NOT DEAD YET: THE FUTURE OF SINGLE-SEX EDUCATION AFTER *UNITED STATES v. VIRGINIA*

Jolee Land*

I. INTRODUCTION

On June 26, 1996, the United States Supreme Court logically answered the question of whether all-male, state-supported military schools are constitutionally permissible. With the case of *United States v. Virginia*,[1] the Court effectively ended the long tradition of male-only admissions at the Virginia Military Institute (VMI). The majority found that Virginia's justifications for its gender classification at VMI were not sufficient to withstand intermediate scrutiny; therefore, the Court found the admissions policy to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[2] What the majority decision did not do, however, is clarify the opinion's ramifications for other forms of single-sex education.

Justice Antonin Scalia's dissent to the majority opinion in the *VMI* case proclaimed that the decision sounded the death knell of all forms of single-sex education, public *and* private.[3] However, Justice Scalia's opinion is based on certain assumptions, such as the lack of validity of the legal distinction between public and private schools,[4] which may be fundamentally wrong.

Before the Supreme Court's resolution of this case, several commentators used the issue of the constitutionality of public single-sex schools to criticize feminist (and nonfeminist) supporters of dual-gender admissions at schools such as VMI.[5] The commentators argued that feminists should not support the admission of women to VMI because doing so would lead to the downfall of single-gender women's schools as well, including private colleges such as Smith

* B.A., University of South Florida, 1994; J.D., Stetson University College of Law, expected December 1997; Notes & Comments Editor, *Stetson Law Review*.

1. 116 S. Ct. 2264 (1996) [hereinafter the *VMI* case].

2. *See id.* at 2287.

3. *See id.* at 2305–07 (Scalia, J., dissenting).

4. *See id.* at 2306–07.

5. *See, e.g.,* Kristin S. Caplice, Comment, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227 (1994); *see also infra* note 114.

and Wellesley.[6] These commentators postured that a Supreme Court decision requiring the admission of women to VMI and the Citadel would necessarily raise the level of judicial review provided to gender classifications to a strict scrutiny standard,[7] and that in-turn would lead to the undoing of single-sex education in any form.[8] The commentator's arguments also extolled the virtues of single-sex education through the examination of social science research, including some feminist research.[9] Most of these commentators concluded that the benefits of single-sex education to girls, boys, women, and men were great enough to justify the exclusion of women from schools such as VMI.[10] In other words, those who supported the admission of women to VMI, especially feminists, could not "have it both ways" — the introduction of women to all-male military schools could not co-exist with any other forms of single-sex education, despite the benefits found to accrue from some single-gender educational settings.[11]

However, these arguments against the admission of women to VMI are based on some of the same faulty assumptions that the dissent made in the *VMI* case. Additionally, some of the commentators' arguments in favor of maintaining single-sex education are merely pretext for the ideology that traditional programs of gender exclusion in public schools, such as that at VMI, should be preserved.[12]

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6. *See infra* note 114 and accompanying text.

7. *See, e.g.,* Caplice, *supra* note 5, at 227; *see also infra* note 114. Indeed, the United States argued in its brief to the Supreme Court that the strict scrutiny standard should be applied to the *VMI* case. *See* Brief for United States at 16, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-2107). However, the United States acknowledged, both in its brief and in oral argument, that applying the intermediate scrutiny test would still mandate a finding that VMI's admissions policy was unconstitutional. *See* Brief for United States at 17; Oral Argument on Behalf of United States at 13–17, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-2107). This Casenote does not address the argument that gender classifications should be afforded strict scrutiny, rather than intermediate scrutiny, by the courts. The premise for this Casenote is an acceptance of the fact that intermediate scrutiny is the analysis currently applied by the courts, and that within that context, single-sex education is a viable alternative.

8. *See infra* note 114 and accompanying text.

9. *See, e.g.,* Thomas R. McDaniel, *The Education of Alice and Dorothy: Helping Girls to Thrive in School*, 68 CLEARING HOUSE 43 (1994).

10. *See infra* note 114 and accompanying text.

11. *See* Stuart Taylor Jr., *Feminism and Educational Opportunity*, LEGAL TIMES, Oct. 3, 1994, at 45, 47.

12. *See* Sara L. Mandelbaum, *"As VMI Goes . . . ": The Domino Effect and*

The majority opinion in the *VMI* case correctly applied the intermediate scrutiny test, and left an open door for the constitutionality of publicly and privately-funded single-sex alternatives to coeducation. First, this Casenote discusses the historical case law that developed the use of intermediate scrutiny in the gender context of equal protection, and the use of intermediate scrutiny in cases concerning single-sex education. Next, this Casenote examines the majority and dissent of the *VMI* case, addressing the application of equal protection review and the discussion of the constitutionality of single-sex schools. This Casenote then analyzes the constitutionality and statutory legality of single-sex education in light of the *VMI* decision and applicable statutory law. This Casenote concludes that states should be able to offer some forms of single-sex education as alternatives to coeducation without violating the Equal Protection Clause.

II. HISTORICAL OVERVIEW

A. Gender Equal Protection Cases

Under traditional equal protection jurisprudence, the United States Supreme Court did not recognize gender as a protected class and therefore did not extend heightened scrutiny to gender discrimination cases.[13] In fact, there is little doubt that the framers of the United States Constitution did not intend to include women as beneficiaries of the Equal Protection Clause of the Fourteenth Amendment.[14] But with the case of *Reed v. Reed*,[15] the Court began applying a form of heightened scrutiny to gender classifications.[16] In *Reed*, the mother of a deceased minor son petitioned the probate

Other Stubborn Myths, 6 SETON HALL CONST. L.J. 979, 979 (1996) (stating that "I wish to stress that the value of single-sex education is not the real issue either in *VMI* or the *Faulkner v. Jones* case. . . . [Arguments suggesting that private women's colleges must become coeducational if VMI is forced to] is an argument that is designed to detract attention from the real issue in *VMI* and *Faulkner*: the intentional exclusion of qualified women from a public school solely on the basis of sex.").

13. *See, e.g.,* Bradwell v. Illinois, 83 U.S. 130 (1872) (upholding the exclusion of women from law practice without extending Fourteenth Amendment protections).

14. This contention is verified by the discussion in *Bradwell* regarding the "natural occupations" of women versus men — the *Bradwell* decision was contemporaneous with the passing of the Fourteenth Amendment. *See id.* at 141.

15. 404 U.S. 71 (1971).

16. *See id.* at 76–77.

court in Ada County, Idaho to become the administratrix of her son's estate.[17] Before the court ruled on the mother's petition, the deceased child's father also petitioned to become administrator of the son's estate.[18] Under a provision of the Idaho Code,[19] the probate court granted the father's petition over the mother's.[20] Although the State of Idaho argued that it had a rational reason for preferring the applications of males over females,[21] the Supreme Court still found that the State's gender classification failed the rational basis analysis.[22] The Court's treatment of this gender classification went beyond a rational basis, however, and raised an equal protection analysis to a heightened level of scrutiny in gender cases.[23] At this time, the Court did not put a name on the test it was using; however, five years later in *Craig v. Boren*,[24] the intermediate scrutiny test emerged as the equal protection analysis for courts to apply in gender cases.[25]

Craig involved an Oklahoma statute[26] that prohibited the sale of 3.2% beer to males under the age of twenty-one and to females under the age of eighteen.[27] The statute was challenged on the basis that it violated the Equal Protection Clause of the Fourteenth Amendment as a discriminatory gender classification.[28] In reviewing

17. *See id.* at 71–72. The son died intestate and left an estate with a value less than $1000. *See id.* at 72 n.1.

18. *See id.* at 72.

19. *See id.* at 72–73 (citing IDAHO CODE §§ 15-312, 15-314 (1971)).

20. The code provision in question preferred males over females when more than one person was entitled to, and was petitioning to, administer an estate. *See Reed*, 404 U.S. at 73.

21. The State argued, and the Idaho Supreme Court found, that the code provision eliminated controversies over the administration of estates and therefore made the probate court's decision easier. *See id.* at 76.

22. *See id.* at 77. The Court stated that the rational basis test, as applied in this case, presented the question of "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314." *Id.* at 76.

23. Had the Court applied a strict rational basis analysis, it would have found that the Idaho provision was constitutional because the Court itself admitted: "Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy." *Id.* at 76.

24. 429 U.S. 190 (1976).

25. *See id.* at 197.

26. *See id.* at 191–92 (citing OKLA. STAT. ANN. tit. 37, §§ 241, 245 (1958 & Supp. 1976)).

27. *See Craig*, 429 U.S. at 192.

28. *See id.*

the statute, the Supreme Court relied on *Reed*'s heightened scrutiny and established that a state must show an "important governmental objective" and means "substantially related to achievement of those objectives" for a gender classification to survive constitutional challenge.[29] Although the Court found Oklahoma's proffered justification of health and safety[30] to be important enough to satisfy the first prong of intermediate scrutiny, the justification failed the second prong.[31] In finding that gender was not an "accurate proxy" for safety statutes aimed at reducing the incidence of driving under the influence,[32] the Supreme Court followed *Reed* and established the two-prong intermediate scrutiny test as the form of heightened scrutiny applicable to gender discrimination cases.[33]

Wengler v. Druggists Mutual Insurance Co.[34] is representative of a series of post-*Craig* cases invalidating state statutes that favored women over men for the distribution of benefits; in this case, workers' compensation benefits.[35] The statute challenged in *Wengler*[36] provided that the State would not disburse workers' compensation death benefits to a surviving male spouse unless he could show actual dependence on his wife's income, whereas the State automatically disbursed death benefits to surviving female spouses.[37] A Missouri man whose wife was killed in a workplace accident, and who was denied death benefits because he was not dependent on his wife's income, challenged the statute as violating the Fourteenth Amendment Equal Protection Clause.[38] The Supreme Court, relying in part on *Craig v. Boren* and applying intermediate scruti-

29. *Id.* at 197.

30. The State presented statistics which showed that 2% of males in the 18–20 age group were arrested for driving under the influence of alcohol while only .18% of females in that age group were arrested for the same offense. *See id.* at 201. Oklahoma claimed these statistics justified prohibiting males in the 18–20 age group from purchasing 3.2% beer. *See id.* at 200–01.

31. *See Craig*, 429 U.S. at 200.

32. *See id.* at 204.

33. *See id.*

34. 446 U.S. 142 (1980).

35. *See id.* at 143; *see also* Orr v. Orr, 440 U.S. 268, 283 (1979) (invalidating Alabama statute authorizing the award of alimony to wives but not husbands); Califano v. Goldfarb, 430 U.S. 199, 216–17 (1977) (striking down statute with preference for widows over widowers in the distribution of social security benefits).

36. *See Wengler*, 446 U.S. at 143–46 & n.1 (citing MO. REV. STAT. § 287.240 (Supp. 1979)).

37. *See id.* at 144–46.

38. *See id.* at 143, 146.

ny, found that the statute was discriminatory against both surviving male spouses and female wage earners.[39] Missouri argued, and the Court agreed, that providing death benefits to surviving spouses was an "important governmental objective."[40] However, the means utilized to achieve that goal failed the second prong of intermediate scrutiny.[41] Missouri claimed that it was more efficient to presume that wives were dependent on their husband's income in making death benefit determinations; however, the Court found that this "justification of administrative convenience" was not substantially related to the goal of providing death benefits to surviving spouses.[42]

The above cases trace the development of intermediate scrutiny in Supreme Court cases involving equal protection challenges based on gender discrimination. Given that intermediate scrutiny is now the standard of equal protection review in gender classification cases, the next step is to address how the intermediate scrutiny test applies in cases concerning challenges to single-sex education.

B. Single-Sex Education Equal Protection Cases

The issue of whether a single-sex admissions policy violates the Equal Protection Clause first arose in *Mississippi University for Women v. Hogan*.[43] Mississippi University for Women (MUW) was a state-supported, all-female college created in 1884.[44] In 1971, the University established a nursing program, and in 1979, Joe Hogan applied for admission to the nursing school.[45] When the University denied Hogan admission based on his gender, he challenged the admissions policy claiming that it violated the Equal Protection Clause.[46] The Court began its analysis by clarifying that a gender classification challenge brought by a male was subject to heightened

39. *See id.* at 147.
40. *Id.* at 151.
41. *See id.* at 151–52.
42. *Wengler,* 446 U.S. at 152. The Court reasoned that "the needs of surviving widows and widowers would be completely served either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need." *Id.* at 151.
43. 458 U.S. 718 (1982).
44. *See id.* at 719–20.
45. *See id.*
46. *See id.* at 721.

scrutiny,[47] and that the state's burden was to show an "exceedingly persuasive justification" for the gender classification.[48] Although the "exceedingly persuasive justification" language did not mirror previous characterizations of what the state must show under intermediate scrutiny, the Court explained that the State could meet this burden by showing that the gender classification "serve[d] `important governmental objectives and that the discriminatory means employed' [were] `substantially related to the achievement of those objectives.'"[49] Further clarifying what the State must show, the Court also expressed that the State's objective in creating the gender classification must not be based on stereotypes or "archaic notions" of gender roles or activities.[50]

In attempting to defend its single-sex admissions policy at MUW, the State of Mississippi claimed that the policy was a form of gender affirmative action because it was intended to compensate for past discrimination against women.[51] But the Court did not accept this as an "important governmental objective," because Mississippi failed to show that women had previously been discriminated against in the field of nursing.[52] Simply claiming a compensatory purpose was not enough; the Court required the State to show that the gender benefitted by the classification had been excluded in the past.[53] Further, the Court found that not only did MUW's policy not compensate for past discrimination, but it also upheld the stereotype of nursing as a woman's career.[54] For these reasons, the State's proffered justification for MUW's single-sex admissions policy failed

47. *See id.* at 723.

48. *Id.* at 724.

49. *Hogan*, 458 U.S. at 724 (citing *Wengler*, 446 U.S. at 150). Thus, the Court appears to say that the two prongs of intermediate scrutiny, if satisfactorily proven by the state, amount to an "exceedingly persuasive justification" for the gender classification being challenged. *Id*.

50. *See id.* at 724–25 (stating that "if the statutory objective is to exclude or `protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate").

51. *See id.* at 727.

52. *See id.* at 728. In fact, the Court found that women predominated in the field of nursing. *See id.* at 729.

53. *See id.* at 728 (stating that "[i]t is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender befitted by the classification actually suffer a disadvantage related to the classification").

54. *See id.* at 729.

the first prong of the intermediate scrutiny test.[55]

The Court further found that, even if Mississippi's justification for the single-sex admissions policy had been an "important governmental objective," the policy would have failed the second prong of intermediate scrutiny.[56] The State did not show that the discriminatory policy was "substantially related" to the objective of compensation for past discrimination because the University admitted that MUW allowed men to audit courses in the school of nursing.[57] Because MUW did not consider the presence of men in the nursing classes to be a detriment to the women's education, the Court found that the policy of excluding men from admission to the school was not necessary to fulfill the State's asserted goal of compensating for past discrimination.[58]

Thus with *Hogan*, the Supreme Court laid the groundwork for invalidating single-sex admissions policies in state-supported schools that did not meet the standard of an "exceedingly persuasive justification."[59] Two recent lower federal court cases concerning Fourteenth Amendment challenges to publicly-funded single-sex schools illustrate the pre-*VMI* trend.

In *Garrett v. Board of Education*,[60] the plaintiffs requested an injunction against the planned opening of three male-only "academies," claiming that the exclusion of females violated the Fourteenth Amendment of the United States Constitution and Article One, Section Two of the Michigan Constitution.[61] The School Board of Detroit designed the male-only academies to reach "at-risk" urban males of primary and secondary school age.[62] The plaintiffs argued,

55. *See Hogan*, 458 U.S. at 730.
56. *See id.*
57. *See id.*
58. *See id.* at 731.
59. *See id.*
60. 775 F. Supp. 1004 (E.D. Mich. 1991).
61. *See id.* at 1005. The plaintiffs were parents with school-age daughters who would be excluded from attending the planned academies. *See id.* Article One, Section Two of the Michigan Constitution closely mirrors the United States Constitution's Fourteenth Amendment Equal Protection Clause. *See* MICH. CONST. art. I, § 2. The plaintiffs also claimed that the planned academies violated Title IX and the Equal Educational Opportunities Act. *See Garrett*, 775 F. Supp. at 1005.
62. *See Garrett*, 775 F. Supp. at 1007. The academies' curricula were to include special programs, such as: "a class entitled `Rites of Passage,' an Afrocentric (Pluralistic) curriculum, futuristic lessons in preparation for 21st century careers, an emphasis on male responsibility, mentors, Saturday classes, individualized counseling, extended

and the district court agreed, that the school board's asserted justification for the male-only academies did not meet the *Hogan* standard.[63] The court stated that "[the school board] has proffered no evidence that the presence of girls in the classroom bears a substantial relationship to the difficulties facing urban males."[64] Therefore, the court issued the requested injunction, based on the likelihood that the Fourteenth Amendment challenge would prevail.[65] Although the court did not rule on the merits, its analysis follows *Hogan* and provides another example in which a publicly-funded, single-sex admissions policy would have been invalidated.

Faulkner v. Jones,[66] the companion to the *VMI* case, involved Shannon Faulkner's challenge to the Citadel's all-male admissions policy. The Citadel, a South Carolina state-supported military college, denied Faulkner's application for admission based on its male-only admissions policy.[67] Faulkner sued, claiming the single-sex policy violated the Equal Protection Clause of the Fourteenth Amendment.[68] Applying the established test of intermediate scrutiny, the court of appeals affirmed the district court's finding that while the State asserted the important objective of providing for single-sex education, it did not assert means substantially related to that objective because South Carolina does not provide single-sex education to both genders.[69] South Carolina argued that it was jus-

classroom hours, and student uniforms." *Id.* at 1006.

63. *See id.* at 1007. While the court accepted that the goal of assisting at-risk, urban males was important, the school board was likely to fail the second prong of intermediate scrutiny in defending the male-only academies. *See id.*

64. *Id.* While the court recognized that the Detroit coeducational schools were failing, it did not accept the presumption that it was the coeducational factor that was causing the schools to fail. *See id.*

65. *See id.* at 1008.

66. 51 F.3d 440 (4th Cir. 1995).

67. *See id.* at 442.

68. *See id.*

69. *See id.* at 444, 446. The Fourth Circuit decided the case on April 13, 1995. *See id.* On August 13, 1995, Shannon Faulkner became the first female Citadel cadet by joining the male cadets in their first week of school, commonly known as "hell week." *See* The Detroit News, *Shannon Faulkner's Citadel Chronology* (visited July 2, 1997) <http://detnews.com/menu/stories/13948.htm> [hereinafter *Chronology*]. The Citadel's first week of school is referred to as "hell week" because of the intense physical training involved, which includes "marching, shouting, marching, saluting and more marching." The Detroit News, Bruce Smith, *Shannon Faulkner Starts "Hell Week" in the Infirmary* (visited July 2, 1997) <http://detnews.com/menu/stories/13611.htm> [hereinafter *Hell Week*]. Faulkner became a target of an unforgiving media and public when she left the Citadel, due to stress and heat exhaustion, only five days after her entrance. *See Chronology*,

tified in providing only a single-sex college for males because there was a lack of demand for a female single-sex college.[70] This argument failed scrutiny, because the State had not proffered evidence to support the alleged lack of demand for female-only educational opportunities in South Carolina.[71] The State's proffered justification for maintaining a single-sex, publicly-funded military college failed intermediate scrutiny, thus the court of appeals affirmed the district court's finding that the policy was unconstitutional as against the Equal Protection Clause of the Fourteenth Amendment.[72]

III. UNITED STATES v. VIRGINIA

A. Equal Protection Analysis — Majority

The Virginia Military Institute (VMI) was founded in 1839 and remains the most unusual of Virginia's publicly-funded schools.[73] Male-only from its inception, VMI offers training for the "citizen-soldier"[74] and conducts its training in the adversative method.[75] Because Virginia provided no similar opportunity for women, the United States sued Virginia, claiming that VMI's male-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.[76]

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supra; *Hell Week*, *supra*; *see also* The News-Times, Kristin Citrone, *No Regrets, No Return* (visited July 2, 1997) <http://www.newstimes.com/archive/mar2996/lcb.htm>.

70. *See id.* at 444.

71. *See Faulkner*, 51 F.3d at 444–45. South Carolina urged the court to take into consideration its educational system as a whole in making its determination as to whether educational opportunities were equitably provided for. The State also argued that its official policy was to provide single-sex education to both males and females, but the lack of demand for a female-only school precluded its offering one. *See id.* at 446.

72. *See id.*

73. *See* United States v. Virginia, 116 S. Ct. 2264, 2269 (1996).

74. *See id.*

VMI's primary purpose is to provide a thorough education within a framework of military discipline. VMI offers a distinctive environment, the product of over 155 years of refining its philosophy of educating citizen-soldiers, prepared for leadership roles in society and in their individual professions and for military leadership in time of national need. Virginia Military Institute HomePage, *About VMI* (visited Nov. 24, 1996) <http://www.vmi.edu>.

75. *See United States v. Virginia*, 116 S. Ct. at 2269. The adversative method consists of "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." *Id.* at 2270 (quoting United States v. Virginia, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)).

76. *See id.* at 2271.

In framing its analysis, the Court cited *Hogan* as its closest guide and reiterated the *Hogan* standard of needing an "exceedingly persuasive justification" to uphold the challenged policy.[77] The Court also restated that in defending the challenged policy, the state could not rely on stereotypes of the "different talents, capacities, or preferences of males and females."[78] Based on this intermediate scrutiny standard,[79] the Court did not find that Virginia made a showing of an "exceedingly persuasive justification" for its male-only admissions policy at VMI.[80]

To satisfy the first prong of the intermediate scrutiny test, asserting an "important governmental objective," Virginia argued that VMI served the interest of diversity in the State's public educational system.[81] Although the Court agreed that diversity in a public educational system is an important goal, it found that Virginia had not shown that diversity was a consideration in establishing or maintaining VMI as an all-male college.[82] In rejecting Virginia's diversity argument, the Court also stated that "a plan to `affor[d] a unique educational benefit only to males'" did not further the purpose of providing diverse educational choices.[83] Thus, Virginia's first proffered justification for the single-sex admissions policy at VMI did not survive the Court's application of the intermediate scrutiny standard.

Virginia also presented a second justification for maintaining VMI's male-only status; namely, that the benefits of VMI's particu-

77. *See id.* As in *Hogan*, the Court stated that the "exceedingly persuasive justification" standard is met by showing that the gender classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.*; *see also supra* note 37 and accompanying text. Because the Court used the traditional intermediate scrutiny elements to delineate the requirements of showing an "exceedingly persuasive justification," this new language is simply an alternative wording of the same intermediate scrutiny test.

78. United States v. Virginia, 116 S. Ct. at 2275.

79. See *infra* notes 88–92 and accompanying text for a discussion of the dissenting view that this standard applied by the majority is higher than intermediate scrutiny.

80. *See* United States v. Virginia, 116 S. Ct. at 2276.

81. *See id.* at 2277. In advancing this justification, Virginia emphasized the beneficial effects of single-sex education. *See id.* at 2276–77.

82. *See id.* at 2277. This finding is similar to the *Hogan* Court's rejection of compensation for past discrimination as a "benign purpose" for excluding men from the MUW nursing school.

83. *Id.* at 2279 (quoting United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1994)).

lar method of single-sex education could not be offered to women without modification, and that any modification to accommodate women would be so "radical" it would "destroy" the VMI method.[84] The Court made short shrift of this argument, however, concluding that this justification is based upon the stereotype that women are not suited for the VMI method.[85] The Court went on to reiterate the rule raised in *Hogan* that gender classifications cannot be based on stereotypes regarding male and female abilities.[86]

The State of Virginia did not proffer a justification for VMI's gender classification that passed the Court's application of the two-pronged intermediate scrutiny analysis, therefore the Court found the male-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.[87]

B. Equal Protection Analysis — Dissent

The dissent in the *VMI* case vigorously tried to discredit the majority's equal protection analysis. Justice Scalia began by agreeing that intermediate scrutiny is the established standard in gender equal protection cases.[88] However, he disagreed with the majority's formulation of that test.[89] In counting the number of times the majority used the "exceedingly persuasive justification" language from *Hogan*, as compared to the number of times it used the standard "important governmental objective" and "means substantially related to that objective" language,[90] Justice Scalia declared that the majority had in effect raised the level of scrutiny above the intermediate level.[91] As proof of this heightened level of scrutiny, the dissent pointed to the Court's finding that Virginia's proffered objectives do

84. *See United States v. Virginia*, 116 S. Ct. at 2279.

85. *See id.* at 2279–80. Because some women would be capable of performing under the VMI method, and because the court of appeals found that some women may prefer being educated under the adversative method, any accommodations that would have to be made to include women would primarily be limited to housing arrangements. *See id.*

86. *See id.* at 2280.

87. *See id.* at 2282.

88. *See id.* at 2293 (Scalia, J., dissenting).

89. *See id.* at 2294.

90. *See United States v. Virginia*, 116 S. Ct. at 2294 (Scalia, J., dissenting) (counting the totals at nine and two, respectively).

91. *See id.*

not survive intermediate scrutiny because some women would be capable of, and interested in, undertaking VMI's adversative training.[92] Justice Scalia contended that the majority could not reach this result without using the "exceedingly persuasive justification" standard as opposed to straight intermediate scrutiny analysis.[93]

In explaining how he would have applied intermediate scrutiny to the VMI gender classification, Justice Scalia stated that the objective of providing effective college education to the state's citizens is "beyond question" an important state interest meeting the first prong of intermediate scrutiny.[94] Justice Scalia then contended that Virginia met the second prong in two ways: single-sex education is substantially related to the goal of providing effective college education: (1) simply because of its long tradition; and (2) because, as was established through expert testimony in the district court and affirmed by the court of appeals, single-sex education benefits both genders.[95]

Justice Scalia further contended that Virginia's proffered justification of providing diversity in its educational system is not only an important governmental objective, but also meets the second prong of intermediate scrutiny. Because VMI's unique teaching methods are conducive to a single-sex environment, VMI's admissions policy is substantially related to the objective of providing diversity in Virginia's educational system.[96] Since Justice Scalia would have accepted both of Virginia's asserted justifications for maintaining VMI's all-male status, he concluded that the majority incorrectly formulated and applied the intermediate scrutiny standard.[97]

92. *See id.* at 2294–95. The majority's finding pertained to the "fixed notions" of women's and men's abilities and interests upon which (according to the majority) VMI's policies were based. *See supra* notes 85–86 and accompanying text.

93. *See United States v. Virginia*, 116 S. Ct. at 2294–95 (Scalia, J., dissenting) (stating that "[i]ntermediate scrutiny has never required a least-restrictive-means analysis, but only a `substantial relation' between the classification and the state interests that it serves").

94. *See id.* at 2296.

95. *See id.*

96. *See id.* at 2297.

97. *See id.* at 2298. For six pages, Justice Scalia listed what he labeled "erroneous contentions" that the majority relied upon in reaching its opposite conclusion. *See id.* at 2298–303 (Scalia, J., dissenting).

C. VMI's Proposed Separate-But-Equal Remedy

Because the categorical exclusion of women from VMI violated the constitution, Virginia proffered a remedial "separate-but-equal" program for women. Both the district court and the Fourth Circuit Court of Appeals accepted Virginia Women's Institute for Leadership (VWIL) as "`sufficiently comparable' to survive equal protection evaluation."[98] However, the Supreme Court did not find that the VWIL program was an acceptable remedy to VMI's discriminatory admissions policy.[99] In dismissing it as a remedial program, the majority pointed to the fact that VWIL did not contain equal "tangible and intangible facilities."[100] The majority also dismissed Virginia's contention that differences between VMI and VWIL were justified because of real gender differences "`in learning and developmental needs.'"[101] The Court found Virginia's justifications to be based on "generalizations about `the way women are'"[102] rather than on real gender differences, because Virginia had failed to show that men *were* especially suited for adversative training despite their contention that women were not.[103]

Thus, because the Court did not find VWIL to be substantially comparable to VMI, and because Virginia based the VWIL program on generalizations about women's educational needs, the Court found that the proffered remedy did not correct VMI's constitutional

98. *Id.* at 2282 (quoting United States v. Virginia, 44 F.3d 1229, 1240–41 (4th Cir. 1995)).

99. *See United States v. Virginia*, 116 S. Ct. at 2287.

100. *See id.* at 2282. Specifically, the Court took note of: VWIL's lack of rigorous military training, VWIL's status as a non-military institute, VWIL's lack of "`barracks' life," VWIL's "`cooperative method' of education `which reinforces self-esteem,'" and the general conclusion that VWIL students would be "[k]ept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training . . . ." *Id.* at 2283 (quoting United States v. Virginia, 766 F. Supp. 1407, 1421–24 (W.D. Va. 1991)). Some other examples of the differences between VMI and VWIL included: Mary Baldwin College, the host school for VWIL, accepted students with lower SAT scores than did VMI; the VMI faculty had a substantially higher number of Ph.D. holders than Mary Baldwin; Mary Baldwin did not offer a degree in math, engineering, or physics, whereas VMI did; VWIL lacked the multiple sports facilities of VMI; VMI was funded by the State of Virginia at significantly higher levels than VWIL; and Mary Baldwin lacked the extensive alumni network of VMI. *See id.* at 2284–85.

101. *Id.* (quoting Brief for Virginia at 28, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-2107)).

102. *United States v. Virginia*, 116 S. Ct. at 2284.

103. *See id.*

violation.[104]

D. What the Majority Said About the Future of Single-Sex Education

The majority opinion alluded to the effect the decision will have on the future of single-sex education only once, in footnote seven.[105] While discussing the fact that several amicus briefs contended that single-sex schools can advance the worthy purpose of providing diversity in education, the Court stated:

We do not question the State's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as "unique" . . . an opportunity available only at Virginia's premier military institute, the State's sole single-sex public university or college.[106]

This language leaves open whether a state can support publicly or privately-funded single-sex education that is "evenhandedly" provided and "non-unique." In other words, the Court did not rule out the possible constitutionality of single-sex schools if the schools do not provide a unique benefit incapable of duplication elsewhere, and if the state provides for both female and male single-sex schools equitably.[107]

E. What the Dissent Said About the Future of Single-Sex Education

The dissent addressed the future of single-sex education at length and projected that the majority's decision spells the end for all single-sex education, even at privately-funded schools.[108] Pointing to *Garrett v. Board of Education*,[109] the dissent expressed regret that

104. *See id.* at 2287.

105. *See id.* at 2276 n.7.

106. *Id.* (citations omitted).

107. *See generally* Amicus Curiae Brief of 26 Private Women's Colleges, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-2107); Amicus Curiae Brief of Wells College, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-2107).

108. *See United States v. Virginia*, 116 S. Ct. at 2305–06 (Scalia, J., dissenting).

109. 775 F. Supp. 1004 (E.D. Mich. 1991). See *supra* notes 43–58 and accompanying text for a discussion of *Hogan*.

the majority's decision would preclude future experimentation with publicly-funded single-sex education like that of the proposed male academies in *Garrett*.[110] Furthermore, the dissent doubted that privately-funded single-sex education could survive the majority's decision because the line between public and private is blurred when private schools receive federal and state aid and tax advantages.[111] In a final assertion that the death of private single-sex schools is certain after this decision, the dissent then stated that, even if government aid to private schools does not turn private schools into state actors, the issue of the government supporting a private party in doing what the government cannot constitutionally do itself would still exist.[112]

IV. ANALYSIS: IN LIGHT OF UNITED STATES v. VIRGINIA, *IS SINGLE-SEX EDUCATION UNCONSTITUTIONAL?*

A. Public Versus Private Education — A Preliminary Matter

As discussed above, Justice Scalia's dissent to the *VMI* decision assumes that the distinction between publicly-funded and privately-funded education has been irreparably blurred.[113] Several commentators, in arguing against the admission of women to VMI, have also cautioned that federal aid and tax advantages to private schools have reached levels sufficient to equate privately-funded schools with publicly-funded schools.[114] These critics of the *VMI* decision

110. *See United States v. Virginia*, 116 S. Ct. at 2306 (Scalia, J., dissenting). See *infra* note 163 and accompanying text for a discussion of the male academies as similar to VMI in their "uniqueness."

111. *See id.* at 2306–07. See *infra* notes 113–21 and accompanying text for a discussion of public versus private education and the single-sex schools issue.

112. *See id.* at 2307 (commenting that "'it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" (quoting Norwood v. Harrison, 413 U.S. 455, 465 (1973))).

113. *See id.* at 2306–07.

114. *See* Anita K. Blair, *The Equal Protection Clause and Single-Sex Public Education:* United States v. Virginia *and Virginia Military Institute*, 6 SETON HALL CONST. L.J. 999, 1004–06 (1996) (claiming that "[i]f . . . sex discrimination violates fundamental United States law, even private schools must admit both men and women or else forego tax-exempt status and . . . tax deductions . . . ."); Jeremy N. Jungreis, *Holding the Line at VMI and the Citadel: The Preservation of a State's Right to Offer a Single-Gender Military Education*, 23 FLA. ST. U. L. REV. 795, 832 (1996) (stating that "a decision ordering VMI and The Citadel to become coeducational . . . [may force] [p]rivate

assume that forcing VMI, a public school, to admit female students would jeopardize private women's and men's colleges as well.[115] Regardless of this speculation, the Court has not removed the distinction between public and private schools in a manner that would require the Court to re-define the state action doctrine.[116]

Sara Mandelbaum, a women's rights attorney who favors admitting women to VMI, but disagrees that private single-sex colleges would be affected by that decision, has stated that "[t]here is simply no basis for simplistically lumping together public and private schools as though there is no legal distinction . . . ."[117] In support, she points out that public schools are created by state legislation, "are governed by the laws of the state and by state officials," and therefore discriminate in the name of the state.[118] This discrimination amounts to state action thus violating the Fourteenth Amendment. However, private schools are "governed and regulated by privately appointed Boards of Trustees," and while "private schools do receive some government funds, these are minimal compared with state schools."[119] Therefore, private schools that discriminate are not state actors and thus cannot violate the Fourteenth Amendment.

Mandelbaum cites *Blum v. Yaretsky*[120] to illustrate how the

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women's colleges . . . to become either coeducational or to forego all state and federal funds" (citations omitted)); Caplice, Comment, *supra* note 5, at 279–81 (asserting that "[t]o determine that $9–11 million in public support renders VMI unconstitutional, but that $40 million [in public funds distributed to Virginia's private colleges] does not likewise jeopardize `private' single-sex schools is `pure sophistry'" (citation omitted)); Karla Cooper-Boggs, Note, *The Link Between Private and Public Single-Sex Colleges: Will Wellesley Stand or Fall with the Citadel?*, 29 IND. L. REV. 131, 136–37 (1995) (warning that "courts may treat all single-sex colleges similarly at some time in the future").

115. *See, e.g.,* Jungreis, *supra* note 114, at 832.

116. See *infra* notes 120–21 and accompanying text for a discussion of the state action doctrine as applied by the Supreme Court; *see also* Mandelbaum, *supra* note 12, at 981–82 (stating that "[i]t is neither automatic nor inevitable that private women's colleges would be deemed state actors").

117. Mandelbaum, *supra* note 12, at 981.

118. *Id.*

119. *Id.*

120. 457 U.S. 991 (1982). In *Blum*, a group of Medicaid patients challenged the decision of the private nursing home in which they lived to discharge or transfer patients. *See id.* at 993. The patients claimed that, among other things, the State's regulation of the nursing home due to the Medicaid funds it received made the nursing home a state actor. *See id.* at 1003 n.14. The Supreme Court, however, found that despite extensive regulation and the receipt of Medicaid funds, the nursing home's decisions did not amount to state action and the State could not be held liable for those decisions. *See*

Supreme Court determines whether a private institution can be considered a state actor. "The Supreme Court held that there was no state action even though the homes were extensively regulated by the state, licensed by the state, heavily subsidized by the state, and the state paid the medical expenses of more than 90% of the patients in the facilities."[121] Unless or until the Court decides to reverse the public-private distinction based on state action, private single-sex schools will retain the ability to exclude based on gender classifications. Therefore, the following discussion focuses on the constitutionality of publicly-funded single-sex schools.

B. Advantages of Single-Sex Education

A growing body of literature touts the educational and social advantages for females in single-sex educational settings.[122] Studies have found that "[w]omen in single-sex settings demonstrate higher self-regard and self-confidence . . . they explore career options more fully, [and] . . . hold higher levels of aspiration" than women in coeducational settings.[123] Other research has shown that females in single-sex schools express "a more positive attitude toward academics," and hold less stereotypical views about women's roles.[124] "Such [female-only] schools `have fostered greater verbal assertiveness, higher career aspirations, more intellectual self-esteem, [and] expanded leadership opportunities . . . .' Without boys dominating the classroom and the teacher's attention, girls speak up, take leadership positions, and pursue nontraditional studies."[125] The studies

id. at 1012; *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 844 (1982) (finding that, even when a private school received almost 90% of its funds from the State and its students were referred by state agencies, the school's employment decisions did not amount to state action and therefore did not violate the Fourteenth Amendment).

121. Mandelbaum, *supra* note 12, at 982 (citing *Blum*, 457 U.S. at 992–93).

122. *See infra* notes 123–30 and accompanying text.

123. Nanci M. Monaco & Eugene L. Gaier, *Single-Sex Versus Coeducational Environment and Achievement in Adolescent Females*, 27 ADOLESCENCE 579, 592–93 (1992).

124. Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCH. 381, 385 (1986) (finding that less stereotypical views of women's roles were also demonstrated in boys attending single-sex schools, although not to the same extent as girls in single-sex schools).

125. Sharon K. Mollman, *The Gender Gap: Separating the Sexes in Public Education*, 68 IND. L.J. 149, 171 (1992) (citing Caren Dubnoff, *Does Gender Equality Always Imply Gender Blindness? The Status of Single-Sex Education for Women*, 86 W.

have found that these benefits exist at all levels of women's educational development, from primary school to college education.[126]

Also documented, although not as comprehensively, is a benefit to males in single-sex educational settings. One study has shown that both boys and girls in single-sex schools outperform their coeducated counterparts,[127] and that men's colleges are more likely to produce males with career plans in traditionally respected fields, such as law and business.[128]

These benefits found in single-sex educational settings are traceable to the different techniques for delivering information in girls' and boys' schools.[129] The different techniques used in male and female schools are formulated on the basis of real gender differences between male and female physical and educational development.[130]

VA. L. REV. 295, 324–25 (1984) and Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 141 (1986)). For further discussion of the positive effects of attendance at women's colleges, see Daryl G. Smith, *Women's Colleges and Coed Colleges: Is There a Difference for Women?, in* WOMEN IN HIGHER EDUCATION: A FEMINIST PERSPECTIVE 311, 318 (Judith S. Glazer et al. eds., 1993) (stating that "women's colleges relate positively to a variety of measures of student satisfaction, perceived changes in skills and abilities, and educational aspirations and educational attainment"); Beth Willinger, *Single Gender Education and the Constitution*, 40 LOY. L. REV. 253, 255–56 (1994) (delineating many positive effects for women who attend women's colleges, including positive self-image and self-esteem, full participation in college activities, higher rate of completion of advanced degrees, higher representation of graduates in the work-force, and overrepresentation in high-level political positions).

126. *Compare* Amicus Curiae Brief of 26 Private Women's Colleges, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-2107) (arguing for the admission of women to VMI and explaining that the relevant studies show that women benefit intellectually in a single-gender environment, even if only for a few years) *with* Amicus Curiae Brief of Mary Baldwin College, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-2107) (arguing against the admission of women to VMI and stating that the relevant research reflects benefits to women in single-sex secondary and post-secondary schools). *See generally* Caplice, *supra* note 5, at 229 (discussing benefits to both males and females of single-sex education at "an early age" and "an older age, too"); Dubnoff, *supra* note 125, at 324–26 (citing sociological studies of beneficial effects of single-sex education in secondary and post-secondary schools).

127. *See* Lee & Bryk, *supra* note 124, at 385. *But see* Mollman, *supra* note 125, at 166–67 (citing several studies tending to show that boys perform better in coeducational environments).

128. *See* Lee & Bryk, *supra* note 124, at 382.

129. *See, e.g.,* Richard A. Hawley, *About Boys' Schools: A Progressive Case for an Ancient Form*, 92 TCHRS. C. REC. 433, 440–41 (1991).

130. *See id*. (discussing physiological and learning differences between girls and boys, and how those differences relate to teaching style); Willinger, *supra* note 125, at 257–58. Specifically, Dr. Willinger states that:

C. Disadvantages of Single-Sex Education

Many articles supporting and opposing the admission of women to schools such as VMI, have identified various disadvantages of single-sex education.[131] Even the most frequently-cited disadvantages, which are discussed below, are not strong enough to overcome the advantages provided by single-sex schools.

The primary disadvantage of single-sex schools (whether elementary, secondary, or post-secondary) is the probability that male schools will be more adequately funded and supported than female schools, and will therefore gain more prestige than female schools.[132] However, state regulation of funds could ensure equal distribution to male and female schools.[133] More problematic is the issue of "intangible benefits" that may accrue to male-only schools and not female-only schools.[134] To maintain an equitable distribution of benefits between male-only and female-only schools, and therefore maintain constitutionality, states would have to ensure that the schools are established with the same level of funding and the same type of curriculum.[135]

Another disadvantage is the argument that single-sex schools do not prepare students for the "real world" in which both sexes interact daily.[136] An appropriate response to this concern is that the

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The classroom climate in women's colleges generally favors women's full participation. It takes into account the different ways in which women learn. For example, women generally respond to questions . . . much slower than do men . . . . This is in large part thought attributable to women's greater ability to plan ahead. . . . Also, women have a preference for written tests over oral examinations . . . . Again, this notion of being able to plan ahead comes into consideration.

Id. at 257.

131. *See infra* notes 132–41 and accompanying text.

132. *See* Caplice, *supra* note 5, at 238–40; Mary M. Cheh, *An Essay on VMI and Military Service: Yes, We Do Have To Be Equal Together*, 50 WASH. & LEE L. REV. 49, 57 (1993).

133. *See generally* Mollman, *supra* note 125, at 175 (concluding that "[t]he only public educational programs that can be restricted to members of one gender are those which . . . promote equal opportunity between the genders").

134. This issue implicates the concept of creating "separate but equal" single-gender schools. See *infra* notes 155–57 and accompanying text for a discussion of the validity of "separate but equal" in the gender context.

135. *See infra* notes 165–67 and accompanying text.

136. *See, e.g.,* Sara L. Mandelbaum, *Single Gender Education and the Constitution,* 40 LOY. L. REV. 267, 272 (1994) ("[W]ithdrawing girls from the co-educational setting is not exactly a great way of preparing either them or the boys left behind for the

same attributes that provide benefits to girls and boys in single-sex schools will better equip both for dealing with inequalities in the university setting, in the workplace, and in society in general.[137]

One concern, especially for feminist commentators, is that all-female schools may reinforce a stereotype that "girls need help to keep up with boys."[138] However, the demonstrated advantages of single-sex education for girls and women discussed in the previous section are noticeable primarily because of the demonstrated negative effects of coeducation on some females.[139] In light of the distinct possibility that some females will be more equitably treated in a single-sex environment, the danger that single-sex education may foster negative stereotypes of women's abilities appears to be an acceptable risk.[140]

D. How the Advantages and Disadvantages Apply to Intermediate Scrutiny

Assuming that the *VMI* decision provides a doorway for states to meet intermediate scrutiny standards and justify funding single-sex schools on some "non-unique" level,[141] the next challenge is passing the actual intermediate scrutiny test. To meet the intermediate scrutiny test, a state must show that its gender classification serves an important governmental interest, and that the means

world that they are going to face when they go out into the workplace. It is a co-educational world out there.").

137. *See, e.g.,* Dubnoff, *supra* note 125, at 328 (arguing that the increased self-esteem engendered in single-sex schools would better prepare girls and women "to face competitive realities" in the "real world"); Hawley, *supra* note 113, at 440 (stating that "boys from boys' schools have not as a body registered special difficulties in adapting to the coeducational conditions of university life").

138. Mandelbaum, *supra* note 136, at 271; *see also* Carol Sanger, *Will VMI Be Used Against Us?,* MS., Nov./Dec. 1996, at 24, 25 (discussing the risk that opponents may point to female-only schools as "proof of women's lesser abilities").

139. *See, e.g.,* Mollman, *supra* note 125, at 169–70 (discussing some negative aspects of coeducation, including sexual harassment, sex discrimination, unequal time and attention provided by educators, and males' dominance in the classroom as facilitated by teachers).

140. "[A]t a time when the sources of personal strength and intellectual confidence for girls are often hard to find, voluntary all-girls schools seem worth the risk." Sanger, *supra* note 138, at 25; *see also* Mollman, *supra* note 125, at 171 (responding to the concern of the perpetuation of negative stereotypes by explaining that single-sex schools created to overcome stereotypes will "promote equal opportunity").

141. *See supra* notes 105–07 and accompanying text.

employed are substantially related to that interest.[142]

1. Important State Interest

The advantages of single-sex education[143] provide the state with one possible "important state interest." This increased quality in the education of the state's citizens would meet the first part of the state's burden in defending a decision to fund single-sex schools. The advantages, which better prepare students for achievement and success, would presumably qualify as an important addition to a state's educational offerings.

Another possible important state interest stems from a feminist argument that single-sex education is justified as a remedial plan for women only.[144] Supporters of this theory argue that society is male-oriented to begin with, so public coeducational schools are already conducive to male patterns of learning and the only need is to provide women with an alternative to coeducation.[145] This conclusion would provide the state with a compelling "affirmative action" interest:[146] compensation for societal discrimination.[147]

Another state interest that might pass intermediate scrutiny is

142. *See* United States v. Virginia, 116 S. Ct. 2264, 2271 (1996).

143. See *supra* notes 123–28 and accompanying text for a discussion of the better academic performance and higher likelihood of future career success demonstrated in single-sex schools.

144. *See, e.g.*, Mandelbaum, *supra* note 136, at 268 (stating that "it makes sense to set up programs that compensate women for past discrimination. We believe those are the only instances in which it may be legally acceptable to establish publicly-funded segregated educational programs.").

145. *See* Cheh, *supra* note 132, at 58; Mollman, *supra* note 125, at 168–73.

146. The invocation of "affirmative action" obviously invites comparison to race-based standards for equal protection. See *infra* notes 156–57 and accompanying text for a discussion of the validity of separate but equal schools in the gender context, as compared to the race context.

147. The *Hogan* case lends some credibility to this argument. In *Hogan*, the Court found the State's proffered "benign, compensatory" purpose for excluding men from the MUW nursing school invalid, partly because the State failed to present evidence that women had ever been excluded from the profession of nursing. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982); *see also supra* notes 43–58 and accompanying text (discussing *Hogan*). This holding would suggest that if MUW were excluding men from a program traditionally dominated by men, i.e., law, medicine or business, the state might have passed scrutiny with its compensatory justification. *But cf.* Taylor, *supra* note 11, at 45, 47 (arguing that the Supreme Court would not uphold such a "double standard" to remedy past discrimination, and that it is not conclusive that "girls and women are denied equal educational opportunities in this country today").

providing for diversity in educational opportunities. This justification was advanced by the State of Virginia in the *VMI* case, but Virginia's argument did not pass constitutional muster for two reasons: (1) Virginia provided the single-sex alternative only to males, and (2) VMI was not originally chartered as an option to provide diversity in Virginia's educational landscape.[148] States that provide single-sex alternatives to both males and females, and that establish single-sex schools in the interest of diversity, should therefore meet the "important state interest" prong of intermediate scrutiny.

Moreover, the proffered important state interest must be free of stereotypical gender role assumptions.[149] This assumption was part of the problem with VMI and the alternative program offered by Virginia, VWIL. The Court examined whether the exclusion was due to stereotypes of male and female ability, or the valid state desire to benefit one gender by recognizing real gender differences.[150]

2. Substantially Related Means

To pass the second prong of intermediate scrutiny, the state must show that the means it has employed are substantially related to attaining its goal. In other words, a strong correlation must exist between the end (the important state interest), and the means to that end. In the context of single-sex schools, the state probably will have to show that it is the *absence* of the opposite sex that provides the educational benefits supporting the important state interest.[151] The state will be able to point to several factors in carrying its substantially related means burden, including: (1) the differences in learning patterns between females and males;[152] and (2) the

148. *See supra* notes 79–80 and accompanying text.

149. *See Hogan*, 458 U.S. at 724–25 (stating that "if the . . . objective is to exclude or `protect' members of one gender because they are presumed to suffer from an inherent handicap or the be innately inferior, the objective itself is illegitimate"); United States v. Virginia, 116 S. Ct. at 2280.

150. *See United States v. Virginia*, 116 S. Ct. at 2283–84.

151. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982); Garrett v. Board of Educ., 795 F. Supp. 1004, 1007 (E.D. Mich. 1991).

152. *See supra* note 130. The justification of single-sex education based on "real gender differences" is a controversial issue among some feminists who contend that the differing behavioral patterns of girls and boys are caused not by real biological differences but by flawed socialization. These feminists urge that the problem can be corrected

reduction of sexual distraction, which creates greater educational benefits.[153]

E. Is Separate-But-Equal Valid in the Gender Context?

The above discussion, which implies that the state may be able to meet the intermediate scrutiny test and therefore be able to provide for single-sex educational alternatives, assumes that separate-but-equal is a constitutionally valid remedy in the context of gender. In other words, when all the factors come together, intermediate scrutiny is satisfied by separate-but-equal provisions for single-sex education. However, as discussed above,[154] to maximize their benefit, single-sex male and female schools will, by necessity, be slightly different from each other. Will these differences create a "separate-but-equal" problem?

To date, the Supreme Court has avoided specifically addressing the validity of separate-but-equal female and male educational programs.[155] In the pre-*Brown v. Board of Education*[156] race segregation cases, the Court suggested that the separate programs had to be "substantially comparable." In looking for substantial comparability between VMI and VWIL, the Court examined both tangible and intangible benefits of each program.[157] Applying this analysis to the

through socialization, not through stigmatization of females in the educational process. *See generally* Mandelbaum, *supra* note 136, at 268–73 (concluding that "we have to focus on improving the coeducational setting, not letting teachers off the hook, and not giving up on redressing the systematic discrimination that is part of the public education system"). *But cf.* McDaniel, *supra* note 9, at 45 (stating that "we might benefit from a realization that the *equal* treatment of girls and boys does not always mean the *same* treatment. Our object should not be to make girls into the best boys they can be.").

153. *See* Hawley, *supra* note 113, at 441 (stating that "[e]xpressed or suppressed, . . . sexual distraction is an undeniable impediment to . . . learning and development").

154. *See supra* notes 129–30 and accompanying text.

155. *See United States v. Virginia*, 116 S. Ct. at 2276 n.7; *Hogan*, 458 U.S. at 720 n.1.

156. 347 U.S. 483 (1954). In *Brown*, the Supreme Court invalidated the concept of "separate-but-equal" schools in the race context. *See id.* at 494. One might assume that this would invalidate the concept in the gender arena as well; however, race and gender are distinguishable: race classifications receive the highest form of judicial protection — strict scrutiny — whereas courts apply intermediate scrutiny to gender classifications. *See supra* note 7 and accompanying text.

157. *See supra* note 100 and accompanying text. In denying Virginia's proffered "separate-but-equal" VWIL program, the Court used the "substantial comparability" language and analogized to race "separate-but-equal" cases that considered "tangible" and

issue of single-gender education reveals that some forms of publicly-funded, gender segregated schools are constitutionally valid. To consider the tangible and intangible benefits provided by an educational institution, a distinction should be drawn between lower-level and upper-level educational settings.

Most public, post-secondary institutions will have the same problems of "uniqueness" that VMI encountered because of the intangible benefits that attach to colleges and universities. Intangible benefits, such as those students received at VMI, preclude a state's ability to equitably provide for the excluded gender.[158]

VMI's unique qualities stemmed from a combination of factors, including its adversative method of instruction, its longstanding tradition, its excellent alumni network, and the prestige that accrues to VMI graduates.[159] With the exception of the adversative method, all of these characteristics fall into the category of "intangible" benefits. As the *VMI* holding suggests, when weighing the comparability of a program like VMI with a "separate-but-equal" alternative like VWIL, these intangible benefits tip the scale and lead to the conclusion that VMI is too distinctive to be provided for "separately-but-equitably."[160] Because most of VMI's unique features derive from intangible benefits common in higher education, it follows that most publicly-funded single-sex colleges and universities will fail constitutionally, as VMI did.

Most primary and secondary schools, however, will not have the problems VMI did in being unique. The general lack of "intangible benefits" due to the generic nature of the educational curriculum at primary and secondary schools suggests that most lower-level, single-sex schools will pass intermediate scrutiny.[161] The case of *Garrett v. Board of Education*[162] involved primary and secondary schools; however, their specialized focus for at-risk inner-city boys

"intangible" benefits. *See United States v. Virginia*, 116 S. Ct. at 2285–86; *see also* Bennett L. Saferstein, Note, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637, 669–70 (1993) (suggesting that the practice of considering tangible and intangible benefits to find "substantial comparability" of racially segregated schools is equally valid in the gender separate-but-equal context).

158. *See supra* notes 105–07 and accompanying text.

159. *See United States v. Virginia*, 116 S. Ct. at 2284.

160. *See id.* at 2276 n.7.

161. *See* Saferstein, *supra* note 157, at 677 n.184.

162. 775 F. Supp. 1004 (E.D. Mich. 1991).

created a "unique" situation.[163] Under the *VMI* decision, anytime a publicly-funded primary or secondary school approaches the realm of the unique, it will also fail constitutional scrutiny and will have to admit both genders. The result is that for single-sex primary and secondary schools to pass intermediate scrutiny, the variations in curriculum and delivery style[164] must not be *too* different.[165] In other words, schools with fundamentally the same academic curriculum, and therefore the same tangible benefits,[166] can afford slightly different methods of delivering the information to students[167] and still pass scrutiny. When a primary or secondary single-sex school begins varying the traditional academic balance, or providing intangible benefits as did the Detroit academies, the school will fail intermediate scrutiny.

As asserted by this Author, the *VMI* decision creates the possibility that states can constitutionally fund single-sex education, and does not affect the constitutionality of private single-sex education. But what about statutory law?

F. Title IX and the EEOA

Publicly- and privately-funded single-sex education will encounter two statutory hurdles in attempting to retain legality: Title IX and the Equal Educational Opportunities Act (EEOA). Title IX[168] prohibits discrimination in educational institutions on the basis of sex.[169] Title IX would not prohibit select forms of single-sex education, however, because it provides for specific exceptions: 20 U.S.C. § 1681(a)(1) provides that the prohibition applies "in regard to ad-

163. *See supra* notes 62–63 and accompanying text; *see also* Mollman, *supra* note 125, at 175 (stating that "[a]ll male classes and schools such as those proposed in Detroit . . . offer special tutoring and subjects for boys for which girls have no equivalent").

164. See *supra* notes 129–30 and accompanying text for a discussion of different teaching techniques in single-sex schools based on differences in physiology and learning patterns.

165. *See* Saferstein, *supra* note 157, at 671.

166. The special programs offered by the Detroit academies, in contrast, provided increased tangible benefits, including a specialized curriculum, a mentoring program, a counseling program, and extended classroom hours. *See Garrett*, 775 F. Supp. at 1006.

167. A slight difference in the method of delivering information to students would create only a slight difference in intangible benefits.

168. 20 U.S.C. §§ 1681–1688 (1994).

169. *See id.*

missions [policies] . . . only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education . . . ."[170] Thus, private single-sex colleges would not be prohibited, and public primary and secondary schools would not be prohibited under Title IX. Section 1681(a)(5) makes an exception for a "public institution of undergraduate higher education . . . that traditionally and continually from its establishment has had a policy of admitting only students of one sex."[171] These exceptions provide room for some forms of publicly and privately-funded single-sex schools.[172]

The EEOA[173] provides:

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by — (a) the deliberate segregation . . . of students on the basis of *race, color, or national origin* among or within schools; . . . (c) the assignment . . . of a student to a school, other than the one closest to his or her place of residence, . . . if the assignment *results in a greater degree of segregation of students on the basis of race, color, sex, or national origin* . . . .[174]

This language appears to allow sex-segregated schools if those schools do not assign students in a manner that increases sex segregation. In other words, it is acceptable under the EEOA for states to have single-sex schools as long as students voluntarily choose to attend those schools.[175] Also, the EEOA was created specifically to end racial segregation in schools, and there is no mention of a goal to end sex-segregation in the Act's congressional history.[176] The fact that Congress included sex in subsection (b) reflects a congressional desire to prohibit school districts' post-*Brown v. Board of Education* practice of using sex-segregation as a vehicle to segregate the races.[177]

Thus, because Title IX and the EEOA as well as the VMI decision do not appear to be major roadblocks to the legality of private-

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170. 20 U.S.C. § 1681(a)(1).

171. 20 U.S.C. § 1681(a)(5).

172. *See, e.g.,* Caplice, *supra* note 5, at 269 (asserting that Title IX does not preclude single-sex schools if both sexes are provided with equal opportunities).

173. 20 U.S.C. §§ 1701–1758 (1994).

174. 20 U.S.C. § 1703 (emphasis added).

175. *See* Mollman, *supra* note 125, at 174; Saferstein, *supra* note 157, at 677.

176. *See* 118 CONG. REC. 8929 (1972).

177. *See* Caplice, *supra* note 114, at 271; Saferstein, *supra* note 157, at 675.

ly-funded single-sex education and to some forms of publicly-funded single-sex education, single-sex schools may be a viable alternative for states experimenting with educational programs.

V. CONCLUSION

The majority in the *VMI* decision clearly invalidates unique, publicly-funded single-sex schools like VMI. However, the Court implies in footnote seven that a state may be able to justify some forms of publicly-funded single-sex schools, as long as the schools are equitably provided to both genders.[178] In light of the *VMI* decision and application of the intermediate scrutiny test, the constitutional validity of "separate-but-equal" single-sex schools is a distinct possibility. Additionally, the existing statutory protections for equal treatment of both genders would not preclude some forms of single-sex education. Specifically, private single-sex colleges do not violate Fourteenth Amendment Equal Protection due to the legal distinction between private and public schools. Moreover, public primary and secondary single-sex education alternatives are possible even after the *VMI* decision.[179] Despite the dissenting opinion's claims, the majority opinion offered a viable potential for states to pass intermediate scrutiny in defense of public funding of some forms of single-sex education.

178. *See* discussion *supra* Part III.D.

179. It remains to be seen whether many students would opt for a single-sex alternative. But interest in single-sex education would likely grow if it were provided publicly as opposed to privately.