The Beat Goes On: District Court Upholds Virginia Military Institute's All-Male Admissions Policy in *United States v. Virginia*

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The Beat Goes On: District Court Upholds Virginia Military Institute’s All-Male Admissions Policy in United States v. Virginia

I. INTRODUCTION

In United States v. Virginia, the United States District Court for the Western District of Virginia held that Virginia Military Institute ("VMI"), a state-supported college, can exclude women under its 152-year-old admissions policy without violating the Equal Protection Clause of the Fourteenth Amendment. The court based its decision on the United States Supreme Court’s holding in Mississippi University for Women v. Hogan. Applying the Hogan test, the district court held that VMI’s discrimination serves an important state educational objective by enhancing the diversity of Virginia’s overall education system and that the exclusive admissions policy is substantially related to the achievement of this objective. According to District Judge Jackson L. Kiser, “VMI truly marches to the beat of a different drummer, and I will permit it to continue to do so.”

This Casenote begins with a discussion of the development of the intermediate scrutiny test employed by the Supreme Court. Next, it provides a brief discussion of the VMI experience, along with the facts and procedural history of United States v. Virginia. An examination of the present controversy follows, including arguments presented by both sides and a discussion of the court’s opinion. The Casenote concludes with an analysis of the decision.

II. DEVELOPMENT OF THE INTERMEDIATE SCRUTINY TEST

The Supreme Court first alluded to heightened scrutiny for gender-based classifications in Reed v. Reed, although the exact test applied by

2. Id. at 1408.
5. Id. at 1415.
the Court was somewhat unclear. In Reed the Court struck down an Idaho statute that preferred males over females as administrators of estates.\(^7\) The Court reasoned that the statute's different treatment of applicants on the basis of sex "established a classification subject to scrutiny under the Equal Protection Clause."\(^8\) Because the statute did not advance the "objective of reducing the workload on probate courts" in a way that survived this heightened scrutiny,\(^9\) the Court concluded that "the arbitrary preference established in favor of males" violated the Fourteenth Amendment's Equal Protection Clause.\(^10\)

In Frontiero v. Richardson,\(^11\) the Court revisited the heightened scrutiny question in a due process context. The Court struck down a federal statutory scheme that determined a spouse's dependency status based on the gender of the armed forces member claiming dependency benefits.\(^12\) Justice Brennan, joined by three other justices,\(^13\) agreed with the claimant's contention that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny."\(^14\) Brennan noted that "sex, like race and national origin, is an immutable characteristic,"\(^15\) that "the sex characteristic frequently bears no relation to ability to perform or contribute to society,"\(^16\) and that "Congress has itself manifested an increasing sensitivity to sex-based classifications."\(^17\) Accordingly, gender-based classifications "are inherently suspect, and must therefore be subjected to strict judicial scrutiny."\(^18\) The statutory scheme failed under this "stricter standard of review."\(^19\) Brennan also dismissed the Government's claim that the statute should be upheld because it furthered administrative convenience.\(^20\) "[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."\(^21\)

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7. Id. at 74.
8. Id. at 75.
9. Id. at 76.
10. Id. at 74.
12. Id. at 678-79 (plurality opinion).
14. 411 U.S. at 682 (plurality opinion).
15. Id. at 686.
16. Id.
17. Id. at 687.
18. Id. at 688.
19. Id.
20. Id. at 690.
21. Id.
However, gender-based classifications failed to receive strict scrutiny in *Frontiero* because of Justice Stewart's opinion. Stewart cast the fifth vote to strike down the statute. In his one-sentence opinion, Stewart simply concurred in the judgment, "agreeing that the statutes . . . work an invidious discrimination in violation of the Constitution" and citing the Court's decision in *Reed.*

In 1976, the Court finally decided upon the appropriate scrutiny level to apply to gender-based classifications and outlined the intermediate scrutiny test in *Craig v. Boren.* In *Craig* the Court held that an Oklahoma statute which "prohibits the sale of 'nonintoxicating' 3.2% beer to males under the age of 21 and to females under the age of 18 . . . constitutes a denial to males 18-20 years of age of the equal protection of the laws in violation of the Fourteenth Amendment." 24

Especially important was the majority's characterization of the scrutiny level established by previous cases. According to the Court's opinion in *Craig,* "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." The Court accepted the State's objective of protecting public health and safety, particularly traffic safety, as an important objective, but held that the gender-based classification was not substantially related to that objective based on the statistics presented by the State. "Proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection clause." The dissenters in *Craig* objected to the extension of any heightened scrutiny in the equal protection area. According to Justice Rehnquist, the statute "need pass only the 'rational basis' equal protection analysis," which he found the statute survived.

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22. Id. at 691 (Stewart, J., concurring).
24. Id. at 192.
25. Id. at 197-98 (citing *Reed v. Reed,* 404 U.S. 71 (1971); *Stanley v. Illinois,* 405 U.S. 645 (1972); *Frontiero v. Richardson,* 411 U.S. 677 (1973); *Schlesinger v. Ballard,* 419 U.S. 498 (1975); *Stanton v. Stanton,* 421 U.S. 7 (1975)).
26. Id. at 197.
27. Id. at 199-200.
28. Id. at 204.
29. Chief Justice Burger and Justice Rehnquist each filed dissenting opinions.
30. 429 U.S. at 217-18 (Rehnquist, J., dissenting). Under the rational basis or rational relationship test, the statute is unconstitutional "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective . . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Id. at 222 (quoting *McGowan v. Maryland,* 366 U.S. 420, 425-26 (1961)). In this case, the Oklahoma legislature's action was "neither irrational nor arbitrary." Id. at 227.
The Court further refined the intermediate scrutiny test in *Michael M. v. Sonoma County Superior Court.*31 The Court upheld a California statutory rape law even though the statute effectively made "men alone criminally liable for the act of sexual intercourse."33 Justice Rehnquist again showed his distaste for the Court's test in *Craig* when he wrote the opinion for the plurality in *Michael M.*33 Although he emphasized that "the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged,"34 Rehnquist carefully characterized the *Craig* approach as a "restatement of the test."35

According to the plurality, the Court "has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."38 In applying the intermediate scrutiny test, the Court held that "the State has a strong interest in preventing . . . [illegitimate] pregnancy"37 and that the statutory rape statute "is sufficiently related to the State's objectives to pass constitutional muster."38

The Court also rejected the petitioner's contention that the law was "impermissibly underinclusive and must, in order to pass judicial scrutiny, be broadened so as to hold the female as criminally liable as the male."39 The question is not, according to the Court, "whether the statute is drawn as precisely as it might have been, but whether the line chosen by the . . . [l]egislature is within constitutional limitations."40

The dissenters in *Michael M.* objected primarily to the plurality's application of the second prong of the *Craig* test, that is, whether the statutory means is substantially related to the State's objective.41 According to Justice Brennan's opinion, because "the State ha[d] not shown that [the present law] . . . [was] any more effective than a gender-neutral law would be in deterring minor females from engaging in sexual intercourse," the State had not proven the substantial relationship that intermediate scrutiny requires.42

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32. *Id.* at 466 (plurality opinion).
33. *Id.* at 465-66.
34. *Id.* at 468.
35. *Id.* at 469.
36. *Id.*
37. *Id.* at 470.
38. *Id.* at 472-73.
39. *Id.* at 473.
40. *Id.*
41. *Id.* at 488-89 (Brennan, J., dissenting).
42. *Id.* at 496.
In 1982, the decision of *Mississippi University for Women v. Hogan* created new dimensions for the intermediate scrutiny test. In *Hogan* the Court held that "a state statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment." Plaintiff was a male registered nurse who applied for admission to the Mississippi University for Women's School of Nursing. The school denied him admission because of his sex. Plaintiff sued the school, claiming that the single-sex admissions policy violated the Equal Protection Clause. Applying the rational relationship test, the district court denied plaintiff's request for injunctive and declaratory relief and entered summary judgment for the State.

The court of appeals reversed, holding that the district court erred in applying the rational relationship test in its analysis. The court of appeals applied the intermediate scrutiny test and found that although "the State has a significant interest in providing educational opportunities for all its citizens, . . . the State had failed to show that providing a unique educational opportunity for females, but not for males, bears a substantial relationship to that interest." The court also rejected the State's argument that Title IX of the Civil Rights Act expressly authorized the school's continuance of the single-sex admissions policy. The Supreme Court affirmed the judgment of the court of appeals.

The Court began by outlining the burden of proof that a state must meet: "[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." The Court then reaffirmed the use of the intermediate scrutiny test in this area and gave specific guidelines on how the test should be applied. "Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."

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43. 458 U.S. 718 (1982).
44. *Id.* at 719.
45. *Id.* at 720-21.
46. *Id.* at 721.
47. *Id.* at 722.
48. *Id.* at 723. The State claimed that Congress "expressly had authorized [Mississippi University for Women's School of Nursing] to continue its single-sex admissions policy by exempting public undergraduate institutions that traditionally have used single-sex admissions policies from the gender discrimination prohibition of Title IX." *Id.* at 722. See 20 U.S.C. § 1681(a)(5) (1976).
49. 458 U.S. at 723.
50. *Id.* at 724.
51. *Id.* at 724-25.
52. *Id.* at 725.
The State asserted that the primary purpose for the admissions policy survived the first prong of the intermediate scrutiny test because the policy "compensates for discrimination against women and, therefore, constitutes educational affirmative action." The Court rejected this argument and noted that the policy does quite the opposite by "perpetuating the stereotyped view of nursing as an exclusively woman's job." The Court also found that the policy was not substantially related to the proposed governmental objective. As the court of appeals had done, the Court quickly disposed of the State's argument based on the Title IX exemption provision.

The dissenters in Hogan lamented that a rigid application of intermediate scrutiny in areas in which it does not belong dampens the "liberating spirit" of the Equal Protection Clause and leads to conformity. According to Justice Powell, a state does not "transgress[] the Constitution when—within the context of a public system that offers a diverse range of campuses, curricula, and educational alternatives—it seeks to accommodate the legitimate personal preferences of those desiring the advantages of an all-women's college." Although Powell would have applied the rational-relationship test, he contended that the admissions policy also survived intermediate scrutiny.

III. THE VMI EXPERIENCE

Understanding the district court's reasoning in United States v. Virginia requires a brief description of VMI's history, its mission, and its unique educational method. VMI was founded in 1839 by an act of the Virginia Legislature. The founders had two models in mind for VMI: the United States Military Academy at West Point and an engineering school in Paris begun during the French Revolution. VMI cadets fought for the Confederacy in the
Civil War, and General Thomas J. "Stonewall" Jackson was an early professor, teaching philosophy and artillery tactics. Today, the school offers undergraduate degrees in liberal arts, science, and engineering, yet still maintains its commitment to military service. Since 1842, almost 14,000 VMI alumni have served in the armed forces during wartime.

Virginia's fifteen state-supported, four-year colleges enroll over 158,000 students annually. VMI enrolls approximately 1,300 of these students, all of whom are men. Students have several reasons for coming to VMI, including the "rigor of the experience," the desire for better "work habits or self-discipline," and the recommendation of the school by another who attended (their father, for example).

According to the Mission Study Committee of the VMI Board of Visitors:

[T]he mission of the Virginia Military Institute is to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.

VMI seeks to achieve this mission by focusing on five basic areas: "(1) education, both general and specialized; (2) military training; (3) mental and physical discipline; (4) character development; and (5) leadership training."

The educational method at VMI is based on the adversative model. The model's objective is to "create doubt about previous beliefs and experiences in order to create a mindset conducive to the values VMI attempts to impart." VMI achieves this objective by emphasizing "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." The adversative model at VMI has three distinctive features: the rat line, the class system, and the dyke system.

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65. 766 F. Supp. at 1424.
66. Id. at 1427.
67. Id. at 1419. During the fall of 1989, 72,819 men and 85,441 women were enrolled in the 15 schools. VMI enrolled 1,312 men. Id.
68. Id. at 1426.
69. Id. at 1425 (quoting the final report of the Mission Study Committee of the VMI Board of Visitors issued May 16, 1986).
70. Id. at 1426.
71. Id. at 1421.
72. Id.
73. Id. at 1422-23.
For their first seven months at VMI, entering cadets are subjected to "indoctrination, egalitarian treatment, rituals (such as walking the rat line), minute regulation of individual behavior, frequent punishments, and [the] use of privileges to support desired behaviors." Rat line activities also include "stoop runs, fifteen-minute running and calisthenic events, rifle runs, training marches, and the like." VMI believes that cadets who survive the rat line develop "a sense of class solidarity in addition to individual responsibility." The class system is designed to replace in the cadets what the rat line strips away. The system is an organized structure of peer pressure, with each class having certain responsibilities. Seniors at VMI (the first class) provide overall leadership and are heavily involved in the supervision of the rat line. Members of the third class are disciplinarians for the rat line. Through the dyke system, almost a subsystem of the class system, first classmen serve as mentors to the rats. Rats typically shine the shoes of the first classmen and provide them with wake-up calls. In return, the first classmen teach the rats the ropes, indoctrinating them with VMI's history and traditions. Both the rats and the first classmen call each other dykes. According to VMI, the dyke system creates "cross-class bonding and provides a model for leadership and support.

The barracks also play a very important role in the VMI experience. All cadets must live in the barracks for all four years.

Each class is assigned a floor in the barracks, which has four floors. There is a total lack of privacy . . . [O]pen windows on the doors in the barracks . . . enable the officer in charge to walk around and check in each room at night and see every cadet without anything being hidden . . . .

The barracks are stark and unattractive . . . Ventilation is poor. Furniture is unappealing. A principal object of these conditions is to induce stress.

VMI's emphasis on the barracks experience distinguishes it not only from most colleges in America, but from the service academies as well.
IV. FACTS AND PROCEDURAL HISTORY

On March 21, 1989, in response to a female high school student’s written complaint of discrimination by VMI, the United States Justice Department wrote to the Acting Superintendent of VMI requesting information on admission policies and practices. The Superintendent responded on April 28 by saying that VMI had never admitted women. On January 30, 1990, the Justice Department notified Virginia’s Governor and the President of the VMI Board of Visitors (“Board”) that the admission policies violated both the Civil Rights Act and the Fourteenth Amendment and gave VMI until February 20, 1990 to develop and implement a remedial plan.

Fifteen days before the deadline, the Board’s President advised the Justice Department that VMI stood behind its current policy. The Commonwealth of Virginia (“Commonwealth”) filed a pre-emptive suit against the United States on behalf of VMI. The VMI Foundation Inc. (“Foundation”) also filed a complaint for judgment and injunctive relief against the United States. On March 1, the United States moved to dismiss the Commonwealth’s suit and filed its own complaint pursuant to Title IV of the Civil Rights Act. The named defendants in this suit were the Commonwealth; the Governor; VMI, its Superintendent and Board; and the State Council of Higher Education (“Council”), its members and Director.

The defendants filed their answer and counterclaim on March 26. One month later, the Foundation moved to consolidate the three pending suits and later amended its complaint to include the VMI Alumni Association (“Association”) as a plaintiff. Both plaintiffs moved to intervene in the United States’ suit on June 5. On October 19, the Commonwealth voluntarily dismissed its action against the United States without prejudice.

83. Id.
84. Id. at 1-2.
85. Id. at 2.
86. Id. at 4.
87. Id. at 2.
89. United States’ Proposed Findings, supra note 82, at 3.
90. Id.
91. Id. at 4.
92. Id. at 2-3.
On November 2, the United States filed a motion to dismiss the Foundation’s suit, which the court granted. The court also granted discretionary intervention to the Foundation and Association and granted an earlier motion by the Commonwealth to dismiss the Council as a defendant. Later that month, the Virginia Attorney General’s Office sought permission from the court to withdraw from the case, alleging a conflict of interest in representing the Commonwealth and the Governor, who had opposed the admissions policy. The court granted this motion (conditionally on November 30, finally on December 10) and appointed substitute counsel.

On January 10, 1991, the Commonwealth filed a Motion for Stay of Liability Proceedings Against Defendant Commonwealth of Virginia Subject to Commonwealth’s Agreement to be Bound for Purposes of this Proceeding by the Ultimate Ruling on Liability. In February, the court granted the Commonwealth’s motion to be bound and bifurcated the action for trial. The court would decide the liability issue first. Two weeks before trial, the Governor filed a Motion in Limine asking the court that he not be required to testify. The court granted his motion, and the trial on the liability issue was held during the first two weeks of April.

V. The Present Controversy

A. Arguments by VMI Defendants

VMI defendants offered two governmental purposes for the exclusionary admissions policy, each of which, they claimed, survived the Hogan test: “The ‘citizen-soldier’ objective focuses on VMI as a singular institution, while the ‘diversity’ objective reflects a system-wide perspective.” Because VMI’s mission “emphasiz[es] character development and preparation for civilian and military leadership,” and because the Board of Visitors acted on behalf of the State of Virginia in defining this mission, the citizen-soldier rationale serves an important governmental objective. The defendants contended that the “admission of female cadets would undermine fulfillment of its existing, indisputably valid mission.”

93. Id. at 4.
94. Id. at 4-5.
95. Id. at 5.
96. Id. at 5-6.
98. Id. at 114.
99. Id.
100. Id. at 115.
Therefore, the relationship between the policy and the citizen-soldier objective is not only substantial, but compelling.\textsuperscript{101} The defendants also argued that VMI serves an important governmental objective by enhancing system-wide diversity in Virginia's education system.\textsuperscript{102} This contribution comes in two different ways: "by providing an opportunity for single-sex education and by providing a distinctive program of military-style education."\textsuperscript{103} The defendants relied on Justice Blackmun's dissent in \textit{Hogan}, in which he commented on the tension between diversity and conformity in higher education.\textsuperscript{104} Because VMI contributes to diversity by virtue of its single-sex status, excluding women is more than a substantially related means; it is a means absolutely necessary to achieving that goal.\textsuperscript{105}

The defendants distinguished the Court's holding in \textit{Hogan}. First, they contended that Justice O'Connor, in writing for the majority, did not challenge Justice Powell's premise in his dissent or the importance he placed on diversity.\textsuperscript{106} Second, they distinguished the case on its facts. The facts that Justice O'Connor emphasized, showing that admitting men to nursing classes would not seriously hinder the classroom setting, are simply not present in this case according to the defendants. In fact, key elements of the VMI experience "would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females."\textsuperscript{107}

B. Arguments by the United States

According to the United States, "this is not a complicated case . . . Virginia Military Institute (VMI) is a public, state-supported undergraduate institution that does not admit women."\textsuperscript{108} Therefore, the admissions policy clearly violates the Equal Protection Clause and Title IV of the Civil Rights Act.\textsuperscript{109}

The United States contended that VMI fails the first prong of the intermediate scrutiny test by not offering any \textit{exceedingly persuasive} governmental interest for the admissions policy. The interest in promoting diversity in Virginia's education system is simply unpersuasive.\textsuperscript{110} "The

\begin{thebibliography}{110}
\bibitem{101} Id.
\bibitem{102} Id.
\bibitem{103} Id.
\bibitem{104} Id.
\bibitem{105} Id. at 116.
\bibitem{106} Id.
\bibitem{107} Id. at 117.
\bibitem{108} United States' Proposed Findings, \textit{supra} note 82, at 7.
\bibitem{109} Id. at 111. \textit{See} 42 U.S.C. \textsection 2000c-6 (1988).
\bibitem{110} United States' Proposed Findings, \textit{supra} note 82, at 111.
\end{thebibliography}
evidence is clear that diversity would be furthered, not denigrated, by the admission of women to VMI. The VMI educational experience is unique, independent of gender, and the admission of women would merely substitute one form of diversity for another."

Perhaps one of the Justice Department’s stronger arguments regarding the diversity rationale was that the defendants were merely making a bootstrapping argument.

The justification for an exclusion of women must rest on something more than the exclusion itself. Here, however, Defendants [sic] diversity rationale offers only the classification itself—i.e., a desire for a single sex school—as the reason.

... Excluding a group will always make the institution “different” from institutions that do not exclude the group."

The United States claimed that even if the policy produced certain educational benefits in Virginia, the evidence was not sufficient to survive Hogan’s “exceedingly persuasive” mandate.

The United States also found unpersuasive the proposed citizen-soldier rationale offered by VMI as an important governmental objective. The evidence “proves that women can be citizen-soldiers, that they are capable of succeeding at VMI, and that their admission will neither harm VMI’s great tradition nor unravel the fabric of the VMI experience.”

The United States especially relied upon the admission of women to the federal service academies for the argument that women could succeed in VMI's mission of producing citizen soldiers. “[T]he experience of female soldiers in Operation Desert Storm demonstrates plainly that women satisfy the soldier portion of VMI’s mission. And, no argument has been made or could be made that women have not had successful civilian careers.”

In addition, the United States contended that VMI failed to demonstrate any substantial relationship between the exclusionary admissions policy and any of the alleged governmental objectives (the diversity rationale or the citizen-soldier rationale). Accordingly, the United States asked the court to require VMI “to formulate, adopt, and fully and timely implement a plan to remedy fully their discriminatory policies and prac-

111. Id. at 7.
112. Id. at 115.
113. Id. at 116.
114. Id. at 8.
115. Id.
116. Id. at 119-26.
117. Id. at 120.
118. Id. at 111, 118, 136.
ties and to comply with the Fourteenth Amendment . . . , and to submit this plan for review, response, and approval."

C. The Court's Opinion

After outlining the controversy, the court framed the issue in the case to be "whether VMI's practice of excluding women can pass muster under the equal protection clause, as glossed by the decisions of the Supreme Court." Judge Kiser then briefly discussed the court's basis for jurisdiction, the procedural background, and the applicable standard of review. The court derived the standard primarily from Supreme Court cases in the higher education area, particularly the Court's decision in Regents of the University of California v. Bakke.

According to the Bakke standard, courts should defer to a university's academic decisionmaking as part of the principle of academic freedom implicit in the First Amendment's freedom of association. The freedom to choose whom the school will admit is included in this right of academic freedom. The court noted that "other courts have extended the rationale of that decision to include the freedom to create different missions at different state universities, in order to promote diverse educational opportunities within the state." However, this deference is not absolute, especially when the decisionmaking "tend[s] to perpetuate unconstitutional discrimination."

The court then presented an overview of sex discrimination in higher education. The court first summarized Kirstein v. Rector & Visitors of the University of Virginia, in which plaintiffs challenged the University of Virginia's all-male admissions policy. The court in Kirstein required Virginia to admit women at the University, but stopped short of requiring coeducation at all of Virginia's colleges.

119. Id. at 136-37.
121. Id. at 1408-09.
122. Id. at 1409. See 438 U.S. 265 (1978).
123. 766 F. Supp. at 1409.
124. Id.
126. Id.
127. Id. at 1409-11.
The court also discussed a Fourth Circuit decision, *Williams v. McNair*,¹³¹ in which the court upheld the denial of admission to male students by South Carolina's Winthrop College, a women's college.¹³² The court in *Williams* reaffirmed the value of single-sex institutions in general.¹³³ The Supreme Court's intermediate scrutiny test was not applied in either *Kirstein* or *Williams* because the Court had not yet articulated the test.¹³⁴

Stating that *Hogan* "guides my decision in this case," Judge Kiser included a lengthy discussion of the *Hogan* case.¹³⁵ The court agreed that the intermediate scrutiny test should govern its decision and that the defendants must show an "exceedingly persuasive justification" for the admissions policy.¹³⁶ However, the court distinguished *Hogan* from the present case in three ways.¹³⁷

First, the court distinguished *Hogan* on its facts.¹³⁸ The court noted that according to the record in *Hogan*, admitting men "does not affect teaching style, . . . would not affect the performance of the female nursing students, . . . and that men in coeducational nursing schools do not dominate the classroom."¹³⁹ In the present case, "single gender education at the undergraduate level is beneficial to both males and females."¹⁴⁰ In addition, the admission of women, with the resulting accommodation of their needs, would "fundamentally" alter key aspects of the VMI educational system, particularly the "focus on barracks life."¹⁴¹

Second, the court evaluated the reasons offered in each case to establish an important governmental interest.¹⁴² In *Hogan* the State's justification for the single-sex admissions policy was that the policy compensated women for past discrimination—a justification that failed intermediate scrutiny.¹⁴³ "In contrast, diversity in education has been recognized both judicially and by education experts as being a legitimate objective. The sole way to attain single-gender diversity is to maintain a policy of admitting only one gender to an institution."¹⁴⁴

¹³⁴ 766 F. Supp. at 1410 n.5.
¹³⁵ Id. at 1410.
¹³⁶ Id. (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982)).
¹³⁷ Id. at 1411.
¹³⁸ Id.
¹³⁹ Id. (quoting *Hogan*, 458 U.S. at 731).
¹⁴⁰ Id.
¹⁴¹ Id.
¹⁴² Id.
¹⁴³ Id.
¹⁴⁴ Id.
Third, the court noted that the plaintiff in Hogan resided in the town in which the school was located and would have faced a "significant hardship" if forced to study his profession in a different community. That result is simply not possible in the VMI case because all cadets must live in the barracks. VMI does not offer a "close-to-home education" during the academic year. In addition, VMI is not "deny[ing] the opportunity to study any particular academic program to anyone," because Virginia Polytechnic Institute (VPI) offers the same courses as VMI, including courses in military instruction.

The court offered a "substantial body" of evidence to support its premise that single-sex education as a form of diversity independently survives constitutional scrutiny. "[T]he opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement." The court placed great weight on one study which showed that students at single-sex colleges "become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience." Justice Powell cited the same research in his dissent in Hogan.

The effect that admitting women would have on the VMI experience "further reinforce[s]" the all-male policy's validity. The court gave several reasons why coeducation at VMI would be detrimental. Women on the VMI campus would "distract male students from their studies," "increase pressures relating to dating," "alter the adversative environment," and "add a new set of stresses on the cadets." Coeducation would also necessitate different physical education requirements. The court noted that these effects are "well-founded in empirical evidence, and not based on an archaic stereotype."

145. Id.
146. Id.
147. Id.
148. Id.
149. Id.
150. Id. at 1411-12.
151. Id. at 1412.
152. Id. See Alexander Astin, Four Critical Years (1977).
154. 766 F. Supp. at 1412.
155. Id. at 1412-13.
156. Id.
157. Id. at 1413.
158. Id.
Accordingly, the court found that "both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system, and that excluding women is substantially related to this mission." Therefore, the defendants met their burden under the intermediate scrutiny test outlined in Hogan.

The court did highlight certain factors that could have been influential under a different set of facts. First, the United States filed the present suit on behalf of one potential applicant. The court conceded that "some women, at least, would want to attend the school if they had the opportunity." However, the court interpreted Hogan to require the consideration of the policy's constitutionality "without regard to the size of the available applicant pool."

Second, the United States sought to require the admission of women to VMI, not to require Virginia to establish a state-supported college for females. Because the latter was not the relief sought by the plaintiff, the court could not address that issue in this lawsuit. The court noted that what plaintiff really wants—admission to the VMI experience—would be virtually impossible if women were admitted. "Even if the female could physically and psychologically undergo the rigors of the life of a male cadet, her introduction into the process would change it. Thus, the very experience she sought would no longer be available."

VI. ANALYSIS AND CONCLUSION

Justice Blackmun's observation in his dissent in Hogan seemed almost to predict the present litigation:

[I]t 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 . . . .

... [The Court's] ruling . . . places in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex . . . .

159. Id.
160. Id.
161. Id. at 1414.
162. Id.
163. Id.
164. Id.
165. Id. at 1414, 1415.
166. Id. at 1414.
167. Id.
Even VMI's self-study committee seemed to acknowledge the inevitable: "'within the next decade—particularly as the grim years of 1992-1995 approach—the exigencies of declining enrollment (or the mandate of a federal court armed with a legal precedent, already extant) may make the admission of women unavoidable.'"

The Justice Department, armed with the Hogan decision, may have viewed the present suit as an easy case, but Judge Kiser welcomed the challenge. His opinion resulted in an impressive defense of single-sex education in general and the VMI experience in particular. However, although the court provides an interesting application of the intermediate scrutiny test, the opinion loses much of its persuasiveness by ignoring many of the Justice Department's toughest arguments.

The court's reliance on the Kirstein and Williams decisions to establish the benefits of single-sex education seems to be misplaced, although the court finds valuable prose in those opinions. The court even acknowledged that the Supreme Court had not yet developed the intermediate scrutiny test when these decisions were written. The court also failed to attack directly the Justice Department's primary argument: because VMI is a state-supported institution, which women want to attend, the Equal Protection Clause requires coeducation. The court extols the benefits of single-sex education on page after page—benefits that few would dispute—but the court de-emphasizes VMI's role as a public school.

The court's acceptance of VMI's diversity rationale has much support in the dissent in Hogan, but the court fails to present much more legal support for this governmental objective. The court asserts that this objective "has been recognized both judicially and by education experts," but Judge Kiser loads the opinion more with expert opinion than with judicial authority post-Craig v. Boren, in which the Supreme Court outlined the intermediate scrutiny test.

Judge Kiser also never refutes, at least not through a reasoned analysis, the Justice Department's arguments that admitting women will further diversity and that VMI simply offers the classification itself to justify the policy. Instead, he merely concludes that the only way to achieve diver-

169. United States' Proposed Findings, supra note 82, at 24.
170. See supra notes 128-34 and accompanying text.
171. See supra note 134 and accompanying text.
174. 766 F. Supp. at 1411.
175. See 429 U.S. 190 (1976).
176. See supra notes 111-12 and accompanying text.
sity in Virginia's higher education system is to keep women out of VMI. 177

Judge Kiser's opinion has, at the very least, sparked additional interest in the continuing debate over women's role in the military. In particular, public reaction to the opinion reflected the irony of the decision in light of the role played by women during Operation Desert Storm. 178 Said Ellen Vargyas of the National Women's Law Center, "This comes on the heels of the Persian Gulf war, where women performed admirably, where women were killed, where women were prisoners . . . . And this court says blatant discrimination against women is all right." 179 A New York Times editorial echoed this distaste: "Judge Kiser's 21-page rhapsody on the merits of single-sex education . . . [is] poorly timed. The Persian Gulf war showed the capability and potential of women in battle . . . . Virginia Military Institute may indulge its pride in uniqueness, but not at taxpayer expense. Let the college buy its own drum." 180

Not everyone was displeased with Judge Kiser's opinion. In a statement issued by the president of the Citadel, the nation's only other state-supported, all-male school, Lieutenant General Claudius E. Watts said, "I can tell you that a very dark cloud has been lifted from VMI and The Citadel." 181 Another writer also felt that Judge Kiser made the right move:

Talk about timing. In the same week that Congress considers the thorny issue of women in combat comes news of a federal judge's ruling that all-male Virginia Military Institute can stay that way.

. . . . [If common sense prevails (which is never a certainty) the VMI decision will stand and Congress will leave well enough alone.

Why? Because, while men and women are indeed equals, you simply cannot ignore the fact that there are differences between the sexes. 182

The court's opinion may also signal a new era in the area of equal protection in higher education—an era in which history and tradition receive more weight in the intermediate scrutiny analysis. VMI defendants did well to frame their governmental objective in terms of educational diver-

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177. 766 F. Supp. at 1415.
179. Barringer, supra note 172.
Seizing upon the diversity and conformity language used in Justice Powell's dissent in Hogan, the defendants set the stage for a constitutional battle that they could very well win before the Supreme Court, which has become a much different battleground in the decade since Hogan.

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183. In fact, Virginia's Attorney General acknowledged that "the educational diversity argument was the only viable case that could be made on behalf of the all-male policy at the Institute." United States' Proposed Findings, supra note 82, at 118-19 (quoting Virginia Attorney General's Statement at 2 (11/27/90)).

184. Interestingly, former Justice Lewis Powell is a native Virginian. See Hogan, 458 U.S. at 737 n.2 (Powell, J., dissenting).

185. Four of the justices who decided Hogan are no longer on the Court. Justices Brennan and Marshall joined with Justices O'Connor, White, and Stevens in the majority's opinion. Justices Burger and Powell dissented. Therefore, with new Justices Scalia, Kennedy, Souter, and Thomas, VMI defendants could conceivably get the necessary votes to succeed on their diversity argument.