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Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute

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Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute

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If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away.

Henry David Thoreau¹

It is a wise man who said that there is no greater inequality than the equal treatment of unequals.

Justice Felix Frankfurter²

I. INTRODUCTION

By the spring of 1864, the great armies of the Union and the Confederacy had maneuvered themselves into the Commonwealth of Virginia for one final year of war. The days of the Confederacy appeared to be numbered. Fighting from the previous summer ended with Union victories at Gettysburg in the North and at Vicksburg in the South. With the war in the western states won and Robert E. Lee's Army of Northern Virginia out of Pennsylvania, President Lin-

1. HENRY D. THOREAU, WALDEN 18 (1854).

2. *Dennis v. United States*, 339 U.S. 162, 184 (1949) (Frankfurter, J., dissenting).

coln concentrated on bringing a speedy end to three years of division and carnage. Lincoln promoted Ulysses S. Grant to the rank of General-in-Chief of all Union forces, and Grant responded swiftly by designing a plan to trap Lee in Virginia. Like carving a turkey, the strategy, according to Lincoln, entailed Grant's main army doing all the "skinning" while two auxiliary Northern armies would each "hold a leg."³ As part of the plan, Grant ordered one of his leg-holders, General Franz Sigel, to move his forces south through the Shenandoah Valley, with the goal of severing Lee's communications and supplies from the region west of the main Confederate army.

Loyal to the Confederacy and eager for battle, young cadets at the Virginia Military Institute (VMI) in Lexington, Virginia, anxiously awaited the opportunity to put their school on the map and their fighting spirit into southern folklore. The approaching Union army kindled the cadets' dreams of battlefield heroics.

Sigel and his Union army met little opposition as they moved through the Valley. However, when the army arrived at New Market, Sigel's advance guard ran into Confederate forces led by General John C. Breckinridge.⁴ Breckinridge managed to muster a small force from the valley and mountains surrounding the Shenandoah to repel the invading Union troops. Still heavily outnumbered, the Confederate General had no choice but to summon the young boys of VMI.

On a spring day in May, 247 VMI cadets, dressed in their grey parade-ground uniforms, set out from their barracks and marched north across the rolling hills of western Virginia to meet up with Breckinridge's Confederate forces at New Market. The fourteen to seventeen year old cadets arrived in time to face Union batteries assembled on a knoll overlooking the Confederate line. Although ordered only to act as reserves, the VMI cadets found themselves in the forefront of the battle when the first Confederate lines broke and retreated to the rear. Closing the gap caused by the retreat, the VMI cadets, facing a heavy cannonade, marched forward and positioned themselves behind a fence. The cadets waited as skies darkened with threatening storm clouds and cannon fire competed with loud bursts of thunder.

The events that follow have been described by historians as "one of the most remarkable episodes of the Civil War, or indeed, of any war."⁵ After all attempts to defeat the batteries failed, the "boy

3. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 722 (1988).

4. ALLAN NEVINS, *THE WAR FOR THE UNION* 51 (1971).

5. EDWARD R. TURNER, *THE NEW MARKET CAMPAIGN* 66 (1912) ("What they did was so brilliant, so unusual, and so unexpected, that after a while their exploits came to be

soldiers" of VMI, years younger than Breckinridge's veterans, rose as one man. They climbed the fences and, with precision, quick-stepped across the slope into the muzzles of Union guns. The young cadets' courage generated so much enthusiasm in the adjacent commands that the whole Confederate line rushed forward.⁶ Unable to distinguish the sounds of thunder and artillery, the cadets charged on, cannon fire pouring into their ranks, until they reached the Union guns on the hilltop. Shaken by the charge, the Union troops fell back as the VMI soldiers stormed the position.

The charge at New Market immortalized the cadets and won VMI great fame. Of the 247 cadets, more than fifty had been shot and no less than ten lost their lives. The VMI charge temporarily stymied the Union invasion of the Shenandoah, and as a result Lincoln was forced to replace General Sigel.

Established in 1839, VMI is the nation's first state-supported military college. The school originally served as an arsenal for storage of spare arms and munitions left with Virginia after the War of 1812.⁷ Tradition is the cornerstone of this 154-year-old establishment. Before New Market and the Civil War, Thomas "Stonewall" Jackson was a professor at VMI. Cadets today must still give a morning salute to the bronze statue of Stonewall that stands in the heart of the campus. Of the 1,902 men that attended VMI until 1861, 1,781 fought for the Confederacy. VMI composed one-third of the field officers for Virginia.⁸ Prominent cadets from VMI include Arctic explorer Admiral Richard Byrd, World War II General George S. Patton and General George C. Marshall, who served as President Truman's Secretary of State and received the Nobel Peace Prize for his leadership in the reconstruction of post-World War II Europe.

These days, however, the most talked about traditions at VMI are the school's status as a public institution and an admissions policy that excludes females. After 154 years, these two traditions have been challenged as irreconcilable under the United States Constitution. The mission of the VMI is to produce "civilian-soldiers, educated and honorable men who are suited for leadership in civilian life and who

shrouded in a mist of tradition and romance very difficult for the historian to penetrate."'). See also MCPHERSON, *supra* note 3, at 724; BRUCE CATTON, NEVER CALL RETREAT 352-53 (1965).

6. TURNER, *supra* note 5, at 84-89.

7. HARRY F. BYRD, JR., THE VIRGINIA MILITARY INSTITUTE: IN PEACE A GLORIOUS ASSET IN WAR A TOWER OF STRENGTH 8-9 (1984).

8. MCPHERSON, *supra* note 3, at 328.

can provide military leadership when necessary.”⁹ In furtherance of this mission, the school has employed since its founding the “adversative model”—a unique method of education that concentrates on the character development of young men. “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.”¹⁰ Derived from the tradition of the all-male public schools in England, the adversative model is unique because no other school in the United States offers this design.¹¹ VMI has rigidly maintained both the adversative model and its single-sex admissions policy throughout its long history.

VMI and the Citadel in Charleston, South Carolina, currently enmeshed in its own legal battle, are the only state-run single-sex military colleges remaining in the United States. State funds comprise more than \$10 million of VMI’s \$29 million annual budget. “Both [institutions] are throwbacks to an earlier time, and neither is like anything else you will find in American higher education.”¹²

In early 1991, the Civil Rights Division of the United States Department of Justice received a letter from a female high school student in northern Virginia complaining that VMI’s admissions policy denied her the right to attend. The Justice Department filed suit against VMI claiming that the state-financed all-male admissions program violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Countering, VMI asserted that it complied with the constitutional standard for single-sex higher education enunciated by the U.S. Supreme Court in *Mississippi University for Women v. Hogan*.¹³

History has thus come full circle, and the United States finds itself engaged in yet another battle with the feisty young cadets of VMI. This time, however, there has been no gallant charge or decisive route. Instead, the Justice Department and VMI have been locked in a grueling legal battle that has raged on for more than three years. In June of 1991, VMI scored a direct hit on the opening volley when United States District Court Judge Jackson Kiser ruled that VMI could continue its policy of excluding female students.¹⁴ Judge Kiser wrote, “VMI is a different type of institution. It has set its eye

9. *United States v. Virginia*, 976 F.2d 890, 893 (4th Cir. 1992) (quoting the final report of the Mission Study Committee of the VMI Board of Visitors dated May 16, 1986).

10. *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991).

11. *Id.*

12. Bill Lohmann, *On Trial*, NAT’L L.J., May 6, 1991, at 8.

13. 458 U.S. 718 (1982). See *infra* notes 58-62 and accompanying text.

14. 766 F. Supp. at 1415.

on the goal of citizen-soldier and never veered from the path. . . . VMI truly marches to the beat of a different drummer and I will permit it to continue to do so."¹⁵

When the case came to the Fourth Circuit Court of Appeals in October 1992, a three-judge panel issued a convoluted opinion that overturned the district court's ruling but refused to compel VMI to admit women.¹⁶ Instead, the court conditioned VMI's status as a single-sex state institution on Virginia's ability to bring the situation into conformity with the Equal Protection Clause.¹⁷ While the court found that VMI's admissions policy was grounded on a legitimate institutional mission and that the introduction of women would materially alter the program's strenuous physical and emotional discipline, the Fourth Circuit ultimately held that the Commonwealth had failed to demonstrate why this unique educational opportunity should be offered only to men.¹⁸ The court suggested three ways Virginia might satisfy the requirements of the Fourteenth Amendment. First, the state might decide to admit women and adjust VMI's program to effectuate integration. Second, VMI could become a private institution and reject all state funding. Third, revisiting the "Separate But Equal" doctrine, Virginia might decide to offer a parallel institution or program to women.¹⁹

This Comment analyzes the VMI case past, present, and future, beginning with *Hogan*, the only U.S. Supreme Court case to address a sex-based admissions policy. Part I of this Comment traces the Supreme Court's development of the intermediate scrutiny test, while looking separately at single-sex education jurisprudence within the federal system. The intermediate standard for gender-based classifications and cases involving single-sex education evolved at roughly the same time; however, the line of cases remained separated until they converged in *Hogan*. Part I concludes with an examination of *Hogan* and its effect on the future of single-sex education.

Part II discusses the opinions of the district court and Fourth Circuit Court of Appeals and their application of the *Hogan* standard. More specifically, Part II demonstrates how both courts agreed that: 1) single-sex education is a legitimate form of diversity which serves an important governmental objective, and 2) VMI's admissions policy is substantially related to diversity in Virginia's higher education sys-

15. *Id.*

16. *United States v. Virginia*, 976 F.2d at 900.

17. *Id.*

18. *Id.*

19. *Id.*

tem. The Fourth Circuit, however, remanded the case back to Judge Kiser when it could not find a reason that this form of diversity, single-sex education in the adversative setting, should not also be offered to women. The U.S. Supreme Court upheld the Fourth Circuit's decision.

Finally, Part III offers a policy discussion on the two most significant issues to follow from the VMI case: 1) the application of the "separate but equal" doctrine to gender and 2) the future of those private women's colleges that also discriminate on the basis of sex. Part III attempts to dispel some myths surrounding these issues—namely, that "separate but equal" was completely abrogated by *Brown v. Board of Education*²⁰ and second, that the private women's colleges will be unaffected by the VMI case. It will also examine the influence of "real differences" between men and women—a concept that led to the intermediate scrutiny standard and a "separate but equal" doctrine in many sex discrimination cases.

II. THE EQUAL PROTECTION CLAUSE AND SINGLE-SEX EDUCATION: MARCHING TOWARDS BATTLE

Under the Equal Protection Clause of the Fourteenth Amendment, "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."²¹ However, the Supreme Court has recognized that the Equal Protection Clause does not "demand that a [state] statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same."²² As the Fourth Circuit stated in the VMI case, "no one suggests that equal protection of the laws requires that all laws apply to all persons without regard to actual differences."²³ These two competing interests—the neutral application of laws as demanded by the Fourteenth Amendment and the notion that all persons are different to a substantial degree—have made it difficult to give a precise definition to the phrase "equal protection."

A. *The Standard of Intermediate Scrutiny*

We do know, however, that prior to 1971, "equal protection" under the Fourteenth Amendment did not necessarily apply to the

20. 347 U.S. 483 (1954).

21. U.S. CONST. amend. XIV, § 1.

22. *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

23. *United States v. Virginia*, 976 F.2d at 895.

women of America. In fact, before the Supreme Court decided *Reed v. Reed*,²⁴ the Court reversed gender-based classifications in the same way it reviewed economic-based classifications—by applying a rational basis test. The rational basis test requires that a law be rationally related to a legitimate governmental interest. Usually, it involves deference to the legislature. In *Reed*, the Court struck down an Idaho statute that provided for the selection of an administrator for an intestate estate.²⁵ Under the Idaho statutory scheme, if two competing applicants were equally qualified, males would be selected over females without regard to individual qualifications.²⁶ While the Court failed to enunciate a precise standard of review, it did find that the rational basis test employed in prior sex discrimination cases was unsatisfactory and unworkable. If the Court had applied the lesser rational basis standard of scrutiny in *Reed*, then it would have been compelled to uphold the classification in the Idaho statute so long as the classification was not irrational and was related to *any* permissible governmental interest, i.e., administrative convenience.²⁷

While it was evident that sex-based classifications should be reviewed under a more exacting level of scrutiny than the rational basis test, the Court refused to classify those persons treated differently on the basis of sex as a suspect class, entitling the sex-based classification to review under the insuperable strict scrutiny test.²⁸ For the next five years, the Court struggled with the meaning of *Reed* and its heightened, yet uncertain, standard of review.

In *Craig v. Boren*,²⁹ the Court finally came to a consensus on the appropriate standard of review for gender-based classifications. Referred to today as the “intermediate standard of review,” the principle established in *Craig* was that a classification by gender “must serve important governmental objectives and must be substantially related to the achievement of those objectives.”³⁰ In *Craig*, the Supreme Court invalidated an Oklahoma law which prohibited the

24. 404 U.S. 71 (1971).

25. *Id.* at 74.

26. *Id.*

27. See *Hoyt v. Florida*, 368 U.S. 57 (1961). In *Hoyt*, a Florida statute regulating jury duty granted women an across-the-board exemption, while males were eligible for jury duty unless they specifically requested an exemption. Applying the rational basis test, the Court found the exemption for women not irrational because of administrative convenience.

28. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), Justice Brennan opined that a gender-based classification was suspect. In that case, however, Brennan stood alone in his belief that a classification based upon gender was suspect in the same manner as a classification based upon race.

29. 429 U.S. 190 (1976).

30. *Id.* at 197.

sale of beer to females under the age of eighteen and to males under the age of twenty-one.³¹ Oklahoma proffered "traffic safety" as its justification for the disparity in the ages at which males and females could purchase beer. The Court, however, found the relationship between the important governmental interest and the gender-based classification to be a tenuous one.³² The state presented no evidence that a person's sex made him or her more or less likely to drive drunk. Oklahoma failed to demonstrate that the classification would lead to the goal of heightened traffic safety. The statute, thus, failed on the "substantial relationship" prong of the test.

Armed with this new standard of review, the post-*Craig* Court possessed the capacity to develop a coherent line of cases addressing sex discrimination under the Equal Protection Clause.

B. *The Single-Sex Education Cases: "Substantial Equality"*

While the Supreme Court struggled to craft a consistent standard of review to apply to sex-based classifications, other federal and state courts across the country were busy segregating the sexes at public schools. After *Brown v. Board of Education*,³³ courts had an opportunity to broaden the abrogation of the "separate but equal" doctrine in public education to desegregate the sexes. Courts, however, continued to defer to the states on the matter of single-sex education, due to the long-established tradition of single-sex education, judicial reluctance to second-guess legislative judgments in the area of education,³⁴ and the availability in most school systems of "substantially equal" opportunities for the education of women.³⁵

In 1970, however, the United States District Court for the Eastern District of Virginia in *Kirstein v. Rector & Visitors of University of Virginia* held that the state could not deny women admission to the University of Virginia in Charlottesville solely on the basis of sex without violating the Equal Protection Clause.³⁶ The decision rested on the fact that the University of Virginia provided women with educational opportunities not offered at any other public institution in the state.³⁷ No other institution existed in Virginia that offered women

31. *Id.* at 191-92.

32. *Id.* at 199-204.

33. 347 U.S. 483 (1954).

34. See *Williams v. McNair*, 316 F. Supp. 134, 138 nn.15-18 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971).

35. See *Heaton v. Bristol*, 317 S.W. 2d 86, 99 (Tex. Civ. App. 1958), *cert. denied*, 359 U.S. 230 (1959); *Allred v. Heaton*, 336 S.W. 251 (Tex. Civ. App. 1960).

36. 309 F. Supp. 184 (E.D. Va. 1970).

37. *Id.* at 187. The Fourth Circuit embraced the same argument in the *VMI* case when it

substantially equal prestige and course selection as did the Charlottesville campus. Had there existed another state school offering the same opportunities for women as the University of Virginia, the court may have held differently.³⁸ The court, however, in its opinion stopped short of striking down all single-sex education in the Commonwealth of Virginia. Foreshadowing the VMI case, the court stated, "We decline to do so. Obvious problems beyond our capacity to decide on this record readily occur. One of Virginia's educational institutions is military in character. Are women to be admitted [to VMI] on an equal basis, and if so, are they to wear uniforms and be taught to bear arms?"³⁹

Consistent with *Kirstein*, in 1971 the United States District Court for the District of South Carolina upheld the all-female admissions policy of Winthrop College, a public institution.⁴⁰ The decision in *Williams v. McNair* could be harmonized with *Kirstein* because the court found that Winthrop College, unlike the University of Virginia, did not offer a wide curriculum and did not enjoy outstanding prestige in the state system.⁴¹ The men of South Carolina had a wide range of educational opportunities available to them, none of which were available only at Winthrop.⁴² Although the court did not explicitly characterize the institutions as "separate but equal," it seemed evident, as with *Kirstein*, that existing single-sex education jurisprudence was finding its basis in the "separate but equal" doctrine. Where a court found other institutions in the state providing substantially equal educational opportunities as the institution in question, courts deferred to the legislature.

In 1975, the Third Circuit Court of Appeals added a new element to the single-sex education cases by finding "substantial equality" between two programs that were not, in fact, equal. In *Vorchheimer v. School District*,⁴³ the Third Circuit upheld the admissions policy of an all-male high school located in Philadelphia. Susan Vorchheimer sought admission to the all-male Central High School, one of two high schools the city maintained for academically-gifted

found no reason why the women of Virginia should not be afforded the same unique educational opportunities offered by VMI.

38. See Patricia W. Lamar, *The Expansion of Constitutional and Statutory Remedies for Sex Segregation in Education: The Fourteenth Amendment and Title IX of the Education Amendments of 1972*, 32 EMORY L.J. 1111, 1123 n.52 (1983) (discussing the implications of an institution which is equal in prestige and course offering to the University of Virginia).

39. *Kirstein*, 309 F. Supp. at 187.

40. *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971).

41. 316 F. Supp. at 138-39.

42. *Id.* at 137-38.

43. 532 F.2d 880 (3d Cir. 1975), *aff'd by an equally divided Court*, 430 U.S. 703 (1977).

students. The other high school was Girls High, the all-female counterpart to Central.⁴⁴ Finding no denial of equal protection, the Third Circuit utilized the “substantially equal” rationale from *Williams* and *Kirstein*, even though the court found the two schools not equal.⁴⁵ Susan Vorchheimer wished to attend Central to take advantage of its superior science facilities. By attending Girls High, students wishing to pursue a career in the sciences were disadvantaged. Despite this recognized inequality, the *Vorchheimer* court emphasized the need to allow “innovation in methods and techniques” to provide quality education.⁴⁶ The court then found that, irrespective of the differences in the science programs, the two schools were substantially equal and generally comparable in prestige and quality.⁴⁷ In 1977, the United States Supreme Court affirmed *Vorchheimer* without an opinion.⁴⁸

Kirstein, *Williams*, and *Vorchheimer*, taken together, provided strong support for what, at that time, was an emerging basis for deciding the single-sex education issue. The courts’ inquiry in each case became a question of whether there were “substantially equal” alternatives to the challenged single-sex institution. If “substantially equal” institutions existed, there would be no violation of equal protection.

The value of these cases as precedent is questionable. Each court couched its opinion in sexist and stereotypical undertones that undermined the weight of its authority.⁴⁹ Each decision, however, did recognize some legitimate and useful factors in the evaluation of single-sex education—factors that would later be employed in the VMI case. In *Kirstein*, the court took note of the long-established tradition of single-sex education,⁵⁰ while the *Vorchheimer* court cited respected authority to support the maintenance of single-sex schools.⁵¹ Furthermore, the court in *Vorchheimer* expressed concern about denying

44. 532 F.2d at 881.

45. *Id.* at 886-87.

46. *Id.* at 882.

47. *Id.*

48. 430 U.S. 703 (1977) (per curiam).

49. The court in *Kirstein* ridiculed the notion of women wearing military uniforms and bearing arms. 309 F. Supp. at 187. At the same time, the *Williams* court supported South Carolina’s purpose for establishing Winthrop College—to prepare women to give instruction in typing, sewing, stenography, and similar skills “suitable to their sex.” 316 F. Supp. at 136 n.3. Moreover, it has been observed that the *Vorchheimer* court, by finding both high schools equal, stereotyped that because girls are not as interested in the sciences as boys, the facilities need not be equal. See Caren Dubnoff, *Does Gender Equality Always Imply Gender Blindness? The Status of Single-Sex Education for Women*, 86 W. VA. L. REV. 295, 312 (1984); Lamar, *supra* note 38, at 1128.

50. 309 F. Supp. at 186.

51. 532 F.2d at 887.

the freedom of choice to those parents and students who wished to continue single-sex education.⁵² Along similar lines, the *Williams* court found that "flexibility and diversity in educational methods, when not tainted with racial overtones, often are both desirable and beneficial; they should be encouraged, not condemned."⁵³

C. Mississippi University for Women v. Hogan

The factors and concerns expressed by the *Kirstein*, *Williams* and *Vorchheimer* courts evidenced the judiciary's uneasiness to strike down public single-sex education. The courts recognized the traditions of the schools, the pedagogical virtues of single-sex education and the differences between men and women. As a result, the courts decided that the Equal Protection Clause does not mandate elimination of this form of schooling. The United States Supreme Court, however, had not yet decided on the issue outright. Armed with its new intermediate standard of review, the Supreme Court underwent the task of applying this heightened scrutiny to single-sex education.⁵⁴

Established in 1884, The Mississippi University for Women (MUW) was Mississippi's only single-sex public institution in 1982. Joe Hogan, a Mississippi resident, sought to enroll in the university's nursing program, but the university denied him admission based on his sex.⁵⁵ In *Hogan*, the Court decided to refrain from deciding the important issue of whether public single-sex education is a per se denial of equal protection. Instead, the Court used the intermediate scrutiny test to find that Mississippi's exclusion of males from the School of Nursing, but not from the entire university, violated the Fourteenth Amendment.⁵⁶ Since Mississippi simply did not offer Joe Hogan an alternative public nursing program, the Court was not forced to address the question of whether a state may provide "separate but equal" educational institutions for males and females.⁵⁷

According to Justice O'Connor's majority opinion, Mississippi held the burden of demonstrating an "exceedingly persuasive justification" for the gender-based classification at the nursing school.⁵⁸ The state could satisfy its burden only "by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the

52. *Id.* at 888.

53. 316 F. Supp. at 138.

54. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

55. *Id.* at 720-21.

56. *Id.* at 733.

57. *Id.* at 721 n.1.

58. *Id.* at 724 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)).

achievement of those objectives.’”⁵⁹ In addition, the intermediate scrutiny standard must be applied “free of fixed notions concerning the roles and abilities of males and females.”⁶⁰ In other words, the Court must assure that the state’s objective does not reflect archaic and stereotypical notions.

Although intermediate scrutiny under the Equal Protection Clause traditionally required a state to satisfy two prongs⁶¹—an important governmental objective and a substantial relationship—Justice O’Connor, in essence, established a third prong in *Hogan*. By ensuring that the other prongs were applied “free of fixed notions” about the sexes, the validity of sex-based classifications could now be determined only through “reasoned analysis rather than through the mechanical application of traditional, often inaccurate assumptions about the proper roles of men and women.”⁶²

The addition of this third prong resulted in the demise of MUW’s all-female nursing program. While Mississippi sought to justify the single-sex program as a means of compensating women for past discrimination (an important governmental objective), it failed to recognize that in a traditionally female dominated occupation such as nursing, women had suffered no discrimination at all. Moreover, Justice O’Connor, eager to apply her third prong, found that “MUW’s policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job.”⁶³ In the end, Mississippi failed all prongs of intermediate scrutiny.

D. *What Hogan Means*

At this point it is more appropriate to ask what *Hogan* does not mean. Clearly, Justice O’Connor’s opinion indicated that she intended *Hogan* to be a narrow decision. One should recall, however, that in a similar vein the Warren Court intended for courts to apply *Brown v. Board of Education*⁶⁴ narrowly to the public schools. Is *Hogan* to become the *Brown* for “separate but equal” schooling based on sex?

Hogan, standing alone, is not and has never been read as a broad denunciation of publicly financed single-sex education. In footnote

59. *Id.* at 724 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

60. *Id.* at 724-25.

61. See *Craig v. Boren*, 429 U.S. 190, 197 (1976); *supra* notes 29-32 and accompanying text.

62. *Hogan*, 458 U.S. at 726.

63. *Id.* at 729.

64. 347 U.S. 483 (1954).

seven of *Hogan*, Justice O'Connor addressed those who might use the Court's decision to assert that all state supported single-sex education is hereafter inherently unequal and a violation of the Equal Protection Clause. O'Connor wrote: "Because Hogan's claim is thus limited . . . we decline to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment."⁶⁵ However, the explicit narrowness of the opinion unsettled several justices on the Court. Believing that Justice O'Connor failed to emphasize the narrowness of her opinion, Chief Justice Burger wrote a one paragraph dissent emphasizing that the Court's holding was "limited to the context of a professional nursing school."⁶⁶ Justice Blackmun's dissent claimed that there could be an "inevitable spillover from the Court's ruling" and that "[t]he Court's reasoning does not stop with the School of Nursing of the Mississippi University for Women."⁶⁷ Finally, Justice Powell wrote that "[t]he logic of the Court's entire opinion . . . appears to apply sweepingly to the entire University. . . . Nor does the opinion anywhere deny that this analysis applies to the entire University."⁶⁸ The narrow holding of *Hogan* and the extent of the dissenters' concern evidenced at least some desire by the Court to preserve single-sex education. Should the Court someday determine that such schooling constitutes a per se violation of the Equal Protection Clause, then clearly *Hogan* would not be the sword used to strike the blow.

In addition, the *Hogan* decision has never been interpreted to mean that "separate but equal" single-sex educational institutions are unconstitutional. Justice O'Connor, again in a footnote, addressed this concern by writing, "Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males or females."⁶⁹ In other words, the Court would not use *Hogan* to overturn *Vorchheimer* or its summary affirmance in *Williams*. Again, the dissenters feared that courts would translate the majority's reasoning into an abrogation of "separate but equal" in the context of sex-based classifications.⁷⁰ This fear, however, was never

65. *Hogan*, 458 U.S. at 723 n.7.

66. *Id.* at 733 (Burger, C.J., dissenting).

67. *Id.* at 734 (Blackmun, J., dissenting).

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

69. *Id.* at 720 n.1.

70. *Id.* at 734 (Blackmun, J., dissenting) ("That ruling, it seems to me, places in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex, even though the State elsewhere provides an equivalent program to the complaining applicant.").

realized since subsequent cases, including VMI, have continued to recognize the vitality of the "separate but equal" doctrine in some gender-based classifications.

So what exactly does *Hogan* stand for other than an isolated problem of discrimination at a small, Southern nursing school? The broad effect of *Hogan* is its requirement that courts must now scrutinize a state's proffered justification for maintaining a single-sex institution so as to ensure that the legislation serves an important governmental objective.⁷¹ Courts will no longer simply defer to state legislatures' interests or objectives without exacting a heightened scrutiny. If this is the case, then what does *Hogan* say about acceptable governmental interests? What state justifications for the continued existence of a single-sex institution will rise to the level of satisfying the standard of review required by *Hogan*?

Justice O'Connor's opinion fails to enumerate which educational objectives might satisfy intermediate scrutiny; however, it does reveal that "compensation for past discrimination" is not an important governmental interest unless the program is actually used to redress an existing burden caused by past discrimination.⁷² For instance, the *Hogan* Court cited to *Schlesinger v. Ballard*,⁷³ where it upheld a federal law allowing female Navy officers to serve four years longer than male officers before implementation of a mandatory discharge. In *Schlesinger*, the Court validated the gender-based statute in order to compensate for the burden female officers suffered as a result of the national policy restricting females from combat duty. Since women could not participate in combat, the Court reasoned, they had fewer opportunities for promotion than the male officers.⁷⁴ The four additional years gave women the chance to reach a particular rank before discharge.

While, in some circumstances, a compensatory purpose may justify a discriminatory program, "compensation" is at the same time limited as an important governmental interest by the Court's requirement that the challenged program be created in order to neutralize an existing burden.⁷⁵ Thus, Justice O'Connor's sole example in *Hogan* of

71. See Deborah B. Rose, *Sex Discrimination in Higher Education—The U.S. Supreme Court and a Bastion of Tradition: Mississippi University for Women v. Hogan*, 1983 S. ILL. U. L.J. 71, 84; Jack G. Steigelfest, *The End of An Era for Single-Sex Schools? Mississippi University for Women v. Hogan*, 15 CONN. L. REV. 353, 372 (1983).

72. *Hogan*, 458 U.S. at 728 ("In limited circumstance, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.").

73. 419 U.S. 498 (1975).

74. *Id.* at 508.

75. See Steigelfest, *supra* note 71, at 373.

a governmental objective important enough to satisfy the first prong of intermediate scrutiny may be routinely difficult to demonstrate. In the case of VMI, the single-sex tradition does not serve any compensatory purpose. What else then constitutes an important governmental objective satisfying intermediate scrutiny? Were the *Hogan* dissenters justified in their fears about Justice O'Connor's facially narrow opinion? While O'Connor professed to limit her opinion to MUW's nursing school, the failure to cite any other potentially important governmental interests creates a barrier in and of itself for any non-compensatory single-sex state program to satisfy the first prong of intermediate scrutiny. *Hogan's* message to the states may be, "If you did not impose your gender-based classification with a compensatory purpose in mind, then that classification will not satisfy the requirements of the Equal Protection Clause."

E. *Diversity as an Important Governmental Objective*

The *Hogan* dissenters accounted for the deficiencies in O'Connor's majority opinion by offering what they viewed as at least one other important governmental objective served by the program at MUW—the diversity in education offered by the school's single-sex status.⁷⁶ Hoping to salvage single-sex education from what he saw as a harmfully broad decision, Justice Powell wrote:

A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system. At stake in this case . . . is the preservation of a small aspect of this diversity . . . [and] that aspect is by no means insignificant, given our heritage of available choice between single-sex and coeducational institutions of higher learning.⁷⁷

From the standpoint of Justices Powell, Blackmun and Rehnquist, the situation at MUW concerned not just the School of Nursing or even single-sex education at large; rather, it involved the deterioration of certain values, such as diversity and "relegat[ing] ourselves to needless conformity."⁷⁸ By trying to elevate diversity in educational experience to an important governmental objective, the dissenters hoped to avert, and probably foresaw, a future crisis that would threaten single-sex education in the name of conformity.

At the time of the *Hogan* decision, however, "diversity" as an important governmental objective was not a new concept to the

76. *Hogan*, 458 U.S. at 735 (Powell, J., dissenting).

77. *Id.* at 745.

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

Supreme Court. Five years earlier, in the landmark case *Regents of the University of California v. Bakke*,⁷⁹ the Court characterized the attainment of a diverse student body as “a constitutionally permissible goal for an institution of higher education”⁸⁰ and held that a race-conscious college admissions program could attract students that would contribute to the “robust exchange of ideas.”⁸¹ Moreover, on at least one occasion since *Hogan* and *Bakke*, the Court has used the “diversity” rationale to uphold a suspect classification.⁸² The Court in *Metro Broadcasting, Inc. v. FCC* upheld a Federal Communications Commission plan to prefer minority-owned radio stations in awarding broadcast licenses. The Court found that “the interest in enhancing broadcast diversity is . . . an important governmental objective and is therefore a sufficient basis for the [FCC’s] minority ownership policies.”⁸³

The Supreme Court is not the only branch of our federal government to justify certain classifications and preferences on the basis of diversity. The United States Congress has employed the theme of “preserving diversity in education” to protect the status of single-sex schools. In 1972, Congress passed Title IX of the Education Amendments which prohibits sex discrimination in educational programs or activities receiving federal financial assistance.⁸⁴ Although Title IX made it impossible for most institutions receiving federal funds to deny admission to a person based on gender, the drafters took care to exempt certain institutions from the statute’s prohibitions. Specifically, the act exempted “any public institution of undergraduate higher learning which is an institution that *traditionally and continually* from its establishment has had a policy of admitting only students of one sex.”⁸⁵ The House Reports to Title IX explicitly recognized the importance of single-sex institutions to diverse educational experiences:

One of the great strengths of the American higher education sys-

79. 438 U.S. 265 (1978).

80. *Id.* at 311-12.

81. *Id.* at 313.

82. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

83. *Id.* at 567-68.

84. 20 U.S.C. § 1681(a) (1976).

85. 20 U.S.C. § 1681(a)(5) (1976) (emphasis added). It is important to note that neither *Hogan* nor *VMI* was decided on a statutory basis. Rather, a constitutional equal protection rationale justified each decision. The provisions of the Education Amendments did not impact either case since each plaintiff challenged the school’s constitutional, rather than statutory, obligation. Furthermore, in addressing the limited impact of Congress’ exemption of single-sex schools, Justice O’Connor wrote, “[N]either Congress nor a state can validate a law that denies the rights guaranteed by the Fourteenth Amendment.” *Hogan*, 458 U.S. at 732-33.

tem is its tremendous diversity in types of educational institutions and experiences. Students should be allowed to choose on the basis of personal preference, and colleges should have an absolute right to offer, the type of environment they desire in college

Equality in education does not mean that all colleges must be equal, or that all students must go to the same school. Neither should it mean that individual colleges should be precluded from determining for themselves the makeup of their own student body.⁸⁶

In the floor debates on the Title IX exemptions, Senator Lloyd Bentsen of Texas argued on behalf of Texas Women's University, a state-supported single-sex college:

The women attending this institution do so voluntarily because they wish to have the experience of attending an all female institution. If they did not want to attend, they could go to . . . another institution of higher education. [Texas Woman's University] has a cohesiveness that other institutions do not have. It is a unique and distinctive institution, and it should be allowed to exist.⁸⁷

III. THE CASE OF THE VIRGINIA MILITARY INSTITUTE

Armed with the single-sex education cases and legislative treatment of the issue by both Congress and the Commonwealth of Virginia,⁸⁸ the VMI cadets once again emerged from their campus barracks to fight another battle, this time a legal battle, with the United States. Seizing upon the theme of Justice Powell's dissent in *Hogan*, the school grounded its position on what has been called the "endangered species argument."⁸⁹ VMI planned to convince the District Court that it provides an important kind of educational diversity on the verge of extinction.

By depending upon educational diversity as its important governmental objective, VMI may have triggered its own demise. The United States District Court for the Western District of Virginia,

86. H.R. REP. NO. 554, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.A.N. 2462, 2590.

87. 118 CONG. REC. S5814 (daily ed. Feb. 28, 1972) (statement of Sen. Bentsen).

88. VMI is controlled by a board of visitors which is controlled by the General Assembly of Virginia. VA. CODE ANN. § 23-92 (Michie 1985). The board decides "the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service and the duration thereof." *Id.* § 23-104. Commonwealth policy dictates that the boards of visitors of its public colleges and universities have broad autonomy in determining the institution's mission, including the school's admissions policies. *See id.* §§ 23-9.2:3 and 23-9.6:1.

89. *VMI Appeals to U.S. Supreme Court*, UPI, Jan. 19, 1993, available in LEXIS, Nexis Library, UPI File [hereinafter *VMI Appeals*].

under Judge Kiser, ruled in favor of VMI based on the diversity argument. The Fourth Circuit Court of Appeals, however, while applauding VMI's diversity, remanded the case back to the district court so that Virginia could implement a plan that would offer this type of educational diversity to the women of Virginia as well.⁹⁰ On May 24, 1993, the United States Supreme Court refused to grant certiorari prior to final judgment in the litigation below.⁹¹

A. *The First Battle: A VMI Victory*

In VMI's case before the district court, Virginia was called upon to satisfy *Hogan's* intermediate scrutiny test. The court essentially accepted VMI's proffered argument in three parts. First, Judge Kiser found diversity in education is a legitimate governmental objective.⁹² Second, the court held that single-sex education is a constitutionally legitimate form of diversity.⁹³ Finally, the court found that the negative effects of coeducation at VMI under the adversative model supported a substantial relationship between the single-sex admissions policy and the state objective of educational diversity.⁹⁴

1. PEDAGOGICAL VIRTUES OF SINGLE-SEX EDUCATION

In the VMI case, both the district court and the court of appeals placed tremendous weight on the pedagogical virtues of single-sex education. Judge Kiser relied principally on almost thirty pages of "findings of fact" which demonstrated the positive impact of single-sex education on both sexes.⁹⁵ The court noted, "For those students [both male and female], the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement."⁹⁶

As applied to women, the empirical evidence amply supports Judge Kiser's findings. Studies show that all-female institutions accelerate women into normally male-dominated fields such as science, politics and business.⁹⁷ Forty-two percent of the women members of Congress attended private women's colleges, as did one-third of the

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

91. *Virginia Military Institute v. United States*, 113 S. Ct. 2431 (1993).

92. *United States v. Virginia*, 766 F. Supp. 1407, 1411 (W.D. Va. 1991).

93. *Id.* at 1412.

94. *Id.* at 1413.

95. *Id.* at 1415-43.

96. *Id.* at 1412.

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

women on the boards of Fortune 1000 companies.⁹⁸ One 1976 study ranked 137 colleges and universities according to the number of doctorate degrees received by women. Of the top twenty-five schools, twelve of them were all-female institutions.⁹⁹ Other studies support these observations as well. In 1979, educator Alexander Astin wrote in his renowned study of single-sex education that “[s]ingle-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 practically all aspects of the college experience . . . compared with their counterparts in coeducational institutions.”¹⁰⁰ In yet another report, cited by the Fourth Circuit, researchers found that both males and females were more likely to pursue nontraditional, nonstereotypical careers if they attended single-sex schools.¹⁰¹ Finally, the pedagogical justification of single-sex education is evidenced in the sheer number of students who continue to attend these schools. Although there has been an overall decline in the number of single-sex schools since the passage of Title IX of the Education Amendments, these institutions account for a large number of students who choose the experience of single-sex education. As of 1990, there were approximately 75,000 men and women enrolled in single-sex institutions.¹⁰²

Notwithstanding the empirical evidence, the diversity offered by VMI is not based solely on its status as another single-sex college. Rather, VMI also offers a unique method of education known as the adversative model. The unique nature of this military-style education ultimately led the district court to find that VMI satisfied the second prong of the intermediate scrutiny test—that a substantial relationship between excluding females and the legitimate governmental objective of educational diversity existed.¹⁰³

2. THE ADVERSATIVE MODEL: A METHOD OF INSTRUCTION UNIQUE IN ALL THE WORLD

The second prong of *Hogan*'s intermediate scrutiny test requires

98. Edward B. Fiske, *Lessons*, N.Y. TIMES, June 14, 1989 at B8; Mona Charan, *Single-sex education has its place*, WASH. POST, Jan. 11, 1994, at A9.

99. See Dubnoff, *supra* note 49, at 324.

100. ALEXANDER W. ASTIN, *FOUR CRITICAL YEARS* 246 (1979).

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

102. *United States v. Virginia*, 766 F. Supp. 1407, 1420 (W.D. Va. 1991).

103. *Id.* at 1413.

that the discriminatory means employed by a state be "substantially related" to the achievement of the state's important governmental objective.¹⁰⁴ In *United States v. Virginia*, the district court found VMI's exclusion of women was directly and substantially related to the Commonwealth's goal of diversity in a way that the policy invalidated in *Hogan* was not. Judge Kiser's conclusions were based on extensive evidence in the record showing that a "method of instruction . . . unique in all the world"¹⁰⁵ would be altered, if not lost forever, were VMI forced to admit women. Coeducation would jeopardize the successful operation of VMI's educational program, commonly referred to as "adversative."¹⁰⁶

VMI's educational method serves an objective quite different from the national military academies which have all integrated women within the last twenty years. The mission of West Point, the Naval Academy, and the Air Force Academy is to prepare cadets for career service in the armed forces.¹⁰⁷ VMI's mission, on the other hand, is to educate and train young men as citizen-soldiers. In fact, only fifteen percent of VMI's cadets actually ever begin a career in military service.¹⁰⁸

In furtherance of the VMI mission, the school utilizes the adversative model of education—a "highly specialized program for the distinctive physiological and developmental characteristics of males."¹⁰⁹ Since the program is tailored specifically to the distinctive physiological attributes of men, the exclusion of females may not be characterized as invidious. In the past, the Supreme Court has allowed classifications based on biological differences for the simple reason that they "realistically reflect the fact that the sexes are not similarly situated in certain circumstances."¹¹⁰ A glance at the VMI program reveals that the sexes are not similarly situated to benefit from the adversative model.

The district court in *VMI* found that "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of desirable values are the salient attributes of the VMI educational experience."¹¹¹ The district

104. See *supra* notes 58-59 and accompanying text.

105. 766 F. Supp. at 1415.

106. Brief for Appellee at 20, *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992) (No. 91-1690) [hereinafter Brief for Appellee].

107. 766 F. Supp. at 1432.

108. *Id.* at 1432.

109. Brief for Appellee, *supra* note 106, at 20.

110. *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981).

111. 766 F. Supp. at 1421.

court, all testifying experts, and the Fourth Circuit agreed that the adversative model is the composition of several individual programs, of which the elimination of any one program would have negative consequences on the entire educational experience.¹¹² Although the Fourth Circuit cited six different programs within the VMI, only four are truly unique in comparison to other higher educational institutions—the “rat line,” the class system, the dyke system, and barracks life.¹¹³

The “rat line” describes the first year cadet program. A first year cadet is called a “rat” because, as one expert testified, the rat is “probably the lowest animal on earth.”¹¹⁴ The rat line is comparable to the physical rigor and mental stress of the Marine Corps boot camp. Punishment and reward are the fundamentals of this intense first year program. Thousands of regulations govern cadet life.¹¹⁵ Dr. Richard Richardson, Jr., one of VMI’s experts who also served on a committee to evaluate West Point, testified that the rat line “challenges all values and all forms of behavior in order to instill the values and behaviors for which VMI exists.”¹¹⁶ Since punishment is collective as well as individual, class solidarity and individual responsibility are the rat line’s main by-products. The rat line is “sufficiently rigorous and stressful that those who complete it feel both a sense of accomplishment and a bonding to their fellow sufferers and former tormentors.”¹¹⁷

While the rat line strips away old values and behaviors, the class and dyke systems reinforce new values and behaviors. The class system maintains constant supervision of cadets and an intricate system of privileges which rewards desired behavior. The dyke system provides young cadets with upper class mentors who serve as models for leadership and guidance. A first classman, called a “dyke,” is assigned to each rat as his mentor.

Barracks life at VMI is at the center of all these systems. The barracks integrate the VMI educational method into a unified experience. Cadets must live in the barracks during their four years at VMI. At trial, the court heard testimony that “[u]nlike most colleges, where the library is central and the dormitories are peripheral, the most important aspects of the VMI educational experience occur in

112. *Id.* at 1422; *United States v. Virginia*, 976 F.2d 890, 896 (4th Cir. 1992).

113. *See* 766 F. Supp. at 1422-23.

114. *Id.* at 1422.

115. *Id.*

116. *Id.*

117. *Id.*

the barracks.”¹¹⁸ More specifically, the twin pillars of the VMI experience—“the egalitarian nature of the program . . . and the complete absence of privacy which permits an openness and scrutiny that assure adherence to the system”—exist primarily through barracks life at the institute.¹¹⁹

Indeed, the spartan conditions of the barracks further the openness and egalitarian environment required for the adversative model to succeed. The barracks are “stark and unattractive.”¹²⁰ There are no locks on the doors of the cadets’ rooms. The windows of the barracks have no window shades or curtains. Toilet and shower facilities are exposed. In most instances, a cadet cannot shower or go to the bathroom without being observed by everyone in the building. Ventilation is poor. The occupancy rate is 3.7 cadets per room. According to Dr. Richardson, “the barracks is ‘definitely unattractive and it is an unappealing place unless you consider the purpose for which it exists. It is designed to provide people with an intensive laboratory in human development. It exists to place people under stress.’ ”¹²¹

3. ADMITTING WOMEN TO VMI: DESTRUCTION OF THE ADVERSATIVE MODEL

Applicants seek admission to VMI because it is regarded as the most challenging military school in the United States.¹²² For many young men, the adversative model provides the best education they can receive. However, as both Judge Kiser and the Fourth Circuit found, if VMI were to admit women, the most crucial elements of the adversative model would have to be substantially altered in order to accommodate the needs and interests of the female cadets.¹²³ This would frustrate adversative model, thereby eliminating most of VMI’s contribution to diversity in higher education in Virginia.

The Fourth Circuit recognized the irony of the situation. “The Catch-22 is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.”¹²⁴ Females seeking admission to VMI with hopes of

118. *Id.* at 1423.

119. Brief for Appellee, *supra* note 106, at 23.

120. 766 F. Supp. at 1424.

121. Brief for Appellee, *supra* note 106, at 24.

122. 766 F. Supp. at 1421.

123. *United States v. Virginia*, 976 F.2d 890, 900 (4th Cir. 1992) (“[T]he introduction of women at VMI will materially alter the very program in which women seek to partake.”); 766 F. Supp. at 1413 (“some aspects of the distinctive method would be altered if it were to admit women.”).

124. 976 F.2d at 897.

experiencing the benefits of the adversative model would find that, by the time they arrived in Lexington, the adversative model would no longer exist. VMI would no longer be VMI. Griffin Bell, former United States Attorney General and attorney for VMI, argued before the Fourth Circuit that "VMI can't be VMI if it lets women in. . . . By obtaining what she wants, [the plaintiff would] lose what she wants because it wouldn't be there anymore."¹²⁵ The VMI experience is holistic to such a degree that changing any one component part of the model would result in an altogether different system of education.¹²⁶ Both the trial and appellate courts determined, on the basis of expert testimony, that integration of women at VMI would require several changes in the program which would force VMI to adopt a developmental method of schooling similar to the one at West Point.¹²⁷

The reference to West Point is not made to show that coeducation at our nation's military academies has been unsuccessful or that coeducation is an insurmountable barrier to those who have had to redesign their schools' programs. The obstacles accompanying integration are a small price to pay for the worthwhile objective of educational equality. However, West Point's and the other national service academies' experiences suggest that VMI, if forced to integrate, will undoubtedly have to change or abandon the principles which have been the sole reason for the school's very existence and heritage. Unlike the racial desegregation of public schools, integration at VMI would benefit neither females nor males. Instead, the Commonwealth of Virginia with an integrated VMI would lose what it considers to be an essential element of diversity in its system of higher education.¹²⁸

The prophetic tales of integration at West Point and the other service academies demonstrate the inevitable demise of the adversative model at VMI. Since 1976, the year West Point admitted its first female cadet, physical standards have been lowered to accommodate the different physiological differences between men and women.¹²⁹ Basic training is now divided into groups according to ability. Physical activities are assigned to cadets on the basis of gender. Men are required to perform pull-ups while women must execute a flexed-arm

125. Suzanne Fields, *Reprieve for Brother Rat*, WASH. TIMES, Oct. 8, 1992, at G1.

126. Brief for Appellee, *supra* note 106, at 28.

127. 766 F. Supp. at 1440; 976 F. 2d at 897.

128. The 1991 Report of the Commission on the University of the 21st Century to the Governor and General Assembly of Virginia boasted, "The formal system of higher education in Virginia includes a great array of institutions: state supported and independent, two year and senior, research and highly specialized, traditionally black and single-sex." Brief for Appellee, *supra* note 106, at 12.

129. BRIAN MITCHELL, *WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY* 69 (1989).

hang.¹³⁰ Men must box and wrestle while women learn karate and self defense (and "interpretive dancing" at the Coast Guard Academy).¹³¹ Men felt that they were the victims of a double standard. "[S]ince the women learned neither to box nor to wrestle, and their close-quarters training emphasized self-defense, they never had bloody noses. The men were outraged, since deep down they knew war was about bloody noses."¹³² Instead of wearing combat boots during running exercises, cadets wear running shoes. Running events no longer required cadets to carry weapons.

As for the facilities, doors on cadets rooms are now locked and solid. Modifications have been made for jewelry, dress, and hair length. Hazing practices, upperclassmen yelling at cadets, and requiring physical activities such as push-ups as punishment have been eliminated. Furthermore, studies show that since integration at the academies, unit morale has declined as a result of cross-sexual relationships and the distractions associated with them.¹³³ The attrition rate for female cadets has been far greater than that for male cadets.¹³⁴ There have been complaints of sexual harassment.¹³⁵ Additionally, more than half of the women at the academies believe that gender integration has been unsuccessful.¹³⁶

While the hardships and changes associated with integration at the academies have proven necessary, they provide concrete support for the proposition that women and men are not similarly situated to benefit from the adversative model at VMI. Integration at VMI would introduce class differences not currently present in its egalitarian atmosphere. The introduction of privacy would eliminate the central element of barracks life—constant scrutiny. Physical education requirements and the rat line would have to be altered to reflect physiological differences. VMI would have two choices: either lower the physical standards for all cadets or introduce the concept of comparable training, which allows females to perform less strenuous tasks than male cadets. While the former would undermine the intensity of the program for the males, the latter would undermine the adversative principle of egalitarianism at VMI. Finally, integration would distract men and women from their studies by adding outside pressures related to dating—pressure a number of cadets seek to escape by

130. 766 F. Supp. at 1439.

131. MITCHELL, *supra* note 129, at 70.

132. *Id.*

133. *Brother Rat Talks Back*, FORTUNE, July 1, 1991, at 95.

134. *Id.*

135. *Id.*

136. *Id.*

choosing VMI.¹³⁷ As a VMI expert on education testified, “the adversative model of education is simply inappropriate for the vast majority of women.”¹³⁸

B. *The Second Battle: Fighting to a Draw*

After holding that VMI could continue its single-sex admissions policy, district court Judge Kiser stated, “VMI is a different type of institution. It has set its eye on the goal of citizen-soldier and never veered from the path it has chosen to meet that goal. VMI truly marches to the beat of a different drummer and I will permit it to continue to do so.”¹³⁹ Unfortunately, the Fourth Circuit Court of Appeals was neither as eager nor as articulate in coming to the rescue of the historic VMI. Instead, the appellate court issued an opinion that left litigants on both sides of the issue with mixed messages.¹⁴⁰

As previously noted, the Fourth Circuit agreed with the district court in nearly all of its findings and reasoning. The Fourth Circuit agreed with VMI that its civilian-soldier mission is appropriate and successful; that the adversative model justifies a single-sex admissions policy; that the key aspects of VMI’s program would be “materially altered” by the presence of women; and, that if women were admitted to VMI, they would not benefit from VMI as it now exists because coeducation would completely alter the school.¹⁴¹ The court, nevertheless, overturned Judge Kiser’s ruling and remanded the case to the district court to implement a plan that brings VMI into conformity with the Equal Protection Clause.¹⁴² While the Fourth Circuit agreed with the positive contributions of VMI to Virginia’s educational diversity, the court found that the Commonwealth failed to advance any state policy for affording VMI’s diverse education to men and not to women.¹⁴³ Judge Niemeyer noted that

[i]f VMI’s male-only admissions policy is in furtherance of a state policy of “diversity,” the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more

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

138. *Id.* at 1413.

139. *Id.* at 1415.

140. *Marching Forward: A Court Ruling Paves the Way for Women at Virginia Military Institute*, TIME, Oct. 19, 1992, at 22.

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

142. *Id.* at 900.

143. *Id.* at 898 (“The decisive question in this case therefore transforms to one of why the Commonwealth of Virginia offers the opportunity only to men.”).

than favor one gender.¹⁴⁴

The Fourth Circuit's decision, while not explicitly ordering VMI to admit women, nonetheless, struck a lethal blow to the Institute. The decision left VMI with three alternatives for bringing the school into conformity with the Fourteenth Amendment. First, the school might "properly decide to admit women and adjust the program to implement that choice."¹⁴⁵ Second, VMI could relinquish its status as a public institution by becoming private.¹⁴⁶ Finally, Virginia could establish parallel institutions or programs—the politically correct phraseology for "separate but equal."¹⁴⁷

Ultimately, VMI's diversity argument, which helped the school prevail in the case before the district court, became its stumbling block in the Fourth Circuit. VMI's reliance on the diversity rationale may have been misplaced for the simple reason that VMI's contribution to the Commonwealth was a "diversity of exclusion" instead of a "diversity of inclusion." The cases relied upon in support of "diversity" involved programs that broadened *all* students' opportunities, rather than simply a particular class of students. For example, in *Bakke*, the University of California implemented its admissions program to create a diverse student body—it admitted students who otherwise might not have attended the school. Similarly, in the *Williams* and *Vorchheimer* cases, the diversity arguments succeeded because the schools' programs enhanced educational opportunities for all. Those courts supported single-sex education because other "separate but equal" institutions offered members of the opposite sex substantially similar opportunities. This enhanced diversity because *all* students could choose a particular type of education in either a co-ed or single-sex setting. At VMI, only males could choose to endure the adversative style of instruction.¹⁴⁸

The diversity argument seems to carry less weight when one considers the homogeneity of the case law relied upon by VMI. Support for "diversity in education" is found mainly in *Bakke* and in the *Hogan* dissent. Those two opinions have one thing in common—Justice Powell. While Justice Powell believed it was a legitimate goal for

144. *Id.* at 899.

145. *Id.* at 900.

146. *Id.*

147. *Id.*

148. The Fourth Circuit noted that, at one point, it was suggested that the women in Virginia did have an option to partake in a similar method of schooling in the ROTC program of Virginia Tech. The argument was not pressed, however, since, by conceding the availability of a similar program, VMI would have undermined its own argument that it is "unique" to the state. 976 F.2d at 898 n.8.

states to create "diverse microcosms in a pluralistic society,"¹⁴⁹ his position essentially remains unsupported by other members of the high Court. VMI's reliance on Powell's theories means it relied on a notion of what "diversity" is in the mind of one Justice, rather than the entire Court.

After the Fourth Circuit's decision, VMI appealed to the United States Supreme Court to rule on the constitutionality of its single-sex admissions policy.¹⁵⁰ Judge Niemeyer's opinion certainly weakened the diversity argument. As a result, it became extremely difficult to demonstrate to the Court why this opportunity should be offered to men and not to women. While diversity may be a dead issue, the Fourth Circuit's opinion raised an equally complicated issue not discussed until the case reached the appellate court. Of the three options the Fourth Circuit offered Virginia, only one seems workable—to create a parallel institution. In fact, the Fourth Circuit subtly encouraged this option. Commenting on the adversative program, the court wrote, "Although it is readily apparent from the evidence that the rigor of the physical training at VMI is tailored to males, in the context of a single-sex *female* institution, it could be adjusted without detrimental effect."¹⁵¹ To many women, however, this option is equally offensive because it calls into debate the "separate but equal" doctrine as applied to females.¹⁵² While VMI pursues this course in the wake of the Supreme Court's denial of certiorari, a legal battle is waiting to emerge on this issue alone.¹⁵³

IV. IN THE AFTERMATH OF THE BATTLE FOR VMI: A POLICY DISCUSSION ON THE EMERGING SINGLE-SEX ISSUES

While VMI's future remains uncertain in the aftermath of the Fourth Circuit's decision, greater uncertainty has been generated by the battle's effect on established norms, institutions and legal principles. There are at least two important issues certain to arise from VMI's struggle. First, controversy is certain to follow the Fourth Circuit's suggestion that VMI create a "parallel institution."¹⁵⁴ This, of course, unearths the old "separate but equal" doctrine in public edu-

149. See Alan Howard & Bruce Howard, *Political Equality*, 83 COLUM. L. REV. 1615, 1631-32 (1983).

150. *VMI Appeals*, *supra* note 89.

151. 976 F.2d at 898 (emphasis added).

152. See *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987) and *United States v. Fordice*, 112 S. Ct. 2727 (1992) for recent "separate but equal" cases.

153. See John F. Harris, *U.S. Court Declares VMI's All-Male Policy Unconstitutional*, WASH. POST, Oct. 6, 1992, at C1.

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

cation.¹⁵⁵ The Supreme Court has never decided the issue of whether "separate but equal" is appropriate in a single-sex public school setting.

Another issue which may emerge if VMI is forced to admit women is the fate of the private women's colleges in America. VMI's potential destruction is a commentary on single-sex education per se. The VMI case is not an isolated problem, but reflects a movement in this country toward conformity and sameness. As one of the last public single-sex institutions left in the country, VMI symbolically and legally serves as a last line of defense against those who wish to challenge gender discrimination at private women's colleges. Moreover, in the last decade, the Supreme Court has found that the public/private distinction may be blurred in the context of higher education.

A. *Carry Me Back to Old Virginny: The Separate but Equal Doctrine*

In September 1993, attorneys for VMI submitted a plan to Judge Kiser's district court in western Virginia with the goal of salvaging the Institute's all-male heritage. The plan embraces the Fourth Circuit's suggestion that a "parallel institution" be created for women. Located only thirty miles from Lexington, officials from Mary Baldwin College in Staunton, Virginia, a private women's school, have agreed to harbor a military program designed to simulate the one at VMI. The program would include a Reserve Officer Training Corps and other military training offered at VMI, but would exclude the more extreme military exercises — including the "rat line" and the "dyke system" of mentors. As further incentive, VMI has agreed to provide \$6.9 million to Mary Baldwin College to cover expenses involved in the creation and maintenance of the program.¹⁵⁶

In 1954, almost forty years before the VMI case, the Supreme Court held in *Brown v. Board of Education*,¹⁵⁷ that "in the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal."¹⁵⁸ Although Justice Earl Warren was referring specifically to separation of the races, a question still exists as to whether this broadly phrased statement abrogates "separate but equal" public educational settings based on gender.¹⁵⁹

155. See *infra* note 162 and accompanying text.

156. Debbi Wilgoren, *Plan for Female VMI Splits Campus*, WASH. POST, Sept. 28, 1993, at D1.

157. 347 U.S. 483 (1954).

158. *Id.* at 495.

159. One legal scholar commented on the Fourth Circuit's decision in *VMI* by saying of the

Many legal commentators believe the argument advanced in *Brown* (that separation is inherently unequal) may be employed in the context of gender to show that separate men's and women's educational institutions are also inherently unequal.¹⁶⁰ Their argument is basically that

. . . blacks and women have faced strikingly similar conditions. It is therefore likely that if, as the Supreme Court found in *Brown v. Board of Education*, racial segregation adversely affects the self-image of black children, sex segregation will have the same effects on females. Separation in each case conveys a stigma and perpetuates stereotypes.¹⁶¹

As in *Brown*, this stigma involves the inferiority associated with separation and the intangible effects associated with denial of attendance at a particular school. To some, the term "separate but equal" carries with it the connotation of exclusion of a disempowered group by a dominant group.¹⁶² Those opposed to a "separate but equal" setting claim to have evidence that the psychological effects on young women are similar to the badge of inferiority experienced by blacks in separation by race.¹⁶³ In addition, it may be difficult for all-female schools to replicate the prestige, traditions, reputation of faculty, alumni influence, and professional contacts of their all-male counterparts. Opponents of the "separate but equal" doctrine in the field of education have called for abrogation by analogy to race. As one commentator concluded, "[The doctrine is] as vulnerable today as [it was] twenty years ago. The grounds for rejecting the racial 'separate but equal' doctrine are applicable to the sex-based doctrine, particularly in view of the analogous situations in which blacks and women have found themselves."¹⁶⁴

The arguments based on analogy to race, however, are misplaced both as to *Brown's* legacy and to the respective plights of women and blacks. First, *Brown* referred only to *de jure* or intentional segregation by race and not to separation by sex. The statistical evidence used in *Brown* dealt only with race. Similar evidence has not been

separate but equal language, "I thought we eliminated [that argument] some 30 or 40 years ago." Harris, *supra* note 153.

160. See Cynthia Lewis, Plessy Revived: *The Separate But Equal Doctrine and Sex-Segregated Education*, 12 HARV. C.R.-C.L. L. REV. 585 (1977); Mollman, *supra* note 97, at 156; *Single-Sex Public Schools: The Last Bastion of "Separate But Equal?"*, 1977 DUKE L.J. 259 (1977) [hereinafter *Single-Sex*]; Marcia Berman, Comment, *An Equal Protection Analysis of Public and Private All-Male Military Schools*, 1991 U. CHI. LEGAL F. 211 (1991).

161. Dubnoff, *supra* note 49, at 320.

162. See Mollman, *supra* note 160, at 156.

163. See *Single-Sex*, *supra* note 160, at 276.

164. Lewis, *supra* note 160, at 648.

offered by the opponents of the "separate but equal" doctrine in the context of sex. It is not so clear that women suffer as a result of "separate but equal" education, and it would be intellectually dishonest to apply the data of *Brown* to the situation of women. Furthermore, after the *Brown* decision, the Court had an opportunity to extend its abrogation of the "separate but equal" doctrine to sex. It chose not to. Both in *Vorchheimer* and *Williams*, the Supreme Court affirmed circuit court decisions which relied on the notion of "separate but equal" educational opportunities.¹⁶⁵ In *Hogan*, as well, Justice O'Connor avoided the opportunity to strike down "separate but equal."¹⁶⁶

Both historical and situational differences exist between blacks and women which limit any parallels between the two groups.¹⁶⁷ "[The] history of slavery and invidious discrimination in the areas of education, public accommodation, and housing, among others, distinguishes the experiences of blacks from those of women."¹⁶⁸ The stigma attached to each group by separation is not the same. The separation between men and women was derived from society placing women on a "pedestal", not in a "cage," as whites had done to blacks.¹⁶⁹ Separation of the sexes has its origins in paternalism, not enslavement. In addition, blacks are truly a minority in the numerical sense. Protection of such minorities is warranted as a result of the powerlessness they may experience in the political process. Women, on the other hand, constitute a slight majority of the electorate.

Perhaps the best expression of why the "separate but equal" doctrine is accepted in the context of sex but not in the context of race has to do with "real differences" between peoples. As Justice Stewart once explained,

The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born. Thus, detrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is

165. *Vorchheimer v. School District*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided Court*, 430 U.S. 703 (1977); *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971).

166. *See supra* note 69 and accompanying text.

167. *See* ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* 250 (1988) (Foner contends that the Fourteenth Amendment does not even apply to women. "A Civil War had not been fought over the status of women.").

168. Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992).

169. *See* Elizabeth C. Yen, *Single-Sex Schools and Sex Segregation Within Schools: Constitutional and Statutory Remedies*, 55 CONN. B.J. 387, 388 (1981).

concerned, people of different races are always similarly situated. By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that *there are differences between males and females that the Constitution necessarily recognizes*.¹⁷⁰

The real differences between men and women have been the cornerstone of the "separate but equal" doctrine. While scrutiny of gender-based classifications must be conducted "free of fixed notions concerning the roles and abilities of males and females,"¹⁷¹ the Supreme Court has also recognized that the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons [or] 'require things which are different in fact . . . to be treated in law as though they were the same.'"¹⁷² Distinguishing a real difference from a bias, therefore, becomes the threshold question in the area of "separate but equal."

As a result, considerable evidence exists that the old doctrine of "separate but equal" continues its viability in sex relations. Everyday examples of the "separate but equal" doctrine unchallenged as applied to gender have one common element—the physiological differences between men and women. These acceptable differences involve the reproductive and physical characteristics which distinguish the sexes. Separate public restrooms are an obvious example. States also maintain separate prisons for men and women because of a concern for the physical welfare of women.¹⁷³ Each of these examples is based on the Court's notion that "the sexes are not similarly situated in certain circumstances."¹⁷⁴

In the case of VMI, the "separate but equal" option suggested by the Fourth Circuit is comparable to the current "separate but equal" system in high school athletics. "Separate but equal" teams remain a constitutionally permissible alternative to gender integrated teams.¹⁷⁵ States traditionally have separated males and females in athletics because of the physical differences between the sexes. The primary rationale for this segregation has been a concern for safety.¹⁷⁶ A cer-

170. *Michael M. v. Superior Court*, 450 U.S. 475, 477-78 (1981) (Stewart, J., concurring) (emphasis added).

171. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

172. *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

173. See Rosemary Herbert, Note, *Women's Prisons: An Equal Protection Evaluation*, 94 *YALE L.J.* 1182 (1985).

174. *Michael M.*, 450 U.S. at 469 (citations omitted).

175. See Polly S. Woods, Comment, *Boys Muscling in on Girls' Sports*, 53 *OHIO ST. L.J.* 891 (1992).

176. See *O'Connor v. Board of Educ.*, 449 U.S. 1301 (Stevens, Circuit Justice 1980).

tain physical danger is involved when females compete in contact sports, such as football or rugby, where males are the predominant participants. Based on federal regulation, courts have implemented an absolute bar against female participation in contact sports.¹⁷⁷ Courts, however, have also generally upheld a "separate but equal" doctrine in non-contact sports, such as swimming or baseball so long as comparable opportunities exist for both boys and girls.¹⁷⁸ But, where the sport is non-contact and no comparable girls' team is provided, the courts have prohibited exclusion of girls from the boys' team.¹⁷⁹

Consistent with these policies, VMI's grounds its position on the notion that men and women are not similarly situated with respect to their physiological ability to benefit from VMI's program. The district court found that "[g]iven the . . . physiological, psychological and sociological differences between males and females, it would be impossible to treat everyone fairly by continuing to treat them the same if women were admitted to VMI. Equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism."¹⁸⁰ This observation is based not on bias or stereotype, but on the testimony of educational experts for both VMI and the United States. The Justice Department's own expert noted that VMI's policy represented only "a small [portion] of a very large number of academics, including many, many, others who have in recent years suggested there are differences and relatively important differences . . . between men and women, [and] that women learn and have different developmental needs."¹⁸¹ Another Justice Department expert in the case, Colonel Toffler from West Point, agreed that the physiological differences raised are "very real and not stereotypes."¹⁸² He testified that in West Point's experience, it identified approximately 120 physiological differences between men and women which were important to the

177. [W]here a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered *unless the sport involved is a contact sport*.

45 C.F.R. § 86.41(b) (1992) (emphasis added).

178. *Id.* at 379 (holding that refusal of school to allow female to try out for boys' basketball team did not violate Equal Protection Clause where girls' team was provided); *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117, 1121 (E.D. Wis. 1978) (holding no Fourteenth Amendment violation where a school prohibited a girl from swimming on the boys' swim team where the school provided a separate girls' team).

179. *Brenden v. Independent Sch. Dist.* 742, 477 F.2d 1292, 1302 (8th Cir. 1973).

180. *United States v. Virginia*, 766 F. Supp. 1407, 1439-40 (W.D. Va. 1991).

181. Brief for Appellee, *supra* note 106, at 25.

182. *Id.* at 27.

development of the school's program.¹⁸³

Whether one refers to it as a parallel institution or a "separate but equal" educational opportunity, if Virginia creates an all-female version of VMI, VMI should be justified in continuing its exclusion of women. Since VMI's exclusion of women is based on physiological differences, rather than bias, and since the Court has been reluctant to use *Brown* to abrogate "separate but equal" in gender segregation, there is no support for the claim that "separate but equal" is improper in the case of VMI.

B. *The Private Women's Colleges*

In May 1990, the students of Mills College, a private women's college in California, staged a strike which closed the school for two weeks. The strike was prompted by the college trustees' decision to enroll undergraduate men as a way of ensuring the school's financial success. The women, arguing that the dynamics of all aspects of campus life would be altered by admitting men, wore shirts proclaiming "Better Dead than Co-ed."¹⁸⁴ After extensive nationwide coverage, the trustees rescinded their decision and Mills College continued its female-only admissions policy.

In the same year, attention suddenly turned to a similar situation at VMI, and many of the issues from the Mills College debate were revisited. Unlike the Mills case, however, popular sentiment shifted in opposition of the single-sex program at VMI. This caused prominent newspaper columnist William Raspberry to observe: "I don't have a lot of trouble deciding what I feel about single-sex . . . schools. My difficulty is in trying to mold my inconsistent opinions into a [single] principle."¹⁸⁵ Raspberry was commenting on why he and many others were supporting the Mills College students, who fought for their 138-year-old all-female admissions policy, while opposing the students at VMI who, at the same time, struggled to keep their 152-year-old single-sex program in place.

While the sentiments may be inconsistent, the truth may be that the fate of the two schools are indelibly linked. Another columnist noted: "If single-sex admissions at VMI falls, it's only a matter of time until the feminist assault wrecks women's colleges, too."¹⁸⁶

183. *Id.* at 27 n.17.

184. Fields, *supra* note 125.

185. William Raspberry, *How Do You Justify Separate Schools?*, WASH. POST, May 25, 1990, at A21.

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

Although VMI is public and the women's colleges are all private, the only thing standing between the destruction of one and not the other is the doctrine of state action employed by the courts in equal protection cases.

The sole catalyst for the suit against Virginia was the Fourteenth Amendment, which states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁸⁷ The liberties protected by the Equal Protection Clause specifically address actions taken by a state. Thus, when a private individual or entity violates a right protected by the Amendment, the issue becomes whether that individual or entity is acting under color of state law or on behalf of the state. If the discriminating individual or entity is not involved with the state, no constitutional violation exists because neither the state nor any of its representatives has acted in a discriminatory manner. So far, private schools rarely have been found to have such a relationship with a state.

On the other hand, VMI is a publicly-funded state school. Consequently, there is no doubt as to state action. Mills, Smith, Wellesley and fifty-three other women's colleges across the country are all essentially private institutions.¹⁸⁸ In theory, these schools have wide discretion in their conduct. Since their private actions are supposedly far removed from the ambit of state action, these schools may continue a gender-discriminatory admissions policy.

The safety afforded to Mills College and other women's colleges by the public/private distinction of the state action doctrine, however, is somewhat illusory. The Supreme Court, for more than a century, has yet to define a precise test or single dispositive factor for finding state action.¹⁸⁹ Instead, state action is usually decided by the courts on an ad-hoc basis. Individuals and entities, at one time considered private, now find themselves in jeopardy of falling into the public sphere as a result of very minimal contacts with state government.¹⁹⁰

Since state action is decided case-by-case, the Court takes into consideration many factors: whether the private entity is engaged in a public function,¹⁹¹ whether a state has encouraged private activi-

187. U.S. CONST. amend. XIV, § 1.

188. Douglass College in New Brunswick, New Jersey is state-funded.

189. See Ronna G. Schneider, *State Action—Making Sense Out of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737, 737 (1985); Berman, *supra* note 160, at 224.

190. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding that the requisite state action existed where private restaurant which discriminated against blacks leased space from a government parking lot).

191. JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* § 12.2, at 426 (3d ed. 1986).

ties,¹⁹² whether a private actor is licensed or regulated by a government agency,¹⁹³ whether there is a symbiotic relationship between the private entity and the state¹⁹⁴ and whether a state is funding the private individuals or entities.¹⁹⁵

The uncertainty associated with the scope of state action threatens the status of all private women's colleges. Today, private institutions and their students depend significantly upon state and federal funding. Private women's schools receive approximately 20 percent of their operating costs from government entities.¹⁹⁶ The Commonwealth of Virginia provides over \$38 million in state financial assistance to benefit five private single-sex colleges for women and one private single-sex college for men.¹⁹⁷ Furthermore, Virginia, like most other states, provides loans to students attending private institutions of higher learning through its Tuition Assistance Grant Program.¹⁹⁸

The relationship between private women's colleges and their state governments is one of inverse proportions. As public funding increases, the school's ability to separate itself from the state decreases. The issue then becomes whether the government is directly subsidizing an entity whose activities would violate the Constitution if the government itself engaged in the activities. In other words, if Virginia violates the Fourteenth Amendment by discriminating against women through VMI's admissions policy, then it is possible that private colleges discriminating against men in the same manner may also be violating the Constitution if the state subsidies are directly linked to the discriminatory practices.

As with other areas of the state action doctrine, the courts have been unpredictable in finding state action in the case of subsidized private education. The threshold question in these cases has been whether the state assistance is directly linked to the discriminatory practice or whether the aid is simply in the form of generalized services to all schools.¹⁹⁹ Only the former triggers state action.

In *Norwood v. Harrison*,²⁰⁰ the Supreme Court struck down a Mississippi program in which the state purchased and loaned text-

192. *Id.* § 12.3, at 432.

193. *Id.* § 12.4, at 437.

194. *Id.* § 12.4 at 440.

195. *Id.* § 12.4 at 442-43.

196. Fields, *supra* note 186, at A12.

197. Brief for Appellee, *supra* note 106, at 12.

198. VA. CODE ANN. § 23-38.11 (Michie 1985).

199. NOWAK ET AL., *supra* note 191, at 442-43.

200. 413 U.S. 455 (1973).

books to all private schools including those that discriminated on the basis of race. While the case dealt primarily with textbooks rather than financial assistance, the Court found that "[t]extbooks are a basic educational tool and, like tuition grants, they are provided only in connection with schools; they are to be distinguished from *generalized services* the government might provide to schools in common with others."²⁰¹ By 1973, state tuition grants had already become suspect in state action cases.

Almost a decade later, the Court revisited the state action issue in *Rendell-Baker v. Kohn*.²⁰² *Rendell-Baker* involved a privately owned school for students with behavioral problems. Not only was the school heavily regulated by public authorities, but between ninety and ninety-nine percent of its operating budget came from public funding.²⁰³ The issue was whether the discharge of certain teachers without due process involved state action. The Court concluded that the receipt of public funding did not make the discharge decisions acts of the state.²⁰⁴ Writing for the majority, Chief Justice Burger stated:

The school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.²⁰⁵

At least one commentator, however, has distinguished the *Rendell-Baker* decision.²⁰⁶ This distinction is important to the situation of private women's colleges. First, *Rendell-Baker* and other cases decided by the Burger Court, a Court famous for narrowing the state action doctrine, were all cases brought under the Due Process Clause of the Fourteenth Amendment by the employees of private entities.²⁰⁷ The plaintiffs' concerns focused primarily on state interference with economic and property rights. Neither race nor gender was a factor.

However, claims brought during the Warren era, when the doctrine of state action expanded, were frequently based on the Equal Protection Clause and involved consumers of the private entity under

201. *Id.* at 465 (emphasis added).

202. 457 U.S. 830 (1982).

203. *Id.* at 832.

204. *Id.* at 831.

205. *Id.* at 841.

206. Schneider, *supra* note 189, at 782-83.

207. *Id.* at 739.

scrutiny.²⁰⁸ Race in these cases was always a factor. A pattern of affording greater protection to claims under the Equal Protection Clause developed. Today claims against private women's colleges would likewise be based on the Equal Protection Clause.

Rendell-Baker can be further distinguished by the identity of the aggrieved party alleging state action.²⁰⁹ *Rendell-Baker* and its progeny involved claims brought by employees of the private entity. This is a controlling factor since state funding of the entity was not intended to benefit private employees. Therefore, no state action was found since state involvement with the entity and the entity's relations with its employees were unconnected.²¹⁰

When students or private consumers sue, however, the courts seem willing to find state action because it is precisely this group that the state funding is intended to benefit.²¹¹ Therefore, the Court in *Rendell-Baker* suggests that if students rather than employees had sued, the state action issue may have been decided differently.²¹² It would no longer be a detached personnel decision.

In *Milonas v. Williams*,²¹³ a case decided by the Tenth Circuit shortly after *Rendell-Baker*, the state action issue was decided precisely in this manner. The facts in *Milonas* were similar to *Rendell-Baker* in that the case involved significant state funding of a private school for students with behavioral problems. However, in *Milonas*, former students, rather than employees, brought suit. The court held that *Rendell-Baker* did not control the state action issue because *Rendell-Baker* "differs from the present case in at least one important respect. The plaintiffs in the present case are not employees, but students . . ." ²¹⁴

The foregoing discussion demonstrates that courts do have the flexibility to find state action in cases involving private colleges. In at least one prior case, the Supreme Court has already demonstrated its propensity to characterize private colleges discriminating on the basis of sex as publicly supported if any of their students receive financial aid. In *Grove City College v. Bell*,²¹⁵ the Court held that in sex discrimination suits brought under Title IX of the Education Amendments of 1972 a private college is subject to Title IX's prohibitions

208. *Id.* at 741.

209. *Id.* at 741-42.

210. *Id.* at 742.

211. *Id.*

212. *See Rendell-Baker v. Kohn*, 457 U.S. at 830, 851 (Marshall, J., dissenting).

213. 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

214. *Id.* at 940.

215. 465 U.S. 555 (1984).

where some of its students received federal tuition grants.²¹⁶ Grove City was a private, coeducational, liberal arts college which refused state or federal financial assistance in an effort to maintain its autonomy from federal regulation. Though the school did not violate Title IX, it did refuse to execute the required assurance of compliance — essentially a promise not to discriminate in any educational program receiving federal financial aid.²¹⁷ Unlike most other challenges to private schools, the issue here was not state action, but rather “federal government action” since the suit was brought under a federal civil rights statute.²¹⁸ The Court was called on to decide if Grove City had sufficient federal subsidies to be subjected to the limitations of Title IX.

The Court looked to the congressional intent and the plain language of Title IX and found that the statute “encompass[ed] all forms of federal aid to education, direct or indirect.”²¹⁹ Since some of Grove City College’s students received Basic Educational Opportunity Grants from the federal government, the Court concluded that the private college received federal financial assistance and therefore fell under Title IX regulation.²²⁰

Although the *Grove City College* decision applied to federal rather than state action issues, it is of paramount importance in forecasting the direction of the state action doctrine in gender discrimination. It would be unusual for the Court to abandon its *Grove City College* reasoning when similar lawsuits brought against private colleges rest on constitutional rather than statutory grounds. If the court can penetrate private schools by holding that federal tuition grants constitute sufficient federal involvement, then there is nothing to prevent the Court from finding, similarly, that state tuition grants constitute adequate state action.

There is no way to predict whether challenges against private women’s colleges will follow if VMI becomes a coeducational institution. It is certain, though, that these schools will be more susceptible to constitutional mandates. This is something even the Fourth Circuit seemed concerned about when it warned of a “conformity that

216. *Id.* at 573-74.

217. *Id.* at 560.

218. NOWAK ET AL., *supra* note 191, at 422.

219. 465 U.S. at 564 (citing *Grove City College v. Bell*, 687 F.2d 684, 691 (3d Cir. 1982)) (emphasis in original) (noting also that, often, the economic effect of direct and indirect assistance is indistinguishable (citing *Mueller v. Allen*, 463 U.S. 388, 397 n.6 (1983) (Marshall, J., dissenting))).

220. *Id.* at 569-70.

common experience rejects.”²²¹

IV. CONCLUSION

At the time of the Fourth Circuit’s decision, a female supporter of VMI wrote to the Washington Post to offer a frank assessment of the situation. She observed:

To me there is little difference between [the desire for women to go to VMI] and the one that lured me into the men’s bathroom in high school just to see the urinals. So now you’ve seen them. So what? . . . I can see the writing on the wall. If it happens to VMI, every other single-sex institution is at risk. Someone will want in just to see what’s on the other side, and in the process, so many choices will be lost.²²²

Tradition is a poor justification for gender segregation, just as it is for racial segregation. “The practice’s longevity may demonstrate merely the depth of the prejudice rather than the practice’s legitimacy.”²²³ Too often tradition has been a pretext for hate, bigotry, and stereotyping.

However, there are traditions that even cultural purists might agree are important to our society. Family, individualism and diversity are all traditions that have earned a healthy respect in our system of government. A nation that emasculates some of the strongest traditions might ultimately become a “nation without a cultural identity.”²²⁴ The traditions of single-sex education and educational diversity are firmly rooted in our history. Unlike other tainted traditions, single-sex education is neither forced nor denied—it is readily available to all who willingly choose it, whether male or female. VMI has been a single-sex institution since its founding 154 years ago. Its contribution to diversity in Virginia’s system of higher education is unquestionable, as are the contributions of the state’s private women’s colleges. In a fire storm of political correctness and liberalism, however, the tradition of single-sex education at VMI, and perhaps elsewhere, now finds itself on the verge of a sacrifice in the name of conformity.

In its petition to the Supreme Court, VMI wrote that unless its single-sex status is preserved, “coeducation will be viewed as a constitutional imperative, and educational diversity and experimentation

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

222. Kathryn Coley, *VMI Should Remain All-Male*, WASH. POST, Oct. 23, 1992, at A20.

223. Lewis, *supra* note 160, at 585.

224. Jere Real, *The Last of the Old Corps?*, NAT’L REV., Aug. 6, 1990, at 23.

will be thwarted at a time when it is desperately needed."²²⁵

For 154 years, VMI has provided young men with the experience of learning in one of the most unique educational environments anywhere under a system uniquely suited to their needs and characteristics. As Justice Stewart once wrote, "the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded. . . . [Our] Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist."²²⁶ The Battle of New Market has taken on a new meaning at the Lexington campus these days. The guns of battle from an earlier era echo in the hearts of the Institute's faithful defenders. The cadets once again face seemingly insurmountable odds. And, VMI should be allowed to continue marching to the beat of its own drummer.

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225. *VMI asks Supreme Court To Decide Constitutionality of Its Single-Sex Admissions Policy*, PR NEWSWIRE, Jan. 19, 1993, available in LEXIS, Nexis Library, UPI File.

226. *Michael M. v. Superior Court*, 450 U.S. 475, 481 (1981) (Stewart, J., concurring).