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The Limits of the Constitutional Imagination: Equal Protection in the Era of Assimilation

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THE LIMITS OF THE CONSTITUTIONAL IMAGINATION: EQUAL PROTECTION IN THE ERA OF ASSIMILATION

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I. INTRODUCTION: SO WHY *CAN'T* A WOMAN BE MORE LIKE A MAN?

In the movie "My Fair Lady," the learned Professor Henry Higgins famously asks "why can't a woman be more like a man?"[1] This is meant to be funny. We are meant to ignore the overbroad generalization implicit in that question, that all women are alike and *not* like all men. Further, we are all meant to share in Higgins's frustration in the impossibility: it is more likely for a flower girl to be like an aristocrat than for a woman to be like a man. Finally, we are meant to assume, like Higgins, that if women and men are to become more compatible, it should be women who change to become more like men, and certainly not the other way around. Higgins's attitude would be laughable were it not of such current relevance.

The triple assumptions of Higgins's comical, musical question—the absolute correlation between personality and gender, the desirability of

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1. REX HARRISON, *I'm an Ordinary Man*, *on* MY FAIR LADY (Original London Cast, Sony Classical 1959).

homogenization, and the preference for male traits over female traits—are reflected in the prevailing views of difference, particularly gender differences in our culture and in the Supreme Court's gender jurisprudence. Indeed, the recent litigation over the exclusion of women from the Virginia Military Institute (VMI) exemplifies these three assumptions.[2] The first assumption is manifested in the state's decision to exclude women from VMI and to create a new institute, the Virginia Women's Institute for Leadership (VWIL), on the ground that men and women are so essentially different that they should not occupy the same educational space.[3] The Supreme Court's invalidation of separate educational facilities except upon exceedingly persuasive justification reflects the second assumption: that integrating men and women is preferable to separating them.[4] Finally, the Court's finding that the admission of women to VMI will require minimal change on VMI's part, and its disdain for the mission of VWIL[5] exemplifies the preference for male traits over female traits that is manifest in Higgins's question and in society generally, even now.

All three of these assumptions are untenable. Virginia based its exclusion of women from VMI and of men from VWIL on the first premise that women are essentially different from men. In modern parlance, this is known as the thesis of gender difference and its most famous propounder is the psychologist Carol Gilligan, whose book *In A Different Voice* gave the thesis its name.[6] In Gilligan's terms, women's moral orientation is defined by an ethic of care which is distinct from the ethic of justice that defines men's moral development.[7] However, even those most committed to this view (including Gilligan) tend to agree that the different ethics do not correspond exclusively and comprehensively to one gender or the other but to personality differences, or at most to a propensity defined by gender: women are more likely to be oriented toward care and men toward justice. There are men and women on both sides of the continuum and no one is really all care or all justice. According to the amicus brief in the VMI case of the American Association of University Professors, "There are no psychological, behavioral or cognitive traits in which males and females do not overlap, and in most cases the area of overlap is larger than the area of

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2. *See* United States v. Virginia, 518 U.S. 515 (1996).

3. *Id.* at 558. This reflects Virginia's view of education in the context of integrating VMI. It does not reflect Virginia's general view of public undergraduate education—all the other state institutions are co-ed, some by virtue of court decrees, some not.

4. *See Virginia*, 518 U.S. at 558.

5. *Id.*

6. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (examining psychology's treatment of women's experiences and development).

7. *Id.*

difference."[8] Therefore, some women already are like some men, and some men are like some women. But asking why some people can't be more like other people isn't as funny.

The second premise is that these clear-cut gender differences ought to be eliminated. The Supreme Court based its order to admit women to VMI on this premise. Again, this resonates in our current thinking about gender, as we break down all barriers that formerly existed between men and women. Women are CEOs, men are full-time caregivers. While this liberation from rigid gender roles is to be applauded, we should also recognize that a headlong rush to homogeneity may have some hidden costs. Differences among people account for the richness of our social and cultural diversity, and this diversity is to be embraced and fostered, not negated or suppressed. It is far more important that we accept differences between genders, and among races, religions, cultures, ages, abilities—indeed, among personalities —than that we exert ourselves to dissolve them.[9] One reason for this is the simple fact that these differences exist.[10] We are not, as Justice Scalia, says, "just one race," nor is it clear why we should strive to be.[11]

The third premise is that if gender differences are going to break down, then the resulting paradigm should be not feminine, nor mixed, but masculine. Professor Higgins says women should be like men;[12] the Supreme Court says that Virginia can fulfill its constitutional obligation simply by admitting women to the masculine VMI and that it need not establish an institution that reflects both female and male models.[13] Furthermore, the Court's finding that VMI's mission, though devised for men, is broad enough to accommodate women signifies that VMI need not change at all when it incorporates women.[14] The women, meanwhile, will have to change substantially to fit into to the masculine world of VMI.[15]

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8. Brief of Amicus Curiae American Association of University Professors at 13, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-1491) [hereinafter AAUP Brief].

9. *See* LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (1997) (examining women's experiences with legal education to argue that all-male institutions must change from within in order to benefit all who have historically been left out).

10. *See* Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333 (1996).

11. Adarand Constructors v. Peña, 515 U.S. 200, 239 (1995) (Scalia J., concurring). As Judge Skelly Wright said: "The magnitude of the problem may not nullify the principle. And that principle is that we are, all of us, Americans, with a right to make our way unfettered by sanctions imposed by man because of the work of God." (*cited in* ROBERT HAYMAN JR., THE SMART CULTURE, SOCIETY, INTELLIGENCE, AND LAW 86 (1998)).

12. *See* HARRISON, *supra* note 1.

13. *Virginia*, 518 U.S. at 558.

14. *Id.*

15. *But see* Ballard v. United States, 329 U.S. 187, 193-194 (1946) ("The truth is that the

This may sound anachronistic or even sexist, but it pervades our current thinking about the hierarchy of gender.[16] Indeed, in its first co-educational year, VMI deliberately did as little as possible to accommodate women in order to ensure that the VMI experience would be the same for all.[17] Virginia Military Institute did not revamp its physical standards or its educational philosophy so that it would be less masculine or even more mixed.

What is ironic and unsettling about the VMI litigation is that the decision was hailed as a feminist triumph—the long-awaited pronouncement of the Court about gender equality from Ruth Bader Ginsburg, probably the century's most notable feminist lawyer.[18] And indeed, it is a triumph of sorts: the Court is absolutely right that the state should not be able to mandate who shall go to which types of schools based on the applicant's gender. Justice Scalia's lone, tradition-bound dissent highlights the correctness of the Court's decision by showing that the alternative is profoundly retrogressive. Furthermore, both the Court's opinion and the state's position do dip into feminist ideology: the Court, relying on the justices' own intuition, found that women can do anything men can do and should not be limited by archaic stereotypes, while the state, relying on feminist research, argued that women need and deserve educational opportunities that are designed *for them* and that do not require them to conform to male norms.

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two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. . . . [A] flavor, a distinct quality is lost if either sex is excluded.") (*cited in* Suzanna Sherry, *Civic Virtue and the Femine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 581-2 n.170 (1986)).

16. Examples, both public and private, abound. One obvious example is the still prevalent practice for women to change their last name when they marry. Women's schools are underendowed, women's sports events are underattended, women's illnesses are under researched, and, of course, women's job performance is under compensated, as compared with men's.

17. *See generally* Jane Maslow Cohen, *Equality For Girls And Other Women: The Built Architecture of The Purposive Life*, 9 J. CONTEMP. LEGAL ISSUES 103 (1998) (discussing extensively *United States v. Virginia*).

18. The Court's rejection of Virginia's VWIL plan was widely praised. Charles Whitebread called it "the greatest victory for women's rights in the last decade." Charles Whitebread, Address to University of Minnesota Law School, (Oct. 19, 1996), *in* Loren Singer, *Scholar Calls Supreme Court's Clarity on Some Issues, Indecision on Others the 'Most Remarkable Thing' about the 1995-96 Term*, WEST'S LEGAL NEWS, 1996 WL 600013 (Oct. 22, 1996). Cass R. Sunstein called it deep and ambitious. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6 (1996). D.C. Circuit Court Judge Patricia Wald called it "cause for cheer." Patricia M. Wald, *Glass Ceilings And Open Doors: A Reaction*, 65 FORDHAM L. REV. 603 (1996).

Yet, the VMI litigation is troublesome because it demonstrates the poverty of the feminist vision. Although the Commonwealth of Virginia and the Court took opposing views—the former embracing the thesis of gender difference, the latter rejecting it—both visions, as noted above, fit comfortably within the cramped (not to say downright misogynist) view of gender equality espoused by Professor Henry Higgins. If mainstream modern feminism goes no further than that, it is in a sorry state. The state says women cannot be more like men, the Court says women can. Neither view is challenging the very premise of the question.

Somewhere in the interstices of mainstream feminist thought, however, lurks the suggestion that the question itself, depending as it does on fixed notions of gender, is all wrong and that an alternative conception of the issue must be, and can be, crafted. More people are recognizing that because personality differences so often transcend the gender line, the relevant categories are not defined by gender, but rather, by personality trait. Thus, the critical insight of feminist research is not so much in identifying what traits are essentially feminine but in recognizing that the traits traditionally associated with women are indeed valuable, whether or not they correlate perfectly with "femaleness."

Part II of this article argues that many of the issues that confront progressives—namely the challenge of inclusion and the rejection of neutral principles—are the same issues that have concerned feminists for the last thirty years. Although the VMI case illustrates how mainstream feminist solutions are inadequate to solve these issues, this article then suggests that the weaker version of the difference thesis—there are different voices, but they do not necessarily correspond to gender differences—is more appealing than either the stronger version of the difference thesis (exemplified by VMI) or its total rejection (exemplified by the Supreme Court). The last section of the article describes this modified version in more detail and offers hypothetical and real examples of how this version works in practice.

II. PROGRESSIVISM'S TASK

A. The Challenge of Inclusion

Given the paucity of clear thinking about gender and other types of personality differences, one of the major tasks of progressivism is to develop a theory of difference that is more coherent than our prevailing ideology. Although progressivism, especially in the context of progressive constitutionalism, can be an amorphous term with a foggy outer perimeter, certain central tenets seem to cluster at its core. Specifically, progressivism embraces a form of pluralism and inclusion that is inconsistent with homogeneity. Robin West has defined progressivism

> in part, by its guiding ideal: progressives are loosely committed to a form of social life in which all individuals live meaningful, autonomous, and self-directed lives, enriched by rewarding work, education, and culture, free of the disabling fears of poverty, violence, and coercion, nurtured by life-affirming connections with intimates and co-citizens alike, and strengthened by caring communities that are both attentive to the shared human needs of its members and equally mindful of their diversity and differences.[19]

This attention to an increasingly heterogeneous population dovetails with current realities and the evolution of constitutional doctrine over the course of the last century. The public sphere has opened up and droves of individuals, once categorically excluded, are now entering and participating in public life: women who were kept at home by the cult of domesticity; racial minorities who were segregated out of mainstream neighborhoods, schools, and jobs; physically and mentally disabled individuals who were isolated by institutionalization and indifference; and homosexuals who stayed in metaphorical closets, to name a few, are all now visible and vocal members of the political community.

Kent Greenawalt has suggested that changes in our immigration policy have contributed to our increasing heterogeneity.[20] In the first fifty years of American immigration policy, Congress attempted to preserve the religious and racial status quo by simultaneously excluding Chinese and other Asian immigrants, by imposing obstacles to integration on those were already here (such as prohibiting naturalization),[21] and by capping the number of people who could immigrate from the eastern but not the western hemisphere.[22] After the Second World War, these restrictions first began to dissolve: first,

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19. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 162 (1994). In his talk, Morton Horwitz explicitly defined the thick description of democracy that progressives should embrace as denoting pluralism and inclusion. *See generally* Morton Horwitz, *In What Sense was the Warren Court Progressive?*, 4 WIDENER L. SYMP. J. 95 (1999).

20. Professor Greenawalt made this point explicitly during the Symposium's round-table discussion. Although his emphasis was on religious heterogeneity, the point can be made more broadly. *See generally* Kent Greenawalt, *Progressive Constitutionalism: Conceptions of Interpretation and the Religion Clauses*, 4 WIDENER L. SYMP. J. 41 (1999).

21. *See generally* James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 229-30 (1995) (explaining how the Immigration Act of 1882 restricted Chinese immigration and prevented the assimilation of Chinese residents by prohibiting naturalization and how Congress extended these and other restrictions to "all Asians, natives of India, and others" in 1917) (citing Chinese Exclusion Act, 22 Stat. 58 (1882) and the Immigration Act of 1917, 39 Stat. 874, 876 (1917)).

22. Smith, *supra* note 20, at 232-33 (explaining and citing the Immigration Act of 1924, 43 Stat. 153 (1924)).

the McCarran-Walter Act of 1952 eliminated race-based exclusions;[23] then in 1965, Congress overhauled the immigration system by eliminating all restrictions based on national origin and, in particular, lifted restrictions on immigration from Asia.[24] The parallel lifting of restrictions on immigration and on people's social and legal opportunities once they were in the country has enhanced the likelihood of genuine integration. Unlike the non-European immigrants of fifty to one hundred years ago, modern-day immigrants are participating fully in political, social, and economic affairs.

Of course, other factors have also contributed to the opening-up of the American political community, and a full analysis of this evolution is far beyond the scope of this article. Suffice it to say that the civil rights movements of the 1950s, 1960s, and 1970s forced the inclusion of blacks, women, native americans, and members of other oppressed groups to the point where the face of America has changed dramatically and visibly in the last fifty years. This is what presidential candidate Bill Clinton meant when he said that he sought an administration that "looked like America."[25] These social upheavals have been matched by federal legislation (such as the Civil Rights Act of 1964, which has been repeatedly updated and strengthened, and the more recent Americans with Disabilities Act of 1992), and state and municipal legislation and ordinances extending protections to those not covered by federal law.[26]

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23. *See* Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (1994) (also referred to as the McCarran-Walter Act).

24. *See* Smith, *supra* note 20, at 232-33 (explaining and citing the Immigration and Nationality Act of 1952, 66 Stat. 163 (1952) and of 1965, 79 Stat. 911 (1965)). It is worth noting that American immigration policy has been cyclical, so that the current opening-up of our immigration is embracing only in comparison to what came immediately before, but not in comparison to American immigration policy for the first hundred years after ratification of the Constitution. Professor Smith argues that from the 1790s to the 1880s, Congress left immigration matters to the states and had no broad-based policy to mold the population in any particular image. *Id.* at 228-30.

25. *See, e.g., Weekend Edition*: National Public Radio, (Aug. 16, 1992) (Governor Bill Clinton (Democratic Presidential Nominee): "This crowd looks like America. This crowd is America. And if you elect me president, my administration will look like you. It will look like America.").

26. *See* Civil Rights Act of 1964, 78 Stat. 241 (1964) . *See also e.g.* WASH. REV. CODE ANN. 49, § 49.60.010 (West 1997) (establishing a commission to enforce prohibition against "discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap"); MASS. GEN. LAWS ANN. ch. 151B §4 (West 1998) (prohibiting discrimination in employment on the basis of race, color, religious creed, national origin, sex, sexual orientation . . .).

Although my only authority is my intuition, it seems that the political correctness

This same phenomenon is reflected in constitutional development and interpretation.[27] As John Hart Ely famously explained: "Not only has the Fourteenth Amendment underscored our commitment to equality in the distribution of various goods . . . but several other amendments, in fact most of the recent ones, have extended the franchise to persons who previously had been denied it . . . ."[28] The amended Constitution, therefore, confirms the progressive acknowledgment and embrace of difference, as well as the concomitant need to reckon with difference. When all the "ins," as Ely calls them, were a homogenous group of propertied white men, there was little need for them to address the issue of difference. The increasing heterogeneity of the ins, however, requires us to confront what it means to be "in" and what price can legitimately be exacted for the privilege of "in"clusion.

A second theme underlying various conceptions of progressivism is its rejection of neutrality, and its willingness to embrace certain substantive values and to reject others. Again, Robin West has cogently articulated this aspect of progressivism. In her view, progressives conceive of the Constitution as sufficiently open-ended that judges must commit to a particular moral stance and reject an opposing or conflicting stance.[29] That is, judges should not or can not engage in what Susanna Sherry calls " 'value-free' judging—[which confines] them to the unsupplemented text."[30] Once judges and other interpreters recognize the inevitability of supplementing the text with a particular set of values, the question then becomes: which values should we adopt? The progressive response is: values which promote what has simply been called the good life.

A progressive definition of the good life is as hard to pin down as a

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movement, despite the vehement backlash it has spawned, has nonetheless contributed to the spirit of inclusion by insisting on respect for and even appreciation of differences among individuals.

27. *See, e.g.,* Brown v. Board of Education, 347 U.S. 483 (1954) (holding unconstitutional racial segregation of elementary and high school students); Buchanan v. Warley, 245 U.S. 60 (1917) (invalidating municipal racial residential segregation statutes, albeit as unconstitutionally interfering with the property interests of white property owners); Reed v. Reed, 404 U.S. 71 (1971) (holding unconstitutional discrimination against women in estate administration); Romer v. Evans, 517 U.S. 620 (1996) (holding unconstitutional state's effort to burden homosexuals' and bisexuals' participation in public life).

28. JOHN HART ELY, DEMOCRACY & DISTRUST: A THEORY OF JUDICIAL REVIEW 123 (1980). *See also Virginia,* 518 U.S. at 557: "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded."

29. Robin West, *Progressive and Conservative Constitutionalism,* 88 MICH. L. REV. 641, 692 (1990).

30. Susanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution,* 64 CHI.-KENT L. REV. 1001, 1010-11 (1988), *cited in* West, *supra* note 29, at 692.

definition of progressivism itself. At a minimum, it would entail substantive guarantees rather than the mere opportunity to compete for substantive guarantees. In other words, under the progressive constitution, each person is her own material and moral sovereign because she has sufficient food, education, shelter, medical (including reproductive) care, etc., and there are no state or private obstacles to her autonomy. The current liberal vogue of reading the Constitution to protect only against state interferences with access to food, shelter, etc. does not sufficiently guarantee that each person will in fact achieve that level of autonomy. Thus, progressive constitutionalism means value or substantive equality and not just formal equality under the Equal Protection Clause, and positive liberty, and not just negative liberty under the Due Process Clauses.

Perhaps there is no more concise judicial statement of this aspect of progressivism than Justice Brandeis's famous statement in *Whitney v. California*: "The final end of the State [is] to make men free to develop their faculties."[31] If that indeed is the purpose of organized society, then the Constitution can and must be read to further that goal. Any rule that detracts from that goal cannot be constitutional. If Justice Brandeis is right, a rule that says that Joshua DeShaney's dad can beat him senseless cannot be constitutional: the Court, the state, and the father should not, individually or collaboratively, be able literally to deprive Joshua of his faculties, but rather must affirmatively act to help Joshua develop his faculties.[32] The outcome is determined not by a commitment to an abstract principle (the requirement of state action) and certainly not by a commitment to any abstract principle that protects only negative liberty, but by the constitutional progressive's affirmative commitment to the good life, as defined in this way. Efforts to define the good life, for the purposes of constitutional interpretation, are more readily available in the pages of law reviews than of judicial opinions. For instance, (and again the example is from West's work), when Catharine MacKinnon argues that the equality guarantee needs to be understood in terms of the eradication of hierarchies and that a law needs to be measured by the extent to which it reinforces the preexisting maldistribution of power,[33] she commits to a particular conception of the good life that the Constitution ought to promote: hierarchies hinder the good life regardless of the degree of state action

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31. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* Brandenberg v. Ohio, 395 U.S. 444, 449 (1969).

32. DeShaney v. Winnebago County Dep't. of Social Services, 489 U.S. 189 (1989) (holding that the state has no constitutional duty under the due process clause to protect a child from his father's abuse).

33. *See* West *supra*, note 29, at 694; *see also* Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting).

involved.[34] Again, the abstract appeal of formal equality does not seduce the progressive whose interpretive polestar is promoting the good life.

Thus, progressivism rejects the kind of neutrality that liberalism seems most comfortable with: the neutrality that says we stick by this principle regardless of who wins or who loses by it:[35] the First Amendment protects freedom of speech whether blacks are marching against segregation or nazis are marching against jews. In fact, liberals revel in the opportunity to protect the nazis precisely because in it they see the depth of the commitment to the abstract principle while progressives see the shallowness of the commitment to those who most need constitutional (anti-majoritarian) protection. Furthermore, in rejecting abstraction, progressivism unmasks the kind of pseudo-neutrality that has camouflaged judicial preferences for economic inequality (as in the *Lochner* Court's commitment to laissez-faire capitalism[36]), patriarchy in its most explicit forms (as in the *DeShaney* case or the pre-*Reed* equal protection cases[37]), and racial inequality (as in *Plessy* and its progeny and, more recently, in the affirmative action cases[38]).

In combination, these two themes—acceptance of heterogeneity and rejection of neutrality— support the view that law can and should embrace certain values not simply because they appear to be descriptively true, but because they appear to be normatively superior. Pluralism, in the sense of recognizing and valuing differences, is one such value. Pluralism is preferable to the alternatives in part because the alternatives have

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34. *See id.*

35. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); *but see* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983)(criticizing Wechsler).

36. Lochner v. New York, 198 U.S. 45 (1905) (Holmes, J., dissenting).

37. *See, e.g., DeShaney*, 489 U.S. 189 (1989); Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (Frankfurter J.) ("Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws.").

38. *See, e.g.*, City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) (O'Connor J.):

> [S]tanding alone this evidence is not probative of any discrimination in the local construction industry. There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction . . . . [t]he mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination.

Id. at 503.

contributed (inevitably, though not always intentionally) to the oppression of individuals in the excluded groups. *By definition,* pluralism does not oppress and it therefore enhances individual lives by incorporating individuals in the life of the community.

Beyond the benefits to individual lives, pluralism transforms the community itself. In the context of gender discrimination, many values that were traditionally excluded from the public sphere are those associated with women such as greater attention to factual context (possibly at the expense of bright lines and rigid categories), more concern about the emotional impact of decisions (possibly at the expense of predictability), and a general orientation towards human relationships (possibly at the expense of repose and efficiency).[39] It is not at all obvious that these traits are *a priori* inappropriate in the public sphere, and, in fact, many have suggested that the public sphere and our legal culture in particular would be much improved if infused with this ethic.[40] Thus, while the need for a new theory of difference is occasioned by the absence of any current theory consistent with pluralism and increased heterogeneity, it should also be seen as an opportunity to transform some of our social institutions.[41]

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39. *See* JOAN TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE (1993) (arguing for an ethic of care whether or not it is typically associated with one or the other gender). *See also* ROBIN WEST, CARING FOR JUSTICE (1997) (arguing that the images of caring typically associated with women and the images of justice typically associated with men are interrelated).

40. *See, e.g.,* WEST, *supra* note 39. In a recent issue of the Boston College Law School Magazine, for instance, a group of judges was asked what makes a good judge, or more specifically, what constitutes a "judicial temperament." Julie Michaels, *The Right Stuff: What Makes a Good Judge*, 6 BOSTON COLLEGE LAW SCHOOL MAGAZINE. 15-19 (Spring 1998). The most common responses (from both men and women): patience, humor, the ability to listen, common sense, a firm hand, a kind heart, humility, and respect. It turns out that traits commonly associated with women and mothering, far from being incompatible with the administration of justice, as Justice Bradley and others had argued, are indispensable to it. Even the military may benefit from traits traditionally thought of as characterizing women: the most decorated living VMI alumnus, Mike Bissell who is in charge of the integration of women at VMI is described as "a quiet consensus-builder, who smiles easily, [and] worries a lot about what others think of him." Matt Chittum, *He Commands, Not Demands, Respect: VMI's Mike Bissell not Reluctant to Listen and Change*, ROANOKE TIMES & WORLD NEWS, Mar. 15, 1998 at A1.

41. Frederick Schauer's comments at the Symposium, then, are directly on point: when we think about progressivism, we need to make those second-order decisions about what kinds of institutions we want. It is the thesis of this article that, whatever else may be said about them, our institutions should increasingly reflect traits traditionally associated with women. *See also* VIRGINIA WOOLF, THREE GUINEAS 49 (1938).

> Surely in view of these questions and pictures [of war] you must consider very carefully before you begin to rebuild your college what is the aim of education, what kind of society, what kind of human being it should

Feminists have long been struggling with the quandary of inclusion and the question of, as Virginia Woolf put it, on what terms we should join the "procession."[42] The next sections of this article describe the two prevailing answers. Either we join it with no questions asked, or we create an entirely separate procession. But, after years of struggle, what can be called the feminist tradition is beginning to develop answers that reject the two extremes (as both unworkable and undesirable) and instead seek to meld the best of the existing, masculine procession with the most valuable feminine traits.[43] It is the general thesis of this article that the approaches feminists are currently developing for finding space for women in the previously masculine procession are valuable solutions for many of the questions with which progressives are grappling. Progressives should, therefore, look to the feminist tradition not just for answers about gender but for answers about pluralism and inclusion generally.

B. Mainstream Approaches to Difference are Inadequate

The VMI case illustrates that the two prevailing approaches to difference are insufficient to achieve progressivism's basic goals of identifying and embracing pluralist values. Under these paradigms, we find ourselves either over-emphasizing difference and exaggerating its significance or, and often in reaction to the first approach, we ignore difference and deny its existence.

1. Exaggerating Difference

The form that difference-awareness has taken for most of our history has been to distort and exaggerate differences—to generalize about a person on the basis of a particular trait. From the particular fact that women bear and generally raise children, society generalizes that women must be more nurturing and flexible than men, less principled or rigorous. This mutation of a specific trait into a general disability has justified the general exclusion of women from the public sphere.[44]

> seek to produce. At any rate I will only send you a guinea with which to rebuild your college if you can satisfy me that you will use it to produce the kind of society, the kind of people that will help to prevent war.

Id. The first part of the comment has obvious relevance to the questions in this essay; the second sentence, unfortunately, has no relevance.

42. *See* WOOLF, *supra* note 41, at 62.

43. Indeed, it has been suggested that the mode of "integrat[ing] the paradigms" exemplifies a distinctively feminine voice. *See* Sherry, *supra* note 15, at 578 n.163.

44. *See* NANCY TUANA, THE LESS NOBLE SEX: SCIENTIFIC, RELIGIOUS AND PHILOSOPHICAL CONCEPTIONS OF WOMEN'S NATURE 165-167 (1993) (noting that women were considered dangerous in the public sphere because a woman could not comprehend

The history is familiar. The original framers excluded women from the Constitution's constituency.[45] For more than one hundred years after the ratification of the (explicitly gendered) Fourteenth Amendment, the Court consistently found that the differences between men and women were so great as to justify whatever burdens a legislature might want to impose upon women. Woman's delicate nature made her unfit to practice at the bar,[46] her inability to protect herself made her unfit to work in a bar without a father or husband to watch over her,[47] and her domestic responsibilities made her unfit for jury duty[48] (although her reproductive obligations did entitle her to greater working benefits than men who, unlike women, were neither wards of the state nor responsible for the perpetuation of the species[49]). In Supreme Court jurisprudence, this phenomenon of exaggerating gender differences is most notoriously manifested in the separate spheres ideology of Justice Bradley's opinion in *Bradwell v. Illinois*: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[50] While this passage is a paragon of

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abstract ideas of rights and justice and were therefore more fit for child rearing). A comment attributed to a colonial Governor of Connecticut exemplifies the prevailing attitude for most of this nation's history. Commenting on his wife's mental illness, Governor Hopkins explained, "If she had attended her household affairs, and such things as belongs to women . . . she had kept her wits." VERN L. BULLOUGH, THE SUBORDINATE SEX: A HISTORY OF ATTITUDES TOWARD WOMEN 297 (1973) (citing JOHN WINTHROP, THE HISTORY OF NEW ENGLAND 1630-1649 vol. 2. at 216). Of course, such classics of feminist literature as Charlotte Perkins Gilman's THE YELLOW WALLPAPER, suggest that the Governor may have confused cause and effect and that in fact it is the confinement to household affairs that puts one's wits at risk. *See* CHARLOTTE PERKINS GILMAN, THE YELLOW WALLPAPER 1899 (The Feminist Press 1973) (1899).

45. See Abigail Adams's letter to John Adams and his rejection of her suggestion that women be included, *quoted in* JOAN HOFF, LAW GENDER & INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 59 (1991). The original Constitution is not explicit on this point and one could attribute the Framers' linguistic generality to their belief that the Constitution might transcend the perhaps temporary disability of women, as has been suggested about the omission of the word "slave." *See* HIGGINBOTHAM, SHADES OF FREEDOM 14 (1996). The Framers of the Fourteenth Amendment, however, thought differently and, despite substantial opposition by feminists, saw fit to guarantee the right to vote only and explicitly to male inhabitants. U.S. Const. Amend. XIV, §2.

46. Bradwell v. Illinois, 83 U.S. 130 (1873).

47. Goesaert v. Cleary, 335 U.S. 464 (1948), *overruled by* Craig v. Boren, 429 U.S. 190, 210 n. 23 (1976).

48. *See* Hoyt v. Florida, 368 U.S. 57, 62-3 (1961).

49. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394-95 (1937); Muller v. Oregon, 208 U.S. 412, 421 (1908).

50. *Bradwell*, 83 U.S. at 141. The full passage reads:

> The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man

separate spheres ideology, it is not aberrational either within or outside constitutional jurisprudence.

Indeed, in its extended discussion of gender discrimination, the *Virginia* Court explored the history of sexism outside the legal arena and referred to a panoply of arguments in other contexts in which biological differences between men and women disabled women generally from participating in everything from public discussion to public education. For instance, according to one nineteenth century treatise on higher education, the "physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs" so that their distinctively female organs justified exclusion from rigorous educational opportunities.[51] Even Thomas Jefferson was not spared by the *Virginia* Court. Jefferson was quoted as arguing that even in a pure democracy, women would be excluded from public decision making: "Women, who, to prevent depravation of morals and ambiguity of issue, should not mix promiscuously in the public meetings of men."[52] Separate spheres ideology marked constitutional jurisprudence and social consciousness from the founding on, apparently immune to both the constitutional command of equal protection and the moral appeal of equality.

2. Dissolving Difference

As this brief overview indicates, under the prevailing ideology, gender was the linchpin for oppression: wherever gender difference was noted, the difference justified discrimination, oppression, and exclusion. The first phase of modern feminism in the 1960s, 1970s, and 1980s responded, in large part, to this form of sexism. If sexists emphasized gender differences to the detriment of women, then mainstream feminists would minimize gender differences and show that they were just like men: if there are no differences between men and women, then there is no basis for discrimination. This approach seems to have been adopted not so much as a matter of political strategy as of individual common sense and practical necessity: many women simply felt that nothing intrinsic or insurmountable separated them

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> is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization . . . indicates the domestic sphere as that which properly belongs to the domain and function of womanhood.

Id.

51. *Virginia*, 518 U.S. at 536 n.9.

52. *Id.* at 531, n.5 (quoting letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), *in* 10 WRITINGS OF THOMAS JEFFERSON 45-46, n. 1 (P. Ford ed. 1899)).

from men and that if they did what their male counterparts did, then they could achieve what those men had achieved. Both female justices who have ever sat on the United States Supreme Court came of age in this environment; they both had stellar academic careers, and the only thing that distinguished them from their equally or less well-qualified peers was their gender. However, that was enough to deny them opportunities in law firms and clerkships in the Supreme Court.[53] It is not surprising then that Justices O'Connor and Ginsburg, like millions of other women, would want to emphasize the similarities between them and their male counterparts and de-emphasize the differences.

The ends of the first feminist movement, like the means, were largely individuated. These women defined their goals in terms of what men had: respect outside the home, fulfilling careers and the pay and status associated with them, ability to define themselves as they wished, and freedom from the *obligation* to devote onself to bearing and raising children.[54] Feminists thus implicitly adopted the general liberal ethos of their male counterparts, a peculiarly individualistic attitude. The goal was for each woman to gain independence and autonomy; if the broader society, or even women's intimate relationships, were enhanced at all, this was an incidental benefit of our own more fulfilling lives. (Indeed, one notable byproduct of the women's "liberation" movement was an increased divorce rate, which would at least suggest that individuation was emphasized over connection.)[55]

Furthermore, as a mainstream movement, feminism did not aim to transform society but to integrate women into society as it was. The public realm was not viewed as defective, but neutral and indeed desirable; as a result, while women were in many instances able to liberate themselves

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53. Both Justice O'Connor and Justice Ginsburg have repeatedly been called upon to tell their own stories of starting out. In Justice O'Connor's words, "I, myself, after graduating near the top of my class at Stanford Law School, was unable to obtain a position at any national law firm, except as a legal secretary." Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1549 (1991). Justice Ginsburg's experience was similar. She was recommended for a clerkship to Justice Frankfurter and although he doubtless knew of her extraordinary academic career as one of the few people to ever serve on the boards of both the Harvard Law Review and the Columbia Law Review, she recounts that he was also "told of my family situation: I was married and had a five-year-old daughter. For whatever reason, he said no." Justice Ruth Bader Ginsburg, *The Washington College of Law Founders Day Tribute*, 5 AM. U. J. GENDER & LAW 1, 3 (1996). By contrast, upon graduating from law school, the future Chief Justice Rehnquist clerked for Justice Robert H. Jackson.

54. As bell hooks has argued, as a mostly white, and mostly middle class movement, the goals were defined not by male values generally but specifically by white, middle-class male values. bell hooks, FEMINIST THEORY: FROM MARGIN TO CENTER 18 (1984).

55. *See generally* BULLOUGH, *supra* note 44, at 349 (indicating that the changing role of the sexes has led to a higher divorce rate). My comment must not be read as a criticism of women's greater individuation, but simply as an observation that it occurred.

from the chains of domesticity, they did not liberate the society. This is only natural as a first wave of a social movement: if you want to get into a club, you show that you are just like the kids who are already members, you do not try to change the club or even criticize the club's standards for membership. You take it as it is and try to fit in.

The Supreme Court's equality jurisprudence has reinforced the importance to women of minimizing perceived gender differences. Where differences exist—such as in the way women and men exercise their right to control their reproductive lives—women are not entitled to equal protection. Thus, the Court has never recognized the equality implications of its abortion jurisprudence because abortion has no counterpart in the masculine experience. On the other hand, to the extent that women are the same as men—that is, to the extent that they are similarly situated—women are entitled to all the benefits that men have. If a woman and a man are equally capable of administering a decedent's estate, it is irrational for the state to distinguish between them. Outside the context of reproductive rights, the Court has viewed gender distinctions as reflecting archaic and overbroad stereotypes that were as likely to put women in cages as on pedestals. Laws were struck down on the theory that women should be on the same level as men, neither above nor below them. Thus, like the women's movement of the 1970s, the Court's current gender jurisprudence aims to deny or dissolve gender differences. To win a case, a woman often has to show that she is just like a man.

The implications of this strategy are important because requiring women to be more like men means not only that women change but that they suppress what is distinctively female about them: when the two genders become more alike, they do not meet in some middle, no-person's land. Rather, they meet where men are and have always been. *United States v. Virginia* is the most recent and explicit example of this.[56]

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56. As VMI Superintendent Josiah Bunting III said, observing one cadet at the end of her first year, "here was this one girl . . . [who] has accepted VMI on its terms, and was accepted by the corps." Wes Allison, *The Rat Line Is Alive And Well; Coeducation Proclaimed Success in First Year*, THE RICHMOND TIMES DISPATCH, May 17, 1998, at A1. [I have never seen a male cadet referred to as a "boy," but I suppose that's beside the point.] Bunting continued: "VMI instinctively was right to say this is what we are, we're not going to change, come take us for what we are." In another interview, Bunting recounted how he answered questions about the accommodation of women at VMI. "I told them it's the same damn place it's always been." Arnold Abrams, *Changed, Yes; Different, No / Virginia Military Institute Has Survived Its First Year With Women—Who, Says a Dean, Would Feel Themselves Demeaned by a Relaxation of The Standards*, NEWSDAY, May 11, 1998, at B6.

3. Difference, With a Difference.

Although separate spheres ideology died as a matter of constitutional law in the Supreme Court's 1971 decision in *Reed v. Reed*,[57] some strands of it have been reincarnated in the form of difference feminism. As its name suggests, difference feminism retains the separate-spheres view that there are differences between men and women and, therefore, suggests that it is neither possible nor desirable for women to attempt to eradicate those differences. Importantly, however, it departs from that archaic view by asserting that what distinguishes women is to be celebrated and valued, not used as the basis for oppression. As Carol Gilligan wrote in 1982, "[a]t a time when efforts are being made to eradicate discrimination between the sexes in the search for social equality and justice, the differences between the sexes are being rediscovered in the social sciences."[58]

Gilligan herself spearheaded the movement rediscovering gender differences with her groundbreaking book, *In A Different Voice: Psychological Theory and Women's Development*.[59] There, Gilligan made two related observations of classical psychological theory, as articulated by Freud, Erickson, Piaget, and Kohlberg. First, classical theory:

> [A]ttached affirmative value to certain characteristics culturally defined as 'masculine,' such as separation, detachment, subordination of relationships, and abstract thinking, while ignoring universal human characteristics culturally defined as 'feminine,' such as attachment and interdependence. Secondly, the theory was premised on incomplete factual data because virtually all of the studies cited in support had been conducted exclusively on males. The research was thus tainted by a fundamental sampling error that rendered its conclusions suspect.[60]

According to Gilligan, classical psychological theory described a system in which men were the standard-bearers, where women did not succeed by male standards, and the standards by which women were successful were not included in the system and, therefore, not valued.[61] It constituted a closed

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57. 404 U.S. 71 (1971) (holding that a statute which prefers men over women as administrators of a decedent's estate violates the Equal Protection Clause).

58. *See* GILLIGAN, *supra* note 6, at 6.

59. *See generally id.*

60. *See* AAUP Brief, *supra* note 8, at 24.

61. As described in the AAUP Brief, Gilligan had observed that

> "women's descriptions of their experiences and responses to experiences did not conform to descriptions of 'normal' human development reflected in classical psychological theory articulated by Freud, Erikson, Piaget, and Kohlberg. While these classical theorists concluded there was something wrong with women, Gilligan concluded that there was

circle assuring the exclusion of women. For instance, if a classical psychologist, measuring moral maturity, studies only boys' moral development, his scale will measure how boys typically develop. When girls are eventually tested by that scale, they will fare worse than the boys, if there is any difference, because the boys' scale does not measure the girls' development. Furthermore, and of particular relevance here, the differences Gilligan identified were not the same old biological differences that had proven so perplexing to legal thinkers. Rather, Gilligan focused specifically on the way girls develop into adults, intellectually, psychologically, emotionally, and morally.

Gilligan's response to the problem in the context of psychological theory was not to deny gender differences, but rather to legitimize and elaborate on them. She accepted the view that there were differences between men and women, and she even accepted some of the traditional labels for those differences: women are more interdependent and care more about relationships, context, and human connections, while men are more autonomous, more comfortable with abstract rules, and more self-sufficient.[62] Women are governed by what can be termed an ethic of care, while men's moral compass is oriented toward justice.[63] Gilligan's book was revolutionary in that it articulated a theory for valuing, rather than deprecating, that which was distinctively feminine. The ethic of care was not, as had been assumed, irrelevant or detrimental to moral development, but rather an important dimension of it. Women did not have to deny their feminine instincts in order to be moral human beings. By implication, they could also be doctors, lawyers, citizens, and even citizen-soldiers without giving up being women.

Gilligan's book was enormously influential and led to similar studies in other disciplines that asked the same basic question: do the rules that are said to be universal apply equally to women, given that the studies producing these rules are being done exclusively on males? In 1986, for instance, Nancy Goldberger, Jill Tarule, Blythe Clinchy, and Mary Belenky published *Women's Ways of Knowing*, perhaps the most influential book in the "difference" school of feminism after Gilligan's.[64] These authors examined whether the procedures for learning that characterize men were also true for women. Like Gilligan, the authors discovered that, contrary

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something wrong with psychological theory."

See AAUP Brief, *supra* note 8, at 24.

62. *See* GILLIGAN, *supra* note 6.

63. *Id.*

64. Gilligan, *supra* note 6.; *see also* AAUP Brief, *supra* note 8. Both Carol Gilligan and Blythe Clinchy, among many others, signed on to the amicus brief of the American Association of University Professors in opposition to Virginia's position, explicitly disclaiming the state's reliance on their work.

to popular belief, there is not a single, proper method of learning something, but rather, that procedures for knowing (or learning, thinking, or believing) can be characterized in at least two ways: separate or connected. Not surprisingly, they found a large correspondence between women and connected knowers on the one hand, and men and separate knowers on the other hand.

The language used to describe the different ways of knowing is interesting and particularly relevant to the VMI situation. Connected knowing is described as "tr[ying] to embrace new ideas, looking for what is 'right' even in positions that seem initially wrong-headed or even abhorrent."[65] Connected knowers play the "believing" game: "[I]f something I say seems to you absurd, you do not ask, 'What are your arguments for such a silly view as that?' but rather, 'What do you see? . . . Give me the vision in your head.'"[66] Separate knowing, by contrast, is replete with the language of adversity, challenge, and even of violence—what Clinchy characterized as "Patriot missile epistemology."[67] "In separate knowing," Clinchy explains, "one takes an adversarial stance toward new ideas . . . ; the typical mode of discourse is argument." Clinchy reports that "people often use images of war in describing separate knowing" and quotes one subject who describes his way of knowing as follows: "'[i]f I could get a job shooting holes in other people's [ideas], . . . I would enjoy my life immensely.'"[68] This subject, one suspects, might make a terrific commander of a VMI unit, or perhaps even a law professor, in the Kingsfieldian style.[69]

While many of the discoveries of "difference feminists" are well documented and perhaps more importantly resonate with many people, this approach has come under attack largely because of its resemblance to the discredited "separate spheres" ideology. Justice O'Connor, for instance, has emphatically criticized those who would identify a distinctively "feminine voice" on precisely this ground.[70] Nonetheless, it was enormously influential to the men and women whose job it was to respond to the Fourth Circuit's command that Virginia either integrate VMI or establish a comparable institution for women.

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65. KNOWLEDGE, DIFFERENCE AND POWER: ESSAYS INSPIRED BY WOMEN'S WAYS OF KNOWING 207 (Goldberger et al., eds., 1996) [hereinafter KNOWLEDGE, DIFFERENCE, AND POWER].

66. *Id.*

67. *Id.* at 207.

68. *Id.*

69. The similarity between separate knowing and the Socratic method is hard to miss.

70. O'Connor, *supra* note 53, at 1553 (noting that difference feminism is "dangerous" because it can be indistinguishable from separate spheres ideology).

III. THE VMI EXAMPLE: CHOOSING ASSIMILATION

A. The Gilliganization of Virginia

What Carol Gilligan had concluded about psychological theory and what Clinchy and others discovered about epistemology was true as well of VMI. The Virginia Military Institute was created for men: its purpose and its methods are designed to suit men's physical and educational needs and abilities. VMI's most striking pedagogical characteristic is known as the "adversative method," which features "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of desirable values . . . hierarchical class system of privileges and responsibilities."[71] In describing the adversative method, the district court explained that it "'dissects the young student' and makes him aware of his 'limits and capabilities,' so that he knows 'how far he can go with his anger, . . . how much he can take under stress, . . . exactly what he can do when he is physically exhausted.'"[72] This educational approach matches men's greater comfort level with hierarchy, rule-based systems, and confrontational modes of behavior. Intellectually, it suits men's propensity to be "separate knowers." Just as the adversative method matches men's intellectual propensities, VMI's athletic standards were developed to match the typical man's physical abilities. As the district court explained, standards for physical fitness were such that 85% of the men (but only 5% of the women) could perform jobs requiring aerobic capacity, 95% of the men (but only 15% of the women) could achieve medium aerobic capacity,[73] 80% of the men (but only 7% of the women) could achieve high maximal lifting standards, and 100% of the men (only 50% of the women) could achieve medium maximal lifting standards.[74]

Rather than trying to minimize the masculine aura of VMI, Virginia's argument for excluding women relied on it. In its brief to the Supreme Court, Virginia argued:

> [T]he 'adversative' educational model has never been advanced by anyone as an appropriate paradigm for optimizing the development of women. Indeed, that system's inappropriateness 'is evident from its abandonment or substantial modification in such military settings as the federal military

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71. *Virginia*, 518 U.S. at 522, *quoting* United States v. Virginia, 766 F.Supp. 1407, 1421 (W.D. Va. 1991).

72. *Virginia*, 766 F.Supp. at 1421-22 (Testimony of Colonel N. Michael Bissell, the Commandant of Cadets at VMI). Colonel Bissell is the same man who smiles easily and worries a lot about that others think of him. *See supra* note 40.

73. *Virginia*, 766 F. Supp. at 1432-33.

74. *Id.* at 1433.

> academies and Virginia [Polytechnic] Institute following coeducation.' The Task Force found no evidence that an extreme adversative environment . . . is appropriate for young women.[75]

The conclusion Virginia drew from this state of affairs is not that VMI's methodology should be changed, but rather that women should continue to be excluded since they wouldn't fit in. This was the closed circle Gilligan and others had described. If the masculine format is incompatible with women, do not change the format—eliminate the women.

Once the litigation began, Virginia no longer had the luxury of ignoring its female population. The Fourth Circuit ordered Virginia to provide military education for women by either admitting women to VMI or developing a women's equivalent to VMI.[76] So at the behest of VMI's alumni, Virginia established a Task Force to develop a separate women's institution.

The Task Force was well versed in difference feminism. It took the position that there was no inherent incompatibility between womanhood and soldier/citizenship but that the VMI model for producing fine citizen-soldiers was inapplicable to a female student body. The Task Force believed that VMI's adversative approach "is based on the premise that young men come with [an] inflated sense of self-efficacy that must [be] knocked down and rebuilt . . . . What [women] need is a system that builds their sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes."[77] Virginia Women's Institute for Leadership, therefore, substituted "a cooperative method [that] reinforces self-esteem" for of VMI's trademark adversative model.[78]

Virginia Women's Institute for Leadership is kinder and gentler than VMI. Whereas the barracks at VMI are spartan and striking in their lack of

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75. Respondents' Brief at 6, *Virginia*, 518 U.S. 515 (1996) (No. 94-1941) (quoting trial testimony).

76. Unites States v. Virginia, 44 F. 3d 1229, 1240 (4th Cir 1995).

77. *Id.* at 1234 (*rev'd by* 518 U.S. 515 (1996)). The adversative approach is quite controversial. VMI insisted that it was the key to its success, although every other military academy has rejected it. In their Supreme Court amicus brief, a group of high ranking women in the military equated it simply with hazing. The brief said that VMI's

> dedication to the use of hazing, or the extreme adversative methodology . . . is an abusive method of imposing stress on cadets, but it is an artificial stress, not a real-life or combat-type stress. VMI has failed to show there is a substantial relationship between its goal of producing 'citizen-soldiers' and the means exercised to fulfill this objective. As evidenced by the service academies, training future leaders can be accomplished without the use of adversative training.

Brief of Amicus Curiae Lieutenant Colonel Rhonda Cornum, et al. at 11-12, *Virginia*, 518 U.S. 515 (1996) (No. 94-1941).

78. *Virginia*, 518 U.S. at 527.

privacy (intended to deter or facilitate detection of honor code violations), VWIL living quarters are more comfortable and less regimental. Unlike VMI cadets, VWIL students are not required to buzz-cut their hair nor to wear uniforms during the day. While VMI's military format includes regular drills, VWIL's military training is a mostly ceremonial Corps of Cadets. And unlike VMI, participants in the VWIL program must minor in leadership studies and "take courses in leadership communications; theories of leadership; ethics, community, and leadership; and a leadership seminar or semester of independent research on a topic relevant to women and leadership."[79]

Virginia presented this plan to the courts as a way make everyone happy. The men would get their "hyper-masculine"[80] VMI to themselves, and the women would get a separate but comparable institution, as suited to their distinctive qualities as VMI is to men's.

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79. *Virginia*, 44 F.3d at 1234. There seems to be some confusion surrounding the available majors at Mary Baldwin College (MBC). The Supreme Court said "Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. [citation omitted] A VWIL student seeking to earn an engineering degree could gain one, without public support, by attending Washington University in St. Louis, Missouri, for two years, paying the required private tuition." *Virginia*, 518 U.S. at 526. Respondents asserted in their brief: "MBC offers 28 undergraduate majors, including degrees in mathematics, the sciences, business, and the arts, and also offers pre-law and pre-med programs and a joint-degree engineering program with the University of Virginia." Respondents' Brief at 3, *Virginia*, 518 U.S. 515 (1996) (No. 94-1491). In addition, VWIL students:

> are required to complete four years of ROTC, which is now offered through cross-enrollment agreements between MBC and the ROTC units at VMI . . . . VWIL students use the same ROTC curriculum, methods, and physical training and evaluation activities, and receive the same leadership training and military career opportunities, as all other ROTC students.

Id. at 8. VWIL students also complete eight semesters of physical and health education and training which is "based on the VMI physical education program [and] is designed to be comparable in rigor and challenge to the physical training test for men at VMI [citation omitted] [and to] produce women who are capable of serving physically in the military service." *Id.* at 9. Students also "take a strength and endurance test each semester based on the national military standards for women . . . [and they] receive special "training in self-defense and self-assertiveness" as part of a Leadership Challenge Program. *Id.* The various opinions and briefs also describe many other aspects of the VWIL experience, from living conditions to the assignment of military rank, some of which differ substantially and some only minimally, if at all, from VMI's approach.

80. Cynthia Fuchs Epstein, *The Myths And Justifications of Sex Segregation in Higher Education: VMI And The Citadel*, 4 DUKE J. GENDER L. & POL'Y 101, 111 n.76 (1997) (citing Susan Faludi, *The Naked Citadel*, THE NEW YORKER, Sept. 5, 1994, at 64).

B. Difference Denied

The Supreme Court emphatically rejected Virginia's plan precisely because of the differences between VMI and VWIL that the Task Force had worked so hard to design.[81] The Court was correct in unambiguously denying Virginia's authority to exclude women from what it called "an extraordinary educational opportunity,"[82] finding that VMI's mission is "broad enough to accommodate women."[83] The Court wisely recognized that VMI is not for all women, but neither is it for all men. As long as some women are capable of succeeding there, they should not be denied the opportunity to do so.

Furthermore, the Court was correct in its factual assessment of the VWIL program. In no way were VMI and VWIL comparable, let alone equal. The inequality is due in part to VMI's reputation (along with its stratospheric endowment[84] and its highly-developed alumni network) having grown over 150 years, while VWIL was starting from scratch. VMI is a proven quantity. As the Court explained: "VMI has notably succeeded in its mission to

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81. *Virginia*, 518 U.S. at 515. Justice Ginsburg wrote for herself and five other justices. Chief Justice Rehnquist wrote a separate concurrence. Only Justice Scalia dissented. Justice Thomas did not participate.

82. *Id.* at 517. Nowhere does the Court's opinion mention that VMI is in fact not at all selective. For instance, the average combined SAT score of incoming freshmen is 930.

83. Indeed, VWIL adopted VMI's mission, changing it only in ideological, gender-neutral ways. VWIL's mission is "to produce 'citizen-soldiers' who are educated and honorable women, prepared for the varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service." Respondents' Brief, *supra* note 75, at 7. VMI's mission is to "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.'" *Virginia*, 766 F.Supp. at 1425. (quoting MISSION STUDY COMMITTEE OF THE VMI BOARD OF VISITORS, Report, VMI Ex. 40 (1986).

84. The Court noted that "VMI's endowment reflects the loyalty of its graduates; VMI has the largest per-student endowment of all public undergraduate institutions in the Nation." *See Virginia*, 518 U.S. at 520.

> "Although Virginia has represented that it will provide equal financial support for in-state VWIL students and VMI cadets, and the VMI Foundation has agreed to endow VWIL with $5.4625 million, the difference between the two schools' financial reserves is pronounced. Mary Baldwin's endowment, currently about $19 million, will gain an additional $35 million based on future commitments; VMI's current endowment, $131 million—the largest per-student endowment in the Nation—will gain $220 million."

Id. at 522. (Citations omitted).

produce leaders; among its alumni are military generals, members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals."[85] Virginia Women's Institute for Leadership has no alumnae, has no loyalty on which to build, and has no laurels on which to rest.

Certain tangible disparities capable of objective measurement also precluded any favorable comparison between VMI and VWIL. According to the Court:

> Mary Baldwin College, whose degree VWIL students will gain, enrolls first-year women with an average combined SAT score about 100 points lower than the average score for VMI freshmen. The Mary Baldwin faculty holds 'significantly fewer Ph.D.'s,' and receives substantially lower salaries than the faculty at VMI.[86]

In addition, the Court continued:

> For physical training, Mary Baldwin has two multi-purpose fields and [o]ne gymnasium [citation omitted]. VMI, [by contrast], has an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track.[87]

Although it is certainly possible that VWIL could develop a program comparable to VMI's, there was no evidence as to whether, how, or when this would happen. Nor could there be since it would be purely speculative. The Constitution guarantees more than the speculation of equality.

As this factual analysis indicates, the Court did not hold that separate institutions for men and women are inherently unequal; instead, it invalidated this scheme because of the actual disparities between the two schools. Thus, the Court brought gender jurisprudence up to where its race jurisprudence was in about 1950—separate but equal may be constitutionally permissible but is subject to detailed, factual scrutiny. While the Court may be applauded for not deciding the case more broadly than was necessary, it may also be chastised for its ambivalence: in *Virginia*, the majority comes razor-close to finding gender separation to be inherently unequal, but holds back.[88]

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85. *Id.* at 520.

86. *Virginia,* 518 U.S. at 551, *citing* 852 F. Supp., 471, 502, *and* Transcript at 158 (testimony of James Lott, Dean of Mary Baldwin College).

87. *Virginia*, 518 U.S. at 522.

88. In fact, Chief Justice Rehnquist's concurrence noted that, although the Court would deny it, its approach "necessarily implies that the only adequate remedy would be the admission of women to the all-male institution." *Id.* at 565.

The Court's resistance reflects society's ambivalence about gender differences; unlike the situation confronting the *Brown* Court, there is no moral imperative mandating one conclusion or the other. While there was certain moral opprobrium attached to the insistence on racial differences, the same simply can not be said of the theory of gender differences.[89] The *Virginia* Court openly accepted that there are "inherent" differences between men and women that may sometimes be relevant to a particular governmental purpose:

> "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," *Califano v. Webster*, 430 U.S. 313, 320 (1977) (per curiam), to "promot[e] equal employment opportunity," *see California Federal Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, *see Goesaert*, 335 U.S., at 467, to create or perpetuate the legal, social, and economic inferiority of women.[90]

Whether a program like VWIL is designed to promote equal opportunities for women or to perpetuate the inferiority of women is going to be difficult to discern in any case,[91] and although the Court left the door

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89. Gender discrimination has always had a dual nature that does not attach to race discrimination. While it could legitimately be argued that some forms of separate spheres ideology benefitted women (wage and hour regulations, for instance, or the exclusion of women from the draft), it could never be argued that segregation put blacks on pedestals. Thus, in the 1990s, our society no longer argues about the morality of race discrimination but simply about the proper way to eradicate it, while we still assume the morality of some gender separation and argue about its proper place. In other words, while separate bathrooms for blacks and whites is universally condemned, separate bathrooms for men and women is universally accepted.

90. *Virginia*, 518 U.S. at 533-34.

91. This is especially true for a court that professes to be unable to distinguish affirmative action from invidious discrimination. *See* Metro Broadcasting v. F.C.C., 497 U.S. 547 (1990) (Kennedy J. concurring.) (comparing American affirmative action programs with South African apartheid). The VWIL case presents a particularly confounding situation: The Task Force was guided by the principles of Carol Gilligan but funded by the pocketbooks of the VMI Alumni Association determined to do whatever is necessary to maintain the exclusion of women at VMI. *See* Valorie K. Vojdik, *At War: Narrative Tactics in The Citadel And VMI Litigation*, 19 HARV. WOMEN'S L.J. 1, 1-2 (1996) ("Rather than admit women, South Carolina and Virginia proposed the establishment of separate, non-military, programs for women at private women's colleges, financed primarily by $13 million in funds from Citadel and VMI alumni."). *See also Virginia*, 518 U.S. at 527 (noting the VMI Foundation's pledge of $5.5 million to the VWIL endowment).

open for future challenges, it is not open very wide. Absent exceedingly persuasive justification (and presumably only those enumerated in the quoted passage will do), a state will be unable to use gender as a basis for differentiating among its citizens. Rather, the state must act on the assumption that women can do anything men can do and are entitled to anything men are entitled to. Thus, if the state provides an "extraordinary educational opportunity" for men, it must make that opportunity available to women on equal terms. In this case, VMI was left with two equally unattractive alternatives. It seriously considered forgoing public funds before deciding (by a closely divided vote) to stay public at the cost of admitting women.[92]

C. *The Need For a New Theory*

Both the state's approach and the Court's response are susceptible to criticism. Virginia Women's Institute for Leadership was an unworkable solution because it relegated women to the sphere of VWIL and prevented women from competing on the same terms as men. This, of course, perpetuates separate spheres ideology, which reinforces the belief that women are not as capable as men. The problem with the Court's decision, however, is that channeling women into VMI means that they will be measured by male standards where only the most extraordinary women (i.e. the most masculine women, like the most masculine men) will succeed. This channeling perpetuates the foibles of the modern women's movement and reinforces the need for women to assimilate into the masculine world, with the concomitant loss of women's distinctive traits, but with no concomitant transformation of the public world. In order to succeed by the male standards, VMI women have to work extremely hard, harder in fact than their male counterparts since the standards are designed for the men, not the women. Women who are most like men—rule-based thinkers, separate knowers, self-directed—are most likely to succeed.[93] Others will have even further to go.[94]

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92. "Unlike The Citadel, which announced within days of the ruling that it would begin accepting women, VMI flirted with trying to raise enough money to avoid coeducation by making the school private. But even after the board of visitors voted 9-8 to admit women, it postponed the women's arrival until August 1997." Allison, *supra* note 56.

93. In other words, the law continues to be made for people like the lawmakers. When the lawmakers were all male, the law was for men. Now women are among the lawmakers, but they are by no means typical women: the law is now being made by and for typical men and extraordinarily masculine women.

94. The parallel to the women's movement is clear. Women who want a good military education but do not want to be sufficiently masculine to succeed at VMI are left behind, just as women who would prefer to be homemakers and full-time mothers feel left behind by the

In contrast to the amount women will have to change to succeed at VMI, VMI is expected to change little in order to educate women. The Court rejected Virginia's argument that admission of women would require fundamental and radical changes that would benefit neither sex, partly on the ground that this was merely a self-fulfilling prophesy, partly because it recalled previous attempts to justify exclusion of women from schools and professions, and partly because it simply did not believe the argument. The school's current mission, the Court believed, is broad enough as is to accommodate women.

Indeed, VMI has changed little in preparation for its first female cadets.[95] Unlike the other military academies, it is not changing the physical standards by which it tests all cadets nor its requirement that first year cadets buzz-cut their heads. Also, unlike other military academies, VMI is not changing its rule prohibiting bedrooms from being locked.[96] The theory seems to be that to change anything for the women would deprive them of the pride they feel in their accomplishment.[97] That is, the pot of gold is only valuable if men are competing for the same pot. Moreover, the changes VMI has agreed to are largely, and sometimes literally, cosmetic: more lighting, more emergency phones, new rules about folding bras and pantyhose, and feminine hygiene products in the student store.[98] Women's experience at VMI will parallel (though perhaps in a more intense way) women's experiences as they have integrated all sorts of previously male bastions: their distinctively feminine qualities will dissolve as they learn to think and act like men.[99] Furthermore, if the thesis of *Women's Ways of*

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women's movement whose primary achievement was to ensure women's place in the professions.

95. VMI spent six years and $5 million to fight the admission of women; it spent $5 million to accommodate women.

96. Women at other military academies have emphasized the importance, to their physical safety, of being able to lock their doors.

97. VMI did not tailor its physical requirements to the average woman's physique because it would demean women to do so. VMI's dean of the faculty was quoted as saying: "I think [the female cadets] would feel themselves demeaned by a relaxation of the standards that this school traditionally has imposed on males." Abrams, *supra* note 56. *See also* Matt Chittum, *VMI Reflects on Year of Controversy And Milestones: 'I Think We're a Little Bruised, And a Lot of That Is Unfair,' Says Alumnus*, THE ROANOKE TIMES & WORLD NEWS, May 16, 1998 at A1.

98. Elaine Donelly, *Raising the Curtain at a New VMI*, THE WASHINGTON TIMES, August 22, 1997 at A16 (noting that VMI plans to implement a "minimal changes" policy); Wes Allison, *VMI Finalizes Plans for First Female Cadets: Gender-Specific, True to Tradition*, RICHMOND TIMES DISPATCH, May 29, 1997 at B1 (listing some of the changes VMI planned to make).

99. Oddly, perhaps, these women are unlikely to be lauded for their efforts which are so much more impressive than those of their male counterparts simply because the

Knowing is correct—that women are more likely to be connected knowers and respond better in environments conducive to connected knowing—then the women who attend VMI are likely to find themselves disconnected, not just socially (because they are so dramatically outnumbered by men) and not just physically (because the physical standards imposed on them were developed for typical male physiques), but intellectually as well. Precisely in the area where women have the greatest opportunity to shine and to minimize differences between them and their male counterparts, women are likely to find imperceptible but palpable barriers to the extent that teaching is conducted in a separate, rather than a connected, style. By contrast, descriptions of VWIL's learning environment fairly exude connected learning. Again, those women for whom separate knowing is most natural will thrive at VMI, while those women who more typically rely to a greater extent on connected knowing will have to suppress what is natural for them in order to succeed at VMI. In contrast, men, who are more likely to use separate knowing procedures, are likely to instinctively feel comfortable in VMI's adversative environment.[100]

This phenomenon of having to suppress feminine instincts in order to succeed in the public world has been explored in a surprisingly wide range of institutions. It is by now common knowledge that the process of learning

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environment is not as comfortable for women, just as women who can succeed in male-oriented businesses are stopped by the glass ceiling rather than being praised for their super-achievements. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). If it is difficult to survive at VMI when you start out male, it must be infinitely more difficult when you start out female. Yet, these women are looked upon by their male colleagues as unnatural aberrations—as if the men simply don't know how to categorize women who can play their game because that's not what women are supposed to do. The revolting harassment that Shannon Faulkner endured during her short stay at the Citadel illustrates this; among the least offensive placards was one referring to "Mrs. Doubtgender." *See* Valorie K. Vojdik, *At War: Narrative Tactics in The Citadel And VMI Litigation*, 19 HARV. WOMEN'S L.J. 1, 14-15 (1996). Professor Vojdik called Faulkner and others in her situation "gender outlaws."

100. That the adversative method is simply a method, not a substantive value to be learned, does not lessen its impact on the educational environment of VMI students. Method not only conveys substantive values, but often conveys substantive values that are antithetical to women. As Mary Daly (no relation) has written: "The tyranny of methodolatry hinders new discoveries . . . . Under patriarchy, Method has wiped out women's questions so totally that even women have not been able to hear and formulate our own questions to meet our own experiences." *cited in* ADRIENNE RICH, *Toward a Woman-Centered University*, *in* ON LIES, SECRETS, AND SILENCE: SELECTED PROSE 1966-1978, 141 (1979). In this view, "methodolatry" in general is a prime vehicle for suppressing feminine instincts. It is effective because it appears so neutral and objective that it becomes acceptable to the point of imperceptibility. This notion has particular relevance for the women at VMI — the only public college in the nation wholly committed to the adversative method. If Method is generally a force to be reckoned with, then the adversative method must be nearly insuperable for women, given its incongruity with many women's ways of knowing.

to think like a lawyer, for instance, is a process of learning to think like a man,[101] which some might equate with simply learning to think.[102] One way of measuring the extent to which educational institutions reflect and reinforce male but not female values is by looking at the transformations that men and women experience as they participate in supposedly neutral endeavors. For instance, one study showed that female law students radically change their approach to solving moral/legal questions during the first year, while male law students do not change their approach; that is, law school seems to be having a strong effect on women's thinking but not on men's. [103] The same results can be seen from the perspective of the institutions. Here the question is if men's institutions reflect men's values, then how much do mixed institutions reflect the values of both men and women? The answer, it seems, is not very much.[104] These studies show that the typical educational institution is not substantially different whether it is all male or coeducational (although presumably, these are substantially different from a program like VWIL which was designed not just for women but deliberately incorporating feminist tenets.)[105]

Significantly, the Court did not compel women to go to VMI; VWIL is still a viable option for women seeking military education in Virginia. However, by emphasizing the extraordinary quality of VMI and holding that the women's version was not a constitutionally adequate substitute, the

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101. GUINIER, *supra* note 9.

102. The connection in the popular imagination between women and irrationality has been extensively documented. As Sara Ruddick has written, "Women's relation to reason is notoriously troubled," citing Immanuel Kant's quip that "a wom[a]n who thinks might as well wear a beard." SARA RUDDICK, *Reason's Femininity: A Case for Connected Knowing* , *in* KNOWLEDGE, DIFFERENCE, AND POWER, *supra* note 65, at 248, 249. Justice O'Connor has cited Clarence Darrow's comments to a group of women as typical of the prevailing nineteenth century view of women: "You can't be shining lights at the bar because you are too kind. You can never be corporation lawyers because you are not cold-blooded. You have not a high grade of intellect. I doubt you can ever make a living." O'Connor, *supra* note 53 at 1548, *citing* Morello, *Bar Admission was Rough for 19th Century Women*, N.Y.L.J., May 13, 1983.

103. *See* Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193 (1991).

104. *See generally* NANCY LEVIT, THE GENDER LINE (1998) (describing studies showing that men get as much out of university whether it is coeducational or only for men, suggesting that even a coeducational institution is primarily responding to men).

105. *See generally* RICH, *supra* note 100 (offering insightful thoughts about what a non-patriarchical university might entail). Although the essay is now 25 years old, it is still current. This is, of course, unfortunate: one would hope that after 25 years of feminism, radical feminism, post-feminism, and feminist backlash, we would have progressed beyond the concerns that Rich addresses such as child care, educational hierarchy, the absence of female role models for students, etc., but apparently, we have not.

Court suggests that VMI is without question the better of the two. By holding that women's rights could be vindicated only by admission to VMI on the same terms as men, the Court reinforced the same values that the women's movement first articulated. The qualities to be emphasized are qualities traditionally associated with men and traditionally assumed to be lacking in women; feminine qualities are not relevant to success and ought to be suppressed. The goals to be attained are male-defined goals; the goals of a women's institution are not worth attaining. Women's success is measured by standards that were set by and for men; success by women's standards, in women's contexts, is not real success.

The preference for male values in male institutions reinforced the conventional submersion of distinctively feminine qualities to the detriment not just of those possessing such qualities but of institutions as well. For instance, one argument supporting the admission of women to VMI was that male cadets who join the service need to learn how to work with and for women since there are now women at all levels of the armed forces.[106] While this argument is compelling, it is unclear how well the male cadets will learn these lessons when they are exposed only to the most masculine of women who survive the hyper-masculine environment of the unliberated VMI. Nor is it clear that the adversative, hyper-masculine environment is best suited to train anyone for any aspect of military or civilian experience. In fact, West Point has suggested that softening its approach for all cadets, albeit in response to women's admission, is helping it produce better and more reliable citizen-soldiers.[107]

For reasons that the VMI case makes clear, neither alternative—exaggerating gender differences or denying them—is acceptable. Denying gender differences is unrealistic and not even normatively appealing. Do we really want to be all one gender? Furthermore, as extensive criticism of the formal equality model has demonstrated, a paradigm that denies difference helps only those women who already are most like men (those women who, presumably, are least in need of judicial indulgence) while the women who are least able to negotiate the public sphere because they are least like men are left to fend for themselves. Yet,

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106. "If VMI's purpose is to train leaders in the community, it should be training its cadets to function in a mixed-gender social and political world. A coeducational VMI experience would provide better training for military service, as well as for leadership in both the business and political arenas." Brief of Amicus Curiae Lieutenant Colonel Rhonda Cornum, *supra* note 77, at 14-15.

107. "General St. Onge hears from old grads that West Point has been 'weenified.' 'I tell them, the kids perform at a high level—you've seen the numbers . . . What do they want? To reintroduce mean-spiritedness, viciousness, dysfunctional leadership? That's total [expletive].'" Michael Winerp, *The Beauty of Beast Barraks*, N.Y. TIMES, Oct. 12, 1997 at 49. *See also* LEVIT, *supra* note 104.

exaggerating difference is equally problematic. Although differences may exist between average women and average men, there is nothing to be gained by planting differences where they do not already exist, particularly when the public world values primarily those traits associated with men. Therefore, emphasizing the differences between men and women disserves women. This is particularly true where, as here, the difference is rooted in physiological and social differences.[108]

IV. TRANSCENDING GENDER

A. Difference Without Gender

Surprisingly, Carol Gilligan, whose controversial work gave rise to this conundrum by reviving the notion of distinct characteristics associated with gender, may also provide a solution to it. *In A Different Voice* can easily be read as correlating personality type with gender; its subtitle, after all, is "Psychological Theory and Women's Development."[109] The better reading of her work, however, is to treat the personality types described therein as just personality types, not distinctions along gender lines. Gilligan herself encourages this reading:

> The different voice I describe is characterized not by gender but theme. Its association with women is an empirical observation, and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex. [110]

Thus, these different personal styles do not necessarily correspond to gender differences. More men congregating at one end of the spectrum and more women at the other end should not detract from the fact that men and women can be found on both sides and even at both ends. Indeed, the approach I advocate is far more consistent with what is actually known about gender differences, once one removes what is most controversial.

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108. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (referring to "the basic concept of our system that legal burdens should bear some relationship to individual responsibility.")

109. GILLIGAN, *supra* note 6.

110. *Id.* at 2. This disclaimer was insufficient to overcome the general understanding of her work as gender-defined. Interestingly, the authors of *Knowledge, Difference, and Power* also try to suggest that the differences they document do not correlate perfectly with gender. *See* KNOWLEDGE, DIFFERENCE, AND POWER, *supra* note 65, at 7.

There is little dispute that learning styles vary. There are different ways of communicating, of understanding the world, of prioritizing; some people are clearly more self-confident than others, some more comfortable with rules than others, or with physical and mental challenges, while others are more comfortable with supportive and encouraging environments. Few would argue that there is only one, or only one valuable or correct, way of learning.[111]

The disagreement is about the degree to which these differences correlate with gender. Some studies show significant correlation—most women learn this way and most men learn that way. Other studies show virtually no gender correlation, especially after one accounts for other socio-economic factors. Studies that show gender correlation tend to show it at the margins: the center of the continuum is mixed, while at the edges one sex may predominate.[112] Thus, knowing someone's gender does not reveal very much about the person's learning style nor will knowing the person's learning style reveal his or her gender. Even those who believe that gender is highly relevant seem to agree that *some* people will not fit the stereotype: VMI and the district court acknowledged that some women could succeed at VMI, suggesting that there is no one-to-one correlation between maleness and suitability to become citizen-soldiers.[113]

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111. Various claims along these lines could be made. For instance, one might argue that the ethic of justice is simply superior to the ethic of care. This would seem to reflect our culture's current value system which prefers male traits to female traits. One might also argue that the ethic of care is superior. Or that the two are equally valuable. The limited claim that I am making is that there are valuable aspects of both, and in the best of all worlds, we would recognize and value the best that each has to offer. This claim recognizes that an excess of care, untempered by justice, just like an excess of justice untempered by care, might lead, and in the latter case, I believe, has led to unfortunate results. I point this out just to indicate some alternative formulations although the development of these is far beyond the scope of this article. Many others have explored these questions. *See* WEST, *supra* note 39.

112. "Even observers of average differences do not claim a causal relationship between sex and specific behaviors or dispute the substantial overlap between the sexes." *See* AAUP Brief, *supra* note 8, at 10 n.33: "Many individuals of both sexes do not conform to the "average" for their sex." *Id.* at 10. "Given the wide within-sex variation in virtually every trait or behavior associated with gender stereotypes, overgeneralization is axiomatic." *Id.* at 11. "There are no psychological, behavioral or cognitive traits in which males and females do not overlap, and in most cases the area of overlap is larger than the area of difference." *Id.* at 13.

113. This might suggest that one way to characterize the difference between the district court and the Supreme Court is that the former ruled on behalf of the average person, while the latter ruled on behalf of the extraordinary person. Given that Supreme Court Justices, and especially the author of this opinion, are not *average* people, this may not be surprising. On the other hand, this reading disparages the opinion. What is valuable about the opinion is not that it gives a very few extraordinary women an extraordinary educational

Gender-based laws that are intended to reflect these "real" differences eliminate the balanced center and push everyone to the edges. All women and all men get treated like the most extreme examples of each group, and what used to be the extreme becomes the average. Such laws result in the hyper-masculinity of the Citadel and VMI. In response to Virginia's efforts to perpetuate hyper-masculinity and hyper-femininity, the Court denied that the Constitution recognizes any distinctively masculine or feminine traits at all. However, by denying the importance of gender, the Court denied the importance of difference; it got rid of the continuum altogether and let VMI stand virtually as the only point.

The better alternative would recognize difference without correlating it to gender. This does not mean that we should ignore women or questions relating to gender generally because that would repeat the same errors of gender-blindness that Gilligan and critics of formal equality have identified. Rather, we should look to women and to men to discover essential truths about personality differences, though we should not make the mistake, as VWIL did, of thinking that personality differences reveal essential truths about women. Recognizing difference in this context means looking beyond gender at differences in learning styles and psychological development: while some people learn better when tested by adversity, others are more productive when encouraged by nurturing. A theory of difference that transcends gender would acknowledge that these differences exist, and would value the diversity, but without hierarchy. If Virginia established a school for those who learn best through adversity, then, the equality principle would require it to establish an equally prestigious school for those who learn best through connections with others. The programs would exist without regard to the gender of the students. Both would be equally valued.[114]

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opportunity, but that it prohibits the state from proclaiming that no woman can be extraordinary.

114. Although this is not a particularly complex concept, many have found it hard to put into words. (The very absence of language to express this idea is perhaps one indication of how very gendered our culture is.) Some have suggested that the goal should be "to effect a truly *androgynous* work environment in which men and women are treated 'equally.'" Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L. J. 471, 476-77 (1990) (emphasis added). Professor Radford, herself, uses the italicized term "guardedly," *see Id.* at n. 22, for lack of a better term. It is problematic, first, to the extent that it suggests neutrality and that neutrality still suggests masculinity and, second, because it may suggest sexlessness—a middle ground that doesn't describe anyone. Rather, the point is to recognize "the strengths and weaknesses of both genders." *Id.* at n. 22. Again, Professor West has made the point well, in rejecting the androgyny label: feminist vision, she says, "is not necessarily androgynous; surely in a utopian world the presence of differences between people will be cause only for celebration [and] all forms of life will be recognized, respected and honored." Robin West, *Jurisprudence and Gender*, 55 U. CHIC. L. REV. 1, 72 (1988),

B. An Illustration or Two

One way to understand the concept of transcending gender is in terms of the argument made by Paul Bender, Deputy Solicitor General, who argued the case for the United States before the Supreme Court:

> QUESTION [SCALIA]: What is your basis for saying that the committee that set up this alternative institution, VWIL, decided not to have the same adversative method that VMI has because it thought women couldn't handle it, as opposed to the fact, which is what they said, that they thought not enough women would be interested in it?
>
> MR. BENDER: They said that it would not be appropriate—
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> QUESTION [SCALIA]: Which is not at all denigrating. It shows to my mind that they're pretty smart.
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> Mr. BENDER: The planning documents—
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> (Laughter.)
>
> MR. BENDER: say that it's not appropriate for most women. Our point is not—we don't quarrel with, because I think it's unknowable, whether it's appropriate for most women or not most women. Our point is that it is inappropriate to say to a particular woman who says I want that training, you can't have it solely because you're a woman.
>
> In thinking about this case, Justice Scalia, I've tried to relate it, as we're all trying to relate it to our own situations and things we're familiar with. I've tried to relate it to something that I've had some experience with, which is legal education.
>
> And I thought, what if a State set up a State law school in 1839, all for men, because at that time only men could be lawyers, and over 150 years it developed an extremely adversative method of legal education, the toughest kind of Socratic teaching, tremendous time pressures, tremendous pressures in exams, tremendous combativeness by the faculty, tremendous competitiveness among the students, and developed a reputation for that.
>
> And the graduates of that school—and it was a place that was known as hard to succeed at, and a third or so of the people flunked out in the first year, and the graduates of that school who survived that process became known as expert leading lawyers and judges in that State and Nationwide.
>
> And then as women came into the legal profession and started to apply to the school, to ask it to change its admission policy, the school made a judgment that most women really wouldn't be comfortable in this environment, and the faculty would have trouble cross-examining them in the same way they cross-examine women [sic], and other students would have difficulty relating to them in the same competitive way, and so it's better not to let women into the school.
>
> What we'll do is, we'll set up a new women's law school, and it won't have the tough Socratic method, it will have a much warmer, a much more

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quoted in Radford, *supra*, at n. 22.

embracing environment, and it won't have large classes with a lot of pressure, it will have seminars, and it won't have tough exams, it will have papers, and things like that—

(Laughter.)

MR. BENDER:—and every woman has to go to that law school, and no man can, and no woman can go to the old law school. I think we all understand that that is not by any means equal treatment of women with regard to their access to the legal profession.[115]

Mr. Bender's point is well taken because it is clearly a ridiculous response for the state to establish a warm and fuzzy law school just for women. Notwithstanding Justice Scalia's skepticism, the picture Mr. Bender draws illustrates that Virginia's treatment of VMI's female applicants is no more acceptable.

The progressive response, however, is that the two law schools may not seem so ridiculous if gender were removed from their mandate. Why not have two equally reputable law schools: one that produces brilliant and successful lawyers by emphasizing tough, adversarial questioning and pressured exam-taking experiences, while the other produces brilliant and successful lawyers by emphasizing independent thinking, cooperative learning, and individualized attention from professors. Some graduates of the latter school might turn out to be better advocates for their clients, more pleasant colleagues, and more effective partners, precisely because of, not in spite of, the skills they learned in law school.[116] In any event, is it likely that some men and some women might prefer the former educational experience while others would prefer the latter.

A hypothetical illustrates the point: suppose two high school seniors want to go to public college in their home state. Dana wants a school where students excel because they are pushed to their limits and constantly proving themselves to their peers and their superiors. Dana is happiest without many of the comforts of daily life, living spartanly in order to learn what the essentials are. Dana is competitive and learns best where students are treated absolutely equally (both physically and emotionally), so that no individual differences among students can be used to another's disadvantage. Dana is also most comfortable when the social hierarchy is clearly delineated so that one always knows where one stands. Luckily, Dana lives two miles

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115. Transcript of Oral Argument at 21-23, *Virginia*, 518 U.S. 515 (No. 94-1941).

116. Peggy Cooper Davis is currently involved in a project that is redefining what traits are necessary to good lawyering. *See also* Brief of Amicus Curiae Lieutenant Colonel Rhonda Cornum, *supra* note 77, at 6 n. 10 ("the qualities that are most important in all military jobs—things like integrity, moral courage, and determination—have nothing to do with gender." MAJOR RHONDA CORNUM, SHE WENT TO WAR 198 (1992)). Furthermore, the adversarial method may not be a very effective way to teach these qualities, and is certainly not the only way.

from the public and prestigious 150-year old University of Adversity. Dana gets admitted, and goes.

Dana's cousin, Alex, is looking for a different educational environment. Alex wants to go to school in a comfortable, supportive environment. Alex wants to develop helpful and encouraging relationships with peers and teachers. Alex has a lot of outside interests which can be developed and honed through school. Alex wants an eclectic group of friends who also have diverse interests and experiences and hopes that they will be able to learn from each other and build on each others' unique backgrounds. Unfortunately, Alex's state does not have a school like this. A neighboring state has a public school called the University of Connection, but Alex can not afford to go out of state.

Since Alex is fairly industrious, Alex tries to convince the state legislature to establish a University of Connection in that state but is unlikely to succeed for a variety of reasons that seem so entrenched that Alex feels powerless to change them. First, the University of Adversity is widely recognized as an extraordinary educational opportunity and, for 150 years, no one has seriously questioned its effectiveness. In fact, many of Alex's legislators are alumni of the University of Adversity; these men are not particularly sympathetic to Alex's claims about the efficacy of a school that devalues everything U. of Adversity is and that values everything U. of Adversity is not. The legislators' attitude, furthermore, is shared by their constituencies: society in general subordinates the substantive values that U. of Connection fosters (even though they are in fact universal human characteristics). This last fact makes lobbying very difficult because Alex is unable to effectively make alliances with like-minded groups—Alex has found like-minded organizations do not wield much power, and regretfully, the most effective allies are uninterested in Alex's plight. Yet, Alex tries tirelessly to convince state legislators that a state can foster and value two different educational styles, and that recognition of Connection's values does not detract from Adversity's reputation. Ultimately, Alex is forced to give up; the session ends at the start of hunting season and everyone leaves the capitol for a well deserved rest.[117]

Alex does what any dejected lobbyist would do: file a complaint in federal court alleging constitutional violations, especially under the Equal Protection clause. The claim is that, while the state promotes and fosters Dana's learning style, it does not promote or foster Alex's, thereby denying Alex equal treatment under the law.

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117. Alex's defeat in the legislature is not meant to be a serious response to the argument of Robin West and others about the viability of progressive legislation. While some of the obstacles Alex faces are serious and real, I identify them here just to raise the issues. I do not intend thereby to dispute West's position that legislatures may be more sympathetic than courts to certain progressive claims.

Before assessing Alex's chances of success, it is worth noting that this is a progressive claim in several ways. First, many of the substantive progressive values are consistent with the ethic of care and, therefore, with Alex's claim which seeks to get these values recognized and promoted at the institutional level. For instance, the premise of Alex's claim is that more than one type of educational setting is valuable;[118] in this sense, the claim promotes the diversity and plurality that is a hallmark of progressivism. Within the U. of Connection, furthermore, Alex's argument is that the substantive values taught therein—progressive values such as inclusion and difference-without-hierarchy—are worthy. In addition, the University of Connection takes the progressive view that human relationships are mutually supportive and enriching rather than competitive, adversarial, or distrustful.

Second, the basis of the claim is contextual in that it is consistent with reality as we currently understand it. Whereas the liberal inclination is to dichotomize constitutional principle and the real world (as evidenced, perhaps, by psychological or sociological data) as if the two were not only unrelated but downright incompatible,[119] the progressive inclination is to develop a legal culture that is more consistent with lived experience. If a significant portion of the population responds to Connection-style educational settings, then our laws should encourage, not impede, the development of these kinds of institutions, and the Constitution should be interpreted to promote them, and not to stand neutrally by.

Third, the claim asks what our institutions should look like. In this sense, it constitutes what Frederick Schauer referred to as a second order question, asking the court to focus on how we want to achieve our societal goals.[120] Like Schauer's argument, Alex's claim assumes, in part, that the traits that would be promoted at U. of Connection are indeed valuable[121]

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118. The claim is not that U. of Adversity should be struck down but that U. of Connection should be built up as well.

119. *See, e.g.*, "The lower courts should not be swayed by the easy answers of social science, nor should they accept the findings, and the assumptions, of sociology and psychology at the price of constitutional principle." Missouri v. Jenkins, 515 U.S. 70 (1995) (Thomas, J., concurring) (noting that *Brown I*, 347 U.S. 483 (1954), did not need to rely upon any psychological or social science research and that to the extent that it did (See *Brown I*, 347 U.S. 494, n.11), it should not have).

120. Frederick Schauer, *Constitutionalism, Progressivism, and Causality: The Empirical Dimensions*, presentation delivered on October 24, 1997 at the Widener University School of Law, Symposium: Is Progressive Constitutionalism Dead?(manuscript on file with the *Widener Law Symposium Journal*).

121. This assumption—that Alex's ethic of care is socially valuable—is not self-evident, given society's general preference for the ethic of justice (in terms of society's official attitude, as well as in terms of the ethic of care's (metaphorical and literal) cash value). However, it is also not correct to say that society denigrates contextual and relational values, as it does, say,

and asks how we can best achieve their promotion.[122]

Furthermore, and particularly relevant in the context of VMI, Alex's claim asks not only what kind of institutions we want, but what kind of *leaders* we want. Since VMI and explicitly VWIL are intended to produce tomorrow's leaders, the design of these institutions will certainly shape the kinds of people emerging from them. It seems a matter of common sense that, all other things being equal (assuming they could be), VMI graduates and VWIL graduates will have different styles of leadership. A whole class of VMI graduates would fight, lead, legislate, manage, and work in ways quite different than VWIL-trained fighters, leaders, legislators, managers, and workers. That is, in fact, the point of VWIL. It seems appropriate, even necessary, to ask then, what kind of leaders does society want? Does society want leaders well schooled in adversity, hierarchy, and equality to the point of anonymity, or does society want leaders well schooled in developing and nurturing support systems and independent study? Or both? Or a melding of the two? Asking a court to consider the establishment of a new type of educational institution forces it to confront these questions.

In all of these ways, Alex's claim is consistent with progressive tenets which explicitly reject neutrality and embrace certain substantive values. It seeks to promote Connection because of the valuable substantive qualities inherent in that approach by recognizing that acceptance of care is no less neutral than the state's current commitment to Adversity and perhaps more neutral in that it provides a balance.

Finally, Alex's claim is progressive in that it avoids some of the roadblocks of traditional liberalism that have impeded the progress of women and others who exemplify these Connection-style traits. The central feature of the claim is that while it emphasizes difference, it de-emphasizes gender and, specifically, the gender line that has proven to be conceptually so problematic to feminists. By focusing on personality differences rather than gender differences, Alex's claim avoids the endless debate over whether gender differences are caused by nature or nurture: the University of Connection does not care whether the environment or genetics accounts for a student's orientation toward care. The claim also avoids the debate over the extent of gender differences—whether the ethic

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criminality or immorality. Apparently, as VMI's consensus-building Mike Bissell has learned, the dichotomy is not between what we value and what we don't, but between what we say we value (hierarchic justice values) and what we say we don't (consensus-building care values).

122. For instance, is it better to foster an ethic of care by exposing people to it only in their private lives (by primary care givers, mothers, wives, friends) or is it appropriate or desirable to infuse public institutions with an ethic of care as well as to instill the notion that care-values have a place in the public sphere? Do we want the kind of public institutions that make explicit the relationship between care and the administration of our public lives? Or do we want our public institutions to reflect only an adversarial ethic of justice?

of care characterizes all women, whether it characterizes some men, and if there is no exact correlation, what do we do with the "aberrations"? Do we make these aberrations the norm, as the Supreme Court does,[123] or do we ignore them, as Virginia would have done? Finally, de-emphasizing gender avoids generalizations based on either what courts that accept them call "real" or inherent differences,[124] or on what courts that reject them call archaic and overbroad stereotypes. Saying "women are guided by an ethic of care" stereotypes and essentializes in a way that saying "some people are guided by an ethic of care" does not.

Ironically, it is precisely Alex's decision to de-emphasize gender that will prove fatal to the claim: the very thing that makes the claim progressive makes it constitutionally invalid. The Court's equality jurisprudence, emphatically including *United States v. Virginia*, makes gender (or race, if available) critical to the success of the claim because it raises the standard of review and shifts the burden of proof. In this case, because the line between the admitted candidates and the rejected candidates was explicitly a gender line, the Court required the state to produce an "exceedingly persuasive justification," a standard at least as high as the previous "intermediate scrutiny" and perhaps as high as strict scrutiny.[125] If the claim is made explicitly in terms of gender, then, the Court is highly skeptical of the state's actions. On the other hand, if the claim is made in terms of personality, the Court is likely to be deferential in the extreme. This is true even if the personality trait is predominantly associated with gender, so long as there is no absolute correlation. The assumption is that the Connection-type people of both genders have enough political clout to change the system, so long as their defining trait is not an immutable characteristic that has been the historical or current basis for discrimination. This premise may generally be true, except to the extent that connection or care correlates with women. It is particularly ironic because, while Justice Ginsburg may have thought she was promoting women's interests by raising the standard of review, she may have been retarding the interests of those whose interests are traditionally characterized as feminine, regardless of their gender.[126] Stated

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123. *See Virginia*, 518 U.S. at 550. "[G]eneralizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.*

124. *Id.* at 533.

125. The *Virginia* Court suggested, somewhat deviously, that the door to strict scrutiny for gender discrimination was still open. *Id.* at 532, n.6 ("The Court has *thus far* reserved most stringent judicial scrutiny for classifications based on race or national origin.") (emphasis added) *Id.* Justice Scalia noticed the majority's caginess about the appropriate standard of review referring to it as "Supreme Court peek-a-boo," "misleading," and "irresponsible, insofar as [the statements] are calculated to destabilize current law." *Id.* at 574.

126. The decision to raise the level of scrutiny may also harm women's interests (as such)

as such, as a gender-neutral claim with an implicit nod to women's ethic, Alex's claim is just as likely to fail in the judiciary as it did in the legislature.[127] The legislature would probably prefer an argument less rooted in women's ways of thinking while the judiciary insists that the claim be stated more explicitly in terms of gender.

C. The Progress of Progressivism: Statutory Styles

As the above hypotheticals suggest, it might be difficult to convince a legislature or a court that the Constitution *requires* it to order a state to formally recognize the ethic of care in its educational scheme or elsewhere. However, that is not to say that women's values are alien to our constitutional or legal culture. Comparing the traditional civil rights statutes with newer forms of legislative attention to social and economic rights illustrates how the government may transcend (though not ignore) gender, without even knowing it.

1. The Liberal Way

Our first true civil rights statutes, enacted by the Reconstruction Congress, were obviously intended to redress the continuing, post-bellum oppression of blacks. These were equality guarantees, rather than due process guarantees. For instance, they did not guarantee the right to make contracts so much as that same right to make contracts "as is enjoyed by white citizens."[128] Characterizing the right in this way did two things of

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in another way: since most explicit classifications now are affirmative action plans rather than examples of invidious discrimination, using stricter scrutiny may make those plans more constitutionally vulnerable than leaving the standard at the indeterminate intermediate level.

127. Alex's claim is likely to fail for additional reasons that have nothing to do with gender, but rather with other abstract principles deeply embedded in the legal fabric. These reasons, ranging from the reluctance of courts to grant this type of specific performance to federalism and separation of powers concerns about federal judicial interference with state educational systems, are probably self-evident and do not require significant elaboration.

128. Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981-1982 (1987)).

> Equal rights under the law: "(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C.A. § 1981. "Property rights of citizens. All citizens of the United States shall have

relevance here: first, it reinforced the color line, and second, it established a white standard. There were, of course, many other implications, but this essay focuses on these two because of their continuing relevance to the way society thinks about equality.

The first implication, the further entrenchment of race, indicates that the primary, or perhaps sole, purpose of the Civil Rights Acts of 1866 was to remedy the legal and/or social imbalance between blacks and whites in the 1860s. Congress was not concerned with redefining what the right to contract or the right to litigate actually entailed, nor was it concerned with other kinds of imbalances, such as between men and women or the rich and the poor. For obvious historical reasons, this single-mindedness is not to be criticized, but it is worth recognizing because of its continuing influence. Indeed, the Reconstruction Civil Rights Acts have served as blueprints for subsequent civil rights acts and so the emphasis of the earlier laws continues to define our approach to civil rights. Subsequent civil rights laws, notably in Title VII, continue to reinforce the specific lines of division that are enumerated therein, although now the list has expanded to include gender, national origin, and religion.[129]

Perhaps there is nothing startling or troubling about this: these laws are anti-discrimination laws, after all, and their primary emphasis should be to cure discrimination. Since discrimination is the over-emphasis of a particular trait, the argument goes, our civil rights laws should remove the most suspect traits from consideration. This logic is unobjectionable, as far as it goes,[130] but the problem is that we have pushed the logic to places

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the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C.A. § 1982.

129. *See, e.g.*, 42 U.S.C.A. § 2000e-2 (1994).

> Unlawful employment practices. (a) Employer practices: It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

State and local civil rights laws, of course, have expanded the list of what have become known as protected categories to include, for instance, veteran status, family status, and sexual orientation, among others.

130. This discussion is not in any way a criticism of the Civil Rights Act of 1866. It is, rather, a plea to reconsider the perhaps unthinking reiteration of the form of nineteenth century statutes to correct twentieth and especially twenty-first century problems. The point is not whether the Reconstruction Congress was sufficiently progressive but whether the

where perhaps it ought not be. Indeed, as suggested above, the backbone of the Court's current constitutional equal protection jurisprudence incorporates the emphasis on certain "immutable" characteristics; by according strict scrutiny to decisions based intentionally on race and (especially under *United States v. Virginia*), gender (and a few others) the Court entrenches the importance of these traits.

A progressive rejoinder might emphasize, however, that now unlike in the Reconstruction period, or even in the more recent past, most of the inequalities that people face are not pure and simple problems of discrimination based on some visible and immutable characteristic. High school girls seeking rigorous education, for instance, are disadvantaged only in small part by explicit exclusionary policies; they may also be disadvantaged by biased tests, teachers and parents having low expectations of them, institutional pressure to pursue humanities rather than sciences, lack of information about avoiding pregnancy, societal pressure to emphasize beauty rather than academic achievement, and economic needs to work rather than go to school. Furthermore, some of these obstacles may cross gender lines, and may interfere with the ability of all poor people, all non-whites, or all kids of distracted parents to excel academically. By the same token, women seeking employment opportunities are burdened not just by explicit discrimination ("I won't hire you because you are female"), but also by a web of obstacles including the need or desire to have children, the need to have reliable, safe and affordable child care, the need to work flexible hours, the need to develop suitable networking techniques,[131] and the need to develop appropriate styles of professional behavior,[132] etc. Again, not all of these obstacles affect all women or women exclusively. The problem is not just pure and simple gender discrimination. Laws that fix only the discrimination are not fixing the whole problem. To the extent that our civil rights laws and equality jurisprudence still reinforce certain lines of division, they may be attacking only one small part of the problem. The progressive response would first define the problem more broadly and then seek a more holistic solution. What makes the current institutional environment less effective than it might be? Who is served by this institution and who is not? What changes can be made to make it more productive for everyone?

The second implication of the form of the old civil rights laws that I

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current and future Congresses are and will be, and how we should encourage them to be.

131. A partner at my former law firm used to point out that while the male partners touted big lunches with potential clients as effective rainmaking techniques, this was not effective for women—lawyers or clients—few of whom ever take the time for lunch. The old favorites have to be re-examined.

132. *See Hopkins*, 490 U.S. 228 (1989). *See generally* Radford, *supra* note 114 (analyzing three cases of gender stereotyping creating obstacles to professional advancement).

would like to address here is the standard by which justice is measured. Under the Civil Rights Act of 1866, everyone—specifically blacks—were entitled to whatever whites had. Whites had as much as anyone was entitled to. What whites did not have—what whites did not need—was more than anyone should ask for. Whites did not need law's *special* attention; they had its general attention. They did not need the kind of help that a newly freed tenth-generation former slave needs (or now that a fifth-generation welfare recipient needs). They did not need the government to give them material goods because the private market was established to provide material goods for them. They needed only to be treated fairly, equally, and largely left alone. Since government is more likely to interfere in the affairs of the privileged than to intercede on their behalf, the less government the better. All that is needed is negative liberty and formal equality. Even in laws written expressly for blacks, the standards were set by and for whites. [133]

More than 100 years later, the Supreme Court's assertion of formal equality is of the same mold. Men set the standard at VMI and women are entitled to everything that men have, namely admission to VMI, and nothing more. Men need challenge, they don't need privacy. Men can feel confident that the institution will not interfere with their ability to achieve but are not entitled to affirmative assistance. The changes that VMI did make are consistent with the liberal ethos: sexual harassment seminars to guarantee that neither men nor women shall be harassed and, presumably to limit institutional liability of VMI for allowing harassment: formal equality, negative liberty. Virginia Military Institute, the Court says, should not change to reflect its new constituency any more than the substance of constitutional rights should change to reflect the Constitution's new constituencies. Any needs that are distinctively those of the newcomers are not recognized in the law because distinctions render formal equality inapplicable.

Again, a progressive response might look not just at the discrimination but at the implications of the discrimination. If the problem is that blacks cannot contract freely, then perhaps the crucial guarantees are the preconditions to free contracting, not just the removal of state-sponsored

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133. To the extent that modern civil rights legislation (such as Title VII) does not suffer from this defect because it does not incorporate the white standard, it may give rise to the problem of competition for rights. Under the Civil Rights Act of 1866, it was clear that whites could not realistically sue not just because the legislative intent was to protect blacks but because a white person, by definition, enjoyed whatever rights a white person enjoyed. Under the current approach, anyone can seek to be a protected class, and this of course, leads to the currently popular argument that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." *Peña*, 515 U.S. 200, 201 (1995). Everyone wants what everyone else is perceived as having.

racial discrimination which may only be one part of the problem. Perhaps the preconditions for women's success at VMI need to be re-evaluated and, more generally, the preconditions for success for all people under the Constitution. This approach would obviously entail more than mere minimalist state neutrality.

2. The Progressive Way: The Future is Here, and There

Two recent legislative initiatives suggest that the ideas espoused here are not as far-fetched as might first appear. Perhaps the most prominent example of an American statute that solved a problem in a way that transcended gender without ignoring it is the Family and Medical Leave Act of 1992 (FMLA).[134] This law requires employers to provide "a total of 12 workweeks of leave during any 12-month period" because of the birth or placement for adoption or foster care of a child, or to care for a close family relative with a serious health condition or because of one's own serious health condition.[135]

The FMLA promotes values that have been traditionally associated with women, but it does so in a distinctly progressive way. First, it identifies the general problem in a broad and ambitious manner:

> Congress found that
> (1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;
> 2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;
> (3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting; . . .[136]

This statement of Congressional findings recognizes the changing roles of women and men both in the family and in the workplace. Congress recognizes the blending of gender roles—the importance to the family of fathers as caregivers, not just as paycheck providers, and the importance to the workplace of women. It does not treat either the working woman or the nurturing father as aberrations of their genders, but rather as normal and desirable because the institutions of family and of work, and individuals' lives are enhanced by the melding of responsibilities. Second, the statute explicitly promotes values embodied in an "ethic of care"—that is, it recognizes and promotes the act of caring for others, and especially for those who are dependent because of age or illness. Furthermore, it values caring

134. 29 U.S.C. §§ 2601-2654.
135. 29 U.S.C. §2612(a)(1)(A)-(D).
136. 29 U.S.C. §2601(a)(1)-(3).

as a *public* value—that is, as a proper subject of legislation, not an activity that is ignored as private. Fourth, it recognizes that the caring is so important that everyone ought to be able to do it, and, indeed, that everyone ought to do it. Caring has risen from literally gratuitous marginalia to a right to a responsibility.[137] In substance, the FMLA fosters those attributes of caring, of relationships, of personal connections with others that have generally defined women's experience but that have been generally excluded from the public sphere. Thus, the statute is not gender-specific but neither is it gender-blind: it neither establishes the masculine as the standard nor ignores the traditionally feminine.

By insisting on gender-neutrality,[138] the FMLA confirms what we had suspected all along: caring is a universal human characteristic, though some people (of both genders) are more inclined than others to value it and engage in it.[139] To put it in the Court's formalist language, men and women should be treated similarly because they are similarly situated with respect to their family and work needs. This is a striking assumption not just because it recognizes something that is undoubtedly true of most men and most women (unlike the assumption that women and men are similarly situated with respect to VMI standards), but also because, under the FMLA, the place where men and women are said to be similarly situated is on women's, not men's, traditional stomping grounds.

Another clear example of transcending gender to solve social problems comes not from the United States but from the European Union. In a recent directive, the ministers of the European Commission decided that part-time work should be put on the same footing as full-time work.[140] Like

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137. "Congress finds that—(5) due to the nature of the roles of men and women in our society, the primary *responsibility* for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C §2601(a)(5) (emphasis added).

138. "Congress finds that—employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. §2601(a)(6).

139. As explained in the Senate Report, "The FMLA addresses the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition or who have a family members with such a condition. A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment." S. Rep. No. 103-3, at 16. (The report then curiously and somewhat precariously in these post-*Lopez* and post-*Boerne* days concludes from these sentences that the FMLA is based "not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment."). *Id.*; *See* United States v. Lopez, 514 U.S. 549 (1995); City of Boerne v. Flores, 521 U.S. 507 (1997).

140. *See Part-time staff poised to secure a fairer future*, THE FINANCIAL TIMES LIMITED (London), Dec. 15, 1997, at 8.

the FMLA, this directive is aimed at a problem that may predominantly affect women and could have been conceptualized in a gender-specific way. But the progressive approach used here recognized that both men and women engage in part-time work and suffer discrimination on that basis even though part-time work is valuable to individuals and to the society. The problem is not with the women who opt for the "mommy track" but with an employment system that rigidly adheres to obsolete standards that no longer reflect the way men or women live and the way businesses choose to operate.

V. CONCLUSION

The emphasis on gender is ultimately misguided because personality traits simply do not fall into such neat categories. It is no more true that women seek or respond to connection than that men seek and respond to adversity. Some do and some do not. And, of course, this is ultimately what makes the Supreme Court's judgment correct: Virginia can not constitutionally say that no woman can or should be permitted to succeed at VMI. But the fault lines of the debate should track values, not gender, and should raise questions not about who we want in our institutions but about what kinds of traits we value and, what kinds of leaders we want, and how we should design our institutions so that we inculcate the traits we value and abate the others. In order to develop progressive answers, we need to ask progressive questions.