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United States v. Virginia: Reinforcing Archaic Stereotypes About Women in the Military Under the Flawed Guise of Educational Diversity

Lucille M. Ponte*

"[T]here is no deformity of human character from which we turn with deeper loathing than from a woman forgetful of her nature, and clamorous for the vocation and rights of men."1

Introduction

This spring, the Supreme Court will be considering whether the Virginia Military Institute (VMI) may continue to admit only males and require women to attend a separate leadership program at a private, all-women's college.2 Proponents of the male-only military system state that the case is a battle over public education policy and the validity of separate but equal in gender-segregated education. However, the real heart of the dispute focuses on whether public education can be used to maintain stereotypical views about the role of women in the military and to continue to keep women out of positions of power in the greater society.

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1. GUNNAR MYRDAL, AN AMERICAN DILEMMA 1074 (1962) (quoting ALBERT T. BLEDSOE, AN ESSAY ON LIBERTY AND SLAVERY 223-25 (1857)). Myrdal's piece is considered a seminal work on the history and sociological implications of white and African-American racial segregation and strife in the United States. The author also draws clear comparisons between the historic social and legal status of women and those of African-Americans. See MYRDAL, supra, at 1072-77.

2. The Department of Justice filed a 29-page appeal with the Supreme Court to open VMI to women, asserting that separate programs reinforce harmful gender stereotypes and an improper return to separate but equal education. The Supreme Court granted certiorari in United States v. Virginia, Nos. 94-1941 and 94-2107 on October 5, 1995. On January 17, 1996 the justices heard oral argument on the case and have not yet issued their opinion on the hotly debated issue. Kathryn R. Urbonya, Separate but Equal Revisited, A.B.A. J., Feb. 1996, at 44.
For more than a century and a half, the Virginia Military Institute has promoted its mission as the education and development of men for leadership roles as "citizen-soldiers" through a rigorous military environment. VMI's intertwining of the terms "citizen" and "soldier" is not an accidental connection. Historically, the obligation of military service was considered a hallmark of manhood giving rise to the rights and status of full citizenship in our society. Throughout our history, women and other

3. VMI's stated mission is "to produce educated and honorable men, prepared for the varied work of civil life . . . and ready as citizen-soldiers to defend their country in time of national peril." United States v. Commonwealth of Virginia, 766 F. Supp. 1407, 1425 (W.D. Va. 1991) (upholding all-male admissions to VMI) (citation omitted). VMI is often extolled for its long history of producing outstanding military leaders dating back to the Civil War era. See United States v. Commonwealth of Virginia, 976 F.2d 890, 892-93 (4th Cir. 1992); William A. DeVan, Toward A New Standard in Gender Discrimination: The Case of the Virginia Military Institute, 33 WM. & MARY L. REV. 489, 493 n.22 (1992) (citing VIRGINIA MILITARY INSTITUTE, CATALOGUE (1990-91)).


Under a social contract theory, the government protects the body politic in exchange for their promise to defend the state. Through protection of the state, the government is able to meet its obligations to the body politic. Since women have not been required to register or serve in the military, they are not viewed as full bargaining members in this social contract. Linda K. Kerber, A Constitutional Right to be Treated Like . . . Ladies: Women, Civic Obligation, and Military Service, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 95-96, 104 (1993); James M. Thunder, Note, The Jurisprudence of Conscription: Social Contract, Moral Obligation and Proposals, 23 CATH. LAW. 255, 258-60 (1978). The Military Selective Service Act echoes this social contract approach stating that "in a free society the obligations and privileges of serving in the armed forces . . . should be shared generally." 50 U.S.C. app. § 451(e) (1988).

In 1980, the congressional debates over the inclusion of women into draft registration plans further illustrated the interrelationship of military service and full citizenship: the paternalistic attitude inherent in the exclusion of women from past draft registration requirements not only relieved women of the burden of military service, it also deprived them of one of the hallmarks of citizenship. Until both men and women share both the rights and obligations of citizenship, they will not be equal.

126 CONG. REC. S6548 (daily ed. June 10, 1980) (remarks of Sen. Hatfield). But see Levin, supra, at 614-15 (arguing that women should use assimilation into military and other violent institutions to redefine citizenship to include the importance of nurturing others).
minority groups have been denied the opportunity of military service and training because of their subordinate social and legal status.  

5. Traditionally, women were lumped together with African-American slaves, children, and criminals as members of the lower castes of society who were not deserving of the full status and rights of manhood. MYRDAL, supra note 1, at 1073-78; Helen Mayer Hacker, Women as a Minority Group, 30 SOC. FORCES 60, 65-66 (Oct. 1951) (pioneering work on women as “minority” group); Jo Freeman, The Building of the Gilded Cage, 1 SECOND WAVE: A MAGAZINE OF NEW FEMINISM (1971), reprinted in JEROME H. SKOLNICK & ELLIOTT CURRIE, CRISIS IN AMERICAN INSTITUTIONS 230, 231-32, 238-43 (3d ed. 1976) (utilizing Hacker’s theory to illustrate legal, economic and social controls on female behavior). Lewis, supra note 4. Although women are not statistically in the minority, women are often coupled with other minority groups because of the discriminatory, unequal treatment they receive in society. Hacker, supra, at 59-60; Freeman, supra, at 239-42.

Myrdal notes that paternal power over women, African-American slaves and children was often justified as part of a divine order. “When a legal status had to be found for the imported Negro servants in the seventeenth century, the nearest and most natural analogy was the status of women and children. The ninth commandment—linking together women, servants, mules, and other property—can be invoked, as well as a great number of other passages of Holy Scripture.” MYRDAL, supra note 1, at 1073. See Dean, supra note 4, at 431-32 (discussing the role of religious doctrine in supporting women’s inferior status to men).

As part of a divine order, the Supreme Court adopted the paternalistic view that women were the weaker sex who needed men to be their protectors:

Man 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 . . . . This is the law of the creator. And the rules of civil society must be adapted to the general constitution of things.

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1873) (upholding denial of women’s right to practice law).

Scholars have often acknowledged strong parallels between the exclusion from military service and the subordinate social and legal status accorded both women and African-Americans throughout our history. Cheh, supra note 4, at 56-57; Dean, supra note 4, at 434-35; Jill L. Goodman, Women, War and Equality: An Examination of Sex-Discrimination in the Military, 5 WOMEN’S RTS. L. REP. 243, 247, 262 (1980); Jones, supra note 4, at 257-58; Karst, supra note 4, at 500-03, 508-09, 525-27, 545; Levin, supra note 4, at 613-14. In particular, women and both African-American slaves and free persons were viewed as socially inferior groups whose “proper place” in society was often enforced through laws and the legal system. MYRDAL, supra note 1, at 1077; Freeman, supra, at 231-32, 238-43; Hacker, supra, at 61-63; Lewis, supra note 4. The Supreme Court recognized the law’s enforcement of women’s lower social status in Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973). In Frontiero, the court noted that:

[O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society, was in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children . . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself “preservative of other basic civil and political rights”—until adoption of the Nineteenth Amendment half a century later.
In the 1970s, revisions in statutes and case law began to pry open the doors of federal service academies to women, and the changing demands of combat expanded opportunities for women in the military. Despite these changes, VMI defiantly refused to admit women into its all-male military training program. VMI's all-male admissions policy has its roots in stereotypical thinking about a women's proper place in society and the exclusion of women from full participation in every aspect of society, including military training and service.6

VMI has succeeded in convincing the district and appellate courts that its all-male admissions policy is about preserving diverse pedagogical choices rather than the reinforcement of stereotypical views about women in the military. VMI argues that its all-male program serves the public's desire for single-gender education and provides greater educational diversity and choice within Virginia's educational system. Although VMI couches its arguments in terms of such positive concepts as educational choice or diversity, VMI's vehement opposition to admitting females cannot be separated from stereotypical views about the proper societal roles of women and an extensive history of gender exclusion, segregation, and discrimination against women in the military.7

This article argues that the battle for female admissions into VMI is rooted in the debate over gender roles in military training and service, but that VMI has successfully masqueraded the dispute as a debate over the value of single-gender education and its adversative training method. In both the trial and appellate cases, the judiciary failed to consider the case in its proper historical military context, thereby missing its true place within the arduous struggle for recognition, respect, and equality for women in the military as well as women in society as a whole. Instead, the appellate court sanctioned the creation of a separate and unequal leadership program for women at a private all-female college. The end result is that VMI's all-male educational program reinforces the archaic notion that full citizenship and leadership roles in society should be reserved for men, who alone bear the burden of defending the nation.8

Part I of this article will examine the historical role of women in the military—a history marked by exclusion, segregation, inequality and finally, the beginnings of integration. Throughout this history, the military's male

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6. See infra notes 100-19, 146-68 and accompanying text.
7. See infra notes 15-182, 383-537 and accompanying text.
8. See infra notes 15-182 and accompanying text.
hierarchy has narrowly prescribed women’s choices and has not recognized
the benefits of expanding female opportunities or promoting true diversity.9
As women’s roles in the military expanded and combat restrictions were
eased, it became more difficult for VMI to sustain its all-male program on
the basis of traditional gender roles in the military. As a result, a new line
of defense based on diversified educational choices emerged.10

Part II analyzes VMI’s use of the separate but equal standard in the
military education context. The strange paradox of the demise of the
concept of separate but equal for race-segregated public education but its
continuing vitality in gender-segregated public education is explored.
Further, the impact of the Supreme Court’s shift from a rational basis test
to a heightened scrutiny standard in gender discrimination cases is
delineated. In Craig v. Boren,11 the Court adopted a heightened scrutiny
test to determine the legitimacy of all male institutions. Prior to Craig, the
rational basis test was used. The rational basis test focused on whether
single-sex programs were generally similar and overlooked substantial
inequalities between male and female educational institutions. This allowed
inferior public educational programs for women to be created and
maintained, rather than opening male institutions to women. In these
earlier cases, all-male military academies were often held out as examples
justifying the continuation of gender segregation, and therefore inequality,
in public education. With the development of the heightened scrutiny test
for gender discrimination, the validity of this earlier precedent was cast into
serious doubt.

Part III considers the first set of court decisions regarding VMI (VMI
I) which upheld the single-sex educational choice for men only under the
perverse guise of educational diversity. Ignoring the role of historical
discrimination against women in the military, the deeply flawed decision
twisted the concepts of educational choice and diversity in order to sustain
VMI’s discriminatory policy. The appeals court weakly reversed the
district court’s decision but opened the door for VMI to propose a separate
but unequal program for women.12

9. For excellent surveys of American women’s roles in military history, see generally:
MAJOR GEN. JEANNE HOLM, USAF (RET.), WOMEN IN THE MILITARY, (ed. rev. 1992);
MARTIN BINKIN & SHIRLEY J. BACH, WOMEN AND THE MILITARY (1977); Goodman, supra
note 5. In the armed forces, African-American females face the double-bind of gender and
race. For an overview of the roles of African-American women in the military, see
generally: OFF. OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR CIVILIAN
PERSONNEL POLICY/EQUAL OPPORTUNITY U.S. DEP’T OF DEFENSE, BLACK AMERICANS IN
DEFENSE OF OUR NATION, 137-147 (1991) [hereinafter BLACK AMERICANS]; HOLM, supra,
at 77-79.
10. See infra notes 183-84 and accompanying text.
12. See infra notes 383-460 and accompanying text.
Part IV analyzes the second set of court decisions regarding VMI (VMI II) in which the courts consider VMI's proposed separate leadership program for women, resuscitating the pernicious notion of separate but equal in public education. Despite significant tangible and intangible inequalities in the program, the district court approved of the separate and unequal program for women, undermining many of its own assertions in VMI I. Recognizing the proposal's obvious disadvantages, the VMI II appeals court upheld the lower court's approval under a new substantive comparability test, which elevates similar educational goals above equality in facilities, faculty, endowment, curriculum, alumni support and reputation. Through its unwillingness to change the status quo at VMI, the appeals court approved separate and unequal military training for women under its new test.13

This article concludes that there was no need for a new standard of review, only a willingness to properly apply intermediate scrutiny to this dispute. The intermediate or heightened scrutiny test would determine whether single gender institutions are substantially related to a stated government interest, such as educational diversity. Given the historical discrimination against military women, VMI's asserted objectives cannot withstand traditional intermediate scrutiny review. VMI should be ordered either to integrate its military training program or surrender its public funding. Any other outcome simply reinforces archaic stereotypes about the proper roles of women in the military and assures women's continuing second class status in society.14

I. Historical Overview of Women in the Military

A. PRE-WORLD WAR II PERIOD

Before 1901, women were officially excluded from military actions and were not allowed to serve in any of the military service branches.15 This treatment was seldom questioned since, based on stereotypical views about appropriate gender roles in society, most viewed the military as purely a male domain.16

13. See infra notes 463-537 and accompanying text.
14. See supra notes 4-5 and accompanying text. See infra notes 15-182 and accompanying text.
15. HOLM, supra note 9, at 9; Women in the Military, 11 EDITORIAL RESEARCH REPS. 495, 496 (1981). Despite severe shortages of military personnel, Army regulations allowed for the enlistments of men only. HOLM, supra note 9, at 5. See infra notes 52-77 and accompanying text.
16. BINKIN & BACH, supra note 9, at 4-5; HOLM, supra note 9, at 16-17; Jones, supra note 4, at 257-58; Karst, supra note 4, at 500-01, 525, 534-37. General Robert H. Barrow, former Commandant of the Marine Corps, asserted the traditional view of male and female roles in the military stating:
However, this lack of official recognition does not mean that women did not participate in military support and combat activities prior to the 20th century. Throughout American history, women have played diverse and significant roles in military activities. In the 18th and 19th centuries, thousands of women accompanied battlefield army units during the Revolutionary War, the War of 1812, and Spanish-American War, facing the hardships of war without official military status. Most women participated as nurses providing desperately needed medical services.

War is man’s work. Biological convergence on the battlefield would not only be dissatisfying in terms of what women could do, but it would be an enormous psychological distraction for the male who wants to think that he’s fighting for that woman somewhere behind, not up there in the same foxhole with him. It tramples the male ego. When you get right down to it, you have to protect the manliness of war.

Karst, supra note 4, at 534. This sentiment was recently echoed in a college lecture given by Speaker of the House, Newt Gingrich, about the biological roots of the roles of men and women in the military.

If combat means living in a ditch, females have biological problems staying in a ditch for 30 days because they get infections and they don’t have upper body strength. I mean some do, but they’re relatively rare.

On the other hand, men are basically little piglets, you drop them in the ditch, they roll around in it, it doesn’t matter . . .

On the other hand, if combat means being on the Aegis-class cruiser managing computer controls for 12 ships and their rockets, a female may again be dramatically better than a male who gets very, very frustrated sitting in a chair all the time because males are biologically driven to go out and hunt giraffes.


Maj. Gen. Jeanne Holm, USAF (Ret.) recognized that long-held beliefs about the proper roles of military men and women continue to block female attempts to fully integrate into the military.

One of the barriers facing women then, as now, was the prevalence in the military of the masculine mystique, the idea that the military is a man’s world and warfare is a man’s business, not a fit or proper place for a woman.

HOLM, supra note 9, at 16-17.

17. BINKIN & BACH, supra note 9, at 4-5; BLACK AMERICANS, supra note 9, at 137-39; HOLM, supra note 9, at 3-9.

18. BINKIN & BACH, supra note 9, at 4-5; BLACK AMERICANS, supra note 9, at 137-39; HOLM, supra note 9, at 3-9; James D. Milko, Beyond the Persian Gulf Crisis: Expanding the Role of Servicewomen in the United States Military, 41 AM. U. L. REV. 1301, 1303 (1992).

19. BINKIN & BACH, supra note 9, at 5; BLACK AMERICANS, supra note 9, at 138-39; HOLM, supra note 9, at 4, 7-9. Some women participated as volunteers while others were paid employees. BLACK AMERICANS, supra note 9, at 138-39; HOLM, supra note 9, at 4, 7-9. During the Civil War, with the leadership of Clara Barton and Dr. Mary Walker, the first female doctor for the Army, battlefield nurses made major contributions to the improvement of sanitation standards and patient care for soldiers wounded in battle. HOLM, supra
while others accompanied their husbands' military companies and performed various domestic duties for the troops.20 During this period, the acceptance of women in battlefield nursing and domestic positions was reflective of societal views of appropriate feminine roles.21 However, some women did depart from these traditional pursuits, disguising themselves as men to become involved in direct combat or to participate as military spies and couriers.22

During the Civil War and the Spanish-American War, government and military leaders reluctantly came to the conclusion that a permanent structure for organizing and directing female nursing activities was needed.
for both routine and battlefield military health services. In 1901, Congress created the Army Nurses Corps, the first uniformed women’s auxiliary branch, with the Navy Nurse Corps following in 1908. These two uniformed female corps were separate from the four main service branches, and carried no military rank, no equal pay provisions, and no veteran’s or retirement benefits.

With the onset of World War I, women returned to their traditional roles in the nurse corps, but also expanded into clerical positions as secretaries and telephone operators, positions formerly held only by men. Recognizing a severe shortage of male recruits, the Navy took the unprecedented step of enlisting women in 1917, followed by the Marines in 1918. These women were the first to receive full, although unequal,

23. Holm, supra note 9, at 8-9; Milko, supra note 18, at 1303 n.9. During the Spanish-American War nearly 75% of all combat casualties were from diseases such as typhoid and yellow fever. Tragically, many African-American female volunteer nurses were directly exposed to these illnesses on the illogical view that “their darker thicker skin made them immune to those diseases.” Black Americans, supra note 9, at 139. The numbers of these volunteer nurses who ultimately became victims of this reckless exposure is not known. Id.

24. Binkin & Bach, supra note 9, at 5; Holm, supra note 9, at 9. Once again African-American female nurses were forgotten volunteers. Originally, these women were not expected to play any role in future recruitment efforts. Despite this view, the National Association of Colored Graduate Nurses was privately founded in 1909. See Black Americans, supra note 9, at 139.

25. Binkin & Bach, supra note 9, at 5; Holm, supra note 9, at 9; Milko, supra note 18, at 1304 n.10.

26. Holm, supra note 9, at 10, 12; Milko, supra note 18, at 1304. At the start of World War I, the Red Cross initially refused to recruit any African-American female nurses. Black Americans, supra note 9, at 139. In the final two months of the war, African-American nurses were finally accepted into the Army Nurse Corps. Id. Despite these official obstacles, African-American females also played important roles aiding soldiers at YWCA Hostess Houses and selling Liberty Bonds. Id. at 140.

27. Binkin & Bach, supra note 9, at 5; Holm, supra note 9, at 10, 12; Milko, supra note 18, at 1304 nn.10-11.

28. Holm, supra note 9, at 10, 12.

29. Id. at 12; Binkin & Bach, supra note 9, at 5. The Navy classified these women as yeoman (f), known as “yeomanettes.” Binkin & Bach, supra note 9, at 5; Holm, supra note 9, at 12; Goodman, supra note 5, at 249 n.53. Although largely functioning in clerical roles, some yeomanettes became translators, draftsmen, camouflage designers and recruiters. Holm, supra note 9, at 12. Navy regulations required that all yeomen must be assigned to ships, but these regulations also prohibited women from serving on ships at sea. Id. To avoid these regulatory hurdles, all yeomanettes were assigned to sunken tugboats at the bottom of the Potomac River. Id.

30. Binkin & Bach, supra note 9, at 5; Holm, supra note 9, at 12, 17.
military status and rank. The Army, however, continued to limit women to civilian roles as nurses.

Some in the War Department were greatly concerned about the growing female presence in the armed forces. The War Department cautioned that "with careful supervision, women employees may be permitted in camps without moral injury either to themselves or to the soldiers" so long as these women were "of mature age and high moral character." By the end of World War I, some 34,000 women served in civilian and enlisted capacities, including 10,000 who served overseas. In 1918, the end of the war lead to rapid demobilization of all enlisted women, with only civilian nurses surviving the post-war disbandment. The armed forces returned once again to all-male enlistments.

Historically, the armed forces followed a pattern of disbanding female military support groups after each war, only to be later forced to recruit women all over again when male enlistments did not meet wartime needs. After World War I, two military studies considered proposals for the mobilization and integration of women into the armed forces, but no changes were ever instituted. It took another world war for the military establishment to finally consider a more permanent, but by no means equal, role for women in the military.

B. THE WORLD WAR II ERA

With the rumblings of World War II on the international horizon, Congress strongly rejected a bill that would establish a women's army
auxiliary corps in 1941. However, after the shock of Pearl Harbor, Congress passed the Women's Auxiliary Army Corps Bill in 1942, followed by congressional authorization two months later for women's auxiliaries in the Navy and Marine Corps. The Air Force and Coast Guard followed with their own female auxiliary units. Despite congressional approval, some members of Congress protested the establishment of women's auxiliaries as a serious challenge to the prescribed roles of men and women in American society:

40. BINKIN & BACH, supra note 9, at 6-7; HOLM, supra note 9, at 23-24. With the support of the War Department, Representative Edith Nourse Rogers of Massachusetts introduced a bill calling for a women's civilian auxiliary, separate from the Army, in May 1941. The bill was shelved after referral to the Bureau of Budget. BINKIN & BACH, supra note 9, at 7. Due to manpower shortages, the British already relied heavily on women's auxiliaries, while Russian and Chinese women actively participated in their national defense, including as soldiers in front-line combat duties. Id. at 6, 9.

41. Women's Army Auxiliary Corps Act, Pub. L. No. 77-554, 56 Stat. 312 (1942). The law created the Women's Army Auxiliary Corps which was transformed into the Women's Army Corps (WACs), with full military status in 1943. HOLM, supra note 9, at 81; Milko, supra note 18, at 1304-05 nn.13, 15. See infra notes 52-77 and accompanying text.

Some 4,000 African-American females and about 1,000,000 African-American males served in the armed forces in World War II. Karst, supra note 4, at 518. The Army was the only service branch that accepted African-American female recruits from the start of the war. HOLM, supra note 9, at 77; BLACK AMERICANS, supra note 9, at 140; MYRDAL, supra note 1, at 421. However, African-American female officers and enlistments were stationed in segregated units with separate housing and dining facilities. HOLM, supra note 9, at 77-78; BLACK AMERICANS, supra note 9, at 140-43; MYRDAL, supra note 1, at 421. Units of African-American women were only stationed at bases that specifically requested their presence, usually at bases where there were African-American male troops or near large African-American communities. HOLM, supra note 9, at 77-78; BLACK AMERICANS, supra note 9, at 140-41. Often female officers became isolated, unable to visit the officer's club or participate in other social functions. HOLM, supra note 9, at 78. With pressure from community leaders, African-American officers and enlistees served in Europe in postal and medical units. BLACK AMERICANS, supra note 9, at 141. African-American female nurses provided medical services primarily to African-American soldiers in segregated hospitals, in the U.S. or in overseas locations where African-American soldiers served such as New Guinea, Philippines, Burma, and Australia. Id. at 140-43. However, the Navy refused to open enlistment until the end of the war, with the first African-American woman, Phyllis Mae Daily, enlisting in March 1945. Id. at 141-42. Only four African-American females were commissioned into the Navy by the end of World War II. Id. at 142. The Marines delayed opening their ranks to African-American females until 1948, with the first African-American female, Annie L. Graham, enlisting in September 1949. Id. at 142. In 1948, President Truman's executive order officially required the racial integration of the armed forces. Exec. Order No. 9981, 3 C.F.R. 2673 (1948).

42. Naval Reserve Act, Pub. L. No. 77-689, 56 Stat. 538 (1942). The law created the Navy's Women Reserve, Women Accepted for Volunteer Emergency Service (WAVES), and the Marine Corps Women's Reserve. BINKIN & BACH, supra note 9, at 7; HOLM, supra note 9, at 9.

43. The Air Force created the Women's Airforce Service Pilots (WASPs). BINKIN & BACH, supra note 9, at 7; HOLM, supra note 9, at 67.

44. The Coast Guard Women's Reserve, known as the SPARs, derived their name from the Coast Guard motto "Semper Partus, Always Ready." BINKIN & BACH, supra note 9, at 7; HOLM, supra note 9, at 27.
I think it is a reflection upon the courageous manhood of the country to pass a law inviting women to join the armed forces in order to win a battle. Take the women into the armed service, who then will do the cooking, the washing, the mending, the humble homey tasks to which every woman has devoted herself. Think of the humiliation! What has become of the manhood of America?\footnote{5}

Initially, the military branches tried to restrict women to traditional roles such as clerical and nursing positions.\footnote{46} However, constant manpower shortages forced the expansion of female roles into nearly every military occupation, outside of direct combat,\footnote{47} particularly in the field of aviation.\footnote{48} Female recruits also participated on highly classified military projects.\footnote{49} By the end of World War II, an unprecedented 350,000 women served both domestically and overseas in the military.\footnote{50}

\footnote{45. Holm, supra note 9, at 24. The decision of a 1968 federal district court case reiterated the nearly century-old societal view of women in the military asserting that "if a nation is to survive, men must provide the first line of defense while women keep the home fires burning." United States v. St. Clair, 291 F. Supp. 122, 125 (S.D.N.Y. 1968). See supra notes 5, 16 and accompanying text. See infra notes 124-25 and accompanying text.}
\footnote{46. Binkin & Bach, supra note 9, at 7; Holm, supra note 9, at 59.}
\footnote{47. Binkin & Bach, supra note 9, at 7; Holm, supra note 9, at 60. Women took on such nontraditional tasks as air traffic controllers, gunner instructors, engine mechanics, navigators, aerophotographers and radio operators. Binkin & Bach, supra note 9, at 7; Holm, supra note 9, at 60.}
\footnote{48. Binkin & Bach, supra note 9, at 7; Holm, supra note 9, at 63-65. The WASPs deserve special attention as about a thousand women between 1942-44 were actively involved in flying all types of military aircraft, including combat airplanes, such as bombers and fighters. Binkin & Bach, supra note 9, at 7; Holm, supra note 9, at 64; Sally Van Wagenen Keil, Those Wonderful Women in Their Flying Machines: The Unknown Heroines of World War II 4 (1979). Although not permitted to fly "combat" missions, 38 WASPs died during these dangerous ferrying assignments. Holm, supra note 9, at 64; Van Wagenen Keil, supra, at 6. Unlike their male pilot counterparts, the WASPs were not given insurance, benefits, or honors if they were killed or injured on their missions. Holm, supra note 9, at 64; Van Wagenen Keil, supra, at 234. In 1977, WASPs were finally granted veteran's status. Holm, supra note 9, at 64; Van Wagenen Keil, supra, at 316. The American Legion lobbied against extending veteran's benefits to the WASPs, as not deserving of this recognition. Van Wagenen Keil, supra, at 312. The Veteran's Administration also opposed the bill as discriminating against other civilian groups who had served during World War II. Holm, supra note 9, at 64. In addition, some 23,000 women participated in Navy aviation, primarily as flight instructors or teaching aircraft gunnery and celestial navigation. Id. at 64-65. About one third of women Marines served in aviation duties in air traffic control and parachute packing, repair and inspection. Id. at 65.}
\footnote{49. WACs participated on the Manhattan Project, while SPARs and WAVES worked at Long-Range Aid to Navigation (LORAN) stations and the night fighter training project. Holm, supra note 9, at 60.}
\footnote{50. Aside from nurses, only the WACs, who were provided with full military status in 1943, were allowed to be deployed overseas in the European and Pacific theaters. Id. at 81; Binkin & Bach, supra note 9, at 7-9. At their peak, 17,000 WACs served overseas in...
from the Women’s Army Corps (WACs), female participants in these critical civilian auxiliary units were not accorded military status for their wartime efforts.51

C. THE WOMEN’S ARMED SERVICES INTEGRATION ACT OF 1948

Despite women’s impressive wartime achievements, the female directors of each branch of the armed forces resigned at the end of the war, as there was no permanent role for women in military service,52 and the women’s branches were rapidly dismantled.53 Yet the overall post-war demobilization resulted in a sharp decline in U.S. military strength from 12.1 million in 1945 to 1.4 million in 1948.54 This decline, coupled with the discontinuance of the draft in 1947, forced military planners to reconsider women as an alternative source for fulfilling military staffing needs.55 With the support of military leaders, Congress passed the Women’s Armed Services Integration Act of 1948 (the Act),56 a triumph more for military expediency than for women’s rights.57

The Act provided women regular and reserve status in the four main military branches.58 Although considered revolutionary in 1948, the Act established a statutory scheme that allowed the secretary of each branch to distinguish between male and female recruits.59 These distinctions created

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51. HOLM, supra note 9, at 81; BINKIN & BACH, supra note 9, at 7.
52. HOLM, supra note 9, at 102-03. The wartime female directors of each women’s branch believed that women should only serve during wartime emergencies and opposed the notion of an interim role for female military service. Id. at 102-03, 106. The newly-appointed female directors, Lt. Col. Mary A. Hallaren (WACs), and Joy Bright Hancock (WAVES) began to promote the concept of permanent women’s branches. Id. at 106-07.
53. Id. at 102-03; BINKIN & BACH, supra note 9, at 10. After the war, the number of women dropped from 266,000 to about 14,000, only about one percent of the military. Id.
54. BINKIN & BACH, supra note 9, at 10.
55. Id.; HOLM, supra note 9, at 114.
57. The objectives of the Act emphasized meeting personnel goals, facilitating service mobilization in national emergencies, and easing restrictions on the military’s experimentation with economical uses of female recruits. BINKIN & BACH, supra note 9, at 10; HOLM, supra note 9, at 114. The right or obligation of women to serve in the military was not a recognized objective.
58. HOLM, supra note 9, at 114. See BINKIN & BACH, supra note 9, at 10-12.
59. The Act permitted the secretary of each branch to adopt gender-based enlistment and reenlistment requirements that institutionalized inequalities. Women’s Armed Services Integration Act of 1948, Pub. L. No. 625, §§ 106(a), 204, 213(a), 305, 62 Stat. 356, 360, 364, 369, 372 (1948); BINKIN & BACH, supra note 9, at 10-12; HOLM, supra note 9, at 119-
a maze of inequalities that institutionalized discrimination against military women impacting their training and career opportunities even today.\textsuperscript{60} Fearing a “feminization” of the military, the Act imposed a two percent ceiling on the number of females in each military branch, along with a host of other institutional barriers to full integration.\textsuperscript{61}

At induction, women were limited by age,\textsuperscript{62} parental consent,\textsuperscript{63} and educational constraints\textsuperscript{64} in enlistment procedures. If these hurdles were passed, women faced further obstacles in their military careers in the form of promotional limits,\textsuperscript{65} unequal dependency benefits,\textsuperscript{66} and combat
restrictions. In addition, women were subject to unprecedented discharge authority without the normal procedural safeguards that protected their male counterparts. These deliberate limits effectively excluded women from the military's senior level policy-making positions. Despite their diverse duties in World War II, military women were once again shunted into traditional females roles in nursing and clerical jobs.

The Act's lofty goals of integrating more women into the military was soon undercut by the reinstatement of the draft just twelve days after passage of the Act.

Grade ceilings were set at a 10% limit on the number of lieutenant colonels and 20% on commanders. Although Air Force females were on integrated promotion lists, they were barred from the top ranks because they were not allowed to participate in the key service positions of pilots and navigators. The promotional limits helped to keep women from reaching top policy-making roles in the military. The grade limits were not repealed until 1967. Act of Nov. 8, 1967, Pub. L. No. 90-130, 81 Stat. 374 (1967).

By statute, women in the Navy and Air Force could not participate in combat. Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, §§ 107, 306, 503, 62 Stat. 356, 361, 369, 373 (1948) (codified at 10 U.S.C. § 1072 (1970) and 37 U.S.C. § 410 (1970)). Husbands of military women were not considered dependents unless their spouses provided for over one-half of their support. Civilian wives were assumed to be dependent on their military husbands. Women's Armed Services Integration Act of 1948, supra note 9, at 12; Holm, supra note 9, at 123-124; see infra notes 78-119 and accompanying text.


The law allowed women to be discharged for unspecified reasons and without the usual due process safeguards afforded males. This provision was often used to discharge women once they became pregnant or otherwise gained custody of children on the assumption that maternal duties took precedence and were incompatible with military service. Id. at 125. See infra note 90 and accompanying text.

Husbands of military women were not considered dependents unless their spouses provided for over one-half of their support. Civilian wives were assumed to be dependent on their military husbands. Binkin & Bach, supra note 9, at 11; Holm, supra note 9, at 123; see infra notes 78-119 and accompanying text.

This tension affected female recruiting efforts into
the 1950s, as the military sought highly-qualified female candidates but offered only limited career opportunities, poor pay scales, and low standards of living. In addition, military women endured accusations of "masculinity and immorality," and a negative public image.

From the 1950s to the mid-1960s, the military expanded tremendously as the Cold War intensified and the Vietnam War escalated. Yet during this same time period, women in the armed forces struggled for institutional support and survival, seldom reaching numbers much beyond one percent of the armed forces.

D. THE 1970'S LIBERALIZATION OF MILITARY POLICIES

As in previous wars, the Department of Defense turned to women to bolster their staffing needs during the Vietnam War. To attract more women, the Johnson Administration approved a 1967 law that lifted the Act's promotional ceilings, two percent limit on female enlistments, and differences in retirement benefits. Even with these changes, females continued to constitute less than two percent of the military until the 1970s.

72. BINKIN & BACH, supra note 9, at 11-12; HOLM, supra note 9, at 152-53, 157-58. The military held recruitment goals of 112,000, but only reached about 46,000. BINKIN & BACH, supra note 9, at 11-12; HOLM, supra note 9, at 153. In 1951, the military sought to prop up sagging numbers of female recruits through its creation of the Defense Advisory Committee on Women in the Services (DACOWITS), a group of 50 women charged with informing the public about career opportunities for women in the military. HOLM, supra note 9, at 151.

73. HOLM, supra note 9, at 154-55, 159. Women were required to meet higher educational, physical, and mental standards than their male counterparts, and were subjected to psychological examinations to weed out those with "personality problems." Id. at 154-55.

74. Id. at 154.

75. Id. Reading between the lines of Holm's historical review, one can assume that the military and the public feared lesbianism among military women. Clearly, this fear has remained unabated as expressed in the debate over gays and lesbians in the military. See Karst, supra note 4, at 500-01, 545-46; Margo Hammond, The Military Balks Again, St. PETERSBURG TIMES, Jan. 31, 1993, at 1D (discussing the debate over gays and lesbians in military through comparisons with military resistance to racial integration).

76. The armed forces increased from about 190,000 after the Korean War to 2,655,000 by 1965. HOLM, supra note 9, at 177.

77. BINKIN AND BACH, supra note 9, at 12; HOLM, supra note 9, at 157-58. By 1965, enlisted women participated in only 36 of 61 noncombat occupational groups with 93% serving in clerical or medical jobs. HOLM, supra note 9, at 184. Female officers only filled 35 out of 46 occupational groups with 75% filling administrative positions. Id.

78. BINKIN & BACH, supra note 9, at 12; HOLM, supra note 9, at 157-58.

79. Act of Nov. 8, 1967, Pub. L. No. 90-130, 81 Stat. 375 (1967); BINKIN & BACH, supra note 9, at 12; HOLM, supra note 9, at 192, 203.

80. BINKIN & BACH, supra note 9, at 12.
In the 1970s, the role of women in the military began to undergo serious changes. The end of the draft in 1970, congressional passage of the Equal Rights Amendment in 1972, and growing legal trends in gender discrimination cases forced the military to expand women’s roles in the armed forces in order to meet the staffing demands of the all-volunteer force. Despite the courts’ traditionally deferential stance on most military matters, many of the changes in women’s military roles

81. Id. at 13-19; HOLM, supra note 9, at 313. These changes came too late to improve the situation for women who served in the Vietnam War. Underscoring the indifference to military women, neither the Veteran’s Administration nor the Department of Defense maintained accurate records on women serving in Vietnam. HOLM, supra note 9, at 241. Unfortunately, this lack of institutional recognition and support only further heightened the alienation and struggles of military women returning back home. The women of Vietnam returned to a nation that ridiculed their voluntary participation and to a military that ignored their plight. For example, the Veteran’s Administration studies of the psychological impact and delay shock of Vietnam veterans considered male veterans, but not a single woman. Id. at 240-42.


84. In a broad range of civilian situations, the Supreme Court relied on equal protection to strike down numerous gender-based federal and state statutes that were based on sexual stereotypes or administrative convenience. See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979) (adoption statutes); Orr v. Orr, 440 U.S. 268 (1979) (alimony payments); Craig v. Boren, 429 U.S. 190 (1976) (alcohol drinking); Stanton v. Stanton, 421 U.S. 7 (1975) (support payments); Taylor v. Louisiana, 419 U.S. 522 (1975) (jury service); Reed v. Reed, 404 U.S. 71 (1971) (estate administration). At this time, these civilian gender disputes had a great impact on the military community, prodding the military to experiment with broadening female integration in the military. Tim M. Callaghan, Bona Fide Occupational Qualifications and the Military Employer: Opportunities for Females and the Handicapped, 11 AKRON L. REV. 182, 183 (1977).

85. BINKIN & BACH, supra note 9, at 13-14; HOLM, supra note 9, at 249, 263-64, 266; Callaghan, supra note 84, at 183.

86. The courts have generally deferred to the other branches of government to make decisions about proper military policy based largely on its own lack of expertise in this arena.

It is difficult to conceive of an area of government activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to the civilian control of the Legislative and Executive branches.

resulted from extensive litigation on a host of gender issues. These legal challenges struck down unequal dependency benefits and upheld gender-based discharge statutes aimed at remedying unequal promotional opportunities for female officers. The courts also ordered the abandonment of automatic discharges for pregnancy and gender-based assignments on all naval vessels.

With the increasing liberalization of military policies during this time period, the percentage of women in the military began to rise quickly from less than two percent in 1971 to about five percent in 1976 and more than seven percent in 1980. In addition, more positions in the military
began to open up to women with about eighty percent of all military specialties becoming accessible to women in 1972. For instance, in the Vietnam War, women participated primarily as nurses and medical specialists. However, even with the asserted combat restrictions on women, about 7,000 women qualified for combat pay in the Vietnam War, and some 200 women received Purple Hearts. By the end of the 1970s, women were instrumental in keeping the all-volunteer force viable and represented the military’s higher quality recruits. The Carter Administration, supportive of the Equal Rights Amendment, implemented a plan to increase the amount of women in the services to twelve percent by 1986.

In addition, the first legal challenge to the exclusion of women from military academies was heard in *Waldie v. Schlesinger* in 1974. The plaintiffs sought a court order mandating that the Secretary of Defense consider female nominees on the same basis as male applicants to the military academies. The government defendants countered that preparing cadets for combat was the main purpose of the federal academies.

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94. BINKIN AND BACH, supra note 9, at 17. Before 1972, women were only eligible for 35% of all military jobs which increased to over 80% after a Department of Defense task force reassessment in 1972. Id. More importantly, women increased their participation in nontraditional fields from 10% in 1972 to 40% in 1976. Id. More importantly, women increased their participation in nontraditional fields from 10% in 1972 to 40% in 1976. Id.

95. BINKIN & BACH, supra note 9, at 12; HOLM, supra note 9, at 228.


97. Id. at 13889.

98. BINKIN AND BACH, supra note 9, at 14-17; HOLM, supra note 9, at 384. While the military struggled to meet its recruiting goals, the armed forces began to accept lower quality male recruits, but continued to enlist higher quality female candidates. Most women were likely to have a high school diploma and scored in the highest mental categories, while their male counterparts were mostly high school dropouts and scored in the lowest mental categories. BINKIN & BACH, supra note 9, at 17, 19; HOLM, supra note 9, at 384. The poorer quality male recruits also had higher attrition rates than females. BINKIN & BACH, supra note 9, at 19.

99. HOLM, supra note 9, at 387.

100. Waldie v. Schlesinger, 509 F.2d 508 (D.C. Cir. 1974). Prior to the *Waldie* litigation, the Secretary of Commerce moved to open state maritime academies to women in 1973. U.S. v. Mass. Maritime Academy, 762 F.2d 142, 144 (1st Cir. 1985) (citing 46 C.F.R. § 310.6(a)(1) (1984)). Despite this mandate, full compliance did not result until some 10 years later due to resistance to full integration from the leaders of these military academies. Mass. Maritime Academy, 762 F.2d at 144. See infra notes 146-65 and accompanying text.

101. 509 F.2d at 508. The plaintiffs were two female candidates and four Congresspersons who nominated these applicants for admissions to the U.S. Air Force and Naval academies. The plaintiffs did not seek to challenge the combat restrictions, they only challenged whether the academies should train women for positions open to them in the military. Id. at 508-09.

102. Id. at 510. In affidavits, the Deputy Secretary of Defense and the three superintendents of the military academies claimed that the role of the academies was to prepare men for combat, a role for which women were not eligible. Id. at 510 n.1.
Seeking to neutralize the gender issue, the government stressed combat eligibility, that is, combat eligible persons in relation to combat ineligible persons, rather than gender as the distinguishing factor in the academies' admissions policies. The district court granted the government's motion for summary judgment, finding that combat restrictions provided a rational basis for the single-gender admissions policies. The plaintiffs appealed.

In response to the Waldie lawsuit and appeal, Congress held hearings on the admission of women into the national service academies in 1974. The Secretary of Defense and the military chiefs, with the support of President Nixon, opposed the admission of women into the academies on the basis of combat restrictions and concerns about women cadets disrupting the disciplined atmosphere needed to train future combat leaders. In the hearings it became clear that many graduates of the service academies never participated in combat roles while others failed to qualify for positions as combat leaders. Congress also determined that academy graduates pursued many career fields open to women. In addition, each service branch grudgingly admitted that women could be integrated into the academies if Congress mandated this action.

Meanwhile, on appeal, the Waldie court questioned the district court's use of the rational basis test and pointed out the prevailing judicial uncertainty over the proper equal protection standard for gender classifications. The appeals court also questioned the actual meaning of the

103. Id. at 509, 510 n.1. In the earlier Supreme Court case of Geduldig v. Aiello, 417 U.S. 484 (1973), the Court similarly sought to neutralize gender in its review of a state health plan that excluded pregnancy from its health care benefit plan. In sustaining the program, the Court asserted that the plan was not gender-based but merely divided plan recipients into two groups: pregnant women and non-pregnant persons, who might be either male or female. Id. at 497 n.20. Later in Rostker v. Goldberg, 453 U.S. 57, 76 (1981), the Court would use this approach again by stressing combat eligibility, not gender, as the distinguishing factor in the all-male draft registration plan. See infra notes 120-82 and accompanying text.
104. 509 F.2d at 510.
105. HOLM, supra note 9, at 306-09.
106. Id. at 307. Military chiefs asserted that it was uneconomical to provide expensive military training at the academies for women who would not be combat leaders. Id. at 307-08.
107. HOLM, supra note 9, at 309-10. Statistics showed that less than 40% of Air Force Academy graduates from 1964-1973 ever participated in combat jobs, and about 12% of the graduates of all three academies never even had a combat assignment. Id.
108. Id. at 309.
109. Id.
110. The appeals court stated that the district court too quickly utilized the rational basis test as the proper equal protection standard. Waldie v. Schlesinger, 509 F.2d 508, 509 (D.C. Cir. 1974). The decision cited numerous Supreme Court and federal cases in which the courts struggled with the proper equal protection standard for gender. Id. at 510-11. During the 1970s and early 1980s, the Supreme Court and the lower courts also vacillated on the
The term "combat" and whether combat leadership was the only objective of the federal academies' training programs. The appeals court remanded the case for further factual and legal investigation of these issues. However, Congress acted to open up the national service academies by 1976 before a further determination was rendered.

In 1978, subsequent federal statutory amendments mandated state military colleges open up their admissions to female candidates and provide opportunities for female military training in order to retain designation as a military academy or college. At that time, the Department of the Army classified four colleges as essential state military colleges: North
Georgia College, Norwich University, Virginia Military Institute and the Citadel. North Georgia College and Norwich University quickly moved to admit women. However, VMI and the Citadel obstinately refused to admit women into their full-time programs and little was done to demand their compliance until the 1990s.

E. THE ROSTKER SETBACK AND CONTINUING BATTLES FOR GREATER INTEGRATION IN THE 1980S AND 1990S

In the wake of this liberalization, women stood on the threshold of greater integration. This advancement was due in large part to the Carter Administration’s call to reactivate draft registration and its recommendation

115. 34 C.F.R. 668.33 (1990); see Williams v. Owen, 241 Ga. 363, 245 S.E.2d 638 (1978). As essential state military colleges, these institutions are allowed to operate officer procurement or training programs with curriculum approved by the Secretary of Defense. Students at these colleges are offered the opportunity to pursue military leadership positions as commissioned officers in the armed forces.


117. VMI refused to accept women into any of their full-time campus programs. Dodge, supra note 116, at A1; Judy Mann, Neanderthal Bonding, THE WASH. POST, Feb. 7, 1990, at B3. Women may register for summer courses provided that they secure off-campus housing. DeVan, supra note 3, at 493 n.25. Women also may elect evening classes which cadets are not allowed to attend. Id. VMI’s public information officer, Tom Joynes, in response to questions about VMI’s all-male admissions policy, stated: “We’re not anti-female here . . . . Our guys date them. And a lot of our alumni married them.” Tom Watson, Military Tradition v. Title VI: Justice Inquiry Threatens Va. All-Male Bastion, LEGAL TIMES, May 1, 1989, at 9. See infra notes 383-460 and accompanying text.

118. The Citadel has accepted women into their summer sessions and evening college, but not in their full-time corps of cadets. Halloran, supra note 116, at B9. See infra note 119 and accompanying text.

119. In March 1990, the Justice Department filed an action against VMI for its failure to admit women under the Civil Rights Act of 1964 and the 14th Amendment. U.S. v. Commonwealth of Virginia, 976 F.2d 890, 894 (4th Cir. 1992). See Dodge, supra note 116, at 1; Watson, supra note 117, at 9. At the time of the action, VMI accepted about $11 million in state government funds which was about half its operating budget. Dodge, supra note 116, at 1.

In 1993, Shannon Faulkner instituted an action against the Citadel seeking admissions into its cadet program. The Citadel had originally accepted Faulkner but revoked the acceptance upon learning that she was a woman. A district court issued a preliminary injunction allowing Faulkner to participate in day classes but not cadet corps, which was upheld by the Fourth Circuit. Faulkner v. Jones, 858 F. Supp. 552, 567-69 (D.S.C. 1993), aff’d 10 F.3d 226, 228-29 (4th Cir. 1993). After a trial on the merits, the district court ordered the Citadel to admit Faulkner as its sole remedy for violating her equal protection rights. Faulkner v. Jones, 858 F. Supp. at 567-69. On appeal, the appeals court upheld the finding of an equal protection violation but ordered the district court to allow the state a reasonable time frame to formulate a remedial plan, which could include a proposal for a separate program for women. If the plan was not completed by August 1995, the Citadel would have to admit Faulkner. Faulkner v. Jones, No. 94-1978, 1995 U.S. App. LEXIS 8252 (4th Cir. 1995).
that women be included in the registration process. The Carter Administration’s efforts were criticized by military experts, who attributed the push for expanding the role of women in the military to excessive social experimentation and a reliance on females military personnel that had already gone to far.

Ultimately, Congress rejected the idea of mandatory draft registration for women. Even though draft registration does not mean one will be involved in combat, Congress based its exclusion of women on traditional concerns about women in combat, with congressional debate often reflecting stereotypical views about the proper societal roles of women. In opposing the draft registration of women, one senator argued:

I am not about to vote for one more strike against the American family and the traditionalism we have known in this country . . . . No matter how much we want to say we are equal in those child rearing areas, we are not. A father cannot replace a mother and that closeness . . . . How far do we carry this ridiculous game of equality, on the basis of equity?

120. In response to the Soviet Union’s invasion of Afghanistan, President Carter acted to restore draft registration, suggesting the registration of both men and women. Holm, supra note 9, at 350. Without congressional amendment to the Military Selective Service Act (50 U.S.C. app. § 4453 (1976)), the President could only recommend, not mandate, the registration of women. 50 U.S.C. app. § 451 note 4 (1981).

121. Holm, supra note 9, at 385, 387-89. See supra note 61 and accompanying text.

122. The Senate rejected a proposed amendment that would include women in the registration plans by a vote of 51-45. 126 Cong. Rec. 13,898 (1980). Excluding women from draft registration also impacts their ability to secure public employment opportunities due to state and federal government veteran’s preferences. See Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256 (1979) (upholding veteran’s job preferences as constitutional despite disproportionate benefit to males). In addition, some private sector jobs are based on training and experience derived primarily from the military, such as airline pilots. Goodman, supra note 5, at 244.

123. In the previous draft, only five percent of all eligible registrants were ever drafted and less than one percent were placed in combat roles. R. Eisler, The Equal Rights Handbook 13 (1978).

124. 126 Cong. Rec. 13,877-98 (1980). Congress’ conclusory findings placed a heavy emphasis on the notion that women and “young mothers” should not be placed in combat roles. Id. at 13,881 (remarks of Sen. Warner). See supra notes 21, 45, 59 and accompanying text. See also Goodman supra note 5, at 262.

125. 126 Cong. Rec. 13,889 (1980) (remarks of Senator Garn). Although hailing the contribution of women to the military, the Senate’s specific findings asserted that women should not be placed in combat positions, in part, because of “the strains to family life that would result from the registration and possible induction of women.” Id. at 13,881 (Sen. Warner reporting the findings of the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee).
In *Rostker v. Goldberg*, the Supreme Court reviewed whether the exclusion of women from draft registration plans was violative of equal protection under the heightened scrutiny test. The *Rostker* decision stated that congressional findings showed that the purpose of draft registration was to provide combat replacements in any future draft. With only males eligible for combat, the Court decided that the registration of both men and women would be an administrative inconvenience. In addition, the Court stated that the registration of women would negatively impact military flexibility as to troop rotation and emergency use of support troops in combat situations.

The Court held that combat replacement policy was an important governmental interest, with the single-sex plan being substantially related to the accomplishment of that objective.

As in *Waldie*, seeking to neutralize the gender issue, the majority stressed combat eligibility rather than gender as the distinguishing factor in the registration plan. The Court never questioned the underlying constitutionality of combat restrictions on women nor whether impermissible sexual stereotyping provided the basis for these combat restrictions. The *Rostker* decision simply remarked that "Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than 'equity'." The case screeched to a halt the march towards gender equality not only in the armed forces, but also in society at large, by contributing to the defeat of the enactment of the Equal Rights Amendment.
With Rostker and the imminent transition to the Reagan Administration, those military policy-makers hostile to female integration into all-male spheres saw an opportunity to reverse the liberalization of the 1970s. Leaders of the armed forces secretly sent proposals to the presidential transition team to roll back plans for further integration of women. These proposals expressed serious concerns about the impact of women on military readiness and effectiveness, despite a series of military studies that clearly reached opposite conclusions.

The military misread the Reagan Administration, which included in its objective to build up the military, the inclusion of women. By 1990, women comprised almost twelve percent of the total of the active forces and more than thirteen percent of the reserve forces, amounting to the largest number of women in the military in U.S. history. In the Reagan military expansion, women became eligible for fifty percent of the two million military jobs in eighty-eight percent of all military job

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Men Only, TIME, July 6, 1981, at 44.
136. HOLM, supra note 9, at 387-89.
137. Id.
138. To determine the effectiveness of women in the armed forces, the military undertook a number of studies known as Women in the Army (WITA) studies. HOLM, supra note 9, at 401. In three-day field exercises, one study found that women did not degrade unit performance. U.S. ARMY RESEARCH INSTITUTE FOR BEHAVIORAL AND SOCIAL SCIENCES, WOMEN CONTENT IN UNITS FORCE DEVELOPMENT TEST (MAXWAC) 1-2 (1977). See BINKIN & BACH, supra note 9, at 95; HOLM, supra note 9, at 401.

A second study focused on extended duty assignments of 30 days based on Army combat simulations in West Germany. Once more, women effectively achieved established standards and did not negatively impact unit performance. U.S. ARMY RESEARCH INSTITUTE FOR BEHAVIORAL AND SOCIAL SCIENCES (ARI), WOMEN CONTENT IN THE ARMY-REFORGER (REFWAC) 77 (1978). See HOLM, supra note 9, at 401.

Also, the Navy undertook its own preparedness experiment by reviewing female performance on the USS Sanctuary in 1972. Again, women performed their shipboard functions with the same dedication and expertise as their male counterparts. 126 CONG. REC. 13,877 (1980) (remarks of Sen. Cohen); BINKIN & BACH, supra note 9, at 93-95.

DACOWITS (Defense Advisory Committee on Women in the Services) challenged the military for its incessant studying of female participation as mere attempts to justify their own desire to roll back the advances of military women. In a letter to the Secretary of Defense, DACOWITS asserted that,

We [DACOWITS] have serious questions regarding the merit of continual studying of women's military participation. As a study reaffirms the positive performance and contribution by [women] . . . a new one seems to be ordered. This finally raises the question of whether objectivity or "right answers" is the purpose.

HOLM, supra note 9, at 403 (quoting letter from DACOWITS Chair, Dr. Mary Huey to Secretary of Defense Caspar Weinberger dated July 1983).
139. HOLM, supra note 9, at 385, 396-97.
classifications. Yet about one million positions remained closed to women due to combat restrictions. 

Technological developments and advanced weaponry outpaced and steadily blurred the traditional distinctions between combat and noncombat support positions. In addition, a series of foreign military actions called into question these remaining combat barriers. Brief military confrontations in Grenada and Panama exposed the American public to women who were integrated into military units and who were successfully performing their duties in combat-sensitive areas. The media attention began eroding the myth that female troops were not confronted with the risks of combat. However, this positive image of women as competent and effective soldiers was attacked by critics who charged that these limited engagements did not fully test women’s abilities to handle combat.

Despite women’s efforts in these police actions, their roles in the military were questioned once again in *U.S. v. Massachusetts Maritime Academy*, a federal court case reviewing an all-male admissions policy at a state maritime academy. The dispute arose out of regulatory changes in 1973 that lifted gender restrictions on admissions to state maritime academies. A woman who applied to the Academy in 1974 was informed that women were not eligible for acceptance, despite the

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141. 134 CONG. REC. 13,135 (1988) (General Accounting Office reports on women in the military detailing that more military jobs can be opened to women under then existing statutes).
142. In October 1983, the Army’s Operation Urgent Fury gave Americans an opportunity to see gender-integrated units, with some 170 women participating in the effort. Originally, some military policewomen were returned to the U.S. due to the high risk of direct combat. But that initial action was overruled and the female soldiers were sent back to Grenada. HOLM, supra note 9, at 404-05; Kitfield, supra note 67, at *4. About two percent of the Grenada troops were female. Kitfield, supra note 67, at *4.
143. In the 1989 Operation Just Cause, some 770 female soldiers participated in the military action and Americans had the opportunity to see military women leading troops in the mission. HOLM, supra note 9, at 434-35; Kitfield, supra note 67, at *4. About four percent of the deployed Army forces were women. Kitfield, supra note 67, at *4. A great deal of media attention was focused on Capt. Linda L. Bray who lead a unit that became embroiled in a three-hour fire-fight when trying to take control of an attack dog kennel of the Panamanian Defense Forces. HOLM, supra note 9, at 434-35. Unfortunately, Bray found that the public attention bred great resentment from fellow male soldiers and negative treatment from Army officers, which lead to her resignation from the Army. HOLM, supra note 9, at 436.
144. HOLM, supra note 9, at 404-05, 434-36.
145. Milko, supra note 18, at 1312 n.54.
147. After these regulatory changes, most of the state maritime academies started to admit women. 762 F.2d at 144. Federal regulations were updated to allow the academies to recruit both male and female cadets. Id. at 144 (citing 46 C.F.R. § 310 (a)(1) (1984)).
regulation to the contrary. Similar to VMI and the Citadel, the
Massachusetts Maritime Academy refused to extend equal admission to
women, dragging the matter through the courts for more than a decade to
avoid admitting female cadets.

The Academy's initial response to the action was to hastily form a
committee which reviewed the issue for nearly a year. Finally, in
April of 1976, the Attorney General brought suit against the Academy and
the institution responded by voting to allow female admissions in the
entering class of 1977. Despite the announced policy, the Academy
refused to actively recruit women and continued to discriminate against
female applicants.

After years of legal wrangling, the dispute was finally brought to trial
in 1982. The district court found that the academy intentionally
discriminated against women prior to 1976 and continued to discriminate
against women after formally opening admissions to females in 1977.

148. The plaintiff was advised that women would not be admitted into the academy. 762 F.2d at 145. In the plaintiff's testimony, she stated that the admissions director mockingly told her "that the only way she would be admitted to the Academy was by going to Sweden and undergoing a sex change operation." Id. at 145 n.1. She was also advised that she lacked a prerequisite mathematics course. Id. at 145.
149. See infra notes 150-64 and accompanying text.
150. 762 F.2d at 145-46. After the complaint was filed, the Attorney General advised the Academy that its all-male admissions policy violated the equal protection clause of the Fourteenth Amendment. Id. In response to the Attorney General's letter, the Academy formed an ad hoc committee in November 1975 to study the issue. Id. at 145.
151. The Academy sought to have the complaint mooted by a 1976 vote that would allow for the admissions of women in the 1977 entering class. Id. at 145-46. But the Attorney General amended the complaint, which claimed discrimination prior to 1976, and included a new claim that the Academy was continuing to intentionally discriminate against women in recruitment, admissions, and training. Id.
152. Id. at 154-56. The appeals court agreed with the lower court's findings regarding the continuing discrimination by the Academy. After changing the policy, the Academy failed to make meaningful efforts to recruit women and lagged well behind other maritime academies in female enrollment. Id. The Academy treated women unequally in the admissions process from grade and SAT scores to the scheduling of physical examinations for admission. Id. at 154-55. The court pointed out that recruiting and catalog materials did not include any textual information or photos of women until 1979, with application materials referencing traditional male activities and sports. Id. at 154. A recruiting poster requested applications from "qualified females" with no similar term utilized for males. Id. In addition, there were no women on the admissions staff until 1981 with the Academy visiting the same all-male schools but no all-female schools. Id.
153. Id. at 146. After recessing for more than one year, the trial resumed in 1984. Id. at 147.
154. Id. The court issued a permanent injunction to enjoin the Academy from discrimina
tion on the basis of gender. The Academy was also ordered to provide a plan for eradicating gender discrimination and a procedure for reviewing rejected female applicants for specific graduating classes. Id. The court retained jurisdiction for three years to enforce its order to ensure that the Academy not revert to its previous discriminatory practices. Id.
Nearly eleven years after the regulatory mandate, the Academy appealed the decision in 1984. Using the heightened scrutiny test, the appeals court affirmed the lower court’s decision to strike down the Academy’s all-male admissions policy and its residual discriminatory practices.\textsuperscript{155}

Initially, the Academy argued that its single-sex admissions policy complied with existing Supreme Court precedent such as \textit{Mississippi University for Women v. Hogan},\textsuperscript{156} and that statutory law exempted state maritime academies from equal opportunity mandates.\textsuperscript{157} However, the appeals court indicated that these earlier cases coupled with the statutory exemption did not preclude constitutional analysis under equal protection.\textsuperscript{158}

Secondly, the Academy asserted that national defense is an important governmental objective. The maritime academies were auxiliary units to the U.S. Navy during war time or national emergencies.\textsuperscript{159} Since female cadets would not be allowed to serve in combat, the Academy asserted that women should not be admitted. As in \textit{Rostker}, the Academy tried to neutralize gender by pointing to combat restrictions.\textsuperscript{160}

Citing \textit{Rostker}, the appeals court agreed that national defense is an important governmental objective. However, the court indicated that national defense is a federal, not a state, prerogative within the domain of the congressional and executive branches.\textsuperscript{161} Therefore, the appeals court reasoned that the case would hinge on existing federal policy.\textsuperscript{162}

Despite the existence of combat restrictions, the court stated that single-sex admissions policies for military colleges and academies had already been abandoned by Congress and the executive branch.\textsuperscript{163} Examining the successful history of female integration at other military academies and congressional support for open admissions, the appeals court determined

\textsuperscript{155} Id. at 156.
\textsuperscript{156} Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (striking down an all-female nursing program as inconsistent with the state goal of educational affirmative action).
\textsuperscript{157} 762 F.2d at 153. Under Title IX, any educational program that receives or benefits from federal funding is not allowed to discriminate on the basis of gender. 20 U.S.C. § 1681(a) (1978). Educational institutions that provide primarily military or merchant marine training are exempt. 20 U.S.C. § 1681(a)(4) (1978).
\textsuperscript{158} 762 F.2d at 153. See Hogan, 458 U.S. at 732. (Title IX exemption for traditionally single-sex schools did not obviate constitutional analysis of single-sex admissions policy). See generally Comment, \textit{The Expansion of Constitutional and Statutory Remedies for Sex Segregation in Education: The Fourteenth Amendment and Title IX of the Education Amendments of 1972}, 32 EMORY L.J. 1111 (Fall 1983) (discussing the roles of constitutional law and Title IX in dealing with gender discrimination in higher education).
\textsuperscript{159} 762 F.2d at 153.
\textsuperscript{160} Id. See supra notes 126-41 and accompanying text.
\textsuperscript{161} 762 F.2d at 153.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
that the all-male policy was not substantially related to the stated objective. 164

Based on the court’s interpretation of statutory and regulatory revisions, military academies and colleges were not solely training grounds for military leaders in combat situations. The decision illustrates that the military training of women at state and federal military institutions was appropriate, despite the continuing existence of combat restrictions. According to this holding, men and women were now similarly situated with respect to recruitment, admission, training and commissioning at military academies and colleges. Despite this precedent, VMI and the Citadel continued to refuse to admit women into their programs. The impetus for full gender integration of these recalcitrant programs was military engagement which brought the role of military women directly into American homes.

That seminal event for women in the military was the Persian Gulf War in which the U.S. deployed its largest concentration of uniformed troops in its military history.165 About 41,000 women participated in Operation Desert Storm166 and made major contributions to the effort, including sacrificing their lives and being wounded and taken prisoner during the battle.167 The intensive media coverage awakened Americans to the courage and abilities of military women, fueling the debate over the military’s combat exclusion policies.168

In response to women’s efforts in the Persian Gulf War, Congress called for the reconsideration of combat restrictions.169 President Bush convened the 1992 Presidential Commission on the Assignment of Women in the Armed Forces to consider lifting the formal bans on women in

164. Id.
165. Milko, supra note 18, at 1313.
166. HOLM, supra note 9, at 469. These female troops accounted for 7.2% of all troops deployed in the Gulf War. Id.
167. Id. at 459-62, 464; Milko, supra note 18, at 1313; Kitfield, supra note 67, at *4-5. Thirteen servicewomen were killed in the Persian Gulf War and some 19 were wounded. Milko, supra note 18, at 1313. Two women were taken as prisoners of war. HOLM, supra note 9, at 464.
168. HOLM, supra note 9, at 471-72; Milko, supra note 18, at 1313, Jones, supra note 4, at 252; Kitfield, supra note 67, at *4-5. See generally WOMEN IN THE MILITARY 62-114 (E. A. Blacksmith ed., 1992) (providing a variety of excellent articles drawn from mainstream magazines debating combat exclusion in the wake of Persian Gulf War). Extensive media coverage of the Grenada, Panama, and Persian Gulf military actions impacted public opinion about women in combat. A 1990 New York Times/CBS News Poll indicated that 70% of Americans believed that women should be allowed to serve in combat positions. Sciolino, supra note 140, at A1.
169. HOLM, supra note 9, at 471; Jones, supra note 4, at 252 n.5; Kitfield, supra note 67, at *5. See also Utilization of Women in the Military Services: Hearings on S1507 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 102d Cong., 1st Sess. 795 (1991).
combat. At the outset, the Commission’s objectivity was challenged since many of its members had previously voiced their opposition to women in combat.

The Commission’s hearings received little substantive evidence that women were unsuited for combat roles. Yet, by a narrow margin, the controversial Commission ultimately defeated greater integration of women in military combat roles.

At the same time the Commission had been convening, the Tailhook Convention scandal, in which Air Force women were sexually assaulted at an aviator’s convention, came to light. The incident heightened public awareness about the pervasive sexual discrimination and harassment faced by military women. In the ensuing Tailhook investigation, some suggested that the participation of women in the Gulf War and the reexamination of women in combat had contributed to an even greater male animosity towards women who were now viewed as potential competitors in a down-sizing military.

Despite such resistance from the rank and file, institutional advancements continued to unfold. Effectuating the policies of the Clinton Administration, an April 1993 Defense Department directive halted the exclusion of women from combat aircraft and ships, followed by

170. HOLM, supra note 9, at 503-05; Kitfield, supra note 67, at *5.
172. Id. at *5-6.
173. Id. at *6-7.
175. In the aftermath of Tailhook, the Pentagon recently released new rules regarding sexual harassment and discrimination against women and minorities. The rules place greater accountability for charges of bias with top generals and admirals. Claimants will also be provided with a new avenue of appeal to service branch secretaries on their harassment and discrimination claims. Reuters, U.S. Officers Made Accountable on Bias, THE BOSTON GLOBE, May 13, 1995, at 3.
176. TAILHOOK REPORT, supra note 174, at 82-86. The expanding role of military women was threatening to many men, who wanted to turn back the clock on female advances. As one female officer asserted,

This was the woman that was making you, you know, change your ways.
This was the woman that was threatening your livelihood. This was the woman that was threatening your lifestyle. This was that woman that wanted to take your spot in that combat aircraft.

Id. at 83-84.
177. The April 1993 directive permitted women to serve in combat aviation positions and warship duty. Kitfield, supra note 67, at *1; Schafer, supra note 67. Women have served on Navy support and other noncombat vessels since 1978. Bradley Graham, Steady as She Goes on the Navy’s First Coed Carrier, THE WASH. POST, June 27, 1994, at A1. The USS Eisenhower is the first Navy combat vessel to be gender-integrated, with most agreeing that the process has progressed better than expected. Id.
statutory enactments of these directives. In January 1994, the Defense Department abolished the policy that excluded women from military specialties considered "dangerous," although women continued to be barred from direct ground combat units. With these 1993 and 1994 military policy changes on the meaning of combat, a number of previously restricted skills and positions were opened up to women.

By the early 1990s, women were becoming more integrated into traditionally male military roles. The military could no longer deny that women had experienced actual combat dangers: being killed, injured and taken prisoner. With the decrease of combat restrictions on military women and the Mass. Maritime decision, VMI (as well as the Citadel) could no longer argue that combat restrictions justified the bar on female admissions to state military academies. In addition, the integration of the federal and most state military academies made it clear that men and women could be trained together for military leadership positions without impacting military effectiveness.

With the expanding role of women in the military, VMI was not able to defend its all-male admissions policy based on combat readiness or military effectiveness. Another line of legal argument was needed to support VMI's exclusionary policy. In an effort to neutralize the gender issue, VMI would have to back away from its military history and pervasive military environment. VMI looked to support its discriminatory ban, not from a military perspective, but an educational one. In earlier case precedent, the concept of educational diversity had been used to limit women's educational choices and, ultimately, their career opportunities. Under the guise of educational diversity, VMI would now assert that providing an all-male educational institution served to diversify and expand

178. See supra note 67 and accompanying text.
179. The January 1994 directive abolished the Department of Defense's "risk rule." See Kitfield, supra note 67, at *5. The 1988 rule excluded women from positions characterized as presenting "risks of exposure to direct combat, hostile fire, or capture ... [provided that] such risks are equal to or greater than that experienced by associated combat units in the same theater of operations." HOLM, supra note 9, at 433. Despite the end of this rule, the Army and Marines continue to exclude women from ground combat roles and anticipate only very gradual growth in women's positions. Army, Marines to be Slow in Adding to Women's Roles, THE BOSTON GLOBE, Oct. 7, 1994, at 13.
180. Schafer, supra note 67; Kitfield, supra note 67, at *1-2. The current percentage of skills and positions open to women in each branch are as follows: Air Force—95% of skills open, 97% of positions open; Army—90% of skills open, 61% of positions open; Navy—83% of skills open, 60% of positions open; Marine Corps—80% of skills open, 34% of positions open. Kitfield, supra note 67, at *7.
181. VMI also faces the reality that only about 15% of its graduates pursue military careers. U.S. v. Commonwealth of Virginia, 766 F. Supp. 1407, 1432 (W.D. Va. 1991). Contra DeVan, supra note 3, at 520-22 (arguing that VMI's mission to train combat leaders justifies all-male admissions policy).
educational choices for both genders. By claiming educational diversity, VMI sought to neutralize gender and protect a discriminatory policy born of stereotypical views about women's roles in the military.

II. Sex-Segregation in Education Cases Under the Guise of Diversity

Traditionally, women, like African Americans, were stereotyped as intellectually inferior to men with little or no need for formal education. The later development of separate girls' schools and women's colleges, considered an important advancement at the time, never aspired to provide females with an education equal to males. Women's education was narrowly aimed at preparing women for their "proper place" in society, focusing on training women for domestic chores or low

182. Bennett L. Saferstein, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. Pitt. L. Rev. 637, 656 (1993). The author correctly asserts that the district court in the VMI case stressed the term "diversity" rather than gender discrimination to support VMI's all-male admissions policy. "This argument is a clever rhetorical device. The word diversity has positive, politically correct connotations. When used in reference to higher education, one naturally thinks of a diverse student body or diverse academic offerings, not an all-male-military school." *Id.* See infra notes 395, 405-07, 409-18, 423-33 and accompanying text.


As in the Negro problem, most men have accepted as self-evident, until recently, the doctrine that women had inferior endowments in most of those respects which carry prestige, power, and advantages in society . . . . The arguments, when arguments were used, have been about the same: smaller brains, scarcity of geniuses and so on. The study of women's intelligence and personality has had broadly the same history as one we record for Negroes.

*Myrdal*, *supra* note 1, at 1077.


As Lewis properly asserted:

Sex-segregated education, like racial segregation, did not represent a genuine attempt to guarantee equality. Just as the improvements in the legal status of blacks prompted the development of separate but equal doctrine in the field of race, an improvement in the status of women, i.e. the recognition by some that women could and should be educated, prompted the development of separate schools for women. Women could no longer be denied an education, but they could be denied coeducational learning. It is highly unlikely that females would have been educated separately from males had there not been prejudice against and stereotypical notions about women.

Lewis, *supra* note 4, at 599.

wage jobs in teaching or clerical positions. Reflecting social stereotypes, the courts often upheld state laws and policies that permitted gender-segregated schooling which marginalized women in the social, employment, and political spheres. Gender-segregated schools are often compared to race-segregated schools as both types of schools provided limited educational opportunities and were based on social stereotypes of intellectual inferiority.

Unlike gender-segregation in education, a number of important Supreme Court challenges began to erode the acceptability of racially-segregated schools under Plessy's pernicious notion of "separate but equal." Even before Brown finally struck down Plessy, these cases initially sought to operate within the confines of "separate but equal" by comparing separate programs to determine if they were indeed equal. These courts looked at both tangible (facilities, number of faculty, variety of courses, library, funding and student programs) and intangible (prestige, reputation, alumni influence, historic traditions, experience of administrators and standing in the community) factors in comparing separate or parallel programs. Leading up to Brown's reversal of Plessy, issues of prestige and history became more important than physical facilities in measuring the equality of separate educational institutions.

The first important development occurred in Missouri ex rel. Gaines v. Canada concerning the admissions of an African-American male to the

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186. MYRDAL, supra note 1, at 1077; Gardenswartz, supra note 184, at 607; Lewis, supra note 4, at 600-01; Saferstein, supra note 182, at 647; Chicago Note, supra note 183, at 312-13. See Williams v. McNair, 316 F. Supp. 134, 136 n.3 (D.S.C. 1970), aff'd per curiam, 410 U.S. 951 (1971) (upholding an all-female admissions policy for Winthrop College which prepared women for teaching, typing, stenography, sewing, drawing, millinery, dressmaking, needlework, cooking, housekeeping, and other skills "suitable to their sex and conducive to their support and usefulness"); But cf. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 720, n.l (1982) (striking down an all-female admissions policy in nursing school of college established to train women in teaching children, typing, bookkeeping, photography, stenography, drawing, needlework and other skills "necessary or proper to fit them for the practical affairs of life").

187. MYRDAL, supra note 1, at 1077; Gardenswartz, supra note 184, at 607; Lewis, supra note 4, at 599-601; Saferstein, supra note 182, at 646-47; Chicago Note, supra note 183, at 312-13. See supra notes 52-91, 103-60 and accompanying text.

188. MYRDAL, supra note 1, at 1077; Hacker, supra note 5, at 65; Lewis, supra note 4, at 594-95, 599-600; Chicago Note, supra note 183, at 312-13.


all-white University of Missouri School of Law. In this case, no other state-supported school offered a law degree program for African Americans, although the state argued that it intended to create a separate but equal law program at all-black Lincoln University. Since Lincoln did not provide legal training, Gaines was allowed to request reimbursement for reasonable tuition fees for a law program in a neighboring state under Missouri law.

Examining both tangible and intangible qualities, the Court noted that the out-of-state programs were substantially equal because these schools possessed fine reputations and utilized the same pedagogy, case books and courses of study as the University of Missouri's law program. However, the Court also recognized that there were special advantages to attending law school in Missouri, including opportunities to study Missouri state law, to observe the local state courts, and the prestige of the university's law program as attractive to prospective clients.

Despite providing nearly identical out-of-state educational options, the Court rejected the state's offer to provide Gaines with substantially equal facilities at out-of-state schools as violative of equal protection. By rejecting the out-of-state option, Gaines recognized that equal protection of the law mandates the preservation of the individual's right to an equal educational opportunity within the state's borders, even if this means segregated programs. Under a states' rights argument, the decision stated that once Missouri created the training opportunity it could not foist

193. 305 U.S. at 342-43.
194. The registrar at the law school advised Gaines to contact all-black Lincoln University, even though that university did not have a law degree program. Id. at 342.
195. The state claimed that the legislature was intending to bring Lincoln University up to the level of the University of Missouri so as to avoid racial integration of public higher education. Id. at 344. Under state law, Lincoln University was authorized to develop programs equal to those accorded white students either at the University or to arrange for the attendance of African-American students at programs in adjacent states. Id. at 340, 342-44.
196. Id. at 343. The state tried to fulfill its duty to provide equal educational opportunities through nearly identical facilities at out-of-state schools in neighboring Nebraska, Iowa, Kansas, and Illinois. Id. at 343-44.
197. Id. at 348-49.
198. Id. at 349.
199. Id. at 349-50.
200. Id. at 349-50. The Court stated that:

The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination . . . .

Id.
its responsibility to provide an equal program on to other states.\textsuperscript{201} The Court also noted that the claim of limited demand for legal training among African Americans was insufficient to justify the State’s actions since equal protection is a personal right, not a group one.\textsuperscript{202} Since equal protection is an individual right, the Court determined that the number of persons discriminated against was not important to its constitutional review.\textsuperscript{203}

In \textit{Sweatt v. Painter},\textsuperscript{204} the Supreme Court revisited a challenge to another all-white law school admissions policy at the University of Texas.\textsuperscript{205} In \textit{Sweatt}, the state hastily created an alternative school for African Americans in response to the lawsuit which the plaintiff found unacceptable.\textsuperscript{206} As in \textit{Gaines}, the Court’s decision examined both tangible and intangible factors in determining whether the newly-developed school was separate but equal to the all-white university program.\textsuperscript{207} In addition, the Court indicated that law is a practical profession that involves the healthy exchange of ideas and views and that the new law school for African Americans excluded the overwhelming majority of the population that lawyers must deal with in their professional careers.\textsuperscript{208}

After reviewing these factors, the Court determined that although the new school was making progress, it was significantly inferior to the

\textsuperscript{201} The decision stated that:

Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is within its own jurisdiction . . . . It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system.

\textit{Id.} at 350. \textit{See infra} note 496 and accompanying text.

\textsuperscript{202} 305 U.S. at 351.

\textsuperscript{203} \textit{Id.} at 351. The \textit{Gaines} decision indicated that:

It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

\textit{Id. See infra} notes 513-15 and accompanying text.

\textsuperscript{204} 339 U.S. 629 (1950).

\textsuperscript{205} \textit{Id.} at 631.

\textsuperscript{206} \textit{Id.} at 632-33. The original “parallel” program had no independent faculty, no library, few law books and lacked accreditation. \textit{Id.} at 633. After the trial, a law school for African Americans was opened at Texas State University for Negroes with a small student body, five full-time professors, a full-time administration staff, a moot court program, a legal aid program and one graduate who was a member of the Texas Bar. \textit{Id. See infra} notes 475-503 and accompanying text.

\textsuperscript{207} 339 U.S. at 632-34.

\textsuperscript{208} \textit{Id.} at 634. The decision noted that the law school’s admissions policy excluded 85% of the State’s population including most of the State’s lawyers, jurors, witnesses, judges and other government and court officials. \textit{Id.}
University’s law school on both tangible and intangible grounds. In particular, the Sweatt Court emphasized the importance of a school’s intangible qualities:

What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Despite the parallel program, the Court required the admissions of the plaintiff since the new school was separate but not equal.

Decided the same day as Sweatt, in McLaurin v. Oklahoma State Regents, the Court considered the admissions of an African-American student into a graduate program that required him to sit apart from his fellow students in the classroom, library and cafeteria. Although the student had access to the school’s tangible facilities, the Court determined that his segregated locations prevented him from enjoying the intangible benefits of “intellectual commingling” with fellow students. The Court noted that his separation from other students handicapped his

209. Id. Compared to the new law school, the University of Texas boasted three times as many full-time faculty with national reputations, a wide variety of courses, a law library with more than 65,000 volumes, a law review, moot court facilities, scholarship funds, Order of the Coif affiliation, and influential alumni in private practice and public life. Id. at 632-33. See infra notes 496-97, 524-30 and accompanying text.

210. 339 U.S. at 634.

211. Id. at 636.


213. Id. at 640-41. Originally, the plaintiff was denied admission to the University of Oklahoma’s doctoral program in education. The district court determined that the refusal violated the plaintiff’s constitutional rights. In response to the outcome, the Oklahoma legislature lifted the ban as to courses of study not available at separate African-American schools, but mandated that African-American students receive their instruction on a segregated basis. Id. at 639.

214. Initially, McLaurin’s section in the classroom was surrounded by a rail with the sign “Reserved for Colored,” which was later removed. Aside from his assigned seat in the classroom, McLaurin was assigned a separate table in the library and the cafeteria. Id. at 640.

215. Id. at 640-41. The state had argued that his separations were only nominal and did not put him at any disadvantage. Id.

216. Id. at 641. “Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.” Id. at 641.
graduate studies and therefore his education was not equal, in violation of his personal right to equal protection.\textsuperscript{217}

In \textit{Brown}, the Court examined racially-segregated schools in which tangible components or facilities were equal or being equalized.\textsuperscript{218} Despite this tangible equality, the decision focused on intangible qualities 'incapable of objective measurement,'\textsuperscript{219} as had been discussed in \textit{Gaines}, \textit{Sweatt}, and \textit{McLaurin}.\textsuperscript{220} The Court determined that separate programs were unconstitutional because they engendered an unacceptable social stigma on African Americans.\textsuperscript{221} Overturning \textit{Plessy}, the Court concluded that as to public education, separate educational institutions were inherently unequal and a denial of equal protection.\textsuperscript{222}

Even after \textit{Brown} struck down race-segregated education, the courts continued to uphold sex-segregated schools and colleges.\textsuperscript{223} Unlike race, some courts asserted that women and men are not similarly situated and, therefore, may be treated differently under the law.\textsuperscript{224} In initial challenges to gender-segregated educational programs, courts typically examined a state or city school system that offered both coeducational and single-sex programs. States often supported all-male or all-female admissions policies

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\item 217. \textit{id.} at 641-42. The Court recognized a distinction between state-mandated separation and individual bias. \textit{McLaurin} stated that the removal of state barriers would not free \textit{McLaurin} from individual or group prejudices. However, the Court stated that the Constitution, nonetheless, mandated the removal of state restrictions to student interaction to protect his rights. \textit{id.}

\item 218. 347 U.S. 483, 492 (1953).

\item 219. \textit{id.} at 493.

\item 220. \textit{see supra} notes 192-217 and accompanying text. \textit{see infra} notes 223-26 and accompanying text.

\item 221. "To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494.

\item 222. \textit{id.} at 495.

\item 223. It is important to note that many racial desegregation plans allowed for sex-segregated schools, at least on a transitional basis, until final adoption of a unitary school system. \textit{See} Singleton v. Jackson Mun. Separate Sch. Dist., 419 F.2d 1211, 1220 (5th Cir. 1970); Moore v. Tangipahoa Parish Sch. Bd., 304 F. Supp. 244, 254-55 (E.D. La. 1969), \textit{appeal dismissed}, 421 F.2d 1407 (5th Cir. 1969); Smith v. St. Tammany Parish School Bd., 302 F. Supp. 106, 108-09, 112-13 (E.D. La. 1969). It has also been suggested that the courts may have upheld sex-segregated schools after \textit{Brown} as a reflection of a prevalent social desire to prevent the commingling of white females and black males. Chicago Note, \textit{supra} note 183, at 300-02. \textit{See} MYRdal, \textit{supra} note 1, at 586-87 (suggesting that segregation grew primarily out of fear of sexual relations and intermarriage between white females and black males).

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by claiming a rational objective of providing both sexes with the same benefits of diverse educational choices within the school system.\textsuperscript{225}

Utilizing rational basis, the courts accepted the notion of educational diversity as a reasonable state objective provided that the single-sex options were substantially equal. Programs were viewed as substantially equal provided that the separate programs offered educational choices to both genders and did not provide better benefits to one gender over the other.\textsuperscript{226} By using the notion of substantial equality, courts avoided undertaking a detailed comparison between all-female and all-male schools, looking only for similar, but not equal, educational opportunities within a state’s entire educational program.\textsuperscript{227} Glossing over serious inequalities between separate programs, courts did not carefully evaluate tangible and intangible aspects of gender-segregated programs as found in the race-based cases of \textit{Gaines, Sweatt}, and \textit{McLaurin}.\textsuperscript{228}

Typically, the application of substantial equality analysis results in female applicants being excluded from all-male schools that are both tangibly and intangibly superior to all-female schools, thereby impacting women’s long-term personal development and career options.\textsuperscript{229} Substantial equality decisions often twist the notion of diversity to mean maximum educational choice for men and the exclusion of women from the most prestigious educational institutions.\textsuperscript{230} Often, the government in substantial equality cases would hold out the all-male military program as a justification for preserving an educational system based on stereotypical views about the military not being a proper place for women.\textsuperscript{231}

A. \textbf{SUBSTANTIAL EQUALITY UNDER THE RATIONAL BASIS TEST}

A critical commonality in earlier gender-segregation cases is that the Court used rational basis analysis in reviewing gender-based distinctions.\textsuperscript{232} These cases were decided before the Supreme Court began to

\textsuperscript{225} See infra notes 236-71, 285-305 and accompanying text.
\textsuperscript{226} See infra notes 251-52, 291, 296 and accompanying text.
\textsuperscript{227} Gardenswartz, supra note 184, at 612-13; Lewis, supra note 4, at 608-09.
\textsuperscript{228} Gardenswartz, supra note 184, at 612-13; Lewis, supra note 4, at 608-09. See supra notes 192-217 and accompanying text.
\textsuperscript{229} Gardenswartz, supra note 184, at 613-14; Saferstein, supra note 182, at 648-49; Lewis, supra note 4, at 611. Often, female aspirations to attend an all-male school were belittled and characterized as “an individual whim rather than a genuine attempt to seek equal rights.” Lewis, supra note 4, at 608. See infra notes 245, 257, 264, 270, 286, 291, 322-23 and accompanying text.
\textsuperscript{230} See infra notes 232-305 and accompanying text. See also Cheh, supra note 4, at 60-61 (warning that the concept of educational diversity can be easily manipulated to exclude or segregate on the basis of race, gender, and national origin).
\textsuperscript{231} See infra notes 240-44, 270-71, 281-83 and accompanying text.
\textsuperscript{232} The rational basis test permits legislative classifications that are reasonably related to legitimate state objectives. F.S. Royster Guano v. Virginia, 253 U.S. 412, 416 (1920). Legislative classifications are usually upheld unless the distinctions are patently arbitrary.
consider higher levels of scrutiny for gender and issues of impermissible sex stereotyping in legislative classifications. The Court did not utilize Craig's more rigorous intermediate scrutiny standard, which should be applied to the VMI dispute today. Despite using the rational basis test, these earlier cases are often cited to justify sex-segregated education in a post-Craig period.

In gender cases, the concept of substantial equality is initially found in Heaton v. Bristol, the first case to challenge sex-segregated schools. The case involved a challenge to the custom of excluding women from admissions to Texas Agricultural and Mechanical College (Texas A&M). The appeals court rejected the district court's determination that the bar to female admission violated the Texas and U.S. Constitutions under the concept of separate but equal.

In reviewing Texas A&M's all-male policy, the appeals court supported this custom by pointing to the college's historic tradition as a military college. Unlike race, the court contended that men and women were not similarly situated as prospective Texas A&M students because of the school's role as a military college with a lengthy record of student participation in mandatory military training. The students were members of military corps, divided up into military units, and lived in barrack-like dormitories under full-time military discipline. The Bristol court stated that the military training at the college was materially different from ROTC.

_Heaton v. Bristol_, 317 S.W.2d 86 (Tex. Civ. App. 1958), cert. denied, 359 U.S. 230 (1959). _It is important to note that the district court concluded that exclusion of females was not based on any direct statutory or constitutional mandate, but merely on the college's Board of Directors' tradition and practice. Id. at 88, 90. The appeals court overruled this interpretation and deferred to the college's all-male admissions policy based upon Board of Directors' resolutions and exercise of discretionary authority under the statutes creating the college. Id. at 93-95. In addition, the appeals court asserted that the Texas legislature's failure to countermand the Board's policy excluding females was viewed as tacit approval of the all-male admissions policy. Id. at 96. However, the appeals court did recognize that daughters of college faculty and staff had been admitted to the college in the past. Id. at 94-95. The appeals court justified these exceptions by asserting that these students were admitted to alleviate financial hardships on college employees. Id. at 95. _See infra_ notes 245, 254, 261, 286, 288 and accompanying text.

317 S.W.2d at 90-91, 97-99. The district court stated that the sex-segregated colleges amounted to separate but equal facilities for males and females which were inherently unequal. _Id._ at 91.
programs offered at other colleges. The appeals court asserted that the admissions of women would result in a costly renovation plan for the physical facilities and might present other "vexing problems" not resolved in the district court's decree. 239

To avoid undermining this justification for the all-male policy, the appeals court glossed over the fact that the college had suspended mandatory military training in 1954. Military training and courses in the military sciences had been purely voluntary for four years when the case went to trial. 240 At the time of the lawsuit, less than half the students at Texas A&M were cadets taking courses in military science and tactics. 241 In an effort to salvage their all-male policy, the Board reinstated a two-year requirement of mandatory military training after the women had filed their legal action. 242 Clearly, the Board believed, and correctly so, that reinstating military training would help thwart the women's claims, 243 since the military, like many other avenues of life, was not viewed as a proper place for women. 244

The female appellees primarily sought to attend Texas A&M based on the college's prestige, cost, and proximity to their homes. 245 In reviewing their concerns, the appeals court considered the entire Texas university system, rather than Texas A&M's individual policy, to determine whether the policy resulted in illegal sex discrimination. 246

Applying the rational basis test, 247 the court asserted that the state has a legitimate interest in providing diverse educational choices for its
Reasonably related to meeting this goal, the Texas university system provided for one all-female college, Texas Women's University, and one all-male college, Texas A&M, and sixteen coeducational institutions. Since most Texas state colleges were coeducational, the court determined that maintaining these single-sex options provided the same benefits and choices for both sexes. Under the concept of substantial equality, the court simply stated that "[s]uch a plan exalts neither sex at the expense of the other, but to the contrary recognizes the equal rights of both sexes to the benefits of the best, most varied system of higher education that the State can apply."

Even though Texas A&M's bar to female admissions might prevent these women applicants from pursuing higher education, the appeals court noted that the degrees they sought could be obtained at other Texas colleges. Under the application of substantial equality, the appeals court dismissed the women's hardships by stating that the goals of educational diversity should not be sacrificed to fulfill individual concerns of convenience and expense.

However, this same diversity argument could be used to uphold racially segregated schools which had been struck down in Brown. The appeals court sidestepped this issue by asserting that gender, unlike race, provides a legitimate basis for legislative classification pointing to a host of Supreme Court cases that limited female participation in the legal, political, and employment arenas.

The court did not address the appellees' desire to attend Texas A&M because of the college's widely-recognized prestige. Nor did the court

248. Id. at 98-99.
250. 317 S.W.2d at 98, 100.
251. Id. at 100.
252. Id.
253. Id. at 94.
254. Id. at 100. See Gardenswartz, supra note 184, at 613. However, the same individual concerns of convenience and expense for faculty and other college employees justified the admissions of their daughters to the college. The appeals court did not address this inconsistency. See supra notes 237, 245 and accompanying text; see infra notes 261, 286, 288 and accompanying text.
255. See Cheh, supra note 4, at 60-61.
256. 317 S.W.2d at 99. The appeals court noted that other cases distinguished between the sexes on such important issues as jury duty, voting rights, employment opportunities and conditions, and property rights. Id. See supra note 5 and accompanying text.
257. See Gardenswartz, supra note 184, at 613; Saferstein, supra note 182, at 648.
compare Texas A&M and Texas Women’s University in terms of reputation, which would have shown that the all-male school’s prestige was derived primarily from its better and broader range of academic programs. Under the guise of educational choice, the Bristol court managed to limit only women from choosing to attend the best and most prestigious school in the state.

Two years later, Allred v. Heaton, a class action brought on behalf of Texas women again seeking admissions to Texas A&M, the court relied on Bristol’s combat preparedness reasoning to justify upholding the school’s exclusively male system. As in Bristol, most of the plaintiffs asserted convenience and expense as the main reasons for their desire to attend the all-male military college. Using the same reasoning applied in the Bristol case, the court restated the purported benefits of educational diversity on a system-wide basis and rejected the class action.

However, unlike Bristol, one of the plaintiffs, Margaret Allred, alleged a desire to study floriculture, a degree program offered only at Texas A&M and not taught at any other state-supported college. The Bristol holding did not extend to this issue, and the court had to contend with the precedent in Gaines which required the admission of a black male to an all-white Missouri law school when no other state-supported school offered a law degree program.

Despite this precedent, the court stated several reasons to reject Allred’s request. First, the Allred court narrowly interpreted the Gaines case as only applying to distinctions based on race and would not extend the case by analogy to gender discrimination. Citing Bristol, the court reiterated the contention that sex, unlike race, provided a permissible basis for legislative classification on a wide range of subjects.


259. Saferstein, supra note 182, at 647-48. See supra notes 183-88 and accompanying text.


261. Id. at 258-60.

262. Id. at 262.

263. The court determined that the plaintiffs failed to provide sufficient evidence that they represented a class of women seeking admission to the college. Id. at 259. In addition, the court held that the female plaintiffs did not represent all women because other females might wish to retain a single-sex option in a primarily coeducational system. Id. at 262.

264. Id. at 252, 254, 258-59.

265. Id. at 260-61. Interestingly, on motions for a rehearing, the court struck out dicta that indicated that if Allred made an application to study floriculture and was otherwise qualified to attend the college, that the Gaines precedent would mandate her admission. Id. at 262-63.

266. Id. at 260-61.
Second, the court asserted that, unlike the student in *Gaines*, Allred had not been rejected for admission because she had not filled out an application for full-time admission to the college. In a rather disingenuous statement, the court indicated that Allred failed to make known her special educational needs to the college, which might have resulted in the college making an exception in her case. The court also doubted that she had any serious desire to study floriculture because her summer session application stated an interest in law.

Even if she had a serious interest in floriculture, the court once again raised the issue of military training as a basis for blocking her admission. As in *Bristol*, the court recited Texas A&M’s long history as a military college. However, the *Allred* court pressed the military issue even harder than *Bristol*:

This Court is of the further view that the duty of the United States Government to train its militia for the protection of the public transcends any private desire of any particular citizen in the United States to take a course of study offered at one of the United States military academies, whether that course includes basic military science, veterinary medicine or floriculture. In keeping with the foregoing view, we also think that it is the duty and a function of the State in the exercise of its public policy to provide military training for its youth, if it elects to do so, for the protection of the public, and that this duty and the form it assumes transcends any private desire of any particular citizen to take a course of study offered at its state military college, however desirable its course of study may be.

In this statement, the court assumes that military training is appropriate only for young males and suggests that Allred’s admission to Texas A&M was somehow unpatriotic and would endanger the national defense. Once again, the twin concerns of military training and educational diversity

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267. *Id.* at 256-57. It is important to note that originally the college refused to send any applications to the women, citing their all-male policy. *Id.* at 256. The plaintiffs’ attorney sent a letter indicating that the women were prepared to provide application information only if the school’s policy was changed to allow female admissions. *Id.* at 257. In response, the college sent four applications with a curt letter asserting that the forms were being supplied “as a courtesy only.” *Id.* The plaintiffs’ attorney then sent a letter notifying the college that his clients would not waste the effort to complete the form unless the college intended to consider their applications in good faith. *Id.*

268. *Id.* at 260.

269. 336 S.W.2d at 259-60. *See infra* notes 321-22 and accompanying text.

270. 336 S.W.2d at 258-61.

271. *Id.* at 261. Interestingly, the court uses the gender-neutral term “youth” when it actually means young males. *See supra* notes 146-55 and accompanying text.
silenced women’s calls for equal admissions to a prestigious state-funded college.

Nearly a decade later, the federal court in *Kirstein v. Rector and Visitors of the University of Virginia*\(^2\) reviewed objections to a two-year plan to admit women to the all-male University of Virginia.\(^3\) The court initially indicated its reluctance to interfere with the internal operation of the college, but deferred to the willingness of Virginia educational authorities to open the university to female students.\(^4\)

In affirming the plan, the court indicated the difficulty in evaluating the quality of education and made no attempt to compare the university with other state coeducational or single-sex colleges.\(^5\) Referring to both tangible and intangible factors, the court acknowledged that the all-male University of Virginia was the state’s largest educational institution providing the most diverse educational programs and maintaining a reputation of unparalleled prestige.\(^6\) In finding a violation of equal protection, the court asserted:

> The pattern of separation by sex of educational institutions is a long established one in America and a system widely and generally accepted until the last decade. Despite this history, it seems clear to us that the Commonwealth of Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the state. Unquestionably the facilities at Charlottesville do offer courses of instruction that are not available elsewhere. Furthermore, as we have noted, there exists at Charlottesville a "prestige" factor that is not available at other Virginia educational institutions.\(^7\)

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273. *Id.* at 187. The plaintiffs raised concerns about whether the plan would be permanently implemented or later undone by the state legislature or future boards. In addition, the plaintiffs objected that the plan did not address gender barriers at other state educational institutions. *Id.*
274. *Id.* at 186. The court congratulated the state’s educational authorities for their willingness “to innovate and favorably entertain the relatively new idea that there must be no discrimination by sex in offering educational opportunity.” *Id.* The court also noted that the suggested integration plan was in line with the general public trend toward coeducation. *Id.* at 188.
275. *Id.* at 186-87.
276. *Id.* at 187. Clearly, the all-male university’s superiority in the state system supports the idea that sex-segregated colleges lead to inferior educational opportunities for women. *See supra* notes 183-88 and accompanying text.
277. 309 F. Supp. at 187 (emphasis added). The court specifically stated that two of the plaintiffs were married to graduate students at the University and could not move without disrupting their marriages. The court asserted that it did not wish to force the plaintiffs to make a choice between marriage and education. *Id.* The sentiment smacks of gender
In reaching this conclusion, the court added that "separate but equal" analysis need not be applied to this situation since the university was unrivaled in the state system.278

Despite governmental approval for removing gender barriers to education,279 the court carefully limited its ruling favoring coeducation to the University of Virginia.280 The court would not extend its reasoning to other single-sex colleges offering unique educational opportunities in the state, such as the Virginia Military Institute.281 The court opined:

We are urged to go further and to hold that Virginia may not operate any educational institution separated according to the sexes. We decline to do so. Obvious problems beyond our capacity to decide on this record readily occur. One of Virginia's educational institutions is military in character. Are women to be admitted on an equal basis, and, if so, are they to wear uniforms and be taught to bear arms?282

The court does not respond to this rhetorical question, assuming that it is self-evident that women do not belong in the military environment.283

A few months later, a second federal court in Williams v. McNair284 reviewed a case in which males challenged an all-female admissions policy.285 The males stated that their desire to attend Winthrop College was based upon its proximity to their home.286 Using the rational basis test,287 the court determined that the males' concern about proximity was stereotyping since the court did not wish to disrupt the lives of women who were fulfilling the traditional role of wife.

278. Id. at 187 n.1. By refusing to apply this concept, the court avoided an important examination of whether sex-segregated schools resulted in inferior facilities, faculty, and programs at all-female colleges. Gardenswartz, supra note 184, at 615.
279. The court stated that it was impressed that the governmental report from the Woody Commission strongly supported the removal of gender-based admissions policies at all Virginia colleges and universities. 309 F. Supp. at 186.
280. Id. at 187.
281. Id.
282. Id. (emphasis added).
283. Even though VMI, like the University of Virginia, provides a unique and highly prestigious educational option, the court fell back into stereotypical thinking about the proper roles of women. See infra notes 385-537 and accompanying text.
285. Id. at 135 n.1. The court determined that the statute establishing the college excluded men by implication, not by its explicit terms. Id.
286. Id. at 138. The males did not claim that any specific programs or courses made Winthrop educationally advantageous to them. Id.
287. Id. at 138.
insufficient to overcome the history and tradition of single-sex colleges in the South Carolina system.\textsuperscript{288} Similar to \textit{Bristol}, the court stated that the women’s college must not be considered in isolation, but as part of a diverse state-wide higher education system. The state of South Carolina had a legitimate state purpose in creating diverse educational choices for its citizens.\textsuperscript{289} Reasonably related to this objective, the state had established eight separate educational institutions that offered varied courses and degree programs, with only two single-gender colleges: an all-female Winthrop College and an all-male military college, the Citadel.\textsuperscript{290} The court held that the male plaintiffs were not educationally disadvantaged since they could choose from a wide range of comparable state educational institutions.\textsuperscript{291}

As in the earlier cases, the court relied on the tradition and history of a prestigious military college to block demands for equal admissions.\textsuperscript{292} The court stated that the Citadel offered a full range of liberal arts courses and engineering degrees. Since it was a military school, the court made the conclusory statement that the legislature’s all-male policy was therefore appropriate.\textsuperscript{293}

In stark contrast with the Citadel’s broad educational opportunities, the court pointed out that Winthrop “was designed as a school for young ladies, which, though offering a liberal arts program, gave special attention to many courses thought to be specially helpful to female students.”\textsuperscript{294} The all-female training at Winthrop College was limited to traditional female jobs in the clerical, teaching, and domestic spheres.\textsuperscript{295} Even though Winthrop is clearly not educationally equal to the Citadel, the court claimed that the state’s single-gender approach was permissible because it

\textsuperscript{288} \textit{Id.}
\textsuperscript{289} \textit{Id.} at 135-36.
\textsuperscript{290} \textit{Id.} at 136. The court did recognize that pedagogical research is split over the quality and effectiveness of single-sex schools. \textit{Id.} at 137. Although recognizing the trend towards coeducation, the court asserted that there was still substantial pedagogical support for single-sex education. \textit{Id.}
\textsuperscript{291} \textit{Id.} at 137-38.
\textsuperscript{292} \textit{Id.} at 136. \textit{See supra} notes 240-46, 270-71, 281-83 and accompanying text.
\textsuperscript{293} \textit{Id.} at 136.
\textsuperscript{294} \textit{Id.}
\textsuperscript{295} \textit{Id.} at 136 n.3. The statute establishing Winthrop sought to provide for:

[The] thorough education of the white girls of this State, the main object of which shall be (1) to give young women such education as shall fit them for teaching and (2) to give instruction to young women in stenography, typewriting, telegraphy, bookkeeping, drawing[,] . . . designing, engraving, sewing, dressmaking, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex and conducive to their support and usefulness . . . .

\textit{Id.}
did not provide one sex with better educational advantages than the
other.296 Remarkably, the Williams court asserted that limiting educational
choice by gender was merely a reflection of the differing interests of
men and women.297 However, this analysis is deeply flawed because it
does not recognize that these differences in educational options were based
primarily on socialized stereotypical views of gender roles.

Building on Gaines and Kirstein, the court suggested that Winthrop
would have to open its doors to males only if comparable schools were not
available in the state.298 Distinguishing Kirstein, the court asserted that
unlike the University of Virginia, Winthrop College did not offer more
diverse areas of study or possess greater prestige than other coeducational
institutions in the state.299 It is not surprising that the court did not
compare Winthrop to the only other single-gender college in the state, the
prestigious Citadel. The fact that Winthrop lacked any special or
outstanding qualities is illustrative of the typical inferiority of all-female
institutions in sex-segregated educational systems.300 The court simplisti-
cally concluded that these admission policies are acceptable because they
are based upon permissible gender classifications and not impermissible
racial ones.301 Once again, the court referred to numerous cases that limit
women’s opportunities in the legal, political, social, and employment
spheres to support these gender-based policies.302

Awash in archaic gender stereotypes, the Williams court upheld the
single-sex policy under the guise of educational diversity.303 Unfortunately,
in its first opportunity to review sex-segregated diversity, the Supreme
Court summarily affirmed Williams.304 Despite the Williams court’s
reliance on the rational basis test and the lack of a written Supreme Court

296. Id. at 138 (quoting Heaton v. Bristol, 317 S.W.2d 86, 100 (Tex. 1958)). See supra
notes 258-59 and accompanying text; see infra notes 299-300, 309 and accompanying text.
297. The Williams court recognized the opposing views on single-sex education, but
basically ignored them:
It is conceded that recognized pedagogical opinion is divided on the wisdom
of maintaining “single-sex” institutions of higher education but it is
stipulated that there is a respectable body of educators who believe that “a
single-sex institution can advance the quality and effectiveness of its
instruction by concentrating upon areas of primary interest to only one sex.”
Id. at 138. (emphasis added).
298. Id. at 137. Under this concept, VMI should have been required to open its doors to
women since no comparable choice is available to females in the state. See supra note 282
and accompanying text.
299. Id. at 138-39.
300. See supra notes 183-88 and accompanying text.
301. Id. at 138.
302. Id. at 136-37. See supra note 5 and accompanying text.
303. See Gardenswartz, supra note 184, at 616-17.
(1971).
opinion, this affirmation would provide the basis for justifying sex-segregated education in later cases.305

B. APPLICATION OF HEIGHTENED SCRUTINY TO CLAIMS OF EDUCATIONAL DIVERSITY

Within a few months of Williams, the Supreme Court began to show greater sensitivity to the issue of sex discrimination and to consider the use of a modified rational basis test.306 The Court turned its attention toward divisions based upon sex and invalidated gender-based distinctions based on “overbroad generalizations” or “archaic notions” about the societal roles of both men and women.307 However, the Court vacillated on the proper standard of review of gender-based classifications, moving from modified rational basis to strict scrutiny and then finally to intermediate scrutiny.308

As courts began to move away from the rational basis standard for gender-segregation cases, as set forth in the Sweatt and McLaurin cases, the tangible-intangible benefits analysis became central to the courts’ evaluations of gender-segregated programs.309 Initially, the rising importance of intangible factors, such as history, prestige, and tradition along with the growing recognition that such gender-segregated programs are based on archaic stereotyping, signalled the end of the separate but

305. See infra notes 310-32, 393-400 and accompanying text.
306. Reed v. Reed, 404 U.S. 71 (1971) (striking down gender-based estate administration law based on administrative convenience under modified rational basis test). See Gardenswartz, supra note 184, at 617-18; Lewis, supra note 4, at 589.
equal justification for publicly funded gender-segregated schools, analogous to race-segregated schools.

Within this context, the Court applied a modified rational basis test to the constitutionality of two sex-segregated academic high schools in *Vorchheimer v. School Dist. of Phila.* 310 The Philadelphia public school system maintained two academic high schools, one for boys, Central High School, and one for girls, Girls High. 311 The plaintiff, a female honor student, challenged her rejection from all-male Central High School based solely on her gender. 312 She wanted to attend Central because she preferred its learning environment and academic program over that of Girls High’s. 313

The district court ruled in favor of the plaintiff. However, in a split decision, the appeals court upheld the gender-based admissions policy as not violative of the Constitution’s equal protection clause. 314 The court applied a modified rational basis test315 and cited *Williams*, with its emphasis on protecting the all-male military educational system, as controlling precedent. 316

Relying heavily upon the lower court’s factual findings, the appellate court stated that the two schools were academically and functionally comparable as to academic facilities, course quality, teaching faculty, academic standing, and prestige. 317 However, both courts noted that Central High was superior to Girls High in the scientific field, but largely

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310. 532 F.2d 880 (3d Cir. 1976).
311. *Id.* at 882. In the Philadelphia school system, academic high schools maintain “high admissions standards and offer only college preparatory courses.” *Id.* at 881. Attendance at these schools is voluntary with only seven percent of city students meeting the schools’ scholastic standards. *Id.* There is no coeducational equivalent in the city’s public school system. *Id.* Both schools were founded in the early 1800s and have maintained excellent educational reputations with distinguished records of alumni achievement. *Id.*
312. *Id.*
313. *Id.* at 882. The plaintiff believed that the environment at Girls High would be detrimental to her academic goals. She had previously been dissatisfied with her education at another city high school which she felt did not apply rigorous academic standards. *Id.* See *supra* note 217 and accompanying text.
314. 532 F.2d at 888.
315. The *Vorchheimer* court claimed that under either a rational basis or substantial relationship test the outcome of the case would be the same. *Id.* at 888. However, the court did not use the traditional language of the intermediate test. Based upon the *Reed* standard, the court reviewed whether the school board had a legitimate interest in single-sex education and whether the two schools bore a ‘fair and substantial relationship’ to this goal. *Id.* at 882.
316. See *supra* notes 284-305 and accompanying text.
317. 532 F.2d at 882-83. However, the plaintiffs had initially argued that there were substantial differences between the schools in such areas as relationships with community leaders, endowments, libraries, speakers, lecture programs, and prestige. Lewis, *supra* note 4, at 610 n.117.
ignored this important difference.\textsuperscript{318} Also, the court dismissed the plaintiff’s concerns as merely personal preference, not supported by evidence of psychological or other harm from attending Girls High.\textsuperscript{319} Although the court indicated that it was sympathetic to her desire to expand her choices, the court concluded that providing the plaintiff with her choice would deny the choice of others to attend single-sex academic schools.\textsuperscript{320}

Both the district and appeals courts determined that providing high schools with outstanding academic standards was a legitimate state objective.\textsuperscript{321} The real dispute arose over whether a dual single-sex system was substantially related to that goal. The district court asserted that although single-sex education had value, it was not substantially related to the interest of providing academically challenging high schools.\textsuperscript{322} The appeals court disagreed, reasoning that equal educational opportunities were available to both sexes since the academic high schools were academically and functionally equivalent\textsuperscript{323} and attendance at these schools was voluntary.\textsuperscript{324} Although the appeals court upheld the separate programs, \textit{Vorchheimer} marks the first serious attempt to compare the tangible and intangible benefits of gender-segregated programs not found in earlier substantial equality cases.

However, the court refused to analyze this dual system under the “separate but equal” doctrine, used in the line of cases challenging racial segregation in education and ultimately struck down in \textit{Brown}.\textsuperscript{325} Distinguishing \textit{Brown}, the appeals court stated that unlike race, gender is not a suspect classification and that it provides a basis for different treatment under the law in certain circumstances.\textsuperscript{326} Relying on \textit{Williams},
the court explained that the gender-based admissions policy applied to both
genders without providing a benefit to one gender over the other.327
Even though Williams was decided under the rational basis test, the appeals
court asserted that the decision would still pass constitutional muster under
the modified rational basis test.328
Further, the court would not distinguish Williams although Williams
dealt with discrimination against males rather than females. The
Vorchheimer appellate court recognized that gender-based distinctions
favoring females are justifiable to remedy past discrimination. However,
the court noted that there was no past deprivation of educational opportuni­
ties for women in Philadelphia that needed to be remedied. Therefore,
Williams was still controlling authority.329
On its second opportunity to consider the issue of sex-segregated
education, the Supreme Court deadlocked, affirming Vorchheimer without
a written opinion.330 Although Vorchheimer stands as precedent, its
controlling authority is undermined by later gender cases raising the
applicable level of scrutiny.331 Its factual findings were also questioned
in Newberg v. Bd. of Public Education, where the court felt that the
academic high schools in Vorchheimer, on closer review, were not
substantially equal.332
The Vorchheimer court did not apply the heightened scrutiny test that
the Supreme Court enunciated for gender-based distinctions in Craig v.
Boren.333 Heightened scrutiny, or the intermediate standard, requires that
the government show an “exceedingly persuasive justification” for its
gender-based distinction.334 At a minimum, the government has the
burden of proving that its objectives are not just rational, but legitimate and
important.335 The gender-based classification or discriminatory means
must be substantially related to the achievement of the purported objec­

327. Id. at 886. The appeals court distinguished earlier Supreme Court precedent
invalidating gender distinctions by asserting that those cases involved an actual loss of a
female benefit. Id.
328. Id. at 887. See supra note 306 and accompanying text.
329. 532 F.2d at 881.
330. Id. at 880.
331. See infra notes 362-82 and accompanying text.
332. Id.
333. Craig v. Boren, 429 U.S. 190, 197 (1976). In Craig, the Court struck down an
Oklahoma statute that permitted the sale of 3.2% beer to females over 18, but only to males
over 21. Id.
334. Id. See also Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 273 (1979);
Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Miss. Univ. for Women v. Hogan, 458
U.S. 718, 724 (1982). This test is to be applied to distinctions that discriminate against men
335. Craig, 429 U.S. at 197; Hogan, 458 U.S. at 724.
This test does not abolish all gender-based distinctions, but only those in which gender is not an accurate proxy for attaining the stated ends. In limited circumstances, the Court has upheld gender-based classifications that sought to remedy the effects of past discrimination against women.

However, the Court has also recognized that such benign classifications must be carefully examined to avoid reinforcing stereotypical notions about gender roles. Therefore, the application of heightened scrutiny must permit careful examination of the purported purposes to avoid perpetuating archaic or stereotypical views about the roles of men and women. The first two decisions to clearly apply Craig's intermediate scrutiny standard have struck down gender-based public education.

In *Mississippi University for Women v. Hogan*, a male applicant challenged his rejection from MUW's School of Nursing solely on the basis of his gender. Although the notion of personal convenience had been rejected in earlier cases, the applicant argued that he wished to attend MUW's nursing program because it was close to his home. The state countered that its objective was maximizing the range of female educational choices to remedy past discrimination against women in education. The state asserted that its all-female admissions policy was not arbitrary because it sought to provide women with the recognized educational benefits of single-sex education.

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336. Craig, 429 U.S. at 197; Hogan, 458 U.S. at 724.
337. Craig, 429 U.S. at 198; Orr, 440 U.S. at 280-83; Hogan, 458 U.S. at 726. A gender-based law can only stand if it better serves government interests than a gender-neutral one. Orr, 440 U.S. at 283.
342. *Id.* at 720-21. The applicant, Joe Hogan, was a registered nurse who sought to attain a baccalaureate in nursing. *Id.* at 720. Although qualified for admission, MUW advised him that he could only audit nursing courses, not take the classes for credit. *Id.* at 721.
343. See supra notes 245, 254, 261, 286, 288 and accompanying text.
344. 458 U.S. at 718 n.8. Unlike earlier cases, the Court considered the issue of proximity as an important, rather than a peripheral, issue in determining the validity of the all-female admissions policy.
345. *Id.* at 721, 727-28.
346. *Id.*
Applying the intermediate scrutiny test, the Court rejected the state’s all-female admissions policy, despite the claim of educational affirmative action for women. Under the first prong of the intermediate standard, the state had the burden of showing an “exceedingly persuasive” justification for a discriminatory classification. In Hogan, the Court examined the state’s purported objective of educational affirmative action for women. The Court stated that it was not required to accept the state’s claim of a benign, compensatory purpose at face value but must undertake a “searching analysis” of the claimed purpose. The Court reasoned that the state’s asserted compensatory purpose must actually benefit those who have suffered a disadvantage related to the gender classification.

In explaining why an analysis of the claimed objective was critical, the Hogan Court stated that the state’s objective must not reflect unacceptable generalizations about gender roles:

Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or “protect” members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

In reviewing the role of women in nursing, the Court found that the state’s claim of educational affirmative action was unpersuasive and was based upon stereotypical views of women. The Court determined that the state had failed to show that women suffered any disadvantages in

347. Id. at 724-26. It is important to note that the district court had entered summary judgment for the state after utilizing the rational basis test. Id. at 721. The appeals court reversed the district court’s decision after applying the intermediate standard. Id. at 721-22. In dicta, the Court hinted that the door was still open to the application of strict scrutiny for gender-based distinctions. “Because we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect.” Id. at 724 n.9 (citation omitted).

348. Id. at 731. In order to receive federal assistance, the Court recognized that Title IX exempts traditionally single-sex undergraduate colleges from its mandate against gender discrimination. Id. at 732. However, the Court determined that under the Supremacy Clause, Title IX cannot abrogate the constitutional right of equal protection of the laws. Id. at 733.

349. Id. at 728. In examining the establishment of MUW, the Court noted that MUW was created to provide women with limited access to higher learning, not to offer women educational options equal or superior to men. Id. at 727 n.13. The Court noted that “in Mississippi, as elsewhere in the country, women’s colleges were founded to provide some form of higher education for the academically disenfranchised.” Id.

350. Id. at 728.

351. Id.

352. Id. at 725. The Court referred to numerous historical examples in which women were excluded from career options because of a paternalistic desire to protect them. Id. at 725.
obtaining nursing education or leadership roles in the nursing profession. Rather, the Court determined that instead of compensating for past discrimination, the state's all-female admissions policy reinforced the stereotypical view that nursing is a woman's job.

By excluding men, the Court opined that the state was actually hurting women because wages are usually depressed in female-dominated professions like nursing. In addition, the Court reasoned that even if women did face discrimination in the nursing field, the state had failed to provide any evidence that the state legislature had instituted the all-female admissions policy to compensate for past discrimination. Therefore, under the first prong of the intermediate test, the Court concluded that the state failed to show how its claim of educational affirmative action supported its discriminatory admissions policy.

Under the second prong of the test, the Court also decided that the discriminatory means chosen, the gender-based admissions policy, were not substantially related to the purported compensatory objective. The Court found that men were already auditing nursing courses and did not adversely affect the learning environment. The Court noted that a male's presence in nursing classes neither impacted teaching styles nor caused any detrimental effect on female academic performance. Therefore, the Court concluded that excluding men was not necessary in order to reach MUW's educational goals.

Following Hogan, the Pennsylvania state court in Newberg v. Board of Public Education revisited Philadelphia's sex-segregation policy which was challenged in the Vorchheimer case. In Newberg, three female plaintiffs challenged the denial of their admission to Central High School based solely on their gender. Noting the revised standard of judicial

353. Id. at 729. Prior to the establishment of MUW's nursing program, the Court found that women earned 94% of all the nursing degrees conferred in Mississippi and women received 98.6% of all nursing degrees nationwide. Id.
354. Id. at 729-30.
355. Id. at 729 n.15.
356. Id. at 730 n.16.
357. Id. at 730.
358. Id.
359. Id.
360. Id. at 731.
361. Id.
363. The original Vorchheimer decision did not constitute res judicata with regard to the federal constitutional issue because the plaintiffs' representation in Vorchheimer was found to be materially inadequate. Id. at *11-12, 15. The original case also did not address the state constitution's Equal Rights Amendment. Id. at *1, 21, 26.
364. Id. at *3. The court noted that there were no known instances of Central High male students trying to transfer or enroll in Girls High, suggesting the clearly superior educational
review for gender classifications since *Vorchheimer*, the state court struck down the single-gender admissions policy, in part, under the Fourteenth Amendment to the U.S. Constitution.

In *Vorchheimer*, the city claimed that the important government objective of providing a quality education for top students justified its sex-segregated academic high schools. The *Newberg* court doubted that this important governmental objective was being served by sex-segregated schools. Although the parties had stipulated that single-sex education was a reasonable educational option, the court criticized the parties for not providing sufficient evidence from qualified educators to support this view. Further defeating the purported justification of insulating the genders from each other, the court stated that some Girls High students did attend certain Central High classes and Central High students regularly went to Girls High for tennis and basketball.

Based primarily on the unequal educational outcomes achieved by Central and Girls High School, the court also questioned the pedagogical value of single-gender education. The court found that the single-gender education policy resulted in poorer academic performance, weaker standardized test scores, and a lower college acceptance rate for female students from Girls High. These educational results undermine the asserted claim that "adolescents may study more effectively in single-sex schools."

Under the second prong of the test, the court determined that the single-sex schools were not substantially related to the asserted objective of quality education. Comparing the two high schools, the court found...
that female students at Girls High School received separate and materially unequal educational opportunities, consistent with the historically inferior educational offerings afforded women through sex-segregated education. Using the measured analysis of Gaines, Sweatt, and McLaurin, the court found substantial differences as to library and computer resources, quality of faculty, program funding, curriculum prerequisites, instructional equipment, degrees awarded, and campus facilities. The court determined that these material differences, some of which were known to the Vorchheimer court, provided separate and unequal educational facilities for female students who would continue to lag academically behind their male counterparts under this single-sex approach. The court, therefore, ordered Central High to open its doors to qualified female students.

Courts continued to apply the intermediate standard to educational diversity claims. In the first two cases, Newberg and Hogan, gender-based nonmilitary educational programs were struck down. However, the two challenges to single-sex education within the military context, VMI and Faulkner, revive the pre-Craig approval of gender-based public education based on stereotypical views about acceptable gender roles. Similar to other gender-based military cases, the VMI decisions take great pains to avoid addressing the historical problem of gender discrimination in the military. The VMI decisions never squarely faced the issue of gender

375. Id. at *12-13, 19-20.
376. See supra notes 183-88 and accompanying text.
377. Central High's aesthetically superior library possessed twice as many volumes as Girls High. It had a smaller population than Girls High, but maintained twice as many computers. Central High also had nearly three times as many faculty members with Ph.D.'s and 1.5 times more faculty with 21 or more years of teaching experience than the Girls High faculty. In addition, Central High students received about $382,145 in scholarships from the Barnwell Foundation over a twelve-year period. This fund was not available to Girls High students who raised money through an annual campaign of magazine subscription sales. Students at Girls High were required to fulfill academic prerequisites for advanced placement chemistry and physics that were not required of students at Central High. Finally, Central High possessed more instructional equipment than Girls High, including a separate computer room, planetarium, and cyclotron. Newberg, No. 5822, 1983 Phila. Cty. Rptr., LEXIS 94, at *12-14.
378. The court noted that the Vorchheimer court was aware of the disparities in library resources, planetarium and cyclotron, and superior scientific facilities. Id. at *11, 13, 14 n.105. However, the inadequate representation of counsel prevented the earlier court from becoming fully aware of many of the other differences. Id. at *12.
379. Id. at *19-20.
380. Id. at *30.
discrimination and stereotyping. Instead, they focused on educational choice, system-wide diversity, and the value of single-gender education. 382

III. The VMI I Decisions—Upholding All-Male Military Training and Education

The first round of the VMI dispute (VMI I) considered the constitutionality of the Commonwealth of Virginia's provision of male only military training under a proffered objective of educational diversity. The VMI I district court upheld the constitutionality of this all-male option applying the pre-Craig standard of substantial equality. 383 The VMI I appeals court reversed the lower court's holding, but stopped short of mandating the integration of VMI. Instead, the appellate court offered VMI an escape hatch: the "separate but equal" solution to the equal protection violation. 384

The second round of the litigation (VMI II) focused on the proposed separate all-female leadership program at a private institution, Mary Baldwin College. Discarding race and gender-based precedent, the VMI II district court approved a separate and substantially inferior training program for women as to both tangible and intangible elements. Recognizing the inferiority of the all-female program, the VMI II appeals court upheld the district court's decision under a new test of substantive comparability. This test, which is akin to the analysis underlying the pre-Craig substantial equality test, suggests that equality is based on bare assertions of similar educational goals rather than a detailed comparison of tangible and intangible aspects of each program.

The VMI I and II decisions ignore existing relevant race and gender-based educational precedent in a continuing effort to exclude women from a traditionally male sphere. A review of these decisions illustrates not the derogation of earlier educational precedent, but the continued embrace of stereotypical thinking about the proper role of women in society.

A. United States v. Virginia—A Deeply Flawed District Court Decision

In 1990, the Department of Justice brought an action against VMI on behalf of a female high school student who wished to be considered for

382. See infra notes 383-538 and accompanying text.
admission. The Justice Department argued that the exclusion of females, regardless of their qualifications, violated the Fourteenth Amendment. VMI responded that its all-male admissions policy promoted the legitimate state interest of diversity in educational choice.

At the outset, the VMI I district court indicated the importance of deference to state educational policy-makers. The opinion stated that courts should defer to state educational policy based upon First Amendment concerns about academic freedom, including the freedom to set diverse admission standards and to create different missions for different schools within a state system. Yet the court did note that this deference is neither as high as the deference to Congress in national defense matters nor is it absolute, as racial segregation cases illustrate.

Despite the claim of educational diversity, the district court could not help but recognize the military dimension of this case. The court’s decision began by analogizing the lawsuit to VMI’s participation in a Civil War battle. Before even discussing Hogan, the district court revisited the Kirstein and Williams decisions and approved of the system in which the military character of VMI and the Citadel called for an all-male admissions policy. The district court went so far as to quote the Kirstein court’s concern about the propriety of women receiving military training, wearing uniforms, and bearing arms. Not surprisingly, those initial remarks preceded a finding of constitutional validity of the Commonwealth’s provision of single-gender military education for men but not for women.

385. 766 F. Supp. at 1408. See also Watson, supra note 117, at 9.
386. 766 F. Supp. at 1408.
387. 766 F. Supp. at 1409. In this instance, the controlling state authority is the VMI Board of Visitors, a 17 member board appointed by the state’s governor and subject to the supervision of the state’s legislative assembly. Id.
388. Id. The court noted that the “attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education.” Id. (citing Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978)). The court added that this goal was not limited to individual programs, but could be extended to a review of a state’s educational system. 766 F. Supp. at 1409.
389. Id. at 1409 n.2. The court makes this remark without recognizing that VMI’s all-male admissions policy clashed with Congress’ view that military training should be co-educational. See supra note 279 and accompanying text.
390. 766 F. Supp. at 1409. See supra notes 236-71, 284-305 and accompanying text.
391. 766 F. Supp. at 1408. This court stated that:

It was in May of 1864 that the United States and the Virginia Military Institute (VMI) first confronted each other. That was a life-and-death engagement that occurred on the battlefield at New Market, Virginia. The combatants have again confronted each other, but this time the venue is the court. Nonetheless, VMI claims the struggle is nothing short of a life-and-death confrontation.

Id.
392. Id. at 1409-10.
393. See supra notes 232-71, 280-305 and accompanying text.
The court professed to use the Hogan test in addressing whether VMI's all-male program supported the state's asserted objective of educational diversity. Under Hogan, however, the state has the burden of showing an exceedingly persuasive justification for the gender classification. Thus, the court's standard of review more closely resembled the pre-Craig substantial equality reasoning. The VMI I district court considered the asserted objective of educational diversity in the context of Virginia's entire state system rather than just examining VMI's single-gender program. The court determined that VMI's all-male admissions policies met this first prong of educational diversity within the Virginia system of higher education by providing a single-sex choice and a unique pedagogical model of character and leadership development.

Initially, the district court improperly manipulated the Hogan standard by considering VMI's single-sex policy as an end rather than a means. The single-sex policy was not intended to be an end, but rather the means to train white males for military leadership. The single sex policy was not implemented for the development of educational choice or diversity.

Unlike the Hogan Court, the district court also seemed to accept at face value VMI's claim that the Commonwealth of Virginia consciously adopted a single-sex policy in order to promote diversity in the Virginia educational system. However, this asserted state objective ignores both history and current reality.

Within a historical context, it is ludicrous to claim that the founding of all-male VMI in 1839 reflected a concern for educational diversity or choice. The school's policy was adopted in a time when military training was exclusively provided to white males, since white males were the only full citizens and the only ones expected to participate and provide leadership in the armed forces.
The court’s deference to the state was also clearly misplaced since there is no evidence of any established state policy of educational diversity through single-sex institutions.\textsuperscript{399} In actuality, the Virginia legislature repealed statutes requiring single-sex institutions and sought the eradication of discrimination in education based on gender, race, or national origin.\textsuperscript{400} Despite a substantially higher demand for single-sex education among females,\textsuperscript{401} the state voluntarily opened up all four all-female schools to men, primarily in the 1960s.\textsuperscript{402} In addition, the governor and the state refused to defend VMI’s all-male admissions policy or actively participate in the lawsuit.\textsuperscript{403} Instead, VMI was represented by private counsel.\textsuperscript{404}

Furthermore, the lack of a coherent policy of diversity through single-sex educational institutions is shown by the fact that VMI is the state’s only single-gender educational institution.\textsuperscript{405} The \textit{VMI I} district court extolled the benefits of single-sex education without reconciling this position with the failure of the Commonwealth to provide such single-sex

When Virginia Military Institute was founded in 1839 as a state-supported military school for men only, it is inconceivable that any thought was given by the founders to the possibility that women should not be denied its intended benefits. No conscious governmental choice between alternatives therefore dictated the original men only policy; it simply reflected the unquestioned general understanding of the time about the distinctively different roles in society of men and women. Since that time and until this litigation (so far as anything before us reveals) no conscious governmental choice had ever been made by the Commonwealth of Virginia to reexamine that original policy. So far as can be told, the gender-role premises of its origins were those that continued over time to sustain it as official state policy.

44 F.3d at 1243 (Phillips, J., dissenting) (citation omitted).


400. 766 F. Supp. at 1414 n.10. Furthermore, the state’s Commission on the University of the 21st Century stated in its 1990 report that there should be no discrimination in higher education based on gender, race, or national origin. 976 F.2d at 898-99.

401. 766 F. Supp. at 1414, 1420. The court found this greater demand by women in both Virginia and the nation. \textit{Id.} at 1420.

402. \textit{Id.} at 1414 n.10. Longwood College became coeducational in 1949, and Mary Washington, Radford, and James Madison became coeducational in the 1960s. The \textit{Kirstein} litigation motivated the Commonwealth to open the doors of the all-male University of Virginia to coeducation in 1970. \textit{Id.} at 1419. \textit{See supra} notes 223-83 and accompanying text.

403. 766 F. Supp. at 1408. At the outset of the suit, then Governor Wilder indicated his personal opposition to VMI’s admissions policy. 976 F.2d at 894; Soderberg, \textit{supra} note 384, at 19. Governor Wilder had been refused admission to law school in Virginia because of his race and sought his degree outside the state. Soderberg, \textit{supra} note 384, at 18. Mary Sue Terry, the Commonwealth’s first female Attorney General, found herself in the ironic position of defending an all-male admissions policy. \textit{Id.} She eventually withdrew, claiming a conflict of interest. 976 F.2d at 894; Soderberg, \textit{supra} note 384, at 20.

404. 766 F. Supp. at 1408. VMI was ultimately defended by private counsel for the VMI Foundation and VMI Alumni Association and by pro bono counsel for the Commonwealth. 976 F.2d at 894; Soderberg, \textit{supra} note 384, at 20.

405. 766 F. Supp. at 1419.
options for women. \textsuperscript{406} Even the pre-Craig substantial equality cases were based on the notion that both genders were offered substantially equal educational opportunities within the state’s entire educational system. In the earlier cases of Bristol, Allred, and Williams, single-gender educational options, although inferior, were already available to women within the state’s educational system.\textsuperscript{407} As indicated in Williams, providing a single-gender choice in education must not exalt one gender over the other.\textsuperscript{408}

The VMI I district court failed to recognize that substantial equality reasoning had not been applied in situations in which no all-female educational option existed. Even under the stereotype-laden Williams decision, a lack of single-gender education choice for women exalts one gender (males) over the other (females). The court embraced single-sex education without considering the failure of the Commonwealth to provide such single-sex options for women.\textsuperscript{409} The court stated that no witnesses for Virginia could explain this failure to provide a single-gender educational choice for women.\textsuperscript{410} Yet, the court concluded its inquiry prematurely and failed to realize that its holding was condoning diversity of educational choice for men only. Instead, it blithely asserted that this omission was not before the court.\textsuperscript{411}

The district court also focused on VMI’s unique utilization of the “adversative” educational model as contributing to diversity in the state’s higher education system.\textsuperscript{412} The court determined that this model was unique and could not be replicated by ROTC programs or training at other

\textsuperscript{406} Id. at 1411-12. Relying primarily on Dr. Alexander Astin’s 1977 research study, \textit{Four Critical Years}, the court determined that single-sex education increased student self-esteem, increased student involvement in academic life, and resulted in greater professional leadership and achievement. \textit{Id.} at 1412. However, the Supreme Court in Hogan made it clear that there was not universal agreement that single-gender education provided unique educational benefits. \textit{Hogan}, 458 U.S. at 721. Also, the court’s reliance on twenty-year old research does not reflect feminist thought or studies that illustrate that single-gender education benefits women more than men. \textit{See} Saferstein, \textit{supra} note 182, at 657-58, 679 n.194. It is important to note that Dr. Astin had testified that he ethically opposed single-gender education because fairness and equity should be a higher societal goal than sustaining VMI’s single-gender policy. \textit{U. S. v. Virginia}, 852 F. Supp. 471, 479 (W.D. Va. 1994).

\textsuperscript{407} \textit{See supra} notes 259-60, 297 and accompanying text.

\textsuperscript{408} \textit{See supra} notes 291, 296-99 and accompanying text.

\textsuperscript{409} 766 F. Supp. at 1411-12. \textit{See supra} note 405 and accompanying text.

\textsuperscript{410} 766 F. Supp. at 1420. The court suggests that the Commonwealth may wish to rely on private colleges to provide single-gender options for women. \textit{Id.} at 1420-21. \textit{See supra} note 400 and accompanying text.

\textsuperscript{411} 766 F. Supp. at 1414-15. The court claims that the Department of Justice was seeking the admission of women to VMI; therefore, the failure of the state to provide an all-female option was not an issue before the court. \textit{Id.}

\textsuperscript{412} \textit{Id.} at 1413, 1415.
military academies. The court described how this adversative approach involves intense indoctrination through the use of ritualistic activities that emphasize physical and psychological stress and punishments, absolute equality of treatment, absence of privacy, military drills, and regimentation of cadet behavior. For the first seven months, new cadets are called "rats," subject to collective rewards and punishments for their conduct, comparable to the Marine Corps boot camp. It is suggested that this approach strips away prior views and habits and instills loyalty to fellow cadets and VMI values. Supporters of VMI assert that this method, along with VMI's pervasive military environment, promote leadership and character development.

Although the unique educational benefits of the University of Virginia demanded its integration in *Kirstein*, the district court decided against integration after considering the second prong of the intermediate standard. Distinguishing *Hogan*, where the Court stated that the admission of men to the all-women nursing school in *Hogan* would not impact pedagogical methods or classroom performance, the district court contended that admitting women to VMI would impair the egalitarian atmosphere that it claimed was central to the adversative model and would require its modification and ultimate destruction. The court never examined whether the adversative model could withstand modification or elimination and still meet VMI's asserted educational mission.

With the adversative model viewed as sacrosanct, the district court determined that the exclusion of women under the single-sex policy was
substantially related to the goal of educational diversity.\textsuperscript{423} Reminiscent of the flawed reasoning of Williams, the court, determined that providing this unique form of education only to men does not favor one gender over the other:

Gender discrimination, as a rule, works to the benefit of one group and to the detriment of another. But in a real sense of the word, that is not true in this case because, as the testimony of experts demonstrates, it would be impossible for a female to participate in the ‘VMI experience.’ Even if the female could physically and psychologically undergo the rigors of the life of a male cadet, her introduction into the process would change it. Thus, the very experience she sought would no longer be available.\textsuperscript{424}

The court’s concern that female admissions would end the adversative method suggests an underlying concern that it might come under closer scrutiny if allowed in a coeducational program, since its tactics might be viewed as sexual harassment.\textsuperscript{425} However, even in a single-sex environment, critics charge that the adversative model promotes unacceptable conduct that is tantamount to hazing, brainwashing, or sadomasochistic acts, which do not accomplish VMI’s mission.\textsuperscript{426}

The claim that admitting women would destroy the complete equality among VMI cadets is based on a false construct. VMI already recognized racial differences between white and African-American cadets starting in 1983. VMI funded a special recruitment and retention program for African-American cadets. The program offered special academic assistance in English and mathematics. It also sought to provide social and cultural

\textsuperscript{423} 766 F. Supp. at 1413.
\textsuperscript{424}  Id. at 1414.
\textsuperscript{425} In VMI II, the appeals court asserts that to employ the adversative method in a coeducational environment would destroy “any sense of decency that still permeates the relationship between the sexes.” U.S. v. Virginia, 44 F.3d 1229, 1239 (4th Cir. 1995), reh’g denied, 52 F.3d 90 (4th Cir. 1995). The court does not reconcile why it is concerned about decency or mutual respect in only a coeducational, and not in a single-gender environment as well. \textit{See supra} notes 113, 174-76 and accompanying text.
\textsuperscript{426} \textit{See} Cheh, \textit{supra} note 4, at 52-53; Saferstein, \textit{supra} note 182, at 655. While VMI seeks to retain this model, West Point has moved away from it and emphasizes more developmental and positive approaches to training and leadership. 766 F. Supp. at 1440. Under West Point’s 1990 Code of Conduct revisions, new cadets may not be hazed nor subjected to psychologically or physically demeaning or excessive conduct from other cadets. \textit{Id.} at 1441. Congress and the Department of Defense have often criticized the failures of the federal service academies and demanded greater efforts to eradicate all forms of physical and psychological hazing, particularly at the Air Force Academy. David Singband, \textit{Hazing Persists at Military Academies, Report Says}, \textit{Plain Dealer}, Nov. 22, 1992, at 8A; \textit{Hazing a ‘Cruel Fact of Life’ at Academies, Glenn Says}, \textit{Orlando Sentinel Trib.}, Nov. 25, 1992, at A10. “Congress outlawed hazing in 1874.” \textit{Id.}.\textsuperscript{426}
support to help the morale of African-American cadets dealing with the
tensions of a predominantly white organization.427

The court distinguished the race issue, however, and stated that gender
was the sole danger to maintaining an egalitarian learning environment.428
First, the court stated that the esprit de corps would be damaged because
male cadets would be distracted by the presence of female cadets and by
dating pressures.429 This assertion, however, flies in the face of the
exceptional level of self-discipline expected of VMI cadets.430 The
successful integration of women into various state and federal service
academies undermines this assertion as well, a fact recognized by the court
but ignored in its decision.431 Furthermore, VMI cadets will need to be
prepared to face these pressures when working with women in the gender­
integrated military branches.432 VMI, like other service academies, such
as West Point, could easily implement appropriate regulations regarding
relationships between male and female cadets.433

Second, the district court stated that accommodations for personal
privacy would have to be made, such as locked doors and covered
windows.434 However, in its findings of fact, the court noted that VMI
admitted that its barracks could accommodate female cadets. In addition,
the court recognized that male and female cadets at other service academies
live side by side in identical rooms without any gender designations on the
doors and use separate but identical shower and toilet facilities.435

429. Id. at 1412, 1440.
430. See Saferstein, supra note 182, at 662.
431. 766 F. Supp. at 1428-29. The district court noted that in 1983 the VMI Board of
Visitors created a Mission Study Committee to review the legality and appropriateness of
VMI’s single-sex policy. The seven-member Mission Study committee included three VMI
alumni and only one female, Dr. Virginia Lester, then president of Mary Baldwin College
which is now the home of the all-female Virginia Military Leadership Institute. Id. at 1427­
28. The committee received positive support and encouragement for coeducation from
representatives from West Point, the Naval Academy at Annapolis, Virginia Polytechnic
Institute, and nonmilitary educational institutions. Id. at 1428-30. Despite this input, the
committee found that there was no evidence to warrant any change in VMI’s single-sex
policy. Id. at 1429-30. The district court noted that “[t]he report provided very little
indication of how this conclusion was reached.” Id. at 1429. See Saferstein, supra note
182, at 663-64.
432. 766 F. Supp. at 1428. See Saferstein, supra note 182, at 663.
433. At West Point, dating is permitted between cadets, except that fourth year cadets may
only date members of their class and all cadets are prohibited from dating those in their
direct chain of command. 766 F. Supp. at 1441. The West Point regulations also require
cadets to knock before entering another’s room and do not allow cadets of different genders
alone behind closed doors. Id. See Saferstein, supra note 182, at 662.
434. 766 F. Supp. at 1412, 1438.
435. Id. at 1442-43. See Saferstein, supra note 182, at 661-62.
Third, the court concluded that physical education mandates would have to be revised to take into account physiological differences between men and women.\textsuperscript{436} However, the court acknowledged that some women could meet all of VMI's physical requirements,\textsuperscript{437} despite the court's claim, so no changes in physical standards would automatically have to be made. Also, now integrated federal service academies have not abandoned physical education requirements, but instead call for comparable training of male and female cadets.\textsuperscript{438} In the court's own findings of fact, representatives of the service academies indicated that these modifications did not significantly alter their missions.\textsuperscript{439}

Lastly, although recognizing that some women would thrive under this adversative model,\textsuperscript{440} the district court contended that most women could not succeed developmentally. The court found that female cadets would need a more supportive and nurturing learning environment.\textsuperscript{441} This determination amounted to sexual stereotyping and reveals the court's belief that the pedagogical underpinnings of military training are based on biological determinism.\textsuperscript{442} Clearly, the concept of different developmental approaches for males and females is not universally accepted, but is the subject of vigorous debate and disagreement among educational experts.\textsuperscript{443} The argument that favors different developmental approaches presupposes that women would not benefit from the adversative model because it involves more aggressive behavior that is considered socially acceptable only for males. This argument also suggests that most women benefit from educational approaches that emphasize maternal, nurturing characteristics in line with socially acceptable views of subordinate female behavior.\textsuperscript{444}

\textsuperscript{436} 766 F. Supp. at 1413, 1432-34, 1438.
\textsuperscript{437} Id. at 1412-13. See Saferstein, \textit{ supra} note 182, at 660.
\textsuperscript{438} 766 F. Supp. at 1439.
\textsuperscript{439} Id. at 1428-29. See Saferstein, \textit{ supra} note 182, at 660-61.
\textsuperscript{440} 766 F. Supp. at 1413. The court noted that one expert, Dr. Conrad, testified that some women would succeed under the adversative method with no major changes needed in a coeducational environment. Id.
\textsuperscript{441} Id. at 1413, 1434-35. See Margaret Talbot, \textit{The Gender Trap: Are Women's Colleges Bad for Women?}, WASH. POST MAG., Nov. 20, 1994, at 19, 30.
\textsuperscript{442} See \textit{supra} note 16 and accompanying text.
\textsuperscript{443} See \textit{supra} note 406 and accompanying text. See generally Talbot, \textit{supra} note 441, at 12-19, 30-35 (questioning whether separate educational approaches to male and female learning simply reinforces traditional sexual stereotyping in society).
\textsuperscript{444} Talbot, \textit{supra} note 441, at 19, 30-32. The author states that: Some [feminist scholars] are frankly suspicious of any approach to learning that seems to saddle women with the same nicey-nicey traits that robbed [women] of power in the past. The picture drawn by a book like \textit{Women's Ways of Knowing} may be descriptive, they argue—that is, it may accurately reflect the ways women have been raised—but it shouldn't necessarily be prescriptive, a blueprint for educating women now and in the future . . . .
B. THE FOURTH CIRCUIT’S WEAK REVERSAL

Despite the clear inconsistencies in the district court’s decision, the appeals court only weakly reversed the lower court’s decision. In doing so, the appellate court set the stage for VMI to exclude women while continuing to accept state funding. After embracing the district court’s view that the state may support single-gender educational options, particularly based on VMI’s pedagogical approach and institutional mission, the appeals court undertook a tortured application of the test set forth in Hogan. To justify its single-gender policy, VMI advanced educational diversity as its goal. However, VMI was unable to support its asserted objective as being in line with state goals promoting diversity based on equal opportunity in admissions and not diversity in pedagogical approaches. Thus, VMI’s argument contradicted the Commonwealth of Virginia’s diversity policy of equal opportunity in education without regard to gender, race, or national origin. In carrying out the goal of diversity, the appeals court found that the state had been moving consistently towards coeducation, including the integration of four formerly all-female colleges. Although, VMI showed that its goal of promoting diversity was an exceedingly persuasive justification for the all-male admission policy, it failed the first prong of the Hogan intermediate scrutiny test because women lacked equal opportunity. Recognizing that the state’s educational policy emphasized diversity and equal access, the appeals court held that the VMI program violated equal protection.

At this juncture of the application of the intermediate scrutiny test in Hogan, the failure of the state’s objective resulted in the Court mandating

Spreading the message that traits like cooperativeness and competitiveness are gender-coded, pink and blue, is risky business. It threatens to revive old stereotypes of women as gentle, intuitive caretakers and men as tough-minded aggressors, even to endorse some kind of biological essentialism.

Id. at 19, 30. See Hacker, supra note 5, at 61-62, 67-68.
445. U.S. v. Virginia, 976 F.2d 890, 898-99 (4th Cir. 1992). The Virginia legislature had established the Commission on the University of the 21st Century, which in its 1990 report espoused broadening access to higher education in the state. “Because colleges and universities provide opportunities for students to develop values and learn from role models, it is extremely important that they deal with faculty, staff, and students without regard to sex, race, or ethnic origin.” Id. at 899. (emphasis added).

In addition, the Governor and Attorney General of Virginia were both reluctant to participate in the lawsuit because of their view that Virginia favored equal access to state supported education. Id. at 894, 899. See supra note 279 and accompanying text.
446. 976 F.2d at 899.
447. Id. at 899-900. See Faulkner v. Jones, 51 F.3d 440, 450 (4th Cir. 1995) (Hall, J., dissenting) (“South Carolina’s proffered justification for denying its daughters an educational opportunity that it provides for its sons is of no more substance than Virginia’s policy of exclusion under the perverse guise of ‘diversity.’”).
the integration of MUW's nursing school. Yet in VMI I, the appeals court was unwilling to require integration or, at a minimum, divest VMI of public funding. On the contrary, out of deference to the preservation of VMI's controversial, adversative pedagogy, the court did not follow through on its conclusion that VMI's educational system was at odds with the state's educational goals. The appeals court accepted the district court's factual determinations that coeducation would substantially change VMI's "egalitarian ethos" due to alterations in physical training requirements, privacy issues, and cross-sexual relationships. Therefore, the appeals court agreed with the lower court that women seeking a VMI education would be denied that opportunity because their admission would destroy that desired experience.

However, the appeals court did not accept the district court's stereotypic view that the adversative model was only beneficial for men. Recounting the benefits of single-gender education, the appeals court contended that it is the homogeneity of gender, not its maleness, that justified the adversative model. The appeals court recognized that this model would also benefit the development of women in an all-female educational environment.

Having rejected the diversity claim, the appeals court looked to a new state objective, the pedagogical need for homogeneity in gender, as justifying VMI's exclusionary policy:

While VMI's institutional mission justifies a single-sex program, the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI's type of education and training to men and not to women. Although it is readily apparent from the evidence that the rigor of the physical training at VMI is tailored to males, in the context of a single-sex female institution, it could not be adjusted without detrimental effect. No other aspect of the program has been shown to depend upon maleness rather than single-genderess.
In deference to the newly-proffered objective of homogeneity of gender, the appeals court refused to mandate a specific course of action to remedy the equal protection violation. The decision allowed the state to select from three choices: 1) the integration of VMI, 2) the abandonment of VMI’s state funding, or 3) allowing the state to establish parallel institutions or programs.457

In a throwback to pre-Brown case law, the appeals court inappropriately revived the reviled concept of separate but equal by suggesting the third option of a distinct, parallel program for women. As in Brown, the appeals court should have adhered to the principle that separate is inherently unequal in public education whether race or gender is at issue. If the court was anxious to maintain VMI’s adversative model, it should have mandated that VMI no longer accept public funding for its discriminatory practices, rather than invoking the damaging concept of separate but equal.

Even if one accepted the dubious claim that Brown can be distinguished because it involved race rather than gender, VMI I is clearly analogous to the pre-Craig decision in Kirstein. In that case, the Kirstein appeals court looked at the Commonwealth of Virginia’s provision of a unique and valuable single-gender educational option available only to men at the University of Virginia. Based on tangible and intangible factors, particularly prestige, the Kirstein court determined that the University of Virginia must admit women because no other comparable state institution existed or could be created within the state system.458 The same approach should have been applied in this case. Recognizing the unique tangible and intangible benefits of VMI, the appeals court should have called for the integration of that prestigious program in order to remedy the constitutional violation.

Unfortunately, the Kirstein court, like the VMI I appeals court, declined to mandate gender integration statewide because of the stereotypical views about the proper roles of women in the military and military training.459 This same stereotypical approach underlying the appeals court’s failure to mandate coeducation at VMI also drove VMI’s decision to propose the substantially inferior program for women at Mary Baldwin College.460

457. Id. at 899-900. See supra note 407 and accompanying text.
459. See supra notes 275-77 and accompanying text.
460. Initially, VMI sought to challenge the appellate court’s decision that its program violated equal protection under the Fourteenth Amendment. VMI requested a rehearing en banc which was denied. Virginia v. United States, No. 91-1690, 1992 U.S. App. LEXIS 30490 (4th Cir. Nov. 19, 1992). VMI then sought a review of the decision by the Supreme Court which was also denied. Virginia v. United States, 113 S. Ct. 2431 (1993). See Scott Jaschik, High Court Deals Blow to Va. Military Institute by Declining to Hear Its Appeal to Stay All-Male, CHRON. OF HIGHER EDUC., June 2, 1993, at A21.
IV. VMI II—Upholding the Separate and Unequal Program—
Virginia Women's Institute for Leadership (VWIL) Under
Substantive Comparability

The VMI II decision involved the reevaluation of the concept of
"separate but equal" in gender-based educational programs. In Gaines,
McLaurin, and Sweatt, working within the limits of Plessy, the Supreme
Court required that any separate but equal arrangements must be equal as
to both tangible and intangible factors such as facilities, course quality,
teaching faculty, and academic standing, with particular focus on the
importance of intellectual exchange, history, prestige, and tradition.

Although separate but equal for race was clearly defeated in
Brown, the concept persisted in the pre-Craig case of Williams and the
modified rational basis test of Vorchheimer. In these earlier cases, the
courts sought to hedge the issue of separate but equal by suggesting that it
was only invalid in instances of race because race is a suspect classification.
Yet even in the Williams and Vorchheimer cases, the courts
indicated that gender-segregated programs are justified provided that one
gender is not provided with better educational advantages than the other.
Borrowing from Gaines, Sweatt, and McLaurin, Vorchheimer and the
Newberg retrial fleshed out this comparison of benefits by requiring that
gender-segregated programs must be functionally comparable based upon
an examination of both tangible and intangible factors.

In VMI II, it became quickly apparent that the proposed Virginia
Women's Institute for Leadership (VWIL) program was grossly unequal as
to both tangible and intangible benefits, with men receiving far superior
educational advantages. The proposed VWIL program failed to meet even
the meager requirements of the pre-Craig decision of Williams or to
undertake the detailed analysis of tangible and intangible benefits called for
in Vorchheimer, Newberg or the pre-Brown race-based cases. Instead the
VMI II courts created a new "special intermediate scrutiny" test of
substantive comparability. This approach places claims of comparable
educational results above the need for equality as to faculty, facilities,
funding, pedagogy, academic offerings, alumni support and prestige.

The VMI II courts clearly failed to consider the all-male admissions
policy in light of the historical discrimination against women in the military
of which VMI's policy is an enduring example. The persistence of the

461. See supra notes 189-222 and accompanying text.
462. See supra notes 284-340 and accompanying text. In Hogan, the Supreme Court
sidestepped the issue by asserting that Mississippi did not maintain any other single-sex
public educational institutions. Mississippi University for Woman v. Hogan, 458 U.S. 718,
720 n.1 (1982).
463. See supra notes 284-340 and accompanying text.
courts in keeping women out of VMI illustrated not the derogation of earlier educational precedent, but the continued embrace of stereotypical thinking about the proper role of women in society, in general, and the military, in particular. If VMI were not a military school, it is unlikely that the courts would have ignored substantial precedent and created the new test of substantive comparability which uses questionable ends to justify the gender-segregated means.

A. DISTRICT COURT APPROVAL OF THE SEPARATE AND UNEQUAL VWIL PROGRAM

VMI's response to the appeals court decision was a predictable one: the development of a separate program, VWIL, to be housed at Mary Baldwin College (MBC), a private all-female institution. A task force, headed and largely staffed by Mary Baldwin College faculty and administrators, was commissioned to create a leadership program appropriate for an all-female four-year college. Although the VMI II district court acknowledged that Mary Baldwin College had no experience training military leaders, the district court swallowed whole the task force's inchoate and untested view of how to train women for military leadership roles. The lower court's approval of VWIL once again raised the specter of separate but equal in the context of gender-based education.

Even though VWIL's mission statement calls for the development of female-citizen soldiers, the proposed VWIL plan is profoundly different from that offered at VMI. The task force did not use as an infrastructure either a military environment or the adversative method found at


465. United States v. Virginia, 852 F. Supp. 471, 476 (W.D. Va. 1994). The task force only met six times, with Dean Lott of MBC spending most of his working hours on the creation of VWIL. Id. at 492.

466. Id. at 501.

467. Id. at 484-85. Expert witnesses testified that it was too difficult to assess the real value of the VWIL program and its ability to achieve its anticipated outcomes until it was actually made operational. Id. at 478-79. The court itself recognized that “VWIL is a new venture and no one can predict with certainty its outcome . . . . No doubt the program will need further adjustment as experience dictates . . . .” Id. at 484. As of June 1995, there were 42 women enrolled in the VWIL program. Linda L. Meggett, Judge Tours Women’s Program in Virginia, POST AND COURIER (Charleston, S.C.) June 29, 1995, at A1.

468. 852 F. Supp. at 476.
VMI, but fell back on the stereotypical view of women as needing a more nurturing, nonmilitary environment. Exhibiting little concern for the formation of an esprit de corps among female students, VWIL organizers decided that students would not be required to wear uniforms, not be housed in barracks, and not yet be subject to strict military discipline codes.

The military training at VWIL is limited primarily to participation in a standard four-year ROTC program that the government described as a "pale image of the military lifestyle at VMI." Although, this same court in VMI I had previously indicated that ROTC programs were not equivalent to the VMI experience, they now determined that ROTC training was sufficient for VWIL’s female students. Incredibly, the district court asserted that a VWIL student need not wear a uniform round the clock, participate in a rat line, nor live in a barracks comparable to VMI to be a successful military leader. These bold pronouncements blatantly contradict the same court’s earlier insistence that the holistic, adversative model was key to the successful development of citizen soldiers.

469. Id. The Task Force rejected VMI’s adversative model, claiming that it would not produce the same results in VWIL participants, in direct contravention of the appeals court decision in VMI I. See infra notes 490-91 and accompanying text. Hearkening back to biological determinism, the task force determined that a more cooperative method, rather than the leveling process of the rat line, was appropriate for women. 852 F. Supp. at 476, 480-81. See supra note 16 and accompanying text.

470. 852 F. Supp. at 476. See supra note 455 and accompanying text.

471. Heavy reliance is placed on upper class students to maintain an esprit de corps. These students are expected to play major roles in mentoring incoming cadets, redesigning freshmen activities, enforcing rules and regulations and leading drills. 852 F. Supp. at 496-97. However, the initial classes will lack this upper class support and it is unclear how these early VWIL students will garner the mentoring skills they need to take on these projected roles.

472. Uniforms would only be worn during ROTC activities or Virginia Corps of Cadets activities. Id. at 495.

473. Id. at 477-78. VWIL students will also not be required to eat meals together. Id. at 495.

474. Military rules or regulations have yet to be adopted as a VWIL code of conduct. Id. at 497-98.

475. Id. at 478, 494-95, 497-98. At times, ROTC activities will be held at VMI because of the lack of proper facilities at MBC, such as a firing range. Id. at 497. To supplement ROTC activities, VWIL students will participate in an undefined leadership externship and Saturday seminars three times per semester. Id. at 477. The current ROTC program at MBC has only one participant, and no MBC student has been commissioned as a military officer in the past three years. Id. at 501.

476. Id. at 498.


478. U.S. v. Virginia, 852 F. Supp. at 478. It is interesting to note that students at ROTC programs at coeducational institutions often perform better than VMI cadets, again undermining the allegation that the adversative model is the key to the proper development of citizen soldiers. Id.

479. Id. at 498.
at VMI and the basis for excluding women from the program. Clearly, under *Williams* and *Vorchheimer*, males would be receiving an educational advantage over females because the *VMI I* court had already recognized that ROTC programs were not equivalent to training under an adversative model.

Aside from pedagogy, the VWIL plan is also fatally defective under *Vorchheimer* and *Newberg* because of substantive differences in both the quality and quantity of tangible and intangible benefits provided by VMI and VWIL. As to tangible aspects, the VWIL program is marked by a significantly smaller endowment, severely limited state financial support, poorer quality faculty, inferior physical training facili-

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480. See *supra* notes 419-33 and accompanying text. *But see* United States v. Virginia, 52 F.3d 90, 93 (4th Cir. 1995) (Motz, J., dissenting) (denying request for rehearing en banc of *VMI II*).

In her dissent, Judge Motz questioned the need for the adversative method based on the different pedagogical approaches used at the federal military academies. *Id.* at 92. See *supra* note 425 and accompanying text. In addition, she asserted that without the adversative model, VWIL is not "substantively comparable" to VMI, and therefore, VMI should become coeducational. 52 F.3d at 93. The dissent asserted:

If 'adversative' training is so critical to the VMI program that it virtually defines it, then a program without 'adversative' training can never be 'substantively comparable' to the VMI program, and so there is nothing to prevent the abolition of 'adversative' training and admission of women to VMI.

*Id.*

481. The facts clearly show that MBC has a total endowment of $19 million, with commitments for $35 million more. This endowment covers all of MBC, not just VWIL. 852 F. Supp. at 503. VMI is currently withholding the endowment until legal proceedings are completed and will only release the endowment if the ruling is favorable. MBC is presently using the interest from these funds to support VWIL's operational expenses. Meggett, *supra* note 467, at A1.

In *VMI II*, the appeals court indicated that VWIL would be provided with a permanent endowment of $5.46 million. On the other hand, VMI boasts a $131 million endowment with commitments for $220 million more. VMI has the highest per student endowment of any institution in the nation. 852 F. Supp. at 503. In addition, a large number of private scholarships are available to VMI cadets that are not open to VWIL students. 766 F. Supp. 1407, 1420 (W.D. Va. 1991).

482. The government had criticized the lack of sufficient funding for VWIL. 852 F. Supp. at 482. Although based on untested assumptions, the court determined that witness assertions of adequate funding were reasonable. *Id.* at 483. However, the General Assembly has only appropriated funds based on the difference in tuition between MBC and VMI for two years for 25 students. Allison Blake, *Student Requirements at Women's Leadership Institute*, ROANOKE TIMES & WORLD NEWS, Nov. 28, 1994, at A5. MBC has already recognized that there is no guaranteed funding for VWIL beyond the initial two years and that VWIL's future lobbying efforts for funds will reflect the realities of deep cuts in Virginia's public system. *Id.*

483. The court found that MBC faculty hold "significantly fewer Ph.D.s" than VMI's, with 86% of VMI's faculty possessing Ph.D.s compared to only 68% of MBC faculty. 852 F. Supp. at 502.
ties, and fewer academic programs. As demonstrated in earlier substantial equality cases, separate institutions for women are once again proven inferior alternatives to all-male options.

With respect to intangible factors, viewed as so important in *Kirstein*, *Sweatt*, and *McLaurin*, VWIL clearly will not provide the prestige, reputation, or alumni network that will open the doors to positions of leadership for its graduates that VMI has provided for its graduates for decades. The district court stated flatly that the VWIL program was not equal to VMI, in part, because of the lack of these very factors. After recognizing these deficiencies, the district court nevertheless approved the VWIL proposal, claiming that its conclusion was grounded in a solid rejection of “separate but equal” in gender-based education.

Thus, if ‘separate but equal’ is the standard by which the Commonwealth’s plan must be measured, then it surely must fail because, as the United States pointed out time and time again during the trial, even if all else were equal between VMI and the Virginia Women’s Institute for Leadership (VWIL), the VWIL program cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years. One must assume that the Fourth Circuit did not assign the Commonwealth an impossible task when it suggested that the Commonwealth was free to establish ‘parallel programs’ or to devise ‘creative options or combinations’ that would comply with

484. VMI has physical training facilities far superior to those of MBC, including an NCAA competition indoor track and field facility, a football stadium with track and field facilities, numerous multi-purpose sporting fields, an obstacle course, indoor and outdoor rifle ranges, more tennis courts, a more extensive weight room, and a gymnasium with ten times the seating capacity as that of MBC with television hookup capabilities and four basketball courts. *Id.* at 503.

485. VMI offers a full array of liberal arts, sciences and engineering degrees. MBC, and therefore VWIL, does not offer any bachelor of science degrees and does not offer an engineering degree. MBC students interested in an engineering degree must travel to Washington University in St. Louis, Missouri to obtain that degree and as a result, would not receive the tuition discount of a publicly-supported engineering degree that VMI students enjoy. *Id.* It is important to note that *Gaines* clearly rejected shifting responsibility for providing a separate but equal program to another state as violative of equal protection. See *supra* notes 192-203 and accompanying text. The district court weakly asserted that demand would not justify an engineering degree at MBC. 852 F. Supp. at 477. But since MBC does not offer an engineering degree, it is difficult to determine how this lack of demand can be shown.

486. *Id.* at 475. See *United States v. Virginia*, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting); United States v. Virginia, 52 F.3d 90, 91 (Motz, J., dissenting). See *infra* notes 534-35 and accompanying text.

487. 852 F. Supp. at 475.

488. *Id.*
the court's decision. It would be unrealistic to think that the Fourth Circuit was requiring an exercise in futility.489

After acknowledging these serious inequalities, the district court simply skipped over Vorchheimer, Newberg, and analogous race-based cases, determining that VMI I could not have intended a call for equality as to tangibles and intangibles since such a mandate could not be achieved through separate programs at VMI and VWIL.490 The district court ignored the fact that the appeals court could have been demanding a creative co-curricular program that more closely intertwines the facilities, faculty, endowment, and pedagogy of VMI with another all-female school. At a minimum, any parallel program should provide equality as to tangible factors such as faculty, facilities, endowment, and academic programs. Also, the district court would not be undertaking "an exercise in futility" if it accepted one of the other options outlined in VMI I: requiring VMI to seek solely private funding or to integrate its corps of cadets.

Having brushed aside existing precedent, the district court introduced a new concept of separate and unequal education when educational programs seek to obtain the same basic goal of training citizen soldiers.491 As a throwback to pre-Craig substantial equality thinking, the district court contended that the programs need not be equal or identical as to tangible and intangible factors in order to meet the demands of equal protection.492

The district court claimed that its view was grounded in the Fourth Circuit’s 1993 decision in Faulkner v. Jones,493 which stated that gender-segregated programs need not be identical in order to be equal.494 The Faulkner appeals court sought to clarify VMI I and identify those situations in which separate but equal might indeed be invalid within the gender-based educational context. Referring to VMI I, the Faulkner court indicated that a state may choose to provide parallel programs that were not identical, provided that the differences reflect recognized differences between men and women and were not based on gender stereotypes or generalized perceptions:

In a circumstance where a gender classification is not justified by an acknowledged difference between men and women, the equality of treatment cannot be satisfied by 'separate but equal' facili-

489. Id. (citation omitted).
490. Id.
491. Id. In an unfortunate closing statement, the district court blithely asserts that "[i]f VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination.” Id. at 484.
492. Id. at 477.
494. 852 F. Supp. at 476.
ties . . . ‘Separate but equal’ does not amount to equal. Thus, in the context of a racial classification which was not justified by the regulation’s purpose, the requirement of equal treatment could not be satisfied by ‘separate but equal’ treatment . . . . When, however, a gender classification is justified by acknowledged differences, identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender.495

Under this standard, in order to satisfy equal protection, the decision to set up separate facilities for males and females must consider the type of difference, the relevant benefits and needs of each gender, the demand both in quality and quantity,496 and other relevant factors.497 Under Faulkner, the real inquiry becomes whether recognized gender differences between males and females support differing military training methods at VMI and VWIL as well as inequalities regarding the tangible and intangible aspects of each program.

Yet the district court used Faulkner mainly for the purpose of asserting that equality can result without the provision of identical programs. However, the district court erred because it failed to recognize the concomitant factor of this standard, that any differences between the VMI and VWIL programs must be linked to actual differences between men and women.498

The VMI I appeals court specifically recognized that the adversative model could work in both an all-male and an all-female environment. The appeals court did not accept the notion that females could not benefit from the adversative model, suggesting instead that homogeneity of gender, not its maleness, was key to the model’s success. Therefore, based on VMI I, there is no recognized difference between the genders upon which to base different training methods in these separate, single-gender environments.499

495. 10 F.3d at 232 (citations omitted).
496. It is important to note that in race-based precedent, demand was not considered an appropriate factor since equal protection is an individual, rather than a group, right. See supra notes 199-203 and accompanying text.
497. 10 F.3d at 232. “In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of difference.” Id. The appeals court looked to public rest rooms as an example that justify different facilities for men and women based on privacy concerns. Id.
498. See United States v. Virginia, 52 F.3d 90, 92-93 (4th Cir. 1995) (Motz, J., dissenting) (denying request for rehearing of VMI II en banc).
499. This determination is at odds with the appellate court’s earlier claim that the adversative model was distinguished by a need for homogeneity of gender rather than its maleness or femaleness. See supra notes 453-55 and accompanying text. Dr. Astin, whose
The district court also tried to support different training methods by asserting that there was little or no demand on the part of women for the adversative style of training.\footnote{500} The court relied largely upon speculative testimony and unscientific interviews to assert the lack of female interest in a VMI-style experience.\footnote{501} The court conveniently dismissed its own finding in \textit{VMI I} that there was a lack of evidence regarding demand from women, since VMI only aimed its recruitment efforts at men.\footnote{502} Despite a lack of VMI recruitment of females, the district court did determine that about 347 women had inquired about admission to VMI between 1988 and 1990. VMI simply ignored these requests and later stopped counting female inquiries, thereby blocking the compilation of data that illustrated clear female interest in this type of education.\footnote{503}

The district court never addressed how gender differences are linked to unequal faculty, facilities, resources, and prestige between the programs at issue, as mandated in \textit{Faulkner}. Clearly, these tangible and intangible factors are equally important to men and women seeking a quality education.\footnote{504}

Without establishing a link between gender and program differences as required under the \textit{Faulkner} standard, the district court approved a separate and unequal program for women at VWIL. The court ordered the VWIL program to be implemented by Fall 1995, with the court retaining jurisdiction in order to supervise its implementation.\footnote{505}

single-gender educational research was heavily relied upon in \textit{VMI I}, argued that he did not support single-gender options in public education. 852 F. Supp. 471, 479 (W.D. Va. 1994). The district court ultimately accepted the view of VMI's experts that women need a more cooperative learning environment. \textit{Id.} at 478-81. Also, although much is made of the adversative model as justifying separate programs, \textit{Faulkner} allowed the option of a separate program without any claim that the Citadel utilized a pedagogical method that required homogeneity of gender. 10 F.3d at 232-33.\footnote{500} 852 F. Supp. at 480. Again, the court improperly considered the demand when equal protection is an individual, rather than a group, right. \textit{See supra} notes 189-222 and accompanying text.\footnote{501} 852 F. Supp. at 481. The court looked to the testimony of Dr. Richardson who claimed that after examining demand at West Point and Virginia Tech, female interest in an all-women's VMI would be too small and therefore, not feasible. \textit{Id.} at 481 n.12. Dr. Richardson also interviewed 20 female students participating in an ROTC program and found that only one expressed an interest in a VMI-style experience. \textit{Id.} Based on these limited efforts, Dr. Richardson extrapolated that only 25-30 women would wish for an all-female mirror-image of VMI. \textit{Id.}\footnote{502} United States v. Virginia, 766 F. Supp. 1407, 1436 (W.D. Va. 1991). VMI did not actively recruit women and told interested females at high school recruitment drives that VMI did not accept women. VMI did not keep any records or tallies of women who stopped by their booth for information. \textit{Id.}\footnote{503} \textit{Id.} 852 F. Supp. at 485. The court also required status reports every six months to help review the progress of the VWIL program. \textit{Id.}\footnote{504} See United States v. Virginia, 52 F.3d 90, 93 (4th Cir. 1995) (Motz, J., dissenting).\footnote{505}
B. Appeals Court Affirms Separate and Unequal Program Under New Substantive Comparability Review

The U.S. government appealed the district court’s ruling arguing that the separate VWIL program denies women a competitive military education and reinforces negative stereotypes about women.\textsuperscript{506} Revising the Hogan standards, the appeals court created a new “special intermediate scrutiny test” to justify its approval of the separate and unequal VWIL program.

Under Hogan’s first prong, the state has the burden of showing an “exceedingly persuasive” justification for a discriminatory classification. The classification must serve a legitimate and important objective. Hogan further indicated that the court must ascertain that the stated objectives are not ad hoc rationalizations that reflect archaic or stereotypical notions of gender roles.\textsuperscript{507} The Hogan Court found that the state’s claim of educational affirmative action was unpersuasive and was based upon stereotypical views of women.\textsuperscript{508}

However, in VMI II, the appeals court took a very different view of Hogan’s mandates. Initially, the court downplayed its responsibility to rigorously review the purported objectives, stating that courts should give substantial deference to a state’s asserted objective, with greater focus on the means selected to accomplish the state’s objective.\textsuperscript{509} However, Hogan emphasized that purported objectives should not be taken at face value. Rather, a searching analysis should be undertaken even when benign, compensatory purposes are claimed.\textsuperscript{510}

In VMI II, the court inquired first whether the facially-benign goal of offering single-gender educational options was a legitimate and important governmental objective.\textsuperscript{511} Although recognizing disagreement among educational experts, the court determined that the state’s provision of

\textsuperscript{506} United States v. Virginia, 44 F.3d 1229, 1235, \textit{reh’g denied}, 52 F.3d 90 (4th Cir. 1995). Because three judges recused themselves, a 6-4 majority of the nonrecused judges voted in favor of a rehearing, but did not achieve the procedurally-required majority of all the circuit’s judges. 52 F.3d. at 91. The government argued that the district court decision provided no remedy for women seeking a rigorous VMI-style challenge. In addition, the government asserted that the separate VWIL program perpetuated the stereotypical view “that women are not tough enough to succeed in VMI’s rigorous military-style program.” 44 F.3d at 1235.


\textsuperscript{508} Id. at 727-29.

\textsuperscript{509} 44 F.3d at 1236. In addition, the court stated that since education is not a constitutional right, states should be given great latitude in expending their limited resources and need not provide all types of education, pedagogical methods, disciplines or courses. Id. at 1237.

\textsuperscript{510} 458 U.S. at 728.

\textsuperscript{511} 44 F.3d at 1236-37. In VMI II, the court made the same mistake as the district court in VMI I in making single-gender education an end rather than a means. \textit{See supra} notes 405-08 and accompanying text.
single-sex education provided benefits for both genders and was therefore a legitimate, important government end.\textsuperscript{512}

Yet this approach was flawed from the outset for several reasons. The \textit{VMI I} appeals court had previously considered the government’s objective to be educational diversity (not single-gender education), which was found to be constitutionally defective. Judge Phillips questioned this unexplained switch in proffered state objectives in his dissent. Judge Phillips noted that the Commonwealth had posited a number of alternative objectives to try to support its discriminatory policy, including the intrinsic value of single-gender education, the need for alternatives to system-wide diversity or choice, and the importance of gender-adapted leadership training.\textsuperscript{513}

Citing \textit{Hogan}, Judge Phillips’ dissent asserted that the importance of the goal can only be analyzed after it has been determined to be the "actual purpose."\textsuperscript{514} His dissent argued that these various Commonwealth objectives were merely ad hoc rationalizations for its overriding concern, the retention of the all-male admissions policy at VMI.\textsuperscript{515} Judge Phillips warned the majority that this exclusionary policy was not based on concerns about pedagogy or expanding educational opportunities, but on

\textsuperscript{512} 44 F.3d at 1238-39.

\textsuperscript{513}  Id. at 1246-47 (Phillips, J., dissenting). Judge Phillips stated that:

Though usually the government objectives relied upon to justify gender (and other) classifications are plainly enough articulated by their state defenders, that is not so true here. There is a real problem of identification in this case, for the Commonwealth seems uncertainly to advance a number as alternative or cumulative free-standing possibilities . . . . We are entitled at the outset to inquire as to whether they are the 'actual purposes,' and to reject them if the record draws their reality as the true motivations for the policy sufficiently in doubt.

\textit{Id.} at 1246.

\textsuperscript{514}  Id. at 1246-47. \textit{See} Faulkner v. Jones, 51 F.3d 440, 451 (4th Cir. 1995) (Hall, J., concurring). Judge Hall stated that “we promoted a means to an end—single-gender education—to the status of an end in itself and avoided ascertaining, let alone analyzing, the true purpose behind the state’s decision to keep women out of VMI.” \textit{Id.}

\textsuperscript{515}  Judge Phillips wrote that VMI’s stated objectives

demonstrably are rationalizations compelled by the exigencies of this litigation rather than the actual overriding purpose of the proposed separate-but-equal arrangement. Such an inquiry—looking realistically to the historical record, taking judicial notice of much of relevance that is known to the whole world and of which we are not compelled to feign ignorance . . . . Specifically, I think it would support a confident and fair conclusion that the primary, overriding purpose is not to create a new type of educational opportunity for women, nor to broaden the Commonwealth’s educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth’s higher education system—though all of these might result serendipitously from the arrangement—but is simply by this means to allow VMI to continue to exclude women . . . .

\textit{Id.} at 1247. \textit{See} 51 F.3d at 451 (Hall, J., concurring); United States v. Virginia, 52 F.3d 90, 92-93 (Motz, J., dissenting).
reinforcing stereotypical views about the roles of women in society and in the military.\textsuperscript{516}

When the Virginia Military Institute was founded in 1839 as a state-supported military school for men only, it simply reflected the unquestioned general understanding of the time about the distinctively different roles in society of men and women. See Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 n.10 (1982) (noting numerous examples from that era of 'legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function'). Since that time and until this litigation (so far as anything before us reveals) no conscious governmental choice had ever been made by the Commonwealth of Virginia to reexamine that original policy. So far as can be told, the gender-role premises for its origins were those that continued over time to sustain it as official state policy.\textsuperscript{517}

The dissent properly criticized the majority for condoning this shift in asserted objectives and for failing to recognize this series of purported objectives as a mere pretext for unconstitutional gender discrimination.\textsuperscript{518}

As has occurred in other military cases involving gender discrimination, the \textit{VMI II} court attempted to neutralize gender by looking to homogeneity of gender and the benefits of single-gender education to justify the admission of men only to VMI. Clearly, the VWIL program would never have been proposed were it not for the legal challenge to VMI's discriminatory admissions policy. The actual purpose of the Commonwealth's actions was to retain the all-male military tradition of VMI, as exemplified by the handling of the litigation by VMI alumni and not state officials. Obviously, the all-male policy was not instituted to meet the various proffered Commonwealth objectives. Instead, it reflects stereotypical thinking about the proper roles of women in society and in the military.

\textsuperscript{516} 44 F.3d at 1243. Judge Hall’s \textit{Faulkner} dissent is consistent with Judge Phillips’ viewpoint. His dissent indicated:

In fact, though VMI, and the Citadel, and their advocates have ceaselessly insisted that education is at the heart of this debate, I suspect that these cases have very little to do with education. They instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later. The daughters of Virginia and South Carolina have every right to insist that their tax dollars no longer be spent to support what amount to fraternal organizations whose initiates emerge as full-fledged members of an all-male aristocracy.

\textsuperscript{517} 44 F.3d at 1243 (Phillips, J., dissenting).

\textsuperscript{518} 44 F.3d at 1244 (Phillips, J., dissenting).
Also, the appeals court has erroneously converted the chosen means—single-gender education—to an end. The Commonwealth’s true purpose is to maintain VMI’s all-male admissions policy while enjoying the use of public funds. The disingenuous end of educational diversity should not now be supplanted by the chosen means of single-gender education. It is this initial mis-step that leads the appeals court to erroneously conclude that a new intermediate standard must be created to review equal protection concerns.

Nevertheless, the court moved onto the second prong of the Hogan test and evaluated whether homogeneity of gender is substantially related to the goal of providing single-gender education. Under a flawed analysis, since single-gender education is viewed as an acceptable purpose, homogeneity of gender is not only substantially related, but automatically required to preserve the benefits of single-gender education. Thus, the court concluded that homogeneity of gender presents a unique problem requiring a new standard of review, which includes an examination of the “substantive comparability” of the gender-segregated programs.

Application of this traditional test, however, to a case where the classification is not directed per se at men or women, but at homogeneity of gender, presents a unique problem, because once the state’s objective is found to be an important one, the classification by gender is by definition necessary for accomplishing the objective and might thereby bypass any equal protection scrutiny. The second prong of the test thus would provide little or no scrutiny of the effect of a classification directed at homogeneity of gender . . . . To achieve the equality of treatment demanded by the Equal Protection Clause, the alternatives left available to each gender by a classification based on a homogeneity of gender need not be the same, but they must be substantively comparable so that, in the end we cannot conclude that the value of the benefits provided by the state to one gender tends, by comparison to the benefits provided to the other, to lessen the dignity, respect, or societal regard of the other gender.

However, this new approach is unnecessary because it is the misinterpretation of the Commonwealth’s objectives which leads to the court’s erroneous conclusion that the second prong of the test will not provide sufficient equal protection review. More appropriately, the court should

519. 51 F.3d at 451 (Hall, J., concurring). See Saferstein, supra note 182, at 657.
520. 44 F.3d at 1239.
521. Id. at 1237.
522. Id.
have determined whether homogeneity of gender is necessary for the development of citizen soldiers, an issue already addressed through the gender integration of federal military academies.\textsuperscript{523}

Yet even if one was to accept this notion of substantive comparability, the court has too narrowly applied this standard to the comparison of the VMI and VWIL programs. Instead of following Vorchheimer, Newberg, and earlier race-based precedent requiring a comparison of the tangible and intangible benefits of each program, the court only considered whether the programs sought to achieve comparable results through similar missions and goals.\textsuperscript{524} Also, the \textit{VMI II} appeals court never reconciled its focus on results with Faulkner’s requirement that any programmatic differences be based upon established gender differences. The court merely recited that providing identical programs for men and women may actually be more discriminatory than providing different programs which seek comparable results.\textsuperscript{525}

Ultimately, under the majority’s view, the importance of comparable facilities, faculty, funding, and prestige gave way to a mere recitation of the goal of providing a military education within the traditional mold.\textsuperscript{526} Rather than look to tangible and intangible factors that are susceptible to objective measurement, the court opted for the more amorphous standard of whether VWIL strived to achieve comparable results for females.\textsuperscript{527}

Thus, despite a flawed analysis which led to the dismissal of a more appropriate legal standard, the \textit{VMI II} court found that the VWIL and VMI programs were comparable and should be considered in the context of the diverse educational choices available in the Virginia educational system.\textsuperscript{528} Although acknowledging that the VWIL program lacked the critical components of history and prestige that the VMI program

\textsuperscript{523} See United States v. Virginia, 52 F.3d 90, 93 (4th Cir. 1995) (Motz, J., dissenting). See supra note 480 and accompanying text.

\textsuperscript{524} 44 F.3d at 1240-41. The court does not undertake a detailed analysis of funding, faculty, facilities, course offerings, alumni influence, prestige, reputation or historic traditions. The court only took a quick glimpse at the issue of pedagogy, suggesting that the debate over the benefits of the much-vaunted adversative training for women was a healthy one which the court need not resolve. \textit{Id.} at 1241.

\textsuperscript{525} \textit{Id.} The court claimed that since men and women were not similarly situated, the Commonwealth need only provide a program that is “comparable in substance, but not in form and detail.” \textit{Id.}

\textsuperscript{526} \textit{Id.}

\textsuperscript{527} Judge Phillips noted that any effort to monitor actual results would become “an absolute quagmire of conflicting contentions about achievement of the objective.” \textit{Id.} at 1251 (Phillips, J., dissenting).

\textsuperscript{528} \textit{Id.} at 1241. The court notes that Virginia students may select the all-male military environment of VMI, the all-female leadership environment of VWIL or the coeducational military environment of VPI. \textit{Id.}
possessed, the court stated that it was satisfied that continued commitment to VWIL's development would insure that both genders would receive comparable opportunities.

The appeals court's approach was a direct throwback to the pre-Craig substantial equality cases of Bristol, Allred and Williams in which these courts failed to undertake a detailed comparison of sex-segregated facilities, looking only for diverse educational opportunities within a state's entire educational system and not for equal choices. As with those earlier cases, a direct comparison would show that all-female institutions were consistently inferior to all-male programs in terms of both tangible and intangible factors. Following a disheartening pattern, VWIL students are again excluded from the best and most prestigious school based on stereotypical thinking about gender roles.

Hearkening back to the stigmatic implications of Brown, the VMI II court did acknowledge that an open question remained as to whether the Commonwealth would implement the VWIL program with the vigor and perseverance needed to build a comparably reputable program to VMI's. The appeals court delayed its examination of the stigmatic implications of the VWIL program since it was only a proposal, preferring to leave monitoring of the implemented program to the district court. The appeals court suggested that the district court's supervision during the VWIL's early development would help insure continuing the Commonwealth's commitment to the success of the VWIL program.

However, borrowing from Brown, Judge Phillip's dissent made it clear that the proposed VWIL program stigmatized its female graduates, a circumstance court supervision cannot remedy:

> [T]he contrast between the two on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation. If every good thing projected for the VWIL program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI in terms of the great bulk, if not all those criteria... The student and eventual graduate of VWIL will not be able to call on the prestigious name of 'VMI' in

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529. The majority states that "[i]t is true that VWIL is at its incipiency, and the VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of a degree from VMI. But such intangible benefits can never be created on command—they must be the byproduct of a longer-term effort." Id. In Brown and other race-based cases, the Court determined that intangibles, such as prestige, were often more important than tangible issues, such as faculty and facilities. See supra notes 197, 210, 216 and accompanying text.
530. 44 F.3d at 1241.
531. See supra notes 183-305 and accompanying text.
532. 44 F.3d at 1241-42.
533. Id. at 1242.
534. Id. at 1244 (Phillips, J., dissenting).
seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to be open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI. The catch-up game is an impossible one, as any honest reflection upon the matter must reveal.535

Clearly, the VWIL program is substantially inferior, not substantially comparable, to VMI. As in Sweatt, any student considering the "choice" between VMI and VWIL would recognize that the decision is hardly a close one.536 It seems inevitable that once the program is implemented, it will be subject to future legal challenges as to whether it has achieved its purported goals without stigmatic implications for women.537

Conclusion

For decades, social, political, and legal forces have barred women from full participation in society, particularly within the military. As women have taken on more challenging societal roles, women in the military have been prevented from keeping pace with women in other sectors because of continuing stereotypical views about the proper role of women in the military. VMI's attempt to keep women out of its publicly-funded military training program is merely a continuation of a discriminatory history.

Originally, VMI attempted to cloak its stereotypical thinking about women by asserting notions of educational diversity and choice. Its arguments manipulated these terms to mean choices only for men, not women. Using the intermediate standard of scrutiny and legal precedent, the VMI I appeals court should have ordered VMI to either integrate its program or forego public funding. Unfortunately, that court succumbed to stereotypical thinking about the proper roles of women in military training, reviving the concept of separate but equal for gender-segregated public education.

In defiance of earlier gender and race-based precedent, the VMI II courts approved a proposed VWIL program that provided separate and wholly unequal tangible and intangible benefits for women cadets. The VMI II courts recognized inequalities, but refused to take the actions required to preserve the equal protection rights of women. Instead, the VMI II courts created a new test of substantive comparability that puts similar ends above similarities in facilities, curriculum, funding, faculty,

535. Id. at 1250.
536. See supra notes 209-11 and accompanying text.
537. See supra note 1 and accompanying text.
alumni support, and prestige. Finding a creative justification for maintaining the status quo, the VMI II courts further entrenched the inferior educational offerings available to women as compared to those available to men.

This spring, the Supreme Court will decide the VMI case and, consequently, has the opportunity to recognize the historic discrimination against military women. The Court can halt the revival of the separate but equal concept it put to rest in the Brown decision forty-two years ago. In denying legitimacy to VMI's arguments for gender segregated military education, the Court will be abolishing a lingering obstacle to full female integration into the armed services—namely, that women do not belong in the military or at these elite military institutions. In the interest of equal protection, the Court should order that VMI lose its public funding if it refuses to integrate. To do any less, the Court will be handing down yet another setback in the struggle of women to be treated as equals, not only in the military environment, but in society at large.

Postscript:

On June 26th, the Supreme Court struck down VMI's all-male admissions policy. United States v. Virginia, No. 94-1941, 1996 WL 345786 (U.S. June 26, 1996). The Supreme Court decision addressed many of the points raised in Prof. Ponte's article, including the substantial tangible and intangible differences between the VMI and VWIL programs, and the lower courts' erroneous application of the intermediate standard. The Hastings Women's Law Journal regrets that its production delays postponed the timely publication of this article.

538. Holm, supra note 9, at 311-12; John Diamond, GAO Finds Rampant Harassment at Military Academies, Associated Press, Feb. 3, 1994, available in LEXIS, Nexis Library, CURNWS file. A survey of the 1993 classes of the academies showed that 80% of female cadets observed or experienced sexist comments in the past year. Id. A 1992 survey determined that 78% of the women and 52% of the men at the Air Force Academy heard sexist or demeaning remarks about females daily. Id. Many female cadets reported egregious acts of harassment, including attempts by male cadets and faculty to fondle or kiss them, videotaping of women in showers, and prank phone calls. Id.

Male cadets continued to challenge the presence of women at the academies. As one West Point cadet stated that he wished he had attended the institution "before females destroyed this place. The West Point I attend is nothing like that I read about that produced MEN like Lee, Eisenhower and the many other brave SOLDIERS. What makes them want to be men?" Id. See Honor Code & Sexual Harassment, 1994: Hearing Before the Subcomm. on Force Requirements and Personnel of the Senate Armed Services Comm., 103d Cong., 2nd Sess. (1994) (statement of Lieutenant General Howard D. Graves, U.S. Army Superintendent, U.S. Military Academy), reprinted in Federal Document Clearing House, Congressional Testimony, LEXIS (efforts of West Point to avoid sexual harassment and to respect diversity in cadet corps).

Despite these obstacles, for the first time in West Point's 193-year history, the number one student in the academy's 1995 graduating class was a woman, Rebecca Marier. Marier lead her class of 987 cadets in academic, military and physical training programs. Marier intends to complete her graduate studies in medicine at Harvard University. Tops at West Point, WASH. POST, June 4, 1995, at A10.