

HOLDING THE LINE AT VMI AND THE CITADEL: THE PRESERVATION OF A STATE’S RIGHT TO OFFER A SINGLE-GENDER MILITARY EDUCATION

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I. INTRODUCTION

It is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose—indeed destroy—values that mean much to

* First Lieutenant, USMCR. The author would like to thank his fiancée, Jeanette Watkins, for moral support and patience, and Lieutenant Colonel David Francis, USMC, for the motivation to write this Comment. The views expressed herein are solely those of the author and should not be construed as representing the views of the United States Marine Corps, nor any other branch of the U.S. Armed Services.

some people by forbidding the State to offer them a choice while not depriving others of an alternative choice.¹

Justice Harry A. Blackmun

Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.²

Justice Potter Stewart

The men rise before sunrise. With the playing of reveille, they are out of their bunks, on the move. All around is frantic activity, noise, making of beds, adjusting of uniforms. No stalls divide the bathrooms; there is no privacy. All is seen. People are yelling, "Formation in five minutes, get out of the barracks." Soon they are out in the cold morning air. They will not sleep for nearly seventeen hours. This is not boot camp and these are not soldiers. They are college students, cadets at the Virginia Military Institute³ (VMI) and The Citadel,⁴ the state-funded military colleges of Virginia and South Carolina.

There are currently no female cadets at VMI or The Citadel. However, in 1990, an anonymous woman contacted the United States Department of Justice (Justice Department) and filed a complaint regarding VMI's single-gender admissions policy.⁵ The Justice Department, acting under statutory authority,⁶ brought suit against VMI on behalf of the complainant; the suit alleged that VMI's single-gender admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.⁷

Two years later, South Carolina resident Shannon Richey Faulkner, who instructed her guidance counselor to delete any reference to gender on her Citadel application,⁸ applied for and was granted conditional admission to The Citadel.⁹ The admission was withdrawn when The Citadel learned that Faulkner was female.¹⁰ Shortly thereafter, Faulkner brought

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

2. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (Stewart, J., writing for the majority).

3. The Virginia Military Institute (VMI) is located in Lexington, Virginia and is state-funded. See *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) [hereinafter *VMI I*].

4. The Citadel is located in Charleston, South Carolina and is funded by the state. See *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993), *mandamus denied*, 14 F.3d 3 (4th Cir.), *stay vacated* by 114 S. Ct. 872 (1994) [hereinafter *Faulkner I*].

5. *VMI I*, 766 F. Supp. at 1408.

6. Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6 (1995), permits the United States to bring actions on behalf of civil rights plaintiffs to remedy violations of the Constitution or federal statutes. See *VMI I*, 766 F. Supp. at 1408.

7. *VMI I*, 976 F.2d 890, 895 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

8. See *Faulkner I*, 10 F.3d at 229 n.1 (Faulkner wanted to be "considered on the merits.").

9. *Id.* at 229.

10. *Id.*

suit against The Citadel seeking a court order that would permit her to attend day classes.¹¹

*United States v. Virginia*¹² and *Faulkner v. Jones*¹³ raise the same fundamental questions. First, can the public funding of single-gender military education promote and further an important governmental objective? Second, can the Equal Protection Clause of the Fourteenth Amendment permit a state to provide a publicly funded military education for one gender, while providing no equivalent educational program for the other gender? Third, if the Equal Protection Clause does prohibit a state from offering single-gender education to one sex, while withholding it from the other, can the constitutional violation be remedied through the establishment of a parallel single-gender institution for the excluded sex?

United States v. Virginia has two litigation phases: the *liability phase* (*VMI I*)¹⁴ and, on remand, the *remedial phase* (*VMI II*).¹⁵ A final disposition of *VMI II* was recently rendered by the United States Court of Appeals for the Fourth Circuit.¹⁶ Accordingly, *United States v. Virginia* became procedurally ripe for review by the United States Supreme Court.¹⁷

Certiorari was granted by the Supreme Court to *United States v. Virginia* on October 5, 1995.¹⁸ Additionally, the Court disposed of the procedurally incomplete *Faulkner v. Jones*.¹⁹ The Court's resolution of *VMI II* could potentially have broad ramifications.²⁰ The fate of single-gender

11. *Id.* (Faulkner's "motion did not request that she be admitted to the corps of cadets.").

12. *VMI I*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

13. *Faulkner I*, 10 F.3d 226 (4th Cir. 1993), *mandamus denied*, 14 F.3d 3 (4th Cir.), *stay vacated* by 114 S. Ct. 872 (1994) (upholding preliminary injunction granted by the District Court for the District of South Carolina); *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994), *aff'd*, 51 F.3d 440 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, *and cert. denied*, 116 S. Ct. 352 (1995) (trial and appeal on merits of equal protection claim) [hereinafter *Faulkner II*].

14. *VMI I*, 766 F. Supp. at 1407.

15. *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) [hereinafter *VMI II*].

16. *VMI II*, 44 F.3d at 1229.

17. Interview with Steven G. Gey, Professor of Constitutional Law at the Florida State University College of Law, in Tallahassee, Fla. (Feb. 15, 1995).

The Supreme Court considered granting certiorari to *VMI I* but did not do so because the case was procedurally incomplete. Justice Scalia wrote a separate opinion underscoring his belief that the issues in *VMI I* deserved the attention of the Court. He stated, "Whether it is constitutional for a state to have a men-only military school is an issue that should receive the attention of this Court before, rather than after a national institution as venerable as the Virginia Military Institute is compelled to transform itself." *VMI I*, 113 S. Ct. at 243.

18. *VMI II*, 116 S. Ct. 281 (1995).

19. *Faulkner II*, 116 S. Ct. 331 (1995) (dismissing certiorari); *Faulkner II*, 116 S. Ct. 352 (1995) (denying certiorari).

20. See generally Daniel Gardenswartz, Comment, *Public Education: An Inner-City Crisis! Single-Sex Schools: An Inner-City Answer?*, 42 EMORY L.J. 591 (1993); Brian S. Yablonski, Comment, *Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute*, 47 U. MIAMI L. REV. 1449 (1993); Douglas W. Kmiec, *Rule of Single-Sex Schools Aren't Unconstitutional*, WALL ST. J., Oct. 14, 1992, at A15.

education, whether public or private, may ultimately hang in the balance.²¹

This Comment analyzes the present legal controversies surrounding VMI and The Citadel. Part II chronicles the rich traditions of VMI and The Citadel and endeavors to illustrate the positive role that the Citadel/VMI methodology plays in improving the lives of young men. Part III discusses the doctrinal history leading up to the present litigation. In so doing, Part III discusses how the Equal Protection Clause has been applied to gender classifications through the use of "intermediate scrutiny." Part III also assesses the line of cases construing the validity of single-gender public education. Part IV delineates the procedural history of *United States v. Virginia*²² and *Faulkner v. Jones*.²³

Part V analyzes the Fourth Circuit's recent decision in *VMI II* and assesses the court's new test for determining the validity of publicly funded single-gender institutions. Part V additionally argues that the Fourth Circuit's approval of Virginia's remedial plan in *VMI II* satisfies the Equal Protection Clause. Part VI assesses the present status of the *Faulkner* litigation and discusses Shannon Faulkner's abrupt departure from The Citadel. Part VII discusses the possible outcome of the Supreme Court's ruling in *United States v. Virginia*. Finally, part VIII argues that valuable educational opportunities may be permanently lost, to both genders, if the Supreme Court does not affirm the Fourth Circuit's final disposition of *United States v. Virginia*.

II. A GRAND TRADITION: SINGLE-GENDER MILITARY EDUCATION AT VMI AND THE CITADEL

A. Traditions of Excellence

VMI enjoys a prestigious history. It was established in 1839 in a building previously used to house surplus ammunition and weapons from the War of 1812.²⁴ The fledgling university performed an instrumental role in the War Between the States. Nearly one-third of the field grade officers (majors and colonels) for Robert E. Lee's Confederate Army of Virginia were VMI graduates.²⁵

21. See *infra* notes 327-48 and accompanying text.

22. *VMI I*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993); *VMI II*, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

23. *Faulkner I*, 10 F.3d 226 (4th Cir. 1993), *mandamus denied*, 14 F.3d 3 (4th Cir.), *stay vacated by* 114 S. Ct. 872 (1994); *Faulkner II*, 858 F. Supp. 552 (D.S.C. 1994), *aff'd*, 51 F.3d 440 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, *and cert. denied*, 116 S. Ct. 352 (1995).

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

25. Yablonski, *supra* note 20, at 1451.

VMI's alumni have continued to play important roles in every American military engagement since the Civil War. Names affiliated with the Institute include VMI's most famous professor, Thomas "Stonewall" Jackson,²⁶ and distinguished alumni General George S. Patton and General of the Army George C. Marshall.²⁷ Six VMI alumni have received the Congressional Medal of Honor, the highest honor that can be bestowed for military bravery.²⁸

In 1842, the South Carolina Legislature created a military college at "The Citadel."²⁹ The mission of the new college was to provide "a system of education for the poor but deserving boys" of South Carolina.³⁰ The Citadel provided young "cadets" military training for "times of conflict" and "knowledge in the practical arts and sciences for service as citizens in time of peace."³¹

"Times of conflict" were close at hand.³² The Citadel's cadets played a dramatic role in the War Between the States.³³ They manned the cannons that fired the first shots across Fort Sumter, marking the symbolic beginning of the Civil War.³⁴ During the war, the cadets were called upon to defend Charleston and South Carolina eight different times.³⁵ In one noteworthy engagement, cadets helped delay General Sherman and his battle-hardened Union troops for ten days while Savannah, Georgia was successfully evacuated by Confederate forces.³⁶ Over the years, The Citadel has produced many great leaders, both military and civilian.³⁷

26. General Stonewall Jackson is one of the most beloved figures in Southern culture. He bedeviled numerous Union generals by repeatedly routing the numerically superior Army of the Potomac in the Shenandoah Valley. See ALLEN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA 193-99 (1984). Every morning the cadets of VMI render a salute to the bronze statue of Stonewall Jackson that stands in the center of the campus. See Yablonski, *supra* note 20, at 1451.

27. Yablonski, *supra* note 20, at 1451. General Marshall was the top general in the United States Army during World War II and orchestrated the postwar rebuilding of Europe pursuant to his "Marshall Plan." *Id.* He won the Nobel Peace Prize for his efforts. *Id.*

28. *VMI I*, 976 F.2d 890, 892 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

29. THE CITADEL, AN OVERVIEW OF THE CITADEL: THE MILITARY COLLEGE OF SOUTH CAROLINA (1994) [hereinafter OVERVIEW OF THE CITADEL]. Fearing an invasion by the British in the summer of 1780, the residents of Charleston, South Carolina constructed a large rampart to protect the city. *Id.* Charleston residents named the rampart "The Citadel" because of its imposing image. The city never fell to the British, and The Citadel remained standing. *Id.*

30. THE GUIDON: 1994-1995 33 (Kirby R. Baker ed., 1994) [hereinafter THE GUIDON].

31. *Id.*

32. See *id.* at 34-35.

33. *Id.*

34. *Id.* The cannons were directed at a Union supply ship, the "Star of the West," which was en route to supply the Union outpost at Fort Sumter. *Id.* Under heavy fire, the vessel turned about and put out to sea. Fort Sumter fell shortly thereafter. *Id.*

35. *Id.* at 35.

36. *Id.* The defense of Savannah was no small task. As one of the most successful Union generals, General Sherman's reputation for ruthlessness preceded him. He was responsible for the burning of Atlanta and for cutting a swath of "scorched earth" across the heart of the Con-

B. *The Adversative Methodology*

At VMI and The Citadel, individual success stories are commonplace.³⁸ Young men lacking direction and discipline, but with a desire to improve themselves, come to the spartan barracks as an alternative to the social distractions of the coeducational university.³⁹ Others are drawn to the rigor of the experience, which represents an ultimate challenge.⁴⁰ Despite the iron discipline and scant social life imposed on cadets, the graduation rate is significantly above the national average.⁴¹ This success is in a large part attributable to the “holistic” educational methodology employed at the two schools.⁴² Every activity, be it in the classroom or barracks, is intended to instill knowledge and to modify behavior. At VMI and The Citadel, character development is the primary goal.⁴³

VMI and The Citadel both use an adversative model of education.⁴⁴ This model includes “[p]hysical rigor, mental stress, *absolute equality of treatment, absence of privacy, minute regulation of behavior,* and indoctrination in desirable values.”⁴⁵ The model is premised on a theory that

federacy. See RUSSELL F. WEIGLEY, *THE AMERICAN WAY OF WAR: A HISTORY OF U.S. MILITARY STRATEGY AND POLICY* 150-152 (1973).

37. See THE GUIDON, *supra* note 30, at 33-45.

38. Consider the story of Citadel Admission Officer Jeff Cole. Cole graduated with honors from The Citadel in the spring of 1994. He spent his first semesters of college at a coeducational institution in South Carolina. He enjoyed the social aspects of the coeducational university but felt that he was making insufficient academic progress. Lacking direction and personal discipline, Cole transferred to The Citadel in the hope of finding that direction. Cole survived the grueling first-year cadet indoctrination and eventually graduated as an Honor Cadet from The Citadel. He credits The Citadel’s strict single-gender environment with helping him to find personal direction and academic focus. Telephone Interview with Jeff Cole, Admission Officer, The Citadel (January 20, 1995) [hereinafter Cole Interview].

39. See *VMI I*, 766 F. Supp. 1407, 1426 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

40. *Id.*

41. See OVERVIEW OF THE CITADEL, *supra* note 29. At The Citadel, the overall graduation rate among cadets is 37% higher than the U.S. average. *Id.* Among African-American cadets, the graduation rate is 135% higher than the national average. *Id.*

42. See *VMI I*, 766 F. Supp. at 1412-15; *Faulkner I*, 10 F.3d 226 (4th Cir. 1993), *mandamus denied*, 14 F.3d 3 (4th Cir.), *stay vacated by* 114 S. Ct. 872 (1994).

43. *VMI I*, 766 F. Supp. at 1426.

44. *Faulkner I*, 10 F.3d at 229.

45. *VMI I*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) (emphasis added).

Being punished or rewarded for the sins or accomplishments of brother rats, as well as for one’s own, builds a sense of class solidarity in addition to individual responsibility. 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.

Id. at 1422.

At The Citadel, each cadet participates in the full rigors of barracks life—learning, training and developing through drills, formations, parades, inspections, studies, sports and even meals. Every cadet enters The Citadel on a basis of absolute equality

adolescent males enter college with overinflated egos and misconceptions about their own self-importance.⁴⁶ The Citadel/VMI educational methodology challenges the entire belief structure of entering cadets and rebuilds each young man into the mold of the citizen soldier.⁴⁷ The tearing down process can be ruthless, but it is applied equally to all cadets, regardless of individual talents or abilities.⁴⁸

The freshman year is the most severe time for cadets at both schools.⁴⁹ It is designed to render an experience comparable to Marine Corps boot camp.⁵⁰ The first year also serves as a time of indoctrination and extensive learning. Although there are small differences between the programs at VMI and The Citadel, the experiences are comparable.⁵¹ An account of the experience endured by first-year cadets at VMI illustrates the holistic nature of The Citadel/VMI educational methodology.

The entering cadet is termed a "rat" because "the rat is 'probably the lowest animal on earth.'" ⁵² "Rats" endure the "rat line," a yearlong ritual of harsh physical and psychological adversity intended to weed out the unsuited.⁵³ The "rats" are verbally abused, stripped of previous beliefs and attitudes, and instilled with the core values of VMI.⁵⁴ Survivors of the first year become "brother rats." Colonel N. Michael Bissell, the Commandant of Cadets at VMI, describes the indoctrination and maturation of the "rat" as follows:

with all others. Every cadet's success is based on his own performance and achievement. The system is demanding; it is tough; and it is pervasive; but it is fair.

See also OVERVIEW OF THE CITADEL, *supra* note 29.

46. See *VMI II*, 44 F.3d 1229, 1234-35 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

47. See *VMI I*, 766 F. Supp. at 1421.

48. *Id.* at 1422.

49. Cadets gain rank and acquire greater privileges as they progress academically. *Id.* at 1422-23; THE GUIDON, *supra* note 30, at 171. However, every entering cadet, whether a freshman or transfer sophomore, starts at the very bottom of the cadet social structure and must work his way up through merit and self-achievement. *Id.*

50. *VMI I*, 976 F.2d 890, 893 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

51. See *Faulkner II*, 858 F. Supp. 552, 554 (D.S.C. 1994), *aff'd*, 51 F.3d 440 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, and *cert. denied*, 116 S. Ct. 352 (1995).

52. *VMI I*, 766 F. Supp. 1407, 1422 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) (citation omitted). At The Citadel, the entering cadet is called a "knob." See THE GUIDON, *supra* note 30, at 152-67.

53. *VMI I*, 766 F. Supp. at 1422.

54. *Id.* at 1421 ("The VMI experience is predicated on the importance of creating doubt about previous beliefs and experiences in order to create a mindset conducive to the values VMI attempts to impart."); THE GUIDON, *supra* note 30, at 167.

The Citadel is an institution of higher learning, to mold our minds, morals, and bodies so that we may be fit officers and better civilians of our country. More than that, however, it is a fortress of duty . . . a towering bulwark of rigid discipline, instilling within us high ideals, honor, uprightness, loyalty, patriotism, obedience, initiative, leadership, professional knowledge, and pride in achievement.

THE GUIDON, *supra* note 30, at 167 (emphasis added).

I like to think VMI literally dissects the young student that comes in there, kind of pulls him apart, and through the stress . . . teach[es] him to know everything about himself. He truly knows how far he can go with his anger . . . he knows just exactly what he can do when he is physically exhausted, he fully understands himself and his limits and capabilities. Something I think is the mainstay of leadership.⁵⁵

Barracks life comprises a significant portion of the holistic education received by cadets at VMI and The Citadel. All cadets are required to live in the barracks during their four years of school.⁵⁶ First-year cadets receive informal training and constant scrutiny by upperclassmen. There is a total absence of privacy.⁵⁷ Furnishings are sparse and inspections frequent. “Rats” and “knobs” must maintain a full load of college classes, as well as memorize and recite to upperclassmen on demand information about institutional regulations, school history, and general military protocol.⁵⁸

Punishments and rewards are collective as well as individual⁵⁹ and are designed to foster egalitarianism and class solidarity. Unlike the United States military academies, VMI and The Citadel employ no ability-level grouping.⁶⁰ Each cadet comes to realize that he individually must perform at required levels, lest his peers suffer for his personal shortcomings.⁶¹

III. DOCTRINAL UNDERPINNINGS: GENDER AND EQUAL PROTECTION

A. *The Basic Equal Protection Framework*

The Equal Protection Clause of the Fourteenth Amendment⁶² commands that laws apply equally to all persons within legally cognizable

55. *VMI I*, 766 F. Supp. at 1421-22.

56. *Id.* at 1423; Cole Interview, *supra* note 38.

57. *VMI I*, 766 F. Supp. at 1424. This is particularly the case at VMI. The barracks at VMI consist of a four-story, neo-gothic building that houses all 1,300 cadets. *Id.* The barracks are stark and poorly ventilated—an atmosphere designed to induce stress. *Id.* Each class is assigned one floor, with the freshmen on the top (and most visible) floor. *Id.* A freshman cadet on the top floor cannot go to the bathroom or take a shower without being observed by everyone in that quadrangle on all levels. *Id.* Cadets are generally housed four to a room. *Id.* The arrangement of the barracks places each cadet under the constant scrutiny of his peers and superiors and allows for minute regulation of behavior. *Id.*

58. Cole Interview, *supra* note 38.

59. *VMI I*, 766 F. Supp. at 1422.

60. After admitting women in 1976, the Army Academy at West Point modified basic training to break it into groups according to ability. Absolute equality of treatment was replaced with fairness. *Id.* at 1439.

61. *Id.*

62. U.S. CONST. amend. XIV, § 1. (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). The Citadel and VMI, as publicly funded universities, are considered “state actors” and are accordingly subject to scrutiny under the Equal Protection Clause. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 343-44 (1938) (holding that Missouri University curators were state actors).

classes.⁶³ However, a government is not required to regulate different classes of people identically under all circumstances.⁶⁴ Thus, the Equal Protection Clause accommodates the principle that some classes of people are inherently different: “[f]undamental injustice would undoubtedly result if the law were to treat different people as though they were the same.”⁶⁵ Courts have found constitutional such disparate treatment from laws regulating the age at which a person may drive or purchase alcohol⁶⁶ and requiring only men to register for Selective Service.⁶⁷

Generally, a government regulation may distinguish among classes of persons if the regulation is “rationally related” to a legitimate public purpose.⁶⁸ However, certain types of regulatory classifications provoke closer judicial scrutiny under the Equal Protection Clause. Courts consider inherently “suspect” governmental action that affects people differently on the basis of race or national origin or that impinges on the “fundamental rights” of individuals.⁶⁹ Suspect classifications are subject to “strict scrutiny” by reviewing courts.⁷⁰ In analyzing such governmental action, courts employ a two-prong analysis:⁷¹ the governmental authority must demonstrate a compelling state interest for the discriminatory classification,⁷² and it must demonstrate that the compelling state interest is advanced by the least restrictive means possible.⁷³ Courts almost universally invalidate discriminatory governmental actions receiving “strict scrutiny.”⁷⁴ This is, at least in part, because little or no deference is given to the challenged governmental regulation during “strict scrutiny” review.⁷⁵

Regulations that discriminate on the basis of a person’s gender are not “inherently suspect” so as to require strict scrutiny.⁷⁶ Rather, gender-

63. See *Faulkner I*, 10 F.3d 226, 230 (4th Cir. 1993), *mandamus denied*, 14 F.3d 3 (4th Cir.), *stay vacated by* 114 S. Ct. 872 (1994).

64. *Id.*

65. *Id.*; see also *Jeness v. Fortson*, 403 U.S. 431, 442 (1971) (“Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.”).

66. *Faulkner I*, 10 F.3d at 230.

67. See *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding that a law requiring only men to register for the draft did not violate the Due Process Clause of the Fifth Amendment).

68. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The “rational relationship” test is the equal protection default position and is highly deferential to the governmental regulation in question. *Id.* Classifications defined by economic factors generally fall under “rational relationship” review. *Id.*

69. *Faulkner I*, 10 F.3d at 230-31.

70. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984).

71. *Id.*

72. *Id.*

73. *Id.*

74. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Palmore v. Sidoti*, 466 U.S. 429 (1984); see also Jon A. Soderberg, *VMI Essays—The Virginia Military Institute and the Equal Protection Clause: A Factual and Legal Introduction*, 50 WASH. & LEE L. REV. 15, 21 n.25 (1993).

75. Soderberg, *supra* note 74, at 21.

76. *Michael M. v. Superior Court*, 450 U.S. 464, 468 (1980).

based classifications receive a mid-level form of heightened judicial review that is often described as “intermediate scrutiny.”⁷⁷

Justice Stewart’s concurrence in *Michael M. v. Superior Court of Sonoma County*⁷⁸ expounds on the rationale for this distinction:

[D]etrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is 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*.⁷⁹

The test for “intermediate scrutiny” is amorphous and often produces inconsistent judicial results.⁸⁰ The following section traces the development of “intermediate scrutiny” for gender classifications under the Equal Protection Clause.

B. *The Genesis and Growth of “Intermediate Scrutiny”*

The United States Supreme Court first applied heightened scrutiny to gender classifications in *Reed v. Reed*.⁸¹ *Reed* involved an Idaho probate statute that preferred the appointment of men as probate administrators.⁸² Idaho attempted to justify the discriminatory statute on the grounds of administrative convenience.⁸³ The Supreme Court found Idaho’s administrative convenience rationale insufficient to justify the gender-based classification. The Court stated that Idaho’s statute was “the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.”⁸⁴ Thereafter, the Court nominally invalidated the Idaho statute under a “rational relationship” analysis, but language in *Reed* indicated that the Court was applying a higher level of scrutiny.⁸⁵

77. *Faulkner I*, 10 F.3d 226, 231 (4th Cir. 1993), *mandamus denied*, 14 F.3d 3 (4th Cir.), *stay vacated by* 114 S. Ct. 872 (1994).

78. 450 U.S. at 478 (Stewart, J., concurring).

79. *Id.* (emphasis added).

80. See *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) (“[T]he phrases used [in “intermediate scrutiny” review] are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation masquerading as judgments.”). See also *Michael M.*, 450 U.S. at 468 (“As is evident from our opinions, the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classification.”).

81. 404 U.S. 71 (1971); see also Yablonski, *supra* note 20, at 1455.

82. *Reed*, 404 U.S. at 73-74.

83. *Id.* at 76.

84. *Id.*

85. *Id.* The *Reed* Court found that increasing efficiency in probate matters “is not without some legitimacy.” *Id.* Thus, under a true “rational basis” review, the Idaho statute probably would have passed constitutional muster. *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding different jury duty standards for women and men using a “rational relationship” test).

The Court addressed several equal protection challenges to gender-based discrimination in the years following *Reed*. Among the cases was *Frontiero v. Richardson*.⁸⁶ In *Frontiero*, the Court invalidated a federal statute that provided greater benefits to female spouses than to male spouses of military personnel.⁸⁷ Justice Brennan, writing for the *Frontiero* plurality, condemned the use by courts of “romantic paternalism” to evaluate gender-based classifications and contended that “romantic paternalism” had “the effect of *invidiously relegating* . . . females to inferior legal status without regard to . . . actual capabilities.”⁸⁸ *Frontiero* also signaled to the lower courts that gender-based classifications could no longer be justified by referencing invidious stereotypes about the roles of men and women. Justice Brennan concluded that gender-based classifications were “inherently suspect.”⁸⁹ However, later Supreme Court opinions unequivocally reject the notion that gender-based classifications are inherently suspect.⁹⁰

*Kahn v. Shevill*⁹¹ and *Schlesinger v. Ballard*,⁹² decided shortly after *Frontiero*, effectively narrowed the holding of *Frontiero*.⁹³ In both *Kahn* and *Schlesinger*, the Court upheld statutes that favored one gender over the other. *Kahn* involved a Florida statute that gave widows, but not widowers, a \$500 cash exemption from state property taxes.⁹⁴ In upholding the *Kahn* statute, the Court found dispositive statistics that indicated that a widowed woman working full-time would make significantly less than a similarly situated male.⁹⁵ Such an income discrepancy would exacerbate economic hardship for a widow to a greater extent than for a widower.⁹⁶ Thus the Court found that Florida’s unequal treatment of widowers had a “fair and substantial relation to the object of the legislation.”⁹⁷

86. 411 U.S. 677 (1973).

87. *Id.* at 680.

88. *Id.* at 686-87. The concurrence of Justice Bradley in *Bradwell v. Illinois*, 16 Wall. 130 (1872), illustrates with great force the “romantic paternalism” that Justice Brennan found objectionable:

Man is, or should be woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Id. at 684-85.

89. *See id.* at 688.

90. *See, e.g., Michael M. v. Superior Court*, 450 U.S. 464, 468 (1980) (“[W]e have not held that gender-based classifications are inherently suspect.”).

91. 416 U.S. 351 (1974).

92. 419 U.S. 498 (1975).

93. Neither case applied “strict scrutiny” review, as suggested by the *Frontiero* plurality. *See id.; Kahn*, 416 U.S. at 351.

94. *Kahn*, 416 U.S. at 352.

95. *Id.* at 354.

96. *Id.* at 355.

97. *Id.* (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)).

The *Schlesinger* Court addressed a challenge to a federal statute that granted female Naval officers a thirteen-year tenure of commissioned service to reach a specified rank before mandatory discharge but gave male officers only nine years to achieve the same rank.⁹⁸ In upholding the statute, the Court reasoned that because women were prohibited from serving in combat billets, they had less opportunity to advance in rank.⁹⁹ Together, *Kahn* and *Schlesinger* support the proposition that a classification favoring one gender may be justified if it intentionally and directly compensates the gender that has been disproportionately burdened by past discrimination.¹⁰⁰

*Craig v. Boren*¹⁰¹ set forth what has become the modern “intermediate scrutiny” test for evaluating the constitutionality of gender-based classifications.¹⁰² *Craig* concerned an Oklahoma statute that permitted females to purchase beer at eighteen years of age but prohibited the sale of beer to males before they reached the age of twenty-one.¹⁰³ The *Craig* Court applied a two-prong test that requires a governmental actor to show: first, that a gender-based classification serves an “important governmental objective,” and, second, that the classification is “substantially related to achievement of that objective.”¹⁰⁴ Oklahoma offered traffic safety as its justification for the disparate treatment¹⁰⁵ and produced statistics backed by substantial evidence showing that changing the statute would adversely affect traffic safety.¹⁰⁶ The *Craig* Court rejected these statistics and found the Oklahoma statute unconstitutional because it failed to “advance substantially” Oklahoma’s “important objective.”¹⁰⁷

C. Publicly Funded Single-Gender Education and the Equal Protection Clause

98. *Schlesinger v. Ballard*, 419 U.S. 498, 499-500 (1975).

99. *Id.* at 508-09.

100. *Craig v. Boren*, 429 U.S. 190, 198 n.6 (1976).

101. *Id.* at 190.

102. See Yablonski, *supra* note 20, at 1455.

103. *Craig*, 429 U.S. at 191-92.

104. *Id.* at 197.

105. *Id.* at 200.

106. The *Craig* Court’s close scrutiny of Oklahoma’s traffic statistics was somewhat puzzling, given the substantial deference accorded the proffered statistics in *Kahn* and *Schlesinger*. See Gardenswartz, *supra* note 20, at 619. Justice Rehnquist, dissenting in *Craig*, opined that the majority’s statistical second-guessing of the Oklahoma Legislature was the “judicial equivalent of a doctoral examination in statistics.” *Craig*, 429 U.S. at 224 (Rehnquist, J., dissenting). Justice Rehnquist argued that “the legislature is not required to prove before a court that its statistics are perfect.” *Id.*

107. See *Craig*, 429 U.S. at 211 (Powell, J., concurring) (“[T]his gender-based classification does not bear a fair and substantial relation to the object of the legislation.”).

The Supreme Court's landmark decision in *Brown v. Board of Education*¹⁰⁸ brought an end to legally sanctioned racial segregation in American public schools. However, the Supreme Court has not extended the *Brown* prohibition of "separate but equal" schools beyond the context of racial classifications,¹⁰⁹ and constitutional challenges to publicly funded single-sex education in the years following *Brown* met with little success.¹¹⁰ Both state and federal courts continued to apply a form of "separate but equal" analysis to address gender classifications.¹¹¹ In *Allred v. Heaton*,¹¹² a Texas court rejected a female plaintiff's challenge to the all-male admission policy of Texas A & M University. The *Allred* court found that women enjoyed substantially equal educational opportunities at other Texas state schools;¹¹³ it reasoned that even if this were not so, under the Equal Protection Clause, gender-based classifications required less scrutiny than race classifications.¹¹⁴

Beginning in the 1970s, courts intensified the scrutiny of publicly funded single-gender education. In *Kirstein v. Rectors & Visitors of the University of Virginia*,¹¹⁵ a Virginia federal district court held that the Equal Protection Clause prohibited Virginia from denying women the opportunity to attend the University of Virginia at Charlottesville.¹¹⁶ *Kirstein* was the first case to acknowledge that the "prestige" of an institution is a relevant consideration in determining whether a school's single-gender admission policy passes constitutional muster.¹¹⁷ While the *Kirstein* court found that no other Virginia university offered women prestige substantially equal to that of the University of Virginia,¹¹⁸ it did not order the University of Virginia to become coeducational. Instead, the court approved a consent decree governing the phasing in of coeducation under a plan voluntarily formulated by the University of Virginia.¹¹⁹

108. 347 U.S. 483 (1954) (holding that the racially "separate but equal" public school system in Topeka, Kansas was unconstitutional under "strict scrutiny" analysis).

109. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720 n.1 (1982).

110. See, e.g., *Heaton v. Bristol*, 317 S.W.2d 86, 99 (Tex. Civ. App. 1958); *Allred v. Heaton*, 336 S.W.2d 251, 261 (Tex. Civ. App. 1960).

111. See *Vorchheimer v. School Dist.*, 532 F.2d 880 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977) (equally divided decision).

112. 336 S.W.2d at 251.

113. *Id.* at 258-59; see Gardenswartz, *supra* note 20, at 613-14.

114. *Allred*, 336 S.W.2d at 260.

115. 309 F. Supp. 184 (E.D. Va. 1970) (three-judge panel approving Virginia's plan to allow females into the University of Virginia at Charlottesville).

116. *Id.* at 187.

117. *Id.* Educational "prestige" was one of the points of contention in *VMI II*, 44 F.3d 1229, 1240 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995). See *infra* notes 239, 244 and accompanying text.

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

119. *Id.* at 188.

Kirstein must be understood as a narrow opinion. The court refused to hold publicly funded single-sex education per se unconstitutional.¹²⁰ Rather, it expressly stated, with ironic foresight: “[W]e are urged to go further and to hold that Virginia may not operate any educational institution separated according to the sexes. We decline to do so One of Virginia’s educational institutions is military in character. Are women to be admitted on an equal basis . . . ?”¹²¹

Federal courts have also upheld single-sex education. In *Williams v. McNair*,¹²² a male plaintiff sought admission to South Carolina’s all-female Winthrop College. The District Court for the District of South Carolina evaluated Winthrop’s all-female admissions policy under a rational basis review and concluded that it was constitutional.¹²³ The *Williams* court explicitly accepted that Winthrop College’s single-sex policy was rationally justified by a need for statewide educational diversity.¹²⁴ Specifically, the court stated: “[F]lexibility and diversity in educational methods, when not tainted with racial overtones, often are both desirable and beneficial; they should be encouraged, not condemned.”¹²⁵ Although it acknowledged that the *Kirstein* court disapproved a single-gender admission policy under similar circumstances,¹²⁶ the *Williams* court distinguished *Kirstein* on the basis that Winthrop College did not enjoy the prestige or offer the vast educational opportunities of the University of Virginia.¹²⁷ The court was unpersuaded by the plaintiff’s argument that he was inconvenienced by having to attend a university outside his hometown.¹²⁸

*Vorchheimer v. School District of Philadelphia*¹²⁹ decided in 1976, is the most recent case upholding publicly funded single-gender education. In *Vorchheimer*, the Third Circuit borrowed the “substantial equality” rationale of *Allred*¹³⁰ and the “educational diversity” reasoning of *Wil-*

120. *Id.* at 187.

121. *Id.*

122. 316 F. Supp. 134 (D.S.C. 1970), *aff’d per curiam*, 401 U.S. 951 (1971).

123. *Id.* at 137. Gender-based classifications were analyzed under a rational basis scrutiny at the time *Williams* was decided. The Supreme Court had not issued its opinion in *Reed v. Reed*, 404 U.S. 71 (1971).

124. *Id.* at 137-38.

125. *Id.* at 138.

126. *Id.*

127. *Id.*

128. *Id.* *But see* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (convenience found to be a factor in determining whether male plaintiff suffered injury in being denied admission to all-female school).

In its subsequent review of *Williams*, the Supreme Court passed on the opportunity to issue an opinion on the per se constitutionality of single-gender institutions. The Court avoided doing so by summarily affirming the opinion of the district court. *Williams v. McNair*, 401 U.S. 951 (1971).

129. 532 F.2d 880 (3d Cir. 1976), *aff’d*, 430 U.S. 703 (1977) (equally divided decision).

130. *See supra* notes 112-14 and accompanying text.

liams,¹³¹ to hold that the Philadelphia school system could continue to operate separate single-gender high schools for gifted students.¹³² The court conceded that the programs for females did not provide the same science curriculum and facilities as those for males.¹³³ Nevertheless, the court found the discrepancies insufficient to render the whole program unconstitutional; it reasoned that differences between the sexes, under limited circumstances, could justify variations in educational curricula.¹³⁴ The court suggested that variations in parallel educational programs could be constitutional if each school district on the whole gave both genders an equal opportunity to succeed in the academic disciplines of their choice.¹³⁵ It then found that the Philadelphia school system, as a whole, provided equal opportunities in science for boys and girls, but it reached this conclusion on little evidence. An equally divided Supreme Court affirmed the Third Circuit's holding in *Vorchheimer* without opinion.¹³⁶

These early single-sex education cases represent judicial confirmation that single-sex education may serve an important governmental purpose.¹³⁷ However, the point at which single-gender education ceases to be an "important governmental purpose" and, instead, becomes "invidious discrimination" is unclear. The Supreme Court's opinion in *Mississippi University for Women v. Hogan*¹³⁸ addressed the issue but seemingly created more questions than it answered.

D. Mississippi University for Women v. Hogan: "Intermediate Scrutiny" Applied to Single-Gender Education

The litigation in *Mississippi University for Women v. Hogan* arose when Joe Hogan, a state resident, sought permission to enroll for credit at the nursing school of the Mississippi University for Women (MUW), Mississippi's only publicly funded single-gender institution.¹³⁹ The Mississippi University for Women denied Hogan permission to enroll, notwithstanding its policy that allowed him to audit the same classes for no credit.¹⁴⁰ Justice O'Connor, writing for a five-to-four majority, held the MUW nursing school's all-female admission policy unconstitutional.

131. See *supra* notes 122-28 and accompanying text.

132. *Vorchheimer*, 532 F.2d at 886-87.

133. *Id.*

134. *Id.* at 886.

135. *Id.* at 887.

136. 430 U.S. 703 (1977).

137. See generally *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977) (equally divided decision); *Williams v. McNair*, 316 F. Supp. 134 (D. S.C. 1970), *aff'd per curiam*, 401 U.S. 951 (1971); *Kirstein v. Rector & Visitors of the Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970); *Allred v. Heaton*, 336 S.W.2d 251 (Tex. Civ. App. 1960).

138. 458 U.S. 718 (1982).

139. *Id.* at 720-21.

140. *Id.* at 721.

The Court found that MUW's admissions policy failed the first prong of the "intermediate scrutiny" analysis.¹⁴¹ For a state to maintain gender-based classifications in education, it must demonstrate "an exceedingly persuasive justification" for the classification.¹⁴² MUW proffered affirmative action as its justification: namely, that the program provided women with an opportunity to advance in a nursing career.¹⁴³ The majority conceded that, in some circumstances, providing affirmative action to a previously disadvantaged class could be considered an important governmental objective.¹⁴⁴ However, the Court found that offering a nursing program only to women would actually decrease the career opportunities and prestige of women and thereby negate any affirmative action effect.¹⁴⁵

MUW's admissions policy also failed the second prong of intermediate scrutiny.¹⁴⁶ The policy of permitting male auditors to participate fully in classes "fatally undermine[d] its claim that women . . . [were] adversely affected by the presence of men."¹⁴⁷

One commentator has suggested that *Hogan* creates a third prong for reviewing gender-based classifications.¹⁴⁸ Language in *J.E.B. v. Alabama ex rel. T.B.*,¹⁴⁹ the Court's most recent pronouncement on gender under the Equal Protection Clause, supports such a proposition.¹⁵⁰ The *Hogan* Court, borrowing dicta from *Frontiero*, declared that "intermediate scrutiny" review must be applied "free of fixed notions concerning the roles

141. *Id.* at 729-30. The first prong, as articulated in *Craig v. Boren*, required the governmental actor to proffer an "important governmental objective" for a gender-based classification. 429 U.S. 190, 197 (1976).

142. *Hogan*, 458 U.S. at 724.

143. *Id.* at 727. Justice Powell's dissent suggested another justification for MUW's single-sex admissions policy: the promotion of educational diversity. *Id.* at 742-43 (Powell, J., dissenting). The majority opinion never directly addressed the educational diversity issue. *See id.* at 731 n.17.

144. *Id.* at 728.

145. *Id.* at 729-30. Justice O'Connor reasoned that an all-female nursing program perpetuates the stereotype of nursing as a strictly female profession; this stereotype leads to decreased wages and prestige for nurses. *Id.*

146. *Id.* at 730. The second prong of "intermediate scrutiny" required a governmental actor to demonstrate that a gender-based classification was "substantially related to the achievement" of the proffered important governmental objective. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

147. *Hogan*, 458 U.S. at 730.

148. *See Yablonski, supra* note 20, at 1460.

149. 114 S. Ct. 1419 (1994) (holding gender-based peremptory challenges unconstitutional).

150. *See generally id.* In *VMI I & II* and *Faulkner II*, the Fourth Circuit discussed Justice O'Connor's language in *Hogan*, not as a new "third prong," but rather as an element of intermediate scrutiny's first prong. Specifically, a gender-based classification that stigmatizes one gender vis-à-vis the other can never constitute an important governmental purpose. *See Faulkner II*, 51 F.3d 440, 443 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, and *cert. denied*, 116 S. Ct. 352 (1995); *see also infra* note 171. Gardenswartz, *supra* note 20, at 611 (assessing the impact of *Hogan* on single-gender education: "[t]he more central question is now whether separation on the basis of sex perpetuates common stereotypes about men and women").

and abilities of males and females.”¹⁵¹ Further, *Hogan* required courts to engage in a “reasoned analysis rather than . . . mechanical application of traditional . . . assumptions about the proper roles of men and women.”¹⁵²

The holding in *Hogan* was narrow.¹⁵³ *Hogan* did not decide whether publicly funded, single-sex institutions were per se unconstitutional. The Court expressly declined to address the issue because Mississippi maintained no other single-gender university or college.¹⁵⁴ *Hogan* suggests that publicly funded, single-gender education (whether in parallel institutions or otherwise) can be constitutionally permissible, provided that an “extremely persuasive justification” for gender-based classifications can be shown.¹⁵⁵ After an eight-year hiatus from the courts, challenges to the constitutionality of single-gender education resurfaced in 1990. Litigation initiated against VMI and The Citadel reopened the questions left unanswered in *Hogan*.

IV. THE PRESENT CONTROVERSY: THE FACTUAL AND PROCEDURAL HISTORY OF *UNITED STATES V. VIRGINIA* AND *FAULKNER V. JONES*

A. *United States v. Virginia (VMI I): The Liability Determination*

The Justice Department began its quest to make VMI coeducational on March 1, 1990, when it filed a complaint in the Federal District Court for the Western District of Virginia.¹⁵⁶ The complaint named as defendants, among others, Virginia Governor Douglas Wilder, VMI, and the VMI Board of Visitors.¹⁵⁷ Additionally, the complaint alleged that VMI’s failure to admit women into its “Corps of Cadets” constituted discrimination on the basis of sex in violation of the Fourteenth Amendment’s Equal Protection Clause.¹⁵⁸ The Justice Department argued that the only suitable remedy for the constitutional violation was the admission of women into VMI.¹⁵⁹ Virginia, representing VMI, responded that the Equal Protection Clause was not violated because the exclusion of women is imperative to

151. *Hogan*, 458 U.S. at 724-25.

152. *Id.* at 725.

153. *Id.* at 733 (Burger, C.J., dissenting) (“[T]he Court’s holding today is limited to the context of a professional nursing school.”).

154. *Id.* at 720 n.1.

155. What constitutes an “extremely persuasive justification” in the context of single-gender education, however, has remained hazy after *Hogan*.

156. *VMI I*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

157. *Id.*

158. *Id.*

159. See *VMI II*, 852 F. Supp. 471, 473 n.2 (W.D. Va. 1994), *aff’d*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

preserving VMI's unique and holistic educational methodology.¹⁶⁰ The Commonwealth further argued that VMI's exclusion of women was required to promote educational diversity, an "important state educational objective."¹⁶¹ After extensive fact-finding, Judge Jackson Kiser found that Virginia's arguments justified the exclusion of women from VMI.¹⁶²

The Justice Department appealed *VMI I* to the Fourth Circuit Court of Appeals.¹⁶³ The Fourth Circuit's decision, however, left both sides unsure whether they had won or lost.¹⁶⁴ The court adopted the district court's finding that "single-gender education is pedagogically justifiable"¹⁶⁵ and agreed that "differences between a single-gender student population and a coeducational one justify a state's offering single-gender education."¹⁶⁶ Additionally, the court agreed that VMI's unique method of education would be materially altered by the integration of women.¹⁶⁷ In summarizing the "catch-22" of admitting women to VMI, the court stated, "[W]omen 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."¹⁶⁸

160. *VMI I*, 766 F. Supp. at 1414. For a discussion of the holistic educational methodology employed at VMI, see *supra* notes 38-61 and accompanying text.

161. *VMI I*, 766 F. Supp. at 1415.

162. *Id.* The ease of VMI's victory in the district court was surprising, considering the conflicting interests among the named defendants. See Soderberg, *supra* note 74, at 18. Then Virginia Governor Douglas Wilder was a black man who had personally been subjected to de jure racial segregation in Virginia. *Id.* Ironically, in *VMI I*, Governor Wilder found himself opposing the forces of gender integration. After Judge Kiser refused to dismiss Governor Wilder as a defendant, Governor Wilder responded to the Justice Department's complaint. Governor Wilder stated that VMI's policy of not admitting females was against his personal philosophy but agreed that he would abide by the district court's ruling. *Id.* Following the lead of Governor Wilder, Virginia's first female Attorney General, Mary Sue Terry, also withdrew from representing the Commonwealth. *Id.* She cited a conflict of interest as the reason for her withdrawal. *Id.* Attorney General Terry explained that in the absence of a contrary statutory directive, Governor Wilder's position was "persuasive." *Id.* Accordingly, she felt compelled as Attorney General to follow the Governor's position. Private pro bono counsel was then appointed to represent the Commonwealth. *Id.*

163. *VMI I*, 976 F.2d at 890.

164. See Yablonski, *supra* note 20, at 1453 ("[A] three judge panel issued a convoluted opinion that overturned the district court's ruling but refused to compel VMI to admit women."). Conservative commentator George Will labeled the Fourth Circuit's decision in *VMI I* "a ruinous victory" for VMI. George F. Will, *Government Coercion, VMI's Diversity*, WASH. POST, January 31, 1993, at C7.

165. *VMI I*, 976 F.2d at 898.

166. *Id.* at 898 n.7.

167. *Id.* at 897.

168. *Id.* (emphasis added). The VMI "catch-22," which the Fourth Circuit found so persuasive, echoes common sense. Even though a small minority of women would be physically capable of performing all activities required of male cadets at VMI, a coeducational VMI would be different from the all-male version. *VMI I*, 766 F. Supp. at 1412-13. True, the differences necessitated by coeducation would not destroy VMI's ability to function as a military school, but would the changes destroy the holistic educational methodology that makes VMI unique? Yes, they would. For example, there is presently an absolute absence of privacy in the

Despite its language suggesting an indication to do otherwise, the Fourth Circuit refused to affirm the district court's disposition of *VMI I*.¹⁶⁹ Essentially, the court found that the women of Virginia were not afforded educational opportunities analogous to those enjoyed by men at VMI.¹⁷⁰ Therefore, the Commonwealth's failure to offer females a comparable single-gender military program violated the Equal Protection Clause.¹⁷¹

VMI barracks. The admission of women would force changes to afford both genders some degree of individual privacy. *Id.* at 1438. The every move of each cadet would no longer be observable by every other fellow cadet in the barracks; this would limit the minute regulation of behavior which characterizes the holistic VMI methodology. Cross-sexual relationships would occur, facilitating distractions from already limited study time and creating the possibility of dating rivalries, resulting in loss of esprit de corps among cadets. See generally ALEXANDER ASTIN, *FOUR CRITICAL YEARS* (1977) (arguing that students at single-gender schools are able to invest more energy in school-oriented activities because they have few opportunities to engage in courtship activities). It is worth noting that many cadets come to VMI to escape the social distractions associated with coeducation. *VMI I*, 766 F. Supp. at 1426.

The current program at VMI requires every cadet to pass precisely the same physical tests before graduation. The rigor of the tests would prevent a disproportionate percentage of women from passing and, thus, graduating. *Id.* Accordingly, VMI would either need to establish different requirements for women and destroy the absolute equality of treatment that is paramount to VMI's methodology, or reduce the requirements so that they could be applied equally to both sexes. Lowering the standards would destroy the rigor of the experience for many male cadets, many of whom were drawn to VMI because of the extreme mental and physical rigor. *Id.* at 1439.

Renowned Harvard sociologist Dr. David Riesman contends that because of the sociological differences between men and women, VMI would eventually be forced to drop the adversative system altogether. *Id.* at 1413. Because adolescent women generally enter college with less self-esteem than men, the tearing down effect of an adversative education would be counterproductive when applied to most women. See *VMI II*, 44 F.3d 1229, 1234-35 (4th Cir.), cert. granted, 116 S. Ct. 281 (1995). In order to draw a sufficient contingent of female cadets to VMI, the VMI system would need to be modified to provide more emotional support for female cadets. *Id.* at 1413. The experience of the Army Academy at West Point when it became coeducational supports Dr. Riesman's contentions. Consider the following:

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 physiological differences between men and women. Basic training is now divided into groups according to ability 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 There have been complaints of sexual harassment. Additionally, *more than half of the women at the academies believe that gender integration has been unsuccessful.*

Yablonski, *supra* note 20, at 1471-72 (emphasis added). But see Bennett L. Saferstein, Note, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637 (1993) (labeling the Fourth Circuit's reasoning "disingenuous" and comparing the VMI "catch-22" to the old Groucho Marx joke "I would never wanna belong to any club that would have someone like me for a member").

169. See *VMI I*, 976 F.2d 890, 900 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993).

170. *Id.*

171. *Id.* The Fourth Circuit in *VMI I* never specifically delineated which prong of "intermediate scrutiny" caused the constitutional violation. The argument has been made that the constitutional violation in *VMI I* was the Commonwealth's failure to satisfy the second prong. See Soderberg, *supra* note 74, at 31 ("VMI's all-male admissions policy did not pass the second prong of the 'intermediate scrutiny' test because by not offering a similar opportu-

The court proposed three ways that the Commonwealth might remedy the constitutional violation: 1) become a private all-male institution and reject state funding, 2) create an all-female military program parallel to VMI, or 3) voluntarily integrate women.¹⁷² The Fourth Circuit then remanded the case to the district court to permit the Commonwealth to “formulate, adopt and implement a plan that conforms to the principles of equal protection.”¹⁷³

Following the court’s instructions, Virginia developed a plan to remedy the constitutional violation. The evaluation of Virginia’s proposed remedial plan, *VMI II*, was argued before the district court on April 29, 1994.¹⁷⁴ During the one-and-one-half-year interim between *VMI I* and *VMI II*, litigation raising similar legal issues as those presented in *United States v. Virginia* was commenced against The Citadel in *Faulkner v. Jones*.¹⁷⁵

B. *Faulkner v. Jones* (*Faulkner I & II*)

The obvious difference between *Faulkner v. Jones* and *United States v. Virginia* was the presence of Shannon Faulkner, “a real, live plaintiff who, but for her sex, would probably be a member of the Corps of Cadets.”¹⁷⁶ Shannon Faulkner, a seventeen-year-old high school senior from Powdersville, South Carolina,¹⁷⁷ applied to The Citadel and was temporarily accepted in January 1993. Upon discovering Faulkner’s gender, The Citadel revoked her admission.¹⁷⁸ Claiming a violation of her equal protection rights, Faulkner promptly brought suit in the District Court for the District of South Carolina.¹⁷⁹ Faulkner sought a permanent injunction

nity for women, VMI’s single-gender admissions policy was not substantially related to an important governmental objective.”). However, the Fourth Circuit’s later analysis of the second prong inquiry in *VMI II* indicates that the second prong was probably not the foundation for the constitutional violation. See *VMI II*, 44 F.3d at 1237 (arguing that where single-gender education is proffered as the “important governmental objective,” the second prong of “intermediate scrutiny” is virtually bypassed because “the classification by gender is by definition necessary for accomplishing the objective”). Thus, it is more probable that the constitutional violation in *VMI I* was premised on the first prong of intermediate scrutiny. Specifically, the provision of a VMI-type of education to men but not to women, without adequate explanation for the disparate opportunity, could not constitute an important governmental objective. See *VMI I*, 976 F.2d at 900.

172. *VMI I*, 976 F.2d at 900.

173. *Id.*

174. *VMI II*, 852 F. Supp. 471 (W.D. Va. 1994), *aff’d*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

175. *Faulkner I*, 10 F.3d 226 (4th Cir. 1993), *mandamus denied*, 14 F.3d 3 (4th Cir.), *stay vacated by* 114 S. Ct. 872 (1994); *Faulkner II*, 858 F. Supp. 552 (D.S.C. 1994), *aff’d*, 51 F.3d 440 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, *and cert. denied*, 116 S. Ct. 352 (1995).

176. *Faulkner II*, 858 F. Supp. 552, 554 n.2 (D.S.C. 1994), *aff’d*, 51 F.3d 440 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, *and cert. denied*, 116 S. Ct. 352 (1995).

177. *Id.* at 555.

178. *Id.*

179. *Id.* at 554.

compelling The Citadel to abolish its single-sex admissions policy and to admit Faulkner and any other qualified female applicant into The Citadel's Corps of Cadets.¹⁸⁰ The Citadel stipulated that "but for" Shannon Faulkner's sex, she was qualified to be a member of The Citadel's Corps of Cadets.¹⁸¹

Four months after initiating the lawsuit, Faulkner filed a motion for a preliminary injunction to compel The Citadel to admit her to day classes pending the resolution of her case. The court granted the motion.¹⁸² The Fourth Circuit affirmed the preliminary injunction over the vehement dissent of Judge Hamilton.¹⁸³ The majority balanced the potential harm to The Citadel of admitting Faulkner against the harm to Faulkner of being denied admission to day classes through the duration of potentially lengthy litigation. The court concluded that "the district court did not abuse its discretion in entering the preliminary injunction for [this] limited but temporary relief."¹⁸⁴

The United States Supreme Court stayed the preliminary injunction in *Faulkner I* on January 12, 1994, but vacated the stay six days later.¹⁸⁵ After one year of litigation, Shannon Faulkner began attending day classes at The Citadel. She was the first woman ever to do this.¹⁸⁶

In April 1994, *Faulkner II* finally proceeded to a trial on the merits.¹⁸⁷ At trial, *VMI I* controlled all of the legal issues in *Faulkner II* except two, "justification" and "remedy."¹⁸⁸ South Carolina, arguing on behalf of The Citadel, contended that the constitutional violation in *VMI I* was grounded on Virginia's inability to "justify" providing a single-gender military education to one gender while withholding it from the other. South Carolina sought to avoid a similar result by demonstrating that providing single-

180. Brief for Appellants at 3, *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993) (No. 93-2030).

181. *Faulkner II*, 858 F. Supp. at 555.

182. *Faulkner v. Jones*, No. 2:93-0488-2 (D.S.C. Aug. 17, 1993) (order granting preliminary injunction).

183. *Faulkner I*, 10 F.3d 226 (4th Cir. 1993), *mandamus denied*, 14 F.3d 3 (4th Cir.), *stay vacated by* 114 S. Ct. 872 (1994).

184. *Id.* at 233.

185. *Faulkner I*, 114 S. Ct. 872 (1994).

186. Cole Interview, *supra* note 38.

187. *Faulkner II*, 858 F. Supp. 552 (D.S.C. 1994), *aff'd*, 51 F.3d 440 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, *and cert. denied*, 116 S. Ct. 352 (1995).

188. *Id.* at 555. Shannon Faulkner made a motion for summary judgment on May 28, 1993. Therefore, *Faulkner II* came to trial in the posture of a summary judgment request with greater deference being given to the party opposing summary judgment. Because of the procedural posture, Faulkner's attorney's accepted that the holdings in *VMI I* would apply with equal force to The Citadel. Judge Houck made it clear, however, that Faulkner would be able to challenge the applicability of *VMI I* to her facts at a later date if it became necessary for her to do so. *Id.* at 555 n.5.

gender military education to women was impracticable because of insufficient demand.¹⁸⁹

South Carolina's justification did not directly address single-gender education in the context of the unique military experience provided at The Citadel. Rather, the state argued that it could not provide *any* public single-sex education to women because there was insufficient demand for such an education among South Carolina's female population.¹⁹⁰ Further, the state reasoned that any existing demand among South Carolina's women for single-gender education was "fully met by the private women's colleges, Converse and Columbia, whose South Carolina students received state support through the South Carolina Tuition Grants Program."¹⁹¹ No mention was made, however, of providing for South Carolina's women who desired a "military education" in a single-gender environment.¹⁹²

The district court rejected South Carolina's positions and found that the state failed to articulate an "important policy" that justified "offering the unique benefits of a Citadel type education to men and not to women."¹⁹³ Accordingly, the court held that The Citadel's all-male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁴

South Carolina fared no better on the issue of remedy. At the time of the trial, the state provided "nothing before the court . . . that permits it to determine what the defendants will do or can do to guarantee to the plaintiff her constitutional rights."¹⁹⁵ Finding that South Carolina had not proposed a sufficient remedy, the judge evaluated the three possible remedies suggested by the Fourth Circuit in *VMI I*: privatization, integra-

189. *Id.* at 564.

190. *Id.*

191. *Id.*

192. *Id.* at 566.

193. *Id.* Judge Houck commented that South Carolina had "called the court's attention to no case that supports the proposition that lack of demand is a sufficient justification." *Id.* at 564.

194. *Id.*

195. *Id.* at 567.

To place the matter of remedy in proper perspective, the manner in which [this] case has been conducted should also be taken into consideration [T]he defendants have continued to defend this case at a cost of millions of dollars to the taxpayers of South Carolina when they do not have a single case to offer in support of their position that a lack of demand for single-sex education on the part of women justifies providing such an education only for men.

Id.

The South Carolina Legislature had formed a committee in May 1993, to make recommendations regarding the provision of single-gender educational opportunities to women. *Id.* The committee, however, met four times and was dissolved by operation of law. *Id.* South Carolina's lawyers did provide the judge with a document stating that "within sixty days after liability is determined," the state would set forth a specific proposed remedy, but Judge Houck found the document unacceptable. *Id.*

tion, or the creation of a parallel institution for the excluded sex.¹⁹⁶ Judge Houck reasoned that because Faulkner was about to enter her junior year of college, time was of the essence.¹⁹⁷ Since privatization of The Citadel was not financially feasible,¹⁹⁸ and the establishment of a program comparable to The Citadel would take too long to give Shannon Faulkner an adequate remedy,¹⁹⁹ the district court concluded that Shannon Faulkner must immediately be admitted into The Citadel's Corps of Cadets.²⁰⁰ Further, the district court ordered that South Carolina be prepared by August 1995, to implement a remedy, in accordance with *VMI I*, for other South Carolina women desiring a single-gender military education.²⁰¹ The Fourth Circuit stayed the district court's order pending appeal.²⁰² The court heard the appeal on January 30, 1995, four days after it released its ruling in *VMI II*.²⁰³

C. *VMI II: The Remedy Trial at the District Court*

Following *VMI I*, Virginia set out to formulate an appropriate remedy for the constitutional violation noted by the Fourth Circuit in *VMI I*. Pursuant to the Fourth Circuit's mandate, Virginia decided to create a parallel leadership training program for women. The Commonwealth named the new program The Virginia Women's Institute for Leadership (VWIL).²⁰⁴

In April 1994, Virginia submitted its remedial plan to the District Court for the Western District of Virginia.²⁰⁵ After weighing the testimony of expert witnesses for the Commonwealth and the Justice Department and making extensive findings of fact, the district court found that VWIL effectively reme-

196. *Id.* at 567-68 (citing *VMI I*, 976 F.2d 890, 900 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993)).

197. Transfer students are not allowed to enter The Citadel's Corps of Cadets after the beginning of their junior year. Cole Interview, *supra* note 38.

198. Telephone Interview with Major Rick Mill (USMC), Public Relations Officer, The Citadel (Jan. 20, 1995) ("Privatization is not really an option; The Citadel would require an endowment of between 350 to 400 million dollars to be able to privatize.").

199. Judge Houck concluded that South Carolina's previous actions indicated a strong likelihood that the state might delay implementation of any parallel program for females to such a time as to "insure that Faulkner would never have the opportunity to enroll in such a parallel institution or program." *Faulkner II*, 858 F. Supp. at 568.

200. *Id.* at 569.

201. *Id.*

202. *Faulkner v. Jones*, No. 94-1978 (4th Cir. Aug. 12, 1994) (order granting appellants' motion to stay, pending appeal).

203. See *Faulkner II*, 51 F.3d 440 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, and *cert. denied*, 116 S. Ct. 352 (1995).

204. Answering and Opening Brief of Appellees/Cross Appellants at 11, *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (Nos. 94-1667, 94-1712) [hereinafter Answering and Opening Brief].

205. *VMI II*, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

died the constitutional violation in *VMI I*.²⁰⁶ Accordingly, the district court held the remedy of VWIL constitutional and ordered its immediate implementation.²⁰⁷ The Justice Department appealed the district court's remedial determination to the Fourth Circuit.²⁰⁸

V. VMI II: THE REMEDIAL DETERMINATION—SOME THINGS ARE WORTH PRESERVING

[T]he proposed Plan is ingenious, and would seem to be unique. When carried into effect, it will provide to women an educationally solid, meaningful experience comparable . . . to the opportunities provided for men at VMI, and one which is otherwise unavailable to women in Virginia.²⁰⁹

Dr. David Riesman
Harvard University

A. *Virginia Women's Institute for Leadership (VWIL)*

VWIL is an all-female educational program established with state funds at Mary Baldwin College (MBC), one of Virginia's all-female private schools.²¹⁰ The Virginia Legislature passed a budget bill funding VWIL "at the same level per Virginia student as the appropriation per Virginia student at VMI."²¹¹ In addition, the VMI Alumni Association extended its career placement services to VWIL, offered assistance in recruiting prospective students to VWIL, and began to develop a joint alumni networking program with Mary Baldwin College.²¹² The VMI Foundation pledged a \$5.6 million permanent endowment for the benefit of VWIL.²¹³ The first VWIL class began in September 1995.²¹⁴ Fifteen students had committed to the VWIL program as of February 1995.²¹⁵ VWIL planned to enroll twenty-five students in the fall of 1995, with a slightly larger class expected in 1996.²¹⁶

The faculty of MBC played a substantial role in designing VWIL.²¹⁷ VWIL's designers concluded that the mission and goals of VWIL could

206. *Id.* at 484.

207. *Id.* at 485.

208. *VMI II*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

209. Answering and Opening Brief, *supra* note 204, at 12-13.

210. MBC had remained entirely female for more than 150 years and had a prestigious history of its own. Answering and Opening Brief, *supra* note 204, at 11 n.3.

211. *Id.* at 14.

212. *Id.*

213. *VMI II*, 44 F.3d 1229, 1234 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

214. Michael Janofsky, *Yes, Ma'am, Mary Baldwin Offers Women Students a Military-Training Program of Their Own*, CHI. TRIB., Feb. 12, 1995, Womanews, at 10.

215. *Id.*

216. *Id.*

217. *Id.* at 11.

be better achieved for young women if the VWIL program de-emphasized the harsh adversative method incorporated in the "rat line" at VMI.²¹⁸ Instead, the program designers sought to create "a structured environment emphasizing leadership training."²¹⁹

Description of the essential program of VWIL follows. In addition to the standard academic program offered at Mary Baldwin College, VWIL students are required to complete, as a "minor," a curriculum in leadership training.²²⁰ Each student must take eight semesters of health and physical education courses.²²¹ The military aspect of VWIL includes four years of mandatory ROTC training taught by ROTC professors from VMI.²²² In addition to standard ROTC training, students participate in organized military drill and the newly formed "Virginia Corps of Cadets," composed of the all-female VWIL, the all-male VMI, and the military component of coeducational Virginia Tech.²²³ The Governor of Virginia is the Commander-in-Chief of the Virginia Corps of Cadets.²²⁴ VWIL students are required to attend a six-week ROTC summer training program between their junior and senior years, and they will be eligible for military commission in any of the four Armed Services upon graduation.²²⁵

VMI I suggested that the establishment of parallel single-sex military programs could eliminate any constitutional violation inherent in providing military education only to men.²²⁶ In *Faulkner I*, the Fourth Circuit provided further guidance, indicating that parallel programs would not

218. *Id.* at 18. The designers of VWIL considered that although a few women might desire the harsh adversative environment of VMI, the overall demand for such an all-female program would not be sufficient to support it. However, the designers felt they could produce the same educational outcomes as VMI by using a similar, but less severe, educational methodology. See *VMI II*, 44 F.3d 1229, 1234-35 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995) (quoting, with approval, educational specialist Dr. Heather Anne Wilson: "[T]he VMI model is based on the premise that young men come with [an] inflated sense of self-efficacy that must be knocked down and rebuilt What [women] need is a system that builds their sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes.").

219. *VMI II*, 44 F.3d at 1233.

220. *Id.* at 1234. To satisfy the leadership component, each VWIL student would be required to teach a leadership seminar or engage in a semester of independent research on a topic relevant to women and leadership. On Saturdays, VWIL students would be required to attend and participate in these seminars. Outside of the academic curriculum, students would be required to complete a leadership externship in the public or private sector and to organize and carry out community service projects. *VMI II*, 852 F. Supp. 471, 494-96 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

221. *VMI II*, 44 F.3d at 1234.

222. *VMI II*, 852 F. Supp. at 494-95.

223. *Id.*

224. *Id.*

225. *Id.* at 497-98. Not all VMI students who desire commissions in the armed forces are able to receive one. Various other factors, such as standardized test scores, are involved in determining which cadets will receive commissions. The students at VWIL would have the same eligibility and credentials to receive commissions as their male counterparts at VMI. *Id.*

226. *VMI I*, 976 F.2d 890, 900 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

have to be "identical for both men and women."²²⁷ Rather, the court determined that the nature of *real differences* between men and women should dictate "the type of facility permissible for each gender":

[A]ny analysis of the nature of a separate facility provided in response to a justified purpose, must take into account the nature of the difference on which the separation is based, the relevant benefits to and the needs of each gender, [and] the demand (both in terms of quality and quantity) [A]ny separate facilities provided for males and females may be based on real differences between the sexes . . . so long as the distinctions are not based on stereotyped or generalized perceptions of differences.²²⁸

In conformance with the Fourth Circuit's guidance, VWIL represents Virginia's attempt to provide the young women of the Commonwealth a holistic military education comparable to VMI's program.²²⁹ VWIL's institutional mission is almost identical to that of VMI:²³⁰ "to produce citizen-soldiers, who are educated and honorable women, prepared for the varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service."²³¹ The women of VWIL will pursue the same five pedagogical goals as the men of VMI: "education, military training, mental and physical discipline, character development, and leadership development."²³² However, VWIL was *not* intended to provide a "mirror image" of VMI. This, the Justice Department contends, was VWIL's fatal shortcoming.²³³

B. The Justice Department's View: Integration as the Only Remedy

The Justice Department opined that VWIL is inadequate, and it argued that only one remedy would satisfy the constitutional violation found in *VMI I*: the

227. *Faulkner I*, 10 F.3d 226 (4th Cir. 1993), *mandamus denied*, 14 F.3d 3 (4th Cir.), *stay vacated by* 114 S. Ct. 872 (1994).

228. *Id.*

229. *Id.*

230. The VMI Mission Statement:

[I]t is the mission of the Virginia Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American Democracy . . . and ready as citizen-soldiers to defend their country in time of national peril. To accomplish this result, the Virginia Military Institute shall provide to qualified young men undergraduate education of highest quality . . . facilitated by the unique VMI system of military discipline.

VMI I, 976 F.2d at 893 (quoting THE VMI BOARD OF VISITORS, MISSION STUDY COMMITTEE REPORT (1986)).

231. *VMI II*, 44 F.3d 1229, 1233 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

232. *Id.*

233. See *VMI II*, 852 F. Supp. 471, 473 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

total integration of females into VMI's Corps of Cadets.²³⁴ The Department reasoned that if only one woman in all the Commonwealth, the "allegorical Jackie Jones,"²³⁵ desired the harsh adversative experience of the VMI "rat line," the Commonwealth was obligated by the Equal Protection Clause to provide it for her.²³⁶ Further, since major programmatic differences exist between VWIL and VMI, VWIL could not satisfy the desires of the allegorical Jackie Jones.²³⁷

C. The "Separate but Equal" Dilemma

Before submitting VWIL to an "intermediate scrutiny" analysis, the Fourth Circuit briefly discussed the notion of "separate but equal" schools in the context of gender classifications.²³⁸ Cases such as *Sweatt v. Painter*²³⁹ and *Brown v. Board of Education*²⁴⁰ direct that where no meaningful and relevant differences exist between two classes of persons, equal treatment is required by law.²⁴¹ In the context of race, the law recognizes no real differences among persons.²⁴² In the context of gender classifications, however, real differences can justify different treatment under some circumstances, provided that differences in treatment are sufficiently cr-

234. *VMI II*, 44 F.3d at 1235.

235. See Answering and Opening Brief, *supra* note 204 at 16 n.7. In this brief to the circuit court, the Justice Department discussed the origin of the "allegorical Jackie Jones" at the district court remedy trial:

In its opening statement, the United States used the pseudonym Jackie Jones to identify a young woman who had made an inquiry about admission to VMI. In the course of the proceedings, the Court, the parties, and the witnesses referred to the "allegorical Jackie Jones." The U.S. argued that if "Jackie Jones" desires to attend VMI, the Commonwealth is constitutionally obligated to admit her.

Id.

236. *Id.* at 16.

237. *VMI II*, 44 F.3d at 1235.

238. *Id.* at 1237. Although technically outside the framework of "intermediate scrutiny," the issue of "separate but equal" in the context of gender will likely be of great importance when *VMI II* is reviewed by the Supreme Court. See, e.g., *Faulkner II*, 51 F.3d 440, 450 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, and *cert. denied*, 116 S. Ct. 352 (1995) (Hall, J., concurring); *VMI II*, 44 F.3d at 1245 (Phillips, J., dissenting); Sara L. Mandelbaum, *Women Would Not Destroy The Citadel or VMI*, VIRGINIA-PILOT (Norfolk, Va.), June 7, 1994, at A14.

239. 339 U.S. 629 (1950). The plaintiff in *Sweatt* sought admission to the all-white University of Texas Law School. Texas offered to create an African-American law school, which it claimed would remedy any constitutional violation emanating from the University of Texas Law School's all-white admissions policy. The Supreme Court ruled that the Texas remedy was inadequate because the intangible qualities that made the University of Texas Law School prestigious would be denied African-Americans since they would be forced to attend a different and less prestigious law school. *Id.*

240. 347 U.S. 483 (1954) (holding that schools segregated on the basis of race were inherently unequal).

241. Modern courts have generally held that classifications based on race per se violate the Constitution. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 478 (1980) (Stewart, J., concurring).

242. *Id.*

related to documented differences between men and women.²⁴³ The Fourth Circuit found the “separate but equal” analysis of *Sweatt* and *Brown* inapposite as applied to VMI and VWIL because relevant and meaningful differences *could and did exist* between males and females in the context of military education.²⁴⁴

This Comment suggests that the Fourth Circuit was correct in distinguishing *Sweatt* and *Brown*. Reality, and not stigma, dictates that men and women are different from each other in many ways.²⁴⁵ In the context of single-gender military education, an educational methodology that yields positive results for one gender may prove ineffective when applied to the other.

For example, studies from both sides of the ideological spectrum indicate that most women learn and perform better in an environment where they are able to build self-confidence through meeting challenges and receiving positive reinforcement from their professors.²⁴⁶ Unlike men, most women do not enter college with over-inflated self-confidence and, thus,

243. *VMI II*, 44 F.3d 1229, 1237 (4th Cir.), cert. granted, 116 S. Ct. 281 (1995). The Supreme Court has held repeatedly that real differences between the genders may justify different treatment under the law. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (requiring only men to register for the draft); *Michael M. v. Superior Court*, 450 U.S. 464 (1980) (holding that California statutory rape law could constitutionally be applied only to males); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (upholding regulation granting women four years longer to make specified rank before mandatory discharge); *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding law granting only women a specified tax exemption).

244. *VMI II*, 44 F.3d at 1237. If Virginia had attempted to create a “mirror image” VMI for women, such a remedy would have endorsed “separate but equal” institutions segregated on the basis of gender. Such a remedy would likely have failed constitutional muster under *Sweatt v. Painter* because the 150-year-old Virginia Military Institute would have greater overall prestige than the fledgling VWIL program. See *id.* at 1250 (Phillips, J., dissenting).

Because men and women are different, however, institutional prestige is not the only factor to be considered in determining whether women are deprived of equal protection. Prestigious or not, experts testified that the vast majority of women would not desire the harsh adversity and degradation of the VMI “rat line.” See *VMI II*, 852 F. Supp. 471, 476, 480-81 (W.D. Va. 1994), *aff’d*, 44 F.3d 1229 (4th Cir.), cert. granted, 116 S. Ct. 281 (1995). Nevertheless, the prestige issue is significant. See *generally Sweatt v. Painter*, 339 U.S. 629 (1950); *Kirstein v. Rector & Visitors of the Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970). It will undoubtedly stand as a significant obstacle to VMI’s success before the United States Supreme Court.

245. See *generally Men, Women & the Sex Difference* (ABC television broadcast, August 30, 1995).

246. See, e.g., Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 43-44 (1994) (arguing that the Socratic method and adversative law school classes disadvantage female law students because women internalize their problems as personal failure to a greater extent than do men).

The research of renowned Harvard sociologist David Riesman indicates that men tend to learn better in an adversative and competitive environment in which the instructor is a worthy competitor (as with the Socratic method employed in many law school classes), whereas women “tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students.” *VMI I*, 766 F. Supp. 1407, 1434 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993). Of course, there are exceptions to the rule for both genders. But, an educational methodology must be designed to accommodate the mean, and not the exception. *Id.* at 1413.

do not need to be “knocked down and rebuilt.”²⁴⁷ If VMI is compelled to accept women, it will need to modify its adversative educational methodology to accommodate the distinctive psychological and sociological needs of women, much as the Army Academy at West Point needed to do following the integration of women in 1976.²⁴⁸ Colonel Patrick Toffler of West Point²⁴⁹ testified during trial in *VMI I* that, based on his observations at West Point, “the psychological and sociological differences between men and women are real differences, not stereotypes.”²⁵⁰

Moreover, it is undisputed that there are real physical performance differences between men and women. In *VMI I*, experts testified that the majority of women could not perform the routine physical fitness requirements mandated of all VMI cadets during the freshman “rat line” and daily physical training.²⁵¹ Further, if VMI is ordered to become co-educational and female cadets are required to perform the same physical regimen as male cadets, it is predicted that female cadets will suffer approximately 300% more injuries than male cadets.²⁵² Real differences exist between genders and were properly accounted for in the design and implementation of VWIL’s educational methodology.²⁵³

D. A Modified “Intermediate Scrutiny” Analysis—Convolved but Correct

The Fourth Circuit began its “intermediate scrutiny” analysis of VWIL by reiterating an important finding in *VMI I*: specifically, the provision of a “single-gender college education may be considered a legitimate and important aspect of a public system of higher education.”²⁵⁴ Single-sex education, reasoned the court, had achieved widespread pedagogical acceptance and praise and could be considered an “important governmental objective.”²⁵⁵

247. *VMI II*, 44 F.3d 1229, 1234 (4th Cir.), cert. granted, 116 S. Ct. 281 (1995) (testimony of Dr. Heather Anne Wilson); see also *VMI II*, 852 F. Supp. at 476 (citing testimony of Dr. Elizabeth Fox-Genovese: “Young women . . . do not need to have uppityness and aggression beaten out of them”).

248. *VMI I*, 766 F. Supp. at 1434.

249. At the time of the trial in *VMI I*, Colonel Toffler was the Director of the Office of Institutional Research (OIR) at West Point. The purpose of OIR was “to assess the degree to which [West Point] is successful in realizing its purpose, accomplishing its mission[, and] achieving its outcome goals.” *Id.* at 1418.

250. *Id.* at 1434.

251. *Id.* at 1438.

252. *Id.*

253. See *supra* notes 245-52 and accompanying text.

254. *VMI II*, 44 F.3d 1229, 1238 (4th Cir.), cert. granted, 116 S. Ct. 281 (1995).

255. *Id.* See also Sandra Reeves, *A Burst of Popularity: Most Women’s Colleges Are Flourishing by Offering Students a Sense of Empowerment*, U.S. NEWS AND WORLD REP., Sept. 26, 1994, at 105; Suzanne Fields, *Assault on VMI Could Backfire on Feminists*, ATLANTA J. & CONST., Oct. 8, 1992, at A12.

The Justice Department once again raised “stigma” as a defense. It argued that, notwithstanding VWIL or the merits of single-gender education, an all-male VMI could never constitute an important governmental objective. In refusing to integrate women at VMI, the Justice Department urged that the Commonwealth was “relying on false stereotypes and generalizations that women [were] not tough enough to succeed in VMI’s rigorous, military style program.”²⁵⁶

In response, the Fourth Circuit acknowledged that some women might succeed in the strict adversative environment of VMI.²⁵⁷ However, no matter how physically or mentally tough an individual woman might be, her presence at VMI *would fundamentally change* the VMI experience and thereby deprive her of the very military education she sought.²⁵⁸ The court believed that continued maintenance of an all-male VMI will not perpetuate archaic stereotypes. Rather, an all-male VMI, as one of two parallel single-gender programs, will allow each gender to reap the benefits of a single-gender military education. Since Virginia’s purpose for providing a single-gender military education is not motivated by stigma and is “within . . . the traditional governmental objective of providing citizens higher education,” the Fourth Circuit held that VWIL satisfied the first prong of “intermediate scrutiny.”²⁵⁹

The Fourth Circuit is correct in finding single-gender education to be an “important governmental objective.” Single-gender education provides an alternative to the mainstream in higher education; it facilitates educational diversity.²⁶⁰ The pressures of dating and inter-gender relationships are significantly decreased at single-gender institutions.²⁶¹ “Men can study men, and women can examine women—more completely and undistractedly. And mature.”²⁶² Studies show that students of both genders become more academically involved and experience increased intellectual self-esteem in a single-sex environment.²⁶³

256. *VMI II*, 44 F.3d at 1235.

257. *Id.* at 1240.

258. *Id.* See *supra* note 168 for an analysis of the VMI “catch-22.”

259. *VMI II*, 44 F.3d at 1240.

260. See *VMI I*, 766 F. Supp. 1407, 1420 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993); Reeves, *supra* note 255, at 105.

261. See George H. Orvin, *Same Gender Schools Important Step on Road to Maturity*, CHARLESTON POST & COURIER, July 22, 1994, at 19A. See also Astin, *supra* note 168.

262. Orvin, *supra* note 261.

263. See *VMI I*, 766 F. Supp. at 1435; OVERVIEW OF THE CITADEL, *supra* note 29 (discussing the disproportionately high graduation rate at The Citadel in comparison to that at coeducational institutions). Though the success of single-gender education at VMI and The Citadel is readily observable, the success of single-gender education is particularly visible in the context of single-gender women’s schools. Women who attend single-gender schools succeed in far greater proportions than their coeducational counterparts. See Reeves, *supra* note 255, at 106. For example, as of 1994, one-fourth of the women in Congress were alumni of single-gender undergraduate institutions. *Id.* This was also true for one-third of the women on the boards of directors of Fortune 500 Corporations. *Id.* Statistics show that graduates of

Virginia successfully demonstrated an “extremely persuasive justification” for its gender-based classification.²⁶⁴ Men and women can, and should, be trained to lead as “citizen soldiers,” but different methods of leadership training produce better results in each gender, particularly in a single-gender environment.²⁶⁵ The holistic VMI methodology, which can be implemented only in a single-gender environment,²⁶⁶ has produced leaders and men of good character for more than 150 years.²⁶⁷ It is worth preserving.

The remedial demands made by the Justice Department before the Fourth Circuit in *VMI II* reinforce the validity of the predicted VMI “catch-22.”²⁶⁸ Under the Justice Department’s remedial plan, physical modifications would be required at VMI’s barracks to afford female cadets privacy in their living quarters.²⁶⁹ VMI would be required to make changes to its “rat line” to lessen the likelihood of cross-sexual confrontations.²⁷⁰ Changes would be mandated in VMI’s athletic and physical fitness programs, and VMI would be required to create an affirmative action program to recruit female cadets, faculty, and administrators.²⁷¹ In essence, the Justice Department’s remedial plan demanded changes that would destroy VMI’s holistic adversative methodology.²⁷² The Commonwealth’s refusal to admit women at VMI is therefore not premised on

women’s colleges are twice as likely to attain a Ph.D. or medical degree than women who attend coeducational universities. *Id.* Alumni of women’s colleges go on to seek a graduate degree 81% of the time. *Id.*

Congress has explicitly recognized the importance of publicly funded single-gender institutions. The 1972 Title IX Education Amendments generally prohibited disbursement of federal funds to educational programs that discriminated on the basis of gender. *Id.* However, Congress intentionally excepted from the statutory prohibition single-gender schools, such as VMI and The Citadel. See 20 U.S.C. § 1681 (a)(5) (1994).

264. *Mississippi Univ. for Women v. Hogan* instructed that the first prong of “intermediate scrutiny” requires a state to proffer “an extremely persuasive justification” for any gender-based classification. 458 U.S. 718, 724 (1982).

265. See *VMI II*, 44 F.3d 1229, 1234 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995) (testimony of Dr. Heather Anne Wilson); *VMI I*, 766 F. Supp. 1407, 1434 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) (testimony of Harvard Sociologist Dr. David Riesman); Janofsky, *supra* note 214, at 10.

266. See *VMI I*, 976 F.2d 890, 897 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) (“It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI.”).

267. See *supra* notes 24-37 and accompanying text.

268. See Answering and Opening Brief, *supra* note 204, at 17 n.8.

269. *Id.*

270. *Id.* Since the vast majority of cadets at VMI and The Citadel would still be men and the method of indoctrinating values would still be the inquisitional adversative method, it is difficult to see how cross-sexual adversative confrontations could be avoided. A possible solution might be to separate women totally from men for purposes of the “rat line,” but, seemingly, such a policy would contravene the very reason that women would seek admission to VMI.

271. *Id.*

272. *Id.*

“archaic stereotypes” or “fixed notions” of a woman’s place, but on realities governing single-gender education in a military environment.²⁷³

The Fourth Circuit next evaluated the second prong of intermediate scrutiny. Specifically, the court assessed whether the Commonwealth’s “means” of promoting single-gender education, through VMI and VWIL, “substantially advanced” the societal benefits of single-gender education.²⁷⁴ The second prong presented a unique problem for the Fourth Circuit. Once an important governmental objective requiring homogeneity in gender (i.e., single-gender education) was established, classification by gender would be “by definition necessary” for “substantially advancing” the objective.²⁷⁵ Hence, the second prong does not adequately test the “fairness” of the VMI/VWIL dichotomy as applied to each gender. Consequently, the Fourth Circuit held that where the legitimacy of a classification is premised on homogeneity of gender, a third prong must be added to the traditional “intermediate scrutiny” test.²⁷⁶

The Fourth Circuit formulated the third prong as “an inquiry into the substantive comparability of the mutually exclusive programs provided to men and women.”²⁷⁷ The court analyzed the educational benefits created for men through the educational methodology of VMI and compared them with the benefits that women would receive through the educational methodology of VWIL.²⁷⁸ Where gender classifications are premised on real differences between the sexes, parallel programs created to address those real differences would pass constitutional muster if the benefits created are “comparable in substance, but not in form and detail.”²⁷⁹

The stated educational goals of VMI and VWIL were identical and the educational missions nearly so.²⁸⁰ Both institutions sought “to teach discipline and prepare students for leadership,” at identical levels of state funding.²⁸¹ Although programmatic differences would exist between VMI and VWIL, comparable benefits would accrue equally to each gender

273. See *VMI II*, 44 F.3d 1229, 1240-41 (4th Cir.), cert. granted, 116 S. Ct. 281 (1995).

274. *Id.*

275. *Id.* at 1237. Parallel single-gender institutions, such as VMI and VWIL, “substantially advance” the goals of providing the benefits of single-gender education and educational diversity. If VMI is ordered to integrate women, publicly funded single-gender education would no longer exist in Virginia. See Yablonski, *supra* note 20, at 1471 (“[I]ntegration at VMI would benefit neither females nor males. Instead, Virginia with an integrated VMI would lose what it considers to be an essential element of diversity in its system of higher education.”). Both genders would have to attend private schools to reap the benefits of single-gender education. See Elizabeth Fox-Genovese, *Single-Sex Education Under Siege*, WALL ST. J., August 24, 1995, at A16. Those who could not afford the significantly higher costs of private school would no longer be able to obtain a single-gender education. *Id.*

276. *VMI II*, 44 F.3d at 1237.

277. *Id.*

278. *Id.* at 1237-38.

279. *Id.* at 1240.

280. *Id.* at 1240-41.

281. *Id.* at 1240-42.

through the different methodologies of the two schools.²⁸² Accordingly, the Fourth Circuit held that the parallel single-gender programs established at VMI and VWIL satisfied the newly created third prong.²⁸³

The Fourth Circuit's new third prong is a pragmatic approach to achieving fairness for both genders. If men are given the opportunity to reap the benefits of a single-gender military education, it is only fair that women be given the opportunity as well. Nevertheless, differences between the genders should allow different approaches to single-gender military programs, provided that each gender is afforded comparable benefits and neither gender is stigmatized by the classification.²⁸⁴ To insist that a state provide "benefits only when . . . provided in identical form to all of its citizens, regardless of whether they are similarly circumstanced, is justified only by a needless, and indeed baseless, demand for conformity."²⁸⁵

Having analyzed VWIL according to its "modified intermediate scrutiny test" and having concluded that VWIL remedied any previous constitutional violation, the Fourth Circuit affirmed the district court's opinion and remanded the case to the district court with instructions to supervise strictly the implementation of VWIL.²⁸⁶

VI. A BITTERSWEET VICTORY FOR SHANNON FAULKNER

Four days after approving Virginia's remedial plan in *VMI II*, the same panel of the Fourth Circuit heard The Citadel's appeal from the district court's ruling in *Faulkner II*.²⁸⁷ At trial in the district court, South Carolina attempted to distinguish the constitutional violation noted by the Fourth Circuit in *VMI I* by arguing that insufficient demand among females for a single-gender education in South Carolina justified providing The Citadel's education only to males.²⁸⁸ In response, the district court ruled, as a matter

282. *Id.* at 1241.

283. *Id.*

284. See *Faulkner II*, 51 F.3d at 443 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, and *cert. denied*, 116 S. Ct. 352 (1995) ("We noted, however, that when providing single-gender education to one gender, Virginia could not, without adequate justification, deny a substantively comparable benefit to the other gender.").

285. *VMI II*, 44 F.3d at 1240.

286. *Id.* at 1242. The Fourth Circuit also found that the Commonwealth had remedied the other matter that concerned the court in *VMI I*: the lack of uniform support for single-sex education within Virginia's governing body. *Id.* at 1241-42. By the time of trial in *VMI II*, former Governor Wilder, Virginia's new Governor George F. Allen, and the entire Virginia Legislature had officially come out in support of VWIL and an all-male VMI. *VMI II*, 852 F. Supp. 471, 483-84 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995) ("[E]very person in Virginia officialdom who has or has had the authority to affect Virginia's policies on higher education has spoken in favor of diversity by offering single-sex education to men and women of the Commonwealth and have strongly supported VWIL.").

287. *Faulkner II*, 51 F.3d at 440.

288. *Faulkner II*, 858 F. Supp. 552, 564 (D.S.C. 1994), *aff'd*, 51 F.3d 440 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, and *cert. denied*, 116 S. Ct. 352 (1995). See *supra* notes 189-94 and accompanying text.

of law, that equal protection is a personal right and, thus, a lack of demand alone could never justify the provision of publicly funded single-gender education to only one gender.²⁸⁹

In a decision handed down on April 13, 1995, the Fourth Circuit disagreed that a lack of demand could *never* justify providing a benefit to only one gender.²⁹⁰ However, the court effectively avoided further discussion of the issue by affirming the district court on another ground.²⁹¹ Specifically, the Fourth Circuit approved "the district court's finding that the defendants [had] failed to present [sufficient] evidence supporting an absence of demand."²⁹² Consequently, the Fourth Circuit affirmed the district court's determination that South Carolina violated Shannon Faulkner's equal protection rights in denying her access to a single-gender military education.²⁹³

South Carolina once again fared poorly on the issue of remedy. The Fourth Circuit found it "difficult to understand why in 1992 . . . South Carolina did not consider *VMI I* to apply to it and, as Virginia did, begin the process of selecting a course to correct the problem."²⁹⁴ In consequence, the Fourth Circuit ordered The Citadel to admit Shannon Faulkner to its Corps of Cadets, unless the State could establish a parallel program (comporting with *VMI II*) by August 1995.²⁹⁵ South Carolina was given until fall 1996, to develop a parallel program for all other women desiring a Citadel-type education.²⁹⁶

A. *South Carolina Courts a Marriage of Convenience*

After two years of litigation, South Carolina was forced to face what it should have realized long before: the constitutional violation found in

289. *Id.* at 564.

290. *Faulkner II*, 51 F.3d at 440.

291. *Id.* at 445-46. The Fourth Circuit sidestepped potentially troublesome legal issues when it refused to affirm the district court's holding on equal protection vis-à-vis demand. Had the Fourth Circuit agreed with the district court that equal protection is strictly an individual right, for which demand is irrelevant, a wide array of single-gender programs could arguably be found unconstitutional.

As George Will has argued, if demand is irrelevant to equal protection scrutiny, would not an all-male college football team, or an all-male boot camp for juvenile offenders, be unconstitutional in the absence of an all-female counterpart? Would the state be forced to create shelters for battered husbands? See Will, *supra* note 164, at C7.

292. *Faulkner II*, 51 F.3d at 445-46. Since South Carolina failed to show sufficient facts to support a conclusion of inadequate demand, the Fourth Circuit did not reach the issue of whether inadequate demand could "justify" providing a single-gender military education to men only. *Id.*

293. *Id.* at 450.

294. *Id.* at 448.

295. *Id.* at 449. If Faulkner was not admitted to The Citadel by the 1995-1996 school year, her junior year, she would be ineligible to graduate from The Citadel because of the school's graduation requirements. *Id.* Thus, time was truly of the essence for her.

296. Twila Decker, *Judge Sets Deadlines for Citadel, State Has 3 Months To Set Up Parallel Program*, THE STATE (Columbia, S.C.), May 12, 1995, at B1.

VMI I applied with equal force to The Citadel and required either the integration of women, the school's privatization, or the establishment of a parallel women's program.²⁹⁷ Judge Houck instructed The Citadel that any remedial program intended to include Shannon Faulkner would have to be implemented and approved (following a full evidentiary trial) by August 12, 1995.²⁹⁸

South Carolina's hastily created remedial program, introduced as The South Carolina Institute of Leadership for Women (SCIL), was filed with Judge Houck on June 5, 1995.²⁹⁹ SCIL was designed to mirror Virginia's remedial plan, VWIL, which had been upheld by the Fourth Circuit in VMI II.³⁰⁰ After repeated warnings to Citadel attorneys that the submitted plan was too vague,³⁰¹ Judge Houck ruled that he would not try the case until November 1995.³⁰² The South Carolina Institute of Leadership would not be implemented in time to prevent Faulkner's admission to The Citadel. Shannon Faulkner had prevailed.³⁰³

B. *Hell Week: An Abrupt End to a Fleeting Victory*

297. See *Faulkner II*, 51 F.3d at 448.

298. See Decker, *supra* note 296, at B1. South Carolina vowed to submit a specific remedial plan for Faulkner and all other women by June 1995. *Id.*

South Carolina's first task was to reach an agreement with one of the state's two private schools concerning the establishment of a program. Following an outright rejection by Columbia College, the state was able to induce an initially ambivalent Converse College to cooperate in the formulation of the parallel program at the Converse campus. See *Second Chance To Explain Citadel Option Sought, S.C. Offering To Create Women's Program*, RICHMOND TIMES-DISPATCH, Feb. 15, 1995, at B5. South Carolina would provide \$10 million towards the establishment of the program, \$6.6 million would be raised privately by The Citadel, and \$3.4 million would be allocated by the South Carolina Legislature. *Citadel Is Told Faulkner Must Also Be a "Knob," Judge Rules She Must Also Be in Barracks*, RICHMOND TIMES-DISPATCH, June 8, 1995, at B3 [hereinafter *Judge Rules*].

299. See *Judge Rules*, *supra* note 298, at B3; *Alternative Plan for The Citadel Unveiled*, ATLANTA J. & CONST., June 6, 1995, at A10. For more specific details of the proposed SCIL program, see *Citadel Plan Keeps Female Cadets Out*, GREENSBORO NEWS & REC., June 6, 1995, at B4.

300. *Citadel Plan Keeps Female Cadets Out*, *supra* note 299, at B4.

301. On June 24, 1995, Judge Houck lamented that he did not "have any earthly idea what's going to happen at Converse College." *Judge Wants Details on Citadel Plan*, RICHMOND TIMES-DISPATCH, June 24, 1995, at B4. He instructed Citadel attorneys to provide details on capital improvements at Converse, the names of the leadership faculty, and the names of those who have applied for leadership program director. *Id.*

302. Debbi Wilgoren, *Female Cadet Leaves Citadel, Faulkner Had Spent First Week of Training in Infirmary*, WASH. POST, Aug. 19, 1995, at A1. The Citadel appealed Judge Houck's ruling to the Fourth Circuit, which declined to stay the decision. *Id.* Subsequent stay requests to Justice Rehnquist and Justice Scalia were summarily denied. *Id.*

303. The Fourth Circuit had instructed Judge Houck that Faulkner should be admitted to The Citadel Corps of Cadets, barring the successful implementation of a remedial program by August 1995. *Faulkner II*, 51 F.3d 440, 450 (4th Cir.), *cert. dismissed*, 116 S. Ct. 331, and *cert. denied*, 116 S. Ct. 352 (1995).

Accompanied by her parents and four U.S. Marshals, Shannon Faulkner reported to The Citadel on August 12, 1995, to take her place in The Citadel Corps of Cadets.³⁰⁴ She was twenty pounds overweight.³⁰⁵ On Monday, August 14, 1995, "knob hell week" began; the indoctrination of the 1995-96 entering class was underway. Shannon Faulkner, however, hardly participated in the experience she fought so hard to attain. Complaining of heat illness, she was in the infirmary by mid-morning of the first day.³⁰⁶ She remained in the infirmary complaining of stress-induced stomach problems for four days.³⁰⁷ On August 17, The Citadel announced that Faulkner had been medically cleared to rejoin her company the following morning.³⁰⁸ As the hours passed on August 18, Shannon Faulkner did not emerge from the school infirmary. Rumors began circulating that she was about to quit.³⁰⁹ Later that afternoon, Faulkner voluntarily resigned from The Citadel.³¹⁰ Fighting to be heard over an approaching thunderstorm, Faulkner tried to explain her reasons for leaving. She alleged that the stress had overcome her. Specifically, she said "The past 2 ½ years [of court battle] came crashing down on me in an instant I don't think there's any dishonor in leaving. I think there's dis-justice in my staying and killing myself just for the political point."³¹¹ The Citadel's first female cadet had left.

In the aftermath of Faulkner's departure, feminists cheered Shannon Faulkner for her bravery.³¹² Conservatives derided her for "political" motives.³¹³ Lost on many, however, was the fact that *Faulkner II* was not over. The Justice Department remained a plaintiff in the case,³¹⁴ and South Carolina was still under a court order to have a parallel program for women (SCIL) established at Converse College by August 1996.³¹⁵

304. See Wilgoren, *supra* note 302, at A1.

305. Suzanne Fields, *Faulkner Displayed Grace Under Feminist Fire, Citadel Controversy Should Spark a Fresh Debate About Single-Gender Schools*, ATLANTA J. & CONST., Aug. 24, 1995, at A18.

306. See Wilgoren, *supra* note 302, at A1.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. Wes Allison, *Faulkner Quits; Other Cadets Rejoice but This Isn't the End, Her Lawyers Say*, RICHMOND TIMES-DISPATCH, Aug. 19, 1995, at A1.

312. See Sara Rimer, *Shannon Faulkner Evokes Mixed Reaction*, N.Y. TIMES, Aug. 21, 1995.

313. See, e.g., Cal Thomas, *Shannon Faulkner: Flawed Symbol*, ST. LOUIS POST-DISPATCH, Aug. 26, 1995, at B15 ("If Faulkner could not withstand the legal battle, how could she have been expected to face a battlefield enemy? . . . There are no fainting couches in war, and certainly not different rules of engagement for women This issue is about politics, not education or opportunity [P]olitics was her point.").

314. See *Faulkner Suit Options Debated: Women Joining It Seen as Having Little Effect*, RICHMOND TIMES-DISPATCH, Aug. 25, 1995, at B4.

315. *Faulkner II*, 51 F.3d 440 (4th Cir.), cert. dismissed, 116 S. Ct. 331, and cert. denied, 116 S. Ct. 352 (1995); see Decker, *supra* note 296, at B1.

The Citadel's holistic single-gender military program is still very much in jeopardy. To succeed in keeping The Citadel all-male, South Carolina must demonstrate that SCIL offers South Carolina's female student population "comparable benefits" to those The Citadel offers the state's male population.³¹⁶

VII. REINFORCING FOR THE FINAL ASSAULT: THE UNITED STATES SUPREME COURT

VMI II arrived at a very different Supreme Court than the Court that heard *Hogan* fourteen years ago. Three Justices remain from the *Hogan* Court: Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor. The Rehnquist Court is known for its commitment to judicial restraint and majoritarianism³¹⁷ and has frequently taken a narrow view of the Equal Protection Clause.³¹⁸ However, the Rehnquist Court has continued to exert heightened scrutiny on gender classifications.³¹⁹ Only eight Justices heard *VMI II*. Justice Clarence Thomas, whose son attends VMI, has recused himself from deciding the case.³²⁰

It is difficult to forecast how the Court will decide *VMI II*. The Court often is unpredictable on equal protection issues. This unpredictability is exacerbated by the inherent ambiguity of "intermediate scrutiny" review.³²¹

*J.E.B. v. Alabama ex rel. T.B.*³²² is the Supreme Court's most recent pronouncement on gender under the Equal Protection Clause, and it may provide guidance on how the Justices will vote on *VMI II*.³²³ *J.E.B.* held that gender-based peremptory challenges were unconstitutional.³²⁴ In reaching this decision, the Court reiterated the lesson of *Hogan*—specifically, that gender classifications which "ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women" vio-

316. See *VMI II*, 44 F.3d 1229, 1240 (4th Cir.), cert. granted, 116 S. Ct. 281 (1995). The successful implementation of SCIL is also contingent on VMI's success before the United States Supreme Court in *United States v. Virginia*.

317. EDWARD J. CLEARY, *BEYOND THE BURNING CROSS* 152 (1994).

318. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-21 (1989).

319. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1433 (1994) (Kennedy, J., concurring) ("In over 20 cases beginning in 1971 . . . we have subjected government classifications based on sex to heightened scrutiny. Neither the State nor any Member of the Court questions that principle here.")

320. Paul M. Barrett, *High Court To Hear Discrimination Case over VMI'S Policy of Excluding Women*, WALL ST. J., Oct. 18, 1995 at B5.

321. See *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

322. 114 S. Ct. 1419 (1994).

323. Interview with Steven G. Gey, Professor of Constitutional Law, Florida State University College of Law, in Tallahassee, Fla. (Feb. 15, 1995).

324. *J.E.B.* involved an action for child support in Alabama state court. 114 S. Ct. at 1421-22. An entirely female jury concluded that the defendant, J.E.B., was the putative father of a child. *Id.* at 1422. The jury was all-female because gender-motivated peremptory challenges had been used to exclude men from the jury. *Id.*

late the Equal Protection Clause.³²⁵ *J.E.B.* indicates that the Supreme Court's disposition of *VMI II* will likely hinge on whether the Supreme Court believes that VMI and The Citadel, as male-only schools, "perpetuate common stereotypes about men and women."³²⁶

VIII. THE FUTURE OF SINGLE-GENDER EDUCATION IN THE WAKE OF *UNITED STATES V. VIRGINIA*

Had VMI lost and the specious notion taken root that the law requires men and women to be treated identically in every context, the next man rejected at a private women's college with a tax exemption or government subsidy would have been the next constitutional claimant.³²⁷

If the Supreme Court reverses the Fourth Circuit's disposition of *United States v. Virginia*, holistic single-gender programs at schools such as VMI, The Citadel, and VWIL will be destroyed.³²⁸ Both men and women will be prohibited from enjoying the benefits of a publicly funded single-gender military education. However, a decision ordering VMI and The Citadel to become coeducational could have further-reaching effects. Private women's colleges may be forced to become either coeducational³²⁹ or to forego all state and federal funds.³³⁰ Moreover, successful single-gender education programs in America's inner cities may be forced to return to a coeducational format as well.³³¹

If private women's colleges are denominated "state actors" by the courts, then they, like VMI and The Citadel, will be subject to "intermediate scrutiny" review under the Equal Protection Clause.³³²

325. *Id.* at 1421.

326. Gardenswartz, *supra* note 20, at 611; *see also*, Lyle Denniston, *Supreme Court To Rule on Men-Only Admission at Military School; VMI's Ban on Women at Issue in Equality Test*, BALTIMORE SUN, Oct. 6, 1995, at 4A.

327. Kmiec, *supra* note 20, at A15.

328. *See* Yablonski, *supra* note 20, at 1487-88.

329. *See* Fields, *supra* note 255, at A12; Reeves, *supra* note 255, at 107; Fox-Genovese, *supra* note 275, at A16.

330. *See* Fields, *supra* note 255, at A12; Reeves, *supra* note 255, at 107; Fox-Genovese *supra* note 275, at A16.

331. *See* Will, *supra* note 164, at C7; Gardenswartz, *supra* note 20.

332. Because they are generally not considered to be "state actors," private organizations are usually not subject to suit under the Equal Protection Clause. *See* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-22 (1961); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (arguing that the Equal Protection Clause "erects no shield against merely private conduct, however discriminatory, or wrongful"). VMI and The Citadel, as publicly funded state universities, are state actors. *See* *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 343-44 (1938) (holding that curators of the University of Missouri Law School were state actors for purposes of the Equal Protection Clause). Less clear, however, is the status of private women's colleges and whether they would be denominated state actors if their single-gender admission policies are challenged under the Equal Protection Clause.

The Supreme Court has yet to distinguish a lodestar for determining when an entity that receives state or federal funds becomes a "state actor." *See* *Burton*, 365 U.S. at 722 ("[T]o

Thus, feminists face a dilemma in addressing *United States v. Virginia* and *Faulkner v. Jones*.³³³ Some feminists adamantly support the rights of women to attend single-gender schools but, at the same time, believe that women should be able to attend college at all-male schools such as VMI and The Citadel.³³⁴ If The Citadel and VMI are proscribed from retaining single-gender admissions policies, then private women's colleges, as "state actors," would logically be prevented from maintaining discriminatory policies as well.³³⁵ Cynthia H. Tyson, President of Mary Baldwin

fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which this Court has never attempted." (quoting *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947)); see also Ronna G. Schneider, *State Action—Making Sense out of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737 (1985). Private women's colleges across the country receive approximately 20% of their operating funds from governmental entities. Yablonski, *supra* note 20, at 1483. In comparison, VMI receives approximately 40% of its operating budget from state funds. Charlotte Grimes, *Idea of Women as Cadets Has VMI up in Arms*, ST. LOUIS POST-DISPATCH, Feb. 18, 1990, at A1. The significant degree of public funding at private women's colleges may lead to their classification as "state actors" by the Supreme Court. See *Grove City College v. Bell*, 465 U.S. 555, 569-70 (1984) (holding that private college was subject to Title IX of the Education Amendments of 1972 because students at the college received federal financial aid); *Norwood v. Harrison*, 413 U.S. 455 (1973) (holding that Mississippi's practice of purchasing and loaning textbooks to private schools that discriminated on the basis of race constituted state action).

333. See Reeves, *supra* note 255, at 107; Fields, *supra* note 255, at A12.

334. See, e.g., William Raspberry, *How Do You Justify Separate Schools?*, WASH. POST, May 25, 1990, at A21; Judy Mann, *The Role of Women's Schools*, WASH. POST, May 16, 1990, at B3 (quoting Ellen J. Vargyas, Staff Attorney at the National Women's Law Center) ("I think [single-gender education is] a very important option for girls and young women to have in ways I can't see any legitimate need for (white) boys and young men to have . . . They have those role models. They dominate just about everywhere they are."). But see Fields, *supra* note 255, at A18 ("Few doubt that certain women can benefit from single-sex schools. Why deprive men of equal opportunity?").

335. Reeves, *supra* note 255, at 107; Fox-Genovese, *supra* note 275, at A16. Feminists have attempted to distinguish VMI's admissions policy from the admissions policies of single-gender women's colleges by arguing for a "compensatory" theory of equal protection jurisprudence. See Kmiec, *supra* note 20, at A15; Mann, *supra* note 334, at B3. Essentially, the "compensatory" theory posits that one class of persons may be treated more favorably than a different class of persons in order to "compensate" the benefitted class for past discrimination. Feminists argue that single-gender admissions policies at women's colleges "compensate" women for past discrimination, while the single-gender admissions policies at schools such as VMI and The Citadel stigmatize women. See Mann, *supra* note 334, at B3; Mandelbaum, *supra* note 238, at A14.

There is significant legal support for the "compensatory" argument, particular in the opinions of Justice O'Connor. See, e.g., *J.A. Croson Co.*, 488 U.S. 469, 476 (1989); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982). Justice O'Connor commented in *Hogan* that "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Hogan*, 458 U.S. at 728. See also *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974) (supporting the proposition that compensation for past discrimination can justify gender-based classifications that favor women). *Accord Craig v. Boren*, 429 U.S. 190, 198 n.6 (1976).

But see *Brunet v. City of Columbus*, 1 F.3d 390, 403-04 (6th Cir. 1993) (holding that gender-based affirmative action plans are subject to "strict scrutiny" when challenged under the

College, aptly summarizes the nexus between single-gender institutions, whether public or private: "This is the reality The fates of single-sex colleges for both women and men are inextricably linked."³³⁶ If VMI and The Citadel fall, single-gender women's colleges may face integration as well.

Innovative single-gender programs in the inner city also may fall if the Supreme Court reverses the Fourth Circuit's disposition of *United States v. Virginia*. Acting upon statistics regarding crime and school dropout rates in the inner city and hoping to reduce crime and promote civic responsibility, school boards in some of America's larger cities have implemented single-gender education programs for young men and boys.³³⁷

In 1991, the Detroit School Board formulated a plan to create single-gender schooling for boys and young men in the inner city.³³⁸ The proposed single-gender institutions, dubbed "male academies," were designed to help foster a sense of identity and community in young boys through the use of male teachers and a male mentor system.³³⁹ The male academies never got underway. In *Garrett v. Board of Education*,³⁴⁰ plaintiffs with school-age daughters were able to obtain an order enjoining the implementation of the male academies.³⁴¹ Though recognizing that the male academies' purpose was an important one, the district court held that the Detroit School Board was not permitted to "override the rights of females to equal opportunities."³⁴² The holistic educational methodology of the Male Academies, in essence, could not be offered to only one gender.³⁴³

The legal issues in *Garrett*, *United States v. Virginia*, and *Faulkner v. Jones* were all quite similar. The constitutional violation in these cases was premised on the fact that males were given the opportunity to benefit from publicly funded single-gender education, while females were not.³⁴⁴ Moreover, like the Fourth Circuit in *VMI I*, the district court in *Garrett* implied that separate academies for males and females may remedy the

Equal Protection Clause); *Lamprecht v. F.C.C.*, 958 F.2d 382 (D.C. Cir. 1992) (holding that compensatory FCC policy preferring female broadcast applicants over similarly situated male applicants was invalid under the Equal Protection Clause).

336. Reeves, *supra* note 255, at 107.

337. See Gardenswartz, *supra* note 20, at 645.

338. *Id.* at 609-10.

339. *Id.* See also Dennis Kelly, *Rites of Passage Encourage High Expectations, Providing a Social Anchor*, USA TODAY, Jan. 15, 1992, at A6. The academies were intended to serve approximately 250 boys ranging in grade levels from kindergarten through the eighth grade. Gardenswartz, *supra* note 20, at 609-10.

340. 775 F. Supp. 1004 (E.D. Mich. 1991).

341. *Id.*

342. *Id.* at 1014.

343. *Id.*

344. See *id.*; *VMI II*, 44 F.3d 1229, 1232 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

constitutional violation.³⁴⁵ Accordingly, if the Fourth Circuit's remedial decision in *United States v. Virginia* remains good law, inner city school boards will be able to establish male academies to reach "at risk" males, as long as comparable programs are established to reach and address the needs of "at risk" females.³⁴⁶

New York, Baltimore, and Milwaukee have implemented, or are planning to implement, holistic single-gender educational programs designed to reach "at risk" inner city youth.³⁴⁷ If the Supreme Court affirms the Fourth Circuit's *VMI II* approval of VWIL and VMI as parallel single-gender institutions, inner city school boards will be permitted to implement male academies and female academies.³⁴⁸ Innovative plans for combating crime and poverty in the inner cities will be allowed to go forward, and both genders will benefit accordingly.

IX. CONCLUSION

The holistic education a cadet can receive at VMI and The Citadel is unique in today's society. This uniqueness comes from a carefully designed curriculum that can flourish only in a single-gender environment. Boys can learn to be men "more completely and undistractedly."³⁴⁹

Nevertheless, as the Fourth Circuit recognized in *United States v. Virginia* and *Faulkner v. Jones*, pedagogically justified single-gender programs cannot be operated in a manner that violates the Constitution. If a state gives men the opportunity to benefit from a single-gender military education, it is appropriate that women be given the opportunity to benefit from such an education as well. Real differences between the genders, however, can and should lead to different pedagogical approaches in the context of single-gender military education.³⁵⁰ When a state designs two parallel single-gender military education programs and implements the programs in a manner designed to reach the same end result for both genders, it is difficult to see how the Equal Protection Clause could require more.³⁵¹ As Justice Blackmun aptly stated in *Hogan*, "*It is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose—indeed destroy—values*

345. See *Garrett*, 775 F. Supp. at 1013 n.14.; *VMI I*, 976 F.2d 890, 900 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993).

346. See *VMI II*, 44 F.3d at 1239-40.

347. Gardenswartz, *supra* note 20, at 645.

348. See *id.* at 644.

349. Orvin, *supra* note 261.

350. Compare *Rostker v. Goldberg*, 453 U.S. 57 (1981) with *Michael M. v. Superior Court*, 450 U.S. 464 (1980); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

351. See *VMI II*, 852 F. Supp. 471, 484 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir.), cert. granted, 116 S. Ct. 281 (1995) ("If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination.").

that mean much to some people by forbidding the State to offer them a choice while not depriving others of an alternative choice."³⁵²

The Supreme Court should heed the words of Justice Blackmun and affirm the Fourth Circuit's disposition of *VMI II*. The single-gender traditions at VMI and The Citadel should be permitted to continue.³⁵³

352. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 734 (1982) (Blackmun, J., dissenting) (emphasis added).

353. The Supreme Court heard oral arguments in *United States v. Virginia* on January 17, 1996. 64 U.S.L.W. 27d29 (U.S. January 23, 1996). See also Kathryn R. Urbonya, *Separate but Equal Revisited: The Court Weighs Whether State-Supported Military Schools May Bar Women*, A.B.A. J., Feb. 1996, at 44; Joan Biskupic, *VMI Argues for All-Male Tradition*, WASH. POST, January 18, 1996, at A4. By most accounts, VMI did not fare well before the Court. See, e.g., Biskupic, *supra*, at A4 ("[A] majority of the justices suggested the time may have come for the prestigious state-run school to change."). With Justice Clarence Thomas having recused himself from the case, only eight Justices heard oral argument. Four of the Justices, Stevens, Souter, Ginsburg, and Breyer, expressed strong skepticism about the exclusion of women from VMI. *Id.* Of the remaining four Justices, only Justice Scalia was unwavering in his defense of VMI. *Id.* Nevertheless, the outcome of the case remains unclear. Justice O'Connor, who is frequently the deciding vote on equal protection issues, hinted that a separate program for men and women, within the grounds of VMI itself (and yielding a VMI degree to both genders), might be sufficient to eliminate any constitutional inequity. *Id.* Questions posed by Justice Kennedy during oral arguments suggest that he might support such an approach as well. *Id.*

Such a compromise approach would leave neither side happy but would likely yield an equitable result. VMI would presumably be able to maintain its adversative methodology, and those women who desired it would have the opportunity to pursue the rigor and prestige of a VMI degree.