racial discrimination. By rejecting the separate but equal doctrine, the Court was not creating a new constitutional right; it was placing an established right within the context of a 1950s America in which education played such a significant role. This mediating interpretation of the Fourteenth Amendment may have contained some elements of the creative impulse, but on the spectrum between guardianship and creation, *Brown* falls well within the arguable realm of the former. The practice of racial segregation created a major impediment to the full enjoyment of civil rights and opportunities; it abridged the privileges and immunities of those precise United States citizens the Fourteenth Amendment was designed to protect. Thus, although *Brown* clearly ran counter to then current social practices, it was those practices and not the Court that were out-of-touch with fundamental constitutional principles. The same simply cannot be said for the jurisprudence of gender discrimination.[24] I do not mean to suggest that gender discrimination is a good thing; indeed, I personally believe gender discrimination to be both unwise and unjust. My only point here is to fully appreciate the Court's role in the creation of this new right.

To place this discussion in a slightly different but perhaps more politically acceptable framework, assume that in a properly presented case the Supreme Court, after examining the most current theories of economics, concludes that the Constitution requires all levels of government to operate on a balanced budget. Such a conclusion would hardly qualify as an exercise of the guardian function; indeed, this reworking of the Constitution would be nothing more that the forced adoption of some version of the Balanced Budget Amendment. The Court may have the raw, creative power to issue such a judgment; but such an exercise of power is far removed from the

23. 16 Wall. 36 (1873).

24. The decision in Roe v. Wade, 410 U.S. 113 (1973), unlike the decision in Brown v. Board of Education, does fall into the law creation category. Yet, even *Roe* has a more tenable foundation than the jurisprudence of gender discrimination. *Roe* was not, after all, decided at a time when a relevant constitutional amendment was being actively considered and rejected. *Cf. infra* note 26.

legitimate scope of judicial review as perceived from a guardian perspective.[25] One can state with some confidence that few if any observers of the Court would find the judicial creation of a balanced budget principle a comfortable exercise of the judicial function.

However, the doctrine of gender discrimination under the Equal Protection Clause has been established and has become part of our constitutional perception of justice. Certainly lower federal courts are not free to ignore developed doctrine. Thus, in applying the intermediate scrutiny test to VMI's all-male admissions policy, the court of appeals did in fact exercise the guardian function; it enforced judicially created constitutional doctrine against contrary state practices in a manner consistent with Supreme Court precedent. Nonetheless one cannot deny that this exercise of the guardian function rested on a base of relatively pure judicial creativity. The district court's reluctance to apply intermediate scrutiny with the full force of that test's language and logic may have been the result of the dissonance triggered by the tension between the judicially created doctrine of gender discrimination and the lower court's perceptions of the proper role of the judicial branch. After all, but for the creative, and somewhat nonjudicial impulses of the Supreme Court during the 1970s, VMI's all-male admissions policy would be plainly constitutional.[26] In this manner, the district court's resolution of the controversy reflected the normal, acceptable, indeed, constitutionally required, conservatism of the judicial function. The problem is that the intermediate scrutiny test does not seem to invite this type of balanced response.

Although various factors, including the doctrine of stare decisis, cause a deep reluctance to suggest that the Court abandon the constitutional protection now afforded to gender discrimination, perhaps some consideration should be given to permitting a more flexible response to such claims.[27] The purpose of this suggestion is not to open the possibilities for ever more acts of gender discrimination. Rather the purpose is to place a layer of humility over the judicial enforcement of a judicially created right. At the

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25. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("But a Constitution is not intended to embody a particular economic theory").

26. Actually a decent argument can be made that but for the development of the intermediate scrutiny test, the Equal Rights Amendment (ERA) would have been ratified. A number of commentators argued persuasively that the ERA was unnecessary in light of the Court's gender jurisprudence. Certainly some of the support for ERA was undermined by these arguments. If in fact the Court's creative impulses led to the demise of the ERA, two observations are in order. First, the Court's creative activism undermined an important part of the constitutional and political process. *See* Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Powell, J., concurring). Second, and somewhat ironically, had the Court not done so and had the ERA passed, VMI's all-male admissions policy would be even more constitutionally suspect under a strict scrutiny standard.

27. The Court's recent decision in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), which reaffirmed the basic premises of *Roe v. Wade* and at the same time opened the doors for a more flexible judicial response to state regulation, suggests that the Court may be open to such a possibility.

same time, the purpose is to recognize that issues of gender are simply more complicated than any single formula can comprehend. Just as the Court in *Brown v. Board of Education (Brown II)*[28] showed good judgment in its exercise of temporal patience, the present judiciary might consider the wisdom of adopting a less narrowly focused and controlled inquiry with respect to problems of gender discrimination. The *Brown II* Court recognized that the social complexities facing it in devising a remedy for segregated public schools were well beyond the competence of a precise, judicially fabricated formula; the complexities of gender are no less deserving of such judicial humility and open-mindedness. Justice Blackmun's dissenting observation in *Hogan* is apropos: "I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose—indeed destroy—values that mean much to some people by forbidding the state to offer them a choice while not depriving others of an alternative choice."[29]

The court of appeals, of course, was not free to ignore the intermediate scrutiny test. Accordingly, the court based its resolution of this controversy on the view that the Commonwealth had failed to explain why it provided a unique and valuable educational experience for men—namely, the VMI experience—and not for women. This is the precise question intermediate scrutiny appears to demand, but the precision of the question fails to account for the complexity of the issue. 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? An analogy may be helpful. 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.[30] 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. One possibility is to abandon the means-ends analysis of intermediate scrutiny in lieu of an approach that takes into account a more broadly inclusive array of factors.

In applying a more open-ended approach in the context of the VMI litigation, a court examining the issue may wish to consider several factors. First, if there are recognized differences between the genders, it is hard to believe that VMI is not a deep reflection of some of those differences. One would not be surprised to learn that there are no private VMI-style schools

28. Brown v. Board of Educ. (Brown II), 349 U.S. 294 (1955).

29. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 734 (1982) (Blackmun, J., dissenting).

30. *See* 20 U.S.C. § 1681 (1988).

for women; the nonexistence of a market for such schools ought to tell us something about the reasonableness of VMI's admissions policy; it also suggests something about the purely symbolic nature of this lawsuit. On the other hand, it may well be that the idea of the male as an aggressor and the female as a nurturer is simply a rank stereotype that ought to be relegated to a museum of cultural anthropology; but, without belaboring the obvious, it is a stereotype founded upon something more than an irrational guess or an animosity toward either group. While an argument can be made that such rigid patterns ought to be discouraged or altered, it does not necessarily follow that the contrary and more traditional view and practice is without constitutional sanction.

In addition, the calculus of discrimination might well include the fact that in 1989 (the year prior to the filing of the suit), total enrollment in Virginia's public institutions of higher education included 72,819 men and 85,441 women. Only 1312 of those men attended VMI. The 13,000 student differential is by no means dispositive, but it seems relevant, at least if the question involves the system-wide equality of opportunity for women. Similarly relevant, is that fact that both Old Dominion University and Virginia Polytechnic Institute and State University—both state universities—offer majors in women's studies programs. Again, these factors are not dispositive, but are certainly part of the overall fabric to be considered in assessing the constitutionality of female opportunity within the Commonwealth's vast system of higher education. Also relevant might be the availability of single-sex education among private colleges. There are five such colleges for women in Virginia and only one for men. In addition, Virginia men and women attending these colleges are eligible for state-sponsored Tuition Assistance Grants.

Next, given the active congressional response to matters of gender discrimination and sexual exploitation, it is pertinent that Title IX of the Education Amendments of 1972, which prohibits gender discrimination in institutions of higher education, specifically exempts undergraduate institutions "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex. . . ."[31] VMI falls into that category. Regardless of the scope of congressional power to define constitutional rights, one would think that when the Court is operating in its creative and super-legislative capacity the views of a coordinate branch would be of significance. It is also worth noting that Congress in addressing a perceived problem of gender discrimination in higher education developed a flexible response that accounted for tradition, while the Court's response sees tradition as the problem. One is tempted to suggest that perhaps the best vehicle for the development of a law of gender discrimination is the enforcement power of Congress under section 5 of the Fourteenth Amendment. Certainly, given the complexities of the issues from a social policy perspective, Congress may be better suited to devise an appropriate response.

31. *Id.*

One final point, even if intermediate scrutiny must remain the test, some consideration should be given to permitting wide latitude in the development of an appropriate remedy. The court of appeals specifically declined to order the admission of women to VMI and remanded the case to the district court with the following instructions:

> [T]he Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or 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 other more creative options or combinations.[32]

This short list of options with the invitation to further creativity may also be a response to the imposed conformity of the intermediate scrutiny test. If so, the parties and the district court ought to be free to consider a wide range of options. Those options need not necessarily focus on providing women a VMI-style experience; indeed, in the absence of some showing that a significant number of women in the Commonwealth would seek such an option, the Commonwealth's money might be more productively spent and the interests of women more substantially advanced by adoption of a state-wide program that will actually attract and benefit women. The remedy could include a wide range of possibilities, or a combination of such possibilities, such as special programs, scholarships, incentives, an all-female college within a co-ed university, and grants earmarked for women who wish to attend all-female private colleges within the Commonwealth. The point is not that VMI ought to be preserved as an all-male bastion, but that the Commonwealth ought to be given broad leeway in determining how best to ensure that women are provided an equal opportunity within the Commonwealth's system of higher education. Of course, one option, and maybe the most sensible option, is to admit women to VMI. That possibility, however, should not be imposed, but should remain an option to be selected at the discretion of the Commonwealth.

CONCLUSION

The controversy surrounding VMI's all-male admissions policy is fraught with conflict and imbued with symbolic significance: the supposed conflict between the genders, the tension between tradition and emerging social

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32. United States v. Virginia, 976 F.2d 890, 900 (4th Cir. 1992). One cannot help but be reminded of the "all deliberate speed" remedy provided in *Brown II*, 349 U.S. at 301. In that case, the Court recognized its own basic incompetence to design a precise remedy for the constitutional violation it found in Brown v. Board of Educ. (Brown I), 347 U.S. 483 (1954). The Court in *Brown II* recognized, at least implicitly, the important role of the political branches in helping to discover and implement a solution that was both constitutionally grounded and practical.

values, the exercise of judicial review versus the functioning or malfunctioning of the democratic process, strict construction, judicial activism, women's rights, men's rights, and the modern military. My point, a simple one I think, is that the judiciary must beware of overextending the function of judicial review, and it must be most wary of doing so when that potential exercise involves an act of judicial creation. In the specific context of gender discrimination, the federal courts would do well to adopt a more fluid approach to examining questions of gender discrimination, recognizing that the more precise the formula adopted, the more likely that formula is to fail to fully examine the nature of the underlying claims and conflicting interests. Moreover, considering the extraconstitutional roots of this judicially created right, the more flexible approach would be an appropriate indication of judicial humility in the realm of constitutional law making.