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Separate but Equal Revisited

The Court weighs whether state-supported military schools may bar women

BY KATHRYN R. URBONYA

More than 40 years after rejecting the notion of "separate but equal" public education on the basis of race in *Brown v. Board of Education*, the U.S. Supreme Court is pondering whether that approach is acceptable on the basis of sex.

On Jan. 17, the justices heard oral arguments in *United States v. Virginia*, Nos. 94-1941 and 94-2107. At stake in the case is the future of the Virginia Military Institute as a male-only public college—and perhaps a lot more.

Among those watching *U.S. v. Virginia* closely will be officials at the Citadel in Charleston, S.C. The Citadel and VMI are the last bastions in this country of a unique brand of higher education that immerses young men in a strict military atmosphere. Virginia established VMI in 1839; the Citadel, known officially as the Military College of South Carolina, was opened by that state in 1842. Neither school ever had a woman in its undergraduate corps of cadets until 1995.

The barrier was broken in August 1995 by Shannon Faulkner after a ruling by the 4th U.S. Circuit Court of Appeals at Richmond, Va., in *Faulkner v. Jones*, No. 94-1978 (April 13, 1995), that affirmed a district court order that she be admitted to the Citadel (Faulkner left school a few weeks later).

The challenge to the Citadel's male-only policy is being kept alive by another woman seeking admission, but that case has been stayed until the Supreme Court decides the VMI case.

The VMI case focuses on two primary issues: whether Virginia violated the equal protection clause of the 14th Amendment to the U.S. Constitution when it excluded women from VMI, and, if so, whether a separate, newly created school for

women is an adequate remedy for the constitutional violation.

In a step in the case that has been dubbed *VMI I*, 976 F.2d 890 (1992), the 4th Circuit—steering in another direction than it had in *Faulkner*—determined that VMI's admissions policy was unconstitutional because Virginia failed to justify why it provided a special

adequate remedy in response to constitutional concerns about VMI's exclusionary admissions policy. Even though the institute and VMI are markedly different, the court reasoned that they share the same goals: "education, military training, mental and physical discipline, character development, and leadership development."



Extreme physical, emotional stress is integral to a Virginia Military Institute education.

type of education to men only.

The court suggested three options to remedy the constitutional violation: Admit women as well as men to VMI, create a parallel institution for women, or convert VMI into a private institution.

Virginia chose the second option, establishing the Virginia Women's Institute of Leadership at Mary Baldwin College, a private school for women in Staunton, about 40 miles from Lexington, where VMI is located, at the southern end of the Shenandoah Valley.

In creating the institute, Virginia did not try to create a separate military college for women. Instead, it is a distinct program supported by a conviction that there are significant differences in how men and women learn, respond to stress and perform physical tasks.

In *VMI II*, 44 F.3d 1229 (1995), the 4th Circuit held that the Women's Institute of Leadership was an

In what it acknowledged is a new interpretation of the equal protection clause, the court held that the contrasting programs need only be "substantively comparable." In articulating that particular requirement, the court explained that it was seeking to provide some similar educational programs for women without destroying the existing program for men.

Dissatisfied with that approach and the result it produced, the U.S. Department of Justice petitioned the Supreme Court for a writ of certiorari, which the justices granted.

Different Routes to One Goal

Like the Citadel, the Virginia Military Institute is not an exclusive training ground for military officers, in the manner of the nation's three military academies (which went coed years ago). In fact, only 18 percent of VMI's graduates pursue careers in the military, accord-

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ing to the school, which has an enrollment of some 1,300 men.

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

VMI uses what it terms an "adversative method" for instruction to break down individual male egos and instill a commitment to teamwork. Extreme physical and emotional stress is an integral part of the education men receive at VMI. New students become "rats," subject to strict discipline and punishments. Senior students create detailed rules of conduct, and other students administer them.

In sharp contrast, the Women's Institute of Leadership operates in a more nurturing environment. It does not employ the adversative method. The purpose of the institute is to enhance the self-esteem of women students, enabling them to become more effective leaders in society. The only military component of the program is mandatory participation in ROTC. The first class of 42 women entered the program in 1995.

The constitutional issues in the VMI and Citadel cases are closely related to important questions about gender stereotypes and educational diversity.

Historically, the Supreme Court has applied an intermediate standard of review to gender-based claims of sex discrimination. This standard questions whether a state has an "important interest" to justify the different treatment, and whether the means chosen are "substantially related" to achieving that goal.

In *Mississippi University for Women v. Hogan*, 458 U.S. 331 (1985), the Court applied that standard of review in holding unconstitutional a state policy excluding men from a nursing program.

Throughout the VMI litigation, Virginia has contended that *Hogan* is distinguishable because VMI's unique approach stands for educational diversity. This diversity, Virginia asserts, is the state's "important interest," and since admitting women would destroy the program, excluding them is the only way to

protect that interest.

But the Justice Department has argued that both the exclusion and the creation of the Women's Institute of Leadership were based on discriminatory sex stereotypes.

To support their arguments, both sides have invoked the testi-

Questions about gender stereotypes and educational diversity, differences within and between the sexes, are key issues here.

mony of social scientists on the question of whether there are significant differences in how men and women learn.

Some of that testimony focused on the work of psychologist Carol Gilligan, a faculty member in the Graduate School of Education at Harvard University in Cambridge, Mass.

In her writings, Gilligan has asserted that traditional psychologists have given undue weight to traits traditionally classified as "masculine" and little weight to traits labeled "feminine." Masculine traits are exhibited by abstract thinking, separation, detachment and subordination of relationships, while feminine traits are displayed in attachment and interdependence.

In an amicus brief filed with the 4th Circuit in the Citadel case, Gilligan maintained that her research results had been misapplied at the trial level, and that her findings do not support single-sex education. She stated, "There is too much variation within each sex to argue that psychological differences result from 'real' differences between the sexes." (Gilligan did not participate in the VMI case.)

Similarly, Dianne Avery, professor at the State University of New York at Buffalo School of Law, details her claims that the VMI trial judge misapplied the expert testimony in an upcoming article in the *Southern California Review of Law & Women's Studies*.

Whether any of this will matter in the Supreme Court is conjecture. Erwin Chemerinsky, a profes-

sor at the University of Southern California Law Center in Los Angeles, for one, says the justices will steer clear of educational theory. He anticipates that the Court will develop a narrow holding that avoids the larger issues of how society educates men and women.

The Court recently rejected using social science data to justify separate treatment of the sexes in another context. Ruling in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), that the equal protection clause bars government lawyers from choosing jurors on the basis of sex, the Court stated, "Even if a measure of truth can be found in some of the gender stereotypes used to justify peremptory challenges, that fact alone cannot support discrimination."

Herma Hill Kay, dean of the University of California School of Law at Boalt Hall in Berkeley, says the Court could find grounds on which to strike down both VMI's men-only policy and Virginia's remedy of establishing an alternative program for women.

Kay asserts that it is "absurd" to believe the Women's Institute of Leadership is the equal to VMI's curriculum, and she maintains that the 4th Circuit clearly departed from traditional equal protection analysis by creating a new standard of substantive comparability.

Kay's analysis of the case is difficult to rebut. Even assuming that educational diversity is an important governmental objective, Virginia's refusal to provide the same type of education to women that men receive at VMI would appear to be unconstitutional under the usual analytical approach taken by the courts.

But the final determination, of course, belongs to the Supreme Court. It may be significant to the outcome that Justice Clarence Thomas was widely expected to recuse himself from the case because his son is a student at VMI.

The timing of the Court's decision could have symbolic significance, as well. The Court may issue its decision near the centennial anniversary of *Plessy v. Ferguson*, 163 U.S. 537 (1896), a decision in which the Court first embraced racial separation, only to retract that position in subsequent years. Whether some similar pattern develops in gender separation will be known soon enough. ■