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A POSTSCRIPT ON VMI

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In the summer of 1996, the Supreme Court announced its decision in *United States v. Virginia*¹ with a flurry of publicity. The Court, in a highly controversial ruling, held that male-only Virginia Military Institute (VMI) had to open its doors to women. Additionally, the Court ruled that Virginia could not maintain two sex-segregated educational institutions with different programs, resources and alumni networks.² After several months of uncertainty, VMI decided to comply with the Supreme Court's ruling by admitting women, at the same time announcing that it will also hold female cadets to the identical shaved head and "rat-line" standards as the male cadets.³ In accord with the decision in the fall of 1997, VMI had 30 female cadets in the fall 1997 freshman class.⁴

The decision of the Court is an important victory for women's rights, both because of what it does and because of what it appears to preserve. The decision has already been the subject of extensive scholarly analysis.⁵ As a postscript to my comments at the Centennial Panel,⁶ however, I want to briefly highlight three aspects of the decision: the language of the majority opinion concerning the standard of scrutiny for gender-based classifications, the contradictions concern-

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1. *United States v. Virginia*, 116 S. Ct. 2264 (1996) [hereinafter "VMI"].

2. Jeffrey Rosen, *Single-Sex Schools and Double Standards*, N.Y. TIMES, July 3, 1996, at A23.

3. Mike Allen, *Defiant VMI to Admit Women, But Will Not Ease Rules for Them*, N.Y. TIMES, Sept. 22, 1996, at 1.

4. Peter Finn, *Female Cadet From N. Va. Departs VMI's Rat Line; Four Women Have Quit, Leaving 25 at School*, WASH. POST, Nov. 6, 1997, at B3.

5. See, e.g., Symposium, *Gender & the Higher Education Classroom: Maximizing the Learning Environment*, 4 DUKE J. GENDER L. & POL'Y 27 (1997). See also Linda L. Peter, Note, *What Remains of Public Choice and Parental Rights: Does the VMI Decision Preclude Exclusive Schools or Classes Based on Gender?*, 33 CAL. W. L. REV. 249 (1997); Raymond F. Runyon, *VMI and Virginia Lose Again: United States v. Virginia*, 32 TULSA L.J. 681 (1997); Charles J. Russo and Ralph D. Mawdsley, *VMI and Single-Sex Public Schools: The End of an Era?*, 114 EDUC. L. REP. 999 (1997); Jennifer R. Cowan, *Distinguishing Private Women's Colleges from the VMI Decision*, 30 COLUM. J. L. SOC. PROBS. 137 (1997).

6. See *Centennial Panel: Two Decades of Intermediate Scrutiny*, 6 AM. U. J. GENDER & L. 1, 21-26 (1997) [hereinafter "Centennial Panel"].

ing the meaning of gender "difference" that are reflected in the opinion, and the implications of the opinion for public single-sex education for women.

The majority opinion, written by Justice Ginsburg, carefully but vigorously rejected VMI's claims. However, the language of the opinion was elusive on the precise standard of review that the Court applied. Justice Ginsburg uses two phrases to characterize the standard: gender-based classifications must meet an "exceedingly persuasive justification,"⁷ and the state's actions in establishing gender-based classifications must be viewed with "skeptical scrutiny."⁸ The opinion stated that "[t]he heightened review standard our precedent establishes does not make sex a proscribed classification,"⁹ but that "case law evolving since 1971 'reveal[s] a strong presumption that gender classifications are invalid.'"¹⁰ The opinion noted that "[t]he Court has *thus far* reserved most stringent judicial scrutiny for classifications based on race or national origin, but . . . observed that strict scrutiny of such classifications is not inevitably 'fatal in fact.'"¹¹ The Court did not "[equate] gender classifications, for all purposes, to classifications based on race or national origin,"¹² but points out that the Court has recently paid careful attention to actions which deny opportunities based on sex.¹³

There are several different ways of interpreting these statements. The majority opinion did not overtly embrace "classic" strict scrutiny as the standard of review for gender-based classifications as the Justice Department and other *amici* argued. Parsing the language of the opinion raises questions concerning the standard of review but does not provide answers. Two phrases that Justice Ginsburg repeatedly used to characterize the standard, "skeptical scrutiny" and "exceedingly persuasive justification" are purposely vague. The phrase

7. *United States v. Virginia*, 116 S. Ct. at 2271, 2274 (quoting *Mississippi Univ. Women v. Hogan*, 458 U.S. 718, 724 (1982) and *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994)).

8. *See id.* at 2274-75 (discussing the United States history of sex discrimination).

9. *See id.* at 2276 (stating that there are "inherent differences" between the sexes, but that these differences should not be used to denigrate either sex).

10. *Id.* at 2275 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring)).

11. *Id.* at 2275-76, n.6 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235-37 (1995)) (emphasis added).

12. *United States v. Virginia*, 116 S. Ct. at 2275.

13. *See id.* at 2275 (explaining the Court's presumption that classifications based on gender are invalid).

“skeptical scrutiny,” used for the first time,¹⁴ could be read to characterize either intermediate or strict scrutiny. The phrase “exceedingly persuasive justification,” although used in prior opinions, had not been used to characterize the state’s specific burden under either standard, but merely to describe the difficulty of demonstrating that the challenged sex-based classification bore a substantial relationship to an important state interest.¹⁵ The Court’s use of the phrase “thus far” could be interpreted as restating Justice Ginsburg’s prior reservation that strict scrutiny remains an option for sometime in the future,¹⁶ or it could be interpreted as the equivalent of “up until now,” meaning until this case.

Questions as to whether “classic” strict scrutiny still exists are raised by the language of the majority opinion, which compared the standard of review for gender with the standard of review for race and national origin. The Court said that gender classifications and race and national origin classifications are not equated for all purposes, but did not clarify for what purposes they *are* equated. Justice Ginsburg’s statement that the Court had “thus far reserved most stringent judicial scrutiny for classifications based on race or national origin” was qualified by reference to the Court’s suggestion that “strict scrutiny of such classifications is not inevitably ‘fatal in fact.’” Does this mean that “classic” strict scrutiny is “watered down” for all three groups—gender, race and national origin? Are there still three tiers of equal protection? Finally there are the questions of how to interpret Justice Scalia’s claim in his dissenting opinion that the majority has adopted strict scrutiny,¹⁷ Justice Rehnquist’s claim in his concurring opinion that the majority has heightened the standard,¹⁸ and the majority’s silence and failure to rebut this claim in its opinion.

In my comments at the Centennial Panel, I suggested that the Supreme Court’s has characterized its treatment of gender issues as saying one thing in its description of the standard of review and sim-

14. Indeed, the full sentence in which Justice Ginsburg introduced this phrase is: “[t]oday’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.” *Id.* at 2274 (emphasis added).

15. See *Mississippi Univ. Women v. Hogan*, 455 U.S. 718, 724 (1982) (stating the burden to be met is that the “classification serves ‘important governmental objectives’”); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

16. See *Harris v. Forklift Systems*, 510 U.S. 17, 26 (1993) (Ginsburg, J. concurring) (“[I]t remains an open question whether classifications based on gender are inherently suspect.”).

17. *United States v. Virginia*, 116 S. Ct. at 2293-96.

18. See *id.* at 2288 (Rehnquist, C.J., concurring) (writing that the Court’s insistence that “the state must demonstrate an ‘exceedingly persuasive justification’ to support a gender-based classification . . . [i]ntroduces an element of uncertainty respecting the appropriate test.”).

ply doing another in applying that standard.¹⁹ *VMI* may be interpreted simply continued this tradition. What the court does in *VMI* is significant, however, what the majority says concerning the standard of review is elusive.

The Court's language regarding "difference" in race and gender contexts is more troubling. Justice Ginsburg wrote that "[i]nherent differences' are no longer accepted as a ground for race or national origin classifications,"²⁰ but "physical differences between men and women are enduring."²¹ She continued by stating that "inherent differences' between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."²² Thus, several questions remain: What *are* "inherent differences" between the sexes? Are they the same as "physical differences"? What "inherent differences" or "physical differences" between the sexes are acceptable as a basis for legislative classification? In what circumstances? Which "inherent differences" are cause for "celebration," and which are "denigrating"?

This general language concerning "difference" raises questions in light of both the Court's historic reliance on gender "difference" and the specific facts of *VMI*. Claims of "physical" and "inherent" differences between men and women historically have been the major rationale for gender discrimination, and they are the exception to the concept of equal treatment that often swallows the rule.²³ Whether gender "difference" is a cause for celebration or denigration depends on a complex range of factors: whether gender "difference" is understood to exist outside of a purely biological context, what gender "difference" is claimed to exist, what "difference" means in a particular context, and whose perspective on gender "difference" is considered and controls.

Reliance on such general language concerning gender "difference" is particularly ironic in the *VMI* opinion, since the case devolved on disputes over claims of gender "difference" and different interpretations of "celebration" or "denigration." Virginia argued that the establishment of the separate Virginia Women's Institute for Leader-

19. See *Centennial Panel*, *supra* note 6 at 23.

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

21. *Id.*

22. *Id.*

23. See *Centennial Panel*, *supra* note 6, at 21-26 (Professor Elizabeth Schneider comments on gender "difference").

ship (VWIL) program at Mary Baldwin College “celebrated” “differences” between men and women. Conversely, the Justice Department argued that VWIL “denigrated” them.

As *VMI* was decided, another case involving single-sex public education came to the fore. In September 1996, the Young Women’s Leadership School (YMLS), a public junior high school for girls, opened in East Harlem.²⁴ YWLS’ students are primarily Black and Hispanic. The program emphasizes mathematics and science, subjects in which girls often lag behind boys, and it is based on the rationale that “studies often show that girls, particularly from poor neighborhoods, learn better when boys are not in the classroom.”²⁵ Much controversy has surrounded this school²⁶ with feminists divided on the issue.²⁷ However, the majority opinion in *VMI* appeared to view single-sex schools, like YWLS, that are intended to remedy a history of subjugation, as different from those like VMI, that continue a pattern of historical exclusion. The opinion suggested that where the “mission of . . . single-sex schools is ‘to dissipate rather than perpetuate, traditional gender classification,’”²⁸ the state may “evenhandedly support diverse educational opportunities.”²⁹

24. Jacques Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*, N.Y. TIMES, July 16, 1996, at A1.

25. *Id.*

26. See Derrick Bell, *Et Tu ACLU*, N.Y. TIMES, July 18, 1996, at A23; John Leo, *Boys on the Side*, U.S. NEWS AND WORLD REP. Aug. 5, 1996, at 18; see generally, Carrie Corcoran, Comment, *Single-Sex Education After VMI: Equal Protection and East Harlem’s Young Women’s Leadership School*, 145 U. PA. L. REV. 987 (1997).

27. Janine Zuniga, *NOW Joins Suit to Halt All-Girls School in Harlem*, THE STAR LEDGER, Newark, New Jersey, Aug. 23, 1996, at 3. Civil rights advocates have filed a Title IX complaint contending that YWLS is discriminatory. Jacques Steinberg, *All-Girls School May Violate Rights of Boys Officials Say*, N.Y. TIMES, Sept. 18, 1997, at B1. Federal education officials have not issued a formal finding of violation but did request that the Board of Education begin negotiating possible solutions to the problem: 1) either admit boys to YWLS, or 2) establish a separate program for boys. *Id.* The matter has yet to be resolved. Jacques Steinberg, *Crew Says “No” to Compromise on All-Girls Middle School*, N.Y. TIMES, Sept. 25, 1997, at B3.

28. *United States v. Virginia*, 116 S. Ct. at 2276, n.7 (citing *Brief for Twenty-Six Private Women’s Colleges as Amici Curiae* 5).

29. *Id.* Significantly, in another footnote, the Court highlighted the difference between all-male and all-female education:

The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority assumptions for which women must eventually pay.

United States v. Virginia, 116 S. Ct. at 2277, n.8 (quoting C. JENCKS AND D. RIESMAN, THE ACADEMIC REVOLUTION 297-98 (1968)).

VMI is an important case and the majority opinion is a great victory because of its forthright rejection and analysis of the historic exclusion of women from public education. At the same time, the opinion signals the continuing nature of the constitutional struggle for gender equality.