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VMI Essays: An Essay On Vmi And Military Service: Yes, We Do Have To Be Equal Together

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AN ESSAY ON VMI AND MILITARY SERVICE: YES, WE DO HAVE TO BE EQUAL TOGETHER

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There is a license plate I see from time to time that sums up much of what I think about men clinging to the military as their rightful bastion. It says "OGROWUP." When the Fourth Circuit recently ruled that the Virginia Military Institute's (VMI) male-only admissions policy violated equal protection guarantees, it missed a wonderful chance to send that message in constitutional terms.

In *United States v. Virginia* (*VMI*),[1] the Fourth Circuit held that VMI's unique "adversative," male-only educational program was not, of itself, unconstitutional. Rather, the program was invalid because the state did not offer a similiar single-sex experience to women. In one sense this result was a "victory" for women because the Commonwealth of Virginia, if it is to continue public funding of VMI, must either incur the considerable expense of creating a second VMI for women, or it must admit women to the VMI program. On closer inspection, however, the case was a deep disappointment to men and women who take seriously basic principles of gender equality.

The appellate panel completely bought into the notion that VMI's mission of developing citizen soldiers "can be accomplished only in a single-gender environment."[2] The court approved a separate but equal solution that may have been good statesmanship but which rested on weak and faulty equal protection analysis. Worse, the opinion effectively endorsed the idea that separate male and female versions of citizen soldiers exist and that the male model—*the* model—would be degraded by the presence of women. The court's opinion reflects less on the adequacy of legal principles than it does on deep-seated acceptance of certain separate male and female roles.

This essay explores why VMI is not just another educational choice which just happens to be open only to men. It suggests why—even if equal all-male and all-female colleges are constitutionally possible—a separate VMI for men and women is not. It may explain why the United States government went through all the fuss to sue a small school in the Virginia countryside where young men are so serious about playing soldier.

I. TAKING GENDER DISCRIMINATION SERIOUSLY

Despite the controversy surrounding the development of the mid-level scrutiny test for gender[3] and despite continuing controversy about its legit-

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1. 976 F.2d 890 (4th Cir. 1992).

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

3. *See, e.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing*

imacy,[4] heightened scrutiny for gender discrimination has taken root. *Craig v. Boren*[5] is frequently cited as articulating the standard of review: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[6] If rigorously applied, the mid-level scrutiny test requires the government to prove that its gender classification is constitutional, looks only to the actual purposes of a law to assess importance, and, crucially, requires a close or direct fit between the legislative objective (ends) and the use of the gender classification (means). In this ends-means analysis, not only must a gender classification promote an important end, but the state must, in effect, show that a sex-neutral approach is less effective in pursuing its goal. If there are reasonable and adequate nondiscriminatory alternatives to a gender classification and a neutral approach can work just as well, then the gender discriminatory approach is invalid. In a number of "hard" cases, however, the rigors of the "intermediate test" have been sidestepped or ignored.[7]

On the one hand, the test has made short and steady work of the kinds of gender classifications—usually harming women but also those harming men—which rest on preconceived notions of the proper societal roles of men and women.[8] For example, laws based on stereotypes about men and women's roles in the workplace,[9] in the care of children,[10] or in the dependence of one spouse upon the other[11] have fallen. On the other hand, cases involving gender discrimination in order to compensate women for past discrimination,[12] segregation of men and women in certain contexts,[13]

Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972); John E. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); *see also* E.A. Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of* Kahn v. Shevin *and* Orr v. Orr, 30 SYRACUSE L. REV. 639 (1979).

4. *See* 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.23 (1986); *see also* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983).

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

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

7. *See* Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 179-82 & n.50 (1982) (discussing Court's use of "similarly situated" inquiry as more lenient alternative to mid-level review in Rostker v. Goldberg, 453 U.S. 57 (1981), and Michael M. v. Superior Court, 450 U.S. 464 (1981)); *see also* Rostker v. Goldberg, 453 U.S. 57, 94 (1981) (Marshall, J., joined by Brennan, J., dissenting); Freedman, *supra* note 4, at 931.

8. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7 (1975).

9. *See, e.g.*, Califano v. Westcott, 443 U.S. 76 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

10. *See* Caban v. Mohammed, 441 U.S. 380 (1979).

11. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Goldfarb, 430 U.S. 199 (1977); *see also Weinberger*, 420 U.S. 636 (1975).

12. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977); *cf. Goldfarb*, 430 U.S. at 199; *see also* Williams, *supra* note 7, at 179-80.

13. Vorchheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally*

deep-seated views about sex roles,[14] and the appropriateness of women in combat[15] have tested the durability and integrity of heightened judicial scrutiny over legislative choices.

The *VMI* case picks up threads from these vexing categories. The question of single-sex schools—though of increasingly limited practical importance in the context of higher education[16]—implicates the use of all-women's schools which may help women develop as leaders. Segregation of men and women in certain activities or spheres implicates rights of privacy and acknowledges the sexual tension which comingling can produce. Finally, there is the matter of male hegemony in military matters. VMI is not treated as just any school of higher education. It is a military academy, a school with a distinguished record of producing "citizen-soldiers, educated and honorable men" who have distinguished themselves in both civilian and military life.[17]

Two pre-*VMI* Supreme Court cases involving sex segregation in the context of male-only draft registration and female-only nursing school admission illustrate the different results that can follow from inconsistent application of mid-level scrutiny. In *Mississippi University for Women v. Hogan*,[18] the Supreme Court held that Mississippi's policy of barring men from a state school of nursing was unconstitutional.[19] The Court closely examined the state's claim that excluding men was a form of affirmative action for women and found it unconvincing. The Court thereby rejected, under a searching analysis, the state's assertion that its single-sex classification furthered a state interest in providing women with diverse educational choices.[20]

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divided Court, 430 U.S. 703 (1977). For an insightful analysis of how the circuit court misapplied heightened scrutiny, see Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741, 1747-48 (1992).

14. Michael M. v. Superior Court, 450 U.S. 464 (1981); *see* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Arnold H. Loewy, *Returned to the Pedestal—The Supreme Court and Gender Classification Cases: 1980 Term*, 60 N.C. L. REV. 87 (1981); *see also* Freedman, *supra* note 4; Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Williams, *supra* note 7, at 181-90.

15. Rostker v. Goldberg, 453 U.S. 57 (1981).

16. Currently there are only four state-supported single-sex schools. There are two publicly supported all men's colleges, VMI in Lexington, Virginia, and the Citadel in Charleston, South Carolina; and two all women's colleges, Texas Women's University in Denton, Texas and Douglass College in New Brunswick, New Jersey. United States v. Virginia, 766 F. Supp. 1407, 1420 (W.D. Va. 1991). Nevertheless, because of private colleges, there are 11,400 men attending single-sex institutions and 64,000 women doing so. *Id.*

17. United States v. Virginia, 976 F.2d 890, 893 (4th Cir. 1992). The district court took great pains to note that VMI's role is *not* primarily to develop career military men. *Virginia*, 766 F. Supp. at 1427. Yet the school is run by military officers, and the students, or "cadets," wear military uniforms, live in "barracks," and participate in mandatory R.O.T.C. units. *Id.* at 1421-25. The institution seems conflicted, to say the least, about its image.

18. 458 U.S. 718 (1982).

19. Mississippi Univ. For Women v. Hogan, 458 U.S. 718, 733 (1982).

20. Craig v. Boren, 429 U.S. 190 (1976), cited by the Court in *Hogan*, probably offers one of the strongest illustrations of the Court rejecting loose-fitting generalities about the sexes.

In contrast, in *Rostker v. Goldberg*[21] the Court accepted, without close examination, the government's unfounded assertion that the purpose of a military draft is exclusively to raise combat troops. And since the exclusion of women from combat was not put in issue at all, it became apparently "logical" to conclude that men and women were not similarly situated with respect to the draft and that it was permissible to register men only.[22]

In *VMI*, the Fourth Circuit purported to accept a rigorous mid-level scrutiny approach, citing *Hogan*.[23] It then applied the test erroneously. The court began adequately enough by identifying the real purpose of a male-only VMI.[24] Under mid-level scrutiny, courts must closely examine, as the appellate panel did in the *VMI* case, the real reason for a state's gender discriminatory policies. As discussed below,[25] such scrutiny readily pierces the state's claim, unblinkingly accepted by the district court, that VMI's all-male program was justified as providing diversity in Virginia's overall system of higher education.[26] The military, barracks-style training of VMI is aimed at producing, according to VMI's own pronouncements, citizen-soldiers; that is,

> [I]t is the mission of the Virginia Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American Democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.[27]

The Fourth Circuit properly phrased its task under mid-level scrutiny as deciding "whether VMI's male-only admissions policy . . . is a classification justified by a fair and substantial relationship with the institution's mission of developing citizen soldiers."[28] The court concluded that the unique educational method used at VMI does substantially promote the goal of producing citizen soldiers. But then, instead of asking whether the introduction of coeducation at VMI would offer a reasonable and adequate alternative way (means) of producing citizen soldiers (the end or objective), the court confused ends and means and asked the wrong question. It asked

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21. 453 U.S. 57 (1981).

22. For a further discussion of the Court's analysis, see Williams, *supra* note 7, at 179-90.

23. *Hogan*, 458 U.S. 718 (1982).

24. United States v. Virginia, 976 F.2d 890, 896 (4th Cir. 1992).

25. The Fourth Circuit discounted the state's argument that VMI remained a male-only institution to promote diversity of educational experiences in Virginia's system of higher education. *Id.* at 898-900. The inadequacies of a diversity justification are discussed *infra* text accompanying notes 57-65.

26. *See infra* text accompanying notes 57-60.

27. *Virginia*, 976 F.2d at 893.

28. *Id.* at 896.

whether the introduction of coeducation (means) will change the unique educational method used at VMI (means). It asked, in other words, whether the use of alternative, gender-neutral means will change the use of the current, gender discriminatory means. Guess what the answer was!

True, there were "findings of fact" from below that the VMI adversative or doubting method of training—including physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of "desirable" value—promotes character development consistent with a model of the citizen soldier.[29] Participants in the VMI experience frequently report growth in personal goals of leadership, responsibility, self-confidence, and integrity.[30] But facts only become relevant within a context and, when closely examined, what would be lost by the admission of women is not the production of citizen soldiers or character building or achieving esprit de corps, but rather particular rituals followed to achieve those ends. These rituals are neither necessary to the ends of military education nor very sensible in their own right. It is a little embarrassing even to recount some of the behaviors, like running naked through the showers while some are turned on all cold and others are turned on all hot.[31] Entering VMI students are known as "rats," and rats "are treated miserably for the first seven months of college."[32] Their miserable treatment includes, for example, indoctrination, minute regulation of individual behavior, frequent punishments, rigorous physical education, and military drills.[33] The experience appears to be something of an amalgam of a very strict English boarding school, traditional Marine Corps boot camp, and medieval secret society rites.

To say that if women were admitted, their admission would change the experience is like saying that, if I moved, I would have a new address—or as Justice Rehnquist once said, it's like saying if my aunt were a man she would be my uncle.[34] Yes, there would be a change, but the question is whether the change would be relevant and, if so, to what? If the aim is to produce citizen soldiers, to build character and esprit de corps, the relevant

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29. *Id.* at 893.

30. United States v. Virginia, 766 F. Supp. 1407, 1426 (W.D. Va. 1991).

31. *See* William A. DeVan, Note, *Toward A New Standard In Gender Discrimination: The Case Of Virginia Military Institute*, 33 WM. & MARY L. REV. 489, 534 n.313 (1992). The author describes this particular ritual based on an interview with a VMI graduate. It is part of a general pattern of "hazing and humiliating treatment that shapes the VMI cadet." *Id.* at 534. The shower run is described as follows: "All rats are stripped naked and run through the communal shower with some shower heads turned on all hot and others all cold." *Id.* at 534 n.313. Other "activities" of this ilk are described in the VMI catalogue and in the above article. *Id.* at 497-98.

32. *Virginia*, 766 F. Supp. at 1422.

33. *Id.*

34. Florida v. Royer, 460 U.S. 491, 528 (1983) (Rehnquist, J., dissenting). This is not exactly like the old expression, "if pigs had wings, they could fly." It's more like "if pigs had wings, they'd be winged pigs."

finding would have to be that that can only be done effectively by the VMI adversative methodology in a single-gender context—only, if you will, by running naked through the showers.

Virginia simply could not and cannot prove what equal protection requires: that there is no gender neutral approach that is just as effective in educating citizen-soldiers.[35] The very existence of the coeducational military academies refutes the argument.

What accounts for courts tinkering with rigorous mid-level scrutiny in certain kinds of cases?[36] There are differing explanations. With *Rostker*, some pointed to the delicacy of showing deference to a congressional judgment in matters affecting military affairs.[37] In *Michael M. v. Superior Court*,[38] a case where the Court upheld a statutory rape law applying only to men and not women, the Supreme Court majority relied upon what it called "real differences" between men and women; that is, only females can get pregnant and only they, unlike men, have a natural deterrent to underage sex.[39] Others saw both cases as touching "the hidden nerves of our most profoundly embedded cultural values."[40]

In *VMI*, the Fourth Circuit may have skated past the full consequences of a heightened scrutiny analysis because it had settled on the separate but equal "solution." The court had no reason to raise the bloody shirt of ending state-supported single-sex education. In fact, it wanted to affirm

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35. Rostker v. Goldberg, 453 U.S. 57, 96 (1981) (Marshall, J., joined by Brennan, J., dissenting).

36. Commentators apparently realize that rigorous scrutiny of VMI's program would lead to a finding of unconstitutionality. This has driven some to turn cartwheels to argue for a relaxation of the mid-level scrutiny standard. *See, e.g.*, DeVan, *supra* note 31, at 536-40. It must be quite difficult for the psyche to let go of a state-supported, all-male VMI.

37. *Rostker*, 453 U.S. at 64-65; *see also* ROTUNDA ET AL., *supra* note 4, at 541-42.

38. 450 U.S. 464 (1981).

39. Of course commentators were quick to note the emptiness of the "real differences" analysis. As one writer expressed it:

> The concept of "real" sex differences is central to the Rehnquist-Stewart approach. Under this approach, the legal problem of sex discrimination is generally conceived as the use of sex classifications when no "real" differences between women and men are involved. "Real" differences are defined broadly to include definitional differences, legally created differences, and differences that result from past discrimination against women. In cases involving "real" differences, review of the relationship between the classification and the goal is deferential. This approach is also associated with a high degree of tolerance for facially sex-neutral rules that have a disparate impact on one sex.
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> The central and inevitable role of culture in determining the existence of most sex differences reveals the hollowness of the search for "real" differences as the basis of sex discrimination law. Sex differences are widespread and important because of human social arrangements. The central issues are not which differences are "real" but rather what degree of sex differentiation and inequality is desirable, and what significance existing sex differences should have as determinants of individual life experiences and collective social structure.

Freedman, *supra* note 4, at 931, 947.

40. Williams, *supra* note 7, at 176.

that sex-segregated education is not only allowable but desirable. The court stated:

> The argument by the government that VMI's existing program is maintained as the result of impermissible stereotyping and overly broad generalizations, without a more detailed analysis, might lead, if accepted, to a finding that would impose a conformity that common experience rejects. Men and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated. Indeed the evidence in this case amply demonstrated that single-genderedness in education can be pedagogically justifiable.[41]

That said, the Fourth Circuit then shifted ground.

II. Do We Have To Be Equal Together?

The Fourth Circuit's conclusion that VMI, if it continued as a state institution, did not necessarily have to admit women but that women had to have their own VMI was Solomon-like statesmanship. VMI was let down easy. Yes VMI, your institution, brave and true, *could* be constitutional. It is unique, special, and important. In fact, it is so wonderful that women in Virginia ought to have their own version. But the court must surely have known about the impracticality of that option. The costs to the state of replicating a VMI for women would probably be great. An entire new institution fashioned along the lines of VMI, with instructors, staff, and materials, would have to be created. A sufficient pool of applicants would have to be developed,[42] both to maintain sufficient standards and to provide economies of scale in running the Women's VMI. So in the end, VMI loses, but nobly.

But the Fourth Circuit, even if it may have "come out right" because of the press of practicalities, came out wrong on principle. In the area of military education, there is no place, at least not now and perhaps not ever, for separate but equal. In the area of racial segregation, the Supreme Court, in *Brown v. Board of Education*,[43] understood that equality means much more than the mere equivalence of physical things such as books, dormitories, and instructors—even assuming the possibility of perfect parity on these matters. The Court observed, "Our decision, therefore, cannot turn

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41. United States v. Virginia, 976 F.2d 890, 897 (4th Cir. 1992).

42. The district court concluded that women's demand for a VMI education is currently unknown. United States v. Virginia, 766 F. Supp. 1407, 1436 (W.D. Va. 1981). "Trial testimony included a great deal of speculation, but very little evidence, on demand for a VMI education among women. This uncertainty is due to a lack of recruitment among women." *Id.* In the two years prior to the filing of the suit against VMI, over 300 women inquired about admission to VMI. *Virginia*, 976 F.2d at 894.

43. 347 U.S. 483 (1954).

on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases."[44] As it had recognized in previous cases, the *Brown* Court understood that equality encompasses "'those qualities which are incapable of objective measurement but which make for greatness in a . . . school.'"[45] The *Brown* Court knew that it was the *very fact of separation*—given the historical and factual context of race relations and race discrimination in the United States—that caused the invidious inequality.

So it is with military education and training. We cannot view military schools as if they carry no historical baggage. We cannot pretend that military schools and military service are not male-constructed, male-dominated, and central to the concept of male power.[46] If only men are capable and required to serve their country—to fight if necessary to defend it—then only they can claim full citizenship. Women cannot realistically claim an equal place until they are equally at risk. As one commentator put it:

> [D]o we not acquire a greater right to claim our share from society if we too share its ultimate jeopardies? To me, *Rostker* [*Rostker v. Goldberg*, 453 U.S. 57 (1981)] never posed the question of whether women should be forced as men now are to fight wars, but whether we, like them, must take the responsibility for deciding whether or not to fight, whether or not to bear the cost of risking our lives, on the one hand, or resisting in the name of peace, on the other.[47]

If military training or education is constructed so that it is a problem for women "to fit," then the answer is to reconstruct the military and military service so that both men and women "fit." Only women and men together, with whatever rearrangements that fact requires, can define what military service is. Side-by-side arrangements will only enshrine the male model—the status quo—as *the* model and consign the female experience to be judged as inferior. That inferiority will then be attributed—tsk, tsk—to women's nature. Yes, men and women are different but that should not mean, so to speak, that men are on the top and women are on the bottom.[48] Differences can be accounted for and privacy can be accounted for, all in the context of equal power and equal service.

Moreover, citizenship is an undifferentiated concept. There should be no gradations of citizenship—whether based on the length of time one has lived in a jurisdiction, or on one's wealth or achievements, or on any other basis.[49] But to be a full citizen, each person must have the equal right to

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44. Brown v. Board of Educ., 347 U.S. 483, 492 (1954).

45. *Id.* at 493 (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)).

46. *See* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991).

47. Williams, *supra* note 7, at 190.

48. *See* CATHERINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 32-45 (1987).

49. *See* Zobel v. Williams, 457 U.S. 55 (1982) (invalidating Alaska's differential distri-

share in the benefits *and the responsibilities* of citizenship.[50] In our culture there has always been a direct connection between military service and citizenship. Full participation in voting and full enjoyment of civil rights have depended upon service eligibility. The story of African-Americans claiming their rightful places as full citizens is mirrored in their ability to shatter policies of exclusion and segregation in the Armed Forces.[51]

A separate VMI for women perpetually will be deemed second class as measured against the "real" military experience of men. The women will be continually striving to meet a male-created standard, destined by definition to come up short. A VMI-Women's Division might even be deemed very good, you know, for a girl's school, but the fact of separateness will perpetuate the stereotype of the military superiority of men. A separate school will keep alive the standard-setting, the symbolism, and the stigma that when it comes to soldiering, to the defense of one's country, to one's ultimate importance when the chips are down, it's still a man's world. So not only is the argument for single-sex education not strengthened by the military dimension of VMI's higher education, it is the least justifiable place for its acceptance.

The conclusion that the state cannot support sex-segregated higher education aimed at military training does not necessarily outlaw all such exclusions in public higher education generally.[52] But making the case for single-sex higher education will not be easy. Nor should it be.

In the VMI litigation, the district court found "very substantial authority favoring single-sex education."[53] The district court placed heavy reliance on a 1977 study by Alexander Astin entitled "Four Critical Years," which the court noted was "not questioned by any expert."[54] The Fourth Circuit favorably cited a summary of the study, which stated:

> Single-sex colleges show a pattern of effects on both sexes that is almost uniformly positive. Students of both sexes become more academically involved, interact with faculty frequently, show large increases in intellectual self-esteem, and are more satisfied with

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bution of income derived from state's natural resources based upon how long person was resident of state). The Court noted: "Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible." *Id.* at 64.

50. *See* Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

51. For a thorough analysis of the interconnectedness of citizenship and military service, see Karst, *supra* note 46.

52. *See, e.g.*, Caren Dubnoff, *Does Gender Equality Always Imply Gender Blindness? The States of Single-Sex Education for Women*, 86 W. VA. L. REV. 295 (1984); David Hoffman, Comment, *Challenge To Single-Sex Schools Under Equal Protection:* Mississippi University for Women v. Hogan, 6 HARV. WOMEN'S L.J. 163, 173-74 (1983); Note, *supra* note 13, at 1748-53; Jack G. Steigelfest, Note, *The End of an Era for Single-Sex Schools?:* Mississippi University for Women v. Hogan, 15 CONN. L. REV. 353, 372-75 (1983).

53. United States v. Virginia, 766 F. Supp. 1407, 1412 (W.D. Va. 1991).

54. *Id.*

> practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions.[55]

Nevertheless it remains unclear what weight to give these conclusions in the absence of a full engagement on the issue. The Supreme Court has yet to meet the matter head on,[56] and because VMI offered a unique educational experience not available to men and women, VMI was not the vehicle for that debate. If the issue is met squarely, it may be that the findings on single-sex schools are now outdated, indeterminate, or evolving. It may be that women are the only true beneficiaries of single-gender experiences precisely because they may need—as men presumably do not—a "safe haven" from the dampening influence of society's gender stereotypes. Single-sex education can never be justified except in the context of an actual educational system where the advantages and disadvantages of maintaining a gender-segregated system are fully explored. If a system of higher education includes truly equal male and female single-sex colleges—a very complicated and delicate inquiry under the best of circumstances—and if the single-gender programs are not based on conventional and unproven differences between men and women, separate programs might pass muster.

III. The Dark Side of Diversity: Diversity As A Reason To Exclude

The district court concluded that VMI's male-only admissions policy was justified as promoting diversity in education. The idea was that VMI offered a unique program of training and education—indeed, a program not found anywhere else in the United States—and that the very distinctiveness of the program was reason enough, constitutionally speaking, to validate it. VMI had to remain all-male because the very uniqueness would be lost by the introduction of women. The Fourth Circuit seemed to accept the general validity of a diversity argument, but it did not have to grapple explicitly with the matter because it posed a different question. The Fourth Circuit asked, if the VMI program was so positive and unique, and if a similar all-women's program was also possible, did the state have an important justification for providing the experience only to men? The court expressed the question this way: "The decisive question in this case therefore transforms to one of why the Commonwealth of Virginia offers the opportunity only to men."[57]

But wait, let us go back to the unadorned diversity argument again. Just how far can an undifferentiated interest in diversity go toward justifying educational opportunities limited to one sex, or perhaps one race or ethnic

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55. United States v. Virginia, 976 F.2d 890, 897 (4th Cir. 1992).

56. The matter remains open despite Supreme Court opinions in Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), and Vorchheimer v. School Dist., 430 U.S. 703 (1977), *aff'g by an equally divided court* 532 F.2d 880 (3rd Cir. 1976).

57. *Virginia*, 976 F.2d at 898.

group, even if the state *is* prepared to set up parallel systems for all of the affected groups?

To address this question squarely, we must first deal with a threshold issue. Is the interest in diversity the real reason why the state is offering the single-sex school, or is there another, more honest reason for the state's gender segregation? Recall that under heightened scrutiny courts will not accept post hoc rationales for gender discrimination but will seek out the real justification for a state's policy. Thus in *Mississippi University for Women v. Hogan*,[58] the Court disbelieved the state's argument that its school of nursing was limited to women as a means of providing additional educational opportunities for women to make up for past discrimination.

> The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. As applied to the School of Nursing, we find the State's argument unpersuasive.
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> In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. However, we consistently have emphasized that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[59]

In *VMI*, the Fourth Circuit did pursue this question, but only to a point. The court was able to find a general state policy of "autonomy and diversity," but it was unable to find any state policy in favor of single-sex education in state-supported colleges or universities. To the contrary, the court found an explicit policy of "affording broad access to higher education" and requiring Virginia's colleges and universities to act toward "'faculty, staff, and students *without regard to sex, race, or ethnic origin.*'"[60] Indeed the court noted that if anything, Virginia had, except for VMI, moved entirely away from gender diversity and had adopted coeducation. Thus, the court properly called into question and implicitly rejected the bona fides of a diversity justification for the continuance of VMI as an all-male institution. This inquiry must be made in every case where the state is offering diversity as its rationale for single-gender institutions.

But assuming a state did articulate a contemporaneous diversity argument as the reason for creating segregated schools, is that enough? Here

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58. Mississippi Univ. For Women v. Hogan, 458 U.S. 718 (1982).

59. *Id.* at 727-28 (citations omitted) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)).

60. United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992) (quoting Commission on University of 21st Century, reported to Governor and General Assembly of Virginia (1990)).

we begin to glimpse the dark side of diversity. Diversity was first used as a compelling justification *to include* minority racial groups in schools where their numbers were scant or nonexistent.[61] And although every inclusion of a minority student meant someone else was not admitted, the overall objective was diversity of the student body as a whole, as a means of enriching the educational experience for everyone. The words of Justice Powell in *Regents of the University of California v. Bakke*[62] emphasize the enriching benefits of including students from many different backgrounds:

> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.
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> . . . An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.[63]

In contrast, diversity in the VMI context is a reason to exclude, or to isolate and separate, constituent groups. By separation we lose the opportunity to learn from one another's experiences, to see the world from many different perspectives. By separation we lose the special insight that comes only from living together and learning together; that is, that there is an essential equality which we all share and, in any group of people, there are a range of talents, strengths, and weaknesses. In the United States, the two great socializing institutions are the schools and the military, and VMI is essentially both. Segregating men and women in this context will not serve a *Bakke*-like diversity; rather, it will cement conformity and close minds.

It may be that isolation and separateness, championed under the slippery banner of diversity, may serve other valuable functions. And it may be that the benefits of exclusion overcome other needs. But the burden should rest on those who support the goal of separateness and exclusion to articulate and demonstrate some important pedagogic purpose and to show the absence of harm or stigma to those separated.

One might, for example, be able to demonstrate that men and women display greater academic accomplishment and more confidence and leadership qualities in a single-gender environment. But that alone is not sufficient to permit separateness. If the experience is one that reinforces or recreates stereotypes or if it consigns a separated group to an inferior status, as in

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61. *See* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).
62. 438 U.S. 265 (1978).
63. Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 313-14 (1978).

the military context, separate—even if dressed up as "diversity"—is constitutionally unequal.

It should be noted that unexamined arguments of "diversity" can lead to other forms of mischief as well. Why not have separate racial schools or separate ethnic schools? Following *Brown v. Board of Education*, school authorities in various jurisdictions argued against the imposition of desegregation in their districts, saying that blacks and whites actually performed better in separate schools and that both groups benefited from the separateness.[64] Similiar arguments are now being heard in support of separate schools for inner-city Black youth.

Diversity can also be turned completely upside-down in some instances. Beware of diversity used as the reason to exclude certain ethnic groups whose numbers are viewed as growing "out of proportion" in particular institutions of higher education. In a sense, "diversity" has been turned against Asian-Americans, who now face attempts to limit their numbers in California schools.[65] Some variant on this idea might also have been appealing to those who sought to limit the number of Jews in Eastern schools in the earlier part of this century. "Diversity" has too many potential meanings and too many negative possibilities to be blithely accepted as an all-purpose justification.

IV. CONCLUSION

One could look at VMI and say, "What's the big deal," the school is just some peculiar guy thing, a four-year, boys-will-be-boys sleep-over camp. Or one could say that the legal challenge to VMI is a misguided effort to stamp out differences between men and women and to impose a needless conformity in the process. But the essence and symbolism of VMI which VMI itself holds so dear—its special mission of producing citizen soldiers—deeply contradicts the idea of equal citizenship for all. It is wrong for the state to support, endorse, and even celebrate the training of citizen soldiers and, at the same time, to display the sign: "Women Do Not Qualify." In our constitutional scheme, both men and women make the grade. Because of the Fourth Circuit's ruling but despite its reasoning, future VMI cadets may learn that real growth—real maturity—lies in recognizing this fundamental legal and moral principle.

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64. *See, e.g.*, Stell v. Savannah-Chatham County Bd. of Educ., 220 F. Supp. 667 (1963), *rev'd*, 333 F.2d 55 (5th Cir. 1964).

65. *See, e.g.*, Grace W. Tsuang, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659 (1989).