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## Unconstitutionally Male?: The Story of *United States v. Virginia*

Katharine T. Bartlett<sup>\*</sup>

In 1989, a northern Virginia female high school student complained to the U.S. Department of Justice that the Virginia Military Institute (“VMI”) did not accept applications from women. Seven years later, in *United States v. Virginia*,<sup>1</sup> the U.S. Supreme Court vindicated her complaint, holding that VMI’s exclusion of women was unconstitutional, even after Virginia attempted to save the male-only school by adding a parallel program for women at a neighboring all-women’s college. The story of this case and its aftermath exhibits both the muscle of sex discrimination doctrine and its unresolved tensions.

The record in *United States v. Virginia* does not reflect what drew this anonymous applicant to the 150-year-old college. VMI has a reputation for rigorous academics, especially in its engineering and science programs. It is also known for a military-style culture and regimen, and especially for its unique, “adversative” system of education, which combines tortuous “[p]hysical rigor, mental stress, . . . minute regulation of behavior, and indoctrination of values.”<sup>2</sup> A new cadet enters VMI as a “rat,” defined in the “Rat Bible” as the “dumbest and lowliest of God’s creatures.”<sup>3</sup> Rats are put through seven months of the “rat line,” a deliberately overwhelming physical and mental leveling process designed to humiliate and disorient the student, instill self-doubt, and strip away any sense of indi-

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<sup>1</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>2</sup> *United States v. Virginia*, 976 F.2d 890, 892–93 (4th Cir. 1992).

<sup>3</sup> The Rat Bible, formally known as *The Bullet*, is a compendium of basic facts about VMI—its history, layout, calendar, student government, and colloquial terms and abbreviations. It is prepared by the senior class and must be memorized in its entirety, and carried by each rat at all times. See, e.g., *The Bullet: The Rat Bible for the Rat Mass of the Virginia Military Institute* (Virginia Military Institute, Lexington, VA), 1997–1998 (on file with VMI Archives, Preston Library, Virginia Military Institute, Lexington, Va.); See also Philippi Strum, *Women in the Barracks: The VMI Case and Equal Rights* 39 (2002).

viduality, favor, or privilege.<sup>4</sup> Out of this experience come graduates who are confident and extraordinarily loyal to the school. VMI alumni are leaders in their communities and disproportionately influential in the state of Virginia.<sup>5</sup>

Like the men who sought admission to VMI, the would-be female applicant may have been hungry for the intensity of the physical and mental challenge and the leadership opportunities. She may have longed for membership in a tightly knit community, bonded through the shared grueling misery VMI experience.<sup>6</sup> Like others who had succeeded at VMI, she may have had proud family members who attended VMI or been a troublesome under-achiever who had squandered other opportunities.<sup>7</sup>

The VMI story is about the battle between the federal government seeking to gain access for an unknown number of women<sup>8</sup> to a school that deliberately excluded them. From the government's perspective, the VMI litigation was part of a long, ongoing effort to eliminate sex distinctions and gender stereotypes from laws and public institutions. The government did not expect that many women would ever attend VMI. In this sense, as one commentator has written, "the continued existence of an all-male military school in Virginia may have been more significant for its expressive effects than for the actual deprivation of educational opportunities."<sup>9</sup> The federal government viewed the principle of equal treatment as a means of transforming how society viewed and treated women and thus as a principle worth continuing to extend. In addition, the case looked winnable. As one law-

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<sup>4</sup> See Statement of Elmon T. Gray, May 5, 1989, available from VMI Archives, *supra* note 3, at 3. [see memo]

<sup>5</sup> Strum, *supra* note 3, at 89. There were 6,000 VMI alumni in 1989, which included "two congressmen, two state senators, the former speaker of the House of Delegates, the managing partners of the state's two biggest law firms, and numerous industrialists and investors." *Id.*

<sup>6</sup> See Laura Fairchild Brodie, *VMI and the Coming of Women* 42 (2001) (describing VMI's "mixture of bonding and bondage").

<sup>7</sup> A case in point is the superintendent of VMI (analogous to the president at most colleges and universities) just before and during gender integration, General Josiah Bunting. Bunting had been a serious discipline problem in high school, who was thrown out of one boarding school after another before finding a school that would let him sit for his final exams. He took to VMI as a student and went on to be one of its most successful graduates—a Rhodes Scholar, president of Briarcliff College (an all-female school in New York) and Hampden-Sydney College (an all-male college in Virginia), and headmaster of the prestigious Lawrenceville Academy in New Jersey where he oversaw the successful introduction of women to the previously all-male preparatory school. See John Sedgwick, *Guess Who's Coming to VMI?*, *Gentleman's Quarterly*, July, 1997, at 124; Brodie, *supra* note 6, at 34; Strum, *supra* note 3, at 36–39, 101.

<sup>8</sup> The record reveals that 347 women made inquiries about VMI in the two years preceding the lawsuit. *United States v. Virginia*, 518 U.S. 515, 523 (1996).

<sup>9</sup> See Cass R. Sunstein, *The Supreme Court 1995 Term, Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 74 (1996).

yer who participated in the litigation later put it, “Although VMI’s admission policy might have seemed like a small fish, at least it looked liked one that could be shot in a barrel.”<sup>10</sup>

If the government’s case for the gender integration of VMI was symbolic, lacking even a specific named victim or a known set of beneficiaries,<sup>11</sup> VMI’s case to keep women out could not have been more concrete. The school was a success story, steeped in rich traditions. Its distinct, holistic teaching philosophy had specific regimens and rituals designed to replace individual ego with an earned sense of accomplishment and group loyalty. It took young men, cut them down, and built them back up as leaders. Its graduates believed fiercely that the presence of the few women who could survive the VMI experience would destroy it, and they were prepared to fight hard to preserve that priceless institution. The federal government’s interference on behalf of some hypothetical women, for these advocates, demonstrated “politically-correct” contempt for a proven educational system and an honorable way of life.<sup>12</sup>

Over the course of the litigation, the struggle between these two world views mirrored the multiple versions of equality that have animated debates over sex discrimination law:

(1) *Exclusion of women based on their differences.* Virginia’s original justification for excluding women from VMI was that women fundamentally differ from men and thus that their admission to VMI would ruin the school for men without benefiting women themselves. The district court followed this rationale in holding that VMI did not need to admit women.

(2) *Separate but equal.* The district court’s decision in support of Virginia’s position was reversed on appeal, on the ground that it was unconstitutional for Virginia to make the unique VMI opportunity available only to men. Thereafter, VMI worked with Mary Baldwin College to develop a parallel, all-female institution with the same general

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<sup>10</sup> Cornelia T.L. Pillard, *United States v. Virginia: The Virginia Military Institute, Where the Men and Men (and so are the Women)*, in *Civil Rights Stories* 265, 266 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

<sup>11</sup> On the significance of having a named plaintiff in the litigation challenging the exclusion of women from The Citadel, see Valorie K. Vojdik, *At War: Narrative Tactics in The Citadel and VMI Litigation*, 19 *Harv. Women’s L.J.* 1 (1996).

<sup>12</sup> See George H. Roberts Jr. (Executive Vice President of the VMI Foundation), *Supreme Court to Hear Case January 17*, *VMI Alumni Rev.*, Fall 1995, at 6, 8 (“To our opponents who choose to view themselves as victims, VMI is an elevated symbol to be toppled regardless of its cost and without concern for the benefits never to be regained for the women and men for whom such distinctive educations have been forever changed.”); see also Interview with Major General Josiah Bunting III, in Princeton, N.J. (June 11, 2008) (explaining his view that a culture that had achieved such a high level of efficiency and proven success should not have been put at risk); Strum, *supra* note 3, at 131 (“Partisans of an all-male VMI considered the idea of a gender-integrated military institute to be the reflection of laughable notions about women’s equality.”).

purpose as VMI. The concept for separate but equal single-sex institutions was approved by both the district court and the Fourth Circuit Court of Appeals.

(3) *Assimilation based on women's similarities to men.* The United States argued, and the Supreme Court ultimately held, that VMI's exclusion of women was based on gender stereotypes, that the two separate programs were not substantially equal, and thus that the exclusion of women from VMI was unconstitutional.

(4) *Accommodation to women's differences.* Although the United States had insisted during the litigation that the admission of women would not require any significant changes to VMI, once the process of women's assimilation began, the United States sought modifications to the VMI program to enable women to obtain equal benefit from a VMI education.

(5) *Unconstitutionally male.* Another view of equality was not argued explicitly by any party nor adopted by any court in the litigation, but glimpses of it emerged throughout the litigation. This view saw beyond VMI's exclusion of women to the problem that the "unique" methodology that defined this state-supported institution was grounded in an ideology of male superiority. The assumption that women did not have the strength, discipline, endurance, character, or loyalty to succeed at VMI was more than an excuse not to admit them; it was a critical motivational component of VMI's unique adversative methodology. By this view of the case, the problem was less that women were missing out on something than that the education available to men was based on a fundamentally degraded and subordinated view of women.

This chapter traces the story of *United States v. Virginia* through the lenses offered by these different views of equality. It concludes that while the standard for evaluating VMI's exclusion of women became more rigorous at each stage, the case remained caught in a paradigm based on women's right to have the opportunity to conform to existing institutions as long as it did not change them. Yet just below the surface, *United States v. Virginia* raised unanswered questions about whether a state should be allowed to fund an educational program defined by hyper-masculine norms. In proceeding as if preserving the institution was both possible and desirable, the parties and the courts failed to confront the constitutional problems of a state-sponsored institution premised on the principles of male superiority. As a result, the decision in the case opened VMI to women, but it did nothing to address the degrading gender norms that defined the school. In treating the problem of VMI as if it were solely about its single-sex admissions policy, the case also failed to distinguish between VMI and other single-sex schools. As a result, the decision failed to provide guidance to states and educators going forward about what forms of single-sex education, if any, are constitutional.

The chapter analyzes these limitations, and suggests how a richer, more substantive view of equality might have made a difference.

### *I. The Virginia Military Institute*

Founded in 1839, the Virginia Military Institute initially imposed a military-style training on raucous, undisciplined young men who had been gathered to guard an arsenal of armaments left over from the War of 1812.<sup>13</sup> From its inception, the school accepted recalcitrant boys and used strict methods of military training to “draw out the man,” and instill discipline and character.<sup>14</sup> Its first superintendent, Francis H. Smith, wrote that

[m]any bad subjects were sent here to be *reformed* . . . . [W]e started with the idea that we would admit such bad subjects, and try and see what could be done with them. The *military* organization of the institution had a tendency to fascinate such unruly spirits, who might be made valuable men by the military pride which promotion to the military offices of the school held out to them.<sup>15</sup>

VMI students studied the military sciences, as well as liberal arts, and engineering.<sup>16</sup> Although at one point called the “West Point of the South,” VMI was not intended as a pipeline to professional military service; rather, its aim was the development of well-disciplined citizen-soldiers who could be leaders in their communities, ready to come to their country’s defense if necessary.<sup>17</sup> In its early decades, it produced primarily school teachers and engineers;<sup>18</sup> in recent years, 43% of its graduates accept military commissions,<sup>19</sup> but only about 15% of its graduates make a full career of military service.<sup>20</sup> In addition to support from the state of Virginia,<sup>21</sup> VMI receives substantial private contributions from its alumni, making it the best endowed public undergraduate institution in the United States on a per-student basis.<sup>22</sup>

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<sup>13</sup> VMI historians describe the men as “an undesirable element in the social economy of aristocratic Lexington” who were lacking in self-discipline and engaged in leisure-time antics that were both distasteful and threatening to the townspeople. Jennings C. Wise, *The Military History of the Virginia Military Institute from 1939 to 1865*, at 31 (1915); Henry A. Wise, *Drawing Out the Man: The VMI Story* 11 (1978); Strum, *supra* note 3, at 9, 12 (2002).

<sup>14</sup> Henry A. Wise, *supra* note 13.

<sup>15</sup> Francis H. Smith, *The Virginia Military Institute, Its Building and Rebuilding* 242 (1912), *quoted in* Strum, *supra* note 3, at 11 (emphasis in original).

<sup>16</sup> VMI was the first school in the South to teach engineering and industrial chemistry, and engineering became one of its core specialties. *See* Strum, *supra* note 3, at 12.

<sup>17</sup> *Id.* at 12–13.

<sup>18</sup> *Id.* at 14 (citing Col. William Couper, 1 *One Hundred Years at V.M.I.* 34–35 (1939)). [see memo][DONE]

<sup>19</sup> Jay Conley, *Just Like the Guys*, Roanoke Times, Aug. 12, 2007, at A1.

<sup>20</sup> *United States v. Virginia*, 766 F. Supp. 1407, 1432 (W.D. Va. 1991).

<sup>21</sup> In representing the United States before the Supreme Court, Paul Bender stated that in the 1989–1990 academic year, the state of Virginia contributed about \$10 million to VMI, or about 35% of the school’s budget. Transcript of Oral Argument at 1–2, *United States v. Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107).

<sup>22</sup> *Virginia*, 518 U.S. at 552.

VMI has been described as “deliberately anachronistic.”<sup>23</sup> Although not technically a military academy, cadets dress in uniforms similar to those worn by the original cadets and they drill and march to and from class.<sup>24</sup> Several times a day, as they enter the courtyard of the “post” from the barracks, they salute the larger-than-life statue of Stonewall Jackson, a Civil War hero and early VMI professor.<sup>25</sup> Year after year, the cadets commemorate Jackson and other VMI standard-bearers, such as World War II General George C. Marshall, VMI Class of 1901.<sup>26</sup> They also celebrate the Civil War Battle of New Market, at which a brave band of 241 young men from VMI (some as young as fifteen) marched eighty-four miles to battle and turned back Union forces. Ten VMI cadets died in the battle and forty-seven were wounded in the service of the Confederacy that day. VMI marks their sacrifices with an annual re-enactment of the battle; a battle streamer hanging from VMI’s regimental colors; an enormous painting of the event in VMI’s Jackson Hall; and a tomb of six of the slain soldiers which lies beneath a statue, *Virginia Bearing Her Dead*, bearing the names of all the New Market cadets who fought in the battle.<sup>27</sup>

Cadets live in Spartan conditions, three to five to a room, with no carpets, door locks, telephones, wall hangings, television sets, or air-conditioning. With classes, military drills, and conditioning exercises, days are tightly scheduled from 6:30 am through lights out at 11 p.m.<sup>28</sup> A strict, student-enforced honor code commands that students not “lie, cheat, steal, nor tolerate those who do.” For even the most minor violation of this code, the single penalty is expulsion.<sup>29</sup>

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<sup>23</sup> Brodie, *supra* note 6, at xi.

<sup>24</sup> Strum, *supra* note 3, at 13.

<sup>25</sup> Further indication of the reverence in which Jackson is held is the mounting of the hide of Jackson’s horse, Little Sorrell, in the museum located at the lower level of the main building on the campus, Jackson Hall. See Brodie, *supra* note 6, at 6–8.

<sup>26</sup> Visitor Guide, Welcome to Virginia Military Institute (rev’d Feb. 2008).

<sup>27</sup> Strum, *supra* note 3, at 19–20. The VMI Visitor Guide, “Welcome to Virginia Military Institute” (rev’d Feb. 2008) boasts that the 1864 battle was “the only time in American history that an entire college student body engaged in pitched battle as a single unit.” The painting of the Battle of New Market is by Benjamin West Clinedinst, VMI Class of 1880; it is displayed prominently in the front of Jackson Memorial Hall. Brodie, *supra* note 6, at 3–6. The statue of Virginia Mourning Her Dead is by Moses Ezekiel, also an alumnus. The re-enactment ceremony takes place each fall; the rats’ first formal duty involves traveling to New Market to parade through the streets and, afterward, to gather at VMI’s Hall of Valor, a museum on the battlefield, where they learn about the events at New Market from upper-class re-enactors, and then, finally, stage their own charge across the battlefield. *Id.* at 6–7. The deaths of the ten New Market soldiers are honored at the end of each year, with a review parade and a placing of wreaths on the graves of the six cadets who are buried at the foot of Virginia Mourning Her Dead. *Id.* at 7.

<sup>28</sup> See Strum, *supra* note 3, at 43–45; *United States v. Virginia*, 766 F. Supp. 1407, 1421–22 (W.D. Va. 1991); *United States v. Virginia*, 976 F.2d 890, 894 (4th Cir. 1992).

<sup>29</sup> *Virginia*, 976 F.2d at 894.

The small college in western Virginia is home to about 1,300 students. For six consecutive years, *U.S. News & World Report* has ranked the school first, among the twenty-seven other public liberal arts colleges in the nation.<sup>30</sup> While the school is ultimately subject to control of the Virginia General Assembly, it is governed by a Board of Visitors, which is charged by state law with prescribing “the terms upon which cadets may be admitted, their number, the course of instruction, the nature of their service, and the duration thereof.”<sup>31</sup>

VMI had always excluded women from admission as students.<sup>32</sup> The exclusion of women, however, does not fully capture the maleness of the institution as it existed in 1989. The adversative system, which defined the essence of the institution,<sup>33</sup> was deliberately and pervasively gendered. Its design was to create leaders by giving them near-impossible challenges, and then equating success in meeting those challenges to masculinity. Rat culture eschewed all things female, except as objects of derision and humiliation. Sexual references saturated the VMI “official” vocabulary. Among the definitions every cadet must learn from the Rat Bible are to “bone,” or report someone for a violation; to “bust,” or reduce in rank; and “running a period,” or going twenty-eight days without a demerit.<sup>34</sup>

The gendered nature of VMI method was especially apparent in the institution of the rat line. The rat line tested the mettle of the entering rats by making them completely subservient to the largely unsupervised upper-class cadets, who ordered the rats to do push-ups and run laps to the point of total exhaustion, “strain,”<sup>35</sup> run errands at all hours, and recite from memory portions of the Rat Bible. To reinforce the machismo ethos, gendered obscenities and hostility toward women served as quasi-official motivational

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<sup>30</sup> Virginia Military Institute, VMI: VMI Again Ranked No. 1 Public Liberal Arts College In U.S., Aug. 18, 2006, at <http://new.vmi.edu/show.asp?durki=7803>.

<sup>31</sup> Va. Code Ann. §§ 23-92 to 23-104 (2006). VMI is supervised, like the other fifteen state-supported colleges and universities in Virginia, by the state’s Council of Higher Education. Va. Code Ann. § 23-9.6:1(2) (2006). The Council delegates to each institution the right to modify its mission and to establish admissions criteria. *Id.*

<sup>32</sup> Following the U.S. Supreme Court’s 1982 decision in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), finding unconstitutional the exclusion of men from an all-female nursing school, VMI reexamined its male-only admissions policy. After a nearly three-year study, a Mission Study Committee appointed by the VMI Board of Visitors counseled against changing VMI’s all-male policy. See *United States v. Virginia*, 518 U.S. 515, 539 (1996); Strum, *supra* note 3, at 31–33.

<sup>33</sup> *Virginia*, 518 U.S. at 548–49 (citing district court); *Virginia*, 766 F. Supp. at 1423 (“[M]ost important aspects of the VMI educational experience occur in the barracks.”).

<sup>34</sup> *The Bullet*, *supra* note 3, at 73, 76.

<sup>35</sup> To “strain” is to “rack in” one’s chin tightly into the neck, hold one’s arms stiffly, and push the chest far forward, while remaining erect and at rigid attention. The Rat Bible describes it as “a position you will practice most of the time as a Rat.” *Id.* at 77.

techniques in the rat line.<sup>36</sup> These coarse and demeaning characterizations of women as a whole were paired with chivalrous standards of behavior toward particular women—“ladies”—that both defined men’s protective role and reinforced the ideology of women’s inequality.<sup>37</sup>

Each rat was assigned a senior-class mentor or “dyke,”<sup>38</sup> but the dyke was sometimes the rat’s most enthusiastic tormenter.<sup>39</sup> Not until the end of the rat line in an infamous ritual known as “breakout” did the subordination subside. Breakout reacted the brutality of the rat line. It began with the rats crawling together in waves across twenty-five to thirty yards of a cold, deep, mud quagmire and then up a steep, 40- to 50-degree slick incline. As they tried to ascend the hill, upperclassmen kicked and pushed them back, slathering mud into their eyes, ears, and mouth. Breakout finally ended, on cue, with upperclassmen extending a helpful hand or foot, literally and symbolically, to help the rats reach the top.<sup>40</sup>

The problem with admitting women to this environment was as much that they might succeed at this manly challenge as that they would fail. As one researcher put it,

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<sup>36</sup> Susan Faludi described this type of culture at The Citadel, the South Carolina counterpart of VMI whose exclusion of women was in litigation at the same time as the VMI lawsuit. See *infra* text accompanying notes 44–48; Susan Faludi, *The Naked Citadel*, *The New Yorker*, Sept. 5, 1994, at 62; see also Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 *Berkeley Women’s L.J.* 68, 98–99 (2002) (describing the culture of hyper-masculinity at The Citadel). One female cadet, looking back on her experience at VMI, described one experience which captured the VMI culture for her: “It really hit me once when I was watching TV with a group of guys . . . . It was a quiz show, and whenever a woman came on, she was instantly characterized as a bitch, a slut or a dog.” Chris Kahn, *VMI Graduates 1st Female Class: The 13 Cadets Survived Taunts and Formed Bonds*, *Milwaukee J. Sentinel*, May 20, 2001, at A22 (internal quotation marks omitted).

<sup>37</sup> Among the rules and expectations set forth in *The Bullet*, which rats must memorize, is The Code of a Gentleman, which provides, among other things, that a Gentleman does not “speak more than casually about his girl friend,” “go to a lady’s house if he is affected by alcohol,” “hail a lady from a club window,” discuss “the merits or demerits of a lady,” or “so much as lay a finger on a lady.” *Virginia*, 518 U.S. at 602–03 (Scalia, J. dissenting).

<sup>38</sup> “Dyke” is one of many terms at VMI that claim official meanings different from the sexualized meaning more commonly associated with them. According to the Rat Bible, “dyke” means (a) “a combination of your mother, father, and older brother; your First Class pal; and confidant; (b) a uniform, e.g., class dyke, gym dyke, church dyke; (c) as a verb, to get dressed, especially for parade (‘dyke out’); (d) the insidious white cross-belts in which a hapless Rat gets hopelessly entangled while trying to ‘Dyke out’ without help.” *The Bullet*, *supra* note 3, at 74. For other terms in the VMI lexicon, see *supra* text accompanying notes 36 and *infra* text accompanying notes 225–226.

<sup>39</sup> See Calvin R. Trice, *VMI is Taking Stock: Mentoring, Honor System Face Reviews*, *Richmond Times-Dispatch*, Nov. 7, 2001, at B3; Philip Walzer, *One ‘Rat’ is Now a Recruiter of Female Cadets to Virginia Military Institute*, *Virginian-Pilot* (Norfolk, VA), Dec. 3, 2004.

<sup>40</sup> Strum, *supra* note 3, at 46–47; Brodie, *supra* note 6, at 312; Interview with Brig. Gen. Mike Bissell, in Staunton, VA (June 12, 2008).

“if women could perform well on [the rat line], how could it continue to function as evidence of manhood?”<sup>41</sup>

It was to this environment that the United States sought entry for women.

## *II. The Legal Challenge*

### *A. United States and Virginia*

The 1989 challenge to VMI initiated by the United States Department of Justice (“DOJ”) was not the first legal complaint about VMI’s exclusion of women. A decade earlier in 1979, a female VMI professor, Margaret Mason Seider, filed suit after she was told her teaching contract would not be renewed. In addition to her cause of action for wrongful discharge, she sought class-action status for females who might have wanted to be students at VMI. Her claim was that “the total absence of female cadets creates an ambiance and an atmosphere at VMI which makes it difficult, if not impossible, for a female professor . . . to participate fully in the life of VMI and pervades all aspects of the institute.”<sup>42</sup> Seider claimed that while at VMI, she was subject to harassment by cadets, including obscene phone calls, open disrespect by cadets to her authority, and a vicious cartoon directed against her in the cadet newspaper. Within a month, the suit settled by confidential agreement.<sup>43</sup>

At the time of the anonymous 1989 complaint, VMI and South Carolina’s The Citadel were the only state-supported, all-male colleges in the country.<sup>44</sup> Subsequent litigation filed in 1993 against The Citadel by Shannon Faulkner led to an injunction by the United States Court of Appeals for the Fourth Circuit, requiring The Citadel to admit Faulkner to day classes while that lawsuit was pending.<sup>45</sup> Faulkner dropped out of The Citadel less than a week after she entered, “overcome by stress and terror as the only woman alone in the barracks with 1800 male cadets, most of whom hated her guts.”<sup>46</sup> The district court later held that the denial of Faulkner’s admission violated her right to substan-

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<sup>41</sup> Strum, *supra* note 3, at 109.

<sup>42</sup> Jen McCaffery & Matt Chittum, *An Early Skirmish Over Admissions*, Roanoke Times, Aug. 1, 2004, at B1.

<sup>43</sup> *Id.*

<sup>44</sup> Strum, *supra* note 3, at 131.

<sup>45</sup> *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993) (affirming grant of preliminary injunction to Faulkner and ordering her admitted to day classes).

<sup>46</sup> Vojdik, *Gender Outlaws*, *supra* note 36, at 71. Poor physical conditioning was also a factor. *Citadel’s First Female Case Tells of the Stress of Her Court Fight*, N.Y. Times, Sept. 10, 1995, § 1, at 36 (Faulkner was considerably overweight); see Diane H. Mazur, *A Call to Arms*, 22 Harv. Women’s L.J. 39, 76–77 (1999) (faulting Faulkner’s attorneys for not ensuring that she was more prepared to enter The Citadel, including being in good physical shape). Other women picked up the litigation after Faulkner left The Citadel. See *Mellette v. Jones*, 136 F.3d 342 (4th Cir. 1998).

tially equal educational opportunities and ordered a remedial plan for the admission of other women to be submitted.<sup>47</sup> The matter was not finally resolved until the 1996 decision of the United States Supreme Court in the VMI case, at which point The Citadel immediately began admitting women.<sup>48</sup>

As the VMI case began to unfold, neither the United States nor Virginia appeared to be fully committed to the litigation. DOJ initiated this matter without consulting with then-President George H.W. Bush.<sup>49</sup> The lead lawyer, Judith Keith of the Civil Rights Division,<sup>50</sup> was personally invested in the case, but the division was understaffed<sup>51</sup> and the lawyering team lacked expertise.<sup>52</sup> The Bush administration tied the department's hands on certain litigation claims, barring attorneys, for example, from conceding that anything other than dorm rooms and bathrooms would have to change with women's admission.<sup>53</sup> In the appeals phase, DOJ was ordered not to communicate with the amici curiae or interested civil rights groups about the appeals strategy.<sup>54</sup>

As for Virginia, despite the enthusiasm of VMI alumni for remaining all-male, many state officials and various state constituencies favored the admission of women to the school. When first contacted by the DOJ in 1989, Governor Gerald L. Baliles tried to persuade the VMI Board of Visitors to admit women.<sup>55</sup> In response, and under fierce pressure by many influential alumni and with the legal advice of former United States Attorney General Griffin Bell, the VMI Board of Visitors affirmed its single-sex admissions policy.<sup>56</sup> The lieutenant governor of the state and Democratic nominee for governor in 1989, L. Douglas Wilder, vacillated over the VMI issue, and the state attorney

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<sup>47</sup> *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994).

<sup>48</sup> Strum, *supra* note 3, at 298.

<sup>49</sup> *Id.* at 90.

<sup>50</sup> *Id.* at 35.

<sup>51</sup> *Id.* at 105–06.

<sup>52</sup> *Id.* at 185–86.

<sup>53</sup> *Id.* at 192. The discomfort of DOJ attorneys with this restriction was sometimes quite apparent. *See infra* text accompanying notes 161–162.

<sup>54</sup> *Id.* at 190.

<sup>55</sup> In the letter, Governor Baliles stated that Virginia law did not preclude the admission of women to VMI and that, furthermore, the “historic fact that VMI has never admitted a woman student does not justify the continuance of that policy.” Letter from Gerald L. Baliles, Governor, Virginia, to Joseph M. Spivey, III, President of the VMI Board of Visitors (Apr. 18, 1990) (on file with VMI Archives, Preston Library, Virginia Military Institute, Lexington, Va.).

<sup>56</sup> Bell advised the Board that the admissions policy was “defensible” and that there was a “good chance” that VMI’s all-male admissions policy would be upheld by the United States Supreme Court. Letter from Joseph M. Spivey, III, to the Honorable Gerald L. Baliles (Apr. 19, 1989) (on file with VMI Archives, Preston Library, Virginia Military Institute, Lexington, Va.).

general, Mary Sue Terry, put off giving an opinion.<sup>57</sup> After Wilder became governor, the district court forced him to take a stand, and he publicly came out in favor of admitting women to VMI.<sup>58</sup> At that point Terry withdrew from the case,<sup>59</sup> with assurances to the court that VMI's board and alumni would be represented by private counsel. That counsel was the firm of McGuire, Woods, Battle and Boothe, led by Robert H. Patterson, Jr., a loyal member of the VMI Class of 1949.<sup>60</sup>

Of all the leaders in the state executive branch during this period, only Republican George Allen, when he became governor in 1994, enthusiastically supported VMI's exclusion of women.<sup>61</sup> The legislature also stood behind VMI, reflecting the strong influence of VMI alumni in the state, but some legislators made vigorous efforts to change the

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<sup>57</sup> Strum, *supra* note 3, at 90–91.

<sup>58</sup> *Id.* at 103; *see also* United States v. Virginia, 766 F. Supp. 1407, 1408 (W.D. Va. 1991) (reporting that the governor told the court that he did not oppose entry of summary judgment against him). The lack of support by the Governor confused that matter when the case reached the Fourth Circuit Court of Appeals. “To the extent that the Governor’s view represents state policy,” the appellate panel wrote, “VMI’s single-sex admissions policy violates state policy.” United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992). In the course of the second trial proceedings in 1994, Governor Wilder publicly supported the VWIL plan, representing to the court that he was “satisfied that [the] plan is educationally sound and will remedy all current discrimination.” Strum, *supra* note 3, at 208.

<sup>59</sup> *Virginia*, 976 F.2d at 894; Strum, *supra* note 3, at 196. Terry stated that she could not defend a position opposite to that of the Governor and that, in any case, the Governor was correct in interpreting state policy to preclude the exclusion of women. *See also* *Chronology 1989–1993*, The United States Department of Justice vs. The Commonwealth of Virginia and Virginia Military Institute (on file with VMI Archives, Preston Library, Virginia Military Institute, Lexington, Va.) (stating that on November 27, 1990, Attorney General Terry asked Judge Kiser to release her from the case “since she feels she cannot defend a position opposite to that of the governor”). Four years later Terry would be the leading Democratic candidate for governor and take the position that women should be admitted to VMI, while the three Republican candidates took the opposite position. Strum, *supra* note 3, at 198–99. Among other state officials who opposed VMI's exclusion of women was Gordon Davies, Executive Director of the Council of Higher Education, which coordinated Virginia's fifteen public institutions of higher learning. Davies was eventually dropped as a defendant in the lawsuit. *Id.* at 89, 99. [see memo]

<sup>60</sup> Strum, *supra* note 3, at 94, 105; *Virginia*, 766 F. Supp. at 1408. Judge Niemeyer of the Fourth Circuit Court of Appeals stated that this representation was taken on a pro bono basis, *see* 976 F.2d at 894; *see also* *Chronology*, *supra* note 59. However, VMI was reported to have spent at least \$14 million in legal and other fees to defend the lawsuit, \$6 million to the Patterson's firm alone. Strum, *supra* note 3, at 298; *see also* David Reed, *VMI's Fight Costs Over \$14 Million: Alumni Footing Legal Bills*, Roanoke Times, Jan. 19, 1998, at A1 (reporting that VMI spent \$14 million to defend lawsuit, not counting a \$6.9 million pledge to endow the VWIL program at Mary Baldwin College). [see memo]

<sup>61</sup> *See* Allison Black, *Allen Supports VMI Setting Up Separate Schools for Women*, The Virginian-Pilot (Norfolk, VA), Jan. 27, 1994, at D4. Upon hearing of VMI's victory in the second district court trial, Allen stated in his commencement address to VMI that he would “stand up to the arrogant, meddling federal bureaucrats whenever Virginia's right and prerogative are threatened,” and suggested that the government had tried to destroy VMI because it hated the things VMI stood for, including “the traditional American values and virtues of moral character, personal discipline, self-reliance and an unabashed and unashamed love of home, state and country, and the willingness to fight to defend them.” Donald P. Baer, *Allen Assails Efforts to End VMI's All-Male Status*, Wash. Post, May 22, 1994, at B4.

all-male admissions policy.<sup>62</sup> A majority of the Virginia public at the start of the litigation thought that VMI should admit women<sup>63</sup> and, according to an informal poll, 62% of the VMI faculty favored coeducation.<sup>64</sup>

### ***B. The District Court Rationalizes the Exclusion of Women***

On January 30, 1990, the Department of Justice made a formal request to Virginia's Governor Wilder and to VMI Board of Visitors President Joseph M. Spivey, III, for a commitment to abandon VMI's single-sex admissions policy. VMI knew the request was coming, and was ready and waiting. Although the response was not due until February 20, by February 5, VMI and the VMI Foundation had filed two pre-emptive lawsuits in the local federal district court in the Western District of Virginia (Roanoke). The sole judge in the district was Judge Jackson L. Kiser who, on a number of previous occasions, had failed to properly apply sex discrimination laws, even after being reversed on appeal.<sup>65</sup> One suit was filed on behalf of VMI by state attorney general Terry. The other was filed on behalf of the VMI Foundation by Griffin Bell and Robert Patterson. Both suits sought declarative and injunctive relief "to prevent federal encroachment seeking to enforce unnecessary conformity in the state-supported system of higher education in Virginia" and a declaration that VMI's admissions policy was constitutional.<sup>66</sup> Having missed its chance to file the case first in a more friendly forum, DOJ then filed its own suit in Roanoke, requesting a permanent injunction prohibiting VMI from discrimination

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<sup>62</sup> Strum, *supra* note 3, at 88–92, 95–96, 104–05.

<sup>63</sup> A poll of 616 Virginians released in June 1989 showed that Virginians favored the admission of women to VMI by a margin of 57% to 34%. The poll's objectivity was disputed, and in February 1990 a second poll was released showing a narrower gap (a ratio of 5-4) in favor of women's admission. See *A Challenge to VMI's Admissions Policy, Chronological Events*, VMI Alumni Rev., Spring 1990, at 21; Strum, *supra* note 3, at 90.

<sup>64</sup> Brodie, *supra* note 6, at 19.

<sup>65</sup> One such case involved an action by the United States against a county sheriff for refusing to hire women. Judge Kiser had first ruled that deputy sheriff positions were not covered by Title VII because they fell within the "personal staff" exemption. The Fourth Circuit overruled him on this point but, on remand, again held that the positions at issue were exempted as personal staff positions. He also held that maleness was a bona fide occupational qualification ("BFOQ") for one of the positions (corrections officer). Judge Kiser was overruled again by the Fourth Circuit Court of Appeals, and on the second remand, Judge Kiser found that the U.S. had not presented sufficient evidence of discrimination. The Fourth Circuit reversed Judge Kiser a third time, holding clearly erroneous his improper ignoring of admissions by the sheriff, as well as other mistakes obscuring the opportunities for hiring women of which the sheriff failed to take advantage. The facts and case history is summarized in the last Fourth Circuit opinion, *United States v. Gregory*, 871 F.2d 1239 (4th Cir. 1989).

<sup>66</sup> Complaint at 1, *VMI v. Thornburgh*, No. 90-083 (W.D. Va. Filed Feb. 5, 1990) (Complaint at 1, *VMI Foundation v. United States*, No. 90-084 (W.D. Va. Filed Feb. 5, 1990)).

on the basis of gender.<sup>67</sup> Later that year, Judge Kiser consolidated the different actions into a single case.<sup>68</sup>

At trial in the district court, testimony from nineteen witnesses took six days. The government's theory of the case tracked a familiar legal principle: women are equal to men, and thus entitled to all the same benefits and opportunities. Although the government conceded that few women were likely to be interested in attending the state-supported school, it insisted that VMI could not exclude women so long as any woman was able to satisfy VMI's requirements.<sup>69</sup>

In contrast to the government's controlled logic and the absence of tangible beneficiaries, VMI's presentation was impassioned and emphasized the high, human stakes—the uniqueness of the school, its success in training leaders in Virginia, and the honorable way of life it represented. VMI advocates argued that it would be foolish to undermine that unique asset—indeed, jeopardize all single-sex schools—for some abstract principle that ignored differences between men and women. The school also played a strong states' rights card, arguing that the federal government's Goliath should not be allowed to force its own particular theory of education upon the sovereign state of Virginia.<sup>70</sup>

Some years later, Judge Kiser remembered that before he got into the case, he thought the government “had a slam-dunk position.”<sup>71</sup> By the time he had heard the extensive evidence of the benefits of single-sex education, differences in the way men and women learn, and the negative experience of gender integration at West Point and the other service academies,<sup>72</sup> however, he had changed his mind. His 1991 decision was a complete victory for VMI. Comparing the case to the “life-and-death” confrontation between the United States and the Virginia Military Institute at New Market, Virginia in 1864,<sup>73</sup> he invoked the traditional deference owed to states in educational decisionmaking—a deference that appeared somewhat surreal given the lack of support for VMI's all-male policy by two state governors, the attorney general, the executive director of the

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<sup>67</sup> United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991) (No. 90-0126-R).

<sup>68</sup> *Virginia*, No. 90-126 (W.D. Va. Nov. 27, 1990) (order).

<sup>69</sup> Strum, *supra* note 3, at 140.

<sup>70</sup> *See, e.g.*, Strum, *supra* note 3, at 142–43.

<sup>71</sup> Interview with Jackson L. Kiser, District Judge, U.S. District Court for the Western District of Virginia, in Danville, Va. (July 14, 2008).

<sup>72</sup> For a detailed account of the testimony on a wide range of issues, see Strum, *supra* note 3, at 139–72.

<sup>73</sup> *Virginia*, 766 F. Supp. at 1408. For a description of the meaning of that battle to VMI, see *supra* text accompanying note 33.

Council of Higher Education, and a majority of the VMI faculty and non-VMI population of the state.<sup>74</sup>

The core of Judge Kiser’s analysis was an account of the benefits of single-sex education. Citing studies showing that graduates of both male and female single-sex colleges do better than graduates of coeducational colleges, Judge Kiser accepted VMI’s argument that single-sex education offers substantial advantages over coeducational institutions<sup>75</sup> and that a ruling against VMI would threaten all single-sex educational institutions. In defining the battle broadly, the court avoided analysis of any factors particular to VMI that might have been especially problematic. The presumed threat to single-sex education also made the case increasingly a politically potent symbol and the source of substantial future amicus support.<sup>76</sup>

The advantages of single-sex education did not explain why Virginia gave only men, and not women, a single-sex option. Virginia attempted to justify this gap by demonstrating that through the fifteen schools it supported throughout the state, it provided a diverse set of educational opportunities for its residents, and that VMI was an important part of that diversity. Each of the schools had its own mission and standards, and all of them but VMI were open to women. In particular, Virginia Polytechnic Institute and State University (Virginia Tech) offered strong engineering programs and a military training program.<sup>77</sup>

Judge Kiser agreed. Virginia’s stated interest in educational diversity was legitimate, and excluding women from VMI was necessary to accomplishing that diversity. “The presence of women,” according to Judge Kiser, “would tend to distract male students from their studies” and “increase pressures relating to dating, which would tend to impair the *esprit de corps*” and the egalitarian atmosphere so critical to the VMI experience.<sup>78</sup> Women cadets would require allowances for privacy and other accommodations that would dilute the strength of VMI’s adversative teaching method.<sup>79</sup> The presence of

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<sup>74</sup> See *supra* text accompanying notes 55–64.

<sup>75</sup> The primary source was Alexander W. Astin, *Four Critical Years: Effects of College on Beliefs, Attitudes, and Knowledge* (1977); see *Virginia*, 766 F. Supp. at 1412, 1435 (Findings VII. B. 10, 11) (“Students of both sexes 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 . . .”). Judge Kiser failed to note that support for this claim was research based on 1961 to 1974 data, when single-sex schools were among the most elite institutions in the country, and thus selected disproportionately by college applicants with the strongest credentials. At the second trial Astin was recruited by DOJ to dispute the conclusions that the court had drawn from his research. At that point, the district court decided not to give his testimony any weight. See *infra* note 108.

<sup>76</sup> See Strum, *supra* note 3, at 198, 235, 261–63.

<sup>77</sup> *Virginia*, 766 F. Supp. at 1411–12, 1418–19; Strum, *supra* note 3, at 150. But see *infra* note 89.

<sup>78</sup> *Virginia*, 766 F. Supp. at 1412.

<sup>79</sup> *Id.*

women would also require VMI to rethink its tough physical fitness requirements, since few women would be able to meet the existing ones.<sup>80</sup> Beyond these concrete dilutions of standards, Judge Kiser concluded that women, by their very presence, would fundamentally alter an intangible element in the “VMI experience.” It would be impossible for even the rare female who “could physically and psychologically undergo the rigors of the life of a male cadet” to participate in this experience; “her introduction into the process would change it,” making “the very experience she sought . . . no longer . . . available.”<sup>81</sup> In other words, VMI’s maleness defined the experience, which women would destroy, as evidenced by the many concessions to women made at West Point, the Air Force Academy, and the other federal service academies after Congress required them to admit women.<sup>82</sup>

The district court opinion acknowledged that the deference to Virginia required in this case “is not absolute,”<sup>83</sup> and it articulated the intermediate standard of review for sex-based classifications established in *Mississippi University for Women v. Hogan*,<sup>84</sup> requiring that there be “a substantial relationship between the single-sex admission policy and achievement of the Commonwealth’s objective of educational diversity.”<sup>85</sup> Judge Kiser’s opinion, however, bore little evidence of that heightened standard.<sup>86</sup> It did not surface

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<sup>80</sup> *Id.* at 1413. The minimum physical fitness requirement at VMI was sixty sit-ups and five pull-ups in two minutes, and a one-and-one-half-mile run in twelve minutes. Strum, *supra* note 3, at 206. The court here disregards the fact that about half of VMI’s new cadets fail the minimum fitness test, some of whom eventually graduate without having passed the test. Brief for the Petitioner at 29, *United States v. Virginia*, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107); Strum, *supra* note 3, at 150.

<sup>81</sup> *Virginia*, 766 F. Supp. at 1414.

<sup>82</sup> Congressional action occurred in 1975 before the federal courts had resolved a lawsuit filed by four members of Congress who objected to being required to discriminate on the basis of sex in making nominations for the service academies. For a brief account, see Strum, *supra* note 3, at 116–23. For more detail, see Jeanne Holm, *Women in the Military: An Unfinished Revolution* (1993). For the trial court’s comparisons between VMI and the service academies, see *Virginia*, 766 F. Supp. at 1432, 1439; Strum, *supra* note 3 at 143, 155–59, 169, 171.

<sup>83</sup> *Virginia*, 766 F. Supp. at 1409.

<sup>84</sup> 458 U.S. 718 (1982).

<sup>85</sup> *Virginia*, 766 F. Supp. at 1410 (quoting *Hogan*, 458 U.S. at 730). At one point Judge Kiser used the “exceedingly persuasive justification language” set forth in several Supreme Court cases. See *infra* note 134. He referenced that language, however, to the strength of the evidence supporting VMI’s contention that some students benefit from attending a single-sex college, rather than to the strength of the state’s justification for excluding women from VMI. *Virginia*, 766 F. Supp. at 1411.

<sup>86</sup> Oddly, the court approvingly cited two cases decided before the Supreme Court began to raise the constitutional standard in sex discrimination cases. One case, *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970) (three-judge panel), *aff’d per curiam*, 401 U.S. 951 (1971), cited at *Virginia*, 766 F. Supp. at 1409, upheld a challenge to an all-female school in South Carolina, Winthrop College. The other decision upheld a consent decree in which the court “encouraged a settlement that required the [University of Virginia] to admit women,” but refused to order the University to admit women because of its reluctance to “interfere with the internal operation of any Virginia college or university,” as well as concerns about the impact on VMI. *Virginia*, 766 F. Supp. at 1409–10 (citing *Kirstein v. Rector and Visitors of the Univ. of Va.*, 309 F.

any of the stereotypes upon which VMI based the exclusion of women. It did not question the plausibility of the diversity rationale offered by Virginia. It did not face the fact that the only single-sex school remaining in Virginia's "diverse" system existed for men. Its eye was on purportedly undeniable differences between men and women and on the unique and creative way VMI took account of those differences. "VMI truly marches to the beat of a different drummer, and I will permit it to continue to do so."<sup>87</sup>

The march would not end there.

***C. The Fourth Circuit Court of Appeals Accepts VMI's Legitimate Purpose, but Finds that Providing a Single-Sex Education Only to Men Is Unfair to Women***

Both sides proceeded to the appellate stage faced with a difficult balancing act. The federal government would be satisfied only if VMI admitted women and thus continued to claim that women would not change anything about the school. Yet its insistence that women were no different from men seemed implausible, even laughable, given VMI's pedagogical goal of developing men who were "more macho than thou."<sup>88</sup>

VMI was caught in its own Catch-22. It emphasized the uniqueness of its adversative method in order to establish both its contribution to the "diverse" set of public educational opportunities in Virginia and the fact that women were unsuited to it and would undermine it. But the more it stressed VMI's uniqueness, the clearer it became that women were missing out on something.<sup>89</sup> Similarly, as the state spelled out the features of VMI that established the tight fit between the school's mission and the exclusion of women, the relationship between VMI and the particular brand of maleness on which it relied became clearer, and the State implicated itself more deeply in a system that promoted male superiority. While the United States did not explicitly challenge VMI on this ground, surely the school was sensitive to the risks of overplaying its hand.

The Fourth Circuit panel accepted much of the district court's analysis of the case. It agreed that single-sex education offered substantial benefits over coeducation; that VMI's adversative method had particular, unique advantages to the men it served; and

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Supp. 184, 187 (E.D. Va. 1970) (three-judge panel) ("One of Virginia's educational institutions is military in character. Are women to be admitted on an equal basis, and, if so, are they to wear uniforms and be taught to bear arms?"). The University of Virginia began admitting women in 1972. *United States v. Virginia*, 518 U.S. 515, 538 (1996).

<sup>87</sup> 766 F. Supp. at 1415.

<sup>88</sup> This phrase was used by an expert for VMI describing women who would be able to endure the adversative method. See Brief for the Petitioner, *supra* note 80, at 38; Jane Maslow Cohen, *Equality for Girls and Other Women: The Built Architecture of the Purposive Life*, 9 J. Contemp. Legal Issues 103, 113 n.18, 45, & 24 (1998).

<sup>89</sup> VMI's claim of uniqueness also prevented Virginia from arguing coherently that women could receive the same benefits at other schools in the state. At one point in the litigation, VMI suggested that an opportunity similar to that at VMI was available to women at Virginia Polytechnic Institute and State University but, as the Fourth Circuit noted in its later opinion, it did not press the point. See *United States v. Virginia*, 976 F.2d 890, 898 n.8 (4th Cir. 1992).

that the presence of women at VMI would require changes to the core methodology of the school and thus undermine its contribution to Virginia's "diverse" set of higher education opportunities. On these grounds, it agreed that Virginia had a legitimate purpose in maintaining VMI as an all-male school.<sup>90</sup>

At the same time, the panel agreed with the Justice Department that these benefits could not be extended exclusively to men. "A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender,"<sup>91</sup> Judge Niemeyer wrote for the three-judge panel. The bottom line was not what VMI had hoped for: VMI would have to admit women, lose its state funding, or establish a parallel program for women.<sup>92</sup>

It was clear that, as between these options, Judge Niemeyer expected Virginia to pursue parallel programs. He also understood that, even with an option for women, the exclusion of women from VMI might still be considered discrimination based on sex. He anticipated this objection by characterizing the potential continued exclusion of women as a gender-neutral criterion based on homogeneity, rather than on maleness per se. "It is not the maleness, as distinguished from femaleness, that provides justification for the program," he wrote. "It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI."<sup>93</sup> With parallel programs, VMI would not necessarily have to admit women.

Not pleased with the alternatives offered by the appellate court, Virginia sought a rehearing, both by the three-judge court and by the full court, en banc. Its appeal requests were denied,<sup>94</sup> but the court issued a stay of the ruling, pending appeal of the case to the Supreme Court. For this appeal, VMI persuaded several women's colleges to participate as amici curiae. These amici argued that a ruling against VMI would not only throw single-sex colleges into doubt, but battered women's shelters and single-sex prisons as well.<sup>95</sup> The Supreme Court, however, was not ready to hear the case and denied *certiorari*.<sup>96</sup> The parties would need to proceed in light of the Fourth Circuit opinion.

#### ***D. The Second Trial, and Appeal, Approving Separate, Parallel Programs***

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<sup>90</sup> *Virginia*, 976 F.2d at 897–98.

<sup>91</sup> *Id.* at 899.

<sup>92</sup> *Id.* at 900.

<sup>93</sup> *Id.* at 897.

<sup>94</sup> *Virginia*, 976 F.2d 890 (No. 91-1690) (petition for rehearing with suggestion for rehearing en banc filed Nov. 19, 1992).

<sup>95</sup> Strum, *supra* note 3, at 198.

<sup>96</sup> *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (with Justice Scalia stating that the issue should receive the attention of the Court, but that "we generally await final judgment in the lower courts before exercising our *certiorari* judgment").

The VMI alumni community was shaken by the Fourth Circuit decision and considered how to respond to it. One possibility was to give up state funding and remain all-male, which many supporters favored. While this possibility remained under consideration, in June 1993, the VMI Board of Visitors told its lawyers to begin drawing up a proposal for a substitute program for women, the existence of which also would allow VMI to stay all-male.<sup>97</sup>

As it happened, only thirty-five miles away a 2,000-student, all-female private school, Mary Baldwin College, had been thinking of developing a leadership program. It would become an issue at the next trial just when the school first began this thinking, and when the goal of developing “citizen soldier” became part of the concept. Whether Mary Baldwin College’s interest in a leadership program was fortuitous or opportunistic, by September 1993, Mary Baldwin had approved the development of a women’s leadership program with a military emphasis—Virginia Women’s Institute for Leadership Institute (“VWIL”)—and VMI had committed to it \$6.5 million in endowment and operating funds. Governor Wilder pledged an additional \$6.9 million in state funds for start-up costs.<sup>98</sup>

Over the next year, a task force from Mary Baldwin made up of faculty, administrators, and a student developed the details of the VWIL proposal. Their charge was to develop the most effective model of leadership training for producing “citizen-soldiers who are educated and honorable women, prepared for the varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions of attitudes of leadership, and possessing a high sense of public service.”<sup>99</sup>

By February 1994, when the constitutionality of the proposed parallel, single-sex programs came before the district court, the VWIL plan provided for a detailed academic program with required courses in the liberal arts, leadership, physical education, and health. The plan provided that every student have a leadership externship, organize a community service project or campus activity, and participate in a one-week wilderness program run by students and a twice-a-week “Cooperative Confidence Building” program involving obstacle courses, rappelling, and a ropes course. The proposal also required four years of ROTC training, for which students would be bussed to VMI. VWIL students would become part of a Virginia Corps of Cadets, along with students from VMI and the coed Virginia Tech corps. Freshmen would participate in a one-week “Cadre week orientation” in the summer. Upper-class students would provide mentoring, enforce behavior regulations, organize leadership speakers, and exercise leadership responsibilities.<sup>100</sup>

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<sup>97</sup> Strum, *supra* note 3, at 199.

<sup>98</sup> *Id.* at 201–02, 208; *United States v. Virginia*, 852 F. Supp. 471, 491–92 (W.D. Va. 1994).

<sup>99</sup> *Virginia*, 852 F. Supp. at 494.

<sup>100</sup> *Id.* at 494–98. The Cadre is composed of third class (junior) corporals and first class (senior) executive officers who are in charge of training the rats. Brodie, *supra* note 6, at 226.

The goal was never to replicate the VMI program at Mary Baldwin College, and those who developed the proposal understood that the differences between the VWIL proposal and VMI were substantial. The purpose of VWIL was to develop female citizen soldiers, not to duplicate the adversative method of VMI. Its method was “cooperative” and designed to reinforce self-esteem, rather than to tear down egos and the cadet’s sense of individuality.<sup>101</sup> VWIL’s focus was on “building up self confidence through mastery of physical, intellectual, and experiential challenges.”<sup>102</sup> VWIL students would live with other VWIL students for at least one year, but the living accommodations would not be as sparse as VMI’s. Moreover, doors to the rooms would have locks, and showers and tubs would have doors or curtains. VWIL women would wear uniforms only on the days in which they were participating in ROTC or the Virginia Corps of Cadets. They would not be subject to an unrelenting military regime, nor would VWIL women be issued arms. Physical fitness requirements, though judged by the district court to be “*comparable* in rigor and challenge,” would be less demanding than VMI’s.<sup>103</sup>

While some differences between VWIL and VMI were based on pedagogical philosophy, others were a consequence of resource constraints and the expected lack of a critical mass of women interested in certain aspects of VMI’s program. For example, the VWIL curriculum would have no courses in engineering or advanced math or physics; VWIL students wanting these courses would have to attend Washington University in St. Louis, with whom Mary Baldwin had a relationship.<sup>104</sup> Mary Baldwin would have fewer NCAA-level sports, and the athletic facilities would be substantially inferior to those of VMI. Proportionally fewer of Mary Baldwin’s faculty had Ph.D.’s, and faculty salaries were in the lowest 20% in the country, whereas VMI’s were in the top 8%. The average SAT score of students at Mary Baldwin was 100 points lower than that at VMI.<sup>105</sup>

Judge Kiser was not troubled by the differences between the programs. He pointed out that the Fourth Circuit had specified not an “equal” school for women,” but rather a “parallel institution[s] or parallel program[s].” Identical programs could not have been intended by the appellate court, Judge Kiser reasoned, since no one could expect a new program to “supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years.” It was “unrealistic to think that the

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<sup>101</sup> *Virginia*, 852 F. Supp. at 476.

<sup>102</sup> Virginia Women’s Institute for Leadership at Mary Baldwin College (“VWIL Plan”) 2 (Sept. 1994) (on file with VMI Archives, Preston Library, Virginia Military Institute, Lexington, Va.); *see also* Strum, *supra* note 3, at 205. [see memo]

<sup>103</sup> *Virginia*, 852 F. Supp. at 496–98, 502 (emphasis added); Strum, *supra* note 3, at 205–06. Instead of sixty sit-ups and five pull-ups in two minutes, and a one-and-one-half mile run in twelve minutes, VWIL would require twenty-eight push-ups in two minutes, sixty full-body sit-ups in two minutes, a flexed arm hang of at least fifteen seconds, and a one-and-one-half mile run in just under fourteen minutes and thirty seconds. Strum, *supra* note 3 at 206.

<sup>104</sup> *Virginia*, 852 F. Supp. at 494.

<sup>105</sup> *Id.* at 501.

Fourth Circuit was requiring an exercise in futility.”<sup>106</sup> Moreover, the appellate court had noted in *The Citadel* case that any parallel program “must take into account the nature of the difference on which the separation [of the sexes] is based, the relevant benefits to the needs of each gender, the demand (both in terms of quality and quantity), and any other relevant factor.”<sup>107</sup>

The district court believed that these signals from the appellate court left ample room to take into account the different needs and learning patterns of women about which many witnesses testified.<sup>108</sup> The differences, Judge Kiser concluded, made the VMI model unsuitable for women; the same model “would not produce the same outcomes for the VWIL population as it does for the VMI population.”<sup>109</sup> Moreover, the rationale for Virginia’s separate colleges and universities compelled different educational models: “The very concept of diversity precludes the Commonwealth from offering an identical curriculum at each of its colleges.”<sup>110</sup> The uniqueness of VWIL, like the uniqueness of VMI, was a strength, not a liability.<sup>111</sup> Finally, although VMI’s curricular offerings, facilities, and faculty were superior to those of Mary Baldwin’s,<sup>112</sup> the tuition of VWIL and VMI students would be the same, as would the per-student support received directly from the state.<sup>113</sup> The bottom line was that VWIL would “attain an outcome for women that is comparable to that received by young men upon graduation from VMI.”<sup>114</sup> “[I]f VMI

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<sup>106</sup> *Id.* at 475.

<sup>107</sup> *Id.* at 476 (citing *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993)).

<sup>108</sup> There were significant disputes at the trial and thereafter about the expertise of the experts, which included a woman’s studies historian, Elizabeth Fox-Genovese, who testified that the lack of confidence of college women would make the VMI adversative method counter-productive for them, and sociologist David Riesman, who gave testimony about the way women learn. Strum, *supra* note 3, at 210–19, 223. There was also disagreement about whose experts belonged to whom. For example, VMI claimed that Carol Gilligan’s work supported its position, but she pointed out at the appellate level that the experts upon whom Judge Kiser had relied were not experts and that the scientific evidence did not show that men benefited from single-sex education. *Id.* at 153, 217, 258. Alexander Astin’s scholarship had been relied upon in the first trial by Judge Kiser for the benefits of single-sex education, but in the second trial Astin was a witness for DOJ, disputing the inappropriateness of a VMI education for women. *Id.* at 225. At that point, Judge Kiser dismissed his testimony because, among other things, his opposition to VMI’s all-male admissions policy impaired his objectivity. See *Virginia*, 852 F. Supp. at 479. He apparently found Dr. Fox-Genovese’s objectivity unimpaired by the fact that she favored VMI remaining an all-male school. *Id.* at 480–81; Strum, *supra* note 3, at 229.

<sup>109</sup> *Virginia*, 852 F. Supp. at 477–78.

<sup>110</sup> *Id.* at 477.

<sup>111</sup> *Id.* at 477–81.

<sup>112</sup> The district court found, for example, that VMI’s \$131 million endowment made it the largest on a per student basis than any other undergraduate institution, as compared to Mary Baldwin’s \$19 million endowment. *Id.* at 503.

<sup>113</sup> *Id.* at 483 & n.19.

<sup>114</sup> *Id.* at 473 (summarizing Virginia’s position).

marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination.”<sup>115</sup> On these grounds, the “remedial” plan was approved.<sup>116</sup>

By a 2-to-1 vote, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court’s decision. The majority reiterated its prior analysis that single-sex education is a legitimate and important governmental objective, and that VMI’s adversative method would not work if women were present. However, while the panel had earlier indicated that admitting women would be one available option, two of the three judges now suggested that gender integration would be irresponsible because of the hostile environment a coeducation environment would create for women.<sup>117</sup> “If we were to place men and women into the adversative relationship inherent in the VMI program,” Judge Niemeyer wrote for the panel majority, “we would destroy . . . any sense of decency that still permeates the relationship between the sexes.”<sup>118</sup>

Judge Phillips dissented, previewing the analysis that the U.S. Supreme Court would eventually bring to the case. In his view, diversity was not the state’s actual purpose in establishing either VMI or the VWIL program; diversity was merely a rationalization designed to allow VMI to continue to exclude women.<sup>119</sup> Moreover, even if diversity was the legitimate state objective, no parallel program could satisfy the mid-level scrutiny required by the U.S. Constitution unless the programs were “*substantially* equal in all of the relevant criteria, tangible and intangible, by which educational institutions are evaluated.”<sup>120</sup> To Judge Phillips, the differences in prestige, tradition, and alumni influence alone, even without the significant differences in curriculum, funding, facilities, faculty, and library, meant that the state was not offering equal programs to men and women.<sup>121</sup>

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<sup>115</sup> *Id.* at 484.

<sup>116</sup> *Id.* at 484.

<sup>117</sup> *United States v. Virginia*, 44 F.3d 1229, 1239 (4th Cir. 1995) (stating that the adversative method that is central to a VMI education “has never been tolerated in a sexually heterogeneous environment”); *see also* George H. Roberts, Jr., *Case Set for Oral Argument September 28, 1994: The Citadel Stays All Male, But Must Present Parallel Program Option*, VMI Alumni Rev., Summer/Fall 1994, at 18, 19 (summarizing Virginia’s argument in the case that “neither VMI nor the cadets could articulate principles that could prevent the accusations of sexual harassment or the conditions that might give rise to those complaints”). [see memo]

<sup>118</sup> *Virginia*, 44 F.3d at 1239.

<sup>119</sup> *Id.* at 1247 (Phillips, J., dissenting).

<sup>120</sup> *Id.* at 1249 (emphasis in original).

<sup>121</sup> *Id.* at 1250 (“[T]he contrast between the two on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation.”).

Judge Phillips asked for a rehearing en banc, which failed to get the necessary votes.<sup>122</sup> Both parties then sought higher review.

### ***E. The United States Supreme Court: Assimilation Without Change***

The U.S. Supreme Court granted *certiorari*,<sup>123</sup> and in this final stretch, both sides raised the ante. As cross-petitioners, Virginia returned to its original position that VMI's all-male admissions policy was justified and constitutional, with or without VWIL.<sup>124</sup> Numerous amici curiae filed briefs with the Court to underscore the importance of the issue they claimed the case raised: the survival of single-sex education.<sup>125</sup>

For its part, the United States, for the first time in any litigation, argued that “strict scrutiny” was the appropriate standard for reviewing sex-based classifications.<sup>126</sup> This argument was clearly an invitation to Justice Ruth Bader Ginsburg, who on many occasions as a women’s rights advocate had promoted this position before the Court.<sup>127</sup> A number of the amici curiae briefs supported the strict scrutiny argument.<sup>128</sup>

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<sup>122</sup> Although six judges had voted to rehear the case en banc and four had voted against rehearing, three judges had recused themselves, *United States v. Virginia*, 52 F.3d 90, 91 (4th Cir. 1995); rehearing en banc under Fourth Circuit rules permits rehearing en banc only with a majority of the Circuit’s judges without regard to recusals. *United States v. Virginia*, 518 U.S. 515, 530 n.4 (1996). Judge Diana Gribbon Motz wrote a stinging dissent from the denial of rehearing, on behalf of herself and three other judges. *Virginia*, 52 F.3d 90.

<sup>123</sup> *Virginia*, 44 F.3d 1229, *cert. granted*, 516 U.S. 910 (1995).

<sup>124</sup> Brief for the Cross-Petitioners at 36–47, *United States v. Virginia*, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107). As respondent, Virginia focused its defense of the parallel programs offered by VMI and VWIL. Brief for the Respondents at 19–42, *Virginia*, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107).

<sup>125</sup> The amici curiae briefs included a submission by Anita Blair, a member of VMI’s Board of Visitors, on behalf of groups and individuals including Lynne Cheney, former head of the National Endowment for the Humanities, and briefs representing Phyllis Schlafly’s Eagle Forum, Concerned Women for America, seven well-known educators (including David Riesman), several single-sex schools including Wells College, The Citadel, and Mary Baldwin College, and the attorney generals of Wyoming and Pennsylvania. Strum, *supra* note 3, at 261–63.

<sup>126</sup> Brief for the Petitioner, *supra* note 80, at 33–36.

<sup>127</sup> See Deborah L. Markowitz, *In Pursuit of Equality: One Woman’s Work to Change the Law*, 14 *Women’s Rts. L. Rep.* 335 (1992); Toni J. Ellington et al., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 *U. Haw. L. Rev.* 699 (1998). Justice Ginsburg was involved in efforts to elevate the constitutional standard for reviewing sex-based classifications in numerous cases since the Court first began to exercise review beyond the traditional “rational basis” test in *Reed v. Reed*, 404 U.S. 71 (1971). In *Frontiero v. Richardson*, 411 U.S. 71 (1971), Ginsburg had convinced four justices that strict scrutiny was the appropriate standard of review. Markowitz, *supra*, at 344, n.106.

<sup>128</sup> The ALCU Women’s Rights Project and the National Women’s Law Center submitted an amicus curiae brief on behalf of twenty-nine different organizations, including the American Jewish Committee, the Anti-Defamation League, the Mexican American Legal Defense and Educational Fund, and People for the American Way. Other amici included the Lawyers’ Committee for Civil Rights Under Law, Nancy Mel-

In a 7-1 decision,<sup>129</sup> the Supreme Court concluded that VMI's exclusion of women violated the Equal Protection Clause of the U.S. Constitution.<sup>130</sup> Writing for herself and five other Justices, Justice Ginsburg did not mention strict scrutiny, aside from observing in a footnote that the most stringent judicial scrutiny is not all that it was once cracked up to be.<sup>131</sup> Instead, she interwove the now-familiar standard that the challenged classification must serve "important governmental objectives" to which the discriminatory means are "substantially related,"<sup>132</sup> with language also found in earlier cases that suggested that sex-based classifications will fail if they are not supported by an "exceedingly persuasive justification."<sup>133</sup>

Since the introduction of "exceeding persuasive justification" language in *Personnel Administrator of Massachusetts v. Feeney*,<sup>134</sup> the place of this language in middle-tier intermediate review<sup>135</sup> had never been clear. Chief Justice Rehnquist, concurring in the judgment, stated that the "exceedingly persuasive justification" language was intended as an "observation on the difficulty of meeting the applicable test" rather than as a "formulation of the test itself."<sup>136</sup> In the majority opinion in *VMI*, however, Justice Ginsburg appeared to forward the language as the test itself<sup>137</sup>—indeed, as the "starting point of the analysis."<sup>138</sup> In addition, in characterizing the appropriate standard of review, she

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lette (the lead plaintiff in *The Citadel*, after Shannon Faulkner dropped out of the school), and eighteen active and retired military officers. Strum, *supra* note 3, at 255–61.

<sup>129</sup> Justice Thomas did not participate because his son was a cadet at VMI at the time. See Strum, *supra* note 3, at 246; Brodie, *supra* note 6, at 21.

<sup>130</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>131</sup> *Id.* at 632 n.6 (noting that "last Term observed that strict scrutiny...is not inevitably 'fatal in fact'").

<sup>132</sup> *Id.* at 524, 533 (citing *Hogan*, 458 U.S. at 724).

<sup>133</sup> *Id.* at 524, 529, 530, 531, 533, 534, 545, 546, 556.

<sup>134</sup> 442 U.S. 256, 273 (1979). This language also appears in *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981), *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982), *Heckler v. Mathews*, 465 U.S. 728 (1984), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994).

<sup>135</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

<sup>136</sup> *Virginia*, 518 U.S. at 559 (Rehnquist, C.J., concurring). Rehnquist does not mention *J.E.B.*, 511 U.S. 127 (1994), but use of the term in that case appears consistent with its use in the other cases he cites. *J.E.B.*, 511 U.S. at 136, 142 n.12.

<sup>137</sup> See *Virginia*, 518 U.S. at 531 ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."); *id.* at 534 ("Virginia has shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI.").

<sup>138</sup> Kevin N. Rolando, *A Decade Later: United States v. Virginia and the Rise and Fall of "Skeptical Scrutiny,"* 12 *Roger Williams U. L. Rev.* 182, 207 (2006).

introduced a new term—“skeptical scrutiny.”<sup>139</sup> Commentators have assumed that these words signaled a shift to a new and more rigorous standard in sex discrimination cases.<sup>140</sup> In a 2002 interview, Justice Ginsburg downplayed the shift, stating that the VMI case and *Mississippi University for Women v. Hogan* were “essentially the same,” with the 7-1 vote in VMI—as compared to the 5-4 decision in the Mississippi case—showing that “the court had learned a lot in those years, between ’82 and ’96.”<sup>141</sup> Whatever the Justices may have intended when the decision was published in 1996, no case before *United States v. Virginia*, or since, summoned a majority to state the test in such strong terms; the case set a heightened, near-strict standard of review, from which subsequent majorities have seemed to withdraw.<sup>142</sup>

In the majority opinion, Justice Ginsburg riveted her analysis to the long historical narrative of women’s rights litigation—a story Justice Ginsburg knew well from her many years as a leading advocate for women’s rights.<sup>143</sup> History, she pointed out, has disproved stereotypes about women’s proper place in society, women’s ability to thrive only in cooperative settings and not in adversarial ones, and outmoded concerns that the presence of women in traditionally male pursuits led to the degradation of public norms of decency and propriety.<sup>144</sup> So, too, history would disprove Virginia’s claim that women cannot make the grade at VMI, or would destroy the adversative system that had made

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<sup>139</sup> *Virginia*, 518 U.S. at 531 (“Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.”).

<sup>140</sup> See, e.g., Christopher H. Pyle, *Women’s Colleges: Is Segregation by Sex Still Justifiable After United States v. Virginia?*, 77 B.U. L. Rev. 209, 233 (1997) (opinion came as close as possible to strict scrutiny without actually adopting it); Deborah L. Brake, *Reflections on the VMI Decision*, 6 Am. U. J. Gender & L. 35, 36 (1997) (“[T]he standard applied in VMI is essentially as rigorous as today’s strict scrutiny standard.”); Jon Gould, *The Triumph of Hate Speech Regulation: Why Gender Wins But Race Loses in America*, 6 Mich. J. Gender & L. 153, 214 (1999) (“In VMI ... the Court invented a new test for gender classifications that closely resembles the strict scrutiny test of race.”); see also Sunstein, *supra* note 9, at 73 (“*Virginia* heightens the level of scrutiny and brings it closer to the ‘strict scrutiny’ that is applied to discrimination on the basis of race.”). In his dissenting opinion, Justice Scalia charged the Court with raising the standard, 518 U.S. at 573–74 (Scalia, J., dissenting), and Chief Justice Rehnquist with confusing it, 518 U.S. at 559 (Rehnquist, C.J., concurring).

<sup>141</sup> See *NPR Morning Edition: Interview by Nina Totenberg with Justice Ruth Bader Ginsburg* (National Public Radio May 3, 2002), available at <http://www.npr.org/templates/story/story.php?storyId=1142738>, and transcript, available at 2002 WLNR 13867838.

<sup>142</sup> For an analysis of the Court’s pulling back from the standard described in *Virginia*, see Rolando, *supra* note 138 (arguing that *Miller v. Albright*, 523 U.S. 420 (1998), *Nguyen v. INS*, 533 U.S. 53 (2001), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), all marked the return of traditional intermediate review analysis in sex discrimination cases). See also Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 Cal. L. Rev. 755, 829–31 (2004) (arguing that the difference between “muscular” skeptical scrutiny standard applied in *United States v. Virginia* and the impotent version of intermediate scrutiny in *Nguyen v. INS* shows the malleability of the intermediate review standard). [see memo]

<sup>143</sup> See *supra* note 128.

<sup>144</sup> *Virginia*, 518 U.S. at 536–45, 556 n.20.

VMI unique and valuable. From this historical standpoint, Virginia's claims about women's limitations were simply not persuasive.<sup>145</sup>

Justice Ginsburg also used history to demonstrate that states sometimes trump up after-the-fact justifications for measures that restrict women's opportunities. Virginia's assertion that VMI's all-male admissions policy furthered its interest in educational diversity was an example.<sup>146</sup> Justice Ginsburg's closer look through an historical lens revealed a tradition of gender stereotypes and exclusion in Virginia's educational system. Women's seminaries and colleges in Virginia had not been merely separate but also unequal to those established for men in terms of resources and stature.<sup>147</sup> The state's justification simply didn't wash.<sup>148</sup> Not only was VMI's exclusion of women based on stereotypes about women, but the state's asserted purpose for VMI was a cover for a design to reinforce those stereotypes and keep women in their unequal status.

Having concluded that the absence of equal opportunities for women was constitutional defective, the question then remained whether the parallel program for women at Mary Baldwin College cured the defect. Facing this question, the Court had two choices. It could have determined that separate, all-male facilities can never be equal—or are inherently unequal—as it had held in *Brown v. Board of Education* with respect to race.<sup>149</sup> It did not do so. Instead, it proceeded to compare the two programs as if comparability was achievable and, under the right circumstances, constitutionally acceptable.<sup>150</sup> In judging comparability, however, Justice Ginsburg brought the same skepticism to bear on the motivation and design of the VWIL program as she had on the exclusion of women from VMI. She found the VWIL solution “reminiscent” of effort by Texas decades earlier to preserve the University of Texas Law School for Whites, by establishing a separate school for Blacks.<sup>151</sup> The differences between the programs reflected the same stereotypes that Virginia had deployed in excluding women from VMI initially.<sup>152</sup> The academic programs, facilities, and faculty were pale versions of VMI, and VWIL lacked the “unique” adversative barracks experience that was, even by the district court's account, where the “most important aspects of the VMI educational experience occur.”<sup>153</sup>

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<sup>145</sup> *Id.* at 540–43.

<sup>146</sup> *Id.* at 535–40.

<sup>147</sup> *Id.* 536–39.

<sup>148</sup> *Id.* at 539. For an excellent note on the disputed use of history in the VMI case in the opinions of Justice Ginsburg, Chief Justice Rehnquist, and Justice Scalia, see Deborah A. Widiss, *Re-Viewing History: The Use of the Past as Negative Precedent in United States v. Virginia*, 108 Yale L.J. 237 (1998).

<sup>149</sup> 347 U.S. 483 (1954).

<sup>150</sup> *Virginia*, 518 U.S. at 547–54.

<sup>151</sup> *Id.* at 553–54 (citing *Sweatt v. Painter*, 339 U.S. 629 (1950)).

<sup>152</sup> *Id.* at 550.

<sup>153</sup> *Id.* at 548–49.

While using a demanding standard to evaluate Virginia's separate programs, Justice Ginsburg reserved the broader question of whether single-sex schools are constitutional. Indeed, she appeared sympathetic to the twenty-six single-sex colleges who had argued to the Court as amici curiae that single-sex schools can sometimes "dissipate, rather than perpetuate, traditional gender classifications."<sup>154</sup> The opinion, however, eliminated the single-sex option in this case. That left two options: VMI could admit women, or it could break its ties with the state of Virginia.<sup>155</sup>

### *III. Beyond Assimilation: Unconstitutional Maleness?*

In *United States v. Virginia*, Justice Ginsburg combined two separate difficulties with sex stereotypes. First, stereotypes are often inaccurate, allocating opportunities of men and women on the basis of false assumptions rather than their actual characteristics.<sup>156</sup> Second, even when stereotypes have some truth to them, use of them can become self-fulfilling prophecies, thereby reinforcing inequalities between men and women and women's inferior status.<sup>157</sup>

Because of Justice Ginsburg's attention to the role of stereotypes in perpetuating women's inferior status, as well as to the problem of false stereotypes, some commentators have argued that her jurisprudence is based in an anti-subordination perspective, rather than in formal equality.<sup>158</sup> Cass Sunstein credits Justice Ginsburg with a "distinctive understanding of sex equality" that moves beyond the denial of difference between men and women to identifying the problem as one of "second-class citizenship."<sup>159</sup> Yet, even as Ginsburg identified the issue of women's legal, social, and economic inferiority in *United States v. Virginia*, her focus remained on the falseness of assumptions about women's dif-

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<sup>154</sup> *Id.* at 533 n.7 (internal quotation marks omitted). Chief Justice Rehnquist, in a separate, concurring opinion, even more explicitly endorsed comparable single-sex programs. He would not require that these programs be as similar as Justice Ginsburg demanded in terms of curriculum and other offerings; it would be enough, he suggested, if the two programs "offered the same quality of education and were of the same overall caliber." *Id.* at 565 (Rehnquist, C.J., concurring).

<sup>155</sup> *Id.* at 551, 552, 557. Justice Scalia in his dissenting opinion questions whether the privatization option was still available to VMI. *Id.* at 596–600 (stating that the majority opinion puts into question all public and private single-sex educational programs).

<sup>156</sup> *Id.* at 541–46.

<sup>157</sup> *Id.* at 542–43.

<sup>158</sup> For the strong view of this thesis, see Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 *Duke L.J.* 770, 782–91 (2010) (arguing that Justice Ginsburg's jurisprudence was, from the beginning, grounded in an "antisubordination approach" which "guides determination of when and how quality values are implicated"). See also Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 *N.Y.U. L. Rev.* (forthcoming April 2010) (manuscript on file with the author) (maintaining that Justice Ginsburg's opposition to gender stereotypes was based on her opposition to the system of restrictive social roles these stereotypes supported, rather than a narrow, anti-classificationist concept of equal protection).

<sup>159</sup> Sunstein, *supra* note 9, at 74, 75.

ferent learning styles, different physical capacities, and different needs. This focus was sufficient to deciding the case, but in tying the perpetuation of women's inferiority to false stereotypes, it captured only part of the problem with VMI. In particular, it failed to address the way in which VMI actively constructed that inferiority. For Justice Ginsburg, the critical point was that VMI did not prove its claim that women were significantly different from men and would require changes in the adversative method.<sup>160</sup> Nothing in her analysis challenged the acceptability of the method itself.

Justice Ginsburg's focus mirrored the government's position the case. From the beginning, DOJ lawyers focused on VMI's assumptions about women's impact on the school's teaching methodology rather than on the legitimacy of that methodology. The federal government's central strategy sought to disprove VMI's claim that women were different from men and would thus require changes to the unique benefits of the school. True to the formal equality paradigm on which this position was based, DOJ lawyers insisted that the women who would be admitted to VMI would be as equally qualified as the men admitted to VMI and thus would not affect the purity of the adversative method. The method itself was not questioned.

In friendly exchange at oral argument in 1992 before the U.S. Court of Appeals for the Fourth Circuit, Judge Phillips tried to move one of the lawyers, Jessica Silver, beyond the government's attachment to the "no-change" position. "So what" if the presence of women caused VMI to alter its method, Judge Phillips pressed Ms. Silver. Isn't change "just . . . the price you have to pay" for the higher value of equality?<sup>161</sup> To Judge Phillips, it was not enough to determine whether women would change VMI; the question, even assuming women's entry to the school would change it, was whether the institution that VMI was trying to preserve had sufficient value to justify women's exclusion. Ms. Silver declined to compromise the government's thin view of the case, going so far as to concede that if it were shown that women would change the institution, VMI would not be required to admit them.<sup>162</sup>

In oral argument before the U.S. Supreme Court, Justice Breyer also seemed to recognize that even if women's presence at VMI would change some of its "unique" features, this fact was not dispositive of the case. Responding to the argument of Virginia's lawyer, former solicitor general Theodore Olson, that the presence of women would require a change in the adversative method—a method that "works"<sup>163</sup>—Justice Breyer analogized the exclusion of women from VMI to the hypothetical exclusion of other protected groups:

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<sup>160</sup> *Virginia*, 518 U.S. at 542–43.

<sup>161</sup> George H. Roberts, Jr., *The United States of America vs. VMI: Round II*, VMI Alumni Rev., Spring 1992, at 11, 12. The transcript of the Court Circuit argument is no longer available from official sources.

<sup>162</sup> *Id.* at 12. The concession was apparently compelled by orders from the Bush administration. Strum, *supra* note 3, at 193.

<sup>163</sup> Transcript of Oral Argument at 48, *Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107).

[C]ouldn't you say exactly the same thing about ethnic or racial or any other [group], I mean somebody could have a school, and they say, we're keeping a [certain] group . . . out . . . because we have a certain unique kind of education . . . and once they're in . . . they'll change the nature of [the method] . . . .

I mean, *don't we have to look at the importance of this thing?* . . .

Isn't the answer [to the claim that they'll change it], so what? You'd have to show that it's important enough to maintain this adversative process . . .

. . . What is it that is so important about it that enables you to say to a woman I'm very sorry, even though you want to go there and you want this result, you can't?<sup>164</sup>

In questioning the adequacy of the argument that women would change VMI enough to justify their exclusion, Justice Breyer seemed to take seriously VMI's concern—in a way the government's position did not—that an important “way of life” would be lost if the school admitted women. However, the fact that women might change VMI and cause the loss of a way of life did not necessarily justify the preservation of VMI as it then existed. Women could be expected to change VMI, as they had juries, workplaces, and police forces, but the possibility of such change did not determine the outcome of the case.<sup>165</sup>

Paul Bender from the Solicitor General's office, too, recognized that VMI posed problems beyond its exclusion of women. Arguing the case for the United States in the Supreme Court, he stated:

What we have here is a single sex institution for men that's designed as a place to teach manly values that only men can learn, to show that men can suffer adversity and succeed, and a single sex institution for women . . . that is openly, expressly, deliberately designed to teach to women womanly values, feminine values.<sup>166</sup>

The position taken by DOJ in its briefs did not reflect this critical, substantive dimension of the case. Instead, it froze the constitutional wrong at VMI's exclusion of women, basing its case on an assumption that was so implausible to those who knew VMI that some observers charged that the government was trying to destroy VMI, not integrate

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<sup>164</sup> *Id.* at 50-52 (emphasis added).

<sup>165</sup> In challenging VMI's attorneys on the circularity of the uniqueness justification for remaining all-male, Justice Souter also goes beyond the descriptive assumptions about women on which VMI's system is based to the normative issues about that system. *Id.* at 53 (“[I]f you are going to justify your system by its distinctness, then you always have a built-in justification . . . and that's why, it seems to me, under middle tier scrutiny, you've got to say the distinctness is worth it for some other reason.”).

<sup>166</sup> *Id.* at 10.

it.<sup>167</sup> Except in the few passing questions and references summarized above, questions about the value of those aspects of VMI used to justify women's exclusion from the school went unasked. Missing from the government's arguments, as well as from the Court's analysis, was any recognition that VMI's absorption of women into the school, "as is," would leave intact the fundamental premises of women's inferiority that were embedded within the school's design. The government and the Court both treated VMI as an institution that had made inaccurate stereotypes about women. In focusing on the right of women to be admitted, the analysis missed that women would be entering an institution that was fundamentally hostile to them.<sup>168</sup>

If the government had pursued the issue of Virginia's support to an institution that furthered a particular version of masculinity that unconstitutionally denigrated women, it would have presented evidence more directed to this concern. Some of the briefs filed on appeal suggest the kind of evidence that might have been developed more fully at the trial court level. For example, a group of eighteen active and retired military officers submitted an amicus curiae brief arguing that there was no proved relationship between the method and the goal of producing citizen-soldiers. They urged that VMI should be preparing cadets for mixed-gender societies, not all-male ones.<sup>169</sup> The brief also criticized the adversa-

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<sup>167</sup> In its brief to the Fourth Circuit Court of Appeals, for example, Mary Baldwin College charged: "It seems unlikely that *amici* such as the ACLU actually believe that the Rat line and 24-hour-a-day military regimen at VMI are superior to other educational methodologies and worthy of emulation. Their goal is to make VMI change its ways, not to encourage the spread of its methodology." Roberts, *Case Set for Oral Argument*, *supra* note 117, at 20 (citing Brief for Mary Baldwin College as Amicus Curiae Supporting Respondents, *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (Nos. 94-1667, 94-1712)); *see also* Rex Bowman, *NOW Wants VMI to Ease Physical Tests for Women*, Wash. Times, Sept. 24, 1996, at A1 (quoting Anita Blair, member of VMI Board of Visitors, as stating: "We're literally spending millions of dollars for the sake of a handful of broad-shouldered women. It's not that they [NOW] want women to have a VMI experience, they want to obliterate VMI from the face of the earth. That's what's so disgusting about this.").

<sup>168</sup> As Valorie Vojdik points out, Justice Ginsburg's analysis, in comparing VMI to other professions that had excluded women, "obscured the power of VMI as an institution and the depth of its hostility toward women." Vojdik, *Gender Outlaws*, *supra* note 36, at 107; *see also* Mary Anne Case, *Two Cheers for Cheerleading: The Noisy Integration of VMI and the Quiet Success of Virginia Women in Leadership*, 1999 U. Chi. Legal F. 347, 370 ("VMI validates, routinizes and institutionalizes these boys' worst instincts.").

<sup>169</sup> Brief of Amicus Curiae Lieutenant Colonel Lt. Col. Rhonda Cornum, USA, et al. in Support of the Petition of the United States at 12, 14–15, *United States v. Virginia*, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107) [hereinafter Brief for Cornum]. At oral argument, Justice Scalia seemed impressed with this argument, even though he thought an all-male VMI was constitutional, noting that "if women are to be leaders in life and in the military, then men have got to become accustomed to taking commands from women, and men won't become accustomed to that if women aren't let in"). Transcript of Oral Argument, *supra* note 163, at 23. Chief Justice Rehnquist, in his opinion concurring with the majority, was also drawn to the logic of the brief. Although otherwise sympathetic to the strengths of VMI, he seemed to wonder whether the adversative system was worth the fight. "While considerable evidence shows that a single-sex education is pedagogically beneficial for some students," the Chief Justice writes, "there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies." *Virginia*, 518 U.S. at 564 (Rehnquist, C.J., concurring). Although the Chief Justice expressed these reservations about the adversative method, he concluded that parallel men's and women's institutions would be constitutional, even if they used different methods and have different cur-

tive method on the grounds that the stress it imposed was “artificial” and did not necessarily prepare cadets for real-life or combat stress.<sup>170</sup> If the government had chosen a broader view of the case, it presumably would also have put in the record further evidence of how the adversative method promoted the values of male superiority and female subordination.

With a sufficient showing of the deficiencies of the adversative method, VMI opponents would not have had to concede that VMI could exclude women if their presence would change the school, as Jessica Silver suggested in oral argument.<sup>171</sup> Instead, a sufficient showing that the school promoted male superiority and female inferiority would have *strengthened* the position that women should be admitted to VMI. If VMI was unconstitutionally male, it would have to change, one way or another. Indeed, an institution that continued to promote a “male ethos” should not have continued to receive state support *no matter who was admitted* to it.<sup>172</sup>

If the Court had recognized the constitutional problem with an educational pedagogy that degraded women, it also would have been clear that VMI needed guidance about how to proceed with gender integration. The assumption that VMI would not change with the admission of women made such guidance unnecessary. But if VMI was unconstitutionally promoting male superiority, a remedy would have had to take account of those aspects of a VMI education that had this effect, including those features of the adversative method that motivated male cadets through an appeal to their desire to dominate women.

Greater consideration of the subordination element of the case also could have led to more judicial direction going forward about when and how states can develop single-sex educational opportunities. Despite the threat that admitting women from VMI would have meant the end of single-sex education everywhere,<sup>173</sup> separate programs arguably are not a problem if members of both sexes have comparable, voluntary options and are equally valued and served —i.e., if the programs do not subordinate women to men. The new generation of single-sex public elementary and secondary schools holds more promise, in this regard, than single-sex schools that were developed at a time when education for women was for a different purpose than education for men and based on countless

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riculum, so long as the institutions “offer the same quality of education and [a]re of the same overall caliber.” *Id.* at 565.

<sup>170</sup> Brief for Cornum, *supra* note 169, at 11–12.

<sup>171</sup> *See supra* text accompanying notes 161–162.

<sup>172</sup> Judge Phillips was pursuing the same issue when he asked the lead Virginia attorney, Robert Patterson, whether “fostering a male ethos” would be an appropriate purpose under the Equal Protection Clause. Consistent with VMI’s litigation strategy, Patterson deflected the question, saying that there were differences between men and women that would justify such a purpose. *See Roberts, supra* note 161, at 12.

<sup>173</sup> Brief for the Respondents at 17–18, *Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107). Justice Scalia in his dissenting opinion treated this threat as a serious one, stating that the majority opinion put not only public single-sex schools in jeopardy, but private ones as well. *See Virginia*, 518 U.S. at 598–600 (Scalia, J., dissenting).

stereotypes of women's interests, abilities, and learning styles. Recently enacted regulations by the U.S. Department of Education under Title IX of the 1972 Education Amendments recognize the difference.<sup>174</sup> The Court's majority opinion offers little help in determining whether these regulations are constitutional.

The possibility exists that the assimilation strategy was the one most likely to win the case and that pushing further into the substantive problems with VMI's educational program would have cost Justice Ginsburg the votes she needed. Just as an incrementalist strategy had succeeded in gaining women access to areas of life from which they were previously excluded, so perhaps the assertion that the admission of women to VMI would not have changed it—if not completely realistic—made the entrance of women to yet another male sphere less threatening.

However, the downside of the assimilation ideal should not be taken lightly. While this ideal has helped bring about significant opportunity for women, it also has reinforced the notion that the only changes to be expected from gender equality are expanded opportunities, not changes to institutional structures and societal attitudes. This message reassures those institutions being asked to accept women, but it also cautions those who would integrate them not to expect too much change.<sup>175</sup> What came next at VMI bears out these limitations.

#### *IV. The Aftermath: Assimilation with Negotiated Accommodations*

On June 28, 1996, two days after the Supreme Court's decision in *United States v. Virginia*, The Citadel announced that it would begin accepting women applicants.<sup>176</sup> Co-education would not happen as quickly at VMI. Board members studied the viability of privatization to enable VMI to remain all-male, while the VMI administration also pre-

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<sup>174</sup> These regulations offer considerable flexibility for school districts to develop single-sex elementary and secondary programs. They require that such programs be voluntary, even-handed, subject to periodic evaluations, and with a purpose either to promote diversity, or to respond to a specific educational need. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 71 Fed. Reg. 62,530 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106); *Access to Classes and Schools*, 34 C.F.R. § 106.34 (2009). For a discussion of these and other guidelines, and of the likely constitutionality of these regulations, see Rebecca A. Kiselewich, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can be Equal*, 49 B.C. L. Rev. 217 (2008); Benjamin O. Carr, *Can Separate Be Equal? Single-Sex Classrooms, The Constitution, and Title IX*, 83 Notre Dame L. Rev. 409 (2007); Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 Wm. & Mary L. Rev. 1953 (2006). Single-sex programs in public schools have multiplied since *United States v. Virginia*. In 1995, there were three public high schools with all-female student bodies. The National Association for Public Single-Sex Education reports that in the 2005–2006 academic year, forty-four public elementary and secondary schools in the United States were single-sex, thirteen of which opened or became single-sex that year. Jenkins, *supra*, at 1957.

<sup>175</sup> There are already many reasons why the introduction of women and minorities to workplaces has not made those workplaces significantly more hospitable to women and minorities. See Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 Wash. & Lee L. Rev. 1645 (2004).

<sup>176</sup> Strum, *supra* note 3, at 298.

pared to admit women. The school's Superintendent Major General Josiah Bunting III understood that the privatization option probably would not work, but he also realized that a substantial segment of the VMI community preferred a private, all-male option to a public coeducational institution and thought that point of view deserved a full hearing. At the same time, he determined that if VMI were to accept females, it needed to start early to plan it right.<sup>177</sup> He was not prepared to fail. "[I]f we're going to do it," Bunting told the Board, "We're going to do it well—*extraordinarily* well."<sup>178</sup>

Bunting's caution would turn out to produce a more successful integration of women at VMI than occurred at The Citadel,<sup>179</sup> but the slower pace also created substantial tension between VMI and the DOJ who, along with representatives of some of the women's groups who had participated in the litigation, accused VMI of stalling.<sup>180</sup> VMI committees worked through the summer months on parallel tracks to develop both a privatization plan and a plan to integrate women.<sup>181</sup> On September 10th, believing that VMI was not moving fast enough to integrate, DOJ filed an emergency motion in the Fourth Circuit Court of Appeals demanding that women be admitted immediately.<sup>182</sup>

On September 21, 1996, while this motion was pending, the VMI Board of Visitors, by a 9-8 vote, passed a resolution to accept women, beginning in August of 1997.<sup>183</sup> An important factor in the decision was that privatization would require VMI to raise \$250–\$300 million in endowment, or the equivalent of expected return on this amount on an annual basis, to replace its state and federal subsidies<sup>184</sup>—this after VMI alumni had already

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<sup>177</sup> *Id.* at 298–99.

<sup>178</sup> Brodie, *supra* note 6, at 49. General Bunting lost support among some alumni, who felt he should have resigned as a matter of principle when VMI was ordered to admit women, rather than submit to the Court's order. *Bunting Speech Ended on Losing Note*, Richmond Times-Dispatch, May 13, 2001, at C2.

<sup>179</sup> By all accounts, the introduction of women at The Citadel, with little study or planning, was a disaster. Shannon Faulkner, admitted by court order in 1995, left within a week due to the stress and isolation of being the only woman at the college. Two of the four women who followed after her were taunted and beaten by male cadets, who set the women's clothes on fire while they were still wearing them. See Associated Press, *F.B.I. Looking into Report of Hazing at Citadel*, N.Y. Times, Dec. 14, 1996, § 1, at 8.

<sup>180</sup> Strum, *supra* note 3, at 299–300.

<sup>181</sup> VMI communications with alumni made it clear that the privatization option had been under study for some time and that consideration of the privatization and coeducation possibilities would be considered simultaneously. See *Supreme Court Rules in Favor of United States*, VMI: The Institute Report (Virginia Military Institute, Lexington, Va.), Sept. 11, 1996, at 1, 6.

<sup>182</sup> Emergency Motion of Respondent-Appellant, *Virginia*, 96 F.3d 114 (4th Cir. 1996) (Nos. 91-1690, 94-1667, and 94-1712).

<sup>183</sup> *The VMI Board of Visitors Renders Historic Decision Not to Pursue Privatization*, VMI Alumni Rev., Winter 1997, at 14, 15–16; Wes Allison, *VMI Votes 9-8 to Admit Women: Some Alumni Weep; Officials Promise Survival*, Richmond Times-Dispatch, Sept. 22, 1996, at A1.

<sup>184</sup> See George H. Roberts, Jr., *The Issues Before the Board*, VMI Alumni Rev., Winter 1997, at 44, 45 (estimating a cost of \$170–\$300 million); Calvin R. Trice, *Bunting Speech Ended on Losing Note*, Rich-

paid more than \$14 million in legal fees, public relations, and payments to VWIL.<sup>185</sup> In addition, then-Governor George Allen expressed some concern that privatization would make VMI a civil rights pariah.<sup>186</sup> Moreover, the Department of Defense had made clear that it intended to terminate the Reserve Officers' Training Corps ("ROTC") program at VMI unless it submitted a remedial plan to integrate women.<sup>187</sup>

With the decision made, General Bunting himself set an extraordinarily positive tone of professionalism and commitment to making gender integration succeed. "When you are given a lawful order," he stated in an interview, "you must execute it. Professionals may not allow their resentments to affect their work."<sup>188</sup> He understood, at least among "home" audiences, that creating and maintaining this attitude throughout the school would take some doing. "We will have to effect a cultural change, an attitudinal change, many of us in ourselves," he told the Board. "[D]oubt, skepticism, cynicism, sorrow are not fertile soil in which to plant the seeds of a new coeducational VMI. ... Healing and building will have to occur simultaneously."<sup>189</sup> Although Bunting would continue privately to take the position that VMI should not have been required to admit women,<sup>190</sup> he proceeded to make decisions designed to make the integration of women as successful as possible, promising that "none of the individual women will be made to feel any more unwelcome than any of the young men."<sup>191</sup>

The one area in which Bunting let his resentment show was in his continuing, adversarial dealings with the DOJ. Throughout the course of the planning for the admission of women, which was to be officially supervised by Judge Kiser,<sup>192</sup> ongoing disputes persisted about what accommodations would be made. Early on, both sides altered the positions they had held during litigation. While VMI had claimed during the litigation that

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mond Times-Dispatch, May 13, 2001, at C2 (stating that "the school would have needed an immediate \$250 million in cash" to go private).

<sup>185</sup> Strum, *supra* note 3, at 298.

<sup>186</sup> *Alumni Present Case for Making VMI Private*, Akron Beacon J., Sept. 21, 1996, at A4.

<sup>187</sup> See Letter from Fred Pang, Assistant Sec'y of Def., to Major General Josiah Bunting III, Superintendent, VMI (Sept. 16, 1996); Letter from William H. Hurd, Deputy Attorney General, Commonwealth of Va., to Fred Pang, Assistant Sec'y of Def. (Oct. 4, 1996); Letter of Judith A. Miller, Attorney, on behalf of the Dep't of Def., to William H. Hurd, Deputy Attorney General, Commonwealth of Va. (Nov. 5, 1996), published in *VMI Alumni Rev.*, Winter 1997, at 28; see also Strum, *supra* note 3, at 298. [see memo]

<sup>188</sup> Strum, *supra* note 3, at 303 (citing Katherine Gazella, *VMI: No Longer Just for Men*, St. Petersburg Times, Aug. 18, 1997, at 1A).

<sup>189</sup> Brodie, *supra* note 6, at 49.

<sup>190</sup> He continues to take that position. Interview with Major General Josiah Bunting III, *supra* note 12.

<sup>191</sup> Strum, *supra* note 3, at 303 (citing Gazella, *supra* note 188). "We must simply demonstrate that the VMI way is the honorable, professional, efficient, self-controlled way," said Bunting in December 1996. The female cadets "are the beneficiaries, not the makers, of the School's new, coeducational, era." Brodie, *supra* note 6, at 170.

<sup>192</sup> *United States v. Virginia*, 96 F.3d 114 (4th Cir. 1996).

the admission of women would require so many changes that the school would lose what made it valuable, it now insisted that female cadets would be treated exactly the same as males.<sup>193</sup> Conversely, while DOJ had insisted during the litigation that no significant changes would be needed to accommodate women, advocates for the potential female cadets immediately began talking about the need to permit women to have longer haircuts and lighter physical requirements, calling the intention to shave women's heads "vindicative" and criticizing the "total equality" approach announced by General Bunting as "just an excuse to exclude women."<sup>194</sup> In its October 17, 1996, motion to the district court to compel VMI to develop a detailed coeducation plan, DOJ asked the court to require VMI to remove from all promotional materials items that could discourage women from attending VMI, to substitute more encouraging images, and to make adjustments to the rat line traditions.<sup>195</sup>

From the beginning, the parties squabbled about how much detail VMI would have to supply to the DOJ about the transition plan. Bunting resisted providing the kind of specific plans demanded by DOJ, believing that the government's effort to ascertain and supervise every facet of the plan was an attempt to remake VMI in the image of the federal service academies. DOJ's mistrust of VMI and its attempt to supervise the process of admitting women, Bunting said, "is a direct challenge to our independence and our honor and, I may add, our professionalism."<sup>196</sup> With a politician's instincts, however, Bunting communicated extensively with alumni and friends both about VMI's preparations for women and about its refusal to comply with all federal requests for information.<sup>197</sup>

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<sup>193</sup> From the starting gate, VMI resolved to make changes that were "absolutely minimal." Major General Josiah Bunting III, Superintendent, VMI, Public Remarks at Press Conference (Sept. 21, 1996), *reported in The VMI Board of Visitors Renders Historic Decision*, *supra* note 183, at 17 (reporting Bunting's statement that "[f]emale cadets will be treated precisely as we treat male cadets"); *see also* Strum, *supra* note 3, at 304. [see memo]

<sup>194</sup> *See* Strum, *supra* note 3, at 304 (citing news stories); Bowman, *supra* note 167.

<sup>195</sup> *Virginia*, 96 F.3d 114 (Nos. 91-1690, 94-1667 and 94-1712) (order remanding case to district court); George H. Roberts, Jr., *Legal Proceedings Continue*, VMI Alumni Rev., Winter 1997, at 48, 49. Even after women were admitted, DOJ continued to try to supervise the transition. For example, when the first woman was suspended for punching an upperclassman, the Justice Department, unsuccessfully, attempted to investigate whether any allegations of sexual harassment were involved. *See* Matt Chittum, *VMI Superintendent Pleads for 'Source of Sanity': Feds Want More Details on Suspended Female Rat*, Roanoke Times, Sept. 26, 1997, at B1; Brodie, *supra* note 6, at 272; *see also* Jamie C. Ruff, *Judge Won't End VMI Oversight Yet: U.S., State Debated Issue of Progress*, Richmond Times-Dispatch, Apr. 17, 1999, at B1 (reporting refusal of trial judge to end supervision). [see memo]

<sup>196</sup> Associated Press, *VMI Co-ed Plan Draws Justice Ire*, The Post and Courier (Charleston, SC), Nov. 14, 1996, at A4; *see also* Allison Blake, *State Pans Justice for Poking VMI; Feds: Let Women Apply Now*, Roanoke Times, Sept. 19, 1996, at A1 (reporting charges by Virginia's assistant state attorney general, William Hurd, that the federal government was trying to "hound and harass" VMI). [see memo]

<sup>197</sup> *See* Brodie, *supra* note 6, 186–89. These communications, many of which are found in the VMI Alumni Review, are available from VMI Archives, Preston Library, Virginia Military Institute, Lexington, Va.

On December 2, 1996, in response to the DOJ motion for a detailed integration plan, Judge Kiser acknowledged that VMI had not yet submitted a formal plan, but it noted that VMI had taken a number of steps toward the integration of women, including recruitment efforts, facilities changes, program development, financial aid, and the hiring of necessary personnel. It also noted that the instructions from the appellate court did not require that Virginia get prior approval of a plan of action. Clearly impatient with both sides, Judge Kiser wrote that the government's claim that VMI was dragging its feet was overstated, but that "had the United States been kept informed as to what Virginia was doing to comply with the mandate of the Supreme Court, the present motion would not have been necessary."<sup>198</sup>

VMI continued giving DOJ less detail than it asked for, but it did proceed to file comprehensive, quarterly reports with the court.<sup>199</sup> DOJ continued to oversee VMI's processes, which continued to irritate VMI. For example, DOJ forbade direct contact with the federal service academies without its permission—contact that might have been able to provide useful information about what had worked at other institutions—on the grounds that VMI was still a party to a federal lawsuit and the federal academies were also DOJ clients.<sup>200</sup>

One of Bunting's earliest decisions was putting then-Colonel Mike Bissell in charge of the planning process for the integration of women at VMI. Bissell had been serving as the commandant of cadets at VMI (equivalent to the dean of students at many colleges) and also as the commandant of VWIL, coordinating the two colleges' programs.<sup>201</sup> Bissell became chair of an executive committee consisting of seven subcommittee heads, seven cadets, and a few specialists. He established subcommittees, made up of faculty, staff, alumni, and cadets, to examine issues relating to the recruitment of women, facilities, academics, athletics, orientation, public relations, and co-curricular activities. The inclusion of more than 100 cadets on the varying transition teams recognized the importance of buy-in from the student body, as well as from faculty and staff.<sup>202</sup>

True to Bunting's word, much of VMI was to stay the same. Its leaders were keen on preserving the harshness of the adversative method; it was the abandonment of that method and the development of a less aggressive style of leadership, many believed, that had led the federal academies to go down the slippery slope into a "feel good" but less ef-

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<sup>198</sup> *United States v. Virginia*, No. 90-126, memorandum op. at 7 (W.D. Va. Dec. 2, 1996); *see also* Strum, *supra* note 3, at 303–05.

<sup>199</sup> *See, e.g., The Third Quarterly Report to the United States District Court from the Commonwealth of Virginia and its Public Co-Defendants*, May 1997, reprinted in *VMI Alumni Rev.*, Summer 1997, at 144–49.

<sup>200</sup> Brodie, *supra* note 6, at 46; Blake, *supra* note 196.

<sup>201</sup> Strum, *supra* note 3, at 305.

<sup>202</sup> *Id.* at 305.

fective military.<sup>203</sup> Phyllis Schlafy, a member of the VMI Board of directors, wrote to VMI alumni: “VMI Alumni, if you allow Ginsburg et al. to do to VMI what Pat Schroeder et al. have done to the United States Navy, you are not the exemplars of manhood we thought you were.”<sup>204</sup>

Accordingly, the same physical fitness test requirements would apply to VMI women, in contrast to the federal service academies, which adjusted physical requirements for females.<sup>205</sup> Physical education requirements were also to remain the same, with the exception that female cadets would participate in boxing and wrestling separately, rather than with the male cadets.<sup>206</sup> A twice-a-week endurance test of ropes course, wall climbing, and obstacle courses, known as the “rat challenge,” was kept the same except for the addition of ramps at a few high obstacles.<sup>207</sup>

Small adjustments were made to the dress and appearance rules. Bunting initially announced that women were to get the same “buzz cuts” as men,<sup>208</sup> but after much back and forth, women rats were left with an one-eighth-inch longer hair style than men.<sup>209</sup> Men and women would wear the same uniforms, except that the female uniforms were tailored. Jewelry remained prohibited for rats, although after breakout, women could wear single gold-post earrings (not more than one-eighth-inch in diameter) for occasions other than parades, inspections, or athletics—an allowance that brought complaints from some male

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<sup>203</sup> Brodie, *supra* note 6, at 41; *see also id.* at 50 (quoting Bunting, “I am not especially impressed that other military schools, since coeducation, have abandoned their adversative systems. We are VMI and we will go our own way as we always have”).

<sup>204</sup> *Id.* at 58–59

<sup>205</sup> *Id.* at 146–58. The VMI Fitness Test (“VFT”) requires at a minimum sixty sit-ups in two minutes, five pull-ups, and a one-and-one-half mile run in twelve minutes. Passing the test is not required for graduation, and many male graduates do not pass it, but it counts as 25% of a cadet’s physical education grade for each of eight required physical education courses, all of which a cadet must pass to graduate. Cadets with low course grades and failing VFT scores have had to repeat the classes, but if the grades are otherwise high enough, a student may end up graduating without ever having passed the test. *See id.* at 148–49. At the end of the first year of coeducation, 96% of men had passed the pull-up requirement, as compared to 30% of women; 97.5% of men had passed the running requirement, as compared to 85% of women, and women averaged seventy-eight sit-ups in the time period while men averaged seventy-six. *Id.* at 329–30. The decision to keep the fitness requirements the same was made even though the Board of Visitors had suggested it would authorize adjustments to these requirements. *Id.* at 68.

<sup>206</sup> Strum, *supra* note 3, at 307–08.

<sup>207</sup> Brodie, *supra* note 6, at 160–61.

<sup>208</sup> Strum, *supra* note 3, at 304.

<sup>209</sup> Women were left with one-inch cuts on top, as compared to one-half inch for men, and three-eighths inch on the sides, as compared to a trace amount for men. Strum, *supra* note 3, at 313. General Bunting, when asked about the different length haircuts, is said to have responded through his spokesman, “Tell them the difference is not worth worrying about.” Peter Finn, *Year of the Female Rat: 30 Women Enroll at VMI, All-Male Since 1839*, Wash. Post, Aug. 19, 1997, at D1.

cadets, who wished to be able to do the same.<sup>210</sup> “Conservative” cosmetics, including “noneccentric lipstick” and colorless nail polish, were allowed for social occasions that required more formal dress than the uniform worn in the classroom.<sup>211</sup> The school issued grey and white skirts to women for social engagements, but they were deemed so unattractive that most women did not wear them. A minor controversy occurred one year when a woman began wearing one of the skirts to class, and was “boned” for improper attire.<sup>212</sup>

Some concessions to women were defended explicitly on the ground that they were necessary to make women’s experience as similar to men’s as possible. For example, female exchange students were recruited from Norwich Academy and Texas A&M to provide dykes to mentor the new female rats.<sup>213</sup> Some changes were clearly for the benefit of the men and the school itself. Female cadets who looked like men created some awkward public relations moments for the school, including women being mistaken for men at public ceremonies and being ejected from public restrooms.<sup>214</sup> There was also concern that too masculine a look might attract the “wrong sort of women” to VMI.<sup>215</sup> On some matters, other forces intervened. For example, at one point the Department of Defense suggested that giving women the same buzz cuts as men might constitute institutional harassment and that it would consider threatening VMI’s ROTC program if it did so.<sup>216</sup>

The VMI administration also made some adjustments for women in the barracks. Female cadets would live in the barracks, without locks on the doors, but shades were added to the windows of all rooms—men’s and women’s—and could be pulled down

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<sup>210</sup> Brodie, *supra* note 6, at 132–33. Other than this accommodation, no jewelry except watches was allowed before breakout; after breakout, cadets could wear one ring on each hand and a religious symbol or military dog tags around the neck, out of view.

<sup>211</sup> *Id.* at 133

<sup>212</sup> *Id.* at 133–35.

<sup>213</sup> Brodie, *supra* note 6, at 90, 302–04. Similarly, advocates argued for longer haircuts for women on the ground that buzz cuts had a different, more humiliating meaning for women than for men, and that Bunting’s initial position that women should have to have the same buzz cuts as men was vindictive and an effort to use the “myth of total equality” as a way of excluding women. Strum, *supra* note 3, at 304 (quoting Val Vojdik, Shannon Faulkner’s lawyer in *The Citadel* case, and Karen Johnson, a retired air force colonel who was vice president of the National Organization for Women).

<sup>214</sup> Brodie, *supra* note 6, at 279–80.

<sup>215</sup> *Id.* at 281.

<sup>216</sup> *Id.* at 128. For the symbolic importance all interested parties placed in the length of women’s haircuts, see *id.* at 127–132, 221–22, 280–86. In the first semester of women’s admission, two women cadets were among about ninety cadets punished for shaving their heads. *VMI Cadets Punished*, Wash. Post, Oct. 3, 1997, at D4.

when dressing.<sup>217</sup> Women would have toilet stalls<sup>218</sup> and individual showers,<sup>219</sup> and their arrival also inspired private examining rooms at the post hospital. Security lighting and emergency call boxes would be installed around the post.<sup>220</sup>

Men benefited from some of these changes, in addition to the window shades and the private examining rooms at the hospital. When administrators lengthened the length of time for showers for female rats from thirty to ninety seconds to ten minutes supposedly for hygienic reasons, complaints of preferential treatment by male rats led to ten-minute showers for them as well.<sup>221</sup> As part of the negotiations over women's swimwear, men bargained for a more popular boxer-style suit, to replace the tight-fitting briefs that previously had been required.<sup>222</sup> In 1999, the first class (seniors) recommended a change in breakout; instead of climbing the cold, muddy, steep hill, there would be a forced march to New Market, followed by a re-enactment of the Civil War charge of their predecessors. Some saw these and other changes as dilutions of the VMI experience, and blamed them on the presence of women, even when the two were not related.<sup>223</sup> Feeding this resentment were continual grumblings in some quarters that women were afforded preferential treatment.<sup>224</sup>

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<sup>217</sup> Brodie, *supra* note 6, at 110–11, 119. The shades went up on both men's and women's Barracks rooms, although by the end of the first month of the 1997–1998 school year, many of them had fallen down from misuse. *Id.* at 110–11. [see memo]CORRECT

<sup>218</sup> The absence of toilet stall doors was apparently not an intentional part of the lack of privacy philosophy at VMI. Before the admission of women to VMI, the stalls had had doors, but they had been torn off so many times that the maintenance workers simply stopped replacing them. Once the female cadets had doors installed, however, the male cadets insisted on them as well. *Id.* at 111.

<sup>219</sup> Agonized attention was given to the issue of individual showers, with some worrying about the danger of blood pathogens during menstruation, and others believing that women would not clean themselves properly if they were not given privacy during a shower. *Id.* at 112–13.

<sup>220</sup> Strum, *supra* note 3, at 306; Brodie, *supra* note 6, at 119–22.

<sup>221</sup> Brodie, *supra* note 6, at 236.

<sup>222</sup> *Id.* at 137.

<sup>223</sup> Case, *supra* note 168, at 373; Brodie, *supra* note 6, at 347–48. An extreme version of this sentiment is represented in the effort by 1977 VMI graduate Michael Guthrie to start a new school modeled on the old VMI. Without any support or encouragement from VMI, within a year after VMI's decision to admit women, Guthrie incorporated the Southern Military Institute (SMI). The mission of SMI is to build an all-male, Christian four-year military college, modeled after the original VMI and The Citadel, where "Southern traditions that have been tarnished and almost lost will live again." Southern Military Institute, at <http://www.south-mil-inst.org> (last visited Jan. 9, 2010). As of 2006, property for the school had still not been acquired. Bill Poovey, *Military School for Men Planned: Southerners Want Traditions Revived*, Comm. Appeal (Memphis, TN), Sept. 21, 2003, at A12; see also Wikipedia, Southern Military Institute, [http://en.wikipedia.org/wiki/Southern\\_Military\\_Institute](http://en.wikipedia.org/wiki/Southern_Military_Institute) (last visited Jul. 24, 2008).

<sup>224</sup> Interview with Katherine Stevens, VWIL cadet, in Staunton, Va. (June 12, 2008). One issue was that NCAA athletes are exempt from the rat challenge and some workouts, and that more women (48%) are on NCAA permits than men (31%). Such exemptions caused some resentment at the school even before

One difficult matter concerned the gendered terminology at the school. In keeping with the intention to assimilate women—not change the institution—female first-year students would be “brother rats.” Bunting ordered that terms like “dyke,” “bone,” and “running a period” would stay.<sup>225</sup> The administration neither official endorsed nor disapproved other familiar phrases, such as “raping your virgin ducks” (peeling apart the stiffly starched legs of a new pair of white trousers) and the more recently coined “rolling your hay tight as a tampon” (rolling up your thin mattress in the morning).<sup>226</sup> Administrators made some effort to reduce the level of gendered vulgarities and obscenities that had made the rat line a form of play-acting the raping and humiliation of women<sup>227</sup> and at one point sanded away the gender profanities etched in the wooden desks.<sup>228</sup>

Dating was forbidden of any rat, and upperclassmen were not allowed to date anyone in their chain of command.<sup>229</sup> In the first year of women’s presence at VMI, a male and female cadet were disciplined for sexual contact. The student Executive Committee recommended suspension for both students, but the school administration reduced the punishment to penalty tours and confinement to barracks. Later in the year, a couple was expelled for a similar offense.<sup>230</sup> Pregnancy was also an issue. Initially, the school ordered that pregnancy would be cause for dismissal for both a pregnant cadet and a male cadet who caused the pregnancy of another cadet.<sup>231</sup> When the first woman cadet became pregnant, however, pressure from DOJ and from women’s advocate groups—including the National Women’s Law Center, who claimed that this approach would be unconstitutional—led to a new policy allowing pregnant cadets to remain in the corps as long as their condition did not prohibit them from fulfilling their duties.<sup>232</sup>

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women were admitted. See Brodie, *supra* note 6, at 161; *Superintendent’s Report to the Board of Visitors*, Feb. 1999 (on file with VMI Archives, Preston Library, Virginia Military Institute, Lexington, Va.).

<sup>225</sup> Brodie, *supra* note 6, at 74–79. Despite the commonly understood meanings of these and other terms, their origins could, mostly, be explained in non-sexual terms. “The words are hardy old VMI words,” said General Bunting. “*They are not to be excised from the Rat Bible, etc., during my time as Superintendent.*” *Id.* at 75–79 (emphasis in original).

<sup>226</sup> *Id.* at 80–81.

<sup>227</sup> *Id.* at 80–83.

<sup>228</sup> Strum, *supra* note 3, at 306. Some of the graffiti reappeared. One favorite phrase soon found on classroom desks and barracks walls was “2000 LCWB” (“Last Class With Balls”). Brodie, *supra* note 6, at 254.

<sup>229</sup> Brodie, *supra* note 6, at 139.

<sup>230</sup> Strum, *supra* note 3, at 314.

<sup>231</sup> Brodie, *supra* note 6, at 143.

<sup>232</sup> Associated Press, *Pregnant VMI Cadet Will Stay in School: Rule Prohibits Her From Getting Married*, Daily Press (Newport News, VA), Feb. 17, 2001, at B4; Associated Press, *VMI Rule Would Force Pregnant Cadets Out*, Daily Press (Newport News, VA), July 2, 2001, at C2; Daniel F. Drummond, *Pregnancy Policy May Cost VMI Federal Aid: Justice Says Plan Violates Title IX*, Wash. Times, July 4, 2001, at A1.

All cadets and staff had to attend workshops on sexual harassment and hazing, and twenty cadets, staff, and faculty were trained to deal with complaints of sexual harassment.<sup>233</sup> Some women believed that hostility decreased as time went on,<sup>234</sup> but expressions of hostility toward the women continued.<sup>235</sup> In fact, some reported that negativity seemed to increase after the first year, possibly because the effort to prime the student leadership to accept responsibility for the successful integration of women could not be sustained year after year at the same level of intensity.<sup>236</sup> In the third year of coeducation, four women left after Christmas break, one claiming that she experienced harassment, received a death threat, and was harassed constantly about her weight.<sup>237</sup> As women became upperclassmen, rats would sometimes ignore them or refuse to do push-ups when asked. One reported being told, “My dyke told me I don’t have to pay attention to women.”<sup>238</sup>

Everyone always understood that the entry of women could not succeed with only a handful of women.<sup>239</sup> Attracting enough women at VMI to have a “critical mass” has been a challenge.<sup>240</sup> As a result of extraordinary recruitment efforts,<sup>241</sup> the school matriculated thirty or more women in the first two years of coeducation, including the upper-class transfers recruited from Norwich Academy and Texas A&M, but only twenty-four to twenty-eight women entered each of the following three classes.<sup>242</sup> With increased recruitment efforts, however, female enrollment at VMI rose to forty-four in

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<sup>233</sup> Strum, *supra* note 3, at 308; Brodie, *supra* note 6, at 226–27.

<sup>234</sup> See Brodie, *supra* note 6, at 354–55.

<sup>235</sup> See, e.g., *id.*, at 225, 253–55, 348, 356 (noting incidents reported). One of the hardest incidents for VMI came when its top-ranking cadet at the school was apprehended using his position to pressure female rats for sex. He was expelled. See Josh White, *Top Cadet Expelled From VMI: Sexual Harassment Alleged by 2 Women*, Wash. Post, June 27, 1999, at C1.

<sup>236</sup> Angelica Martinez, *VMI Loses Four Females Over Furlough*, *The Cadet*, Feb. 4, 2000, at 1.

<sup>237</sup> See Calvin R. Trice, *Hostility Lessens as Time Goes By*, *Richmond Times-Dispatch*, May 13, 2001, at C1; see also *supra* note 37.

<sup>238</sup> See Trice, *supra* note 237.

<sup>239</sup> Brodie, *supra* note 6, at 87–89; Interview with Major General Josiah Bunting, *supra* note 12.

<sup>240</sup> One dean speculated in 2003 that the best VMI can hope for is a corps that is 10% female. See Matt Chittum, *Record-Setting Number of Women Join VMI’s Ranks: School Spent Six Years and Millions of Dollars Trying to Bar Women*, *Roanoke Times*, Aug. 28, 2003, at A1; Conley, *supra* note 19.

<sup>241</sup> Brodie, *supra* note 6, at 91.

<sup>242</sup> *Id.* at 90, 302–04; Calvin R. Trice, *Strong Growth and Growing Pains: Women Flock to VWIL But Female Enrollment Has Leveled Off at VMI*, *Richmond Times-Dispatch*, Aug. 25, 2001, at B1. Of the original group of thirty recruits, nineteen made it to graduation. Four were transfer students who graduated in 1999 and 2000; fourteen graduated in 2001. Of the eleven who didn’t graduate, two were expelled for honor-code violations and one was suspended for hitting an upperclassman. The others resigned for various reasons, not all of them related to the harshness of the place. Bill Lohmann, *VMI’s Rigor a Lasting Lesson for First Women*, *Richmond Times-Dispatch*, July 23, 2007, at A1.

2003,<sup>243</sup> just over fifty in 2005, and forty-seven in 2007.<sup>244</sup> It appears, consistent with the assimilation ideal, that these women were not crusaders seeking to change the institution from within, but women who wanted the same physical and mental challenges as VMI men.<sup>245</sup>

At the same time, enrollment in the VWIL program at Mary Baldwin College has been consistently higher than that of female enrollment at VMI—sometimes more than double. Since the program was started in 1995, at least forty-two cadets have entered VWIL each year. In 2001, while twenty-four freshmen women matriculated at VMI, fifty-two came to VWIL.<sup>246</sup> In 2005, again, VWIL had twice the number of female cadets as VMI did.<sup>247</sup>

VWIL graduates are succeeding, by some measures more than the female graduates of VMI. For example, in May 2008, fourteen of the nineteen women who graduated from the VWIL program were to be commissioned in the Air Force, Army, or Marine Corps,<sup>248</sup> a higher figure than the typical 40% figure averaged by VMI graduates, both male and female.<sup>249</sup> VWIL women are serving in the military with distinction.<sup>250</sup> Virginia continues to support VWIL, even though the program did not serve its original purpose of saving VMI's all-male status.<sup>251</sup>

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<sup>243</sup> Chittum, *supra* note 240.

<sup>244</sup> Conley, *supra* note 19.

<sup>245</sup> Interview with Major General Josiah Bunting, *supra* note 12 (women who came to VMI are not radical feminists). See also Lindsay Kastner, VMI Grad Doesn't See Herself as a Pioneer, *Richmond Times-Dispatch*, June 6, 2001, at N4 (citing female student who said that she and other women who entered VMI were not crusaders trying to tear down an all-male tradition); Conley, *supra* note 19 (quoting female student, "I had absolutely no desire to change VMI or be a poster child for feminists in America"). [see memo]

<sup>246</sup> Trice, *supra* note 242.

<sup>247</sup> Matt Chittum, *Decade Strong Virginia Women's Institute for Leadership*, *Roanoke Times*, March 18, 2005, at A1.

<sup>248</sup> *VWIL Grads Attain Record Commissions*, *Richmond Times-Dispatch*, May 19, 2008, at A10.

<sup>249</sup> See Conley, *supra* note 19. The goal at VMI is a 70% commission rate. *Id.*

<sup>250</sup> Air Force Special Agent Captain Kristy Wheeler received a Bronze Star in 2008 for her work in Iraq supervising the transport of troops and equipment. Brad Zinn, *VWIL Grad Awarded Bronze Star*, *The Daily News Leader* (Staunton, VA), Apr. 6, 2008, at 1A. In September 2005, VWIL suffered its first service casualty when a graduate died in combat in the Middle East. Calvin R. Trice, *Mary Baldwin Grad Killed While Serving in Military*, *Richmond Times-Dispatch*, Sept. 21, 2005, at B4.

<sup>251</sup> The State of Virginia continues to support the program in the form of tuition subsidies, at the level of about \$750,000 annually, Chittum, *supra* note 247, although it has terminated its additional allotment to VWIL under the Unique Military Appropriation. Interview with Brigadier General Mike Bissell, in Staunton, Va. (June 12, 2008). VMI provided \$2.3 million of its \$6.9 million commitment to endow the VWIL program before pulling its funding. Trice, *supra* note 242.

Such success might suggest that VWIL is, indeed, more compatible with women's style of learning and leadership than VMI. Some have gone further, suggesting that the VWIL program is a better program not only for training women but men as well.<sup>252</sup> VWIL's successes, however, do not appear to have influenced the way VMI operates. Given the seriousness with which VMI took the integration of women when required by law to do so, one has to wonder how it would have responded to an order not only to admit women but to eliminate the ethos of male superiority at VMI.

### *V. Epilogue*

On December 6, 2001, Judge Kiser entered an order that VMI had met all the obligations required by the federal courts in bringing women into the student body and the case could now be closed.<sup>253</sup> Bunting's reaction to this order reflected both how much, and how little, the case had achieved. He called the order "a vindication of many years of dedication and hard work." "We are pleased we were able to conclude this case," he said in a statement, "without compromising the institute's core values."<sup>254</sup>

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<sup>252</sup> Lucinda M. Finley, *Sex-Blind, Separate but Equal, or Anti-Subordination? The Uneasy Legacy of Plessy v. Ferguson and Gender Discrimination*, 12 Ga. St. U.L. Rev. 1089, 1105 (1996); Case, *supra* note 168, at 349; see also Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 103–04 (1995) (discussing the possibility of opening up VWIL to men).

<sup>253</sup> United States v. Virginia, No. 90-0126, order (W.D. Va. Dec. 6, 2001).

<sup>254</sup> Calvin R. Trice, *U.S. Judge Tells VMI: "At Ease"; Book Closed on All-Male Policy Suit*, Richmond Times-Dispatch, Dec. 8, 2001, at A1.

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