

## Rethinking Educational Equity: Sometimes, Different Can Be an Acceptable Substitute for Equal

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# **Rethinking Educational Equity: Sometimes, Different Can Be an Acceptable Substitute for Equal**

*Kimberly M. Schuld†*

Several years ago, Jeremy N. Jungreis began an article about single-sex education<sup>1</sup> with two quotations that are appropriate to restate here:

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.

Justice Harry A. Blackmun<sup>2</sup>

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

Justice Potter Stewart<sup>3</sup>

Exact equality in a free society is a largely unattainable goal. In a society where a broad range of choices, options, and freedoms result in the unequal selection of those options by members of a

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† Special Projects Manager and Director of Play Fair for the Independent Women's Forum. The opinions expressed herein are the author's personal views and do not necessarily represent the official views or positions of the Independent Women's Forum. The author extends heartfelt gratitude to James C. Ho, University of Chicago Law School Class of 1999, for his encouragement and support in facilitating the author's participation with the *Legal Forum*.

<sup>1</sup> Jeremy N. Jungreis, *Holding the Line at VMI and the Citadel: The Preservation of a State's Right to Offer a Single-Gender Military Education*, 23 Fla St U L Rev 795, 795-96 (1996).

<sup>2</sup> *Mississippi University for Women v Hogan*, 458 US 718, 734 (1982) (Blackmun dissenting).

<sup>3</sup> *Jenness v Fortson*, 403 US 431, 442 (1971) (Stewart writing for the Court).

particular classification of people, a government can only guarantee exact equality by removing the freedom of choice. But at the heart of a free society is whether that broad range of choices, options, and freedoms is available to all members of society in an equal manner. The goal to be defined is how to measure the successes or failures of such a system. Should we examine the aggregate and presume that if vast majorities of people can achieve a certain benefit, then small differences are allowable? Or should we examine the outcomes of each and every choice for a proper representation or reflection of society at large? The cultural battle is between a macroscopic view of society and a microscopic view of individuals within that society, and which view should dominate.

Attention to the microscopic may be unrealistic as well as undesirable in maintaining a free society and culture such as that defined and protected by the Constitution of the United States. Laws and regulations governing a free society are best understood to be written and enforced for the macroscopic. In *United States v Virginia*,<sup>4</sup> the Fourth Circuit Court of Appeals wrote:

We recognize that all persons are in many important respects different and that they were created with differences, and it is not the goal of the Equal Protection Clause to attempt to make them the same. To apply law to different persons with a mind toward making them the same might result, among other things, in the unequal application of the law. Thus, no one suggests that equal protection of the laws requires that all laws apply to all persons without regard to actual differences.<sup>5</sup>

As our society strives to create an environment of non-discrimination, we should be cautious to avoid presuming that differences in outcomes automatically reflect inherent discrimination or discriminatory practices.

### I. MICROSCOPIC OR MACROSCOPIC DISCRIMINATION?

When the differences among various peoples within a group are their race or ethnicity, the courts have chosen to ignore such differences and to demand that no opportunity be denied any in-

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<sup>4</sup> 976 F2d 890 (4th Cir 1992).

<sup>5</sup> Id at 895.

dividual on that basis.<sup>6</sup> The government has established affirmative action programs not only to ensure that such differences are minimized — thereby satisfying the macroscopic view — but also to promote members of racial or ethnic minorities groups, thereby meeting the microscopic needs of individual people.<sup>7</sup> Disagreement exists within our society about the validity, effectiveness, and continuing need for such programs.<sup>8</sup> However, our society generally accepts that there is no difference between peoples of different races significant enough to warrant the denial of services or programs to particular classifications of those peoples on that basis.

But legitimate differences between the sexes present a problem for those who prefer a microscopic view of society. As the Independent Women's Forum wrote in its amicus brief in support of the Virginia Military Institute before the United States Supreme Court, "Racial classifications are subject to strict scrutiny because we regard racial differences as purely superficial. Differences between men and women, however, are real and substantial."<sup>9</sup> Pursuit of a macroscopic view of the effectiveness of how well we (as a society) make opportunities available to both sexes allows for accommodation of differences but may mask incidents of discrimination. On the other hand, measuring equality by examining microscopic outcomes may satisfy a particular legal question

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<sup>6</sup> See *Adarand Constructors, Inc v Peña*, 515 US 200, 227 (1995) ("It follows from that principle that all governmental action based on race — a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' — should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.") (citation omitted).

<sup>7</sup> For example, the Disadvantaged Business Enterprise ("DBE") classification in government contracting allows minority and women-owned firms, which tend to be smaller and less experienced, an opportunity to bid on government contracts on an equal footing with larger, more experienced firms, which tend to be dominated by white male ownership. See 49 CFR § 26.5 (1998), which defines DBE as:

[A] for-profit small business concern — (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

<sup>8</sup> See, for example, Carol Goforth, "What is She?" *How Race Matters and Why It Shouldn't*, 46 DePaul L Rev 1, 84–107 (1996); Michael Braswell, Gary Moore, and Stephen Poe, *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 Albany L Rev 365, 431–40 (1993).

<sup>9</sup> Brief *Amici Curiae* of the Independent Women's Forum, Women's Economic Project, Diana Furchtgott-Roth, Linda Chavez, Lynne V. Cheney, Christina Hoff Sommers, Abigail Thernstrom in Support of Respondents at 3, *United States v Virginia*, 518 US 515 (1996) ("IWF 1995 Brief"), available at 1995 WL 745003.

but defies common sense or the reality of how society-at-large operates.<sup>10</sup>

The struggle between macroscopic and microscopic views of gender equality came to the courtroom in the case of the Virginia Military Institute's ("VMI")<sup>11</sup> and The Citadel's all-male admission policies.<sup>12</sup> Both cases questioned the level of scrutiny to be used in sex classifications under the Equal Protection Clause of the Fourteenth Amendment.<sup>13</sup> This clause states that laws should be applied equally to all persons within legally cognizable classes. "However, a government is not required to regulate different classes of people identically under all circumstances."<sup>14</sup> Thus, the Equal Protection Clause accommodates the principle that some classes of people are inherently different as the court wrote in *Faulkner v Jones*<sup>15</sup>: "Fundamental injustice would undoubtedly result if the law were to treat different people as though they were the same."<sup>16</sup>

Courts consider governmental action that affects people differently on the basis of race or national origin to be inherently suspect.<sup>17</sup> Suspect classifications are subject to "strict scrutiny" by reviewing courts under a two-prong analysis: the government authority must demonstrate a compelling state interest for the discriminatory classification, and it must demonstrate that the

<sup>10</sup> For example, women can legally work as the Santa at the shopping mall but would a woman have the same credibility as a portly, older man in portraying the mythical figure? We do not hear of many lawsuits demanding that women play Santa in numbers proportional to their demographic profile. Similarly, many private country clubs have voluntarily opened their doors and golf courses to women, but we do not demand that all women participate in golf to justify their access to the club.

<sup>11</sup> The Virginia Military Institute is a state-funded military college in Lexington, Virginia. In 1991, the United States Department of Justice filed a complaint against VMI's admission policy on behalf of an anonymous woman from Virginia, see *United States v Virginia*, 766 F Supp 1407 (W D Va 1991), vacated, 976 F2d 890 (4th Cir 1992), cert denied, 508 US 946 (1993).

<sup>12</sup> The Citadel is a state-funded military college in Charleston, South Carolina. In 1993, Shannon Faulkner filed suit against the Citadel, challenging its admission policy. See *Faulkner v Jones*, 10 F3d 226 (4th Cir 1993).

<sup>13</sup> US 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 *Gaines v Canada*, 305 US 337, 343-44 (1938) (holding that University of Missouri curators were state actors).

<sup>14</sup> Jungreis, 23 Fla St U L Rev at 803 (cited in note 1), citing *Faulkner v Jones*, 10 F3d at 230.

<sup>15</sup> 10 F3d 226 (4th Cir 1993).

<sup>16</sup> *Id* at 230.

<sup>17</sup> *Id* at 230-31 ("Thus, a classification based on race or national origin or which affects fundamental rights secured by the Constitution is examined most closely because the classification is deemed inherently suspect.").

compelling state interest is advanced by the least restrictive means possible.<sup>18</sup>

Regulations that discriminate on the basis of a person's gender are not "inherently suspect" so as to require strict scrutiny.<sup>19</sup> Rather, gender-based classifications receive a mid-level form of review that is described as "intermediate scrutiny."<sup>20</sup> Whether courts should subject gender classifications to strict scrutiny received extensive review as the VMI case made its way to the United States Supreme Court.<sup>21</sup> The modern standard of "intermediate scrutiny" was set forth in *Craig v Boren*, requiring 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.'"<sup>22</sup>

As the Court prepared to review the VMI case, a number of organizations filed amici briefs urging the justices to apply either strict scrutiny or less stringent intermediate scrutiny to gender classifications.<sup>23</sup> However, the principle of applying strict scrutiny to gender classifications was less a discussion about what the drafters of the Fourteenth Amendment intended, and more a debate over stereotypes and roles in society.

The parties' and amici's debate over stereotypes amounted to a debate on a microscopic or macroscopic view of gender equity.

<sup>18</sup> *Id.*

<sup>19</sup> See *Michael M. v Superior Court of Sonoma County*, 450 US 464, 468 (1981) ("[W]e have not held that gender-based classifications are 'inherently suspect' and thus we do not apply so-called 'strict scrutiny' to those classifications.")

<sup>20</sup> *Faulkner*, 10 F3d at 231. There are numerous discussions about the history and development of intermediate scrutiny and whether gender is deserving of the strict scrutiny afforded to race classifications. See generally, Jungreis, 23 Fla St U L Rev 795 (cited in note 1); William Henry Hurd, *Gone With the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 Duke J Gender L & Pol 27, 45-49 (1997); Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make the Grade?*, 4 Duke J Gender L & Pol 69, 71-73 (1997).

<sup>21</sup> *United States v Virginia*, 852 F Supp 471 (W D Va 1994), *affd*, 44 F3d 1229 (4th Cir 1995), *revd*, 518 US 515 (1996).

<sup>22</sup> 429 US 190, 197 n 6 (1976), quoted in Jungreis, 23 Fla St U L Rev at 806 (cited in note 1).

<sup>23</sup> See, for example, Brief of Mary Baldwin College as *Amicus Curiae* in support of Respondents at 28-29, 518 US 515 (1996) available at 1995 WL 744994 (opposing application of strict scrutiny because strict scrutiny will threaten federal funding of private women's colleges); Brief *Amicus Curiae* of the Center for Military Readiness, et al, in Support of Respondent at 16-21, 518 US 515 (1996) available at 1996 WL 744997 (arguing against use of strict scrutiny because strict scrutiny would require judicial interference in military policy choices); Brief of the Employment Law Center, et al, as *Amici Curiae* in Support of Petitioner at 21-22, 518 US 515 (1996), available at 1995 WL 702836 (urging Supreme Court to apply strict scrutiny to gender classifications because of discrimination women continue to face).

The Department of Justice argued for the microscopic position in its request that the Court adopt a standard of strict scrutiny for gender classifications.<sup>24</sup> The department contended that the Fourth Circuit had relied on "stereotypes" in upholding Virginia's remedial plan to continue an all-male military program at VMI and operate a parallel Virginia Women's Institute for Leadership ("VWIL") at the private, all-female Mary Baldwin College.<sup>25</sup> The Respondents countered with a macroscopic argument that the lower court had addressed legitimate sex differences and had not employed stereotypes.<sup>26</sup>

As amici in support of the Petitioners, the National Women's Law Center urged a microscopic view by suggesting that the remedial action was itself discriminatory.<sup>27</sup> As amici for the Respondents, the Independent Women's Forum countered with a macroscopic argument that sex differences are real and allowing for them to exist is not necessarily discriminatory.<sup>28</sup>

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<sup>24</sup> Brief for the Petitioner at 33, 518 US 515 (1996), available at 1995 WL 703403. In its opening brief to the Court, the Justice Department as Petitioner argued that "strict scrutiny is, in fact, the correct constitutional standard for evaluating differences in official treatment based on sex."

<sup>25</sup> Id ("There are substantial, undisputed differences between VMI and VWIL that render VWIL unable to provide to women what they are denied at VMI. Nor are those differences the product of happenstance; they are deliberate and are unconstitutionally premised on explicit and archaic sex-based stereotypes and generalizations about the sociological and psychological characteristics women and men.")

<sup>26</sup> Brief for the Commonwealth of Virginia, et al, in Opposition at 23, 518 US 515 (1996), in 250 Gerald Gunther and Gerhard Casper, *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 65 (Univ Pubs of Am 1997):

Rather than relying on outdated stereotypes or unfounded presumptions about the respective roles of the genders, the courts below considered the most up-to-date sociological, psychological, and physiological research and expert opinion and found, based on a 'reasoned analysis' of the evidence, that real differences between adolescent men and women and between the optimum methods of educating them justify the methodological differences between VWIL and VMI. Neither the Constitution nor this Court's cases require more.

<sup>27</sup> Brief of National Women's Law Center, et al, at 1-2, 518 US 515 (1996), available at 1995 WL 703392:

Virginia's creation of a gender-stereotyped, separate and inferior program for women — the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College — cannot begin to remedy the constitutional deprivations of rights caused by the exclusion of women from VMI.

<sup>28</sup> IWF 1995 Brief at 5, available at 1995 WL 745003:

Men and women share many of the same human characteristics and in many ways are equally capable, but men and women also differ in significant ways. To compound the difficulty, male and female children have differences and similarities that change as they mature into adults. To apply the Equal Protection Clause intelligently in the case of a gender-

In the end, the Supreme Court majority opinion penned by Justice Ruth Bader Ginsburg, determined that VWIL was an inadequate remedy for VMI's discrimination against women,<sup>29</sup> without addressing directly the conflict between strict scrutiny and intermediate scrutiny.<sup>30</sup> The Court left the door open for sex-based classifications by stating that:

Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," to advance the full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.<sup>31</sup>

By allowing that sex classifications may be used in certain circumstances, the Court has left room for some sex-restricted or sex-limited activities such as single-sex schools or affirmative action programs for women.<sup>32</sup> However, the Court has also left

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based classification, one cannot assume, as one does in the case of race, that the classification is in all likelihood unjustified. Because there are real differences between men and women, a particular law treating them differently might be entirely justified. The only fair way to proceed is to undertake an open-minded inquiry into the substance and purpose of the classification.

<sup>29</sup> *United States v Virginia*, 518 US 515, 555 (1996) ("Valuable as VWIL may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade.")

<sup>30</sup> The majority opinion notes that "the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men)." *Id.* at 532. Further, "[t]o summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely on the State." *Id.* at 532-33. Continuing further, "[m]easuring the record in this case against the review standard just described, we conclude that Virginia has shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI." *Id.* at 534. By focusing on the responsibility of Virginia to prove a justification for an all-male school, the Court was not required to address directly whether strict scrutiny should or should not be applied to sex classifications, nor did it comment on whether this case contributed to the continued evolution of heightened review standards or intermediate scrutiny. See also *One More Male Bastion Bites the Dust*, 8 No 2, Feminist Majority Newsletter (Summer 1996) ("In the VMI ruling, the Supreme Court did not make any changes to the scrutiny level of sex discrimination.")

<sup>31</sup> *United States v Virginia*, 518 US at 533-34 (citations and footnote omitted) (alterations in original).

<sup>32</sup> See generally Denise Morgan, *Finding a Constitutionally Permissible Path to Sex Equality: The Young Women's Leadership School of East Harlem*, 14 NY L Sch J Hum Rts 95 (1997).



those of us on the outside where we were before *Virginia* started: debating stereotypes. Although it was not the Court's intent or duty in *Virginia* to define gender roles or stereotypes, absent an explicit ruling that sex classifications are subject to strict scrutiny, the cultural debate over what constitutes or perpetuates "economic inferiority of women," and whether women still need compensation, rages on.

## II. SEX DIFFERENCES: STEREOTYPES OR REALITY?

The debate over stereotypes and women's rights is not simply a battle between men and women, liberal and conservative. As Valorie Vojdik points out, the notion that our society would recognize and defer to differences between the sexes is threatening to some people:

Claims of difference are inherently dangerous. When invoked as a justification for denying women access to VMI, Virginia's claims of difference appeared disingenuous, an obvious rationalization for denying qualified women who would prefer a stressful educational experience from VMI. When invoked by well-meaning feminists or educators to justify sex-segregated education programs, claims that women have "different ways of knowing," speak in a "different voice," or utilize different management techniques, while heard by feminists as validation of qualities historically undervalued and attributed to women, are heard by the rest of society as justifications for excluding women and treating them differently.<sup>33</sup>

Throughout the VMI and Citadel cases, reporters, scholars, politicians, feminists, and judges used inflammatory terms such as "dangerous," "arcane," and "inferior" to describe the roles and positions attributed to women, and the ideas and notions held by men.<sup>34</sup> That the Fourth Circuit's acceptance of proven gender dif-

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<sup>33</sup> Vojdik, *Girls' Schools*, 4 Duke J Gender L & Pol at 85-86 (cited in note 20), quoting Mary Field Belenky, et al, *Women's Ways of Knowing* 3 (Basic Books 1997) and Carol Gilligan, *In a Different Voice* (Harvard 1982).

<sup>34</sup> Scott Jaschik, *Women's Colleges Disagree on VMI Case*, Chron Higher Ed A37 (Dec 1, 1995) (reporting that twenty-six women's colleges, in their brief urging the Court to force VMI to admit women "said that lower-court rulings allowing V.M.I. to remain all male were based on stereotypes that are dangerous to women and women's colleges"). See also Marcia D. Greenberger and Deborah L. Brake, *The VMI Decision: Shattering Sexual Stereotypes*, Chron Higher Ed A52 (July 5, 1996) ("It seems unthinkable that in today's world a state would limit a prestigious and unique educational program to men only, rele-

ferences was translated to define "men and woman [as] bipolar categories of persons"<sup>35</sup> seems particularly harsh. *Random House Webster's Unabridged Dictionary* defines "bipolar" as "characterized by opposite extremes."<sup>36</sup> Exactly when did "different" become "opposite" in discussing gender differences?

The battle ground over single-sex education is really a cultural battle over whether men impose stereotypes of women on society (microscopic), or whether there are differences between the sexes that can be defined and accepted (macroscopic). A microscopic focus of gender equity would examine individual interactions between males and females as a reflection of a larger societal trend. If "Sally" wants to go to a boys-only school, not only should she be allowed to, but all girls should be allowed access to every boys-only school so that in the future, potential "Sallys" are not denied access to any particular school. Discrimination is presumed by differences in outcomes.

A macroscopic perspective on gender equity would examine the whole of society and the conglomerate of its offerings to determine whether males as a group and females as a group are offered relatively similar opportunities to make individual choices. If Sally, as an individual, has the opportunity to attend other schools with offerings comparable to the boys-only school, the macroscopic view would hold that the boys-only school need not necessarily open its doors to Sally, or any other potential female student. Discrimination comes to be defined as an action that generally hurts one sex while offering favorable treatment to the other sex.

In the gender equity battle, a macroscopic view would allow the state to support an all-male educational institution, provided that there were a broad enough selection of other institutions from which females could choose. The microscopic view focuses on the one all-male institution as an example of state-supported discrimination without considering the availability or quality of other educational institutions.

The Supreme Court did not clarify those battle lines in *United States v Virginia*.<sup>37</sup> After the Court's ruling, Elizabeth Lu-

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gating women to an inferior and less-rigorous program of their own. . . . Virginia defended the exclusion of women from V.M.I. by using arcane gender stereotypes about men's and women's abilities.").

<sup>35</sup> Vojdik, *Girls' Schools*, 4 Duke J Gender L and Pol at 85 (cited in note 20).

<sup>36</sup> *Random House Webster's Unabridged Dictionary* 211 (Random House 2d ed 1997).

<sup>37</sup> 518 US 515 (1996).

rie, President of the W.H. Brady Foundation, wrote in a letter to the VMI Board of Visitors:

As a result [of the VMI decision], the Court that defines the supreme Law of our land now has no comprehension that men and women are different. Justice Ginsburg's opinion confuses complementarity with identity, equality with sameness. Strangely but purposively, her opinion also confounds the reality of sex with the constructs of race and ethnicity, abstract descriptors wholly irrelevant to the matter reviewed. Upon such illogic, and ignoring not only the evidence in the record but everything experience confirms, Justice Ginsburg declared the natural complementarity of the sexes to be contrary to the founding Law of the nation.<sup>38</sup>

Ms. Lurie's letter expressed the confusion that the Court's ruling causes for those fighting the cultural gender equity battle. While the Court acknowledged that in some cases sex differences might be justified,<sup>39</sup> the ruling alluded to the "sameness" of men and women in stating that VMI's unique offerings, specifically designed and maintained to address male learning patterns, were not unsuitable to women.<sup>40</sup> The Court, in establishing whether Virginia had met the compelling interests test, was not obligated to clarify the central question of the cultural debate: Are men and women different or are they the same?

Can the law ever eliminate the legitimate differences between the sexes, or will they simply become more narrowed? In recognizing the pedagogical justification for single-sex schools,<sup>41</sup> the Supreme Court did not give us an answer that will define or ensure equality in education in a microscopic sense. The Court's ruling did not take the individual instance of an all-male admissions policy at VMI to declare that all-male policies are unconstitutional, thereby allowing that there may be an instance where a publicly-funded all-male institution would be constitutional.

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<sup>38</sup> Letter to the VMI Board of Visitors from Elizabeth B. Lurie, President of the W.H. Brady Foundation (July 4, 1996) (on file with publisher).

<sup>39</sup> *United States v Virginia*, 518 US at 533 ("Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered.'" (alterations in original)).

<sup>40</sup> *Id* at 520 ("Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women.").

<sup>41</sup> *Id* at 535 ("Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation.").

### III. MEASURING PROGRESS: WHEN CAN WE DECLARE VICTORY OVER STEREOTYPES?

While it would be imprudent to ignore the history of discrimination women and girls have faced in education, it is time to recognize that the gap between males and females has largely been closed.<sup>42</sup> It is time to re-evaluate the intended goals of government programs and the state's legal interest in providing those programs.

#### A. Manufacturing The Girl Crisis

In the early 1990s, the "Girl Crisis" was created with the release of a series of three reports by the American Association of University Women ("AAUW").<sup>43</sup> Newspapers across the country blared the horrible news to us: the *San Francisco Chronicle* warned, "Dreadful Waste of Female Talent,"<sup>44</sup> The *New York Times* predicted doomsday with, "Bias Against Girls Is Found Rife in Schools, With Lasting Damage,"<sup>45</sup> and the *Chicago Tribune* lamented, "Girls' confidence erodes over years."<sup>46</sup>

The AAUW drafted its plan of action called the "Initiative for Educational Equity" and lobbied the Congressional Caucus for Women's Issues that promptly introduced the Women's Educational Equity Act of 1993, which was passed in 1994.<sup>47</sup> The bill outlined specific measures for eliminating inequitable practices in the classroom and authorized an enormous amount of money<sup>48</sup> for

<sup>42</sup> Tamar Lewin, *How Boys Lost Out to Girl Power*, NY Times D3 (Dec 12, 1998) ("But some educators say the boys-versus-girls bean-counting has gone too far, that those gaps have become small enough that they are unimportant, especially when measured against the very large racial differences in educational achievement."); see also notes 72-83 and accompanying text.

<sup>43</sup> See *Shortchanging Girls Shortchanging America: A Call to Action* (AAUW 1991); *The AAUW Report: How Schools Shortchange Girls* (AAUW 1992); *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools* (AAUW 1993); see also Lewin, *How Boys Lost Out To Girl Power*, NY Times D3 (cited in note 42) ("The furor over gender equity was kindled in 1992 by the release of a study by the American Association of University Women, 'How Schools Shortchange Girls,' which declared that girls face bias from preschool through high school in textbooks, tests and teachers.").

<sup>44</sup> Editorial, *A Dreadful Waste of Female Talent*, SF Chron A22 (Feb 13, 1992).

<sup>45</sup> Susan Chira, *Bias Against Girls Is Found Rife in Schools, With Lasting Damage*, NY Times A1 (Feb 12, 1992).

<sup>46</sup> Mary Sue Mohnke, *Girls' confidence erodes over years, study says*, Chi Trib 1 (Sept 29, 1991).

<sup>47</sup> Women's Educational Equity Act of 1994, Pub L No 103-382, § 1, 108 Stat 3696, codified at 20 USC § 7233 (1994).

<sup>48</sup> 20 USC § 7238 ("For the purposes of carrying out this part, there are authorized to be appropriated \$5,000,000 for fiscal year 1995 and such sums as may be necessary for each of the four succeeding fiscal years.").

school districts, community organizations, and other entities to “provide funds for the implementation of equity programs in schools throughout the Nation.”<sup>49</sup> Christina Hoff Sommers, author of *Who Stole Feminism?*,<sup>50</sup> calls this a classic example of the Washington phenomenon known as “do a study, declare a crisis, get a bill.”<sup>51</sup> The Representatives and Senators who spoke on behalf of this bill on the floors of their respective chambers could not have been more effusive in their gratitude to those who had lobbied them to write, pass, and fund a new bureaucracy.<sup>52</sup> A group of female members of Congress went a step further and introduced House Joint Resolution 302 designating 1994 through 1999 as the “Years of the Girl Child.”<sup>53</sup> The resolution began with an audacious declaration of the status of girls: “Whereas girls are the most neglected, deprived, and mistreated human resource worldwide . . . .”<sup>54</sup>

But there is a significant flaw in this story — professional reviews of the AAUW’s research and findings paint a very different picture about the status of girls in this country. Judith Kleinfeld, a professor of psychology from the University of Alaska, reviewed some of the AAUW’s raw data on girls self-esteem, and additional data not used in the report.<sup>55</sup> Kleinfeld found that the charge that schools shortchange girls is based on “soft and slippery issues, like the ‘silencing’ of girls in the classroom.”<sup>56</sup> To determine whether girls are truly shortchanged in schools, Kleinfeld reviewed the available research on a wide variety of strong educational attainment measures: “[S]chool grades, class rank, honors and prizes in academic competitions, scores on standardized achievement tests, college entrance and graduation rates, and attainment of professional and doctoral degrees.”<sup>57</sup>

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<sup>49</sup> 20 USC § 7233 (b) (1) (“The Secretary is authorized to make grants to, and enter into contracts and cooperative agreements with, public agencies, private nonprofit agencies, organizations, institutions, student groups, community groups, and individuals, for a period not to exceed four years, to — (A) provide grants to develop model equity programs; and (B) provide funds for the implementation of equity programs in schools throughout the Nation.”).

<sup>50</sup> Christina Hoff Sommers, *Who Stole Feminism?: How Women Have Betrayed Women* (Simon & Schuster 1994).

<sup>51</sup> Christina Hoff Sommers, *Capitol Hill’s Girl Trouble*, Wash Post C1 (July 17, 1994).

<sup>52</sup> Id.

<sup>53</sup> HJ Res 302, 103d Cong 2d Sess (May 11, 1994), in 140 Cong Rec H 3272 (May 11, 1994).

<sup>54</sup> 140 Cong Rec H 3271 (May 11, 1994).

<sup>55</sup> Judith Kleinfeld, *The Myth that Schools Shortchange Girls: Social Science in the Service of Deception* 3 (Women’s Freedom Network 1998).

<sup>56</sup> Id at 22.

<sup>57</sup> Id at 3.

Kleinfeld found that "[m]ajor assertions [with]in the AAUW report are based on research by David and Myra Sadker that has mysteriously disappeared,"<sup>58</sup> and has also been misinterpreted.<sup>59</sup> When Kleinfeld attempted to locate the original research by telephoning David Sadker, he deflected the request.<sup>60</sup>

Christina Hoff Sommers also researched the claims of the Sadkers, the AAUW, and Professor Carol Gilligan. Gilligan's contributions to the "Girl Crisis" consisted of an analysis of her interviews with 100 boarding school girls.<sup>61</sup> The study has never appeared in a peer-reviewed journal, yet Gilligan's conclusion that girls' self-esteem plummets between grade school and high school was central to a widely-distributed AAUW brochure claiming that girls experience a 31-point drop in self-esteem between elementary school and high school.<sup>62</sup>

The AAUW conducted its own survey on student self-esteem to include in its report. When Professor Sommers<sup>63</sup> received and reviewed a copy of the raw data, she found that the AAUW had reported only the response "always true" to the question "I am happy the way I am." Girls in high school responded at the 29

<sup>58</sup> Id at 4.

<sup>59</sup> John Leo, *Gender Wars Redux*, US News & World Report 24 (Feb 22, 1999):

The most devastating charge in the AAUW report was the claim that teachers call on boys more often and allow them to call out answers 8 times more often than girls. This finding turned up everywhere — on television, in lectures, and in the *Doonesbury* comic strip. But it wasn't true. It comes from a mistake involving David and Myra Sadker, education professors and gender-bias specialists. In a 1981 article, the Sadkers reported that boys in Washington, D.C., public schools 'receive 8 to 10 times as many reprimands as their female counterparts.' Somehow the AAUW report garbled this finding into one saying that boys who didn't raise their hands got away with barking out remarks 8 to 10 times more often than girls, and received the full attention of their teachers. But the Sadkers' original ungarbled study shows that this 'extra attention' to boys was almost entirely scolding.

<sup>60</sup> Kleinfeld, *The Myth that Schools Shortchange Girls* at 22 (cited in note 55) ("I telephoned David Sadker to ask him directly about the serious charge that his famous study had disappeared. He could not send me a copy of the report. He disingenuously directed me to his university's proposal office and asserted that many other studies of classroom interaction support the contention anyway that boys receive far more attention than girls in the classroom.")

<sup>61</sup> See generally Carol Gilligan, Nona P. Lyons and Trudy J. Hanmer, *Making Connections: The Relational Worlds of Adolescent Girls at Emma Willard School* (Troy 1989).

<sup>62</sup> *The AAUW Report* at 12 (cited in note 43), citing *Shortchanging Girls, Shortchanging America* (cited in note 43).

<sup>63</sup> Sommers was an Associate Professor of Philosophy at Clark University. See Nina Auerbach, *Sisterhood is Fractious*, NY Times (Book Review) 13 (June 12, 1994).

percent level and boys at the 46 percent level, and the AAUW assumed the consequent that 71 percent of girls are unhappy.<sup>64</sup>

A more accurate measure of either the total positive or total negative levels of self-esteem in an opinion survey such as this requires the analyst to combine the extreme responses with the moderate responses in both directions. If the AAUW had added together the responses of "always true," "sort of true," and "sometimes true/sometimes false" for the question "I am happy the way I am," it would have been able to report that only 12 percent of girls are genuinely unhappy.<sup>65</sup> The AAUW appears to have reported the results of its survey in such a fashion as to support their contention of low self-esteem among girls based upon Gilligan's survey of a small group of girls at one private school.

Nonetheless, journalists and Congress eagerly bought into the notion of a crisis and have paid little heed to the results of other studies. And, the headlines from the newspapers have been repeated over the years in numerous amicus briefs, law review articles, educational publications, proposed legislation, op-eds, news articles and magazine articles.<sup>66</sup> In a January 1991 interview with the *New York Times*, the AAUW's president candidly justified the organization's report by stating: "We wanted to put some factual data behind our belief that girls are getting short-changed in the classroom."<sup>67</sup> Sommers responded, "Needless to say, 'belief' should come after, not before, data-gathering."<sup>68</sup>

What has grown out of this exercise is a new educational profession of gender equity specialists who perpetuate the myth that there is a "Girl Crisis," along with the myth that boys and masculine teaching methods are the cause of the crisis.<sup>69</sup> This approach only serves to strengthen a stereotype that girls are the

<sup>64</sup> Sommers, *Capitol Hill's Girl Trouble*, Wash Post at C1 (cited in note 51).

<sup>65</sup> Id.

<sup>66</sup> See, for example, Employment Law Center Brief at 16 n 8, available at 1995 WL 702836; *Gender Equity for Educators, Parents, and Community* at 6 (Educ Development Center 1995); Rosemary C. Salomone, *Sometimes 'Equal' Means 'Different'*, Ed Week 44 (Oct 8, 1997); Margot Hornblower, *Beyond the Gender Myths*, Time (Oct 19, 1998); HJ Res 302, 103d Cong, 2d Sess (May 11, 1994), in 140 Cong Rec H 3272 (May 11, 1994) ("Whereas girls in the United States still receive an unequal education in our Nation's schools, by any measure — test scores, curriculum, or teacher-student interactions . . ."); Morgan, 14 NY L Sch J Hum Rts at 99 n 11 (cited in note 32); Vojdik, 4 Duke J Gender L & Pol at 87 (cited in note 20).

<sup>67</sup> Suzanne Daley, *Little Girls Lose Their Self-Esteem on Way to Adolescence, Study Finds*, NY Times B6 (Jan 9, 1991).

<sup>68</sup> Christine Hoff Sommers, *Where the Boys Are*, Ed Week 52 (June 12, 1996).

<sup>69</sup> Examples include the National Coalition for Sex Equity in Education, the WEEA Equity Resource Center, the Center for Equity and Cultural Diversity, and the Center for Research on Women, Wellesley College.

weaker sex by portraying them as being in dire need of government intervention in order to equal boys in academics and self-esteem.

## B. The Truth About Girls

For the purposes of legal discussions about single-sex education, it seems imperative first to establish an accurate picture of where girls and boys, women and men, are in relation to one another, and then to address the assumptions about the need or benefits of single-sex education for either or both. A large question for the Supreme Court in *United States v Virginia*<sup>70</sup> was grounded in competing notions of women's progress, stereotypes, and learning abilities.<sup>71</sup>

As Professor Kleinfeld has recently detailed, "From grade school through college, females receive higher grades and obtain higher class ranks. They also receive more honors in every field except science and sports."<sup>72</sup> Concerning standardized tests, "females typically surpass males in writing ability, reading achievement, and study skills."<sup>73</sup> Kleinfeld's review of literature on standardized tests reveals that males do surpass females in mathematics, science, and geopolitics, but by margins that are considered "small" to "slight." The only measurable gender difference that approached "medium" was in writing skills, which favored females.<sup>74</sup>

According to Professor Kleinfeld, gender differences are more visible in the top 10 percent of self-selected populations taking standardized tests than in the student population as a whole, thereby exaggerating the male advantage and the overall gender differences.<sup>75</sup> In fact, females take as many high school math and science courses as males and the gender gap in advanced placement classes has narrowed.<sup>76</sup> Males additionally appear more often at the bottom of their class in schools, labeled as impaired or assigned to special education classes.<sup>77</sup>

<sup>70</sup> 518 US 515 (1996).

<sup>71</sup> See Hurd, 4 Duke J Gender L & Pol at 36-42 (cited in note 20) (containing a detailed discussion of the legal arguments on the value of single-sex education used in the *United States v Virginia* case).

<sup>72</sup> Kleinfeld, *The Myth that Schools Shortchange Girls* at 5 & Table 1 (cited in note 55) (for all majors, women average a 3.07 GPA, compared to 2.92 for men).

<sup>73</sup> *Id.* at 7.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 9-10.

<sup>76</sup> Kleinfeld, *The Myth that Schools Shortchange Girls* at 12 (cited in note 55).

<sup>77</sup> *Id.* at 10.



A landmark 1997 study on gender issues in schools commissioned by the Metropolitan Life Insurance Company Foundation found that girls are performing better and feel more positive than boys in both public and private schools.<sup>78</sup> Minority boys are the group most at risk in today's schools.<sup>79</sup> The MetLife survey found that, "contrary to the commonly held view that boys are at an advantage over girls in school, girls appear to have an advantage over boys in terms of their future plans, teacher's expectations, everyday experiences at school and interactions in the classroom."<sup>80</sup> Minority girls, in particular, the study found, "hold the most optimistic views of the future and are the group most likely to focus on education goals."<sup>81</sup> Minority boys, in contrast, are "the most likely to feel discouraged about the future and the least interested in getting a good education."<sup>82</sup> In general, the study found that "teachers nationwide view girls as higher achievers and more likely to succeed than boys."<sup>83</sup>

Professor Kleinfeld's approach to determining the status of girls differed from other studies in that it compared educational attainment factors such as grades, test scores and degree completion between males and females.<sup>84</sup> The MetLife survey is a large-scale quantitative study<sup>85</sup> conducted in a school setting that links students' feelings directly to scholarly activity and classroom environment.<sup>86</sup> The MetLife survey was also unique because it compared and contrasted students' perspectives with their teachers'.<sup>87</sup>

Both the students' and teachers' perspectives on academic achievement, future opportunities, classroom interactions, attitudes toward school, intentions to complete advanced studies, intentions to take determinative standardized tests, interest in extracurricular activities including sports, and many other factors lead to a picture of very healthy self-esteem for girls. The MetLife survey points out that "[b]oys more often feel that they are not listened to in class and that they do not receive as much helpful or positive feedback from their teachers as girls do. . . . In

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<sup>78</sup> *Metropolitan Life Survey of the American Teacher (No 628203), 1997: Examining Gender Issues in Public Schools 3* (Louis Harris Assoc 1997) ("MetLife Survey").

<sup>79</sup> *Id.* at 4 (minority boys appear to be lagging behind all other students).

<sup>80</sup> *Id.* at 3.

<sup>81</sup> *Id.*

<sup>82</sup> *MetLife Survey* at 38 (cited in note 78).

<sup>83</sup> *Id.*

<sup>84</sup> Kleinfeld, *The Myth that Schools Shortchange Girls* at 3 (cited in note 55).

<sup>85</sup> *MetLife Survey* at 151 (cited in note 78) (survey methodology for students included both self-administered questionnaires and interviews).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 169.

contrast to [other] studies, the present study shows that girls do not feel they are being shortchanged by their teachers in the classroom and, in fact, come out ahead of boys on these measures."<sup>88</sup>

In measuring educational progress, the Educational Testing Service ("ETS") has "developed procedures to determine whether group differences in performances on test questions reflected real differences in skills or factors . . . irrelevant to the knowledge being tested."<sup>89</sup> ETS's 1997 *Gender Study*<sup>90</sup> of male and female performance in educational settings also shows that girls are not necessarily shortchanged in school.<sup>91</sup> The *ETS Gender Study* found that there is not a dominant picture of one gender excelling over the other, and, in fact, the average performance difference across all academic subjects is essentially zero.<sup>92</sup> In fact, "[p]atterns of gender differences in performances are similar to patterns of differences in interests and out-of-school activities, suggesting that a broad constellation of events relates to observed differences."<sup>93</sup> The ETS found larger gender differences concentrated, instead, in "self-selected groups taking high-stakes tests than for nationally representative samples, reflecting primarily the wider spread of male scores."<sup>94</sup>

The *ETS Gender Study* clarifies the distinction between gender bias and gender differences. By looking at both test scores and skills in which males and females really do differ, the ETS points out that a difference in test scores in skill areas where there is no difference between groups would be biased.<sup>95</sup> This study concluded that some of the differences between the genders

<sup>88</sup> *MetLife Survey* at 5 (cited in note 78).

<sup>89</sup> Educational Testing Service, *1996 Annual Report Traces History of ETS Equity Efforts*, available online at <<http://www.ets.org/aboutets/z3-af.html>> (visited Apr 21, 1998).

<sup>90</sup> Nancy S. Cole, *The ETS Gender Study: How Females and Males Perform in Educational Settings* 3 (ETS May 1997).

<sup>91</sup> *Id.* at 10 ("Result 3: The results contradict the view that the problem of gender is that the girls need to catch up with the boys.").

<sup>92</sup> *Id.* at 3.

<sup>93</sup> *Id.* at 3.

<sup>94</sup> Cole, *ETS Gender Study* at 3 (cited in note 90). *Id.* at 9 (noting that high-stakes tests are voluntary tests taken for consideration in undergraduate and graduate admissions process).

<sup>95</sup> *Id.* at 23 ("If a test produces score differences on skills for which the groups do not really differ, then the word [bias] would apply. However, if differences are real and the test correctly reflects them, then the test should not be considered biased.").

are, in fact, real differences and that the wide variety of tests reflecting these differences were not biased.<sup>96</sup>

The success story of female students is not limited to the elementary and secondary schools. Since Title IX<sup>97</sup> was passed in 1972, prohibiting sex discrimination in education, women have made extraordinary and rapid progress in our nation's colleges and universities. For example, women now constitute majorities in college enrollment: 56 percent of undergraduate students at two-year and four-year institutions are female.<sup>98</sup> By 2006, women are expected to earn 55 percent of all bachelors' degrees.<sup>99</sup> The proportion of women graduating from college today is equal to that of men, with both at 27 percent.<sup>100</sup> In comparison, in 1971, only 18 percent of young women completed four or more years of college, compared to 26 percent of young men.<sup>101</sup> The percentage of women earning professional degrees is rising steadily as well.<sup>102</sup> In the realm of athletics there has been a fourfold increase in women's participation rates since 1971. Currently, women comprise 37 percent of all collegiate athletes, compared to 15 percent in 1972.<sup>103</sup>

A great deal of factual evidence indicates that women and girls are not suffering widespread bias or discrimination in schools. The incidents of discrimination that can be found are not representative of the experiences of the entire population of fe-

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<sup>96</sup> Id at 23 ("A primary result from this large amount of data we examined was that some of the differences between the genders are real differences — found in many types of measures, by many different approaches, and in many samples. Tests that reflect such widely corroborated differences are not making an error. They are correct, not biased.")

<sup>97</sup> 20 USC § 1681(a) (1994) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.")

<sup>98</sup> National Center for Education Statistics, *Fall Enrollment in Post Secondary Institutions, 1996* 8 (NCES 1999-239) (US Dept of Educ 1998).

<sup>99</sup> National Center for Education Statistics, *Digest of Education Statistics 1996* Table 239 (NCES 96-133) (US Dept of Educ 1996).

<sup>100</sup> National Center for Education Statistics, *The Educational Progress of Women* 11 (NCES 96-768) (US Dept of Educ 1995).

<sup>101</sup> Id.

<sup>102</sup> See *Title IX: 25 Years of Progress* (US Dept of Educ 1997) (In 1994, women earned 38 percent of all medical degrees, compared to 9 percent in 1972. Women earned 38 percent of all dental degrees in 1994, compared to 1 percent in 1972. Women earned 43 percent of all law school degrees in 1994, up from 7 percent in 1972. And women received 44 percent of the doctoral degrees awarded in 1993-94, compared to 25 percent in 1977.); see also *Chron Higher Ed Almanac* 23 (Aug 29, 1997) (noting that women received the majority of professional degrees awarded in veterinary medicine (65 percent), pharmacy (65 percent) and optometry (55 percent) in 1995); see also National Center for Education Statistics, *Digest of Education Statistics 1997* Table 281 (NCES 98-015) (US Dept of Educ 1997) (reporting that American women received 34,700 Masters in Business degrees (37 percent) in 1995).

<sup>103</sup> *Title IX: 25 Years of Progress* at 3 (cited in note 102).

males in our educational system, nor are they an indication that the system has failed women and girls to the favor of men and boys.

Ironically, feminist legal scholars still maintain that all-women's colleges are justified as a compensatory tool,<sup>104</sup> despite women's significant advances to catch up with and overtake men on university campuses.<sup>105</sup> If the measure of success in educational gender equality is to demonstrate that women are as smart as men through test scores and grades, have we not succeeded? If another measure of success is to demonstrate that women have equal access to as broad a range of academic environments and disciplines as men, have we not also succeeded? Those who view the world in a macroscopic sense point to these statistics and say "yes." Those who look through a microscopic prism will always find a particular situation where the answer is "no."

The place where the pursuit of perfect legal standards fails the larger goals of society is where the focus of the microscope denies opportunities to males to have interesting and unique experiences, even if females are generally not interested in participating in those activities. One example could be the option to attend a rigorous and physically demanding all-male military academy. Another might be to attend all-male courses within a public school. Whatever the design, males are seldom allowed to have anything uniquely male in our postmodern feminist society.<sup>106</sup>

### C. Single-Sex Education for Both Sexes

Many supporters for single-sex education cite the tenets of the "Girl Crisis" as evidence that a single-sex option should be made available.<sup>107</sup> Other supporters favor single-sex education

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<sup>104</sup> See, for example, Vojdik, 4 Duke J Gender L & Pol at 82 (cited in note 20) ("Unlike men's colleges, many women's colleges seek to compensate for the historical discrimination against women in education and the lack of gender equity in coeducational environments. Neither VMI nor The Citadel purports to compensate men for past discrimination; their exclusionary policies instead reflect outmoded notions of gender roles and stereotypes.").

<sup>105</sup> See notes 57-87 and accompanying text.

<sup>106</sup> See Elizabeth Fox-Genovese, *For Women Only*, Wash Post C7 (Mar 26, 1995) ("The whole point of promoting feminist pedagogy and feminist classrooms is to transform men as we have known them. What would be the point if we improved women's opportunities while we left the men to their own devices? No proper feminist pedagogy can allow boys to be boys, even if it gets them out of the girls' way.").

<sup>107</sup> See Salomone, *Sometimes 'Equal' Means 'Different'*, Ed Week 44 (cited in note 66) ("Studies sponsored by the American Association of University Women confirm not only the gender gap in self-esteem as girls advance from elementary to middle and high school, but also the sexually hostile school environment in which many young women struggle to assert themselves academically and to survive emotionally."); see also Elisabeth Griffith, *The Case for Girls' Schools*, Wash Post X5 (Aug 6, 1989) ("The research proving the inade-

because of the benefit to some students — both male and female — of such a setting, especially the increased attention girls give to subjects such as math and science.<sup>108</sup>

Some opponents of single-sex schools also use the contrived “Girl Crisis” to argue that separating boys and girls is insufficient training for a coed world and that shortchanged girls might become shortchanged women.<sup>109</sup> Even the AAUW has decried the use of its 1992 report as evidence that single-sex schools are the solution to girls’ problems.<sup>110</sup>

However, new reviews of single-sex education find that the students who gain from such a setting are more likely to experience the gains as members of a lower socioeconomic strata rather than as a member of a gender group.<sup>111</sup> The girls attending the Young Women’s Leadership School (YWLS) in Harlem, for exam-

quacy of coeducation for adolescent and college girls is impressive and persuasive. To cite just one study, David and Myra Sadker of American university . . . found that in any coed classroom, no matter the ratio of boys to girls or the sex of the instructor, boys are called on from two to 12 more times than girls in any class period.”)

<sup>108</sup> See Judy Mann, *Boys and Girls Apart: Single Sex Education Is One School Choice We Need*, Wash Post C1 (Oct 20, 1996) (“The evidence that gender inequities undermine girls in many public schools is well-documented. So is the evidence that single-sex schools can build confidence and lead to stronger academic performance among girls.”); see also Robert L. Maginnis, *Faulkner is Gone, But Battle Over Single-Sex Schools Threatens Educational Diversity*, Family Research Council Perspective (Aug 22, 1995), available online at <<http://www.frc.org/perspective/pv96h3ed.html>> (visited Oct 30, 1998) (“The benefits of single-sex schools for some students is marked. Students do better academically, and women tend to pursue majors in science, math and management, hold more leadership positions, and are more likely to seek higher academic degrees.”).

<sup>109</sup> See Mark Walsh, *Ruling’s Effect on Single-Sex Classes Mull’d: VMI’s All-Male Policy Found Discriminatory*, Ed Week 31 (July 10, 1996) (“The remedy has to do something other than perpetuate the stereotypes of girls being unable to learn certain subjects,” said Kathy Rodgers, the executive director of the NOW Legal Defense and Education Fund in New York City.”).

<sup>110</sup> See Julie N. Lynem, *All-Girls Schools Blossom: Bay Area academies stress learning and self-esteem*, SF Chron A1 (Dec 8, 1998) (“We found that what contributes to the achievement of girls is really the qualities of good schooling, such as high standards and parent involvement,” said Janice Weinman, the foundation’s executive director. “Those are the things that make for success among girls. It’s not so much an issue of separating by sex.”); see also Beth Reinhard, *California Opens Single-Sex Academies*, Ed Week 17 (Sept 10, 1997) (“Single-sex education doesn’t correct the gender-equity problems found in public education,” said Kryss Wulff, the president-elect of the American Association of University Women, a Washington-based group that has issued reports contending that girls are shortchanged by the education system. “These single-gender academies are a short-term, political fix.”).

<sup>111</sup> See William Raspberry, *Same-Sex Schools Work — Sometimes*, Wash Post A21 (Mar 16, 1998) (“Cornelius Riordan, a professor of sociology at Providence College, found that single-sex schools ‘work for girls and boys, women and men, whites and non-whites, but the effect is limited to students of low socioeconomic status.’ For middle-class children, it’s a tossup.”); see also Salomone, *Sometimes ‘Equal’ Means ‘Different’*, Ed Week at 32 (cited in note 66) (“Most importantly, single-sex education has proven particularly beneficial to minority girls who, in one recent study, scored nearly a year ahead of their peers in public coed schools.”).

ple, are in smaller classes, with more time devoted to teacher interaction. The YWLS has access to more resources, and the standards for excellence and achievement are set much higher than the schools the girls attended previously.<sup>112</sup> Arguably, any child from a lower socioeconomic strata would improve under these conditions. Most urban schools, heavily populated by minority students from poor households, are failing to properly educate their students due to lack of funds and lowered expectations.<sup>113</sup>

Yet, when the Detroit school system tried to address the needs of a small group of socioeconomically disadvantaged, at-risk minority boys by establishing three public all-male academies focused on high academic standards and strict discipline, the ACLU and a cadre of its allies successfully sued the school district.<sup>114</sup> The district court agreed with the argument that the risk factors these boys faced were not related to the presence of

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<sup>112</sup> See Bill Zimmerman and Liz Willen, *Girls' School Gets Lesson in Controversy: Some Call It Discrimination*, *Newsday* A68 (Nov 6, 1996) ("The students, meanwhile, have been surprised and even confused by all the attention their school is getting. Many are grateful to be somewhere clean, safe and uncrowded, a place where they get lots of individual attention. At the large public schools they came from, they had grown used to overcrowded classrooms and cafeterias, metal detectors and fears of violence."); see also Sheryl McCarthy, *If Kids Thrive At Same-Sex School, So Be It*, *Newsday* A58 (Dec 12, 1996) ("But her new school is rich in music, dance, drama and humanities, and is a very 'nurturing' environment, Trotman says. It also has new and spotless classrooms and is small and intimate, with only 55 students and classes of around 15 kids.")

<sup>113</sup> See *Improving Student Performance in the Inner City*, Policy and Research Report (Urban Institute Spring 1996), available online at <[http://www.urban.org/periodical/pr26\\_1b.htm](http://www.urban.org/periodical/pr26_1b.htm)> (visited Apr 19, 1999) ("Seriously at risk are minority students who are educated primarily through the nation's urban school systems and whose performance is markedly worse in math and science than their more affluent counterparts. . . . Urban schools now enroll approximately one-third of all U.S. elementary and secondary school children."); see also Diane Ravitch, *A New Era in Urban Education?* Policy Brief #35 (Brookings Institution, Aug 1998) ("Urban School systems are uncomfortable with the principle of student or teacher choice of assignment; they prefer a system in which all schools are as nearly identical as possible, with students and teachers as interchangeable as widgets. These systems are characterized by their absence of clear standards, acceptance of social promotion, lack of accountability, and administrative bloat. . . . Urban school systems, and their states, must adopt clear and rigorous academic standards so that everyone knows what students are expected to learn."); see also Nina Shokraii Rees, *A Close Look at Title I, The Federal Program to Aid Poor Children*, Background No 1271 (The Heritage Foundation, Apr 13, 1999), available online at <<http://www.heritage.org/library/backgrounder/bg1271.html>> (visited Apr 19, 1999) ("The Department of Education attributes these results to the 'standards-based' reforms of the 1994 ESEA reauthorization. These reforms were inspired by a 1993 Department of Education review of the Prospects findings. According to this report, disadvantaged students were held to lower academic standards and received an average of only 10 minutes of extra instruction per day, taught by unqualified aides; thus it came as no surprise that disadvantaged students had failed to make any progress toward narrowing the achievement gap with their peers.")

<sup>114</sup> *Garrett v Detroit Board of Education*, 775 F Supp 1004, 1005 (E D Mich 1991) (noting that the ACLU represented the plaintiffs).

girls, therefore, they could not be separated from the girls in a publicly-funded school.<sup>115</sup> Although the 250 boys selected for this program were not high-risk students due to the presence of girls in their classrooms, a country as diverse as the United States should be able to allow some unique educational settings that address the specific needs of students — male or female. The ACLU's interest in pursuing a strict legal standard to avoid even the appearance of discrimination against girls did not serve a higher purpose than the school district's interest in meeting the needs of a small number of boys in inner-city Detroit.

The law does not always provide reasonable solutions for the problems of real people. The district court can pride itself on having protected an indeterminate number of unspecified girls from potentially being discriminated against in the Detroit school system, but it failed to provide us with a sense of how legally to address the problems facing a small group of boys. And the problem is not limited to the courts. Government policy is driven by laws, and new laws are influenced by policy making. But policy making is also largely captive to politics and the courts have been used by special interest groups to change the politics of policy, thereby politicizing the law itself. While academics and legal experts debate the state's compelling interests, the government's responsibilities, and the meaning of the Fourteenth Amendment in very narrow arenas, the law itself is being used microscopically to pursue political goals, and macroscopically ignoring the larger social good of educating students in a changing world.

In making her argument that single-sex schools fail to correct gender equity problems, Valorie Vojdik refers to a study by Valerie Lee which questioned the inherent value of single-sex schools in both public and private settings.<sup>116</sup> After evaluating the Lee study, Vojdik wrote, "Whether YWLS, or any single-sex school for girls, can demonstrate that it is likely to enhance girls' performance as compared to coeducational schools remains to be seen. What is clear, however, is that it is not the only method of im-

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<sup>115</sup> *Id.* at 1007. The court agreed that the state's objective was important, but that the Board of Education had failed to prove that the exclusion of girls was necessary to combat unemployment, dropout and homicide rates among urban males. The court found that there was no evidence that the school failed boys because girls were in the classroom; the system failed girls as well. *Id.* While meeting the needs of inner-city males was an important objective, the court held that it was "insufficient to override the rights of females to equal opportunities." *Id.* at 1014.

<sup>116</sup> See Vojdik, 4 *Duke J Gender L and Pol* at 93 (cited in note 20).

proving gender equity and performance in schools."<sup>117</sup> What is not clear from this statement, or from the *United States v Virginia*,<sup>118</sup> *Faulkner v Jones*,<sup>119</sup> or *Garrett v Detroit Board of Education*<sup>120</sup> decisions or even from the complaints against the YWLS, is whether these schools had as an educational goal the "improvement of gender equity," or whether that discussion was necessitated by narrow legal proceedings.

Clearly single-sex schools work well for *some* students. But single-sex education is only one of many solutions to the problems facing our public educational system today. Single-sex schools should not be outlawed or banned for fear of potential discrimination. Not all students will opt for the single-sex school and, not all schools in a state (or given school district) will be converted to single-sex education. Flexibility in the law may provide what will best serve some students' needs, and even their interests, in an era where the choices available are diverse and plentiful. As the Independent Women's Forum wrote to the Supreme Court in its amicus brief for VMI:

Every state has a strong, legitimate interest in providing its citizens a system of education that is both educationally and economically sound. In deciding whether and to whom they will offer specialized educational programs States should be permitted to make reasonable allocations of their resources. The Equal Protection Clause does not deny States the power to treat different classes of persons differently, nor does it require States to confer benefits on all classes equally or equivalently.<sup>121</sup>

In *United States v Virginia*, the Commonwealth of Virginia tried to prove that strict scrutiny should not apply to single-sex education, and therefore, a compelling state interest was not required.<sup>122</sup> VMI was unique because it was an all-male military school. It was also exclusive because not all males — or all females — in the Commonwealth could have access to its educa-

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<sup>117</sup> See *id.* at 94–95; see also Wendy Kammer, *The Trouble With Single-Sex Schools*, *Atlantic Monthly* 34 (Apr 1998).

<sup>118</sup> 518 US 515 (1996).

<sup>119</sup> 10 F3d 226 (4th Cir 1993).

<sup>120</sup> 775 F Supp 1004 (E D Mich 1991).

<sup>121</sup> IWF 1995 Brief at 3, available at 1995 WL 745003.

<sup>122</sup> See Brief for Respondents at 47–48, *United States v Virginia*, 518 US 515 (1996), available at 1995 WL 745011.



tional offerings.<sup>123</sup> The Supreme Court was not convinced by VMI's diversity argument, finding that the school was not established to offer diversity.<sup>124</sup> Of course, a school more than 150 years old would not have been established for diversity reasons.<sup>125</sup> But the fact that other state institutions with different offerings had been built around it created an environment where the state was offering very diverse education to its residents, including VMI as one of the options.<sup>126</sup>

The same question of purpose has been raised in the commentary over the creation of the YWLS in New York. Vojdik questioned the school's intent:

While school officials now claim that the school seeks to improve girls' performance in math and science, there is no evidence that this was the actual purpose of the school rather than a post hoc rationalization in the face of threatened litigation by the NYCLU [New York Civil Liberties Union] and NOW [National Organization for Women].<sup>127</sup>

The larger question under the "good-of-society" umbrella is: Should we deny these few girls<sup>128</sup> a unique and exclusive opportunity simply because it is not available to boys, or vice versa?<sup>129</sup> Judy Mann, author and columnist for the *Washington Post* supports the option of single-sex schools:

Anyone who has seriously thought about the sorry results of public education — and any parent who is trying to find

<sup>123</sup> See 518 US at 535.

<sup>124</sup> *Id.* at 539.

<sup>125</sup> *Id.* at 536 ("In 1839, when the State established VMI, a range of educational opportunities for men and women was scarcely contemplated.").

<sup>126</sup> See *id.* at 539 ("No such policy [promoting diversity], the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education.").

<sup>127</sup> Vojdik, 4 Duke J Gender L & Pol at 97 (cited in note 20) (footnotes omitted).

<sup>128</sup> See McCarthy, *If Kids Thrive at Same-Sex School, So Be It*, *Newsday* at A58 (cited in note 112) (reporting that the YWLS was started with only 55 students.).

<sup>129</sup> See Susan Estrich, *Sometimes, single-sex schools educate best*, *Denver Post* B7 (Sept 24, 1997) ("No one pretends that single-sex education is the answer to the crisis of urban schools. But if it helps some kids develop their full potential, at no loss to others, why shouldn't it be an option for them?"); see also McCarthy, *If Kids Thrive at Same-Sex School, So Be It*, *Newsday* at A58 (cited in note 112) ("So much of education is affirming what kids are and what they, as individuals, require in order to learn. Almost any innovation that makes a few more kids happier about school and excited about learning is worth trying. A small boys' school wouldn't deprive girls of anything, just as the Young Women's Leadership School doesn't deprive the city's boys.").

the best school match for a child — ought to be hoping that those loopholes are wide enough to permit the continued existence of some taxpayer-funded single-sex schools, especially at the middle school and high school level. For the sake of children, it's time to resolve the legal question so we can get on with a thoughtful discussion about how to reform the public educational system so that both boys and girls can learn what they need to learn and thrive as adults.<sup>130</sup>

The courts should define as a compelling state interest the education of all boys and girls, men and women, with the best available methods, widest variety of methods, and availability of individualistic approaches. In so doing, courts would provide states the flexibility to allow the existence of single-sex schools or classes without fear of violating the Fourteenth Amendment. This macroscopic perspective of state interests would best serve the individual interests and needs of its citizens.

In an amicus brief to the Fourth Circuit, the Women's Washington Issues Network argued that "[s]ingle-sex educational institutions are an important element in achieving a State's educational mission, that States should be able to tailor educational programs to respond to the distinctive needs and interests of each sex, and that single-sex education should continue to remain eligible for public funding and support."<sup>131</sup> For the interpretations of intermediate scrutiny, strict scrutiny, and state's interests in *Virginia*,<sup>132</sup> *Faulkner*<sup>133</sup> and *Garrett*<sup>134</sup> to stand, the Court must dismiss the factual data showing that for *some* students, specific, unique, and single-sex education is effective and desirable. And if that is true for *some* girls and women, is it not also true for *some* boys and men?

#### IV. SOMETIMES, EQUAL IS DIFFERENT

As amici for the Respondents in *United States v Virginia*, the Independent Women's Forum wrote: "We should not assume, as a matter of law, that for every gender-related action there must be an equal and opposite reaction."<sup>135</sup> Taking a macroscopic look at

<sup>130</sup> See Mann, *Boys and Girls Apart*, Wash Post at C1 (cited in note 108).

<sup>131</sup> IWF 1995 Brief at 2, available at 1995 WL 745003.

<sup>132</sup> 518 US 515 (1996).

<sup>133</sup> 10 F3d 226 (4th Cir 1993).

<sup>134</sup> 775 F Supp 1004 (E D Mich 1991).

<sup>135</sup> IWF 1995 Brief at 8, available at 1995 WL 745003.

society, one can observe that individuals of different sexes do not make choices in equal proportions. For example, only three percent of timber cutters are female, whereas eighty-six percent of professional dieticians are female.<sup>136</sup>

It is also unlikely that society would demand mirror image programs where they do not make sense. For example, government-funded programs for pregnant women are not in high demand among men, and most people would not find it necessary to ask the court to mandate that they be provided to men in the same proportion they are provided to women. Slightly more complicated would be the institution of a boot-camp-style work program for violent male prisoners, but not one for females. Females account for a significantly smaller proportion of prisoners and are often less violent offenders,<sup>137</sup> and it would be a strain on state resources to create an identical program where one is not warranted. Thus, although the programs are not equally offered to both sexes, it is not likely that the American Civil Liberties Union or the National Organization for Women will be demanding equal access for women to boot camp prisons. This is because, despite our litigious tendencies, American society is macroscopically reasonable. As Rosemary C. Salomone, professor of law at St. John's University, observed in *Education Week*:

When we strip away all the rhetoric of "benevolent sexism" and "separate is unequal" and focus on the educational issues, we find a confusing inconsistency in oppositionist arguments. Rather than redress a legal wrong, their position effectively turns the equality ideal on its head. Over the past three decades, that ideal has come to mean not just "same is equal" but sometimes "different is equal" and even "more is equal" when applied to various student populations, including the economically and educationally

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<sup>136</sup> See Diana Furchtgott-Roth and Christine Stolba, *Women's Figures: An Illustrated Guide to the Economic Progress of Women in America* 34-35 (AEI 1999).

<sup>137</sup> See Bureau of Justice Statistics, *Criminal Offenders Statistics*, available online at <<http://www.ojp.usdoj.gov/bjs/crimoff.htm>> (visited Feb 1, 1999) (stating that 5 percent of state prison inmates in 1991 were women, 8 percent of federal prison inmates in 1991 were women, and 10 percent of jail inmates in 1996 were women); Bureau of Justice Statistics, *Comparing Federal and State Prisoners* (press release) (Oct 2, 1994), available online at <<http://www.ojp.usdoj.gov/bjs/pub/press/cfasp91.pr>> (visited May 3, 1999) (stating that 8 percent of women were sentenced for violent crimes compared with 18 percent for men).

disadvantaged, linguistic minorities, and the disabled. Why should gender be any different?<sup>138</sup>

Women and men do not choose college majors or careers in equal or proportional numbers.<sup>139</sup> There are also a wide variety of chosen majors within each gender group.<sup>140</sup> Women and men also choose the type of college or university they attend in different proportions, with a slightly higher proportion of women than men choosing to attend a private institution.<sup>141</sup>

From a macroscopic perspective, the argument that both VMI and The Citadel were denying women access to education sounds contextually weak. In the two years prior to *United States v Virginia*, VMI had received 347 inquiries from women.<sup>142</sup> (Only two women had filed admission applications with VMI in the twenty years preceding the lawsuit.)<sup>143</sup> In 1988 and 1989, the same two years preceding the lawsuit, there were 3,612,000 and 3,628,000 full-time female college students in the United States, respectively.<sup>144</sup> Very few women were actually seeking information about VMI admissions.

The interest in VMI has not changed much since the lawsuit was filed. Not only are there very few women interested in attending VMI, but there are relatively few men interested in attending VMI.<sup>145</sup> Because both VMI and The Citadel opted to co-

<sup>138</sup> Salomone, *Sometimes 'Equal' Means 'Different'*, Ed Week at 32 (cited in note 66).

<sup>139</sup> National Center for Education Statistics, *Profile of Undergraduates in U.S. Post-secondary Education Institutions: 1995-96* Table 3.2 (NCES 98-084) (US Dept of Educ 1998) (showing, for example, that 9.8 percent of female undergraduate students choose to major in Education while only 5.3 percent of male undergraduates choose the same major; comparatively, 17.6 percent of female undergraduates choose to major in Health while only 5.5 percent of male undergraduates choose the same).

<sup>140</sup> Id at Table 3.2 (showing, for example, that 20.8 percent of female undergraduates choose Business/Management as a major, while only 2.4 percent choose Computer/Information Science; comparatively, 19.2 percent of male undergraduates choose Business/Management and only 5.2 percent choose Computer/Information Science).

<sup>141</sup> Id at Table 2.2 (showing that 76.0 percent of male undergraduates and 73.7 percent of female undergraduates choose a public institution, compared to 20.1 percent of male undergraduates and 21.3 percent of female undergraduates choosing a private institution).

<sup>142</sup> 518 US at 523 ("In the two years preceding the lawsuit, the District Court noted, VMI had received inquiries from 347 women, but had responded to none of them.").

<sup>143</sup> Nell Henderson, *Cadets Defend Male Bastion; Virginia Military Institute Under Siege to Go Coed*, Wash Post D1 (May 7, 1998) ("VMI has received no applications from women in the past 11 years and only two in the last 20 years, Knapp told the Justice Department.").

<sup>144</sup> See US Bureau of the Census, *College Enrollment of Students*, available online at <<http://www.census.gov/population/socdemo/school/report96/ta-ba-7.txt>> (visited Dec 7, 1998).

<sup>145</sup> VMI can accommodate approximately 1,300 students per academic year. Of the 14.8 million students enrolled in the nation's 6,404 post-secondary institutions in 1996,

educate following the Supreme Court's ruling in 1996, there are only four all-male colleges remaining in the United States to balance more than eighty all-female colleges.<sup>146</sup> Of the more than six thousand colleges and universities in this country, would it have been so awful simply to allow two small military colleges to remain as they were? The macroscopic viewpoint says the Fourteenth Amendment has room to let them stay, while the microscopic perspective demands that they must bend and yield to the minutiae of the law, regardless of who is interested in attending.

#### CONCLUSION: A MORE COMPELLING STATE INTEREST

Following its loss before the Supreme Court, VMI started making preparations to integrate women while maintaining as much integrity in the school's programs as existed prior to the ruling — that same integrity that made VMI so unique. Yet, the reaction of women and girls to the pronouncement that women enrolling at VMI would face the same academic and physical requirements as males was typically hypocritical. In a September 24, 1996 *Washington Post* article, Mary Anne Case was quoted as saying, "Their [VMI's] motive is not an egalitarian one, it is an exclusionary one. VMI is still re-fighting its own bizarre version of the Civil War here."<sup>147</sup> In the same article, several teenage girls expressing interest in VMI also complained that the school was not going to change more. Cheryl Clements said: "They're only saying that so women will get scared and not join."<sup>148</sup>

In a grand twist of irony, it was, presumably, the unique educational experience — including strict discipline and the VMI adversative system with its physical demands — that the women were seeking in pursuit of admission to the school. This adversative system resulted in a desirable loyalty and camaraderie that continued into adult life.<sup>149</sup> The contention that VMI was dis-

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only 1,027 students applied to VMI, only 840 were admitted, and only 380 enrolled. See *Fall Enrollment in Post-Secondary Institutions, 1996* at iii (cited in note 98); Virginia Military Institute, *The Admissions Data Common Data Sheet, Fall 1996*.

<sup>146</sup> The four remaining schools are all private: Hampden-Sydney College in Hampden-Sydney, Virginia; Deep Springs College in Dyer, Nevada; Morehouse College in Atlanta, Georgia; and Wabash College in Crawfordsville, Indiana.

<sup>147</sup> Eric Lipton, *VMI Cuts No Slack for Female Applicants*, *Wash Post* B1 (Sept 24, 1996).

<sup>148</sup> *Id.* at B5.

<sup>149</sup> Nell Henderson and Peter Baker, *For VMI Cadets, It's Still 'Better Dead Than Coed'*; Terry Preparing Defense for Threatened Lawsuit Over School's No-Women Policy, *Wash Post* B1 (Feb 2, 1990) ("The goal of the rigorous discipline is to produce the ideal 'citizen-soldier,' prepared for leadership in the board room or on the battlefield. One result

criminating against women was predicated on the evidence that there was no exact equivalent school for women, and presumably, no equivalent alumni experience.<sup>150</sup>

Comments that VMI's steadfast commitment to the adversative system was a ploy to make things difficult for women,<sup>151</sup> coupled with the not-so-subtle threat that VMI should prepare for more lawsuits if they did not lower their expectations for women,<sup>152</sup> appear to confirm the fears of VMI supporters that admitting women would so change the institution that the educational experience these women sought would no longer exist.<sup>153</sup>

After The Citadel admitted women, the school changed some of the training requirements for its female students.<sup>154</sup> There is a separate physical fitness test for women that requires fewer push-ups and sit-ups and gives female students a longer time to complete a two-mile run.<sup>155</sup> The female students also have a different hair cut, considered to be "feminine."<sup>156</sup> Citadel spokesman Colonel Terry Leedom stated: "We want to try to ensure that they [female students] have every opportunity to succeed. They are not being coddled. They get a real good share of hard treatment. But we don't want to create any unnecessary obstacles."<sup>157</sup> By setting lower standards for women, The Citadel appears to be conceding to the gender stereotyping and differences between men and women that the opponents of its all-male admission policy sought to end.

Apparently, those stereotypes have also not been overcome at the integrated service academies.<sup>158</sup> A letter from a retired Navy

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has been an alumni network that permeates the state government and business establishment. About 4,500 of VMI's 12,500 alumni live in Virginia, the school estimates.")

<sup>150</sup> 518 US at 523 ("[W]omen have no opportunity anywhere to gain the benefits of [the system of education at VMI].") (alterations in original), quoting *United States v Virginia*, 766 F Supp 1407, 1421 (W D Va 1991).

<sup>151</sup> See notes 147-48 and accompanying text.

<sup>152</sup> See Rex Bowman, *NOW wants VMI to ease physical tests for women*, Wash Times A1 (Sept 24, 1996) (reporting that Karen Johnson, Vice President of the National Organization for Women, alluded to further court action against VMI if women could not meet the school's existing physical standards).

<sup>153</sup> Karl Vick, *Male bonding vs. the 1990s: Virginia Military Institute battles efforts to admit women*, St Petersburg Times 1A (Feb 12, 1990) ("The whole thing is the closeness," an alumnus said. "Looking at the constitutionality of it, you certainly can't eliminate females. But I don't see how they can get the VMI experience, either. So they won't get what they want.")

<sup>154</sup> Lipton, *VMI Cuts No Slack* at B5 (cited in note 147).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> The service academies were used as a comparison to VMI and the Citadel during court proceedings. See *Virginia*, 518 US at 544-45 ("Women's successful entry into the

Captain to Josiah Bunting, Superintendent of VMI, expresses a skepticism about the success of integrated military training held by some in uniform:

It is known by all who have knowledge of the service academies that a two tiered system exists yet all in authority deny such. Furthermore, there is no evidence that women are needed nor has their infusion into the active forces enhanced the combat readiness of same. Until this is proven, all the rhetoric and actions taken are just rubbish, nothing more. A very good case can be made that the work of the social engineers has degraded the ability of the forces to fight.<sup>159</sup>

The district court reviewing the VMI case also found that the service academies had been altered with the admission of women.<sup>160</sup>

So in the end, it is not clear that VMI's loss has served to eliminate the stereotypes so viciously attacked in the briefs filed with the Supreme Court.<sup>161</sup> It is obvious that the interest of proving that women were just as good as men was simply a politically expedient argument on the way to pushing strict scrutiny and microscopic attention onto the courts. As for whether integration will strengthen or weaken VMI as an institution, only time can provide the answer.

We must ask ourselves if America is a better country for having gone through this legal exercise. Politics being what they are, and law being subject to its whims, there is no doubt that

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federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded." (footnotes omitted).

<sup>159</sup> Letter to Major General Josiah Bunting, Superintendent of VMI, from Robert C. Peniston, Captain, US Navy (Ret) (June 27, 1996) (copy on file with publisher). Captain Peniston is a graduate of the US Naval Academy and was referring to media questions regarding the integration of women into the service academies.

<sup>160</sup> See Brief for the Commonwealth of Virginia in Opposition at 29 n 25, 518 US 515 (1996) in 250 Gunther and Casper, *Landmark Briefs* at 71 (cited in note 26) ("As the district court found, West Point modified and then abandoned the adversative model altogether after women were admitted, and it also rejected fixed physical training standards in favor of 'comparable' training, thereby creating inequalities and resentment among the cadets."); see also *United States v Virginia*, 766 F Supp 1407, 1440 (W D Va 1991).

<sup>161</sup> See Wilfred M. McClay, *Of Rats and Women*, Commentary 46, 48 (Sept 1996) ("[D]espite her disdain for gender stereotypes, Ginsburg ends up employing them herself. Thus she argues that admitting women to VMI 'would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.'" (emphasis added)), quoting *Virginia*, 518 US at 550 n 19.

VMI and The Citadel would have eventually succumbed to some legal challenge. The Fall 1998 enrollment statistics for VMI indicate that 1,276 men and 52 women were enrolled as degree-seeking students.<sup>162</sup> Since admitting women, VMI is continuing to adhere as closely as possible to its old adversative model, but the need for a modicum of privacy to accommodate the women has created some new problems.<sup>163</sup>

No one has yet answered the question of how forcing VMI, The Citadel, or even the Detroit academies to abandon all-male admissions policies benefits the larger population of American women and girls. Wilfred M. McClay, professor of history at Tulane University, wrote in the September 1996 issue of *Commentary*:

Needless to say, not all forms of institutional diversity are worth preserving, and some forms of exclusion are intolerable. But this particular form eminently deserves preservation, and for the very same reasons that it came under assault in the first place. We are living in an era of extraordinary confusion with regard to the respective characteristics of men and women, and to the best ways of educating them. Every kind of institution, so long as it is not actively harmful to the conduct of our collective life, is, potentially, a national resource, a bit of evidence bearing upon the larger questions that confound us. In this respect, VMI's 'anachronism' is precisely its virtue. It is *because* coeducation is now the standard — and a far from unproblematic one — that we should do all we can to preserve other examples, other ways of doing things, as a hedge against an uncertain future.<sup>164</sup>

Sometimes, equal can be different, and in the search for educational equity, single-sex schools may do more to help society at large than a microscopic view of the world can see. To paraphrase Justice Blackmun,<sup>165</sup> the rigidity of law, so valued by the court

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<sup>162</sup> See Virginia Military Institute, *Admissions Data Common Data Sheet, Fall 1998*, available online at <<http://www1.vmi.edu/ir/cds9899.htm>> (visited Feb 25, 1999).

<sup>163</sup> Andrew Cain, *No sisterly sympathy at VMI: Female cadets won't spare rats*, Wash Times C7 (Aug 20, 1998) ("In May VMI expelled a senior male cadet caught naked in the barracks with a senior female exchange student. She was returned to her school, Norwich University in Vermont. In March, two freshmen, a male and a female, caught in an unspecified sexual encounter were suspended.").

<sup>164</sup> See McClay, *Commentary* at 50 (cited in note 161).

<sup>165</sup> *Mississippi University for Women v Hogan*, 458 US 718, 734 (1982) (Blackmun dissenting).



and exploited by special interests, can sometimes violate the right of people to choose what is in their own best interests.