VMI and Virginia Lose Again: United States v. Virginia

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I. INTRODUCTION

For one hundred fifty-seven years, the men and women voters in the Commonwealth of Virginia have endeavored to provide single sex education at the Virginia Military Institute (VMI), yet on June 26, 1996, this venerable institution was destroyed by seven United States Supreme Court Justices. The Supreme Court of the United States, with Justice Scalia dissenting and Justice Thomas not taking part in the decision, decided that the equal protection guarantee of the Fourteenth Amendment "precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords" and implicitly ordered that the institution admit women or become a private college. While some applaud this decision as another giant step for women's rights, it is clear from the opinion penned by Justice Ruth Bader Ginsburg that it is really a classic example of the countermajoritarian problem: "[H]ow can a democratic society justify empowering unelected, relatively unaccountable judges to invalidate the policy choices of more democratically selected legislators?"
From even a cursory examination of the text of Justice Ginsburg's opinion, it is patently obvious that the Court's decision is a mockery of judicial precedent. First and foremost, the Court ignored clear precedent when analyzing the case. Rather than giving deference to the District Court's findings of fact, the Justices found their judgment to be more reliable and discarded the findings proffered by Chief Judge Jackson Kiser of the United States District Court for the Western District of Virginia. Additionally, the Court ignored the previous Constitutional standard for determining whether justification based on sex was proper, the intermediate standard, adopting instead a standard Ginsburg advocated as an attorney with the American Civil Liberties Union. The Court's role is reminiscent of the spoiled child who insists that others play his game by the rules he created, yet changes those rules anytime they become unfavorable.

More crucial than the Justices' inability to follow legal precedent is their understanding, or lack thereof, of history. With its beginnings in 1839 as the nation's first state military college, VMI was created at a time when the Constitution provided no remedy for those wishing to challenge its single-sex policy. The subsequent ratification of the Fourteenth Amendment, guaranteeing decisions of the polity. This is completely at odds with the classical conception of citizenship held by political theorists such as Aristotle, J.S. Mill, Rousseau, and Jefferson, for whom the very concept of citizenship involved participation in those decisions.

7. As Justice Scalia stated, "This is not the interpretation of a Constitution, but the creation of one." Virginia, 116 S. Ct. at 2293 (Scalia, J., dissenting). See also Editorial, Review & Outlook: "This Most Illiberal Court," WALL ST. J., June 28, 1996, at A8 ("We are looking at a Constitution invented by a gaggle of lawyers and activist judges who litigated what they couldn't legislate.").

8. See Editorial, The Imperial Supreme Court, WASH. TIMES, June 27, 1996, at A18 ("in order to reach the result [the Supreme Court's] majorities have desired, the court... has had to twist itself around in various ways, ignoring such precedents and inventing such new categories of classification and standards of judgment as necessary.").

9. In criticizing the majority's analysis of the facts, Justice Scalia comments, "How remarkable to criticize the District Court on the ground that its findings rest on evidence (i.e., the testimony of Virginia's witnesses)! That is what findings are supposed to do." Virginia, 116 S. Ct. at 2300 (Scalia, J., dissenting).


11. "Under the intermediate standard of review, the Justices will not uphold a classification unless they find that the classification has a 'substantial relationship' to an 'important' government interest. The Supreme Court... [uses]... this intermediate standard of review in cases involving gender classifications... "JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 603 (5th ed. 1995).


13. See Virginia, 116 S. Ct. at 2300 (Scalia, J., dissenting) (internal citations omitted):

It is indefensible to tell the Commonwealth that "the burden of justification is demanding and rests entirely on [you]," and then to ignore the District Court's findings because they rest on the evidence put forward by the Commonwealth — particularly when, as the District Court said, "[t]he evidence in the case... is virtually uncontradicted."

Ultimately, however, VMI has assumed the role of the spoiled child, electing to admit women, but make them undergo the same excruciatingly short haircuts that have marked freshman cadets ('rats') for years. As VMI Superintendent Josiah Bunting III stated, "You might call it a barrier (to women), but we think it would be a barrier to the faint of heart." Wes Allison, VMI Votes 9-8 to Admit Women Some Alumni Weep; Officials Promise Survival, RICHMOND TIMES-DISPATCH, Sept. 22, 1996, at A1.

equality,\textsuperscript{15} was similarly futile in any attack on VMI. It was not until 1971, when the Supreme Court utilized the Fourteenth Amendment to attack gender discrimination in \textit{Reed v. Reed},\textsuperscript{16} that VMI came under any possible\textsuperscript{17} attack whatsoever.\textsuperscript{18} The more defining period of scrutiny, however, arose with the Court’s opinion in \textit{Mississippi University for Women v. Hogan},\textsuperscript{19} a decision rendered in 1982 that attacked a nursing school’s single-sex status.\textsuperscript{20}

For over one hundred thirty years VMI was allowed to evolve and grow, supplying the Commonwealth of Virginia with many capable leaders.\textsuperscript{21} Rather than allowing the Commonwealth to attain the goal dictated by its citizens\textsuperscript{22} through the democratic process\textsuperscript{23} of creating diversity amongst its universities,\textsuperscript{24} the members of the Supreme Court struck down the will of the people\textsuperscript{25} by resorting to flawed historical analysis.\textsuperscript{26} By analyzing VMI as a dinosaur created from ignorance and bigotry,\textsuperscript{27} the Court does not realize that its decision necessarily mandates that the mistakes of one generation must be paid by another.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{15} Passed in 1868 under Reconstruction government, the Fourteenth Amendment reads, in pertinent part:
\begin{quote}
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
\end{quote}
\end{itemize}
U.S. \textsc{const.} amend. XIV, § 1.

\begin{itemize}
\item \textsuperscript{16} 404 U.S. 71 (1971).
\item \textsuperscript{17} As Chief Justice Rehnquist commented, the facts in \textit{Reed} had “nothing to do with admissions to any sort of educational institution.” \textit{Virginia}, 116 S. Ct. at 2289 (Rehnquist, C.J., concurring).
\item \textsuperscript{18} \textit{See} Ids, supra note 14, at 41.
\item \textsuperscript{19} 458 U.S. 718 (1982).
\item \textsuperscript{20} “[The Mississippi University for Women] holding did place Virginia on notice that VMI’s men-only admissions policy was open to serious question.” \textit{Virginia}, 116 S. Ct. at 2289 (Rehnquist, C.J., concurring).
\item \textsuperscript{22} \textit{See} Editorial, \textit{The Imperial Supreme Court}, \textsc{WASH. TIMES}, June 27, 1996, at A18 (“All-male instruction [is not a choice] that people, through their elective representatives, can be permitted to make for themselves. Again, more than a century of state support, duly authorized by the officials the people chose, means nothing.”).
\item \textsuperscript{23} As Justice Blackmun stated:
\begin{quote}
I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose — indeed destroy — values that mean much to some people by forbidding the state to offer them a choice while not depriving others of an alternative choice.
\end{quote}
\item \textsuperscript{24} \textit{See} Brief for Petitioner at 7, \textit{United States v. Virginia}, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107).
\item \textsuperscript{25} Several bills requiring state-supported institutions to end discrimination on the basis of sex, race, creed or national origin have been introduced by Virginia State Senator Emilie F. Miller, but each bill has been rejected by the Virginia General Assembly. \textit{See} Bill Lohmann, \textit{Ms. Terry Set to Defend VMI Men-Only Policy}, \textsc{RICHMOND TIMES-DISPATCH}, Feb. 1, 1990, at 1. Indeed, one would be hard pressed to argue that the Commonwealth of Virginia is politically backward; it elected Douglas Wilder, the nation’s first African-American Governor. \textit{See} Ray McCallister, \textit{Perspective}, \textsc{RICHMOND TIMES-DISPATCH}, Dec. 31, 1989, at F1.
\item \textsuperscript{26} By characterizing Virginia’s system of higher education as evincing a “deliberate” plan to discriminate against women, the Court does not take into context the enormous changes that have occurred since VMI was founded in 1839, such as the adoption of the Fourteenth Amendment or women’s suffrage. \textit{See} \textit{Virginia}, 116 S. Ct. at 2278. \textit{See also} id. at 2289-90 (Rehnquist, C.J., concurring) (“[U]nlike the majority, I would consider only evidence that postdates our decision in \textit{Hogan}, and would draw no negative inferences from the State’s actions before that time.”).
\item \textsuperscript{27} \textit{See} id. at 2277.
\item \textsuperscript{28} \textit{See} Kerry Dougherty, Editorial, \textit{Our Daughters Can Pick Single-Sex Schools, Our Sons—No}, \textsc{VIR-}
\end{itemize}
By providing a brief history of the Virginia Military Institute and the history of this intriguing case, it will become readily apparent that the Supreme Court's decision rested upon personal convictions rather than established law and deference to the democratic processes of the Commonwealth of Virginia. This faulty reasoning is illustrative of the countermajoritarian problem.

II. VMI: A SUCCESSFUL EDUCATIONAL PHILOSOPHY

Founded in 1839, the Virginia Military Institute is a tax-supported four-year college whose mission is to "produce educated and honorable men who are

GINA PILOT & LEDGER STAR, June 29, 1996, at A11 ("Choice is key... There are just 86 single-sex collegians left. Eighty one of those are women's colleges. [The Supreme Court's decision in United States v. Virginia leaves only three men's colleges.] [If my son wants a single-sex education there will be no more than three schools available. That's really no choice at all.").

See also James F. Vesely, Editorial, The Wrong Solution at VMI, SEATTLE TIMES, June 28, 1996, at B4:

[The eradication of male-only places to go and learn about oneself seems a strange thing to do given the expectations placed on young people. A simple plan in Detroit, for example, to bring boys together for a summer program before they entered high school was defeated because it excluded girls. Mills and the exclusive women's colleges of the East Coast are the classy end result of money, talent and power, exactly the thing that is so despised about [VMI]. No one can honestly say the variety and choices of higher education are not diminished as VMI goes co-ed.

29. See United States v. Virginia, 44 F.3d 1229, 1226 (4th Cir. 1995) [hereinafter VMI II Circuit Court] ("In undertaking the first steps of the Hogan analysis to determine whether the state's objective is 'legitimate and important,' a court should not substitute its priorities of value over those established by the democratically chosen branch.").

30. See Bruce Fein, Editorial, Forced March to a Unisex Drumbeat, WASH. TIMES, June 28, 1996, at A20 ("The Supreme Court enervates the democratic spirit... when it issues ex cathedra public policy pronouncements for light and transient causes. As Justice Oliver Wendell Holmes exhorted... [It] must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as courts.").

31. In addition to tax-support, VMI's alumni provided the institution with one hundred-eighty million dollars, the largest per-student endowment of any public college. In 1995, the alumni contributed seventeen million dollars. See Wes Allison, VMI Tries to Get Alumni to "Fall In," They're Told School Needs Help More Than Ever, RICHMOND TIMES-DISPATCH, Oct. 10, 1996, at B1. One wonders if many writers have embraced the notion that this is a tax-supported establishment and, moreover, that women have had the vote since 1920 and the Nineteenth Amendment. For instance, one author asked, "Legitimate admission standards aside, how can a tax-supported school say which taxpayers can and cannot benefit from a VMI education?"

Gender Barriers Falling Down, supra note 5, at 20. Answer: After over seventy years, one would hope that the democratic process is an appropriate reply. In fact, after the creation of the Virginia Women's Institute for Leadership, the Virginia General Assembly enacted legislation "mandating equal funding on a per-student basis for VWIL and VMI, without any limit on the maximum number of VWIL students." Respondent's Brief at 11, United States v. Virginia, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107). See also Virginia, 116 S. Ct. at 2293-95 (Scalia, J., dissenting).

Today, however, change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic process, but by order of this Court. It is hard to consider women a "discrete and insular minority" unable to employ the "political processes ordinarily to be relied upon," when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of paternalism that the Court so roundly condemns. Moreover, a long list of legislation proves the proposition false. See, e.g., Equal Pay Act of 1963, 29 U.S.C. § 206 (d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; Women's Business Ownership Act of 1988, Pub.L. 100-533, 102 Stat. 2689; Violence Against Women Act of 1994, Pub.L. 103-322, Title IV, 108 Stat. 1092.

Id. See also Joan Beck, Editorial, Bad Move, Virginia Military Institute is Intent on Maintaining Good Ol' Boy Sexism at Taxpayers' Expense, CHI. TRIB., Jan. 21, 1996, at 19. Beck apparently maintains that the women voters of Virginia have a problem recognizing VMI for what it is: "good ol' boy sexism at taxpayers' expense." Id.

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suited for leadership in civilian life and who can provide military leadership when necessary." Enrolling approximately 1250 students, VMI offers majors in the liberal arts, sciences and engineering, all of which are available at various other public colleges within the state of Virginia. VMI does not offer any graduate or post-graduate degree programs. VMI, of course, is all-male, one of only two (before the decision in United States v. Virginia) such public institutions in the United States. VMI does, however, allow women to attend evening classes and summer school.

Although a small school, VMI has produced a substantial number of Virginia's political and business leaders largely through a unique method of education, the adversative method, and exemplary instructors. The adversative method utilizes a educational philosophy reminiscent of English Boy's Schools and Marine Corps bootcamp, designed to instill character and leadership in young men. Under this method, incoming students are subjected to a severe form of the adversative method which has been characterized as a "physically and emotionally rigorous system of hazing."

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32. Brief for Petitioner at 2, Virginia (No. 94-1941).
33. See Brief for Petitioner at 10, Virginia (Nos. 94-1941, 94-2107).
35. Prospective VMI cadets receive a college catalog from the institution that plainly notes this distinction. See Ruberry, supra note 21, at A1.
37. This is not to say that women have not attempted to obtain admission to VMI. One of the first inquiries by a female was in 1974, but other female applicants have been few and far between. Explaining the lack of female applicants, one VMI official unfortunately joked, "Most people love their daughters." Bill Lohmann, VMI Fires First Shot in Court "Unfortunate," Says Justice Department, RICHMOND TIMES-DISPATCH, Feb. 6, 1990, at 1.
38. See Ruberry, supra note 21, at A1.
41. For instance, famed Southern Civil War General Thomas "Stonewall" Jackson taught at the Virginia Military Institute. See Asseo, supra note 3, at 1.
42. See Virginia, 116 S. Ct. at 2270.
43. See Brief for Petitioner at 10, Virginia (Nos. 94-1941, 94-2107); see also Paul M. Barrett, High Court to Hear Discrimination Case Over VMI's Policy of Excluding Women, WALL ST. J., Oct. 6, 1995, at B5.
44. Barrett, supra note 36, at B5. See also Barrett, supra note 43, at B5.
While a basic outline of the program is admittedly unfair to describe the utilization and benefits of the adversative method on young men at VMI, it will give the reader valuable insight into the program. In order to ensure that VMI cadets accept the school’s code of conduct, not only for their duration at VMI, but later in life, the adversative method is employed to make sure that incoming “rats” question all of their past life experiences. This method is accomplished by extreme physical discipline and a total lack of privacy: five cadets live in each room, locks are not allowed on the doors, windows must remain uncovered and, finally, bathrooms are accessible only through an outdoor path.

In addition to the adversative method, cadets are indoctrinated into a class system whereby each class of cadets is given specific duties. For instance, the most senior class is responsible for the application of the adversative method to the freshman class, creating the standards for the system and, moreover, to serve as mentors for individual freshman cadets. This unique method is invaluable to the mission of VMI and, as many experts in the area of education agree, to instruct young men.

Although often compared to the United States service academies, it should be noted that only a small fraction of VMI graduates serve in the armed forces. Unlike the service academies, whose sole job is to provide military training for the men and women who will lead the United States Armed Services, the military training at VMI is used as a tool to sharpen the intellect of its

45. One of the most noteworthy features of VMI is that students are expected to have a copy of "The Code of a Gentleman" in their possession at all times and abide by its rules. For a listing of the contents of this code, see Virginia, 116 S. Ct. at 2308-09 (Scalia, J., dissenting).

46. As explained by VMI officials, cadets are referred to as “rats" because, the rat is “probably the lowest animal on earth." Juliette Kayyem, Note, The Search for Citizen-Soldiers: Female Cadets and the Campaign Against the Virginia Military Institute — United States v. Commonwealth of Virginia, 30 HARV. C.R.-C.L. L. REV. 247, 248 (1995).

47. See Soderberg, supra note 34, at 17.

48. See id.

49. The school employs a single sanction honor code whereby the only penalty for violation is expulsion. See Julie M. Amstein, United States v. Virginia: The Case of Coeducation at Virginia Military Institute, 3 AM. U.J. GENDER & L. 69, 102 (1994).

50. See Brief of Petitioner at 11, Virginia (Nos. 94-1941, 94-2107).

51. From the beginning, several legal commentators noted that the unique methods employed by VMI would bode well for the institution in a lawsuit against the U.S. Department of Justice. As Gary C. Leedes, a professor at the T.C. Williams School of Law at the University of Richmond, noted:

I think VMI has a much stronger case than many people think because the institution is so unique. . . . If the Justice Department prevails, it wouldn't just be a matter of letting people attend classes. It would require radical restructuring of the whole institution. It would interfere with the legitimate objectives of the school.

Lohmann, supra note 37, at 1 (emphasis added).

52. See Brief of Petitioner at 11, Virginia (Nos. 94-1941, 94-2107).


54. See, e.g., Virginia, 116 S. Ct. at 2281 ("Women's successful entry into the federal military academies . . . indicate the Virginia's fears for the future of VMI may not be solidly grounded.").

55. See Oral argument, Virginia, 1996 WL 16020, at *4. See also VMI I Dist. Court, 766 F. Supp. at 1430 ("The mission of the federal service academies is to prepare cadets for career service in the armed forces. This is very different from the mission at VMI. . . . VMI has gone to considerable lengths to assure the public that [it] is simply not a military college.").

56. See Brian Scott Yablonski, Comment, Marching to the Beat of a Different Drummer: The Case of
young students. So while it may be true that the service academies became coeducational in the 1970s, the fact that they no longer utilize the adversative method means that they do not provide a useful guide for institutions such as VMI or, for that matter, The Citadel. These two schools, unlike the service academies, utilize the adversative method as a means rather than an end.

III. STATEMENT OF THE CASE

A. VMI I: VMI's Method is Particularly Suited for Young Men, but Virginia should Provide a Similar Institution for Women

In 1990, prompted by the disgruntled plea of an anonymous female high school student in Northern Virginia, who was disappointed that she could not attend the Virginia Military Institute, the United States Department of Justice launched a one year investigation of the school. On January 30, 1990, the United States Department of Justice, in a letter sent to then Governor of Virginia, Douglas Wilder, and Joseph M. Spivey III, President of the VMI Board of Visitors, announced that it had found VMI's male only policy violated the Fourteenth Amendment and the Civil Rights Act of 1964. The letter threatened that, unless VMI's policy was changed, the Justice Department would file suit. Much like the eager Confederates of VMI's last major struggle against the federal government, Virginia Attorney General Mary Sue Terry filed a

the Virginia Military Institute, 47 U. MIAMI L. REV. 1449, 1468 (1993).

57. "The admission of women in 1976 [to the United States Military Academies], came not by court decree, but because the people, through their elected representatives, decreed a change." Virginia, 116 S. Ct. at 2293 (Scalia, J., dissenting).


59. See Vesely, supra note 28, at B4 ("It wasn't easy for women in the service academies, but frankly, it's not easy for anybody. But the essential question — whether women can succeed in the U.S. service academies, is now moot.").

60. Like VMI, The Citadel, located in Charleston, South Carolina, came under similar attack for its male only admission policy. Shannon Faulkner, although initially accepted as a cadet, was subsequently rejected upon discovery that she was a female. Shortly after a court injunction allowed her to attend the Citadel, Faulkner quit. Spending every minute after her initial morning of "knob hell week" in the infirmary, Faulkner was a dismal champion for women's rights. In the wake of the recent VMI decision, The Citadel has reluctantly decided to become co-educational. See Wes Allison, Welcome was Rude, but Women Take Oath, Several Cried at The Citadel, and 1 Male Quit, RICHMOND TIMES-DISPATCH, Aug. 27, 1996, at B4.

61. In the oral arguments before the Supreme Court on January 17, 1996, Justice Ginsburg, the author of the opinion, stated, "If women are to be leaders in life and in the military, then men have got to become accustomed to taking commands from women, and men won't become accustomed to that if women aren't let in." Oral Argument, Virginia, available in 1996 WL 16020, at *10.

62. This student has remained anonymous. See Lohmann, supra note 25, at 1. For an intriguing analysis of the U.S. Department of Justice's decision to proceed without a named plaintiff, see Kayyem, supra note 46, at 266 ("If formulating constitutional challenges around a specific plaintiff's harms shapes judicial relief and society's ability to recognize injustice.").

63. See Lohmann, supra note 25, at 1.

64. See id.

65. See id.

66. The Confederate army fired the initial shots at the Battle of Fort Sumter on April 12, 1861. See ROLAND, supra note 1, at 33.

67. Ironically, Attorney General Mary Sue Terry was the first woman elected to statewide office in
TULSA LAW JOURNAL

lawsuit in United States District Court demanding the court rule that VMI's male only policy was legal and thus avert the costly legal battle that would necessarily ensue with any battle against the federal government.68

As promised, the Department of Justice filed a countersuit against VMI, its Superintendent and Board of Visitors, the State Council of Higher Education, Governor Wilder and the Commonwealth of Virginia on March 1, 1990.69 Restating the allegation that VMI's male only admission policy violated the Equal Protection Clause of the Fourteenth Amendment, the Justice Department sought to permanently enjoin VMI from refusing to admit women.70 Virginia countered with the argument that admitting women would radically transform the VMI educational experience, "result in unnecessary duplication of existing coeducational undergraduate academic and ROTC programs already offered to women within the Virginia system of higher education," and destroy VMI's adversative method of education.71 Moreover, Virginia asserted that VMI's admission policy was in accord with the Commonwealth's interest in maintaining diversity in higher education.72

Judge Jackson Kiser, United States District Court, after a trial of six days, concluded that VMI's policy did not violate the requirements of the Fourteenth Amendment's Equal Protection Clause.73 In analyzing the school's policy, Judge Kiser applied the intermediate scrutiny test, which mandates that any state sanctioned sexually discriminatory practice must be substantially related to an important governmental objective.74 More particularly, he found that Virginia's recognized policy of diversity in higher education was an important governmental objective.75 The admission policy of VMI, creating a single sex institution and, hence, diversity, was thus constitutionally sound. Although admitting that women would not be able to attend this unique institution,76 he noted that any unique aspect of the institution would be destroyed with the admission of women,77 rendering VMI substantially similar to the coeducational experience offered at another Virginia university, the Virginia Polytechnic Institution.78

Virginia's history.

68. See Lohmann, supra note 37, at 1. Much like the enthusiasm displayed at the start of the Civil War by newspapers on both sides, so too was this lawsuit greeted in Virginia. For instance, this article began, "Surrender, hell." Id.
69. See Russo & Scollay, supra note 36, at 1074.
70. See id.
71. Lohmann, supra note 37, at 1.
72. See id. ("[The People of the Commonwealth of Virginia] believe that VMI's academic mission contributes to the diversity and balance of higher education' in Virginia. . . . We [at VMI] reaffirm our current academic mission and admissions policy as a part of Virginia's rich and diverse educational heritage.").
73. See VMI I Dist. Court, 766 F. Supp. at 1415.
74. See id. at 1410.
75. See id. at 1411.
76. See id. at 1414.
77. See id. at 1412 ("Expert testimony established that, even though some women are capable of all of the individual activities required of VMI cadets, a college where women are present would be significantly different from one where only men are present."). See also id. at 1414 ("Even if the female could physically and psychologically undergo the rigors of the life of a male cadet, her introduction into the process would change it. Thus, the very experience she sought would no longer be available.").
78. Virginia Polytechnic Institution ("VPI"), more commonly referred to as, "Virginia Tech," is a coedu-
On April 8, 1992, the Fourth Circuit heard arguments and rendered its opinion four months later. While admitting that the presence of women would destroy VMI’s adversative method, the Fourth Circuit still found that Virginia violated the Equal Protection Clause: Virginia’s daughters were not offered a public, single-sex institution of comparable quality. Rather than mandating the admission of women, however, the court outlined three possible remedial actions to cure the Constitutional defect: (1) make the necessary changes to VMI and admit women; (2) transform VMI into a private institution; or (3) establish a similar college or program to VMI for women or where women could attend.

After the Fourth Circuit denied Virginia’s request for a rehearing en banc, a petition for a writ of certiorari was made to the United States Supreme Court. Although denying the petition on the grounds that a final judgment had not yet been rendered, Justice Scalia commented, “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.”

B. Virginia’s Remedy: Virginia Women’s Institute for Leadership

In an effort to comply with the Fourth Circuit’s decision, Virginia created a Task Force in 1993 to formulate a program comparable to VMI for women. The Task Force suggested that the state could accomplish this goal with the founding of the Virginia Women’s Institute for Leadership (VWIL) at Mary Baldwin College, a private women’s liberal arts college founded in 1842, and located in Staunton, Virginia. A leader among liberal arts colleges, the lead-
ership program designed by the Task Force was intended to prepare women for the same goals as VMI: leadership in the civilian and military life.90

Rather than endeavoring to do the impossible, create an exact replica of VMI for women,91 the Task Force instead utilized methods best catered to women’s needs.92 By employing the advice of numerous experts and consulting educational literature,93 the Task Force concluded that “an organized and disciplined environment which has as its purpose the building up of self-confidence through mastery of physical, intellectual, and experiential challenges . . . is the optimum environment for the education and training of women leaders,”94 rather than the adversative or doubt-inducing method95 applied at VMI. VWIL students would undergo ROTC exercises96 in addition to other military training.97 Despite the initial skepticism of feminist critics, VWIL has done extremely well, currently enrolling eighty women in the leadership program.98

Although not VMI, Mary Baldwin College and the VWIL program offer substantial benefits to the women enrolled in the program. Among regional liberal arts colleges, Mary Baldwin College has been ranked first in the South.99 Additionally, students at Mary Baldwin College benefit from Virginia tax funds in the amount of $5,900 a year per student, approximately what the state pays for each cadet at VMI.100 Tremendous financial support from VMI alumni helped implement VWIL and, moreover, the alumni offered to give VWIL a $5.5 million endowment upon court approval of the remedial plan.101 Finally, access to the extensive network created by VMI alumni over the school’s 139 year existence has been freely given to all students enrolled at VWIL.102

90. See Respondents Brief at 1-2, Virginia (Nos. 94-1941, 94-2107).
91. Indeed, “[m]any of the women at Mary Baldwin College say they wouldn’t want to attend VMI even if they could.” Gender Barriers Falling Down, supra note 5, at 20.
92. For a listing of gender-based differences that suggest the VMI adversative method is not suitable for women, see VMI I Dist. Court, 766 F. Supp. at 1432-35.
93. Expert literature is resoundingly in favor of the methods created at VWIL. See, e.g., Caplice, supra note 53, at 259; Elizabeth Fox-Genovese, Strict Scrutiny, VMI, and Women’s Lives, 6 SETON HALL CONST. L.J. 987, 988 (1996); Dr. Beth Willinger, Single Gender Education and the Constitution, 40 Loy. L. Rev. 253, 255 (“Research findings reveal that single-sex schools have a significant positive impact on women.”); Yablonski, supra note 56, at 1465-67.
94. Respondent’s Brief at 6, Virginia (Nos. 94-1941, 94-2107).
95. See VMI I Dist. Court, 766 F. Supp. at 1421.
96. Major General Robert E. Wagner stated that “students with only ROTC training fared as well, if not better, than those students, like those at VMI, who live a co-curricular lifestyle.” Kayyem, supra note 46, at 260.
98. See Allison, supra note 13, at A1. Perhaps more importantly, Mary Baldwin College and the Commonwealth of Virginia plan to continue the VWIL program despite the Supreme Court’s decision. See id.
99. See Respondent’s Brief at 2-3, Virginia (Nos. 94-1941, 94-2107).
100. See Caplice, supra note 53, at 273.
101. See Respondent’s Brief at 11, Virginia (Nos. 94-1941, 94-2107).
102. See id.
C. VMI II: VWIL, Although Separate, is Equal to VMI

Having implemented a women's equivalent of VMI and expended a considerable amount of money, Virginians rightly believed they had complied with the Fourth Circuit's mandate. On April 29, 1994, the United States District Court, Judge Jackson Kiser presiding, agreed. Specifically, Judge Kiser found: (1) to honor the Fourth Circuit's ruling, Virginia had neither to allow the admission of women at VMI nor create an exact replica of VMI;¹⁰³ (2) the substantive differences between VMI and VWIL are irrelevant, as the state has "finite resources and it must identify demand for the various alternatives in higher education in the Commonwealth and allocate its resources accordingly"¹⁰⁴; (3) differences in housing accommodations between VWIL and VMI are particularly suited for the specific methods of teaching utilized by each program;¹⁰⁵ (4) ROTC training offered at VWIL offset any disadvantage in military training obtained by students at VMI;¹⁰⁶ and (5) the pedagogical differences between men and women justified the different methodologies employed by VMI and VWIL.¹⁰⁷ Quite simply, Virginia had successfully created a separate but equal institution, remedying any Equal Protection violation by giving its daughters an institution comparable to that provided for its sons.¹⁰⁸

Undaunted from the failure of its efforts, the Justice Department appealed the case to the United States Court of Appeals for the Fourth Circuit. Due to the unique aspects of a VMI education, according to the Justice Department, VWIL was not an appropriate remedy and, therefore, court ordered admission of women to VMI was the only answer to the Equal Protection violation.

With only one judge dissenting,¹⁰⁹ the Fourth Circuit upheld the VWIL program, but mandated that the District Court, when supervising the implementation of VWIL, ensure that VWIL (1) employ an extraordinary individual, compensated accordingly, to enhance the chances of the program's success;¹¹⁰ (2) heavily recruit qualified students;¹¹¹ (3) receive a guarantee of financial support from the Commonwealth of Virginia;¹¹² and (4) undergo significant review by qualified experts to assess the program's ability to provide "a quality bachelor's degree . . . [and] the additional element of taught discipline and leadership training for women."¹¹³

103. See VMI II Dist. Court, 852 F. Supp. at 475.
104. Id. at 477.
105. See id. at 477-78.
106. See id. at 478.
107. See id. at 480-81.
108. "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. The defendants' Proposed Remedial Plan will be approved." Id. at 484.
109. Senior Judge Phillips, dissenting, said about VWIL as a remedy for the Equal Protection violation simply, "It will not work." VMI II Circuit Court, 44 F.3d at 1251 (Phillips, J., dissenting).
110. See id. at 1242.
111. See id.
112. See id.
113. Id.
On the verge of victory, the citizens of Virginia were cruelly dealt another blow when the United States Supreme Court granted certiorari to hear the case. Once again contending that VWIL could never remedy the Equal Protection violation unless VMI admitted women, the Justice Department, now with the substantial backing of the Clinton White House, pressed forward.

IV. UNITED STATES V. VIRGINIA: THE DECISION

A. Issues Presented

From the beginning of Justice Ginsburg's opinion, it was apparent that Virginia had lost the case. Rather than focusing on the Constitutionality of the remedial plan adopted by Virginia, the Court started anew. The first question the Court examined was not whether the Equal Protection guarantee of the Fourteenth Amendment was violated by Virginia's decision to not admit all women, but only those women "capable of all of the individual activities required of VMI cadets." Only after thoroughly thrashing the reasoning and findings of fact made by the District Court did Justice Ginsburg address the second issue: if VMI's exclusionary policy offends the Constitution, what is the remedy?

B. The Holding

The Supreme Court denied certiorari in VMI I and reversed the Fourth Circuit Court of Appeals in VMI II. In VMI I, the Fourth Circuit Court of Appeals held that Virginia had made an adequate showing of the benefits derived from single-gender education, but remanded the case to the District Court for a showing of how only one public single-sex college could advance the government's stated goal of diversity in education. In VMI II, the Fourth Circuit Court of Appeals held that VWIL provided a comparable institution for Virginia women and, as such, remedied Virginia's Equal Protection violation. In short, the Supreme Court made two rulings: (1) Virginia failed to set forth an adequate justification for excluding women from VMI; and (2)


115. The Court's emphasis on the fact that even if only one female were able to withstand the traditional challenges of males at VMI seems to dissipate the message Ginsburg was trying to state: men and women are equal. While the cognitive equality of men and women is obvious, it is patently obvious that men and women do not share physical equality. For instance, a man cannot become pregnant. Stated as such, it is obvious that inequality does not necessarily entail inferiority or, conversely, superiority. See also Edwin M. Yoder, Jr., Editorial, Supreme Court Makes a Regrettable Decision on VMI, GREENSBORO NEWS & RECORD, July 2, 1996, at A9 ("But unlike [race based] discrimination, discrimination based on sex has empirically observable foundations in biological differences as well as long custom and tradition. X and Y chromosomes and hormones don't discriminate; they simply are.").


117. See id.

118. See VMI I Circuit Court, 976 F.2d at 898-900.

119. See VMI II Circuit Court, 44 F.3d at 1240-41.
VWIL was not a comparable institution and, therefore, not an adequate remedy for Virginia’s Equal Protection violation.

C. The Decision

The decision in United States v. Virginia was wholly against the Supreme Court’s prior decisions. Rather than utilizing the intermediate scrutiny test, the test normally employed to review state based gender discrimination, the Supreme Court articulated a vague new standard. The standard seems to lie somewhere between intermediate scrutiny and strict scrutiny, but it is unclear at what latitude this new test is found. Furthermore, the Supreme Court failed to give credence to the District Court’s findings of fact, clearly contrary to long-established law. In the end, the Supreme Court’s blatant use of Constitutional power to advance personal beliefs can only be characterized as extremely frightening.

D. The Majority Opinion

The first issue the Supreme Court examined was whether Virginia could avoid an Equal Protection violation by only allowing males to attend VMI. Although the level of scrutiny the Supreme Court has applied to government classification based on sex has fluctuated, eventually it was settled, or thought to be settled, that the intermediate scrutiny test would be the law of the land. Quite simply, the intermediate scrutiny test mandates that any gender-based classification by the government must be substantially related to an important governmental interest.

In 1982, however, the Supreme Court in Mississippi University for Women v. Hogan, in an opinion written by Justice O’Connor, applied the intermediate level scrutiny with a “flare.” In the context of the opinion, Justice O’Connor added that an “exceedingly persuasive justification” must be shown by the government for any gender-based classification. Due to the vigorous dissents, the “exceedingly persuasive justification” was not thought to be a new standard, but simply the poetic vexing of a new justice. In other words, the use of the phrase “exceedingly persuasive justification” was thought to be an

120. Until 1971, and the case of Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court had utilized the “mere rationality” test. To satisfy this test, the government had to merely show that the classification or statute was rationally related to some legitimate state objective. For an application of this test, see Goesaert v. Cleary, 335 U.S. 464 (1948). In Reed, however, the Supreme Court purported to apply the mere rationality test, but clearly demanded more, applying what some have called “rational basis with bite.” Gayle Lynn Pettinger, Note, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name, 62 IND. L.J. 779, 780 (1987). Finally, before arriving at the intermediate scrutiny test, a divided Supreme Court held that classifications based on sex would utilize strict scrutiny, the same test used for race. See Frontiero v. Richardson, 411 U.S. 677, 688 (1973).
122. This was the test employed at all phases of the VMI litigation except the Supreme Court. See, e.g., VMI I Dist. Court, 766 F. Supp. at 1410.
124. Id. at 731.
125. See Virginia, 116 S. Ct. at 2288 (Rehnquist, J., concurring).
elaboration on the intermediate scrutiny test, not a new and higher standard of scrutiny.

Rather than applying the traditional intermediate scrutiny test, the Supreme Court in United States v. Virginia adopted a new standard, incorporating the wording of Justice O'Connor in Mississippi University for Women. In order to pass Equal Protection scrutiny, any state based gender discrimination action must at least meet the intermediate scrutiny test. Then, according to Justice Ginsburg, the state "must demonstrate an 'exceedingly persuasive justification' for that action." The task for Virginia was twofold. First, Virginia had to establish that the decision to only allow males to attend VMI was substantially related to an important governmental interest, thus satisfying traditional intermediate scrutiny. Second, Virginia had to prove that this justification was "exceedingly persuasive." Moreover, in examining the proffered justification, Virginia had to show the justification was genuine and that it did "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." The task was impossible.

Virginia's argument in defending VMI was quite simple: The governmental interest is diversity in education, which the funding of single-sex institutions provides. Obviously, the admission of women would destroy this diversity. Since it is patently obvious that Virginia's argument, as stated, satisfies intermediate scrutiny, the Court then forced the Commonwealth to explain why this was an "exceedingly persuasive justification." To answer this question, Virginia put forth primarily two justifications: (1) single-sex education not only contributes to diversity within the state's system of higher education, but also serves as an important educational tool for some students; and, (2) the admission of women would destroy the adversative method.

In short, the Court did not agree. While finding that single-sex education does provide some benefit to some students, the Court would not find that

126. See Virginia, 116 S. Ct. at 2275. In response to the Mississippi University for Women case, the Virginia Military Institute created a task force to study the possibility of admitting women and to make sure that the school's admissions policy was in compliance with the new ruling. After meeting from October of 1983 to May of 1986, the task force concluded that it "found no information that would warrant the change of VMI status as a single-sex college." VMI I Dist. Court, 766 F. Supp. at 1429.


128. Id. at 2275.

129. Id.

130. "The VMI system has unique educational and character benefits which can only be thoroughly gained in a single-sex environment. This is why, even after conscious and deliberate reconsideration, the people of Virginia and their elected representatives just a few years ago decided to maintain VMI as an all-male school." Thomas L. Jipping, Editorial, Social Engineering Courtesy of the Supreme Court, Wash. Times, July 1, 1996, at A17.

131. Justice Ginsburg craftily phrases this argument in a different manner: "Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women." Virginia, 116 S. Ct. at 2279. By using "unmodified" instead of destroyed, Ginsburg makes it sound as if a simple change will allow the continuance of the adversative method, downplaying the drastic reality.

132. As one commentator sadly noted, "When the old VMI dies, much that is valuable in human quirkiness and educational variety will have been sacrificed to a judicial ideology that fall well short of eternal wisdom." Yoder, supra, note 115, at A9.
"VMI was established, or has been maintained, with a view to diversifying," 133 the system of higher education in Virginia. At the time of founding in 1839, women were wrongly excluded from most schools because it was considered dangerous to their health, 134 and, as such, women were excluded from VMI. Between 1884 and 1910, however, Virginia established four public female institutions. 135 Additionally, the Court made short work of a report by Virginia’s Commission on the University of the 21st Century, which stated that diversity was a goal, by referring to a statement within the report that it was “extremely important that [schools] deal with faculty, staff, and students without regard to sex, race, or ethnic origin.” 136 The Court also discounted the good faith effort of VMI’s task force that sought to insure compliance with Mississippi University for Women, finding that it failed to establish any state policy for diversity in education. 137 Thus, the Court found that Virginia did not have a legitimate and long-standing policy of diversity in education, but, to the contrary, a long and systematic history of deliberately discriminating against women. 138

Despite the Court’s seemingly persuasive argument, several fallacies 139 should be addressed. First, when VMI was founded in 1839, the Fourteenth Amendment did not exist, much less was it contemplated. 140 In fact, the only indication that Virginia had that it might be violating the Equal Protection Clause came in 1982 with Mississippi University for Women. Despite the fact that the opinion was supported by only five justices, VMI instituted a task force that studied the problem for three years to insure compliance with the law. 141 Virginia has never deliberately discriminated against women with regard to

133. Virginia, 116 S. Ct. at 2277.
134. Justice Ginsburg sets forth several marvelous examples that show how far women have progressed. One of the most interesting comments is that of Dr. Edward H. Clarke of Harvard Medical School who claimed, “the physiological effects of hard study and academic competition with boys would interfere with the development of girls’ reproductive organs.” Id. at 2277 n.9.
135. These schools are: Farmville Female Seminary College (1884), Mary Washington College (1908), James Madison University (1908), and Radford University (1910). See id. at 2278.
136. Id.
137. See id. at 2278-79.
138. In Justice Ginsburg’s words, “[T]he historical record indicates action more deliberate. . . . First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation. . . . That is not equal protection.” Id.
139. Not the least of such fallacies is that the majority “engaged less in construing the Constitution than in what is called ‘consciousness-raising.’” George F. Will, Editorial, Defenders of Diversity Kill a School of Choice, TULSA WORLD, July 3, 1996, at A14.
140. As Justice Stewart noted in City of Mobile v. Bolden, 446 U.S. 55, 74 (1980), “[P]ast discrimination cannot, in the manner of original sin, condemn government action that is not itself unlawful.”
VMI\textsuperscript{142} and the Court wholly fails to make a justifiable argument to the contrary.

The second fallacy that the Court quickly glosses over is the history of women's colleges in Virginia. Noting that all of the schools had become coeducational by the mid-1970's, the Court uses this fact as another example of Virginia's intentional discrimination against women. The problem with this argument is twofold: (a) in the 1970's most of the single-sex institutions in the United States were forced to become coeducational by economic mandate and popular sentiment;\textsuperscript{143} and (b) while VMI was left as the sole remaining single-gender public institution, women had four heavily state-supported private female colleges from which to choose.\textsuperscript{144} In a nutshell, economics dictated that VMI would remain the only single-sex institution in Virginia, not intentional or calculated discrimination. To penalize the citizens of Virginia, and their goal of diversity in education because of the harsh realities of economics, is a travesty and flagrant example of the abuse that typifies the countermajoritarian problem.

Having found that Virginia's argument concerning diversity was not "exceedingly persuasive," the Court next addressed the contention that admission of women to VMI would destroy the adversative method. From expert testimony, the District Court found that "at least three aspects of VMI's program — physical training, the absence of privacy and the adversative approach,"\textsuperscript{145} would be affected by the admission of women.\textsuperscript{146} Since Virginia conceded that at least some females could withstand the VMI system,\textsuperscript{147} Justice Ginsburg launched into a myriad of other examples where women had been denied opportunity based on "fixed notions concerning the roles and abilities of males and females."\textsuperscript{148} Relying heavily on instances of discrimination within various professions, Ginsburg dismissed Virginia's contention that the adversative method would be destroyed with the admission of women to VMI.\textsuperscript{149} Additionally,

\begin{itemize}
  \item[142.] The University of Virginia became coeducational in 1970 and its motives for denying admission to women is properly considered as deliberate discrimination. The reasons Virginia advanced for this belief were: "Women . . . "would encroach on the rights of men; there would be new problems of government, perhaps scandals; the old honor system would have to be changed; standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trampled in the dust."\textit{Virginia}, 116 S. Ct. at 2278 (quoting 2 THOMAS WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 255 (1929)). The honor system at the University of Virginia is still intact. The only prophecy that came true is that it is no longer viewed as a glorious school for men. Currently, the University, as it is referred to by alumni, Virginians and others, is comprised of approximately 52 percent females.
  \item[143.] See Brief for Petitioner at 6-7, \textit{Virginia} (No. 94-1941, 94-2107).
  \item[144.] These colleges are: Randolph-Macon Women's College, Mary Baldwin College, Sweet Briar College, and Hollins College. See id. at 7.
  \item[145.] \textit{VMI I Circuit Court}, 976 F.2d at 896-97.
  \item[146.] "But saying VMI can manage the change by doing away with its relentless lack of privacy and its rigorous physical requirements is a little like trying to get by without the apples in an apple pie. It's manageable. It's just not the same pie." Editorial, \textit{Without Honor}, WASH. TIMES, June 30, 1996, at B2.
  \item[147.] Even assuming some women could make it through the rigors of VMI, "almost everyone concedes that women will never benefit from VMI's distinctive virtues because with the admission of women, that VMI 'will no longer exist.'" Will, \textit{supra} note 139, at A14.
  \item[148.] \textit{Virginia}, 116 S. Ct. at 2280 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).
  \item[149.] The discrimination that Justice Ginsburg faced as an aspiring female in the male-dominated legal
\end{itemize}
Ginsburg argued that the success of the service academies illustrated that women can survive, indeed thrive, in a military institution.

Once again, Ginsburg's opinion neglects to examine the true facts. Whatever the justification for excluding women from the medical and legal field, ability in these areas is dictated by cognitive ability, not physical ability. The adversative method, on the other hand, is an extreme and continuing test of physical strength. Indeed, it is hard to ascertain any useful analogy between VMI's adversative method and the legal or medical profession.

Another aspect that Ginsburg fails to account for is the patent difference between the United States Service Academies and VMI. The service academies provide instruction for those that will eventually protect our country. VMI, on the other hand, sends only approximately 15 percent of its graduates into the armed forces. Admission to a service academy guarantees a free education, clothing, spending money and, perhaps most important, a job. VMI, however, does not offer any of these advantages. As such, it will be difficult and costly, if not completely impossible, for VMI to attract qualified applicants from what Ginsburg admits will be a small pool of qualified women. Finally and most importantly, despite the continuing vitality of the service academies and the achievement of women in the military, one undisputed fact remains: The admission of women into the service academies ended their use of the adversative method, precisely Virginia's reason for choosing to keep VMI all-male.

profession is well documented. While it is unfortunate that Justice Ginsburg faced these obstacles, her injection of these examples illustrates the problem with the opinion: Personal opinion has been injected to override the clear facts, and reason has given way to anger over past events. As was noted in the Wall Street Journal, "The victors in U.S. v. Commonwealth of Virginia were the feminist fringe and its supporters who would re-invent the Constitution to immortalize the 'smug assurances' they happened to acquire from certain professors in a rather narrow span of years — say, 1974 to now — at various colleges and law schools." This Most Illiberal Court, supra note 7, at A8.

150. "Justice Ginsburg insinuated that benighted male chauvinism, not enlightened educational thinking, was behind the exclusion of women from VMI. She recounted with disparagement days of yore when female admissions to higher education was fought as fiercely as the Spartans fought at Thermopylae." Bruce Fein, Editorial, Forced March to a Unisex Drumbeat, WASH. TIMES, June 28, 1996, at A20.

151. While warfare and schooling are different, the recent sex scandal plaguing the army has produced interesting commentary on the role of women in the military and somewhat analogous conflicts of ideas. See Robert L. Maginnis, Editorial, Equality Isn't Sameness, USA TODAY, Nov. 20, 1996, at 12A.

Desert Storm commander Gen. Norman Schwarzkopf testified to Congress, "Decisions on what roles women should play in war must be based on military standards, not women's rights." On the modern battlefield, every soldier is a potential combatant, and all should have equal opportunity to survive. Women don't. That doesn't mean women and men aren't equal. They are, but equality is not sameness. [Women] have 50% less upper body strength and 70% of a man's aerobic fitness. . . . [T]he status of women in the armed services must be reviewed in light of reality instead of some mystical feminist agenda.

Id. 152. See VMI I Dist. Court, 766 F. Supp. at 1432.

153. Justice Ginsburg also seems to admit this fact: "Admitting women to VMI would undoubtedly require alterations necessary . . . to adjust aspects of the physical training programs." Virginia, 116 S. Ct. at 2284 n.19. See also VMI I Dist. Court, 766 F. Supp. at 1432 ("West Point has identified more than 120 physiological differences that exist between men and women. . . . The physiological differences between males and females identified by West Point's Office of Institutional Research are very real differences, not stereotypes."); Charley Reese, Editorial, VMI Decision is Latest in Disturbing Trend of Legislating by Fad, ORLANDO SENTINEL, July 11, 1996, at A17 ("When they decreed that the nation's military academies has to accept women, they soon discovered that women couldn't compete on an equal basis so, in effect, we now have two academy programs — one for males and one for females.").
In a decision of monumental importance to many men and women of Virginia, the Court's ill-reasoned opinion is regrettable. Diversity in education is a legitimate state interest and the undisputed fact remains that single-gender education is beneficial to some students. Additionally, the adversative method for which VMI is famed will come to an abrupt end with the admission of women. Despite these facts, however, the Court found that Virginia failed to set forth an “exceedingly persuasive” justification for excluding women from VMI. When an adjudicatory body makes decisions based on emotion rather than reason, it is clear that the “exceedingly persuasive” standard, whatever that means, will never be met.

The second aspect of the Court’s decision concerned whether or not Virginia had put forth an adequate remedy in its creation of the Virginia Women's Leadership Institute (VWIL) to satisfy the Equal Protection violation. A remedial decree, in the realm of Equal Protection, must place the person deprived of a right in the place he or she would have had the right not been violated. In an effort to satisfy the Court of Appeals' demand, Virginia created the VWIL located at Mary Baldwin College. While the Court's analysis seems clear and thoroughly coherent, a careful reading illustrates that, once again, passion overruled reason.

Virginia created VWIL with the hope of creating an institution that would allow women to achieve the same results as their male counterparts at VMI. As emphasized throughout this paper, the adversative method has been found a suitable tool for educating young men. On the other hand, expert testimony and relevant literature support the position that women tend to thrive in "cooperative environments." Armed with these facts, Virginia implemented the educa-

154. See Virginia, 116 S. Ct. at 2276-77.
156. "The public college whose hallmark is so-called ‘adversative’ training ... will never be able to duplicate that training in a coeducational setting." Editorial, The Imperial Supreme Court, WASH. TIMES, June 27, 1996, at A18. See also James Kilpatrick, Editorial, VMI: No Surprise, No "Victory", CINCINNATI ENQUIR-ER, July 11, 1996, at A10 ("What do a handful of young women seek at VMI and the Citadel? Whatever it is, their very presence will dissolve it. The rigor will be less rigorous, the surveillance less constant, the equality not so equal, the tormenting not so brutal.").
157. See Reese, supra note 153, at A17 ("The Supreme Court’s decision that the Virginia Military Institute must admit female students is both stupid and proof that appointing allegedly conservative people to the court will not prevent silliness.").
158. "The States and the Federal Government are entitled to know before they act the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek-a-boo." Virginia, 116 S. Ct. at 2295 (Scalia, J., dissenting). See also Will, supra note 139, at A14 ("[T]he logic [in United States v. Virginia] may forbid single-sex classes or ... government support for ... programs [like] shelters for battered women. ... What else? We will know when our robed masters tell us what single-sex programs have ‘exceedingly persuasive’ justifications."); Jipping, supra note 130, at A17 ("Single-sex education is important only if [the Supreme Court Justices] say so, based on whatever criteria they wish to use.").
159. In the context of VMI, founded in 1839, it is interesting to ponder at what stage this discrimination took place. On the one hand, it could be argued that the refusal to allow women in, regardless of the time, laws and prevalent social mores was still discriminatory and, therefore, wrong. On the other, however, one could trace the development of the equal protection doctrine and argue that this occurred, if at all, with the 1983 Supreme Court decision in Mississippi University for Women.
160. See Virginia, 116 S. Ct. at 2282.
161. "If VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether, and adopt a system that provides more nurturing and support for the students." VMI I Dist. Court,
tional tool best suited for women, the "cooperative method." 62 Despite this rational approach taken by Virginia, the Court once again found "the State has shown no 'exceedingly persuasive justification' for withholding from women... the experience... VMI affords." 63

In analyzing the VWIL program, Justice Ginsburg primarily relied on four factors to exemplify the inferiority of VWIL to VMI 64: (1) the faculty and students are of a lower overall caliber; (2) the curriculum is not quite as broad; (3) the financial resources are not the same; and (4) the degree lacks the prestige of those granted at VMI. 65

The first factor the Court relies on relates to the overall composition or tangible qualities of the two schools. Mary Baldwin College, according to the facts, has "an average combined SAT score about 100 points lower" 66 than the average score for VMI freshmen. 67 Also, the faculty holds fewer doctorate degrees and receives lower salaries than those at VMI. Based in part on these findings, the Court found Mary Baldwin College inferior to VMI. 68

While it is hard to argue with these findings, one point remained unanswered: school ranking. As established by U.S. News and World Report, Mary Baldwin College ranks third among regional liberal arts schools in the South. 69 On the other hand, VMI ranked in the third tier (comprised of the schools ranked 81-120) of national liberal arts colleges. 70 In short, Mary Baldwin College is an excellent school and, according to an objective reporting service, 71 superior to VMI. Additionally, at a time when the use of SAT scores to gauge student's potential has come under increasing attack, 72 it is surprising that Justice Ginsburg decided to give their use the stamp of Supreme Court approval. Finally, the fact that Mary Baldwin College’s faculty holds fewer doctorate degrees is probably due to the difference in the size of the faculties. 73 In any event, it is far from clear that Mary Baldwin College is in-

766 F. Supp at 1413.

162. "[T]he difference [between VMI and VWIL] is attributable to a professional judgment of how to best provide the same opportunity." VMI II Circuit Court, 44 F.3d at 1241.

163. Virginia, 116 S. Ct. at 2287.

164. If VWIL is indeed inferior to VMI, it is because "VWIL is a program appended to a private college, not a self-standing institution," id. at 2291, not because of the illogical reasons put forth by Justice Ginsburg.

165. The intangible factors that the Court alludes to are similar to those enunciated in Sweatt v. Painter, 339 U.S. 629 (1950).

166. "This approximately 100 point differential from VMI is within 30 points of the national average differences between young women and young men." VMI II Dist. Court, 852 F. Supp. at 501.


168. An outraged VWIL student bitterly stated: "The women at VWIL did not just settle for the program; we chose it. Proudly." Crystal Lynn Newcomb, Letters, Women Will Change VMI, USA TODAY, July 19, 1996, at 14A.


170. The difference between "regional" and "national" is largely a matter of the size of the institution.

171. See America's Best Colleges 1997, supra note 169, at 35.


173. Mary Baldwin College enrolls approximately 700 students, while VMI enrolls in excess of 1200. See Brief for Petitioner at 10, Virginia (Nos. 94-1941, 94-2107).
ferior to VMI. If ranking is a good indicator, Mary Baldwin College is, to the contrary, quite superior.174

The second prong of the Court's analysis, that "Mary Baldwin does not offer a VWIL student the range of curricular choices available to a VMI cadet,"175 is also ill-reasoned.176 Mary Baldwin College, as the Court notes,177 neither offers an engineering program, nor an emphasis on math and science classes.178 Additionally, the Court asserts that VMI has significantly more physical education facilities.179 What the Court fails to appreciate, however, is that the VWIL program is brand new.180 Given the many years experience utilized by the Virginia Legislature to shape the curriculum and facilities at VMI, it seems that the same should hold true for VWIL.181 This is not only fair play, but common sense.

Justice Ginsburg, in the third prong of the Court's analysis, tried to differentiate between the financial resources of the two schools. Since the Court accepted the fact that the State of Virginia agreed to provide equal funding for the two programs (VWIL and VMI),182 the Court's analysis should have stopped before it began. However, the Court did not stop and instead considered the endowments of the two schools provided by their respective alumni. For whatever reason,183 VMI's endowment is significantly larger than that of Mary Baldwin College. In order to remedy this situation, it is implicit in the Court's opinion that the donations of private VMI alumni would have to be matched by the taxpayers of Virginia to cure Mary Baldwin College's "deficient" $20.5

174. "MBC [Mary Baldwin College] has been listed among the top ten liberal arts colleges in the Southeast four times in the last eight years by U.S. News and World Report... MBC also has been listed in Best Buys in College Education, published by the New York Times." VMII Dist. Court, 852 F. Supp. at 501.

175. Virginia, 116 S. Ct. at 2284.


177. See Virginia, 116 S. Ct. at 2284.

178. "[The Commonwealth of Virginia] explained however, that demand at present would not justify an engineering program at MBC [Mary Baldwin College]. The Fourth Circuit... stated explicitly that one of the factors to be considered by this Court in evaluating any proposed remedy is the demand for aspects of a particular program." VMII Dist. Court, 852 F. Supp. at 477.

179. The Court observes:
For physical training, Mary Baldwin has two multi-purpose fields and one gymnasium. VMI has an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track.

Virginia, 116 S. Ct. at 2284-85 (internal quotation marks deleted).

180. As one commentator noted, "Good educational programs don't spring up like weeds. VMI has a long history; the alternative program for women at Mary Baldwin in Staunton has been in operation for only a year." Yoder, supra note 132, at A9.

181. "VWIL is a new venture and no one can predict with certainty its outcome. The evidence, however, supplies a reasonable basis for predicting success in attaining its stated goals. No doubt the program will need further adjustment as experience dictates..." VMII Dist. Court, 852 F. Supp. at 484.

182. See Virginia, 116 S. Ct. at 2285.

183. Other schools in the Commonwealth of Virginia do not have the large endowment that VMI possesses. For instance, Mary Washington College has an endowment of $15 million, James Madison, an endowment of $9 million, and Radford University, an endowment of $6 million. In short, Mary Baldwin College's endowment is "above average." VMII Dist. Court, 852 F. Supp. at 499.
million dollar endowment. In effect, the Court once again demanded the impossible.

Fourth and finally, the Court stated that the "VWIL student does not graduate with the advantage of a VMI degree." The Court pointed out that VWIL graduates will not have the same bond to VMI alumni that keep them "exceptionally close to the school" and the sense of history accompanying a VMI degree. Additionally, the Court argued that it is unclear whether VMI alumni will be as responsive to hiring VWIL graduates as they are to those from VMI.

While this argument represents the most legitimate attack on VWIL, the Court lacks clarity and reason in its analysis. First, the obvious should be restated: Mary Baldwin College is not VMI. VMI was founded in 1839, VWIL, on the other hand, was founded in 1995. It is ridiculous to require, much less believe, that Virginia could create a school or program that could have the force of history attached to it. Moreover, the VMI alumni association has agreed to share resources with VWIL and allow women access to their vast network of graduates. It is a fair indication of the Court's understanding of VMI and its graduates to doubt them on this promise, as "a VMI man's word is his bond."

Instead of giving "deference to legislative will," as the Court of Appeals did when reviewing Virginia's remedial plan, the Supreme Court embarked on a journey of repeatedly fallacious reasoning. In passing on the fate and traditions of an institution founded over one hundred fifty years old, it is both sad and frightening that the clear will of Virginia voters was so lightly regarded and the personal views of a few powerful, unelected officials forced on a democratic society. In short, the Supreme Court's decision af-

184. Virginia, 116 S. Ct. at 2285.
185. Id.
186. Mary Baldwin College was founded in 1842. VMI II Dist. Court, 852 F. Supp. at 499.
188. VMI II Circuit Court, 44 F.3d at 1236.
189. Adding insult to injury, Justice Ginsburg added a familiar barb to all Southerners by stating, "There is no reason to believe that the admission of women capable of all of the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the 'more perfect Union.'" Virginia, 116 S. Ct. at 2287 (emphasis added). If only women "capable" of all the activities required by VMI cadets are to be admitted, does not this really mean that Justice Ginsburg realizes that men and women are not equal?
190. See Terrance Sandlau, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653, 677 (1975) ("[The equal protection] clause does not reveal the values courts are to defend against legislative incursion . . . [V]alue choices necessarily undertake the selection of one or another principle, and . . . there is no escape from the risk that the principle selected will reflect values personal to the judge.") (citation omitted).
191. See Jipping, supra note 130, at A17.

Justice Ruth Bader Ginsburg has been an advocate for a particular sociological theory about men and women for decades. She founded the Women's Rights Project at the American Civil Liberties Union to argue that theory in court. Now, by writing the majority opinion in Virginia v. United States, she took the opportunity to impose that theory upon us in the name of the Constitution. We are now told that this theory — which posits essentially no differences between the sexes and has no tolerance for what the people may believe — is the only constitutionally permissible opinion on the matter.
firms the increasing dimensions of the countermajoritarian problem in today’s society. 192

E. Justice Scalia’s Dissent 193

Unlike the majority opinion, Justice Scalia’s opinion strictly adheres to established law and Constitutional principles. 194 Stating that the majority “rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people,” 195 in order to reach its result, Scalia quickly and thoroughly disposes of Justice Ginsburg’s fallacious reasoning. Moreover, Scalia condemns the majority’s implication of strict scrutiny to gender-based governmental classifications as “irresponsible, insofar as they are calculated to destabilize current law.” 196 By giving a brief overview of Scalia’s opinion, it will become clear that Virginia should have been allowed to maintain VMI as an all male institution.

Rather than apply the amorphous “exceedingly persuasive justification” test that the majority employed, Justice Scalia utilized the historically correct standard, 197 intermediate scrutiny. Quite simply, this test mandates that any gov-

Id. See also Georgie Anne Geyer, Editorial, Grim, Radical Feminists Seek Homogeneity, COLUMBUS DISPATCH, July 11, 1996, at 11A (“I was an . . . impassioned, feminist. . . . We early feminists wanted men and women to be treated fairly and equally. . . . [T]he new feminists . . . want not harmony but homogenization. They live not for equality but for getting even, and they essentially want a world in which nobody is happy.”).

192. See Editorial, VMI: Judicial Overreach, DETROIT NEWS, June 28, 1996, at A14 (“Thus, the court’s ruling in striking down single-sex education at the all-male, state-supported Virginia Military Institute (VMI) is a particularly arrogant and destructive abuse of judicial power.”); see Fein, supra note 150, at A20 (“It is no business of the U.S. Supreme Court to fast-forward what may be socially or culturally inevitable.”); see The Imperial Supreme Court, supra note 156, at A18 (“Any notion of modesty, either in deference to the traditional role of a judge. . . or with regard to the propriety of imposing one’s views upon a reluctant populace attached to the quaint notion that they, through their elected representatives, rule themselves-well, that modesty is absent in this court majority.”); see Yoder, supra note 132, at A9 (“But these are national institutions [the United States service academies] whose admissions policies, whatever one may think of the gains and losses involved, reflect the judgment of Congress, not a judicial ideology imposed by seven judges.”); see Jipping, supra note 130, at A17 (“the importance of single-sex education to the people of Virginia means nothing. The traditions. . . mean nothing. The diversity that VMI gives to the educational opportunities funded by the people of Virginia means nothing.”); see Editorial, Without Honor, WASH. TIMES, June 30, 1996, at B2 (“Virginia lawmakers are no match for the lawmakers-for-life on the high court.”); see Editorial, Litigation vs. Liberty, DAILY OKLAHOMAN, July 10, 1996, at 4 (“[T]he VMI decision continues the court’s dubious advance on the legislative responsibilities constitutionally invested in the states and in Congress.”); see Reese, supra note 153, at A17 (“Power does indeed corrupt, and the current court, with its lifetime appointments and its free hand to rewrite continuously the Constitution, has more power than any governor or legislature. When the black robes decide to play God before their next vacation, no law, rule, tradition or state constitution is safe.”).

193. Due to space limitations, the concurring opinion of Chief Justice Rehnquist will not be analyzed. In short, however, the Chief Justice explained: “I disagree with the Court’s analysis. . . . [T]he phrase ‘exceedingly persuasive justification’ . . . is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test.” Virginia, 116 S. Ct. at 2287-88 (Rehnquist, C.J., concurring).

194. In criticizing the majority, Scalia states that the majority’s opinion represents “not the interpretation of a Constitution, but the creation of one.” Id. at 2293 (Scalia, J., dissenting).

195. Id. at 2291.

196. Id. at 2295.

eighmental classification based on gender must be "substantially related to an important governmental objective."" In the context of VMI, the question presented to the District Court, the Fourth Circuit Court of Appeals and Scalia was whether Virginia had an important objective that was related to the exclusion of women from VMI. In answering this question, only two questions must be asked: (1) What is the object of Virginia’s pursuit and is it important?; and (2) Is this objective substantially related to Virginia’s decision to exclude women from VMI?

The first question, regarding an important governmental objective, is easily answered. From the beginning of the lawsuit, Virginia maintained that, in order to provide quality and meaningful education to its citizens, diversity in higher education had been realized. By giving tax dollars to both public and private universities within the Commonwealth, Virginia had sought to maximize the educational choices that were economically possible.

Since VMI was capable of consistently attracting high caliber students and effectively educating them in a unique manner, the men and women of Virginia did not make it coeducational. On the other hand, as financial resources dried up and the traditionally state-supported female universities were unable to attract top students due to their single-gender status, Virginia made these institutions coeducational. In an effort to provide single-gender education for those women who desired its substantial benefits in the aftermath of co-education, however, Virginia elected to provide private universities with generous subsidies. In short, Virginia sought to present the broadest possible array of educational choices that were economically feasible. Resting on this theory, Virginia maintained that VMI added needed diversity to their system of higher education.

198. Virginia, 116 S. Ct. at 2296 (Scalia, J., dissenting).
199. See VMI I Dist. Court, 766 F. Supp. at 1419.
200. "Virginia’s financial resources, like any other State’s, are not limitless, and the Commonwealth must select among the available options." Virginia, 116 S. Ct. at 2297 (Scalia, J., dissenting).

Dr. Fox-Genovese testified that VWIL does not need to use the same methodology as VMI with respect to the rat line and the adversative system and that based upon her study of literature and people, there would be little demand for a female VMI but there would be much more significant demand for VWIL.
Since it is patently obvious that Virginia has an important state interest in providing quality education to its citizens, Scalia next addressed whether single-gender education was substantially related to that goal. Having already addressed Virginia’s desire to maintain diversity and the accompanying implicit fact that single-gender education adds diversity to a overwhelmingly coeducational system, it need only be established that VMI’s methods of education are a beneficial mechanism for instruction.

Overwhelming evidence supports the proposition that single-gender education is beneficial to some students. Students attending single-sex schools do not feel the sexual tension that affect their counterparts in the normal coeducational setting. Furthermore, students at single-sex colleges are more apt to interact with faculty, “show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of [the] college experience.” This increase in self-esteem also leads to the development of leadership values. Finally, students at single-sex colleges are more apt to pursue careers as doctors, professors and lawyers than students at traditional colleges and universities.

In short, it could not be any clearer that single-sex education is valuable and, as such, the maintenance of VMI as male only is a constitutionally sound goal of Virginia citizens.

Additionally, it is apparent, as Justice Scalia argued, that the method of instruction utilized by VMI, the adversative method, is beneficial to males, but not females. In the lengthy appendix of findings of fact made at the District Court level in VMI I, the evidence proved that “[m]ales tend to need an atmosphere of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor.” On the other hand, “young women, by the time they reach college, have less confidence in themselves than young men [and] . . . do not need to have uppityness and aggression beaten out of them,” but need a system that emphasizes cooperation and the reinforcement of self-esteem. In short, the adversative method works well for young men, but not at all for young women.

Justice Scalia’s dissent, in the grand scheme of the opinion, is worthless. Rather than waste precious paper and time, the appellate courts should develop a system similar to the directed verdict at the trial level. In perhaps no other case than United States v. Virginia would this method be more appropriate. According to the intermediate standard of scrutiny, the law of the land for years, Virginia needed to only show that the male only admission policy at VMI was substantially related to an important governmental interest. Given this
standard and the facts, as found by the District Court, Justice Scalia could have simply written, "I defer to the evidence."

V. CONCLUSION

In the wake of the United States v. Virginia opinion, it is necessary to reflect on the ramifications of the decision. First, the Virginia Military Institute was forced to either go private or admit women. Since this marks the end of one era and the beginning of another, sympathizers and detractors alike can only hope that female students like Amy Abraham\textsuperscript{210} will create a new tradition as grand as the old. Second, the Supreme Court articulated a vague new standard for gender discrimination that will probably cause more harm than good. While it is unclear how this new standard will be applied, it has already had a tremendous impact.

If the Supreme Court is willing to eliminate the Virginia Military Institute, it is unclear why this should not hold true for any single-gender institution. Justice Ginsburg tries to allay these fears by claiming that VMI is "unique." Given the evidence in VMI's favor, however, what will stop the Court from destroying Smith, Wellesley or Morehouse on the basis that they receive federally subsidized loans? Moreover, given this vague new standard, what state would possibly risk the costly expenses associated with litigating its right to provide single-gender education for its citizens?\textsuperscript{211} Innovative new programs that place young girls in single-sex math classes and troubled adolescent males in leadership programs, regardless of their value, simply lead to too many headaches to be seriously considered.\textsuperscript{212} After all, as United States v. Virginia demonstrates, it only takes one anonymous and disgruntled plea to start the costly wheels of litigation.

Despite having served the Commonwealth of Virginia for over one hundred-fifty years, the Virginia Military Institute has come to an abrupt end. The institution left in the aftermath of the Supreme Court's decision was not made by any democratic process, but the flawed reasoning of seven appointed justices. While the voters of Virginia must pay, literally, for this decision, their obvious preference in the matter was of no consequence. Although flagrant abuses of judicial power of this magnitude are rare, it is unfortunate that it happened in a case that meant so much to so many. Indeed, United States v. Virginia is a prime example of the countermajoritarian problem — and that is too bad.

Raymond F. Runyon

\textsuperscript{210} See Paul Leavitt, For First Time, VMI has Coed Open-House Weekend, USA TODAY, Oct. 21, 1996, at 3A. Miss Abraham was one of two women that came to the open house. See id.

\textsuperscript{211} See, e.g., Tamara Henry, Confusion Over Single-Sex Classes Fear of Lawsuits Make States Leery, USA TODAY, July 3, 1996, at 6D.

\textsuperscript{212} See e.g., Susan Estrich, Editorial, Laws Stand in Way of Single-Sex Schools, USA TODAY, July 25, 1996, at 15A ("The threat of litigation has been enough to deter most districts from experimenting with single-sex schools.").