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United States v. Virginia: Does Intermediate Scrutiny Still Exist?

Eric J. Stockel

UNITED STATES v. VIRGINIA: DOES INTERMEDIATE SCRUTINY STILL EXIST?

INTRODUCTION

It is well-settled that separate but equal does not apply to classifications based upon race in public schools.[1] Now, after the Supreme Court's decision in *United States v. Virginia*[2] [hereinafter "*Virginia*"], this doctrine appears to apply to educational facilities at the college level. In *Virginia*, the Court determined that the male-only admissions policy of the state-funded Virginia Military Institute violated the Equal Protection Clause of the Fourteenth Amendment.[3]

The Virginia Military Institute [hereinafter "VMI"] is a four-year military college located in Lexington, Virginia. VMI was established in 1839 "to produce 'citizen-soldiers,' men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not

1. *See* Brown v. Board of Educ., 347 U.S. 483 (1954), *supplemented by*, 349 U.S. 294 (1955). In *Brown*, the Court declared that "education is perhaps the most important function of state and local governments." *Id.* at 493. The Court held that racial segregation "generates [in black students] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . . We conclude that in the field of public education the doctrine of 'separate but equal' has no place." *Id.* at 494-95. However, this holding had been limited to racial classifications. *See, e.g.*, Vorchheimer v. School District, 532 F.2d 880, 888 (3d Cir. 1976) (implicitly endorsing the notion of separate but equal for gender classifications because this type of classification benefits one gender by providing opportunities not otherwise available), *aff'd*, 430 U.S. 703 (1977).

2. 116 S. Ct. 2264 (1996).

3. *Virginia*, 116 S. Ct. at 2287. *See* U.S. CONST. amend. XIV, § 1. This amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

available anywhere else in Virginia."[4] Since its establishment, VMI has continuously been financially supported by the Commonwealth of Virginia [hereinafter the "Commonwealth"] and "subject to the control of the Virginia General Assembly."[5]

In 1991, the Civil Rights Division of the United States Department of Justice brought suit against VMI and the Commonwealth after a female high-school student, who was denied admission to VMI, filed a complaint with the United States Attorney General.[6] The District Court found in favor of VMI[7] [hereinafter *VMI I*].[8]

Following this decision, the Justice Department appealed to the United States Court of Appeals for the Fourth Circuit. The

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4. *Virginia,* 116 S. Ct. at 2269.

5. *Id.* at 2270 (*quoting* Va. Code Ann. § 23-92 (1993)). This statute states that "[t]he VMI Board of Visitors decides the admissions policy of VMI. The seventeen members of this Board are appointed by the Governor of Virginia, subject to approval by the General Assembly, including the State Adjutant General, who is a member ex officio . . . . Twelve of the members must be VMI alumni." Va. Code Ann. § 23-92 (1993).

6. The student was asserting that she was denied the right to attend the institution because of her gender. *Virginia,* 116 S. Ct. at 2271.

7. *See* United States v. Virginia, 766 F. Supp. 1407, 1415 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993). The court held that VMI could continue its admission policy because the unique method of instruction in the single-gender environment at VMI yielded substantial benefits to those attending, such as increased intellectual self-esteem, increased academic involvement, more frequent interaction with faculty, a likelihood of a substantially higher starting salary in business, and an increased likelihood of carrying out plans for a career in law, college teaching and business. *Id.* at 1412.

In actuality, this very issue regarding single-sex admission policies in a state-funded institution was almost addressed by the Court in *Mississippi Univ. for Women v. Hogan* fourteen years earlier. *See* 458 U.S. 718, 720 n.1 (1982) ("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 and females.").

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

Fourth Circuit reversed and remanded the case,[9] finding the school's policy unconstitutional.[10] In so remanding, the circuit court instructed the district court to allow the Commonwealth time to develop a plan to address the constitutional violation and develop a remedy which will comport with the Equal Protection Clause of the Fourteenth Amendment.[11]

Pursuant to the mandate of the Fourth Circuit, the Commonwealth developed a plan to establish an all-female, publicly-funded military college which would provide a single-sex education similar to that of VMI.[12] Both the district court and the circuit court found the proposal satisfied the Constitutional requirements and upheld the admission policy [hereinafter *VMI II*].[13]

Once again, the Justice Department appealed and the United States Supreme Court granted the Justice Department's request for certiorari.[14] After oral argument, the Court held: (a) the Commonwealth had failed to provide a justification for excluding women from the program offered at VMI; (b) the Commonwealth's proposal to create the Virginia Woman's Institute for Leadership [hereinafter "VWIL"] did not afford

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9. United States v. Virginia, 976 F.2d 890, 900 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

10. *Id.* at 898-900. The court held that VMI had failed to show that its admission policy was substantially related to the benefits of a single-sex education. *Id.* The court stated that "[i]t is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of . . . sex . . . that has been shown to be related to the essence of the education and training at VMI." *Id.* at 897. Based on this analysis, the court was of the opinion that the Commonwealth had not provided a sufficient justification for the gender classification. *Id.* at 897-99.

11. *Id.* at 900.

12. The plan called for the establishment of the Virginia Woman's Institute for Leadership [hereinafter "VWIL"]. VWIL would be located at Mary Baldwin College, a private liberal arts college for women. United States v. Virginia, 116 S. Ct. 2264, 2282-83 (1996).

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

14. 116 S. Ct. 281 (1995).

women comparable benefits to those offered at VMI; and (c) the Fourth Circuit erred in its use of a deferential standard of review.[15] Accordingly, the Court affirmed the initial judgment of the Fourth Circuit *(VMI I)*, reversed the final judgment of the Fourth Circuit *(VMI II)* and remanded the case.[16]

This note will initially summarize the history of gender discrimination jurisprudence in this country over the past fifty years.[17] It will then analyze the deferential standard of intermediate scrutiny utilized by the Fourth Circuit in *VMI II*[18] and finally, it will discuss the Supreme Court's decision to reject that standard and adopt what appears to be a heightened standard of intermediate scrutiny.[19]

I. A SYNOPSIS OF GENDER DISCRIMINATION JURISPRUDENCE

Historically, the legal standard for determining the constitutionality of gender based classifications has been rational basis review.[20] Under this standard, a classification is considered constitutional if it is rationally related to a legitimate

15. 116 S. Ct. 2264, 2287 (1996).

16. *Id.*

17. *See infra* notes 20 - 55 and accompanying text.

18. *See infra* notes 56 - 131 and accompanying text.

19. *See infra* notes 132 - 188 and accompanying text.

20. *See* Frontiero v. Richardson, 411 U.S. 677, 683 (1973) ("Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."). *See also*, Goesaert v. Cleary, 335 U.S. 464 (1948), *overruled by* Craig v. Boren, 429 U.S. 190 (1976). In *Goesaert*, the Court upheld a Michigan statute which prohibited any female from becoming a bartender, expect those who were either married to or the daughter of a male owner of the establishment. *Id.* at 465. In reviewing the statute, the Court stated that "Michigan cannot play favorites among women without rhyme or reason. The Constitution . . . precludes *irrational* discrimination as between persons or group of persons . . . . If [the rationality of the statute] is entertainable, . . . [the state] has not violated its duty to afford equal protection of its laws." *Id.* at 466 (emphasis added).

governmental objective.[21] It was not until the 1970's that the Supreme Court looked more closely at the dissimilar treatment between the sexes.

In 1972, the United States Supreme Court, for the first time, held that a state law which discriminated against women was unconstitutional.[22] In *Reed v. Reed*,[23] the Court held that a mandatory provision of an Idaho statute, which gave preference to men over women for appointments as administrators of estates, was an unconstitutional gender classification.[24] The Court rejected the State's argument that administrative convenience could justify the inconsistency with the Equal Protection Clause of the Fourteenth Amendment.[25] Although the Court did not formulate a new standard of review, it was clear they had rejected the rational basis test previously used.[26]

In *Frontiero v. Richardson*,[27] a plurality of the Court explicitly adopted a heightened level of judicial scrutiny when it invalidated a rule that automatically permitted servicemen to claim their spouses as dependents for certain benefits while servicewomen had to prove that their spouses were actually dependent upon them before benefits were conferred upon the spouse.[28] The plurality agreed with the appellants that classifications based upon gender are "inherently suspect and must therefore be subjected to

21. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961). In *Hoyt*, the Court held that Florida's restriction of jury service to males was "based on some reasonable classification" and thus it was not "infected with unconstitutionality." *Id.* at 61.

22. *See* Reed v. Reed, 404 U.S. 71 (1971).

23. *Id.*

24. *Id.* at 77.

25. *Id.* at 76. In rejecting this argument, the Court was of the opinion that giving "mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of [appointment] hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Id.*

26. In rejecting the statutory appendage as unconstitutional, the Court reinforced the objective of the original statute, which was to establish lists of classes of persons entitled to compete for letters of administration, regardless of their gender. *Id.* at 77.

27. 411 U.S. 677 (1973).

28. *Id.* at 682.

close judicial scrutiny."[29] However, since only four justices joined in the adoption of strict scrutiny,[30] the question of which standard to apply to gender classifications was left unresolved.[31]

This lack of guidance from the Court was finally clarified in 1976. In *Craig v. Boren*,[32] a majority of the Court adopted an intermediate standard of judicial scrutiny for discrimination based upon gender.[33] Under this intermediate standard, a classification based upon sex must "serve important governmental objectives and must be substantially related to the achievement of those objectives."[34]

The *Craig* Court invalidated an Oklahoma law which allowed the sale of 3.2% beer to women over eighteen years of age while restricting the sale of the same beer to males over the age of twenty-one.[35] The Court accepted the claim of the Oklahoma Attorney General that the regulation of traffic safety, more specifically, the problems associated with driving under the influence of alcohol, was an important governmental objective.[36] However, the majority was of the opinion that the statistical evidence offered by the State was not sufficient enough to demonstrate that there was a substantial relationship between the promotion of traffic safety and the gender classification of the statute.[37] The statistics offered by the State showed that 2% of

29. *Id.* The Court was of the opinion that a departure from rational basis review with regard to classifications based upon sex was "clearly justified." *Id.* at 684.

30. Only Justices Brennan, Douglas, White and Marshall joined in the plurality opinion.

31. Justice Powell, in his concurring opinion joined by Chief Justice Burger and Justice Blackmun, agreed with the outcome of the case but refused to adopt the strict scrutiny standard because he felt that the case could have been decided under *Reed* without categorizing sex as a suspect classification. *Id.* at 691-92 (Powell, J., concurring).

32. 429 U.S. 190 (1976).

33. *Id.* at 197.

34. *Id.*

35. *Id.* at 199.

36. *Id.* The Court conceded that the protection of public health and safety will always satisfy the requirement that an important governmental objective exists. *Id.* at 199-200.

37. *Id.* at 200.

males between the ages of eighteen and twenty were arrested for drunk driving, while only .18% of females in the same age group were arrested.[38] The Court stated that "while such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device."[39] The Court found the "normative philosophy" underlying the Equal Protection Clause far surpasses the skepticism of a statistical analysis of broad social propositions.[40]

Since the formulation of the initial intermediate standard in *Craig*, the Court has pronounced a more stringent intermediate standard of review.[41] This modified standard requires that a state, in seeking to uphold a statute which is based upon a sex-based classification, must provide "an exceedingly persuasive justification" for the classification.[42]

In *Mississippi University for Women v. Hogan*,[43] the State of Mississippi sought to uphold the female-only admissions policy at the Mississippi University for Women School of Nursing [hereinafter "MUW"] on the grounds that the admissions policy was designed to compensate for past discrimination against women, and therefore, constituted educational affirmative

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38. *Id.* at 201. These numbers, the Court acknowledged, are quite substantial in that 427 males were arrested for driving under the influence as compared to only 24 female arrests. *Id.* at 200 n.8.

39. *Id.* at 201.

40. *Id.* at 204. The Court further illustrated the danger of relying on the statistical analysis of the state alcohol regulation when it posed the hypothetical of the logistics of "states [freely favoring] Jews and Italian Catholics at the expense of all other Americans, since available studies regularly demonstrate that the former two groups exhibit the lowest rate of problem drinking." *Id.* at 208 n.22.

41. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (stating that the in order to overcome the expressed gender-based discrimination of a statute, a party must prove the statute is justified and furthers an important governmental interest); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (stating that the existence of an exceedingly persuasive justification will defeat an attack based upon the Equal Protection Clause).

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

43. *Id.*

action.[44] After applying this modified intermediate scrutiny standard, the *Hogan* Court struck down the statute, finding the exclusion did not serve the compensatory purpose proffered by the State.[45]

According to the Court, a state "can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification *actually suffer a disadvantage* related to the classification."[46] Thus, in order to pass constitutional muster, Mississippi had to prove that the opportunity to obtain training in the field of nursing was not available to women.

In concluding the State had not made such a showing, the Court pointed to statistics which demonstrated that "women earned 94% of the nursing baccalaureate degrees conferred in Mississippi and 98.6% of the degrees earned nationwide."[47] In holding the statute violated the Equal Protection Clause, the Court noted 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" rather than compensate for discriminatory barriers aimed at women in the nursing field.[48]

Twelve years later, the Court once again had the opportunity to examine the intermediate scrutiny standard in *J.E.B. v. Alabama*.[49] In *J.E.B.*, the Court held that a gender-based

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44. *Id.* at 727. The lawsuit was brought by Joe Hogan, a male who had sought admission to the baccalaureate program at the MUW School of Nursing. *Id.* at 720. He was denied admission solely on the basis of his sex, even though his qualifications equaled those of the admitted women. *Id.* at 720-21.

45. *Id.* at 730.

46. *Id.* at 728 (emphasis added).

47. *Id.* at 729 (*citing* U.S. Department of Health, Education, and Welfare, Earned Degrees Conferred: 1969 - 1970, Institutional Data 388 (1972)). In addition, the statistics showed that nearly 98% of all employed registered nurses were female. *Id.*

48. *Id.*

49. 114 S. Ct. 1419 (1994). In *J.E.B.*, a putative father appealed an order which found him to be the father of a child on the grounds that the State unconstitutionally used its peremptory challenges to exclude men from the

peremptory challenge, used in an effort to remove members of one sex from a jury, was unconstitutional.[50] The State attempted to justify the use of peremptory challenges to remove men from the jury in a paternity case on grounds that women were more likely to be sympathetic to the arguments of the female plaintiff who bore the child in such cases.[51]

In reaffirming the intermediate scrutiny standard developed in *Hogan*, the Court noted that "our Nation has had a long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today."[52] The Court rejected the assertion by the State that its use of the peremptory challenges was substantially related to the State's legitimate interest in achieving a fair and impartial jury and stated "gender, like race, is an unconstitutional proxy for juror competence and impartiality"[53] and the proposed justification was "the very stereotype[] the law condemns."[54]

Although the standard of review for gender-based discrimination has remained consistent for approximately the past fifteen years, it is important to note that twice the Supreme Court has gone out of its way to mention there is a distinct possibility that strict scrutiny may be adopted for review of gender classifications in the future.[55]

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jury. *Id.* at 1422. The State had used nine of its ten peremptory challenges to remove men from the panel, resulting in an all-female jury. *Id.*

50. *Id.* at 1430. "[P]otential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *Id.* at 1421.

51. *Id.* at 1426.

52. *Id.* at 1425 (citations omitted). Thus, the only question the *J.E.B.* Court needed to consider was whether the use of peremptory challenges in an effort to remove members of one sex from a jury furthered the State's legitimate interest in achieving a fair and impartial jury. *Id.*

53. *Id.* at 1421.

54. *Id.*

55. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982) ("Because we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect."); *J.E.B.*, 114 S. Ct. at 1425 n.6 ("Because we conclude that gender-based peremptory challenges

II. THE STANDARD OF REVIEW ADOPTED BY THE FOURTH CIRCUIT IN *VMI II*

Since *Craig*, the United States Supreme Court has looked unfavorably upon gender discrimination and has performed a searching examination when scrutinizing such classifications.[56] However, lower federal courts have not been as consistent. History demonstrates there has been widespread confusion and variations with regard to the outcome of gender discrimination cases among the lower courts.[57] Lower courts generally express the view that the Supreme Court has failed to provide sufficient guidance regarding intermediate scrutiny and as a result, individual judges are left to decide what constitutes a legitimate state objective and whether the classification is substantially related to that objective.[58] A good example of this result can be found by examining the decisions of the Court of Appeals for the Fourth Circuit in *VMI I* and *VMI II*. However, before this

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are not substantially related to an important government objective, we once again need not decide whether classifications based on gender are inherently suspect.").

56. *See, e.g.*, Lamprecht v. Federal Communications Commission, 958 F.2d 382, 398 n.9 (D.C. Cir. 1992) (concluding that although the Court found that the adoption of a rational basis or strict standard of review would have marginally allowed for less error, the Court chose to follow the intermediate scrutiny standard which requires a form of 'line-drawing' as to the degree of correlation needed to satisfy equal protection); Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.2d 922, 939 (9th Cir. 1987) (stating that in order to protect and reconcile the rights and interests of citizens, neutral remedial measures must first be exhausted "before resorting to race-conscious ones."); Meloon v. Helgemoe, 564 F.2d 602, 604 (1st Cir. 1977) ("The statute at issue . . . is a classification based on sex. As such it requires a more heightened scrutiny than would be applied to completely non-suspect legislation, but less stringent scrutiny than is typically applied to racial classifications."), *cert. denied*, 436 U.S. 950 (1978).

57. *See* Contractors Assoc. of Eastern Penn., Inc. v. City of Philadelphia, 6 F.3d 990, 1010 (3d Cir. 1993) ("The Supreme Court gender-preference cases are inconclusive . . . [and] its decisions are difficult to reconcile . . . . ").

58. *Id.* ("Lower court cases are similarly diverse.").

example of confusion and inconsistency can be demonstrated, it is necessary to examine each of these decisions individually.

A. THE LIABILITY STAGE - A LOOK AT VMI I

In 1991, the United States sued the Commonwealth, VMI, and others in federal district court, challenging the school's all-male admission policy on the ground it violated the Equal Protection Clause.[59] The court, in holding the admissions policy to be constitutional, found that VMI's single-gender policy and unique and strenuous educational method constituted a legitimate state objective by providing diversity in Virginia's higher educational system and that the across-the-board exclusion of females was substantially related to that objective.[60]

After considering the evidence presented during the six day trial,[61] the court recognized that diversity in education achieved through a single-gender environment, constitutes a legitimate and important state objective.[62] The court found that VMI had presented sufficient proof that a single gender education at the college level is beneficial to both sexes[63] and that the admission of women would "distract the male students from their studies."[64] In addition, the court determined that if the system were to be altered by the admission of females, life at VMI

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59. United States v. Virginia, 766 F. Supp. 1407, 1408 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995), *rev'd*, 116 S. Ct. 2264 (1996).

60. *Id.* at 1413.

61. The evidence presented consisted of the testimony of "[n]ineteen witnesses . . . including four experts on education, one expert on college facilities, and one expert on human physiology." *Id.* at 1408. Included in the court's opinion is a 29 page appendix containing the findings of facts. *Id.* at 1415 - 43.

62. *Id.* at 1411 ("[D]iversity in education has been recognized both judicially and by education experts as being a legitimate objective. The sole way to attain single-gender diversity is to maintain a policy of admitting only one gender to an institution.").

63. *Id.*

64. *Id.* at 1412.

would be drastically changed.[65] In concluding that VMI has met its burden of proof by showing a substantial relationship between the classification and the state's objective, the court stated that:

> VMI is a different type of institution. It has set its eye on the goal of citizen-solider and never veered from that 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.[66]

The United States appealed[67] and the Court of Appeals for the Fourth Circuit agreed with the district court finding that VMI's unique education justifies a single-gender environment and important aspects of that education would be drastically changed by coeducation.[68] However, the circuit court did not agree that the Commonwealth had "advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women."[69]

However, in making such a determination, the court admittedly found itself in a "Catch-22" in that "women are denied the opportunity [offered to males] when excluded from VMI and cannot be given the opportunity [offered to males] by admitting them, because the change caused by their admission would destroy the opportunity."[70] More specifically, the appellate court agreed that coeducation at VMI would destroy the adversative method of teaching because the same results would not be produced; would cause a fundamental change to the

65. *Id.* "[T]he evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted . . . . " *Id.* at 1411.

66. *Id.* at 1415.

67. United States v. Virginia, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995), *rev'd*, 116 S. Ct. 2264 (1996).

68. *Id.* at 892. The court stated that "the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so." *Id.* at 898.

69. *Id.* at 892.

70. *Id.* at 897.

absence of privacy found to be essential to the leveling process; and would force VMI to modify its physical training program.[71]

Having determined that VMI failed to explain how the existence of a single-gender institution furthers the governmental objective of a diversified education through such an admission's policy, the court was left with three conclusions:

> (1) single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex; (2) the introduction of women at VMI will materially alter the very program in which women seek to partake; and (3) the Commonwealth of Virginia, despite its announced policy of diversity, has failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women . . . . [therefore] [e]vidence of a legitimate and substantial state purpose is lacking.[72]

Having reached its conclusion, the Fourth Circuit remanded the case with instructions to allow the Commonwealth time to develop a plan which will provide females the opportunity to receive an education similar to that available at VMI.[73] The court emphasized this plan must address the constitutional violation and conform with the Equal Protection Clause of the Fourteenth Amendment.[74] The court provided several examples of remedies available to the Commonwealth, such as:

> admit[ing] women to VMI and adjust[ing] the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution . . . . [and] there might be other more creative options or combinations.[75]

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71. *Id.*

72. *Id.* at 899-900. As a result of these findings, the Fourth Circuit did not order VMI to admit women until it was determined that there were no other alternatives available.

73. *Id.* at 900.

74. *Id.*

75. *Id.*

B. THE REMEDIAL STAGE - A LOOK AT VMI II

Although the mandate of the Fourth Circuit in *VMI I* seemed clear, the parties substantially disagreed with regard to what the Fourth Circuit required by the remanding instructions.[76] The Commonwealth claimed the instructions meant that a state-funded, all-female institution provides a comparable atmosphere and education to that of VMI must be founded.[77] The United States viewed the instructions as requiring the Commonwealth to either admit women to VMI or, in the alternative, develop a separate program which "must be in all respects equivalent to, i.e. a mirror image of, the VMI program."[78]

Based on its interpretation of the court's mandate, the Commonwealth proposed the establishment of the Virginia Women's Institute for Leadership at Mary Baldwin College.[79] This plan was designed to provide women with a single-gender education, coupled with special leadership training,[80] to produce "citizen soldiers who are educated and honorable women, prepared for varied work of civil life, qualified to serve the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service."[81] VWIL's mission was to be based upon that of VMI in that students pursue the same five goals, which are "education, military training, mental and physical discipline, character development, and leadership development."[82]

However, the task force established to develop the VWIL program concluded that certain aspects of a VMI education,

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

77. *Id.* at 473.

78. *Id.*

79. *Id.* at 476.

80. *Id.* The program would be based on "a cooperative method which reinforces self-esteem rather than the leveling process used by VMI." Brief for the Petitioner at 8, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-1941).

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

82. *Id.*

specifically the adversative method, would not be included in the VWIL program because they believed this would not be effective for "women as a group."[83] Based on this belief, several aspects of the VWIL program differed from that offered at VMI. For example, VWIL's curriculum and environment will be different from the militaristic experience received at VMI in that students at VWIL, in addition to having to take several required courses in leadership training,[84] must participate in four years of ROTC training and in ROTC summer camp.[85] VWIL does not require students to wear uniforms except in the required ROTC training.[86] Moreover, students at VWIL would be required to live in VWIL housing for one year and the housing will not be operated in a military format.[87]

On remand, the district court determined that the Commonwealth's proposed plan passed constitutional muster.[88] The court rejected the United States' understanding of the Fourth Circuit's instructions in *VMI I* by stating that such a reading would require the creation of a 'separate but equal' program and the court of appeals did not contemplate such an interpretation.[89]

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83. *Id.* The task force determined that the goals of VWIL could better be achieved by using an environment that centered on leadership training rather than a 'rat line.' *Id.* at 1234. A leading expert on the education of women stated that the "adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter productive." *Virginia*, 852 F. Supp. at 476.

84. *Id.* at 477. The curriculum at VWIL is grounded upon public service and leadership. *Id.* at 478. Every student is required to participate in a leadership externship program. *Id.* at 495. This leadership externship "should be ideally related to [the students'] major, will be distinguished from other externships by providing an opportunity to experience and reflect upon leadership in practice." *Id.*

85. *Id.* at 497-98.

86. *Id.* at 495.

87. *Id.* at 497-98.

88. *Id.* at 485.

89. *Id.* at 475. The court noted that the 'separate but equal' concept was abandoned in Sweatt v. Painter. *See* 339 U.S. 629 (1950). In *Sweatt*, the Court invalidated the admissions policy of the University of Texas Law School because it denied admission to all black applicants. *Id.* at 636. The University

The court further noted that if this was the remedy envisioned by the circuit court, then the Commonwealth's plan must violate the Constitution since the VWIL program "cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years."[90] Having approved the proposed plan, the district court directed the Commonwealth "to proceed with all deliberate speed in implementing the Plan and to have the Plan operational for the academic year commencing in the Fall of 1995."[91]

The United States again appealed to the Fourth Circuit, arguing that under the proposed plan, women would still be denied the benefits of VMI's unique educational methodology despite the similarities between the two programs.[92] Claiming the proposed program must be identical to a VMI education, the United States argued that, absent such a program, the only acceptable remedy available to the Commonwealth was admitting women to VMI.[93]

In making its determination, the Fourth Circuit found the application of the traditional intermediate scrutiny test to a situation where the classification is based on the homogeneity of gender rather than directed at men or women per se "present[ed] a unique problem, because once the state's objective is found to be an important one, the classification by gender is by definition

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of Texas offered to establish an all-Negro law school which it claimed would remedy any constitutional violation, but the Court disagreed and stated:

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Id. at 634.

90. *Virginia*, 852 F. Supp. at 475.

91. *Id.* at 485.

92. United States v. Virginia, 44 F.3d 1229, 1235 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

93. *Id.*

necessary for accomplishing the objective and might thereby bypass any equal protection scrutiny."[94]

Thus, the court concluded that an additional step must be taken to "carefully weigh[] the alternatives available to members of each gender denied benefits by the classification"[95] and developed a third prong for the intermediate scrutiny test which it called the "substantive comparability" test.[96] Under this new standard, the court had to determine:

> (1) whether the state's objective of providing single-gender education to its citizens may be considered a legitimate and important governmental objective; (2) whether the gender classification adopted is directly and substantially related to that purpose; and *(3) whether the resulting mutual exclusion of women and men from each other's institutions leaves open opportunities for those excluded to obtain substantively comparable benefits at their institution or through other means offered by the state."*[97]

After applying this test, the Fourth Circuit affirmed the district court's approval of the proposal.[98] First, the court determined that a single-gender education constitutes a legitimate and important governmental objective.[99] In noting that the provision of education is considered to be one of the most important functions of a state,[100] the court concluded that a single-gender

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94. *Id.* at 1237. The court noted that the second prong of the test would therefore "provide little or no scrutiny of the effect of a classification . . . . " *Id.*

95. *Id.*

96. *Id.*

97. *Id.* (emphasis added).

98. *Id.* at 1242.

99. *Id.* at 1239. When making this determination, the court noted that deference is to be given to the state legislature provided the purpose "is not pernicious and does not violate traditional notions of the role of government." *Id.* at 1237.

100. *Id. See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."); Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 158 (4th Cir. 1992) ("Public education is recognized as one of the most important public services offered by state government . . . . ").

education is an important aspect of a public higher educational system as well as beneficial to both sexes.[101]

Next, the court found that the Commonwealth's gender classification was substantially related to the purpose of providing a single-gender education with the benefit that attending students would be able to enjoy an anxiety-free education without the presence of the opposite sex.[102] The court noted that "[w]hen combined with the third part of the test, *i.e.*, the inquiry into whether excluded men and women have opportunities to obtain substantively comparable benefits, this inquiry scrutinizes the *means* by which the state chooses to obtain its objective."[103]

According to the court, the only way to effectuate the usefulness of homogeneity of gender is to limit the admission to members of one sex, thus "the means of classifying by gender are focused on the single-gender educational purpose as directly as the nature of the objective allows."[104]

The court concluded that in order for the classification to be constitutional, the students excluded from the programs must have "reasonable opportunities to obtain benefits substantively comparable to those they are denied."[105] Therefore, the court was of the opinion that if VWIL could provide comparable benefits to those offered at VMI, then the equal protection violation would be remedied.[106]

The court then analyzed the government's argument. The United States asserted that the VMI educational experience is unique, can not be replicated, and thus, a separate institution could not be equal. Accordingly, the government argued that "women could only enjoy the unique benefits of the VMI

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101. *Virginia*, 44 F.3d at 1238.

102. *Id.* at 1239.

103. *Id.*

104. *Id.* Moreover, the court found that the classification at VMI is directly related to accomplishing the goals of a military environment, more specifically the adversative method. *Id.*

105. *Id.* at 1239-40. The court stated that the benefits had to be comparable in substance and not in form or detail. *Id.* at 1240.

106. *Id.* at 1241.

program if VMI admits women."[107] However, the court failed to follow this reasoning because once women were to be admitted to VMI, the program would have to be altered dramatically, "forever denying its unique methodology to both women and men."[108]

Finally, the circuit court examined whether the VMI and VWIL programs offered substantially comparable benefits to both genders.[109] Comparing the two programs, the court determined that substantially comparable benefits were available[110] and that any differences between the programs were attributable to the demonstrated pedagogical differences between the sexes.[111] With regard to the intangible qualities of VMI that are necessarily unavailable at VWIL, such as the history and prestige behind a VMI degree, the court noted that these benefits are the "by-product of a longer-term effort."[112]

The court found that the equal protection violation in *VMI I* was remedied, since the programs offered at the two institutions will be substantively comparable if the VWIL program is "undertaken with a persistently high level of commitment by [the Commonwealth] and that men and women mutually excluded by the two programs will not be denied the opportunity for an undergraduate education with discipline and special training in

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107. *Id.* at 1240.

108. *Id.* According to the court:

> Changes would have to be made to the adversative method, to the absence of privacy, and to the physical requirements of the program, all of which are part of VMI's unique methodology. Certainly military training could be provided for women at VMI, but it would be substantially different from the training VMI cadets currently receive . . . . Thus, neither gender would experience the unique type of adversative military training now utilized at VMI if VMI were to become co-educational.

Id.

109. *Id.*

110. The similarities noted by the court were the provision of a single-gender environment, the offering of a bachelor's degree and the implementation of a program designed to produce disciplined, honorable students trained in leadership. *Id.*

111. *Id.* at 1242.

112. *Id.* at 1241.

leadership."[113] The court further observed that the Commonwealth offers various opportunities in higher education through additional state-supported colleges and universities, such as the coeducational ROTC program offered at Virginia Polytechnic Institute and State University, more commonly known as Virginia Tech.[114]

Based on the foregoing, the court found that the existing differences between the programs did "not require that the important state purpose of providing single-gender education . . . be defeated in this case."[115] Thus, the circuit court affirmed the judgment and remanded the case with instructions that the district court conduct:

> a specific review to ensure that (1) the program is headed by a well-qualified, motivated administrator, attracted by a level of compensation suited for the position; (2) the program is well-promoted to potentially qualified candidates; (3) the program includes a commitment for adequate funding by the state for the near term; and (4) the program includes a mechanism for continuing review by qualified professional educators so that its elements may be adjusted as necessary to keep the program aimed not only at providing a quality bachelor's degree but also at affording the additional element of taught discipline and leadership training for women.[116]

In his dissent, Judge Phillips expressed skepticism regarding the state's proposed remedy.[117] He agreed with the government that the only constitutional remedy to VMI's male-only admissions policy is either ordering co-education at VMI or foregoing further state support for VMI.[118]

Judge Phillips questioned whether separate, state-supported educational institutions for men and women, like those for white and black students, are so "inherently unequal" by reason of their stigmatic implications to the extent that such classifications

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 1242.
117. *Id.* at 1245 (Phillips, J., dissenting).
118. *Id.* (Phillips, J., dissenting).

should be subject to the same strict scrutiny as race-based classifications.[119]

Judge Phillips agreed with the majority's characterization of the basic structures of both the VWIL and VMI programs, but found a "real problem" with the Commonwealth's identification of its important interest used to justify its classifications.[120] He questioned the genuineness of the objectives asserted by the Commonwealth, and came to the conclusion that the asserted governmental objectives suggested by the Commonwealth failed the standard set out in *Hogan*.[121] He instead determined that the asserted governmental interests "are rationalizations compelled by the exigencies of this litigation rather than an actual overriding purpose of the proposed separate-but-equal arrangement."[122]

Given the newly established program at VWIL could not possibly offer the same benefits that an institution established before the Civil War could offer under Judge Phillips's interpretation of the intermediate scrutiny standard, the only possible conclusion was that VMI's historical, discriminatory admissions policy could be remedied only through either (1) abandonment of state support for the VMI or (2) admission of women to VMI.[123]

Judge Phillips stated the only way a state could constitutionally establish separate, single-sex institutions, is if those institutions

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119. *Id.* at 1244 (Phillips, J., dissenting). However, Judge Phillips found it unnecessary to address that question because, in his opinion, the proposed VWIL plan clearly fails to pass equal protection muster. *Id.* (Phillips, J., dissenting). He remarked at the outset that "[b]ecause I believe that even were the VWIL proposal to be substantially consummated in foreseeable time the resulting two-component arrangement would not pass equal protection muster, I would proceed on that assumption . . . ." *Id.* at 1245 (Phillips, J., dissenting).

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

121. *Id.* (Phillips, J., dissenting). He stated that "[t]his was exactly what the Supreme Court did in rejecting the State of Mississippi's assertion in *Hogan* that its primary objectives in maintaining its School of Nursing for women only was to compensate for past discrimination against them." *Id.* (Phillips, J., dissenting). *See supra* notes 43-48 and accompanying text.

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

123. *Id.* at 1243 (Phillips, J., dissenting).

were established simultaneously and provided "substantially comparable curricular and extracurricular programs, funding, physical plant, administration and support services, and faculty and library resources."[124] Thus, he concluded that "[n]o separate single-gender arrangement that involved VMI as the all-mens' school and any newly-founded *separate* institution (whether free-standing or an appendage) as the all-womens' component could pass equal protection muster" because "[i]t could not provide substantially equal educational benefits or opportunities to both genders."[125]

The Fourth Circuit denied the rehearing en banc.[126] In her dissent, Circuit Judge Motz was of the opinion that this case presented an extremely important issue[127] and she agreed with Judge Phillips that the Commonwealth had failed to demonstrate an "exceedingly persuasive justification" for the existence of differences between the two programs.[128]

She attacked the argument that VMI and VWIL were substantively comparable by focusing on the adversative training

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

125. *Id.* (Phillips, J., dissenting). He further stated that:

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

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

126. 52 F.3d 90 (4th Cir. 1995).

127. *Id.* at 91 (Motz, J., dissenting). She stated:

> More than forty years ago the Supreme Court unanimously held that a state could not constitutionally provide a "separate but equal" education to African - Americans. Yet in a 2-1 decision, a panel of this court has now held that a state can constitutionally provide a separate--and concededly not even equal-- education to women. In my view, this holding is one of exceptional importance, which merits the careful consideration of every eligible member of the court.

Id. (Motz, J., dissenting).

128. *Id.* at 92 (Motz, J., dissenting) (*quoting* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

method.[129] In support of her argument, Judge Motz explains that the:

> military academies are apparently able to train soldiers, sailors, and pilots without the benefit of "adversative" training. It might even be argued that, since the military academies have abandoned "adversative" training, the provision of that training to VMI cadets, rather than preparing them to be leaders in today's Armed Forces, affirmatively disadvantages them for military leadership roles.
>
> Assuming, however, that "adversative" training is both desirable and essential to the VMI program, then the proposed Mary Baldwin program, which does not include "adversative" training, cannot be "substantively comparable" to the VMI program. If "adversative" training is so critical to the VMI program that it virtually defines it, then a program without "adversative" training can never be "substantively comparable." Conversely, if the proposed program at Mary Baldwin is truly "substantively comparable" to the VMI program, then "adversative" training must not be critical to the VMI program, and so there is nothing to prevent the abolition of "adversative" training and admission of women to VMI.[130]

Judge Motz concluded that "[w]omen need not be guaranteed equal 'results' . . . but the Equal Protection Clause does require equal opportunity to obtain these results; that opportunity is being denied here."[131]

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129. *Id.* (Motz, J., dissenting). She claims that majority in *VMI II* "never demonstrate[d] the 'requisite direct, substantial relationship' between VMI's asserted objective--producing 'citizen soldiers, educated and honorable'-- and the means employed to accomplish that objective." *Id.* (Motz, J., dissenting).

130. *Id.* at 92-93 (Motz, J., dissenting). She also asks the question:

> [H]ow can a degree from a yet to be implemented supplemental program at Mary Baldwin be held "substantively comparable" to a degree from a venerable Virginia military institution that was established more than 150 years ago? As the majority acknowledges, in almost epic understatement, the alternative degree from [VWIL] "lacks the historical benefit and prestige of a degree from VMI."

Id. at 93 (Motz, J., dissenting) (*quoting* United States v. Virginia, 44 F.3d 1229, 1241 (4th Cir. 1995)).

131. *Id.* at 93.

III. THE OPINION OF THE SUPREME COURT

Following the Fourth Circuit's denial of the rehearing en banc, the United States Supreme Court granted the federal government's petition for certiorari,[132] setting the stage for the Court to make its first major statement on gender equality in more than ten years.

In its briefs, the government asked the Court to use the VMI case as a device for declaring that discrimination on the basis of sex should be subject to the strict scrutiny standard that the Court applies to official distinctions on the basis of race.[133] The government reiterated the position it had taken throughout the litigation that the Commonwealth must be ordered to admit women to VMI or to discontinue state funding for the institution.[134]

The Court also granted the Commonwealth's conditional cross-petition for certiorari, which challenged the initial determination by the Fourth Circuit which ruled that the Commonwealth could not continue VMI as a male-only public college without establishing a comparable facility for women.[135] In its cross-petition, the Commonwealth argued that equal protection jurisprudence does not require the Commonwealth to provide the VWIL program and that the Fourth Circuit's decision in *VMI I* "will unduly and unnecessarily inhibit States in the development of programs to meet the special and demonstrated needs of their citizens."[136]

In challenging the court of appeals decision in *VMI I*, the Commonwealth stated, regardless of the position taken in the cross-petition, it was "committed by legislation to single-sex

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132. 116 S. Ct. 281 (1995).

133. Brief for the Petitioners at 17-18, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-1941).

134. *Id.* at 7-8, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-1941)

135. *Virginia*, 116 S. Ct. at 281.

136. Brief for the Cross-Petitioners at 3, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-1941).

education as a beneficial pedagogical option for both men and women and intend to continue offering this option through VMI and VWIL even if [the Supreme] Court holds that parallel programs are not a prerequisite to a State's ability to offer the benefits of single-sex education to its citizens."[137]

The seven-to-one majority reversed the Fourth Circuit, holding that VMI's male-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment and that the creation of VWIL did not remedy the constitutional violation.[138]

The Court considered two issues before concluding the all-male policy violated equal protection. First, the Court decided that the exclusion of women from the educational opportunities provided by VMI denied them equal protection of the laws as guaranteed by the Fourteenth Amendment.[139] Second, the Court held that the Commonwealth's proposal to create VWIL also offended the Equal Protection Clause.[140]

The Court stated the Commonwealth was required to demonstrate an "exceedingly persuasive justification" for its exclusion of women from VMI and explained that the "[t]he burden of justification is demanding and it rests entirely on the state . . . . The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on over-broad generalizations about the different talents, capacities or preferences of males and females."[141]

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

138. United States v. Virginia, 116 S. Ct. 2264, 2287 (1996). The majority opinion was written by Justice Ginsburg and was joined by Justices Stevens, O'Connor, Kennedy, Souter and Breyer. Chief Justice Rehnquist concurred separately and Justice Scalia dissented. Justice Thomas did not participate because his son attends VMI.

139. *Id.* at 2276.

140. *Id.* at 2287.

141. *Id.* at 2279 (citations omitted). The majority noted that "'[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.* at 2276.

While the Court acknowledged the differences between the sexes, it provided guidance on how those differences can and cannot be accommodated by the states:

> Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," "to promot[e] equal employment opportunity, to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.[142]

The Commonwealth asserted two justifications for excluding women from VMI. First, it argued that a single-sex education can provide important educational benefits and contribute to diversity in the educational process.[143] It also asserted that VMI's unique adversative "method of character development and leadership training would have to be modified if women were admitted."[144]

In response to the argument that VMI was established and maintained with a view toward diversifying educational opportunities, the Court reviewed the historical context in which VMI was created.[145] When VMI was established in 1839, higher education for women was considered dangerous.[146] The Court relied on publications at the time reflective of the widely held view that female reproductive functions were endangered by the rigors of hard study and academic competition.[147] The Court

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142. *Id.* (citations omitted).

143. *Id.*

144. *Id.*

145. *Id.* at 2277.

146. *Id.*

147. *Id.* For example, one study stated that "after five or six weeks of 'mental and educational discipline', a healthy woman would 'lose . . . the habit of menstruation' and suffer numerous ills as a result of depriving her body for the sake of her mind." *Id.* (*quoting* C. Meigs, Females and Their Diseases 350 (1848)). Likewise, another publication stated:

> [i]t is not that girls have not ambition, nor that they fail generally to run the intellectual race . . . but it is asserted that they do it at a cost to their strength and health which entails life-long suffering, and even

also reviewed the Commonwealth's history with regard to the provision of education to women within the state and found the record to be dismal.[148] While the Commonwealth created four all-female schools, the Court characterized the resources and stature at these schools as being far from equal.[149] Thus, the Court failed to find any "persuasive evidence in this record that VMI's male-only admission policy 'is in furtherance of a state policy of diversity.'"[150]

In support of its argument that the admission of women to VMI would destroy its unique program, the Commonwealth cited to three aspects of VMI's program that would be changed: physical training, the absence of privacy, and the adversative approach.[151]

After acknowledging that changes would have to be made, the Supreme Court rejected the argument that average capacities and preferences of men and women can justify denying "women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."[152] With a comprehensive summary of the historical justifications for denying women various opportunities such as practicing law and medicine, the Court found that the Commonwealth's justification for excluding women from VMI was not "exceedingly

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incapacitates them for the adequate performance of the natural functions of their sex.

Id. (*quoting* H. Maudsley, Sex in Mind and in Education 17 (1874)).

148. *Id.*

149. *Id.* at 2278. In addition, all four of the all-female schools became co-educational by the mid-1970's. *Id.* The Court also noted that the State's most prestigious school, the University of Virginia, began to admit women in 1972. *Id.*

150. *Id.* at 2279.

151. *Id.*

152. *Id.* at 2280. The District Court had found, based on expert opinions, that "[m]ales tend to need an atmosphere of assertiveness or ritual combat . . . [while] [f]emales tend to thrive in a cooperative atmosphere. United States v. Virginia, 766 F. Supp. 1407, 1434 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995), *rev'd*, 116 S. Ct. 2264 (1996).

persuasive."[153] The Court concluded that VMI's goal of producing:

> "citizen-soldiers" . . . confident in the functions and attitudes of leadership [can] accommodate women, who today count as citizens in our American democracy equal in stature to men. Just as surely, the State's great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the State's premier "citizen-soldier" corps.[154]

In addition to determining that VMI's exclusion of women was unconstitutional, the Court addressed whether the Commonwealth's creation of VWIL remedied the constitutional violation.[155] According to the Court, "[a] remedial decree must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of discrimination.'"[156]

In comparing the benefits and opportunities proposed at VWIL with those offered at VMI, the Court noted that VWIL requires lower S.A.T. scores; the school has significantly fewer instructors with doctorates and they receive significantly lower salaries than their colleagues at VMI; and its educational programs are much more limited.[157] The Court determined that VWIL did not remedy the constitutional violation created by VMI's exclusion of women.[158]

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153. *Virginia*, 116 S. Ct. at 2281.

154. *Id.* at 2281-82.

155. *Id.* at 2282.

156. *Id.* (*quoting* Milliken v. Bradley, 433 U.S. 267, 280 (1977)).

157. *Id.* at 2284. For example, VMI awards baccalaureate degrees in liberal arts, biology, chemistry, civil engineering, electrical and computer engineering, and mechanical engineering. *Id.* VWIL, on the other hand "does not have a math and science focus." *Id.*

158. *Id.* at 2285. The Court concluded that "VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network." *Id.* at 2284.

In the end, the Court found that the Fourth Circuit "plainly erred" in deferentially reviewing the Commonwealth's remedial plan and further held that all classifications based on gender must be tested under "heightened scrutiny."[159] Because the alternative program afforded "women no opportunity to experience the rigorous military training for which VMI is famed," it could not be said to have eliminated as far as possible the effects of past discrimination and prevent future discrimination.[160] The proposed VWIL program was simply not comparable to the program offered at VMI.

Ultimately, the Court stopped short of ruling that gender classifications should be tested by the strict scrutiny standard. However, the Court's analysis seemed to resemble to the strict scrutiny standard applied to suspect classifications although the Court did not explicitly use terms which are commonly associated with the standard applied in strict scrutiny cases, such as the least restrictive alternative or narrowly tailored classifications.

In his concurring opinion, Chief Justice Rehnquist agreed with the Court's ultimate holding but disagreed with the analysis.[161] His main point of contention was that, although the majority adhered to the test set out in *Craig*, it made the mistake of introducing "an element of uncertainty" by requiring the state to "demonstrate an 'exceedingly persuasive justification' to support a gender-based classification."[162] He also disagreed with the Court's analysis in determining whether the Commonwealth had proven that its proffered purpose behind the classification, which was diversity in education, was the actual purpose.[163]

While he agreed with the Court that there was little evidence to support the Commonwealth's justification in maintaining VMI as an all-male institution, he would have only considered evidence that postdated the Court's decision in *Hogan*.[164] Since *Hogan*

159. *Id.* at 2286.

160. *Id.* at 2283.

161. *Id.* at 2287 (Rehnquist, J., concurring).

162. *Id.* at 2288 (Rehnquist, J., concurring).

163. *Id.* (Rehnquist, J., concurring).

164. *Id.* at 2290 (Rehnquist, J., concurring). *See supra* notes 43 - 55 and accompanying text.

put the State on notice that VMI's admissions policy might be unconstitutional, Chief Justice Rehnquist was of the opinion that the Commonwealth was entitled to have any decisions with regard to its admission policy after *Hogan* held against it since there was adequate time for the Commonwealth to deal with the problem.[165]

He noted that, even if diversity was the actual purpose behind the classification, there was still a problem with the Commonwealth's position.[166] "The difficulty with its position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women."[167]

Finally, the Chief Justice disagreed with the way the majority defined the constitutional violation.[168] The problem with the way the majority phrased the violation was that it implied that the only adequate remedy available to the Commonwealth would be the admission of women to VMI.[169] Rather than define the violation as the "exclusion of women," he would have phrased it as the "maintenance of an all-men school without providing any--much less a comparable--institution for women."[170] Therefore, an adequate remedy according to the Chief Justice "might be a demonstration by Virginia that its interest in educating men is matched by its interest in education women at a single-sex institution."[171]

He concluded by stating that VWIL fails as an adequate remedy "because it is distinctly inferior to the existing men's institution

165. *Id.* at 2289-90 (Rehnquist, J., concurring).

166. *Id.* at 2290 (Rehnquist, J., concurring).

167. *Id.* (Rehnquist, J., concurring) ("If diversity in the form of single-sex, as well as co-educational, institutions of higher learning were to be available to Virginians, that diversity had to be available to women as well as to men.").

168. *Id.* at 2291 (Rehnquist, J., concurring). The majority defined the violation as "the categorical exclusion of women from an extraordinary education opportunity afforded to men." *Id.* (Rehnquist, J., concurring).

169. *Id.* (Rehnquist, J., concurring).

170. *Id.*

171. *Id.*

and will continue to be for the foreseeable future. VWIL simply is not, in any sense, the institution that VMI is."[172]

Of all the current Supreme Court justices, only Justice Antonin Scalia defended the Virginia Military Institute's refusal to admit female cadets, dismissing gender discrimination as less important than preserving a male-only education dedicated to promoting manly honor.[173] Justice Scalia lashed out at the majority, calling his colleagues a "self-righteous" band out to destroy VMI.[174] He said the Court was guilty of making "misleading" and "irresponsible" statements and "made-up" tests of discrimination and that they were submitting to "current preferences of the society."[175]

Justice Scalia, considered to be the most conservative member of the Court was furious and unpleasant as he often is when he disagrees with the majority. Justice Scalia's constricted "textual" view of the Constitution was unwilling to concede that some human progress, such as equal rights for women and African-Americans, was unanticipated by the Founding Fathers over 200 years ago.[176] His uncompromising attitude was that our revered document is static and not subject to evolution or judicial interpretation.

Justice Scalia said the majority believes, against considerable evidence, that no substantial educational value is served by the existence of all-male military academies.[177] He said inherently

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172. *Id.*

173. *Id.* at 2293 (Scalia, J., dissenting) ("[T]he tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat . . . . the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.").

174. *Id.* at 2308 (Scalia, J., dissenting).

175. *Id.* at 2295 (Scalia, J., dissenting).

176. The "Scalia theory" is that since the Constitution does not address all-male schools, VMI should continue to deny admissions to women because it has always done so. *Id.* at 2293 (Scalia, J., dissenting). To end that privilege, he implied, would be to improperly rewrite the Constitution. *Id.* (Scalia, J., dissenting) ("This is not the interpretation of a Constitution, but the creation of one.").

177. *Id.* at 2292 (Scalia, J., dissenting).

ambiguous constitutional provisions such as the equal protection guarantee should be construed in ways that reflect respect for "constant and unbroken national traditions" such as educational diversity that includes some single-sex schools, including male-only military schools.[178]

He noted the majority criticized the "fixed notions" of our forefathers regarding women's education,[179] but that the majority favors its own notions so fixedly that it makes them as constitutional mandates.[180] He notes that the majority faults the "closed-mindedness" of our forefathers regarding women, but the majority wields judicial power to abort the system of democratic persuasion by which the public's mind is kept open.[181] He stated that:

> [this] system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: they left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law.[182]

Beyond that, he excoriates his colleagues for having set a new and confusing standard for assessing gender discrimination.[183] Their opinion, he asserts, claims to recognize the validity of differentiating between the sexes but it will make it virtually impossible to defend those distinctions against charges of unconstitutionality.[184] Justice Scalia maintains that this ruling serves as a death sentence for private single-sex colleges, for special public school programs for boys and for any other gender

178. *Id.*
179. *Id.* at 2291 (Scalia, J., dissenting).
180. *Id.* at 2292 (Scalia, J., dissenting).
181. *Id.*
182. *Id.*
183. *Id.* at 2295 (Scalia, J., dissenting).
184. *Id.* at 2306 (Scalia, J., dissenting).

distinction in the law that cannot withstand the strict scrutiny review now applied to race distinctions.[185]

"Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half," wrote Justice Scalia.[186] He said it is "powerfully impressive" that VMI sought to have its students live up to a rigorous "[c]ode of a [g]entleman"[187] and ended his opinion by stating the he does "not think any of us, women included, will be better off for its destruction."[188]

CONCLUSION

The Court's decision in *United States v. Virginia* represents a victory for the principle of equal opportunity for women at all levels of education. While the Court attempted to narrow its decision,[189] the magnitude of the decision may make this case one of the high-water marks in the twentieth century.

The most obvious and immediate effect occurred on September 21, 1996 when the governing board of VMI narrowly decided to admit women to the institution.[190] In the time period between the Court's decision and the board's vote to admit women, VMI had continued to refuse to give applications to interested

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185. *Id.* Justice Scalia stated that "the rationale for today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. . . . I suggest that the single-sex program that will not be capable of being characterized as 'unique' is not only unique but nonexistent." *Id.* (Scalia, J., dissenting).

186. *Id.* at 2291 (Scalia, J., dissenting).

187. *Id.* at 2309 (Scalia, J., dissenting).

188. *Id.*

189. The Court noted that it was addressing "specifically and only an educational opportunity recognized by the district court and the court of appeals as 'unique,' an opportunity available only at Virginia's premier military institute, the State's sole single-sex public university or college." *Id.* at 2276 n.7 (citations omitted).

190. The board voted nine to eight in favor of admitting women. Mike Allen, *Defiant V.M.I. to Admit Women But Will Not Ease Rules For Them*, N.Y. TIMES, Sept. 22, 1996, at A1.

females.[191] This decision came about despite vigorous attempts by VMI alumni to purchase the college from the Commonwealth.[192] However, the board concluded that the "legal, political and financial hurdles were insurmountable."[193]

Moreover, the Supreme Court's decision in *United States v. Virginia* has many people debating its long-term effect on the intermediate standard used by courts to review gender-based claims under the Constitution. This decision by the Court has been applauded by many women's rights groups as finally putting an end to sex discrimination in publicly-funded schools.[194] Some scholars say the VMI decision imposes a "heightened" intermediate standard because states now must provide an "exceedingly persuasive justification" for any sex classification,[195] while other scholars say the Court merely clarified the standard. A third view, stated by Chief Justice Rehnquist in his concurring opinion, is that the decision muddies the waters.[196]

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191. *Id.* at A36. Since the Supreme Court's decision, approximately 80 women had requested application information and they were referred to VMI's World Wide Web site on the Internet. *Id.*

192. *Id.* ("Intent on thwarting coeducation, alumni leaders had spent the summer trying to raise more than $100 million in an attempt to buy the college from the State of Virginia, which has provided the institute with one-third of its $30 million annual budget.").

193. *Id.*

194. Judy Appelbaum, senior counsel and director of legal programs for the National Women's Law Center, a Washington, D.C.-based women's rights legal organization stated "[i]t is significant that the highest court in the land has spoken with such a clear voice." Hope Viner Samborn, *Scrutiny Scrutinized - Case Sparks Debate on Intermediate Scrutiny*, A.B.A. J., September 1996, at 29.

195. "Justice Ginsburg's opinion in United States v. Virginia makes it quite clear that the scrutiny employed for gender classifications is quite close to compelling interest review." Martin A. Schwartz, *Equal Protection Developments*, 216 N.Y. L.J. 55 (1996) (citations omitted). In his dissent, Justice Scalia said the Court's decision has "drastically revised" the intermediate standard. United States v. Virginia, 116 S. Ct. 2264, 2291 (1996) (Scalia, J., dissenting).

196. *See supra* notes 161 - 172 and accompanying text.

The majority attempts to clarify the lingering confusion with regard to the legal and social parameters of a woman's place in society and the complex role that educational access plays in supporting the constitutional value of equality. However, this opinion lends itself to possible misinterpretation and distortion. It also provokes a reactionary response in some people grounded in traditional views of male and female roles, as evidenced by Justice Scalia's dissenting opinion.[197]

From a legal prospective, the majority puts a new spin on over twenty years of equal protection jurisprudence. Justice Ginsburg did not simply reaffirm the standard of review applied to gender classification. Instead, she moved gender equality one step closer to the more exacting judicial standard applied to classifications based on race, religion, and national origin.[198] Although not moving completely to strict scrutiny, the majority nevertheless restated and applied, with a "bite," the standard used in gender discrimination cases for the past two decades.

The VMI case will remain controversial for years to come and will continue to stir up distinctly different perspectives on the role the Court should play in pronouncing public values and shaping public policy through the Constitution. It remains to be seen whether the Court's heightened standard of review for gender discrimination cases is but a fleeting departure or a firmly rooted approach that will influence the future of gender equality.

What is clear, however, is that the Supreme Court has convincingly spoken out against the categorical exclusion of either sex based on "traditional" notions of typical male and female tendencies. The VMI decision supports an expansive

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197. *See supra* notes 173 - 188 and accompanying text.

198. Classifications drawn on the basis of race, religion and national origin, require the government to demonstrate that its policy is supported by a compelling governmental interest and represents the least restrictive alternative. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtain the civil rights of a single racial group are immediately suspect . . . . [and] courts must subject them to the most rigid [judicial] scrutiny."); United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938) (establishing the rationale for more exacting judicial review in certain cases).

view of equal educational opportunities for both sexes, a view that permits educational distinctness and choice so long as the objective and the result are to provide equal access.

Eric J. Stockel