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William A. DeVan

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NOTES

TOWARD A NEW STANDARD IN GENDER DISCRIMINATION: THE CASE OF VIRGINIA MILITARY INSTITUTE*

The whole drift of our law is toward the absolute prohibition of all ideas that diverge in the slightest form from the accepted platitudes, and behind that drift of law there is a far more potent force of growing custom, and under that custom there is a national philosophy which erects conformity into the noblest of virtues and the free functioning of personality into a capital crime against society.¹

Through many battles in the courts, legislatures, and businesses of America, women have made unprecedented progress in securing equal rights under the law in the past thirty years. Society and the courts, however, have failed to reach the same consensus regarding the place of gender under our Constitution as they have with respect to race.

The conflict between women's demands for economic and professional equality and men's basic desire for privacy poses delicate questions that current Equal Protection Clause analysis cannot clearly answer. Twelve years after Melissa Ludtke won the right to conduct interviews with professional male athletes in their locker rooms,² National Football League Commissioner Paul Tagliabue fined Sam Wyche, coach of the Cincinnati Bengals, \$30,000

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1. *In Brief, the Law*, N.Y. TIMES, Aug. 9, 1964, § 6 (Magazine), at 60 (compilation of quotations by Ruth Block; quotations attributed to H.L. Mencken).

2. *See Ludtke v. Kuhn*, 461 F. Supp. 86 (S.D.N.Y. 1978). The court reasoned that because the City of New York leased the stadium to the New York Yankees baseball team, the Commissioner of Baseball's policy of excluding female reporters from the locker room constituted state action. *Id.* at 98. The court determined that the policy of exclusion was not substantially related to the privacy of the players and that it interfered with Ms. Ludtke's "fundamental right to pursue her profession in violation of the Due Process Clause of the Fourteenth Amendment." *Id.*

for refusing to allow a female sports reporter into a locker room to conduct postgame interviews.³ Coach Wyche implied that concerns for the privacy of his players motivated his actions when he stated, "I will not allow women to walk in on 50 naked men."⁴ Other professional athletes have expressed similar concerns.⁵

In *New York State Club Association v. City of New York*,⁶ the New York Court of Appeals ruled that state laws banning all-male clubs that provided benefits to persons other than their own members did not violate constitutional rights to freedom of association and privacy.⁷ As in the cases involving female reporters, the men in *New York State Club* believed they had a right to congregate in the absence of women.⁸ Because these congregations resulted in economic benefits to the club members, women exerted political pressure to prohibit such clubs.⁹

Although these conflicts occurred in different legal climates, they highlight a fundamental problem with Equal Protection Clause analysis in gender discrimination cases. Normatively, individuals should not receive different legal treatment merely because they were born one sex and not the other, however real physiological¹⁰ and psychological¹¹ differences exist be-

3. Ann Blackman & Wendy Cole, *Trouble in the Locker Rooms; More Women Reporters Face Hostility that Threatens Their Access*, TIME, Oct. 15, 1990, at 97.

4. *Id.*

5. *See id.* When Detroit Free Press reporter Jennifer Frey asked Jack Morris, a pitcher for the Detroit Tigers, for an interview, he reportedly responded by saying "I don't talk to women when I am naked unless they are on top of me or I am on top of them." *Id.*

6. 505 N.E.2d 915 (N.Y. 1987).

7. *Id.* at 916, 921-22.

8. *See id.* at 920.

9. *See id.* at 916-17.

10. *See* JUDITH STIEHM, *BRING ME MEN AND WOMEN: MANDATED CHANGE AT THE U.S. AIR FORCE ACADEMY* 173 (1981). These differences are not limited to the relative roles in child bearing. For example, on average, women have 24% body fat as compared to 16% for males, and "[m]inimum essential fat is considered to be 3 percent for men and 14 percent for women." *Id.* Additionally, men tend to have greater upper body strength. *Id.*

11. One journalist summarized these differences as such:

Relationship colors every aspect of a woman's life, according to the researchers. Women use conversation to expand and understand relationships; men use talk to convey solutions, thereby ending conversation. Women tend to see people as mutually dependent; men view them as self-reliant. Women emphasize caring; men value freedom. Women consider actions within a context, linking one to the next; men tend to regard events as isolated and discrete.

Anastasia Toufexis, *Coming from a Different Place: Men and Women Just Don't See Things The Same Way. Some Surprising New Studies of Schoolgirls Show Why*, TIME SPECIAL ISSUE, WOMEN: THE ROAD AHEAD, Fall 1990, at 65; *see also* DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990) (explaining how fundamental

tween gender groups.¹² These differences are probably "the most salient of all personal characteristics. Observers almost always notice and recall the gender of a target person."¹³ Common experience indicates that men and women interact differently. Although using group differences to treat individuals differently may result in overbroad exclusions from certain benefits, the very existence of the differences impedes consistent application of a single Equal Protection standard of review.

The Court currently applies mid-tier or intermediate level scrutiny in gender discrimination cases. The United States Supreme Court first announced this standard in *Craig v. Boren*¹⁴ when it stated that "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."¹⁵ Justice Rehnquist immediately criticized the standard in his dissent:

How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite

differences in perception create substantial obstacles to communication between males and females); Judith Galloway, *The Impact of the Admission of Women to the Service Academies on the Role of the Woman Line Officer*, 19 AM. BEHAVIORAL SCIENTIST 647 (1976). Other researchers have suggested that

the difference in emotional response in men and women can be explained by the differences in the structure and organization of the brain. Because the two halves of a man's brain are connected by a smaller number of fibers than a woman's, the flow of information between one side of the brain and the other is more restricted.

Ann Moir & David Jessel, *Sex and the Cerebellum: Thinking About the Real Difference Between Men and Women*, WASH. POST, May 4, 1991, at K4.

12. The issue of whether these differences result from nature or nurture is beyond the scope of this Note. It may be within the scope of constitutional inquiry when differences in treatment create self-perpetuating stereotypes. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (holding that the "policy of excluding males for admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job"). Some evidence indicates that differences in physical strength between men and women are partially attributable to stereotypes. See STIEHM, *supra* note 10, at 168.

13. Jerome Adams, *Women at West Point: A Three Year Perspective*, 11 SEX ROLES 525, 533-34 (1984) (citing Kay Deaux, *Sex: A Perspective on the Attribution Process*, in 1 NEW DIRECTIONS IN ATTRIBUTION RESEARCH 335, 535-52 (John H. Harvey et al. eds., 1976)).

14. 429 U.S. 190 (1976).

15. *Id.* at 197.

subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.¹⁶

Justice Souter echoed these concerns during his confirmation hearings when he stated: "[The mid-tier test] is not good, sound protection. It is too loose."¹⁷

One of the most recent gender discrimination cases litigated on Equal Protection grounds was a dispute between the Virginia Military Institute (VMI), located in Lexington, Virginia, and the United States Department of Justice (DOJ).¹⁸ The district court rejected DOJ's allegation that VMI's policy of limiting admissions to its four-year cadet program to men violated the Fourteenth Amendment.¹⁹ The integration issue received wide attention and evoked strong emotional responses from alumni and other individuals.²⁰ Many students claimed the educational system at VMI could not remain the same if women were admitted.²¹

16. *Id.* at 221 (Rehnquist, J., dissenting).

17. Ruth Marcus & Michael I. Sikoff, *Souter Declines Comment on Abortion; Nominee Moves to Dispel Image as Judge Lacking Companion*, WASH. POST, Sept. 14, 1990, at A1, A16.

18. *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), *appeal docketed*, No. 90-0126-R (4th Cir. Aug. 12, 1991).

19. *Id.* at 1415. The government did not litigate on statutory grounds because Title IX of the Civil Rights Act specifically exempts traditionally single-sex schools and military or maritime academies from its prohibitions of sexual discrimination in admission decisions. *Id.* at 1408; see 20 U.S.C. § 1681(a)(4)-(5) (1988).

20. See, e.g., Judy Mann, *Neanderthal Bonding*, WASH. POST, Feb. 7, 1990, at B3 (asserting that "VMI's argument for keeping its male-only policy is the same kind of bunk that every other institution has used to keep women out—and down—and deserves the same rapt attention we would give to the caterwauling of Virginia's last mountain lion."); Willis C. Rowe, *Why Women Should Be Kept out of VMI*, WASH. TIMES, Feb. 13, 1990, at F2 ("With nothing to lose, the VMI students can afford a farewell march-past with Rebel colors flying, a ceremonial stacking of arms and abandonment of the campus to the silly women. . . . The question is whether anyone has the brains and self-respect to do this.").

21. See Mitchell Locin, *Breaking Ranks: Virginia Military Institute Fears Women Would Tarnish its Mettle*, CHI. TRIB., Feb. 26, 1990, Tempo section, at 1. One student stated, "There's no way it could be the same, . . . if women are allowed to join the Corps of Cadets." *Id.* Another asserted:

Everybody is here living as one, getting along every day with each other, no shades on the windows. If she comes, there's going to be shades and locks put on the doors. She might not even be in the barracks. I think that will break the unification. Then I think there will be problems with our strong honor code.

Id.

With a rich history,²² VMI is a small,²³ public,²⁴ all-male,²⁵ military college composed of a corps of cadets.²⁶ As such, the educational program pervades every aspect of a cadet's life.²⁷ Both the educational program and admissions process place heavy emphasis on physical conditioning.²⁸ Life at VMI is characterized

22. VMI was founded on November 11, 1839. VIRGINIA MILITARY INSTITUTE 1990-91 CATALOGUE 7 [hereinafter CATALOGUE]. Twenty years later the Corps of Cadets sent a contingent to Harper's Ferry to maintain order at the execution of John Brown. *Id.* at 9. In 1864, the Corps marched to battle at New Market, Virginia, and "won credit for helping turn the tide in favor of the Confederate forces" at the cost of "10 cadets killed and 47 wounded." *Id.* Federal forces later burned the Institute, but VMI literally rose from the ashes of war in 1865. *Id.* Distinguished alumni include George C. Marshall, United States Army Chief of Staff during World War II and winner of the 1953 Nobel Peace Prize; Thomas Troy Handy, Deputy Chief of Staff of the Army during World War II; General George Patton, who matriculated at VMI and later transferred to West Point; and Lt. Gen. James Henry Binford Peay III, commanding general of the 101st Airborne during operation Desert Storm. Telephone interview with Jeff Jackson, Curator of the VMI Museum (Nov. 15, 1991).

VMI and The Citadel, a public all-male military institute in South Carolina, continue to add color to the nation's history. On February 24, 1991, Operation Desert Storm began a blitzkrieg-style attack to liberate Kuwait from Iraqi occupation. R.W. Apple, Jr., *War in the Gulf: The Overview*, N.Y. TIMES, Feb. 24, 1991, at A1. Part of the liberation efforts included the largest helicopter assault in history, reinforced by a 700 truck convoy. *Id.* A Citadel graduate led the convoy, and a VMI alumnus led the entire assault. *Id.* The code name of the convoy was "Citadel," and the code name of the road it used was "Newmarket" in remembrance of VMI's participation in that Civil War battle. *Id.* Ironically, female helicopter pilots participated in the assault. *See id.*

23. Total enrollment in the 1988-89 academic year included 1436 cadets and 117 summer students. EXECUTIVE BUDGET OF THE COMMONWEALTH 1990-92, at F-87. The legality of the summer program and night classes to which women are admitted is not at issue in the suit. *See infra* note 25.

24. VA. CODE ANN. § 23-14 (Michie 1985). VMI receives substantial aid from the Commonwealth. Appropriations for the fiscal years ending June 30, 1990 and June 30, 1991, were \$10,608,916 and \$10,560,455, respectively, from the General Fund. 1990 Va. Acts 2009. VMI's total budget for these two years was \$26,371,423 and \$26,602,172, respectively. *Id.*

25. Women may enroll as day students during the summer session, but they must arrange to live off campus. CATALOGUE, *supra* note 22, at 60. Women may also enroll in evening classes that cadets are not permitted to attend. *Id.*

26. "All students at VMI are members of the Corps of Cadets." *Id.* at 7. "[T]he Institute offers young men a challenging academic program conducted within the framework of military life and discipline." *Id.* at 12.

27. One indicator of the importance of full participation in the cadet program is that "[m]arriage constitutes a disqualification for admission to the Institute as a cadet, and marriage during the period of cadetship requires that the cadet resign." *Id.* at 20. At the national service academies, marriage during or before cadetship is also a disqualification. Interview with Brg. Gen. John Bard (United States Army, Ret.), Former Commandant of Cadets, United States Military Academy, from Jan. 1977 through July 1979, in Williamsburg, Va. (Oct. 8, 1991).

28. All cadets are required to take eight consecutive semesters of physical education, including swimming, boxing, and wrestling. CATALOGUE, *supra* note 22, at 127. Each class has a physical fitness component measured by a physical fitness test constituting one

by complete equality within each class,²⁹ providing cadets with little, if any, privacy.³⁰

Because the VMI educational program removes all privacy from cadets' lives, the different social dynamics between women and men must dominate much of the factual analysis concerning the integration issue. The case is thus an ideal vehicle to examine the weaknesses of current Equal Protection doctrine and remedies in gender discrimination cases. Any judicial order to integrate VMI would involve a continuing oversight responsibility. Whether a sufficient number of women would attend the school if it failed to make allowances accommodating privacy values is doubtful. Such allowances would necessitate a change in educational practices that VMI has used successfully for over 150 years.

quarter of the final grade for that course. *See id.* The emphasis on physical fitness is also an element of the admissions decision:

To qualify for enrollment at VMI, an applicant must be in sound health, good physical condition, and must be able to participate fully in the Institute's strenuous physical programs. VMI's physical and medical standards are essentially those required for enrollment in ROTC. . . .

Because each cadet lives in a demanding military environment, mental and physical disabilities that would limit his chances for success are examined carefully.

Id. at 29. The catalogue also contains a list of disqualifying defects. *See id.* (listing defects such as obesity, respiratory problems, cardiovascular or renal disorders, "impairments of the senses or bodily functions," nervous disorders, and muscular or skeletal defects).

29. *See United States v. Virginia*, 766 F. Supp. 1407, 1439 (W.D. Va. 1991), *appeal docketed*, No. 90-0126-R (4th Cir. Aug. 12, 1991). "The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way." *Id.*

30. The court found that "the most important aspects of the VMI educational experience occur in the barracks." *Id.* at 1423. "In barracks, a cadet is totally removed from his social background." *Id.* at 1424. As the court stated:

There is a total lack of privacy [within the barracks]. Everyone knows what everyone else is doing. The closest a cadet can come to privacy at VMI is a study table in the library because there is literally no place in the barracks that physically affords privacy. The open windows on the doors in the barracks are significant because they enable the officer in charge to walk around and check in each room at night and see every cadet without anything being hidden. . . .

. . . .

. . . There are no locks on the doors of cadet rooms in barracks, . . . no window shades or curtains. Barracks rooms open onto stoops. The stoops are open corridors at each level and provide access to the gang bathrooms. On the fourth floor a cadet cannot go to the bathroom or go to take a shower without being observed by everyone in that quadrangle on all levels. This places cadets under constant scrutiny and permits minute regulation of behavior, especially for the fourth classmen [freshmen] who reside on the top floor.

Id.

This Note analyzes the VMI controversy in the context of current Equal Protection and Due Process jurisprudence. The first part discusses the specifics of education at VMI, the case history to date, and the Virginia system of higher education. The next two parts discuss the development of gender Equal Protection Clause analysis and the viability of a procedural due process focus in analyzing gender discrimination. The fourth part applies the current standards of review to VMI and shows, independently of the analysis of the United States District Court for the Western District of Virginia, how VMI's facially discriminatory admissions policy is constitutional.

In its final part, this Note proposes that the Supreme Court adopt a new standard of review to examine gender discrimination cases under the Equal Protection Clause. The new standard would make a distinction between laws establishing procedural burdens on members of one gender and not the other. When no *a priori* procedures exist to gain eligibility to a benefit, the courts should utilize strict scrutiny review. When the government imposes a procedural burden, the court should inquire into the nature of the right. Because sex is usually used as a proxy for some other trait, a procedure allocating a right or benefit between individuals or the state-as-a-state³¹ should be able to take the trait into account without resorting to a presumption based on gender. This Note refers to such rights as "individual rights," because the person *against* whom the plaintiff is attempting to assert certain rights is an individual or the state-as-a-state. In cases involving an individual right, the procedural barrier should be *per se* unconstitutional because it is unnecessary. When the exercise of the right would impose burdens on members of the opposite gender in a *group*, however, the courts should utilize a balancing test. Because a decision favoring the group may impose burdens on the individual seeking the right, the individual should receive damages. This Note refers to such asserted rights as "group rights," because the plaintiff is attempting to assert rights against a group.

THE HISTORY AND CONTEXT OF *UNITED STATES V. VIRGINIA*³²

VMI's Educational System

VMI is one of only four single-sex public colleges remaining in the country,³³ and although the number of single-sex private

31. See *infra* note 340 for a further discussion of the concept of a state-as-a-state.

32. 766 F. Supp. 1407.

33. The only two all-female public colleges in the country are Texas Women's University

colleges is declining rapidly,³⁴ VMI has decided to fight integration to the end. Attempts to integrate VMI through the legislative process in 1990 failed when the Chairman of the Virginia Senate's Education and Health Committee ruled out of order a bill requiring integration.³⁵ A similar defeat occurred in the 1991 legislative session, and any future attempts at integrating VMI through the legislative process will probably fail because "VMI alumni populate the ranks of the state's business and political elite, and many graduates are deeply opposed to allowing women to enroll."³⁶ VMI alumni have expressed their opposition by raising over \$100,000 to oppose the DOJ suit.³⁷

VMI claims that the "rat line" generates this alumni loyalty.³⁸ According to VMI's catalogue: "The [rat] system is equal and

33: The only two all-female public colleges in the country are Texas Women's University in Denton, Texas, see Colin Hughes, *Education: Better Dead than Co-ed*, THE INDEPENDENT, June 7, 1990, at 13, and Douglass College in New Brunswick, New Jersey, see *Virginia*, 766 F. Supp. at 1420. The Citadel in Charleston, South Carolina, is the only other all-male, public college. See *Virginia*, 766 F. Supp. at 1420. It too is a military school. *Id.*

34. See Hughes, *supra* note 33, at 13 (commenting that "[a]ll-women's colleges in the United States have been shutting down or converting to co-education at a consistent and rapid rate: from nearly 298 in 1960 to 94 today").

Examples of single-sex schools that have taken action to admit members of the opposite sex include Mills College in Oakland, California (which has postponed its decision for one year as a result of student protests), see *id.*; Washington and Lee University in Lexington, Virginia, see Jay Walsh, *When Tradition Bows to Modern Realities; As VMI Continues to Bar Women, Washington and Lee Terms its Coeducation a Success*, WASH. POST, Apr. 14, 1990, at D1; and Mississippi University for Women (MUW) in Columbus, Mississippi, see *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

MUW integrated in reaction to events immediately following the Supreme Court's holding in *Hogan*. In *Hogan*, the Court held that prohibiting male students from taking classes for credit in a nursing school was unconstitutional. *Id.* at 733. The local radio announced the decision, and within 30 minutes two lawyers with male clients appeared in the admissions office requesting admission to the undergraduate university. Telephone Interview with Nancy Finn, Office of Admissions, Mississippi Univ. for Women (Oct. 17, 1990). Rather than litigate the case, MUW's Board of Visitors agreed to change the entire university's female-only admissions policy. *Id.*

35. Locin, *supra* note 21, at 1. The Chairman of the Committee is Elmon Gray, a Democrat from Sussex, Virginia, and the sole VMI alumnus in the Virginia General Assembly. See MANUAL OF THE SENATE 114 (1988); HOUSE OF DELEGATES MANUAL 1988-89; see also Jack Anderson & Donald Baker, *Alumnus in Senate Acts to Let VMI Have its Day in Court*, WASH. POST, Feb. 1, 1991, at D5. The admissions policy is set by the Board of Visitors pursuant to state law. VA. CODE ANN. § 23-104 (Michie 1985).

36. John Harris, *Terry Asks Court to Approve VMI's Male-Only Admissions Policy; 'Federal Encroachment' in Education Cited*, WASH. POST, Feb. 6, 1990, at B1.

37. See *Attorneys Ready to Begin Jousting over VMI Lawsuit*, UPI, June 2, 1990, available in LEXIS, Nexis Library, UPI File. An additional indication of alumni support is that a higher percentage of VMI alumni contribute to their alma mater than do alumni from any other public university or college in the United States. See 1989 Va. Acts 2232.

38. The stated goals of the rat system are:

impersonal in its application, tending to remove wealth and former station in life as factors in one's standing as a cadet, and ensuring equal opportunity for all to advance by personal effort and to enjoy those returns that are earned."³⁹ Judy Mann less charitably describes the rat system as "ritualistic physical and psychological punishments"⁴⁰ and says that VMI is "more like a medieval time warp, in which a brotherhood is forged through sadomasochistic rituals in a forgotten monastery supported by the state for its own Byzantine purposes."⁴¹

VMI's catalogue explains:

Throughout most of the "rat year," the new cadet walks at rigid attention a prescribed route inside barracks known as the "rat line," and doubletimes up and down barracks stairs. He must be punctilious in keeping his shoes shined, his uniform spotless, his hair cut, and in shaving daily. He must memorize school songs, yells, and other information.⁴²

If anything, this description is an understatement. When the catalogue says the rat must walk "at rigid attention," it refers to the "strain" position in which the rat's chin is "tightly pulled in, his eyes trained steely ahead even while climbing stairs at doubletime or reading announcements off the chalk board, fists clenched, arms squeezed to his sides so that no daylight shows, chest stuck out and shoulders thrown back."⁴³ If he should dare stand in the way of an upperclassmen, that upperclassmen shouts "move," and the rat moves.⁴⁴ He must be prepared upon command "to recite the day's menu or a random excerpt from the 'rat's

[T]o teach or promote the following in the shortest span of time possible:

1. Excellence in all things, particularly academics.
2. Military bearing, discipline, and conduct.
3. Self-control, humility, and self-restraint.
4. Respect for authority and the forms of military courtesy.
5. Habits of neatness, cleanliness, orderliness, punctuality, and the importance of perfection of detail.
6. The history and traditions of VMI and cadet life.
7. Class unity and the "brother rat" spirit that result from shared experiences in a stern and challenging environment.

CATALOGUE, *supra* note 22, at 14.

39. *Id.*

40. Mann, *supra* note 20, at B3.

41. *Id.*

42. CATALOGUE, *supra* note 22, at 14.

43. Locin, *supra* note 21, at 1.

44. *Id.*

bible,' the 64-page palm-sized handbook" filled with the "school songs, yells, and other information" referenced in the catalogue.⁴⁵ If the rat fails to recite something in the book properly, he must immediately perform twenty pushups, and if a "Brother Rat" sees him doing the pushups, he must also drop and perform twenty pushups out of "brotherly love."⁴⁶ In addition to the tribulations to which the catalogue refers, an inspector will always find something wrong with the rat's room or uniform.⁴⁷ In the mess hall, the rat "sit[s] perched on the front three inches of the chair, knees clamped, head down in obeisance, unable to look up from the plate."⁴⁸

VMI students must abide by an honor code in which "lying, cheating, stealing and the breaking of one's word are considered violations."⁴⁹ A cadet may plead guilty to a violation of the honor code and resign; however, if the Honor Court finds him guilty, the school dishonorably dismisses him.⁵⁰ The system is so effective that dormitory rooms have no locks and cadets frequently leave valuables in open drawers without fear of theft.⁵¹

The Case History

The Department of Justice first attacked VMI's admissions policy in a January 30, 1990, letter by demanding that "VMI immediately abandon its 'single-sex admissions policy' and that it undertake 'appropriate recruitment activities . . . promptly.'"⁵² The Commonwealth responded to the letter by filing for declaratory and injunctive relief⁵³ and by claiming: "Admission of women to the VMI undergraduate four-year program is not necessary to provide equal educational opportunities for women within the Virginia system of Higher education."⁵⁴ Virginia also

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. CATALOGUE, *supra* note 22, at 12.

50. *Id.*

51. *Id.*

52. Counterclaim at 2, *United States v. Virginia*, No. 90-0126-R (W.D. Va. filed Mar. 28, 1990) (quoting letter from James P. Turner, Acting Assistant Attorney General Civil Rights Division, to Lawrence D. Wilder, Governor, Commonwealth of Va., and Joseph M. Spivey III, President, Board of Visitors of VMI (Jan. 30, 1990) (copy on file with the *William and Mary Law Review*)).

53. Complaint at 1, *Virginia Military Inst. v. Thornburgh*, No. 90-0083-R (W.D. Va. filed Feb. 5, 1990).

54. *Id.* at 3.

claimed an important governmental interest in providing a diverse system of higher education which an all-male VMI substantially furthered.⁵⁵ DOJ later filed its own suit against VMI.⁵⁶ VMI's alumni society filed a third suit. The court consolidated the three suits in November, 1990, and the Honorable Jackson L. Kiser of the Western District of Virginia handed down his decision on June 14, 1991.⁵⁷ DOJ appealed on August 12, 1991.⁵⁸

The Virginia Higher Education System

The Commonwealth's claim rested upon the "diversity of the Virginia higher education system,"⁵⁹ the goal of which is to provide students the "fullest opportunity to learn and to develop

55. According to the Complaint,

The state-supported system of higher education in Virginia is richly diverse, consisting of both public and private institutions with differentiated missions, coordinated by law through the State Council of Higher Education. The Commonwealth's important interest in preserving the diversity of the system and a balance in the educational choices offered is reflected in the statutory responsibility of the State Council

. . . .

. . . In Virginia, the public and private institutions complement each other. State policies and financial support maintain the private sector as a necessary and critical component in the Virginia higher education system. Virginia's private institutions are beneficiaries of a number of state initiatives and financial support designed to maintain their viability and specialized contribution to the diversity of the Virginia higher education system. Information resources, technological and planning support, tuition grants and faculty incentives are provided to maximize the contributions and potential of these institutions.

Id. at 3-4 (citations omitted).

56. *See* Counterclaim, *United States v. Virginia*, No. 90-126-R. The DOJ filed suit pursuant to 42 U.S.C. § 2000c-6 (1988). This statute confers standing upon the Attorney General upon receiving a signed, written statement that a college denied someone admission by reason of "race, color, religion, sex or national origin." *Id.* The section allows the Attorney General to prosecute the suit when he deems the person unable to initiate and maintain a suit due to the expense of the suit or because it may jeopardize "the personal safety, employment, or economic standing of such person or persons, their families, or their property." *Id.* § 2000c-6(b). The Attorney General's Office refused to release the name of the woman who initiated this suit by filing a complaint with the Department of Justice. *See* Complaint at 2, *United States v. Virginia*, No. 90-0126-R (omitting specific reference to individual). This Note does not discuss the specifics of the ongoing litigation; nor does it address possible due process defects resulting from nondisclosure of the real-party-in-interest's name, because any such defects could be remedied by the involvement of another plaintiff.

57. *See* *United States v. Virginia*, 766 F. Supp. 1407, 1408 (W.D. Va. 1991), *appeal docketed*, No. 90-0126-R (4th Cir. Aug. 12, 1991).

58. *Virginia*, No. 90-0126-R (4th Cir. Aug. 12, 1991).

59. *See supra* note 55.

intellectual and mental capacities."⁶⁰ The system is coordinated through the Virginia Council of Higher Education,⁶¹ which visits and studies programs of higher education⁶² and reviews all changes in mission statements⁶³ and academic programs.⁶⁴ The system includes forty-five four-year colleges and universities and twenty-seven two-year colleges.⁶⁵ Currently two of these colleges are single-gender institutions for men,⁶⁶ and five are private single-gender institutions for women.⁶⁷ Over twenty of these colleges offer ROTC programs, and two have residential cadet corps.⁶⁸ As recently as 1970, the Commonwealth of Virginia operated five single-sex colleges; currently VMI is the only remaining single-sex state-supported college in Virginia.⁶⁹

Single-sex education has flourished in private Virginia colleges at least partially because these colleges receive funding from the state through Tuition Assistance Grants.⁷⁰ The 1990-92 biennial budget allocated \$40,094,000 to these grants.⁷¹ Although the grants are nominally awarded to the students attending the colleges,

60. VA. CODE ANN. § 23-30.39 (Michie 1985).

61. *Id.* § 23-9.6:1.

62. *Id.* § 23-9.6:1(12).

63. *Id.* § 23-9.6:1(1).

64. *Id.*

65. CENTER FOR PUBLIC SERVICE, VIRGINIA STATISTICAL ABSTRACT § 5.22 (1989).

66. These are Hampden-Sydney College and VMI. See *United States v. Virginia*, 766 F. Supp. 1407, 1420 (W.D. Va. 1991), *appeal docketed*, No. 90-0126-R (4th Cir. Aug. 12, 1991). In the Fall of 1989, only 944 of the 2256 men enrolled in single-sex colleges in Virginia were enrolled at Hampden-Sydney. *Id.*

67. These are Hollins College, Sweet Briar College, Randolph-Macon Women's College, Southern Seminary College, and Mary Baldwin College. *Id.* The total enrollment for these colleges in the Fall of 1989 was 3850 women. *Id.*

68. Counterclaim by Commonwealth of Virginia at 3, *United States v. Virginia*, No. 90-0126-R (W.D. Va. filed Mar. 28, 1990).

69. See *Kirstein v. University of Virginia*, 309 F. Supp. 184, 186 (E.D. Va. 1970). The other single-sex institutions were the University of Virginia, which adopted an integration policy permitting the admission of women in the Fall of 1970 in response to *Kirstein*, see *Virginia*, 766 F. Supp. at 1419; Mary Washington College of the University of Virginia, which also adopted an integration policy by admitting men in 1970, see *id.* at 1418; Longwood College, which adopted an integration policy by admitting men in June 1976, Interview with Elizabeth Marrs, 1979 graduate of Longwood College, in Charlottesville, Va. (June 30, 1991); and Radford College, which adopted its integration policy by admitting men in 1972, see *Virginia*, 766 F. Supp. at 1418.

70. See Tuition Assistance Grant Act, VA. CODE ANN. §§ 23-38.12, .15 (Michie 1985).

71. 1990 Va. Acts 1966. The grants are limited to "students attending certain private colleges in Virginia." VA. CODE ANN. § 23-38.45. During the 1989-90 biennium, the Commonwealth spent \$5,448,871 on the Grant Program for the six private single-sex institutions in Virginia. Letter from James A. McLean, Coordinator of Affirmative Action and Student Research, Commonwealth of Virginia, Council of Higher Education (Feb. 21, 1991) (on file with the *William and Mary Law Review*).

the grant money goes directly to the private school coffers.⁷² For purposes of constitutional analysis, any distinction between this aid and state support for "public colleges" is pure sophistry.

REVIEW OF EQUAL PROTECTION DOCTRINE

Early Cases

The 1971 case of *Reed v. Reed*⁷³ was the first case in which the Supreme Court rigorously applied the Equal Protection Clause to gender discrimination. *Reed* involved an Idaho probate code regulating applications for appointment as administrator of a decedent's estate.⁷⁴ The code gave preference to men over women who bore the same degree of relationship to the decedent.⁷⁵ The Court divined two possible benefits from Idaho's claim that the objective of the law was to eliminate areas of controversy when two or more equally qualified persons desired the position.⁷⁶ The first benefit was the reduction of the probate court workload. Although the Court admitted that this reduction was a legitimate state objective,⁷⁷ it harshly condemned the means utilized by the State as "mak[ing] the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."⁷⁸ The second benefit the Court discussed was the alleviation of intrafamily disputes. The Court simply stated that the choice of this dispute resolution method could "not lawfully be mandated solely on the basis of sex."⁷⁹

Both alleged benefits were derived by denying women equal access to the state's decisionmaking process. If a dispute arose between two equally qualified men, a probate court would hold a hearing and determine who was best qualified to administer the estate;⁸⁰ but, if the dispute was between a woman and a man, that woman had no opportunity to show she was more qualified

72. Because the grants are for tuition, the private school is the ultimate beneficiary of the program. See VA. CODE ANN. §§ 23-38.15, .17:1.

73. 404 U.S. 71 (1971); see Richard W. Brunette, Jr., *Single Sex Public Schools: The Last Bastion of "Separate but Equal"?*, 1977 DUKE L.J. 259, 261.

74. *Reed*, 404 U.S. at 72-73.

75. See *id.*

76. *Id.* at 76.

77. *Id.*

78. *Id.*

79. *Id.* at 77.

80. See *id.* at 76.

than the man to administer the estate.⁸¹ In reality, the equal protection harm was a denial of due process.

In reaching the unanimous decision in *Reed*, the Court did not develop a heightened standard of review. It merely applied the rational basis test enunciated in *Royster Guano Co. v. Virginia*,⁸² that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."⁸³ Two more years would pass before the Court would consider developing a heightened standard of review for sex discrimination.⁸⁴

Strict Scrutiny in Gender Discrimination

The Court first attempted to develop a higher standard of review in the 1973 case of *Frontiero v. Richardson*.⁸⁵ *Frontiero* involved a law requiring military women to show their husbands were dependents in order to obtain greater housing allowances and medical benefits.⁸⁶ The law did not require a man to make the same showing concerning his wife.⁸⁷ Lieutenant Sharon Frontiero applied for and was denied increased benefits because her husband did not qualify as a dependent under the relevant statute.⁸⁸ A plurality of the Court concluded that "classifications based upon sex, like classifications based on race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."⁸⁹

Although the plurality applied strict scrutiny to that gender-based classification, Justice Powell's concurrence suggested that the "far-reaching implications of such a holding" should occasionally be withheld.⁹⁰ As the plurality stated: "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic *frequently* bears no relation to ability

81. See *id.*

82. 253 U.S. 412 (1920).

83. *Reed*, 404 U.S. at 76 (quoting *Royster*, 253 U.S. at 415).

84. See *infra* notes 85-102 and accompanying text.

85. 411 U.S. 677 (1973) (plurality opinion).

86. See *id.* at 678-79.

87. *Id.*

88. *Id.* at 680.

89. *Id.* at 688.

90. *Id.* at 692 (Powell, J., concurring in the judgment).

to perform or contribute to society."⁹¹ That sex may sometimes bear a relationship to one's ability is a result of fundamental gender differences.⁹² Because these differences do not uniformly affect all members of each sex, any law allocating sufficient procedural safeguards on a sex-neutral basis should be constitutional.

The result in *Frontiero* demonstrates the superiority of a procedural due process analysis. The plurality noted that saving the government money may have constituted a sufficiently compelling interest to justify different treatment, but that

the Government must demonstrate . . . that it is actually cheaper to grant increased benefits with respect to *all* male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement.⁹³

The Court's decision, however, struck down only that portion of the statute that required women members of the military to prove that their husbands were dependents.⁹⁴ By removing the disability of proof for women, all armed services members became entitled to obtain benefits to which they may not have otherwise been entitled. As one commentator explained:

Had *Frontiero* been viewed through the lens of procedural due process, it would have become apparent that the appropriate remedy was not to have extended the windfall to equally undeserving persons, but to have required individualized determinations of need in the cases of male as well as female members of the service.⁹⁵

Frontiero was not a difficult case. Had the plurality decided the case on the logic of *Reed*, it would have been an eight-to-one decision with Justice Rehnquist as the lone dissenter.⁹⁶ The split

91. *Id.* at 686 (emphasis added).

92. *See supra* notes 10-11 and accompanying text.

93. *Frontiero*, 411 U.S. at 689.

94. *See id.* at 690-91.

95. Paul Savoy, *The Spiritual Nature of Equality: Natural Principles of Constitutional Law*, 28 How. L.J. 809, 867-68 (1985).

96. *See supra* notes 82-83 and accompanying text (discussing the application of the rational basis test in *Reed*); *cf. Frontiero*, 411 U.S. at 691 (Stewart, J., concurring) ("Mr. Justice Stewart concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution."); *id.* at 692 (Powell, J., concurring) (joined by Burger, C.J., and Blackman, J.) ("In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.").

on the Court resulted from the status of the proposed Equal Rights Amendment (ERA),⁹⁷ which would most likely have caused the Court to adopt strict scrutiny in cases of gender discrimination.⁹⁸ Justice Powell was unwilling to adopt strict scrutiny because

[t]he Equal Rights Amendment . . . if adopted will resolve the substance of this precise question By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.⁹⁹

While analyzing the *Reed* decision that had recognized the substantial equality of capabilities between the sexes,¹⁰⁰ the *Frontiero* plurality suggested that this equality of capabilities should result in equality of status and indicated that a new gender discrimination standard was necessary to further this goal.¹⁰¹ Although *Frontiero* was a plurality opinion, it represents the high-water mark of gender discrimination Equal Protection Clause analysis; the Court later rejected gender as an impermissible classification in *Rostker v. Goldberg*.¹⁰²

97. The text of the proposed amendment was:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

H.J.R. Res. 208, 92d Cong., 2d Sess. (1972).

98. See Patricia Werner Lamar, Comment, *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, 1157 n.164 (1983).

99. *Frontiero*, 411 U.S. at 692 (Powell, J., concurring) (joined by Burger, C.J., and Blackmun, J.).

100. See *Reed v. Reed*, 404 U.S. 71, 77 (1971).

101. See *Frontiero*, 411 U.S. at 688-91.

102. 453 U.S. 57, 69 n.7 (1981) (quoting *Kahn v. Shevin*, 416 U.S. 351, 356 n.10 (1974)) ("It is clear that '[g]ender has never been rejected as an impermissible classification in all instances.'").

The Current Standard

*Reed v. Reed*¹⁰³ and *Frontiero v. Richardson*¹⁰⁴ involved procedural barriers constructed on the basis of sex. In both cases, the direct harms to the disfavored class were procedural in nature, and the effective harm was the denial of some governmental benefit. Following *Reed* and *Frontiero*, a host of similar cases almost uniformly struck down laws imposing gender-based procedural barriers.¹⁰⁵ The Court enunciated the current Equal Protection Clause test for gender discrimination in 1976 when it faced a different kind of harm in *Craig v. Boren*.¹⁰⁶

Craig involved an Oklahoma statute that prohibited the sale of beer containing between one-half of one percent (0.5%) alcohol by volume and three point two percent (3.2%) alcohol by weight to men under twenty-one years of age and women under eighteen years of age.¹⁰⁷ The case was brought by a private liquor seller and, unlike *Frontiero* and *Reed*, did not involve the procedural mechanisms through which the government distributed benefits.¹⁰⁸ Referring to unspecified "previous cases," the Court established the current standard for gender discrimination by stating that "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."¹⁰⁹

103. 404 U.S. 71.

104. 411 U.S. 677.

105. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 381-82 (1979) (declaring unconstitutional a law permitting mothers, but not fathers, unilaterally to block adoptions of their children); *Orr v. Orr*, 440 U.S. 268, 270-71 (1979) (declaring unconstitutional a law denying male eligibility for alimony); *Califano v. Goldfarb*, 430 U.S. 199, 201-02 (1977) (invalidating law requiring widowers, but not widows, to prove actual dependency on a deceased spouse to qualify for survivor's benefits); see also *Taylor v. Louisiana*, 419 U.S. 522, 524-25 (1975) (holding Sixth Amendment right to a jury invalidates conviction if law requires women, but not men, to register for jury duty). But see *Parham v. Hughes*, 441 U.S. 347, 357-59 (1979) (upholding Georgia law requiring men to go through a legitimization procedure before they may sue on behalf of their illegitimate children).

106. 429 U.S. 190 (1976).

107. See *id.* at 191-92.

108. Although state governments have the right to regulate the sale and consumption of alcoholic beverages, U.S. CONST. amend. 21; see, e.g., VA. CODE ANN. tit. 4 (Michie 1988) (dealing with alcoholic beverage control), any person of legal age can purchase such beverages, see, e.g., *id.* § 4-62 (establishing 21 as the minimum drinking age). This right, thus, is distinguishable from rights that states vest in particular people such as estate administrators and divorced parents.

109. *Craig*, 429 U.S. at 197.

The Court did not question Oklahoma's claim that it had an important governmental objective in promoting traffic safety.¹¹⁰ The controversy centered on the degree to which forbidding sales of certain alcoholic beverages to males between eighteen and twenty years of age furthered that objective.¹¹¹ The State produced statistics that showed that men in the eighteen- to twenty-year-old age group were more likely to be arrested for both driving under the influence and drunkenness than women, but these statistics failed to indicate that age bore any relation to the comparative arrest rate.¹¹² In fact, the findings indicated "even more male involvement in such arrests at later ages."¹¹³ Although these statistics showed that men within the age group were eleven times more likely to be arrested for alcohol related driving offenses than women,¹¹⁴ the Court found that "[w]hile such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'"¹¹⁵

Although the statistical "fit" may have been "unduly tenuous," the means-end fit between the law and its stated purpose of reducing alcohol-related driving offenses was even more tenuous. The statute allowed an exemption for license holders who wished to dispense 3.2% beer to their children,¹¹⁶ and

when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18-20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed's* requirement that the gender-based difference be substantially related to achievement of the statutory objective.¹¹⁷

110. *Id.* at 199-200.

111. *Id.* at 200.

112. *Id.* at 200 n.8. During 1973, 427 males were arrested for driving under the influence in Oklahoma compared to only 24 females. *Id.* The arrest totals for drunkenness included 966 males and 102 females. *Id.*

113. *Id.* (citing *Walker v. Hall*, 399 F. Supp. 1304, 1309 (W.D. Okla. 1975)).

114. The actual statistics showed that 2% of males were arrested for alcohol-related driving offenses, but only 0.18% of females were arrested. *Id.* at 201.

115. *Id.* at 201-02.

116. *Id.* at 213 n.5 (Stevens, J., concurring).

117. *Id.* at 204.

Statistics and Stereotypes

The Court further explained its stance on statistics in *Craig v. Boren*,¹¹⁸ when it stated, "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."¹¹⁹ To buttress the danger it saw in using statistics, the Court related drinking tendencies among adolescent males and females to those among racial groups.¹²⁰ The Court then noted that "the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups."¹²¹

In declaring sociological statistics an impermissible justification for differences in group treatment, the Court focused on an analytical strand that first crept into gender discrimination decisions in *Stanton v. Stanton*.¹²² In *Stanton*, a divorce decree provided for the cessation of child support payments when the children attained their majority.¹²³ A Utah statute defined the age of majority as eighteen for females and twenty-one for males.¹²⁴ The difference in ages was justified, *inter alia*, by the notion that women tended to marry earlier and leave the home, whereas boys went to college to prepare themselves to support the home.¹²⁵ The Court swiftly struck down this rationale, stating:

No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . To distinguish between [the genders] on educational grounds . . . is self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her

118. 429 U.S. 190 (1976).

119. *Id.* at 204.

120. *Id.* at 208 n.22. The argument that sexual discrimination is equivalent to racial discrimination has great intuitive appeal; the analogy, however, is imperfect, and one should not accept it blindly. See *supra* notes 10-11 for a discussion of group differences between men and women that could not easily be expanded to cover racial groups. Indeed, one reason the Court may have adopted the current standard with its "diaphanous and elastic" terminology is that the analogy to race is imperfect. See *supra* note 16 and accompanying text.

121. *Craig*, 429 U.S. at 208-09.

122. 421 U.S. 7 (1975).

123. *Id.* at 9.

124. *Id.*

125. *Id.* at 10.

education to an end earlier coincides with the role-typing society has long imposed.¹²⁶

Stereotypes are best seen as overbroad generalizations, but determining which generalizations reflect a stereotype has sometimes stymied the Court. In *Kahn v. Shevin*,¹²⁷ the Court upheld a \$500 Florida property tax exemption given to widows, but not widowers¹²⁸ because "[t]here can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man."¹²⁹ The Court distinguished *Kahn* from *Frontiero v. Richardson*¹³⁰ by claiming that in *Frontiero*, "the Government denied its female employees both substantive and procedural benefits granted males 'solely . . . for administrative convenience.'"¹³¹

Three years after *Kahn*, the Court again addressed the issue of preferential treatment for widows in *Califano v. Goldfarb*.¹³² *Califano* involved a statute that required widowers, but not widows, to prove dependency on their dead spouse to obtain survivors' benefits.¹³³ The Court struck down the distinction as being supported only by "'archaic and overbroad generalizations' . . . that are more consistent with 'the role-typing society has long imposed' than with contemporary reality."¹³⁴ The Court attempted to distinguish *Califano* and *Kahn* by stating that whereas *Kahn* related to a presumption of need on the part of the widow, the statute in *Califano* related to dependency.¹³⁵ In his dissent, Justice Rehnquist noted the weakness of the distinction¹³⁶ which served as little more than a veneer to hide the change in Equal Protection Clause jurisprudence.

126. *Id.* at 14-15 (citation omitted).

127. 416 U.S. 351 (1974). The Court decided *Kahn* before its 1975 opinion in *Stanton* addressed the question of perpetuating stereotypes.

128. *Id.* at 352.

129. *Id.* at 353.

130. 411 U.S. 677 (1973); see *supra* notes 85-102 and accompanying text.

131. *Kahn*, 416 U.S. at 355 (quoting *Frontiero*, 411 U.S. at 690). With due respect to the Court in *Kahn*, the majority omits the justification proffered in *Frontiero* "that Congress might reasonably have concluded that it would be both *cheaper* and easier simply . . . to presume that wives of male members are financially dependent upon their husbands." *Frontiero*, 411 U.S. at 689 (emphasis added).

132. 430 U.S. 199 (1977) (plurality opinion).

133. *Id.* at 201.

134. *Id.* at 207 (citations omitted) (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) and *Stanton v. Stanton*, 421 U.S. 7, 15 (1975)).

135. *Id.* at 212-13.

136. Justice Rehnquist stated:

The question of stereotype was critical in the case of *Parham v. Hughes*.¹³⁷ In *Parham*, Georgia law allowed an illegitimate father to legitimize his child without marrying the child's mother.¹³⁸ The law provided that the father could gain paternal rights in the child only through a legitimization process.¹³⁹ This provision served the state's interest in having the father "identify himself [and] undertake his paternal responsibilities."¹⁴⁰ The Court found the statute did not create an overbroad generalization about men as a class¹⁴¹ but rather "distinguish[ed] between [those] fathers who h[ad] legitimated their children and those who h[ad] not."¹⁴² Unlike *Stanton*, in which the Court described different treatment of the sexes as an example of overbroad generalization that coincided "with the role-typing society has long imposed,"¹⁴³ any generalizations inherent in the Georgia law were attributable to choices by the member of the disadvantaged class.¹⁴⁴ In providing a procedure to counter the generalization, the Court approved a means by which a gender-based law could avoid the stereotype curse.

The comparisons between *Califano*, *Parham*, and *Kahn* highlight the emergence of stereotypes in determining whether a classification is legitimate. Unfortunately, determining whether a classification perpetuates a stereotype is a difficult, subjective exercise. To determine whether an adequate fit exists between the evil that legislators intended the law to address and the

A waiver of the dependency prerequisite for benefits, in the case of this same class of aged widows, under a program explicitly aimed at the assistance of needy groups, appears to be well within the holding of the *Kahn* case, which upheld a flat \$500 exemption to widows, without any consideration of need.

Id. at 242 (Rehnquist, J., dissenting).

137. 441 U.S. 347 (1979) (plurality opinion).

138. *Id.* at 349 n.2 (citing GA. CODE ANN. § 74-103 (Michie 1978)).

139. *Id.* The Court did not address the issue of the different treatment of fathers and mothers.

140. *Id.* at 356.

141. *Id.* at 356-57.

142. *Id.* at 356.

143. *Stanton v. Stanton*, 421 U.S. 7, 15 (1975).

144. See *Parham*, 441 U.S. at 355-56 nn.7-9. The *Parham* holding is distinguishable from the decision in *Caban v. Mohammed*, 441 U.S. 380 (1979), which involved a New York statute that gave an unwed mother the right to block unilaterally the adoption of her child by withholding her consent. *Id.* at 385-87. The child's father had no equivalent right. *Id.* New York claimed the law reflected "a fundamental difference between maternal and paternal relations" with the child. *Id.* at 388. The Court rejected the idea that maternal and paternal roles are "invariably different in importance" and struck down the statute's "broad, gender-based" classification. *Id.* at 389.

classification it imposes, finders of fact are themselves subject to influences of stereotypes. As in *Frontiero*, a procedural due process approach to *Kahn* would have reached a result consistent "with the normative philosophy that underlies the Equal Protection Clause."¹⁴⁵ The resulting outcome would have achieved this result without forcing the Court to make spurious distinctions between cases with identical facts. Most importantly, however, a procedural due process approach would have rendered a consistent guide for future cases. Today's stereotype may be tomorrow's truth just as much as today's truth may be tomorrow's stereotype.¹⁴⁶

The Court will uphold discriminatory treatment when it fails to find that the classification perpetuates a stereotype. For example, in *Schlesinger v. Ballard*,¹⁴⁷ the Court upheld a statutory scheme whereby male naval officers who failed to receive promotion from lieutenant to lieutenant commander for a second time were subject to mandatory discharge from the Navy without regard to length of service.¹⁴⁸ Female officers were allowed thirteen years to advance between the grades.¹⁴⁹ The Court stated that "the different treatment of men and women . . . under . . . [the statute] reflects, not archaic and overbroad generalizations, but, instead the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service."¹⁵⁰

The Court also used the statutory combat exclusion to justify a statute requiring only men to register for the draft in *Rostker v. Goldberg*.¹⁵¹ The Court in *Rostker*, however, seemed uncomfortable with distinctions drawn from the combat exclusion and warned:

None of this is to say that Congress is free to disregard the Constitution when it acts in . . . military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context. We of course

145. *Craig v. Boren*, 429 U.S. 190, 204 (1976).

146. See *Brown v. Board of Educ.*, 347 U.S. 483, 492 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.").

147. 419 U.S. 498 (1975).

148. *Id.* at 499 n.1, 501, 510.

149. *Id.* at 500 n.2.

150. *Id.* at 508.

151. 453 U.S. 57, 67 (1981).

do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice.¹⁵²

This discomfort appears to be partially due to the fact that the Court never addressed the constitutional validity of the combat exclusion itself.¹⁵³ This omission resembles the Court's approach in *Parham*, in which the Court avoided determining the constitutionality of excluding unwed mothers from the requirement that they legitimize their children before acquiring parental rights.¹⁵⁴ One must wonder whether the distinctions drawn in *Schlesinger*, *Rostker*, and *Parham* will one day seem like manifestations of unfounded stereotypes. Congress, in fact, is considering changing the combat exclusion laws.¹⁵⁵

GENDER DISCRIMINATION IN EDUCATION AND *MISSISSIPPI*
*UNIVERSITY FOR WOMEN V. HOGAN*¹⁵⁶

The Constitution and Single Sex Schools Before 1982

When the United States Supreme Court overturned the doctrine of "separate but equal" in *Brown v. Board of Education*,¹⁵⁷ it declared that "education is perhaps the most important function of state and local governments,"¹⁵⁸ and it noted that "[c]ompulsory school attendance laws . . . demonstrate our recognition of the importance of education to our democratic society."¹⁵⁹ The Court also observed that quality in education is dependent on more than equality among tangible factors¹⁶⁰ and focused much of its inquiry upon the psychological harm inflicted upon children de-

152. *Id.* (citations omitted).

153. The Fifth Amendment of the Constitution does not contain an Equal Protection Clause, but courts have inferred one through its Due Process Clause. *See, e.g., Schlesinger*, 419 U.S. at 500 n.3.

154. In practice, such a requirement could be administered easily when the child's birth certificate is completed. A child's legitimacy is a function of the legal relationship between the natural parents. Because the state's strongest interest in the child's legitimacy is to ensure that the father assist with the care of the child, *see supra* note 140 and accompanying text, such a "legitimizing" procedure for mothers identified through the birth process would usually be a mere redundancy.

155. *See infra* note 230.

156. 458 U.S. 718 (1982).

157. 347 U.S. 483 (1954).

158. *Id.* at 493.

159. *Id.*

160. *Id.* (citing *Sweatt v. Painter*, 339 U.S. 629 (1950) and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950)).

nied the right to attend school with other children solely on the basis of race.¹⁶¹

[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of . . . the benefits they would receive in a racial[ly] integrated school system.¹⁶²

The broad phrasing of the Court's holding in *Brown* that "in the field of public education the doctrine of 'separate but equal' has no place"¹⁶³ would seem to foreclose any possibility of maintaining single-sex schooling. The Court in *Brown*, however, ruled on an educational system that mandated complete segregation and promulgated this ruling before *Reed v. Reed*¹⁶⁴ applied the Equal Protection Clause to gender discrimination.

The first case to address the constitutionality of single-sex public education was *Vorchheimer v. School District*.¹⁶⁵ The City of Philadelphia maintained a school system that involved four types of high schools with differing enrollment requirements.¹⁶⁶ These schools were denominated as technical, magnet, and comprehensive high schools that were generally open to both sexes.¹⁶⁷ Additionally, the system included two single-sex "academic" high schools that offered only college preparatory classes.¹⁶⁸ Only about seven percent of the school-age population was eligible to attend the academic schools.¹⁶⁹ The plaintiff was a gifted teenage girl who graduated from her junior high school with honors and who would have been eligible to go to Central High, the boys' high school, except that she was female.¹⁷⁰ Both Central High School and Girls High, its female equivalent, were "comparable in qual-

161. *Id.* at 493-95.

162. *Id.* at 494 (quoting the trial court in "the Kansas case," *Brown v. Board of Educ.*, 98 F. Supp. 797 (D. Kan. 1951), *rev'd*, 347 U.S. 483 (1954)).

163. *Id.* at 495.

164. 404 U.S. 71 (1971); see *supra* notes 73-84 and accompanying text.

165. 532 F.2d 880 (3d Cir. 1976), *aff'd per curiam by an equally divided Court*, 430 U.S. 703 (1977).

166. *Id.* at 881.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

ity, academic standing, and prestige."¹⁷¹ The United States Court of Appeals for the Third Circuit found that although the plaintiff had a valid interest in an expanded freedom of choice,¹⁷² the expansion of her choice would result in heavy costs that would outweigh the harm she suffered:

[A]ll public single-sex schools would have to be abolished. The absence of these schools would stifle the ability of the local school board to continue with a respected educational methodology. It follows too that those students and parents who prefer an education in a public, single-sex school would be denied their freedom of choice. The existence of private schools is no more an answer to those people than it is to the plaintiff.¹⁷³

The *Vorchheimer* decision was supported by the District Court of South Carolina's decision in *Williams v. McNair*,¹⁷⁴ which held that Winthrop College, an all-female public liberal arts college in Rock Hill, South Carolina, could constitutionally deny male applicants admission to the school on the sole basis of sex.¹⁷⁵ The gravamen of the opinion was that although single-sex education was not universally accepted as superior to coeducation, substantial belief existed within the educational community that limiting enrollment to one sex "offers better educational advantages"¹⁷⁶ and that "the Constitution does not require that a classification 'keep abreast of the latest' in educational opinion, especially when there remains a respectable opinion to the contrary."¹⁷⁷ The court's declaration in *Vorchheimer* that "the special emotional problems of the adolescent years are matters of human experi-

171. *Id.* at 882.

172. *Id.* at 888. The plaintiff's demonstration of harm was less than convincing. "She submitted no factual evidence that attendance at Girls High would constitute psychological or other injury." *Id.* at 882. She merely stated: "I just didn't like the impression . . . [Girls High] gave me. I didn't think I would be able to go there for three years and not be harmed in any way by it." *Id.* Additionally, although she was "dissatisfied" with the education she was receiving at the comprehensive school that she attended in lieu of Girls High at the time of the suit, she was going to be eligible for early admission to college at the end of the eleventh grade. *Id.* at 882 n.3. Central High has since integrated, and Girls High is the only single-sex public high school remaining in the country. Mary Koepke, *A School of Their Own*, TEACHER, Feb. 1991, at 44.

173. *Vorchheimer*, 532 F.2d at 888.

174. 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971).

175. *See id.* at 137-38.

176. *Id.* at 137.

177. *Id.*

ence and have led some educational experts to opt for one-sex high schools"¹⁷⁸ echoed this sentiment.

Both opinions stressed that the interest of diversity in education is a goal that may justify discriminatory treatment along gender lines. As the court in *Williams* said of Winthrop College and the higher educational system in South Carolina,

[i]t must be remembered, too, that Winthrop is merely a part of an entire system of State-supported higher education. It may not be considered in isolation. If the State operated only one college and that college was Winthrop, there can be no question that to deny males admission thereto would be impermissible under the Equal Protection Clause. But, as we have already remarked, these plaintiffs have a complete range of state institutions they may attend. They are free to attend either an all-male or, if they wish, a number of co-educational institutions at various locations over the State.¹⁷⁹

The court in *Vorchheimer* was more blatant in its analysis: "Equal educational opportunities should be available to both sexes in any intellectual field. . . . While t[he] policy [of single-sex high schools] has limited acceptance on its merits, it does have its basis in a theory of equal benefit and not discriminatory denial."¹⁸⁰ Thus, "separate but equal" has a place in public education with respect to gender.

*Mississippi University for Women v. Hogan*¹⁸¹

Although the United States Supreme Court affirmed both *Vorchheimer v. School District*¹⁸² and *Williams v. McNair*,¹⁸³ neither case received a full opinion. The Court did not address the

178. *Vorchheimer v. School Dist.*, 532 F.2d 880, 887 (3d Cir. 1976), *aff'd per curiam by an equally divided Court*, 430 U.S. 703 (1977).

179. *Williams*, 316 F. Supp. at 137-38.

180. *Vorchheimer*, 532 F.2d at 887. In his dissent in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), Justice Powell stated:

Generations of our finest minds, both among educators and students, have believed that single-sex, college-level institutions afford distinctive benefits. There are many persons, of course, who have different views. But simply because there are these differences is no reason—certainly none of constitutional dimension—to conclude that no substantial state interest is served when such a choice is made available.

Id. at 743 (Powell, J., dissenting).

181. 458 U.S. 718.

182. 532 F.2d 880.

183. 316 F. Supp. 134.

constitutionality of single-sex public education until it decided *Mississippi University for Women v. Hogan*¹⁸⁴ in 1982.

Joe Hogan was a male registered nurse who did not have a baccalaureate degree in nursing.¹⁸⁵ He worked and resided in Columbus, Mississippi, where the Mississippi University for Women (MUW) operated a nursing school offering such degrees.¹⁸⁶ MUW limited admission to the nursing school to women.¹⁸⁷ Mississippi also operated two other nursing programs offering baccalaureate degrees in nursing, but these schools were a substantial distance from Mr. Hogan's home.¹⁸⁸

The majority claimed it did not reach the issue of whether the state may permissibly provide "separate but equal" education for males and females because the State of Mississippi did not have any all-male nursing schools.¹⁸⁹ Instead, it applied the same gender discrimination test developed in *Craig v. Boren*¹⁹⁰ with the clear addition of the *Stanton v. Stanton*¹⁹¹ stereotype analysis.

The Court asked first whether the State was trying to further "important governmental objectives"¹⁹² and had an "exceedingly persuasive justification"¹⁹³ for operating an all-female nursing school. Because females dominated the nursing profession, the Court found that MUW's admission policy served no remedial purposes.¹⁹⁴ Additionally, the majority rejected MUW's argument that the gender-based classification was "substantially and di-

184. 458 U.S. 718.

185. *Id.* at 720.

186. *Id.*

187. *Id.*

188. *See id.* at 735 n.1 (Powell, J., dissenting). These schools were 178 miles and 147 miles, respectively, from Columbus, Mississippi. *Id.*

189. *Id.* at 720 n.1. By applying a test other than "separate but equal," the Court essentially made the "separate but equal" argument of *Vorchheimer* and *Williams* a nullity as it applies to single-sex education. Unless the Court deviates from the *Hogan* analysis, whether "separate but equal" institutions exist for each gender is constitutionally irrelevant. The Court could, of course, revive the test in controversies in which such institutions do exist, but by not requiring them to exist, the Court indicated that a state can support an institution for one gender and not for the other without transgressing constitutional bounds.

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

191. 421 U.S. 7 (1975).

192. *Hogan*, 458 U.S. at 724 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

193. *Id.* at 724 (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 273 (1979)).

194. *Id.* at 729. Moreover, the Court noted: "Officials of the American Nurses Association have suggested that excluding men from the field has depressed nurses' wages. . . . To the extent [that] the exclusion of men has that effect, MUW's admissions policy actually penalizes the very class the State purports to benefit." *Id.* at 729 n.15 (citations omitted).

rectly related to its proposed compensatory objective"¹⁹⁵ of enhancing educational quality in the nursing school.¹⁹⁶ As Justice O'Connor stated, "MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men."¹⁹⁷ Finally, the majority joined the stereotype analysis of *Stanton* to the *Craig* test when it stated:

MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.¹⁹⁸

That the Court limited the holding in *Hogan* to the nursing school¹⁹⁹ indicates the importance of this portion of the analysis.

195. *Id.* at 730.

196. *See id.* at 730-31.

197. *Id.* at 730. This reasoning implies that an even more discriminatory policy might have had a stronger claim to constitutionality. If men had not been allowed to audit classes, the gender purity of the student body would have allowed the belief that men have an adverse impact on the instructional program to stand uncontradicted by actual practices at the school. Evidence exists that integrated classes at other schools have a different atmosphere than their single-sex counterparts. *See Koepke, supra* note 172, at 44-45; *infra* note 275.

One reason the presence of men may not have noticeably impacted education at MUW is the paucity of men who audited classes. During the 10 years preceding the case, men audited an average of 14 classes per year. *Hogan*, 458 U.S. at 744 n.17 (Powell, J., dissenting). The 1981-82 MUW bulletin listed 913 courses offered at the college for one year. *Id.*

198. *Hogan*, 458 U.S. at 729-30 (footnote omitted). A significant distinction between professional and nonprofessional undergraduate education is that one generally expects persons completing a professional education to enter that profession. Single-sex education in an undergraduate college, however, produces a greater likelihood that the student will enter a profession traditionally associated with the opposite sex. *United States v. Virginia*, 766 F. Supp. 1407, 1435 (W.D. Va. 1991), *appeal docketed*, No. 90-0126-R (4th Cir. Aug. 12, 1991). Thus, the Court's concern in *Hogan* that MUW's policy of excluding males would promote stereotypes in the professional world does not necessarily apply to VMI.

199. *Hogan*, 458 U.S. at 723 n.7. The Court claims the narrowness of its holding was because Joe Hogan's harm was only being denied admission to the nursing school, not the undergraduate part of the campus. *Id.* The Court easily could have extended the opinion to the entire University. The circuit court opinion implied that the admissions policy of the entire University was unconstitutional, *see id.*, and a summary affirmance similar to that in *Vorchheimer v. School District*, 532 F.2d 880 (3d Cir. 1976), *aff'd per curiam by an equally divided Court*, 430 U.S. 703 (1977) (allowing single-sex public high schools), would have reached that result. Additionally, evidence indicating that men had no adverse impact on the education of the nursing students would have been equally applicable to the other schools of the University.

The dissenting opinions in *Hogan* addressed other values the Court may consider in the VMI action and other future gender cases. Justice Blackmun warned that it may be time to retreat from the "rigid rules in this area of claimed sex discrimination"²⁰⁰ because it leads to "needless conformity"²⁰¹ and the loss of "values that mean much to some people by forbidding the State to offer them a choice while not depriving others of an alternative choice."²⁰²

Applying whimsical public sentiment to timeless constitutional values is a difficult and dangerous exercise.²⁰³ This is particularly true in the area of gender discrimination.²⁰⁴ The analysis should focus instead on replicable analytical tools such as balancing the harm against the benefits and recognizing that the assertion of rights by some may mean diminution in the rights of others.²⁰⁵ Justice Powell implicitly adopted this approach in his dissent:

[The Court] gives no heed to the efforts of the State of Mississippi to provide abundant opportunities for young men and young women to attend coeducational institutions, and none to the preferences of the more than 40,000 young women who over the years have evidenced their approval of an all-women's college by choosing Mississippi University for Women (MUW) over seven coeducational universities within the State. . . . It does so in a case instituted by one man, who represents no class, and whose primary concern is personal convenience.²⁰⁶

He further noted that the need for women's colleges still exists²⁰⁷ and that sexual segregation is distinguishable from racial segregation because "[i]t was characteristic of racial segregation that segregated facilities were offered, not as alternatives to increase the choices available to blacks, but as the *sole* alternative. MUW stands in sharp contrast."²⁰⁸

200. See *Hogan*, 458 U.S. at 734 (Blackmun, J., dissenting).

201. See *id.* at 735.

202. See *id.* at 734.

203. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 548-51 (1896) (allowing enforced separation of races by stating that equality "must be the result of natural affinities").

204. See *supra* notes 118-155 and accompanying text.

205. See *Vorchheimer v. School Dist.*, 532 F.2d 880, 888 (3d Cir. 1976), *aff'd per curiam* by an equally divided Court, 430 U.S. 703 (1977).

206. *Hogan*, 458 U.S. at 735 (Powell, J., dissenting).

207. *Id.* at 738-39.

208. *Id.* at 741 n.9.

The Statutory Exemptions

Title IX of the Education Amendments of 1972 prohibits most publicly funded, undergraduate institutions from discriminating on the basis of sex during the admissions process; however, the amendments make exceptions for schools that are intended primarily to train military personnel or members of the merchant marine or that have always limited admissions to members of one sex.²⁰⁹ MUW had limited its admissions for classes taken for credit to women since it was chartered in 1884.²¹⁰ The University claimed that Title IX and its exceptions were in furtherance of Congress' powers under section 5 of the Fourteenth Amendment.²¹¹ The Court in *Hogan* denounced this reasoning, stating that "Congress' power under § 5, however, is 'limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.'" ²¹²

One perplexing aspect of the Court's holding regarding the statutory exception was that it reached the constitutional issue even though it easily could have decided the case on other grounds. Section 1681(a)(5) exempted only schools that "traditionally and continually" since their establishment had admitted members of only one sex.²¹³ The statute makes no distinction

209. 20 U.S.C. § 1681 (1988) provides in part:

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(4) Educational institutions training individuals for military services or merchant marine this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy in regard to admissions this section shall not apply to any public institution . . . that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

Id.

210. *Hogan*, 458 U.S. at 719-20.

211. *Id.* at 722-23.

212. *Id.* at 732 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966)).

213. See *supra* note 209 (quoting 20 U.S.C. § 1681 (1988)).

between those schools that admit men for credit and those that admit men solely to audit classes. Because MUW allowed men to audit classes, a colorable argument existed that the statutory exemption did not apply.²¹⁴ Partially based on the Court's broad reasoning in *Hogan*, the United States Court of Appeals for the First Circuit found that the exemptions in § 1681(a)(4) for educational institutions "whose primary purpose is the training of individuals for the military services of the United States or the merchant marine"²¹⁵ did not bar a sex discrimination suit.²¹⁶

APPLICATION TO VIRGINIA MILITARY INSTITUTE

The analysis of whether VMI should admit women requires answers to four separate questions. The first question is whether men and women are similarly situated with respect to admissions to a military college.²¹⁷ If the answer to that question is affirmative, one must determine whether classification by gender serves important governmental objectives and whether the maintenance of VMI as an all-male institution is substantially related to these objectives.²¹⁸ The final question is whether the maintenance of VMI as an all-male institution perpetuates a stereotype regarding gender roles.²¹⁹

214. See Lamar, *supra* note 98, at 1138. Lamar suggests two additional ways in which the Court could have circumvented the constitutional issue. First, because the School of Nursing was established in 1971, one argument might be that Congress did not intend the exemption for single-sex schools under 20 U.S.C. § 1681(a)(5) to apply to schools with only one year of tradition. *Id.* at 1137. This argument is less than compelling because it requires entering the murky area of legislative intent to support a finding that directly contradicts the language of the statute.

Lamar also suggests that, because Mr. Hogan sought an undergraduate degree that was in essence a professional or vocational degree, the Court could have construed § 1681(a)(1) to supersede the specific exemptions of § 1681(a)(5) by extending the application of the statute to "institutions of vocational education, professional education . . . and institutions of under graduate higher education." *Id.* This approach would contradict the general canon of statutory interpretation that the specific should govern the general. See *Naranjo v. Alverno College*, 487 F. Supp. 635, 636, 638 (E.D. Wis. 1980).

215. See *supra* note 209 (quoting 20 U.S.C. § 1681 (1988)).

216. *United States v. Massachusetts Maritime Academy*, 762 F.2d 142, 150-51 (1st Cir. 1985) (holding that a maritime academy's single-sex admissions policy did not substantially further an important governmental interest, and therefore finding the policy unconstitutional).

217. "[T]his Court has consistently upheld statutes where the gender classification is not invidious but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981).

218. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

219. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (declaring that if a statutory objective reflects archaic, stereotypic ideas, the objective "itself is illegitimate").

Are Men and Women Similarly Situated with Respect to Admissions to Military Colleges?

The Court has frequently displayed a great degree of deference to congressional determinations that concern the armed forces.²²⁰ The Court's rulings concerning the training of troops reflect this great respect.²²¹ The stated purpose of such deference is that

"[i]t is difficult to conceive of an area of governmental 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 civilian control of the Legislative and Executive Branches."²²²

The Court has exercised this broad deference to military judgment with respect to gender discrimination when the issues relate to the military's staffing and promotional policies;²²³ however, it has deviated from this deferential stance when the different treatment is unrelated to combat needs.²²⁴

Although only eighteen percent of VMI's graduates have chosen military careers,²²⁵ the Institute is designed to prepare com-

220. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("[P]erhaps in no other area has the Court accorded Congress greater deference."). That this deference is derived from the serious nature of warfare and Congress' express authority to declare war and raise armies was first enunciated in *United States v. Macintosh*, 283 U.S. 605 (1931), when the Court reasoned: "In express terms Congress is empowered 'to declare war,' . . . and 'to raise . . . armies,' which necessarily connotes the like power to say *who shall serve in them and in what way.*" *Id.* at 622 (emphasis added).

221.

I believe that the congressional and executive authority to prescribe and regulate the training and weaponry of the National Guard, as set forth above, clearly precludes any form of judicial regulation of the same matters. . . . Any such relief, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction.

Gilligan v. Morgan, 413 U.S. 1, 8-9 (1973) (quoting *Morgan v. Rhodes*, 456 F.2d 608, 619 (6th Cir. 1972) (Celebrezze, J., dissenting)).

222. *Rostker*, 453 U.S. at 65-66 (quoting *Gilligan*, 413 U.S. at 10).

223. See *id.* at 83 (upholding a male-only draft); see also *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (upholding preferential promotional treatment for women); *Lewis v. United States Army*, 697 F. Supp. 1385, 1386, 1393 (E.D. Pa. 1988) (upholding United States Army's policy of recruiting women only if they held high school diplomas or graduate equivalency degrees, but not requiring the same academic achievements for male recruits).

224. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (striking down preferential benefits for male service members).

225. See CATALOGUE, *supra* note 22, at 7.

bat leaders.²²⁶ VMI requires that every cadet engage in four years of military training offered by ROTC,²²⁷ and upon "entering the last two years of military instruction, qualified cadets are encouraged to sign a formal contract with the service of their choice and thereby enter a course of study that normally leads to a military commission."²²⁸

That VMI attempts to prepare "combat leaders" may not be dispositive on the issue of whether women are dissimilarly situated from men for purposes of admissions. Although Congress has not completely abandoned the policy of segregating women from combat, it has abandoned the policy of limiting military academy admissions to men.²²⁹ Additionally, statutes limiting combat opportunities for women apply only to the Navy and the Air Force although they are an official part of Army and Marine

226. "It is the mission of the Virginia Military Institute to produce educated and honorable men, . . . ready as citizen-soldiers to defend their country in time of national peril." *United States v. Virginia*, 766 F. Supp. 1407, 1425 (W.D. Va. 1991) (quoting the Mission Study Committee of the VMI Board of Visitors), *appeal docketed*, No. 90-0126-R (4th Cir. Aug. 12, 1991). "The VMI experience promotes the development of qualities important to effective combat leadership: Self control, self discipline, and the belief that you must subordinate your own personal desires and well-being to the good of the whole unit." *Id.* at 1427. When the service academies began accepting women, they changed the wording of their mission statements from training "combat officers" to training "career officers." STIEHM, *supra* note 10, at 37-38.

227. CATALOGUE, *supra* note 22, at 12.

228. *Id.* Until January 27, 1990, VMI required all cadets to accept a commission if the military offered it. The policy change was motivated by a change in the military policy requiring cadets to make their decision to accept a commission at the end of two years. The services had previously offered the commissions only at the end of four years of training. If VMI had not changed the policy, cadets electing not to accept the commission would have been forced to leave VMI after two years of cadetship. Traditionally, 70% of the cadets accepted a commission upon graduation. *VMI Drops Commission Acceptance Requirement*, UPI, Feb. 9, 1990, available in LEXIS, Nexis Library, UPI File.

229. 10 U.S.C. § 4342 note (1988) provides:

SEC. 803. (a) Notwithstanding any other provision of law, in the administration of chapter 403 of title 10, United States Code (relating to the United States Military Academy), chapter 603 of such title (relating to the United States Naval Academy), and chapter 903 of such title (relating to the United States Air Force Academy), the Secretary of the military department concerned shall take such action as may be necessary and appropriate to insure that (1) female individuals shall be eligible for appointment and admission to the service academy concerned beginning with appointments to such academy for the class beginning in calendar year 1976, and (2) the academic and other relevant standards required for appointment, admission, training, graduation, and commissioning of female individuals shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals.

Id.

Corps policy.²³⁰ Furthermore, "[n]ational defense lies within the federal not state sphere."²³¹ The lack of state competence in national defense matters limits the force of a national defense justification for maintaining VMI as an all-male institution.²³² The argument that men and women are dissimilarly situated with respect to admissions because of combat exclusion laws may be an example of deference to legislative pronouncements "becom[ing] facile abstractions used to justify a result."²³³

Additionally, claims that men and women are dissimilarly situated because women cannot perform as well as men at a military school are fatuous. Women generally have performed very well at the service academies and other military colleges.²³⁴ With the

230. See *Rostker v. Goldberg*, 453 U.S. 57, 76 (1981). Although the Army still officially observes this policy, some analysts argue it does not comport with reality. See BRIAN MITCHELL, *WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY* 119-20 (1989). Additionally, Congress is in the process of debating changes in the combat exclusionary laws in the aftermath of the Persian Gulf War. See S. 1515, 102d Cong., 1st Sess. § 12 (1991) (establishing a commission to study the assignment of women in the armed forces).

231. *United States v. Massachusetts Maritime Academy*, 762 F.2d 142, 153 (1st Cir. 1985).

232. Cadets at integrated military schools opine that an all-male environment does not adequately prepare a cadet to serve in the sexually integrated armed services of today. See Susan Dodge, *Unlike VMI and Citadel, in the Corps of Cadets at North Georgia College, Men and Women Learn and Train Side by Side*, *CHRON. OF HIGHER EDUC.*, Mar. 21, 1990, at A1, A34:

Male cadets at North Georgia believe men who graduate from coeducational military programs are better prepared to work alongside women in the Army. The Army admits women into all of its branches except the infantry, armor, and special-forces units.

"A graduate of an all-male military school wouldn't necessarily know how to deal with women in leadership roles, or women under his command," says Eric Norris, a senior cadet. "It wouldn't be realistic."

The court noted that the United States Military Academy at West Point agreed with this general proposition. *United States v. Virginia*, 766 F. Supp. 1407, 1428 (W.D. Va. 1991), *appeal docketed*, No. 90-0126-R (4th Cir. Aug. 12, 1991).

233. *Rostker*, 453 U.S. at 70. Regardless of these arguments, courts may still invoke deference to achieve some doctrinal consistency. If the current combat exclusion laws are constitutional, a ruling against VMI may have a restrictive effect on military training in the future. Hypothetically, if Congress determined that the percentage of women in the military was too high and wished to restrict admission to the military academies to men, a ruling against VMI would almost necessarily tie Congress' hands.

234. For example,

Cadet Staff Sgt. Shelly Beseman . . . is a member of the elite NGC [North Georgia College] Ranger Challenge team. In a recent competition, Beseman defeated all male competitors in every event, including a 6-kilometer race in full field gear. . . .

. . . .

Cadet Command Sgt. Maj. Dawn Wood . . . obtained the highest rank possible as a North Georgia junior. She oversees about 280 cadets as the

notable exception of courses in military science, women have performed academically as well or better than their male counterparts.²³⁵ Moreover, sociological evidence indicates that a person's ability to lead in military academies is not related to sex except when the followers hold stereotypic attitudes toward sex roles.²³⁶

ranking non-commissioned officer and is a strong candidate to become cadet corps commander in her senior year.

Larry Fricks, *North Georgia Praises Female Cadets as VMI, Citadel Fight*, Gannett News Serv., Apr. 16, 1990, available in LEXIS, Nexis Library, GNS File. The significance of these achievements by women cadets at North Georgia College (NGC) is indicated by the fact that only 20 of the 490 North Georgia College cadets are female. Dodge, *supra* note 232, at A1, A34. West Point, the classes of which usually contain approximately 10% females, selected its first female brigade commander in 1989. Frank Fisher, *She's West Point's First Female Top Cadet*, L.A. TIMES, Oct. 22, 1989, at A24. She is a member of the tenth class at West Point to include women. *Id.*

Some of the seemingly disproportionate success of the women cadets results from the fact that the schools expect the women to meet lower physical standards than the men. For example, at NGC women are required to perform only 52 regular pushups in a 2-minute period, whereas men must perform 82. Dodge, *supra* note 232, at A34. The standards at VMI are set above the standards of the Army, Navy, and Marine Corps because VMI believes their cadets "one, should be physically fit and two, be a cut above those standards set by the services, in that they must lead by example." Letter from Arnold W. Joyce, Professor of Physical Education, to William DeVan (Oct. 15, 1990) (on file with the *William and Mary Law Review*) (discussing VMI physical fitness standards).

235. JEROME ADAMS, REPORT OF THE ADMISSION OF WOMEN TO THE UNITED STATES MILITARY ACADEMY: PROJECT ATHENA III 91 (1979) (Project Athena was the United States Military Academy's longitudinal study on integration). Over 40% of the women in West Point's class of 1980 were in the bottom quarter of their class in upper level military science classes. *See id.* Subsequent classes maintained this performance level. *Id.*

236. *See* Jerome Adams et al., *Group Performance at West Point: Relationships with Intelligence and Attitudes Toward Sex Roles*, 7 ARMED FORCES & SOC'Y 246, 253 (1981). This study found a positive correlation between intelligence and leadership ability that was enhanced by male leadership when the group held traditional attitudes towards women. *Id.* If the group held egalitarian attitudes towards women, no significant difference in the follower's perception of the leader's effectiveness existed. *Id.* Although the study was based on subordinates with an average SAT score of above 1200, and "[c]learly, the average intelligence level of subordinates in today's Army is much below that," *id.* at 254, it indicates that gender will not affect leadership effectiveness when attitudes are properly adjusted within the ranks. *Accord* Robert Rice et al., *Leader Sex, Leader Success, and Leadership Process: Two Field Studies*, 69 J. OF APPLIED PSYCHOL. 12, 27 (1984) (finding that "[l]eader sex seldom has shown strong and replicable effects in operational settings where male and female cadets regularly train for their roles as military leaders.").

Furthermore, within the context of a military school, any differences between the leadership abilities of men and women would be expected to change over time as the men became accustomed to finding women at the school. *See* Dodge, *supra* note 232, at A1, A34. Evidence at North Georgia Military School where "few students spend much time thinking about the integration of the corps" supports this result. *Id.*; *see also* United States v. Virginia Military Inst., 766 F. Supp. 1407, 1428 (W.D. Va. 1991), *appeal docketed*, No. 96-0126-R (4th Cir. Aug. 12, 1991). *But see* Adams, *supra* note 13:

The continuing relationship between physical measures and leadership rat-

Nothing in the Fourteenth Amendment, however, "require[s] a State to pretend that demonstrable differences between men and women do not . . . exist."²³⁷ No court would limit an equitable remedy in the VMI litigation to the individual applicant in question, so the court must examine whether the *group* itself, not just an *individual* within the group, is similarly situated. The most accurate inquiry into whether the differences between men and women make them dissimilarly situated with respect to admissions to a military college must focus on whether the admission of women to the national service academies has had a noticeable effect on the instructional programs at those academies.²³⁸ Evidence of a significant and essentially uniform impact on the educational systems at military colleges that admit women²³⁹ indicates the existence of some quality to coeducation in a military environment that makes women dissimilarly situated.²⁴⁰

ings is . . . demonstrated with counts of dropping out of the two-mile runs (FALLOUT) during CBT [Cadet Basic Training]. The more a woman falls out during CBT, the lower her leadership rating after CBT . . . FALLOUT is not related to leadership ratings taken for men. Very few men failed to complete the two mile runs—the average was less than one—while women dropped out more frequently.

Id. at 534; see also Marilyn Greene, *Female Military Students Still Do Battle with Bias*, USA TODAY, May 24, 1990, at A2 (discussing discrimination and prejudice at the Naval and Air Force Academics and at West Point); Lisa Liff, *Sex Bias Study Takes Naval Academy to Task*, WASH. POST, Oct. 10, 1990, at B3 (discussing sexual harassment and discrimination at the Naval Academy).

237. Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 481 (1981) (Stewart, J., concurring).

238. Although the inference that a military college will adopt the adjustments of the academies automatically is not certain, several factors logically indicate that such a college would adopt the academy approaches to some minimal extent. If a Court were to force VMI to admit women, the probable remedy would involve an order "to formulate, adopt, and fully and timely implement a plan to remedy fully their discriminatory policies and practices." See Complaint at 4, ¶ 2, *United States v. Virginia*, No. 90-0126-R (W.D. Va. filed Mar. 1, 1990). Women at the service academies currently comprise 9-12% of the class, and a study at VMI indicates that approximately 10% of the class would have to be female in order to make necessary changes economically practical. *The Regiment of Women*, WASH. TIMES, Mar. 16, 1990, at F2. Because studies of coeducation indicate that the minority gender must make up approximately 10-40% of the class for integration to be successful, VMI's selection of a 10% threshold does not indicate hostility toward women. See *Virginia*, 766 F. Supp. at 1437. These and other similarities between the service academies and VMI compelled the court to state that "VMI would have to make the changes analogous to those that have been made at the service academies." *Id.* at 1439.

239. See *infra* notes 241-79 and accompanying text.

240. Additionally, this quality relates to the issue of whether the admission of women will actually diminish the State's educational diversity. See *infra* notes 280-90 and accompanying text.

In three of the national service academies, the integration of women has had a deleterious effect on both the unity of the cadet class and the physical standards demanded of cadets.²⁴¹ The essential aspects of military training are the strong emphasis on physical training and rigid command structures and the forging of the individual trainees into a unified body.²⁴² This unity is a necessary element of battlefield success²⁴³ and results from a common and shared experience that transforms a civilian into a soldier.²⁴⁴

The failure of integration was most notable at the Air Force Academy where the attitudes of both the administration and students were generally most favorable to integration.²⁴⁵ From the very first week of Basic Cadet Training at the Academy, "doolies," or first year cadets, noted evidence of double standards in housing,²⁴⁶

241. See *infra* notes 245-79 and accompanying text. Very little literature exists concerning integration at the Coast Guard Academy, and therefore this Note does not address the results of its experience.

242. See STIEHM, *supra* note 10, at 87-146 (discussing training at the service academies). Nonservice academy graduates develop this unification through basic training. See William Arkin & Lynne R. Dobrofsky, *Military Socialization and Masculinity*, 34 J. SOC. ISSUES 151, 157-58 (1978).

243. John P. Lovell, *Professionalism and the Service Academies*, 19 AM. BEHAVIORAL SCIENTIST 605, 613 (1976) (discussing the importance of loyalty on the battlefield).

244. See MITCHELL, *supra* note 230, at 51-53. See generally, ARNOLD VAN GENNEP, *THE RITES OF PASSAGE* 187-94 (Monika Vizedom & Gabrielle Caffee trans., 1960) (discussing the ceremonial patterns used by various societies to mark the transition between stages in an individual's life, which Van Gennep broadly defines as rites of separation, transition, and incorporation).

245. See STIEHM, *supra* note 10, at 89-146.

246. See MITCHELL, *supra* note 230, at 57. In describing the effect of women on the Academy, Mitchell stated,

Also inhibiting the assimilation of women was the mistake of concentrating them on the sixth floor of Vandenberg Hall, instead of quartering them with their assigned squadrons. During the school year, doolies put themselves in harm's way anytime they entered their squadron area. They were often roused out of bed at an early hour by screaming upperclassmen, who dogged them constantly during the five or ten minutes they had to prepare for the morning run. After the run, they had to hurry again to shower and dress before the breakfast formation. Harassment was a frequent interruption of these meager moments of personal time. Just as frequently, doolies were grabbed to form a detail to clean the day rooms, police the squadron area, or turn in laundry. Other details in the evening took them away from their studies.

The women, however, were spared such interruptions. Upperclassmen could not roust the women out of bed and send them scurrying up and down halls in their skivies, as they did the men. After a squadron run, the women returned immediately to Vandenberg Hall, escaping further harassment as well as the morning details. Out of sight and out of mind, they were usually left alone in the evenings also. This arrangement produced the Academy's

grooming,²⁴⁷ and physical conditioning;²⁴⁸ as a result, "[i]nstead of growing closer through shared experiences, male and female cadets grew further apart."²⁴⁹ This may have explained the increase in male attrition from thirty-five percent to forty-four percent of the entering class.²⁵⁰

The United States Naval Academy and the United States Military Academy at West Point devised separate physical standards for men and women.²⁵¹ The classic example is the fate of the Enduro run, a timed two and one-half mile run in which a cadet wore combat boots and a helmet while carrying a rucksack, canteen, rifle, and poncho.²⁵² In the first year of integration, West Point required women to perform the run, but did not count the women's results when awarding the Recondo patch.²⁵³ Although less than half as many women completed the run as men, virtually the same percentage of women received the patch.²⁵⁴ Male cadets were understandably outraged at the double standard, and the Academy agreed to count the female results the following year.²⁵⁵ In the second year of integration, 82% of the male cadets received

intended result of making life easier for the women, but it also produced the unintended result of making their male classmates resent them more. Absent from so much of daily squadron life and shielded from even mild harassment, the women never earned membership in their assigned squadrons.

Id.

247. Although 10 U.S.C. § 4342 (1988) required that the service academies make only the "minimum essential adjustments . . . required because of physiological differences between male and female individuals," female cadets were not required to shave their heads in the same way as male cadets. MITCHELL, *supra* note 230, at 53. Mitchell claims head shaving is part of "the Rite of Separation" intended to separate the cadet from his or her former life and prepare him or her for the future as a cadet and is thus an essential part of the socialization process. *Id.* at 51-52.

248. Women performed 50% of the pushups men did, jumped only 80% as far, did 90% as many situps and performed flexed-arm hangs instead of pull-ups. STIEHM, *supra* note 10, at 166, 168. Despite the lesser performance, women suffered significantly more injuries than men. *Id.*

249. MITCHELL, *supra* note 230, at 56.

250. *Id.* at 66.

251. *Id.* at 71.

252. *Id.*

253. *Id.* at 71. The Recondo patch is given to cadets if they can successfully complete a short course in reconnaissance and commando training at West Point. Within the cadet culture, acquiring the patch is significant as a "rite of passage" and as a symbol of "elitism" within the Corps. Interview with Brig. Gen. John Bard (United States Army, Ret.), Former Commandant of Cadets, United States Military Academy, from Jan. 1977 through July 1979, in Williamsburg, Va. (Nov. 1, 1991).

254. *Id.* at 71-72.

255. *Id.*

the Recondo patch, but only 32% of the women received the patch.²⁵⁶

In the third year of integration, the Academy changed its mind again, this time to spare the female cadets the stigma of failure by eliminating the Enduro run from the training program altogether, for both men and women. The final official report on integration at West Point hailed this as a good example of "the Academy's attempt to normalize physical requirements."²⁵⁷

Additional examples of changes at the academies abound. The Naval Academy formerly required all midshipmen to perform a thirty-four foot jump into a pool of water before graduating.²⁵⁸ The jump simulates abandoning ship, but because females are not allowed aboard ship, a female first-class midshipman may refuse to do the jump and still graduate.²⁵⁹ Peer ratings, a means of gauging leadership capability, were discontinued at West Point after women consistently received lower ratings than men.²⁶⁰ Except while on parade, West Point required women to carry M-16 rifles while the men had to carry M-14s which weighed approximately two and one-half pounds more than the M-16s.²⁶¹ More recently, West Point eliminated its requirement that cadets carry weapons during running exercises.²⁶² Karate and self-defense classes for females replaced boxing and wrestling courses still required of male cadets at West Point and Annapolis.²⁶³ Whereas units formerly performed morning runs together, they are now separated into ability groups; due to increased injuries among women, participants now wear running shoes rather than combat boots.²⁶⁴

256. *Id.* at 72.

257. *Id.* (quoting JEROME ADAMS, REPORT OF THE ADMISSION OF WOMEN TO THE UNITED STATES MILITARY ACADEMY: PROJECT ATHENA IV 48 (1980)).

258. *Id.* at 87.

259. *Id.*

260. See ADAMS, *supra* note 235, at 110-15; ALAN G. VITTERS & NORA SCOTT KINZER, REPORT OF THE ADMISSION OF WOMEN TO THE UNITED STATES MILITARY ACADEMY: PROJECT ATHENA I 114-20 (1977). Similar changes occurred at the Naval Academy. See MITCHELL, *supra* note 230, at 75.

261. MITCHELL, *supra* note 230, at 70.

262. *United States v. Virginia*, 766 F. Supp. 1407, 1439 (W.D. Va. 1991), *appeal docketed*, No. 90-0126-R (4th Cir. Aug. 12, 1991).

263. ALAN G. VITTERS, REPORT OF THE ADMISSION OF WOMEN TO THE UNITED STATES MILITARY ACADEMY: PROJECT ATHENA II 32 (1978). Currently, VMI requires all cadets to take boxing and wrestling courses. CATALOGUE, *supra* note 22, at 127.

264. *Virginia*, 766 F. Supp. at 1439; ADAMS, *supra* note 235, at 55.

Even where the academies have not initiated the changes, the inevitable ambiguities of sexual relations have created a dynamic of their own. The ambiguous line between hazing, used to create unity among the cadets,²⁶⁵ and sexual harassment has affected the ability of cadets to carry out punishments in the traditional manner. In one instance, a Naval Academy upperclassman forced a female cadet to eat with an oversized spoon as a punishment for poor table manners.²⁶⁶ The cadet complained of sexual harassment, and the Academy administration punished the upperclassman.²⁶⁷ In a more recent example, male colleagues chained a female Naval Academy cadet to a urinal.²⁶⁸ This sort of hazing is common among the men at the Academy; but, because it involved a woman, it was publicized and condemned as an example of sexual harassment. The Naval Academy warned the cadets responsible for the incident that future incidents would result in expulsion.²⁶⁹ Additionally, male cadets have experienced difficulty in disciplining female cadets simply because they feel less comfortable meting out punishments to females than they do to males.²⁷⁰

Although some may question the importance of physical prowess, it remains an essential element of masculine culture and military training.²⁷¹ When integrating a military school, the greatest difficulty is distinguishing between "what is male and what is military."²⁷² Granted, a reexamination of qualities tested may correct some of the differences in requirements,²⁷³ but efforts to

265. The author does not endorse hazing to create class unity, but offers this as an example of how the admission of women to the academies precipitated change.

266. MITCHELL, *supra* note 230, at 75-76.

267. *Id.* at 76.

268. Hughes, *supra* note 33, at 13.

269. *Id.*

270. See VITERS & KINZER, *supra* note 260, at 79; STEIHM, *supra* note 10, at 241. Male cadets planning a military career should gain from overcoming this discomfort while attending college. Because VMI is not a military school in the same sense as the academies, this argument would not appear to work in DOJ's favor.

271. See Adams, *supra* note 13, at 535:

In summary, these results paint a picture of leadership ratings at West Point that is related to what is stereotypically masculine: physical prowess, positive attitude about physical activity, and a masculine self-image. In a traditionally male-oriented subsystem, leadership ratings for members of the Class of 1980 seem to be related to masculinity, both for men and women cadets.

272. STEIHM, *supra* note 10, at 5.

273. See Janice P. Yoder, *Another Look at Women in the United States Army: A Comment on Woefel's Article*, 9 SEX ROLES 285, 288 (1983). At West Point, an obstacle course contained an eight-foot wall optimally navigated by men weighing 145 pounds and standing 5 feet 10 inches tall. *Id.* at 287. To compensate for the superior upper body strength of

maintain the female component²⁷⁴ have changed the manner of education at the academies. Furthermore, the presence of women has changed institutional social dynamics²⁷⁵ and classroom ambi-

male cadets, a two-foot step was constructed on the wall when women were admitted. Cadets of either sex could use the step and incur an identical time penalty. *Id.* When a female cadet approached the wall, grasped the top and walked her way up the wall rather than pulling herself up using her arms, an observing officer chastised her for using her legs instead of her arms. *Id.* "No one considers that inexperience can be remedied or that physiological differences may simply require a reexamination of emphasis [sic] (as in the wall example, the use of powerful legs). Instead, the solutions proposed are directed at changing or accommodating individuals." *Id.* But cf. *United States v. Virginia*, 766 F. Supp. 1407, 1439 (W.D. Va. 1991) (noting that since the admission of women to West Point, the obstacle course has been revised to remove certain events requiring upper body strength, due in part to concern that "women would be psychologically discouraged by them"), *appeal docketed*, No. 90-0126-R (4th Cir. Aug. 12, 1991). As the law requiring admission of female cadets to the military academies allowed only for changes necessary to accommodate physiological differences, the reason behind these changes indicates a strong effort by the military to maintain the female component. See *supra* note 229 (quoting 10 U.S.C. § 4342 (1988)).

274. Traditionally, the Air Force Academy allowed a male doolie who wished to leave to do so on the assumption that quitting revealed a character flaw. MITCHELL, *supra* note 230, at 60. After integration, the Academy continued this policy for male cadets, but required female cadets to attend mandatory counselling before leaving. *Id.* "Such exceptions made men of the Class of 1980 feel that the Academy considered it more important for a woman to graduate than for a man." *Id.* at 60-61.

275. An interview with Brig. Gen. (Ret.) John Bard, former Commandant of Cadets at West Point, revealed:

The phenomenon which came from women in the military is that men and women act differently around each other. The Army was familiar with behavior in an all-male environment, but a lot changes when women are introduced into that environment. Behavior changes, and while that is neither right nor wrong, it does have both advantages and disadvantages.

It is not easy to get back to business as usual when you integrate by fiat. The military has been characterized by an aggressive, highly physical, male culture and there arises a hostility toward women. On the other extreme, you have to control the sexuality aspect and the paternalism which also arises in the male-female relationship. The command structure has to clamp down on both extremes.

Women are just as capable of performing military tasks and providing leadership as men are. The Army has determined that an extremely small percentage of the work cannot normally be done by women because they don't on the average have the upper body and abdominal strength that most men have.

Telephone Interview with Brig. Gen. John Bard (United States Army, Ret.), Former Commandant of Cadets, United States Military Academy, from Jan. 1977 through July 1979 (Feb. 28, 1991).

This change in social dynamics is not limited to military colleges. When the last all-female class graduated from Wheaton College in Norton, Massachusetts, in May, 1990, "[s]ome of the graduating women departed saying that they felt the cherished culture of an all-female institution had been soured" by the presence of men in the festivities. Hughes, *supra* note 33, at 13.

ence.²⁷⁶ As the Court noted of a different forum in *Taylor v. Louisiana*,²⁷⁷

The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.²⁷⁸

As the experience of the academies shows, a distinct quality also may be lost if both sexes are included.²⁷⁹ Thus, for purposes of military education, the sexes are not similarly situated.

The Existence of Important Government Interests

The Commonwealth of Virginia claimed an "important interest in preserving the diversity of the [state higher education] system and a balance in the educational choices offered."²⁸⁰ One cannot doubt the importance of the state's interest in education. The Court has declared that "education is perhaps the most important function of state and local governments."²⁸¹ The Virginia Code contains a statement of policy "that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities" through institutions of higher education.²⁸² The vast sums of money the state annually budgets for higher education substantiate this statement of policy.²⁸³ Additionally, the Commonwealth seeks to ensure that it provides education in a diversified manner by coordinating changes

276. Many women who attend the academies do not recognize the change because they have nothing with which to compare their experience. STIEHM, *supra* note 10, at 242 n.c. At least one male cadet at the Air Force Academy noted that the free-wheeling discussions that dominated the classroom prior to integration became much more reserved after integration. *Id.* at 242.

277. 419 U.S. 522 (1975) (invalidating law with different procedures for placing men and women with a jury pool).

278. *Id.* at 531-32 (quoting *Ballard v. United States*, 329 U.S. 187, 193-94 (1946)) (emphasis added).

279. See *supra* notes 274-76 and accompanying text.

280. Complaint at 4, *Virginia Military Inst. v. Thornburgh*, No. 90-0083 (W.D. Va. filed Feb. 5, 1990).

281. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1953).

282. VA. CODE ANN. § 23-30.39 (Michie 1985).

283. See 1990 Va. Acts 2020 (listing total state budget allocations of \$10,787,438,207 for higher education in Virginia over the 1990-92 biennium).

in programs through the state Council of Higher Education.²⁸⁴

One would expect the typical freshman entering the Virginia system of higher education to be only eighteen years of age. This is below both Virginia's legal drinking age²⁸⁵ and the common law age of majority.²⁸⁶ "[T]he special emotional problems of the adolescent years are matters of human experience," and eighteen-year-olds are not far removed from this category.²⁸⁷ A single-sex learning institution can "free its students of the burden of playing the mating game while attending classes, thus giving academic rather than sexual emphasis."²⁸⁸ Furthermore, common human experience indicates that viable, effective education demands accommodation of individual differences. As Justice Powell stated, "A distinctive feature of America's tradition has been respect for diversity."²⁸⁹ These considerations lead to the inevitable conclusion that the state's interest in diversity of education is a fundamental element of its important interest in education in general. One commentator has characterized the alternative as the "interstate highway approach . . . to higher education for a mall-oriented culture."²⁹⁰

Virginia's state support for one of the two single-sex, military colleges in the country enhances the diversity of educational opportunity for men. This, however, does not mean that VMI's

284. See *supra* note 61.

285. See VA. CODE ANN. § 4-62 (Michie 1988) (restricting consumption of alcohol to those over 21 years).

286. At common law, "a minor, male or female, [did] not attain majority until the age of twenty-one." *Koonin v. Hornsby*, 140 A.2d 309, 311 (D.C. 1958); cf. *Hurdle v. Prinz*, 235 S.E.2d 354, 355-56 (Va. 1977) (discussing the fact that the state legislature lowered the common law age of majority of 21 years by enacting a statute that specified 18 years).

287. *Vorchheimer v. School Dist.*, 532 F.2d 880, 887 (3d Cir. 1976), *aff'd per curiam by an equally divided Court*, 430 U.S. 703 (1977).

288. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 739 n.5 (1982) (Powell, J., dissenting) (quoting *Amicus Curiae Brief for Mississippi Univ. for Women Alumnae Ass'n* at 2-3 (No. 81-406)). The experience at the military academies has proven clearly erroneous any argument that the discipline at a military school will counteract the natural tendency for students to date. See, e.g., *Air Force: Close Encounters*, TIME, Oct. 29, 1990, at 47 (reporting an incident in which a male cadet had six male friends observe from his closet while he had sex with his girlfriend, a female cadet); see also MITCHELL, *supra* note 230, at 77 (stating that 20 of the first 25 women to drop out of the Naval Academy's class of 1980 married former midshipmen); Adams, *supra* note 236, at 537 (discussing survey showing that 86.0% of women and 50.3% of men at West Point approve of dating relationships between cadets in the same class and company, 98.5% of women and 57.9% of men approved of dating between cadets in same class and different company, and 38.0% of women and 16.5% of men approved of dating between plebes and upperclassmen).

289. *Hogan*, 458 U.S. at 745 (Powell, J., dissenting).

290. Jere Real, *The Last of the Old Corps; Federal Suits Against Virginia Military Institute for Refusing to Admit Women*, NAT'L REV., Aug. 6, 1990, at 23.

policy furthers educational choice for all youth; the all-male admissions policy decreases options available to women. Both *Vorchheimer v. School District*²⁹¹ and *Williams v. McNair*²⁹² implicitly approved the concept of "separate but equal" for gender discrimination in education because it enhanced educational choices that may not otherwise have been available to the benefitted classes.²⁹³ In *Mississippi University for Women v. Hogan*,²⁹⁴ the Court did not overturn the reasoning of those decisions.²⁹⁵ Virginia does operate a substantially equivalent coeducational cadet style program at Virginia Polytechnic Institute and State University, but no public all-female school exists in Virginia. Although courts strictly interpreted "separate but equal,"²⁹⁶ due to the nature of military education and the general decline in the number of women's schools in the country today,²⁹⁷ one should not fault Virginia for failing to supply an all-female public college within the "separate but equal" framework.²⁹⁸

The better view of "separate but equal" in the sphere of education is one that looks at the elements of diversity that VMI provides to the state system and balances those elements against the effects of diversity on the disadvantaged class.²⁹⁹ The benefit of this view is that it takes into account the realities of the educational marketplace, the needs of the benefitted class, and harm to the disadvantaged class. Allowing VMI to remain an all-male institution furthers the interests of the approximately 380 young men who opt for single-sex education at VMI each year.³⁰⁰ Many of these men might not be able to afford single-sex education in a private school; and, should a court force VMI to admit women, the likely result would be that no man would be able to

291. 532 F.2d 880, 888.

292. 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971).

293. See *supra* notes 174-80 and accompanying text.

294. 458 U.S. 718, 720 n.1 (1982).

295. But see *supra* note 189.

296. See, e.g., *McLauren v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

297. See *supra* note 34.

298. These considerations are supported further by the shackles that the Educational Amendments of 1972, 20 U.S.C. § 1681 (1988), place on Virginia in regards to establishing a "separate but equal" institution for women. Virginia could conceivably charter an all-female military school and still fall within the exceptions under § 1681(a)(4), but such an institution would probably not be economically viable.

299. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 735, 742 (1982) (Powell, J., dissenting).

300. See CATALOGUE, *supra* note 22, at 144.

obtain a single-sex military education within the United States.³⁰¹

On the other side of the balance are the interests of the class of women who wish to attend VMI but are presumptively barred from admission. These women may still attend a school that would provide them with a military education.³⁰² VMI denies them only the right to attend a specific school.³⁰³ The Court has never recognized such a right.³⁰⁴ Thus, if one balances the enhancement of diversity for the benefitted male class achieved by maintaining VMI as a single-sex institution against the decrease in choice for the burdened female class, the clear result is that the state's interest in diversity is consistent with the *Vorchheimer* "separate but equal" reasoning.³⁰⁵

The differences between men and women may find their most compelling manifestation in the context of military education. A reversal of Judge Kiser's ruling, however, would have repercussions in all spheres of the educational world. As problems associated with rising numbers of single-parent families confront public school systems across the country, these systems are experimenting with a return to single-sex classrooms.³⁰⁶ A ruling against VMI would have a chilling effect on experimentation with such educational methodologies.

301. If a court were to force VMI to integrate, The Citadel in Charleston, South Carolina, would probably face a similar order, so no all-male publicly funded colleges would remain in the country. See *supra* note 33 and accompanying text. Furthermore, single-sex military education tends to be different from integrated military education. See *supra* notes 241-79 and accompanying text.

302. See *supra* notes 68, 232 and accompanying text.

303. This is in essence a "catch-22" in operation. VMI is unique because of its all-male character. The all-male admissions policy therefore denies women the opportunity to enjoy a unique educational experience provided by the state. If women are allowed into the Institute, the factors making VMI unique would vanish. Women would thus be denied the unique educational opportunities currently afforded by VMI as a result of their very admission. *United States v. Virginia*, 766 F. Supp. 1407, 1414 (W.D. Va. 1991), *appeal docketed*, No. 96-0126-R (4th Cir. filed Aug. 12, 1991).

304. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 736 (1982) (Powell, J., dissenting).

305. *Vorchheimer v. School Dist.*, 532 F.2d 880, 888 (3d Cir. 1976), *aff'd per curiam by an equally divided Court*, 430 U.S. 703 (1977).

306. Most of these experiments are directed at black youths. See, e.g., Kenneth J. Cooper, *Three Rs and Role Model in Baltimore Third Grade: Single-Sex Class Harnesses Boys' Instincts*, WASH. POST, Dec. 5, 1990, at A1 (discussing a pilot program of an all-boys third grade class); Joseph Berger, *New York Board Backs School for Minority Men*, N.Y. TIMES, Jan. 10, 1991, at A1 (discussing plans to open a high school directed at black males in New York, New York, and a similar plan to open elementary and middle schools for black and hispanic boys in Milwaukee, Wisconsin).

Is There a "Substantial Relationship?"

In *Mississippi University for Women v. Hogan*,³⁰⁷ MUW claimed the presence of men in the classroom would eliminate the special educational benefits women received in a single-sex environment.³⁰⁸ The Court found that this argument was "fatally undermine[d]" by "MUW's policy of permitting men to attend classes as auditors."³⁰⁹ Additionally, "[t]he uncontroverted record reveal[ed] that admitting men to nursing classes does not affect teaching style, . . . would not affect the performance of the female nursing students, . . . and that men in coeducational nursing schools do not dominate the classroom."³¹⁰ Although women may attend night classes and summer school at VMI, they may not visit cadet classes or the VMI barracks.³¹¹ The evidence from the academies indicates that the presence of women would affect esprit de corps and nonacademic standards.³¹² Thus, both of the factual elements that the Court used in *Hogan* to demonstrate the lack of "a substantial relationship" between MUW's female-only admissions policy and the policy's stated ends do not apply to VMI.

Because of basic physiological differences, the district court found that VMI would not allow the corps to subject female cadets to the same hazing and humiliating treatment that shapes a VMI cadet.³¹³ The nearly uniform experiences of the national service academies are strong evidence that VMI will find it impossible to retain its present system if a court forces VMI to admit women.³¹⁴ Only by excluding women can VMI retain its unique educational system.

307. 458 U.S. 718.

308. *See id.* at 721.

309. *Id.* at 730.

310. *Id.* at 731 (citations omitted).

311. *United States v. Virginia*, 766 F. Supp. 1407, 1425 (W.D. Va. 1991), *appeal docketed*, No. 96-0126-R (4th Cir. Aug. 12, 1991).

312. *See supra* notes 241-79 and accompanying text.

313. *Virginia*, 766 F. Supp. at 1413. One of the unofficial activities that takes place is a shower run. Interview with William Cronenberg, 1st Lt. U.S.A.R., VMI Class of 1988, in Williamsburg, Va. (Dec. 5, 1990). All rats are stripped naked and run through the communal shower with some shower heads turned on all hot and others all cold. *Id.* Although the substantive benefits of this treatment are at best questionable, it does provide the kind of common shared experience that binds together each class of cadets. In a coeducational setting, such activity would probably be considered beyond the limits of sexual privacy that our society still recognizes between the sexes in the form of separate bathrooms. *See Virginia*, 766 F. Supp. at 1438.

314. *Virginia*, 766 F. Supp. at 1438-41.

Does the Discrimination Perpetuate a Stereotype?

The traditional test for perpetuation of stereotypes looked to determine whether the classification was based on "old notions"³¹⁵ about the "proper place" of the sexes.³¹⁶ In *Mississippi University for Women v. Hogan*,³¹⁷ the Court noted that "[b]y assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses."³¹⁸ As noted above, this approach suffers from two major flaws.³¹⁹ As society changes, so do views as to what constitutes a stereotype.³²⁰ Constitutional decisionmaking based upon these changing values is bound to reach inconsistent results over time.³²¹ Similarly, the biases of the fact finder will certainly play a role in determining whether some classification is a reflection of a stereotype or a real difference between the classes.

The Court based its decision in *Hogan* on the perpetuation of a professional stereotype.³²² One can divide the question of whether VMI perpetuates an impermissible stereotype into three separate queries. Is VMI a professional school? If so, does an all-male admissions policy perpetuate the "myth" that only men are fit to practice that profession; and if not, does the policy perpetuate some other stereotype?³²³

Statistics contradict the notion that VMI is a "professional school." Although VMI is a military school, it is not a professional military school.³²⁴ Unlike national academy cadets, the military

315. *Stanton v. Stanton*, 421 U.S. 7, 10, 14 (1975).

316. *Orr v. Orr*, 440 U.S. 268, 283 (1979).

317. 458 U.S. 718 (1982).

318. *Id.* at 729-30.

319. See *supra* notes 127-46 and accompanying text.

320. See *supra* notes 145-46 and accompanying text.

321. A brief comparison of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Education*, 347 U.S. 483 (1954), or *Kahn v. Shevin*, 416 U.S. 351 (1974), and *Califano v. Goldfarb*, 430 U.S. 199 (1977), discloses the fluid nature of broad inquiries based on societal beliefs about the proper roles of the races or sexes.

322. *Hogan*, 458 U.S. at 729.

323. Throughout his opinion, Judge Kiser declared that his findings of fact were based on real differences and not stereotypes. See, e.g., *United States v. Virginia*, 766 F. Supp. 1407, 1432, 1434 (W.D. Va. 1991), *appeal docketed*, No. 96-0126-R (4th Cir. Aug. 12, 1991). Merely stating that factual findings are not based on stereotypes will not prove such a contention; however, the documentation of these differences from sources outside the opinion supports Judge Kiser's contention that his findings of fact were not mere reiterations of pernicious stereotypes. *Id.*

324. See *id.* at 1427, 1432.

does not automatically offer commissions to VMI graduates.³²⁵ The school does not require cadets to accept military commissions if offered, and only seventy percent of VMI men accept commissions.³²⁶ Only eighteen percent of VMI graduates make a career out of the military.³²⁷ Even if one considers VMI a professional military school and that status perpetuates a stereotype of men as warriors, it does nothing more than reflect the reality that only men are eligible for combat.³²⁸

The existence of VMI as an all-male institution may perpetuate other stereotypes, such as the idea that women cannot successfully compete in a military environment. The existence of alternative programs for women does not effectively dispel this stereotype, because the existence of VMI as an institution holding on to the stereotype allows the stereotype to flourish with the support of the state. That the presence of women has changed the way the academies conduct education³²⁹ does not imply that women cannot compete in a military environment, nor does it necessarily mean that the educational experience overall is impaired. It only means that the environment that some male students seek in an all-male institution has not been successfully replicated in a coeducational setting. Until evidence to the contrary emerges, the stereotype is really one of fact that does not merit intrusion by the Fourteenth Amendment under current analytical standards.

The true issue of stereotype is unrelated to professional and educational issues. So long as men feel women are somehow different and women continue to feel the same way about men, both groups will desire to maintain some institutions that are exclusively theirs. Eliminating public support for these institutions would reduce the diversity that has always been the hallmark and strength of our society.

RESOLUTION, PROCEDURAL DUE PROCESS HARMS, AND REMEDIES AT LAW

The previous analysis, as well as the court's somewhat sparser analysis, is dissatisfying because it holds forth the possibility

325. CATALOGUE, *supra* note 22, at 12.

326. *VMI Drops Commission Acceptance Requirement*, *supra* note 228.

327. CATALOGUE, *supra* note 22, at 7. Within six years of graduation from West Point, 75% of the men and 60% of the women from the Class of 1980 remained in the Army. MITCHELL, *supra* note 230, at 84.

328. See *supra* note 230 and accompanying text.

329. See *supra* notes 241-79 and accompanying text.

that the Constitution permits and should continue to permit sexual discrimination without a remedy. It does so because men and women are not androgynous. In essence, society can choose either to tolerate discrimination for "important governmental reasons" or to eliminate the diversity that enriches the lives of its people. Society, however, can avoid the limits presented by this option if it is willing to make a closer distinction between the kinds of cases reaching the courts, and if it is willing to expand the remedies available for victims of sexual discrimination.

The doctrinal development culminating in *Mississippi University for Women v. Hogan*³³⁰ evolved from *Stanton v. Stanton*³³¹ and *Craig v. Boren*.³³² The laws challenged in both of those cases involved overt sexual discrimination.³³³ In almost every other case, the member of the disadvantaged class suffered a procedural disability.³³⁴ Although the substantive harm to a female applicant to VMI is denial of the educational opportunities offered by VMI, her legal harm is a procedural bar.³³⁵ Both the state and those young men who choose to attend VMI have a valid interest in preserving the unique all-male structure of VMI, and admitting women would defeat this purpose.³³⁶

To provide a more predictable approach, the courts should begin by distinguishing between those cases for which the state action provides some procedure to evaluate the rights of the parties and those for which it does not. Such an approach would achieve many of the same results as the current doctrine. Moreover, this approach would provide a means for determining the

330. 458 U.S. 718 (1982).

331. 421 U.S. 7 (1975).

332. 429 U.S. 190 (1976).

333. *Craig*, 429 U.S. at 192; *Stanton*, 421 U.S. at 8.

334. See, e.g., *Hogan*, 458 U.S. at 720-21 (discussing admissions procedure in which male applications to nursing school were not considered); *Caban v. Mohammed*, 441 U.S. 380, 381-82 (1979) (discussing law providing mothers, but not fathers, of illegitimate children the absolute right to block adoptions by another member of same sex); *Orr v. Orr*, 440 U.S. 268, 270-71 (1979) (discussing law under which husbands, but not wives, could be required to pay alimony); *Taylor v. Louisiana*, 419 U.S. 522, 524-25 (1975) (discussing different procedures used to place men and women within a jury pool); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (discussing different procedures through which military men and women could procure extra benefits); *Reed v. Reed*, 404 U.S. 71, 73 (1971) (discussing law that created statutory preference for men in same entitlement class as women).

335. Students have no right to go to a specific state college. *Hogan*, 458 U.S. at 736 (Powell, J., dissenting).

336. See *supra* note 303.

constitutionality of state action without the dangers of prejudice inherent in determining whether a state's interests are important enough to warrant discrimination, whether the means are substantially related to that end, and whether the law perpetuates an impermissible stereotype.

If the state facially discriminates against one sex without providing a modicum of due process, a court should hold the action to the strict scrutiny standard. Application of strict scrutiny would surely achieve the same results that the Supreme Court achieved in *Stanton*³³⁷ and *Craig*.³³⁸ If the law allows for some procedural mechanism whereby a plaintiff can establish her rights on an equal footing with men, she presumptively suffers no gender discrimination.³³⁹

If a procedural disability does exist, the court should decide whether the state action implicates a group or individual right. An individual right is one that affects the status of the individual vis-à-vis another specific individual or the state-as-a-state.³⁴⁰ These are the kinds of harms discussed in *Reed v. Reed*³⁴¹ and *Frontiero v. Richardson*.³⁴² A group right is one that establishes the plaintiff's right vis-à-vis a group. If the state action implicates an individual right, the procedural disability is per se unconstitutional because the procedure would presumably take into account the rights and interests of all the parties without having to resort to the procedural disability. In the case of a group right, however, the state finds itself in the position of providing special benefits for one subset of individuals within a single gender group and presumptively denying those benefits to all members of the opposite gender group. If a procedural bar exists, the court should balance the benefits to the advantaged class against the harms to the disadvantaged class.

337. 421 U.S. 7 (1975).

338. 429 U.S. 190 (1976).

339. This analysis uses the example of a female plaintiff because females are the most frequent victims of gender discrimination. The analysis also assumes that the procedural elements would be sufficient to pass constitutional muster and would not be applied on a covertly discriminatory basis.

340. By the term "state-as-a-state," this Note contemplates a situation in which the state and the plaintiff are engaged in competition for some discrete and identifiable benefit much in the same way that two private parties may compete. This Note uses the term to avoid the vagaries of Fourteenth Amendment jurisprudence concerning whether an actor qualifies as a state actor. At issue in any competition between a plaintiff and the state-as-a-state would be rights that the court could allocate while only incidentally, if at all, affecting the rights of groups operating under the state's auspices.

341. 404 U.S. 71 (1971).

342. 411 U.S. 677 (1973).

In performing this balancing test, the court should recognize that some factors in the balancing test are "imponderables"³⁴³ and "distinct qualities."³⁴⁴ These flavors and qualities consist of the varied effects that one sex has on the other. Neither the state nor anyone else can truly quantify these effects, and researchers are still discovering how extensively they permeate our lives.³⁴⁵ Nonetheless, these effects represent a value, albeit at times personal, that the law cannot ignore without completely removing itself from human experience.

If the balancing test still favors discrimination, the state should pay compensation to those victims of discrimination who actually suffer its ill-effects because of procedural barriers. The Court has acknowledged previously that even under strict scrutiny the government may discriminate if it will save money,³⁴⁶ and a nonequitable remedy will require the state to "put its money where its mouth is."³⁴⁷

The advantages of the proposed test are manifold. The test mandates procedural processes to allocate rights among individuals and between the state-as-a-state. The balancing test recognizes that the state may sponsor certain group rights only at

343. *Taylor v. Louisiana*, 419 U.S. 522, 531-32 (1975).

344. *Id.*

345. See *supra* note 11 and accompanying text (discussing research on gender-based differences).

346. See *Frontiero*, 411 U.S. at 689.

347. This approach deviates from current doctrine in two major ways. First, requiring the state to pay compensation for a harm inflicted without violating the law contradicts the general principle that a wrong should precede liability. The approach, however, comports with the general theory of enterprise liability used in respondeat superior cases. Although an employer may do nothing wrong, he is still held liable on the theory that the harm would not have occurred "but for" the activities of the enterprise. See WILLIAM PROSSER, *LAW OF TORTS* § 69 (1971). Whatever harm one suffers by being excluded from a governmental benefit because of one's gender would not occur "but for" the governmental program.

A second way in which this proposal deviates from the current doctrine is that it proposes abandoning the use of equitable remedies to stamp out inequality. The fact that state governments dominated by whites were willing to pay the price of a segregated school system is testament to the notion that individuals who discriminate are not influenced by economic rationality. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 354-55 (1981) (discussing the inefficiency of segregation). Such a comparison, however, misses the point behind this approach. When the benefits of discrimination appear to justify the means of discrimination, assurances that the judicial branch accurately weighed the values can be most effectively verified by ensuring that the elected branches bear the political costs of monetary compensation for the victims of that discrimination. Further, a move to compensatory rather than equitable remedies is already afoot when the violation is statutory. For example, Congress has acted to provide for compensatory and punitive damages for intentional employment discrimination based on gender. See Pub. L. No. 102-166, § 102, 137 CONG. REC. D1490 (daily ed. Nov. 21, 1991).

the expense of the rights and legitimate interests of those people whom it excludes. By forcing the state to pay compensation to victims of procedural gender discrimination, the victims of discrimination receive redress without sacrificing the legitimate rights and interests of the benefitted class.

Courts could easily devise standards for recovery on a case-by-case basis. As a prerequisite, the state would have to surrender its claims to sovereign immunity. In the VMI case, applicants could recover only if they complete a military education at a comparable military college elsewhere.³⁴⁸ They would also have to substantiate their true desire to attend VMI. Compensation would amount to the increased cost of obtaining an education at one of these other schools, provable psychological damage caused by the discrimination, and perhaps some nominal amount for stigmatic harm. The state should also pay lawyer's fees and costs.

The most difficult aspect of applying this test would be determining whether a group right is at stake. To qualify as a group for purposes of applying the test, more than one individual would have to experience the effects of the plaintiff's attempt to exercise a claimed right. The group would have to be uniform in gender and in some way insulated from general society.³⁴⁹ Additionally, the group could not qualify as a state actor, although it may be able to operate under state auspices. We must be careful to distinguish between the state actor and the object of its actions. VMI as an institution is an actor. The student body is the object of its actions, and the state may discriminate only with respect to the composition of the student body. The most obvious examples of groups that would meet these criteria are athletes in a locker room, students in class, and certain social organizations such as fraternities and sororities.

CONCLUSION

The VMI case illustrates a growing trend toward the belief that discrimination on the basis of gender is per se both immoral and unconstitutional. Although the long history of discrimination

348. Examples of such colleges would include the federal military academies and the cadet corps at Virginia Polytechnic Institute and State University and North Georgia Military College.

349. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (stating that disproportionate burdens may justify sex-based classifications in limited circumstances). This test would affirm the unconstitutionality of MUW's actions in *Hogan* because admitting male students to the classroom would end the isolation of the female student body from general society.

in this country has resulted in the denial of fundamental and important rights, the courts must be wary of throwing out the baby with the bathwater. American society owes much to its diversity, and maintaining single-sex education as an option furthers that diversity. Many individuals cannot afford to attend a private, single-sex college; by requiring VMI, The Citadel, and all other public institutions to open their doors to both genders, we eliminate freedom of choice for those less wealthy individuals who cannot afford a private education.

The basic premise of this Note is that the sexes are not fungible. This does not imply that one sex is superior to the other, but only that the broad spectrum of interactions between men and women creates a fundamentally different social dynamic than those interactions between either just men or just women. The sexual attractions and physical and emotional differences between the sexes distinguish gender discrimination from racial discrimination. Society must be sensitive to the fact that sex is an inaccurate proxy and can do this by eliminating procedural biases and broad laws that fail to grant members of one sex the same rights and privileges as those of the other sex. This does not mean, however, that society must disregard the costs of integration to well-defined single-sex groups. Courts can balance the costs of integration against the harm to the burdened individuals and compensate the individuals in ways that preserve their integrity and the interests of the single-sex group. If society insists on removing all forms of discrimination with equitable remedies, its reflexive disdain for discrimination will stifle those energies that maximize freedom and happiness for all.

A closer examination of the methods of state-supported discrimination and its costs and benefits can make the law more predictable and sensitive to everyone's needs. The courts can and should dispense with elastic terms like "stereotypes," "important governmental interests," and "substantial relationships" in favor of replicable analytical tools.

The issues surrounding gender discrimination under the Fourteenth Amendment reflect the tension between demands for equality and the reality of gender differences. The courts cannot mandate equality when these differences are material, but individuals should not be denied equal opportunities to prove their worth without compensation. The courts should not "erect[] conformity into the noblest of virtues"³⁵⁰ and force the diversity that

350. See *In Brief, the Law*, *supra* note 1, at 60.

enriches our society from its midst. As a society, we can and should resolve these competing values by awarding common law damages to victims of procedural gender discrimination. An award of common law damages will compensate victims of procedural gender discrimination and will shift the burden of such discrimination onto the bodies that perpetrate the offending practices. Thus, although plaintiffs may not receive the equitable remedy they desire, they will receive a remedy to which they otherwise would not be entitled, and our society will benefit by maintaining diverse institutions capable of meeting the needs of the individuals they serve.

William A. DeVan