1996

The Citadel: Last Male Bastion or New Training Ground

Laurie A. Keco

Follow this and additional works at: http://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation

Available at: http://scholarlycommons.law.case.edu/caselrev/vol46/iss2/5

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
NOTES

THE CITADEL: LAST MALE BASTION OR NEW TRAINING GROUND?

Almost three years ago, Shannon Richey Faulkner made a simple request: to be admitted to The Citadel, the all-male, state-supported Military College of South Carolina. What began as a college application ended as an intense legal and social controversy which rocked the country.1 Over the course of the litigation, Faulkner appeared on television news programs,2 was featured in People Magazine3 and The New Yorker,4 and mentioned in countless newspaper and magazine articles across the country.5

In Charleston, South Carolina, propaganda against Faulkner ran high. The controversy inspired “Save the Males” bumper stickers6

1. Faulkner v. Jones, 10 F.3d 226, 229 n.1 (4th Cir. 1993) (noting that The Citadel’s application form did not require specification of gender); id. at 238 n.4 (Hamilton, J., dissenting). After learning Faulkner’s sex, The Citadel promptly revoked her acceptance. Id. at 229. Following this revocation, Faulkner filed suit on behalf of herself and all others similarly situated to compel the admission of all qualified women. Id. at 226, 229.


6. Faludi, supra note 4, at 65. A more caustic saying was “Shave the Whale,” a dual reference to Faulkner’s weight gain and her exemption from the traditional cadet haircut. Sheryl Stolberg, Faulkner Hailed for Blazing a Lonely Trial to Citadel Military, L.A.
and T-shirts proclaiming “1,952 Bulldogs and 1 Bitch.” She eventually gained admission to The Citadel after more than two years of legal maneuvering, but amid the cheers of her male classmates she withdrew after one week, citing the cumulative stress of her personal battle.

---

9. One of the many trial orders included a last minute challenge to Faulkner’s admission based on physical ability. The Citadel asserted that Faulkner was more than twenty pounds over the weight requirement. After a closed hearing, the district court ruled that The Citadel had no objective policy that would deny Faulkner’s admission based on weight, even though such students would typically not be admitted. *Faulkner Too Heavy, Citadel Argues*, SAN DIEGO UNION-TRIB., July 28, 1995, at A7. The Fourth Circuit denied The Citadel’s motion for a stay pending an appeal on this issue, over a dissent by Judge Hamilton. *Faulkner v. The Citadel*, 61 F.3d 278, 278 (4th Cir. 1995).
10. *NBC Nightly News* (NBC News television broadcast, Aug. 18, 1995) (transcript available in Westlaw, NBCNN database). Faulkner specifically repudiated The Citadel’s contention that she was physically unable to meet the rigorous demands of Hell Week and reaffirmed that the stress was not caused by the cadets or The Citadel. Ellen Yan, *Faulkner Wiser After Saga at Citadel*, PLAIN DEALER (Cleveland), Aug. 22, 1995, at 9E.

Faulkner’s decision to withdraw from The Citadel sparked an intense debate across the country. The following is a cross-section of reactions.


“It is not an exercise in male chauvinism at all. It is a reflection of Southern culture and the attitude toward women. Southern men have been raised in an atmosphere of chivalry. . . . [The Southern man] wants [his wife] to be protected and nurtured and not forced to undertake onerous duties that are quite contrary to disposition and breeding.” Ray Gordon, *Chivalrous Southern Men*, POST-GAZETTE (Pittsburgh), Aug. 27, 1995, at F3 (letter to the editor).

“[Using Faulkner’s withdrawal as a demonstration of female inferiority] ignores the fact that 34 other cadets in Faulkner’s class of 592 quit the same week she did. It ignores the fact that last year, 61 cadets couldn’t hack it . . . [and] . . . in 1993, 45 cadets left.” Diana Griego Erwin, *Early Exit Aside, Faulkner Was a Pioneer for Women*, SACRAMENTO BEE, Aug. 24, 1995, at A2.

“A comparison of Faulkner and McCorvey [the Roe in *Roe v. Wade*] is both instructive and apt. Both were used in similar ways, becoming what Lenin described as ‘useful idiots,’ well-meaning people willing to be exploited without fully understanding the political responsibility of the ideological cause.” Suzanne Fields, *Faulkner Displayed Grace Under Feminist Fire*, ATLANTA J., Aug. 24, 1995, at A18 (Editorial).
Although Faulkner is no longer involved in the case against The Citadel, the issues surrounding its all-male admissions policy still remain. To appreciate the harm experienced by women as a result of their exclusion from The Citadel, one must first understand the school's unique atmosphere.

The Citadel employs military-styled training to "strip each young recruit of his original identity and remold him into the 'Whole Man.'" This adversative method is accomplished within

"Now the Chicago man . . . offers this consoling thought to Shannon Faulkner, who quit the Citadel. If she had endured the abuse of her freshman year, something even worse would have happened to her. She would have become one of them." Mike Royko, *It Could Have Been Worse for Faulkner*, PLAIN DEALER (Cleveland), Aug. 31, 1995, at 1B (syndicated column).

"Fortunately, I don't live in South Carolina, which not only has the Citadel, but also has Strom Thurmond. This can't be a coincidence." Mike Littwin, *After Faulkner, Why Should Women Storm The Citadel?*, BALTIMORE SUN, Aug. 28, 1995, at 1D.


"[Faulkner said,] 'It would have been different if there had been other women with me.' That's not an excuse. That's a valedictory." Susan Faludi, *A Lesson in Solidarity*, PHOENIX GAZETTE, Aug. 26, 1995, at B7.

"'To say she let down the women's movement is outrageous,' [Gloria Steinem] said. 'I am proud of her.'" *Faulkner Not a Quitter*, ARIZONA REPUBLIC, Aug. 23, 1995, at B6.

"'Should Faulkner have been in better shape? Yeah, probably. But, oh, how easy it is to say this from a flabby distance, from a place where that kind of pressure at that age is not part of most of our daily lives. . . . We are so quick to lament that she was not some supernatural Terminator chick, a woman with nerves of steel and polyester skin from which the insults would roll right off.'" *The Citadel, Faulkner and the Onlookers*, STAR-TELEGRAM (Fort Worth), Aug. 27, 1995, § 3, at 4 (Editorial) (quoting Liz Balmaseda of the Miami Herald).

11. The Citadel moved to have Faulkner's name dropped from the lawsuit, leaving the United States as the only remaining party. Paul Leavitt, *Citadel Wants Faulkner Dropped from Lawsuit*, USA TODAY, Aug. 24, 1995, at 3A. The Citadel's motion to have Faulkner removed was granted. Telephone interview with Ms. Valorie Vojdik, Instructor at New York University School of Law and Attorney for Shannon Faulkner (Feb. 1, 1996) [hereinafter Vojdik Interview]. Nancy Mellette's motion to intervene was granted. *Id.* Mellette, a cadet at Oak Ridge Military Prep School in North Carolina, is an outstanding athlete and claims to be better prepared to handle the physical rigors of The Citadel. She can run two miles in 13 minutes and do 28 sit-ups in 30 seconds. *Candidate Says She's Ready to Battle The Citadel*, ORLANDO SENTINEL, Sept. 6, 1995, at A3. Mellette's brother is a senior cadet at The Citadel and her father is an alumnus. Carrie Dowling, *Military Student Wants to Follow in Faulkner's Steps*, USA TODAY, Sept. 1, 1995, at 2A. Faulkner's attorneys, who represent Mellette, have asked the district court to certify the case as a class action, but the request has not been granted as of February, 1996. Vojdik Interview, *supra*. However, three other individuals have applied to The Citadel since Mellette's request for intervention was granted. *Id.*

12. Faludi, *supra* note 4, at 64.
the framework of the Fourth Class System. According to The Citadel Catalogue,

The purpose of the Fourth Class System is . . . to produce Citadel Whole Men with alert minds and sound bodies who have been taught high ideals, honor, integrity, loyalty, and patriotism; who accept the responsibilities which accompany leadership; and who have sufficient professional knowledge to take their place in a competitive world.13

The Fourth Class System "demands prompt and unquestioning obedience of authority."14 It includes,

standing at a rigid position of attention, turning square corners when walking, undergoing neatness inspections before formations, learning various items of fourth-class knowledge, working on approved company details such as minor chores incident to keeping one's own area of the barracks in order, and submitting to a variety of minor restrictions concerning the use of certain campus grounds and facilities, the wearing of the uniform, and the general conduct of a fourthclassman.15

In addition to fulfilling normal academic requirements, each student trains as a member of the South Carolina Corps of Cadets.16

The Citadel is just one of a number of single-gender colleges in the country, although the vast majority are private and available only to women.17 Single-gender education is experiencing a comeback, with increasing admissions at women's schools18 and even

---

14. Id. at 55.
15. Id. In addition, the Citadel Catalogue states, cadets who are unable to meet the desired standards or violate one or more of the customs are subject to corrective action. This can range from a verbal reprimand to walking tours on the quadrangle of barracks and may include restriction to the limits of campus. In extreme cases, a cadet who is unable to conform to the military way of life may be brought before a suitability board to determine his fitness to continue at The Citadel.
16. Id. at 12 (stating that the primary mission of The Citadel is to "educate male undergraduates as members of the South Carolina Corps of Cadets and to prepare them for post-graduate positions of leadership through academic programs of recognized excellence").
17. Brief for Cross-Petitioner at 25 n.21, United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995) (available in LEXIS, Genfed library, Briefs file) (noting that only four single-gender schools for men exist, including VMI and The Citadel).
18. Sandra Reeves & Anne Marriott, A Burst of Popularity, U.S. NEWS & WORLD
some experimentation with African-American male or all-male academies at the high school level. Thus the basic tension arises between the advocates of single-gender education, who believe it is an important and justifiable pedagogical method, against the proponents of integration. While some proponents may concede that single-gender education has some value, they believe that the admissions policies of all-male schools subordinate women. This Note adopts the latter approach, arguing that The Citadel’s admissions policy and stereotypical notions upon which its parallel program was founded perpetuate the subordination of women by denying them access to demonstrably effective leadership training and the most influential power structure of South Carolina.

This Note addresses the equal protection concerns associated with The Citadel’s all-male admissions policy and its newly created “parallel sister school,” the South Carolina Institute of Leadership for Women (SCIL). Part I of this Note provides a detailed account of The Citadel case and a discussion of the Virginia Military Institute (VMI) case. The VMI case preceded The Citadel case and provides background for analyzing the multiple opinions issued in the latter case. Both cases concern the same basic issue: whether the VMI’s all-male admissions policy was constitutionally permissible. Part I also discusses the relevant desegregation precedents that deal with alleged separate but equal facilities and intangible factors associated with educational institutions.

Part II first discusses the standard equal protection analysis of a gender classification, where the appropriate standard of review is intermediate scrutiny. To survive a challenge under intermediate

---


scrutiny, The Citadel must show that its admissions policy is substantially related to the achievement of an important governmental objective. Although educational diversity and single-gender education may be important governmental objectives, this section demonstrates that the Court has found other objectives more important than those asserted here, inadequate to defeat a claim of gender discrimination. Furthermore, this section questions whether the asserted objectives in this case are merely pretextual. It then views the equal protection analysis from an entirely different perspective, the anti-subordination framework. Under this framework, the only justification for a classification that has discriminatory impact based on race or sex is anti-subordination. This section elaborates upon The Citadel’s proposed justification of lack of demand and concludes that it is inappropriate.

Part III demonstrates the effects of past discrimination resulting from The Citadel’s admissions policy. Part IV analyzes the proposed parallel program, SCIL, which uses a cooperative methodology to achieve the same outcome for women as the adversative methodology does for men. This section concludes that SCIL should not save The Citadel from integration since it fails to address the nature of the constitutional violation and since the intangible factors associated with such an institution will not be equal to those associated with The Citadel. Furthermore, SCIL should be declared unconstitutional because denying women access to the adversative methodology is based on stereotypes about the ability and nature of women and will place a stigma of inferiority upon the parallel program.

Part V presents practical solutions that will allow both male and female students to enjoy intangible benefits such as exposure to the adversative method, access to The Citadel’s alumni network, and preparation for functioning in a co-educational society, while minimizing female students’ concerns regarding safety, effective classroom participation, and physical fitness requirements.

PART I: BACKGROUND

A. “All-Male Military Institute” Equal Protection Litigation

The Citadel controversy is best understood in light of the VMI decisions issued prior to and during the course of The Citadel trial. The first stage of the VMI litigation will be referred to as the liability phase, while the second stage will be referred to as the
remedial phase.

VMI is a state-supported institution of higher learning that utilizes a single-gender adversative model adapted from military training to produce citizen-soldiers. It emphasizes "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." Throughout his four years, each cadet must live in the barracks, which provides the framework for the hierarchical system, and participate in ROTC. VMI has employed this same model since 1839, when it was established as a military college prior to the Civil War.

A female high school student initiated the liability phase of the VMI case by lodging a complaint with the Department of Justice challenging VMI's all-male admissions policy. The Department of Justice brought suit against Virginia, claiming that VMI's admissions policy violated the Equal Protection Clause. Since the student was only a prospective applicant, the Department sued pursuant to Title IV of the Civil Rights Act of 1964, which permits filing of an action alleging discrimination in violation of federal statutes or the Constitution. Since military academies and historically single-sex schools are exempt from Title IX of the Civil Rights Act, only a constitutional violation was alleged.

Intermediate scrutiny is the appropriate standard of analysis for equal protection violations based on gender. The Supreme Court

21. Id. at 1421.
22. Id.
23. Id. at 1423.
24. Id. at 1424.
27. Id.
28. See generally U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").
32. 20 U.S.C. § 1681(a)(4)-(5) (1994) (exemptions for "educational institution[s] whose primary purpose is the training of individuals for the military services of the United States" and "public institution[s] of undergraduate higher education which . . . traditionally and continually from . . . establishment ha[ve] a policy of admitting only students of one sex").
34. This test differs from strict scrutiny analysis, which requires the state's classifica-
applied this standard to higher education in *Mississippi University for Women v. Hogan.* In *Hogan,* a male student sought admission to Mississippi University for Women's (MUW) nursing program. Although coeducational nursing opportunities existed within the state, they required extensive travel. The Court stated that Mississippi must show that "the [gender] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Justice O'Connor's opinion emphasized that this test "must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."

After applying the intermediate scrutiny standard, the Court found that the all-female admissions policy of MUW failed to compensate past victims of discrimination since women were not lacking opportunities in the field of nursing, and tended to "perpetuate the stereotyped view of nursing as an exclusively woman's job." The Court also emphasized that its holding did not apply

---

36. *Id.* at 720.
37. *Id.* at 723 n.8 (noting that no other nursing schools existed in the city where Hogan lived).
38. *Id.* at 724 (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)).
39. *Id.* at 724-25. One of the most famous instances of stereotyping in Supreme Court history occurred more than 100 years ago. Justice Bradley stated in 1873 that "[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring in judgment).
to all MUW programs, nor to single-gender education in general.\textsuperscript{41}

In his dissenting opinion, Justice Powell concluded that the element of choice and diversity in the higher education system of Mississippi should be maintained.\textsuperscript{42} He argued that, unlike African-American students who were forced to attend alternative schools as a matter of law prior to \textit{Brown v. Board of Education},\textsuperscript{43} the women of MUW were not “coerced” into attendance.\textsuperscript{44} Additionally, Justice Powell emphasized that since options exist in choosing among colleges, students may select the school most beneficial to them.\textsuperscript{45}

Justice O'Connor responded by stating that any gender-based classification provides benefits to one class which are not available to the other.\textsuperscript{46} She emphasized that the real question is “whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.”\textsuperscript{47}

After applying the \textit{Hogan} test, the district court found that VMI's exclusion of women did not violate the Equal Protection Clause.\textsuperscript{48} On appeal, the Fourth Circuit held that the detailed record supported the conclusion that VMI's single-gender admissions policy was justifiable because of its institutional mission favoring neither sex.\textsuperscript{49} Thus, the court felt that the single-gender atmosphere of VMI was sufficient to add diversity to Virginia's system of higher education, without even considering its adversative methodology.\textsuperscript{50}

\textsuperscript{41} \textit{Id.} at 720 n.1 (“[W]e are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.”); \textit{Id.} at 723 n.7 (“[W]e decline to address the question of whether MUW’s admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment.”); \textit{Id.} at 733 (Burger, C.J., dissenting) (“Since the Court’s opinion relied heavily on its finding that women have traditionally dominated the nursing profession, it suggests that a State might well be justified in maintaining, for example, the option of an all-women's business school or liberal arts program.”).

\textsuperscript{42} \textit{Id.} at 735 (Powell, J., dissenting) (citing studies showing single-sex colleges can have a positive effect on self-esteem).

\textsuperscript{43} 347 U.S. 483 (1954) (declaring racially segregated primary and secondary schools unconstitutional).

\textsuperscript{44} \textit{Hogan}, 458 U.S. at 741 n.9 (Powell, J., dissenting).

\textsuperscript{45} \textit{Id.} at 744 (Powell, J., dissenting).

\textsuperscript{46} \textit{Id.} at 731 n.17.

\textsuperscript{47} \textit{Id.}


\textsuperscript{49} United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992).

\textsuperscript{50} United States v. Virginia, 766 F. Supp. at 1412 (The district court concluded, “the
The Fourth Circuit concluded that admitting women to VMI would materially alter the very experience the school sought to provide.\textsuperscript{51} It was not maleness (as distinguished from femaleness) that was imperative to VMI’s mission, but rather the homogeneity of gender which was shown to be the essence of the education provided by VMI.\textsuperscript{52} Thus, the relevant question was why Virginia offered this distinctive opportunity only to men.\textsuperscript{53} Since Virginia articulated no important state policy that substantially justified offering the opportunity for military education to men alone,\textsuperscript{54} the court held that the admissions policy of VMI violated the Equal Protection Clause.\textsuperscript{55} However, the Fourth Circuit did not order VMI to admit women.\textsuperscript{56} Instead, it presented Virginia with several options:

[T]he Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations.\textsuperscript{57}

Following the conclusion of the liability phase of the VMI case, The Citadel litigation began. Faulkner received a preliminary injunction from the district court to attend Day Classes.\textsuperscript{58} In denying The Citadel’s appeal, the Fourth Circuit concluded that the district court did not abuse its discretion.\textsuperscript{59} The appellate court distinguished The Citadel case from the VMI case on procedural

\textsuperscript{51} United States v. Virginia, 976 F.2d at 897.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 898.
\textsuperscript{54} Id. at 899.
\textsuperscript{55} Id. at 900.
\textsuperscript{56} Id.
\textsuperscript{59} Faulkner, 10 F.3d at 233.
grounds, namely in VMI the plaintiffs did not seek a preliminary injunction. In examining the relative harm to the parties under the preliminary injunction, the court concluded that Faulkner would be irreparably harmed while The Citadel's harm would be minimal at best.

In July 1994, the district court issued an opinion on the merits of the case and ordered The Citadel to admit Faulkner to the Corps of Cadets. Since the parties agreed that The Citadel was similar enough to VMI that the Fourth Circuit's opinion on liability would control, the court did not retry all the issues of VMI. Instead, it chose only to try the issue of justification: whether lack of demand could justify South Carolina's failure to provide Citadel-type educational opportunities to women. After making extensive findings of fact, the court found that, based on Missouri ex rel. Gaines v. Canada, "[t]o suggest that a lack of demand for a certain type of equal protection can somehow justify the denial of another person's constitutional right thereto undermines the express intent of the Fourteenth Amendment.

Since The Citadel case involved an actual plaintiff rather than the Department of Justice, the issue of remedy acquired a meaning not present in VMI. The court outlined its remedial power in the context of desegregation, concentrating primarily on the local authorities' failure to comply. It noted that South Carolina had failed to make a substantive effort to fashion a remedy and that The Citadel could easily delay the process and prevent Faulkner from receiving any benefits from the proposed programs.

60. Id. Specifically, the court acknowledged "the presence of this time pressure, combined with an absence of present opportunity for Faulkner." Id.
61. Id. The Fourth Circuit then denied The Citadel's motion for a stay pending appeal to the Supreme Court. Faulkner v. Jones, 14 F.3d 3, 4 (4th Cir. 1994). In his dissent, Chief Judge Hamilton recommended granting a stay because the Supreme Court had not addressed significant constitutional questions. Id. at 5 (Hamilton, J., dissenting).
63. See supra notes 48-57 and accompanying text.
64. Faulkner, 858 F. Supp. at 555.
65. See id. at 555-62.
66. 305 U.S. 337, 350 (1938) (finding that lack of demand fails to justify denial of equal protection).
67. Faulkner, 858 F. Supp. at 564.
68. See id. at 567.
69. See id. at 567-68.
Since the district court reached its decision in the late summer, there was no possibility of admitting any other women during the 1994 school year.\(^7\) Thus, other women who wished to gain admission to The Citadel were not similarly situated to Faulkner regarding the immediacy of the violation. The court ordered The Citadel to pursue its proposed remedial plan as it concerned future female applicants.\(^7\) The plan was to be formulated, adopted, and implemented for the 1995-96 school year or The Citadel would be ordered to admit all qualified women.\(^7\)

While the order was stayed\(^7\) and the appeal pending, The Citadel proposed the creation of a Women's Leadership Institute (WLI), which would employ cooperative (rather than adversative) methodology to achieve the same outcome as The Citadel.\(^7\) WLI turned out to be a stop-gap measure, however, until the Fourth Circuit confirmed The Citadel’s liability in April 1995 in a split opinion.\(^7\)

The majority, by reserving judgment on the issue of lack of demand as a matter of law and instead finding as a matter of fact that The Citadel failed to meet its evidentiary burden, lent credence to the notion that the demand theory could be acceptable under certain circumstances.\(^7\) With respect to the issue of remedy, The Citadel contended that federalism and comity required an opportunity to correct the violation, as in the VMI case, without imposing Faulkner’s integration.\(^7\) The court responded by describing what it perceived to be “feet-dragging” by The Citadel,\(^7\) and stated that “South Carolina may have forfeited its right to include Faulkner in its general remedial plans.”\(^8\)

Judge Hall concurred in the opinion because its disposition

\(^7\) Faulkner, 858 F. Supp. at 569.
\(^7\) Id.
\(^7\) Id.
\(^7\) Faulkner v. Jones, 51 F.3d 440, 442 (4th Cir. 1995).
\(^7\) Id. at 445.
\(^7\) Id. at 446.
\(^7\) Id. at 446-49.
\(^7\) Id. at 450.
provided for Faulkner’s entrance and because he felt bound by precedent. He had serious misgivings about the entire proceedings to establish parallel programs. In a very forthright statement, Judge Hall said:

We began this unfortunate journey in VMI I, when we promoted a means to an end—single gender education—to the status of an end in itself and avoided ascertaining, let alone analyzing, the true purpose behind the state’s decision to keep women out of VMI. Though we correctly concluded that maintaining the status quo offended the Constitution, we failed to mandate VMI’s integration—and thus we failed.

. . . .

In fact, though VMI, The Citadel, and their advocates have ceaselessly insisted that education is at the heart of the debate, I suspect that these cases have very little to do with education. They instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later. The daughters of Virginia and South Carolina have every right to insist that their tax dollars no longer be spent to support what amount to fraternal organizations whose initiates emerge as full-fledged members of an all-male aristocracy. Though our nation has, throughout its history, discounted the contributions and wasted the abilities of the female half of its population, it cannot continue to do so. As we prepare, together, to face the twenty-first century, we simply cannot afford to preserve a relic of the nineteenth.

81. Id. (Hall, J., concurring).

82. Id. at 450-51. Judge Hamilton, in his dissenting opinion, fully accepted lack of demand as a justification in this case. Id. (Hamilton, J., dissenting). He contended that

[to compel a state, laboring under limited financial resources, to institute such a program is not only economically repugnant, but also turns the federal judiciary into a super-commission on higher education. . . . [T]his resurrects the infamous ghoul of Lochner v. New York [198 U.S. 45 (1905) (holding unconstitutional a law regulating maximum hours in the work day)] . . . which . . . has been discredited as an example of the Court’s usurpation of local legislature.

Id. at 455-56 (citations omitted).

It should be noted that the Lochner analogy is inappropriate in this case. Lack of demand has been used here as a mere pretext to justify an explicit gender based classification. This litigation is not about the right to higher education, or the right to be provid-
Although Faulkner is no longer directly involved in The Citadel litigation, the legal precedent declaring The Citadel’s admissions policy unconstitutional still stands. The new South Carolina Institute of Leadership for Women at Converse College (SCIL), based on WLI, has been implemented for the fall of 1995 and its validity will be determined pending the outcome of the VMI case. The Supreme Court granted certiorari in October of 1995 and heard oral arguments regarding VMI’s constitutional violation and remedy in January of 1996. Therefore the issue of separate

ed with diverse educational opportunities, but is about exclusions based on gender. Therefore, this case should not be analyzed under the rational basis or Lochner test, but should be analyzed under a more stringent standard. Currently, that standard is intermediate scrutiny, but the Court has indicated that the question is still open as to whether strict scrutiny will be applied to gender discrimination. See J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. at 1426 n.6; supra note 34.

83. The Fourth Circuit upheld a similar program as an alternative to integrating VMI. See infra notes 165-214 (discussing VWIL, VMI’s parallel program, and critiquing the court’s opinion).

84. See Grant, supra note 11, at 3B. The VMI case is being touted as a potential vehicle for the Supreme Court to announce that strict scrutiny will apply to gender discrimination. See David G. Savage, High Court Case Revives Debate on Gender Bias, L.A. TIMES, Jan. 1, 1996, at A1. The Department of Justice and many amici are urging the Court to adopt strict scrutiny. See, e.g., Brief for Petitioners, United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995) (No. 94-1941) (available in LEXIS, Genfed library, Briefs file) [hereinafter U.S. Brief]; Amicus Brief of Nancy Mellette in Support of Petitioner, United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995) (Nos. 94-2107, 94-1941) (available in LEXIS, Genfed library, Briefs file) [hereinafter Mellette Brief]; Brief of Amici Curiae National Women’s Law Center, American Civil Liberties Union in Support of Petitioner, United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995) (No. 94-1941) (available in LEXIS, Genfed library, Briefs file) [hereinafter ACLU Brief]. In general, proponents of the application of strict scrutiny argue that “the intermediate scrutiny standard has produced erroneous, confused, and inconsistent results in lower courts.” ACLU Brief, supra, at 9. In addition, the Court’s recent decision in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), arguably compels the Court to recognize strict scrutiny in gender cases. “If gender based classifications continue to be evaluated under intermediate scrutiny, white males will have greater constitutional protection from race-conscious affirmative action, however benignly intended, than women will have from invidious sex discrimination. As a matter of logic and history, this result cannot be squared with principled equal protection analysis.” ACLU Brief, supra, at 11 (citing Justice Stevens’s dissenting opinion in Adarand). Those who argue against the application of strict scrutiny preach caution: “What about women’s and men’s prisons, . . . battered women’s shelters, . . . high school and college sports, . . . and private women’s colleges?” Savage, supra, at A1; see also Stephen C. Minnich, Comment, Adarand Constructors, Inc. v. Pena—A Strict Scrutiny of Affirmative Action, 46 CASE W. RES. L. REV. 279, 304-05 (1995) (arguing that there are still distinctions between race and sex that compel a different standard). Preliminary reports indicate that a number of the Justices are not sympathetic to VMI’s plight. Bob Dart, VMI Pleads Cause to Skeptical Court, PLAIN DEALER (Cleveland), Jan. 18, 1996, at 11-A (quoting Justice Breyer as saying “so what?” in response to arguments that VMI
but equal and its concerns regarding stigma and intangible factors becomes paramount in a discussion of parallel programs.

B. Desegregation

Since SCIL involves a parallel program for women, it is useful to examine Supreme Court opinions regarding separate programs in the context of race. The Fourteenth Amendment provides, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Prior to 1954, the Supreme Court permitted segregation based on race under this amendment, which resulted in educational systems purporting to be separate but equal. Change began at the graduate school level. In *Missouri ex rel. Gaines v. Canada*, the Court held that Missouri’s practice of granting out-of-state scholarships to African-Americans to preserve the all-white character of schools within its borders was unconstitutional. Since Missouri offered legal education to whites within its borders, it was required to do the same for African-Americans. In *Sweatt v. Painter*, the Court found that a newly established African-American law school was not equal to the existing white law school due to the existence of intangible factors such as “reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.”

Finally, the attack on educational institutions focused on elementary and secondary schools. In *Brown v. Board of Education*, the Supreme Court held, “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” The Court presumed the

---

\[\text{\textsuperscript{85}} \text{ U.S. CONST. amend. XIV, § 1.}\]
\[\text{\textsuperscript{86}} \text{ See Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding a “separate but equal” railroad passenger car); Brown v. Board of Educ., 347 U.S. 483 (1954) (striking down “separate but equal” primary and secondary schools).}\]
\[\text{\textsuperscript{87}} \text{ 305 U.S. 337 (1938).}\]
\[\text{\textsuperscript{88}} \text{ Id. at 350.}\]
\[\text{\textsuperscript{89}} \text{ Since no other option was available, Missouri was required to permit them to attend the white institution. Id. at 352.}\]
\[\text{\textsuperscript{90}} \text{ 339 U.S. 629 (1950) (emphasizing the importance of intangible factors in determining the equality of schools).}\]
\[\text{\textsuperscript{91}} \text{ Id. at 633-34.}\]
\[\text{\textsuperscript{92}} \text{ Id. at 654.}\]
\[\text{\textsuperscript{93}} \text{ 347 U.S. 483 (1954).}\]
\[\text{\textsuperscript{94}} \text{ Id. at 495.}\]
physical equality of the facilities and expenditures, and instead concentrated on the psychological and social harm to African-American children caused by separate education. The Court said, "To separate [children] solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."  

The desegregation cases established important principles regarding the nature of dual school systems. Separate schools place a stigma on individuals solely because of some immutable characteristic unrelated to a student's ability to learn. Furthermore, intangible differences in reputation, prestige, and intellectual environment prevent separate schools from ever being equal. These principles can be applied to cases of gender segregation. Before analyzing the proposed remedial alternatives, however, detailed discussion of the

95. This presumption was not grounded in fact, particularly in the South. The following figures illustrate the reality of per pupil expenditures. Although the discrepancy diminished over time, expenditures for African-American students were still lower. In addition, the amount of the discrepancy varied tremendously by state.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>$34.25</td>
<td>$12.20</td>
<td>$87.55</td>
<td>$69.28</td>
<td>$107.64</td>
<td>$92.45</td>
</tr>
<tr>
<td>AK</td>
<td>23.93</td>
<td>11.17</td>
<td>75.88</td>
<td>47.21</td>
<td>80.15</td>
<td>54.21</td>
</tr>
<tr>
<td>FL</td>
<td>51.96</td>
<td>23.09</td>
<td>142.79</td>
<td>111.24</td>
<td>156.04</td>
<td>131.79</td>
</tr>
<tr>
<td>GA</td>
<td>40.50</td>
<td>13.92</td>
<td>93.42</td>
<td>61.31</td>
<td>124.08</td>
<td>99.49</td>
</tr>
<tr>
<td>LA</td>
<td>51.78</td>
<td>14.93</td>
<td>141.89</td>
<td>86.92</td>
<td>151.46</td>
<td>99.82</td>
</tr>
<tr>
<td>MS</td>
<td>31.33</td>
<td>6.64</td>
<td>78.71</td>
<td>23.84</td>
<td>88.97</td>
<td>32.68</td>
</tr>
<tr>
<td>NC</td>
<td>34.63</td>
<td>23.60</td>
<td>103.18</td>
<td>95.29</td>
<td>113.72</td>
<td>105.81</td>
</tr>
<tr>
<td>SC</td>
<td>42.00</td>
<td>13.81</td>
<td>92.40</td>
<td>58.54</td>
<td>120.17</td>
<td>81.04</td>
</tr>
<tr>
<td>TX</td>
<td>53.09</td>
<td>29.36</td>
<td>153.59</td>
<td>115.35</td>
<td>167.54</td>
<td>119.92</td>
</tr>
<tr>
<td>TOTAL</td>
<td>41.99</td>
<td>16.29</td>
<td>115.68</td>
<td>72.70</td>
<td>132.38</td>
<td>90.20</td>
</tr>
</tbody>
</table>

Truman M. Pierce et al., White and Negro Schools in the South: An Analysis of Biracial Education 165 (1955).

actual nature of the alleged constitutional violation is useful.

PART II: INTERMEDIATE SCRUTINY AS APPLIED TO THE CITADEL CASE

A. Important Governmental Objective

1. Standard Equal Protection Analysis

The Citadel case must be analyzed under intermediate scrutiny as defined by Hogan.97 As noted previously, under intermediate scrutiny, a court must first look at the state's asserted interest to determine whether it is an important governmental objective. Arguably, one can assert three important objectives in this case: the intrinsic value of single-gender education, educational diversity, and the education of "citizen-soldiers" (to borrow from VMI parlance). Note, however, the adversative method is a technique used to achieve a specific objective; the maintenance of the method merely for its own sake cannot be considered an important objective. Furthermore, the production of citizen-soldiers does not in any way depend upon homogeneity of gender, as is amply demonstrated by the mixed gender at federal military academies.

Here, the value of single-gender education and educational diversity are intertwined. The courts seem to accept assertions regarding the benefits of single-gender education without really critically analyzing such claims. The benefits that may or may not exist for women in single-gender atmospheres do not necessarily hold true for men.98 Even assuming that men benefit from single-gender education, it cannot be self-justifying. As stated in Hogan,

Since any gender-based classification provides one class a benefit or choice not available to the other class, [the] argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially


98. See infra notes 242-43 and accompanying text (discussing a noted education researcher who qualifies his earlier findings regarding the benefits of all-male schools because the positive effects were observed even after the schools became coeducational).
related to achieving a legitimate and substantial goal.99 Therefore, the assertion that men will no longer experience the unique benefits they once enjoyed if integration occurs is not a valid justification.

Single-gender education may also be considered as one aspect of educational diversity, which the courts have thus far accepted as an important objective,100 and which this Note defines to mean differing educational opportunities for citizens within a state. The adversative method alone, without consideration of gender, can contribute to educational diversity. Therein lies the problem. If The Citadel did not have such a unique contribution to make to the higher education system in South Carolina, conceded to be unmatched anywhere in the state, its admissions policy would not create as great of a problem as it does today. But since The Citadel is unique not only in its admissions policy, but also in its methodology and benefits, the laudable goal of diversity101 is real-

100. See United States v. Virginia, 766 F. Supp. at 1415; United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992); Faulkner, 858 F. Supp. at 555 (implicitly accepting diversity as an important governmental objective by not retrying the issue). While not questioning the importance of diversity, the Fourth Circuit questioned how offering single-gender education only to men promotes a policy of diversity. United States v. Virginia, 976 F.2d at 899 ("[VMI] has not adequately explained how the maintenance of one single-gender institution gives effect to, or establishes the existence of, the governmental objective advanced to support VMI's admissions policy, a desire for educational diversity.").
101. It is possible that educational diversity may be an important objective. College can challenge and further one’s knowledge, attitudes, and views about the surrounding world, while providing enhanced career opportunities. Therefore, the decision is highly personal. To differentiate themselves and attract students, educational institutions frequently tout their unique atmosphere and course offerings. See United States v. Virginia, 766 F. Supp. at 1413 ("Trial testimony established that VMI's military program is absolutely unique."); Faulkner, 858 F. Supp. at 556 ("There is considerable duplication in program offerings among the public institutions [of South Carolina], but each has its unique features, and the diversity between the institutions and their locations makes each a different experience."). It is arguably in the state's best interest to provide low-cost educational opportunities for its citizens. A well-educated society promotes the expression of ideas guaranteed by the First Amendment and contributes toward a properly functioning representative government. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35-36 (1973) (acknowledging that effective exercise of First Amendment rights and intelligent use of the right to vote are desirable goals, but are insufficient justifications for declaring a fundamental right to education). Education also enhances the earnings potential of its citizens, thus potentially increasing the tax base for the state. Substantially similar institutions do not cater to the diverse needs of the educable populace. Since the American economy operates generally on a system of specialization and division of labor, see generally 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 13-24, 25 (R.H. Campbell & A.S. Skinner eds., 1976) (discussing the principles and func-
ly only available to half of the state.

Even if a court accepts any of the above justifications as important, they certainly are no more important than the right to an impartial jury\textsuperscript{102} or the right to freedom of association.\textsuperscript{103} These objectives are explicitly encompassed in the Bill of Rights,\textsuperscript{104} unlike the potential objectives in this case. Since the Supreme Court has found that even primary and secondary school education is not a fundamental right,\textsuperscript{105} it is unlikely that any of the aforementioned objectives could claim such lofty status. But the Court has declared that certain rights, even though encompassed in the Bill of Rights, must fall to the principle of remedying gender discrimination. Since South Carolina asserts that it is not discriminatory against its female citizens, it is appropriate for the federal government and individual women to assert this compelling interest.

Although educational diversity may be the primary objective articulated by South Carolina, the possibility exists that it is not the real objective of the legislature. As was noted in the VMI case, it is difficult to believe that South Carolina and The Citadel were truly concerned about educational diversity and single-gender education for women and men in the mid-nineteenth century when the school was founded. An interesting question arises as to whether a state's purpose in maintaining an institution may change over time. Although facially discriminatory at its inception, The Citadel's admissions policy was possibly maintained by South Carolina due to its diversity objectives. However, the most likely scenario is that

\begin{enumerate}
\item[102.] In \textit{J.E.B. v. Alabama ex rel. T.B.}, 114 S. Ct. 1419 (1994), the Court held that the right to an impartial jury was insufficient to permit women to be systematically removed from juries via peremptory challenges. \textit{Id.} at 1426.
\item[103.] In \textit{Roberts v. United States Jaycees}, 468 U.S. 609 (1984), the Court explicitly stated, "We are persuaded that [the state's] compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." \textit{Id.} at 623. It is conceded that certain nonconstitutional interests such as public safety may in fact trump constitutional protections. However, the interests asserted in this case do not rise to the level of importance of public safety.
\item[104.] \textit{See U.S. Const.} amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury"); \textit{NAACP v. Alabama}, 357 U.S. 449 (1958) (recognizing that the First Amendment protected the freedom of association).
\item[105.] \textit{See San Antonio Indep. Sch. Dist. v. Rodriguez}, 411 U.S. 1, 1 (1973) (holding that education was not a fundamental right).
\end{enumerate}
The Citadel’s alumni network began a campaign to save the very institution that binds it together.\textsuperscript{106} The legislature officially articulated its support for single-gender education only in direct response to litigation, and couched its support in facile lawyer-like “lack of demand” language,\textsuperscript{107} which arguably anticipated a legal defense. The legislature also established a committee—comprised of a majority of Citadel graduates—\textsuperscript{108} to study single-gender alternatives in higher education only in response to litigation.\textsuperscript{109} This committee inherently lacked the objectivity needed to render an impartial decision. In fact, the trial court “refused to admit the legislative committee report into evidence, finding that it lacked trustworthiness because of the control of Citadel alumni over the Committee and its report.”\textsuperscript{110}

2. The Anti-Subordination Framework

An anti-subordination framework represents another method to analyze the proposed equal protection violations.\textsuperscript{111} This framework suggests that the current equal protection jurisprudence focuses on the wrong questions and shifts the inquiry away from the more important concern: does the classification subordinate anyone based on race or gender? According to Professor Colker, “Both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy.”\textsuperscript{112} Under the proposed two-part inquiry, the discriminatory impact of a classification must be shown, and then the inquiry would turn to justification, where only one of anti-subordination would be permitted.\textsuperscript{113} Thus, valid affirmative action programs would be permitted as a remedy to alleviate the past subordination of a class.

Under this framework, The Citadel’s admissions policy cannot

\textsuperscript{106} See Mellette Brief, supra note 84, at 4 (noting that the legislative resolution was co-sponsored by five Citadel alumni in the General Assembly).

\textsuperscript{107} See Faulkner v. Jones, 10 F.3d 226, 229 (4th Cir. 1993).

\textsuperscript{108} Mellette Brief, supra note 84, at 4 (noting that six of ten committee members were Citadel graduates).

\textsuperscript{109} Id.

\textsuperscript{110} Mellette Brief, supra note 84, at 5 (citing Trial Transcript dated May 27, 1994 at 63-64).

\textsuperscript{111} See generally Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. Rev. 1003 (1986) (promoting an anti-subordination perspective as the appropriate viewpoint from which to analyze race and sex classifications).

\textsuperscript{112} Id. at 1007.

\textsuperscript{113} Id. at 1014-15.
be said to remedy past subordination. It is not hard to imagine that an all-male military college was funded in the 1800s with the objective of keeping women in their proper place: out of college, and out of the military. Even though such a policy was a natural by-product of the culture and was not evidence of hatred toward women, it was nonetheless subordination. In fact, maintenance of the admissions policy is arguably yet another attempt to keep women in a subordinate position by denying them access to one of the most influential power structures in the State. The Citadel cannot claim to remedy the past effects of any subordination against men either at the time of its creation or in its present state. Furthermore, the creation of SCIL perpetuates the subordination of women by relegating to them the stereotypical options that the legislature deems appropriate.

In one respect, the framework focuses on discrimination rather than malleable definitions of important objectives. But in another respect it also serves to broaden our thinking away from debates over how much demand an all-female Citadel would produce, and reminds us that the Fourteenth Amendment was adopted to redress the subordination of a class of people. Stepping away from the minutiae allows us to see what is really going on here: women cannot join our club. While obviously not the prevailing constitutional standard, the anti-subordination framework is useful as another method to demonstrate that women are being harmed by The Citadel’s admissions policy in a fundamental way.

B. Justification for The Citadel’s All-Male Admissions Policy

Under Hogan, a state must show that its classification is substantially related to the important governmental objective;\textsuperscript{114} therefore the question must be asked whether South Carolina’s policy of providing a unique single-gender opportunity solely to males is substantially related to achieving educational diversity. South Carolina offered the following justification:

South Carolina has historically supported and continues to support single-gender educational institutions as a matter of public policy based on legitimate state interests where sufficient demand has existed for particular single-gender programs thereby justifying the expenditure of public funds

\textsuperscript{114} See supra notes 35–47 and accompanying text (discussing Mississippi Univ. for Women v. Hogan and the intermediate scrutiny standard).
to support such programs.\textsuperscript{115}

The question then becomes whether an alleged general lack of interest in military education by women justifies not providing women who have an interest in military education with that opportunity.

A major criticism of the lack of demand justification is the absence of an appropriate benchmark. It is difficult to understand how South Carolina knows that women do not have an interest in this type of education. Ascertaining interest by the relatively few inquiries it receives from women about The Citadel\textsuperscript{116} is arguably underrepresentative of the actual level of interest. Since most women in South Carolina know that The Citadel would not accept them, they have no incentive to inquire about admission.\textsuperscript{117} A woman interested in a military education would either have to pursue an appointment at a federal military academy, apply to a military-style college in another state, abandon her interest, or pursue litigation to compel admission to The Citadel. An inquiry as to whether The Citadel might admit her is not a prerequisite to any of these options. South Carolina and The Citadel should not be permitted to benefit from a potential lack of documented demand that they helped to create and perpetuate. Alternatively, if South Carolina operated under the stereotypical notion that women would be unable to perform in such an atmosphere, then it would be an improper motive under \textit{Hogan}. \textit{Hogan} commands judges to apply the standards of intermediate scrutiny free of fixed notions and stereotypes about the roles or preferences of women.\textsuperscript{118}

\begin{itemize}
    \item \textsuperscript{115} Faulkner v. Jones, 10 F.3d 226, 229 (4th Cir. 1993) (emphasis added); see also \textit{supra} note 106 (noting that Citadel graduates sponsored this resolution).
    \item \textsuperscript{116} From June 1994 until December 1994, The Citadel received 128 inquiries from women. Most inquiries were form letters providing no indication regarding whether the women were aware of the unique nature of The Citadel. Fewer than 10 actually indicated knowledge about and interest in joining the Corps of Cadets. Only one woman followed up after receiving the initial information. Interview with Wallace West, Director of Admissions for The Citadel, in Charleston, S.C. (Jan. 4, 1995).
    \item \textsuperscript{117} According to the Supreme Court, "The application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." \textit{Dothard} v. Rawlinson, 433 U.S. 321, 330 (1977) (striking down height and weight requirements for female correctional counselors). Although \textit{Dothard} arose in the context of Title VII, its observations regarding the applicant pool apply to higher education.
    \item \textsuperscript{118} See \textit{Mississippi Univ. for Women v. Hogan}, 458 U.S. 718, 724-25 (1982).
\end{itemize}
Missouri ex rel. Gaines v. Canada\textsuperscript{119} should apply to the instant situation. Instead of admitting Gaines to the all-white law school, Missouri offered to pay his tuition at an out-of-state institution because the limited demand made it unpracticable to establish an African-American law school at Lincoln University. The Supreme Court rejected that justification, stating that limited demand makes "the constitutional right 'depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one . . . . It is the individual who is entitled to equal protection of the laws . . . ."\textsuperscript{120}

Although Gaines arose in the context of race discrimination, the Court's assertions regarding the nature of equal protection apply to alleged gender discrimination. The Court did not discuss anything inherent in race discrimination that would limit the application of its rationale. Instead, it discussed the nature of equal protection in its broadest terms. Furthermore, The Citadel case is analogous to Gaines if both are viewed from the anti-subordination perspective.\textsuperscript{121} Just as African-Americans were denied access to the legal network, one avenue of power in the state of Missouri in the early twentieth century,\textsuperscript{122} women currently are denied access to one of the most effective power structures in the state of South Carolina. In both cases, there are explicit classifications based on categories that require heightened scrutiny examination.

Obviously, a state is not required to meet every educational desire. But what is required depends on whether the educational facility is state-sponsored. The private free market for higher education would be limited by the demand of students and the ability of the private sector to meet that demand based on potential costs. For example, if an insufficient number of students are interested in Course X, then a private institution is justified in eliminating that course offering, whether or not that institution is single-gender.

Constitutional constraints operate to limit such options in the public decision-making forum, however. While low demand for Course X justifies its elimination in the public context, it is inap-

\textsuperscript{119} 305 U.S. 337 (1938).
\textsuperscript{120} Id. at 351 (quoting McCabe v. Atchinson, T. & S.F. Ry. Co., 235 U.S. 151, 161-62 (1914)).
\textsuperscript{121} See generally Colker, supra note 111 (discussing the anti-subordination perspective).
\textsuperscript{122} JAMES W. HURST, GROWTH OF AMERICAN LAW 254-55, 352-54 (discussing the income of attorneys in the early twentieth century, their overrepresentation in the government relative to their representation in the general population, and their leadership in business and civic affairs).
appropriate for a state to provide Course X for men at a single-gender institution and not for women either in a single-gender or coeducational context. Since even primary and secondary education is not guaranteed under the Constitution, there is no fundamental right to post-secondary education, and certainly no fundamental right to have particular course offerings available. However, if a state chooses to make Course X available to some of its students, it should not be able to do so in a manner that discriminates against women, even if a low female demand for the course exists. It is therefore appropriate to conclude that lack of demand should be an insufficient justification for denying women the same opportunity as men in the area of educational choice.

PART III: EFFECTS OF PAST DISCRIMINATION

Access to an extensive alumni network is an important benefit that would accrue to women enrolled in an integrated program at The Citadel. This network represents economic and political influence. One commentator asserts,

Political and economic power has been especially difficult for women to assert because of their dispersion, their historic isolation within the home, and their confinement in low-income jobs. . . . The participation and contributions of women are absent at the seminal stage when political and economic decisions are made, decisions which are later

124. United States v. Virginia, 44 F.3d 1229, 1238 (4th Cir. 1995) ("[A] citizen does not, in the absence of legislative will, have a right to demand a publicly financed education.").
125. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 736 (1982) (Powell, J., dissenting) ("[T]here is, of course, no constitutional right to attend a state-supported university in one's home town.").
126. In Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 349 the Court stated that [t]he question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right.
127. At least one commentator takes the opposite position. See, Stuart Taylor, Jr., Standing Up for Single-Sex Education, THE RECORDER (San Francisco), Oct. 13, 1994, at 8 ("As long as there is such minimal demand for VMI-style education for women, Virginia should not be obliged to provide it."). Also, the Fourth Circuit expressly reserved ruling on the lack of demand question as a matter of law, instead ruling as a matter of fact that The Citadel had not met is burden of proof. Faulkner v. Jones, 51 F.3d 440, 445 (4th Cir. 1995).
translated into policy and practice affecting all of society.\textsuperscript{128}

The significance of this network is hard to grasp until it is clearly illustrated by reference to a specific institution. One such illustration relates to The Bohemian Club in San Francisco, which at the time it was studied did not admit women.\textsuperscript{129} The Bohemian Club held annual summer encampments for its most influential members. At the 1970 encampment, fully 29\% of the top-level businesses ranked by Fortune for 1969 were represented by at least one officer or director.\textsuperscript{130} In addition, "\cite{burns98}"views articulated at the \cite{burns98}summer retreat have been known to affect public policy."\textsuperscript{131} In the aggregate, denying women access to organizations such as The Bohemian Club effectively denies them access to the political and economic decision-making of the country.

Although this illustration of the old-boys' network describes the general problem, it is not applicable to the Citadel alumni network. However, one can draw a similar conclusion from some current data from South Carolina.\textsuperscript{132} Citadel graduates are present at all levels in the government of South Carolina, and include one Congressman (Senator Hollings), three members of the State Senate, six members of the State House, and three members of the judiciary during the 1994 term.\textsuperscript{133} These figures support the conclusion that The Citadel, with a total population of under 2000 cadets per year, is overrepresented in this government. Clemson University, a much larger state institution,\textsuperscript{134} is represented by only approxi-
mately double the number of Citadel graduates. No one would claim that The Citadel graduates in government or other leadership positions are not well qualified or deserving of their positions. The difficulty arises from the admissions policy of The Citadel. Women are denied access to one of the most successful power structures in South Carolina and are thereby subjected to a type of subordination by this denial.

PART IV: PROPOSED PARALLEL PROGRAMS

In this Note, a parallel program is a program employing something other than the adversative methodology to produce an educational outcome comparable to The Citadel's or VMI's. The Citadel's proposed parallel program is the South Carolina Institute of Leadership (SCIL); VMI's proposed program is the Virginia

which is more than six times the number enrolled at The Citadel. COLLEGE ADMISSIONS DATA HANDBOOK 1993-94: SOUTHEAST REGION 159 (Maura Kelly & Kimberly Quinlan eds., Orchard House, Inc. 1993).

135. The distribution of Clemson graduates in the government of South Carolina in 1994 was as follows: 1 Congressman (Senator Thurmond), 2 members of the State Senate, 18 members of the State House, 1 member of the executive department, and 6 members of the judiciary. See MANUAL, supra note 133, at 24, 34, 72, 75, 77, 78, 79, 83, 85, 86, 98, 99, 104, 111, 112, 115, 118, 125, 126, 281, 294, 300, 314, 315, 318, 319, 328.

136. David Van Biema, The Citadel Still Holds, TIME, Aug. 22, 1994, at 61 ("[T]he college is a proud dinosaur of the Old South, notable today for . . . its alumni network, which includes at least one South Carolina Senator, one former Governor and countless other sons of Dixie whose extraordinary mutual loyalty gives them enormous local clout."). But see Faludi, supra note 4, at 67 (recounting the story of a Citadel graduate working in a grocery store).

137. WLI, the original Citadel proposal, would have enabled female cadets to attend North Georgia College (a public coeducational military college), Converse College, or Columbia College (both private single-gender colleges). WLI, supra note 75, at 2, 5. The stated goals of WLI were

1. To provide the young women of South Carolina the opportunity to pursue a publicly supported, single-gender education for leadership into the 21st century.
2. To enhance the diversity of education opportunities for the young women of South Carolina by providing publicly supported options designed to promote young women's development of intellectual, military, physical, and spiritual self-discipline.

Id. at 1. According to information provided by The Citadel, "The basic philosophy of The Citadel education emphasizes the importance of challenging cadets as individuals and building self-confidence through mutual association with their peers. WLI's co-curricular aspect fosters a sense of interdependence and mutual support among WLI students." Id. at 3-4.

South Carolina would have covered the difference in the cost of attendance between The Citadel and the private institutions. See id. at 2; Plan, supra note 75, at A26. Women would have enrolled in established ROTC (Reserve Officer Training Corps) programs. The physical requirements would have closely resembled those required at The Citadel.
Women's Institute for Leadership (VWIL).

A. The Citadel's Proposed Parallel Program: SCIL

SCIL is part of the Converse College Leadership Program, located at Converse College in Spartanburg, South Carolina. Converse is a private college for women. The SCIL Student Handbook explicitly states that SCIL is designed to achieve benefits comparable to those that men receive at The Citadel. It will not employ The Citadel's adversative method.

SCIL prepares women, as The Citadel prepares men, for "postgraduate positions of leadership through academic programs of [recognized] excellence" supported by an environment that fosters "growth and development of character, physical fitness, [and] moral and spiritual principles, thereby preparing its students to meet the requirements of citizens and especially of leaders[]."

SCIL is composed of eight separate parts designed to form a holistic leadership experience. It includes academics, military leadership, internship, service, honor and self-development, cultural opportunity and education, an orientation program.

WLI students would have had access to both The Citadel alumni network and Placement Office. The Citadel Board of Governors pledged up to $5 million to launch WLI and fully supported its implementation. WLI, supra note 75, at 2-5.


139. Id. at 4.

140. SOUTH CAROLINA INSTITUTE OF LEADERSHIP FOR WOMEN AT CONVERSE COLLEGE, SCIL OVERVIEW (n.d.).

141. HANDBOOK, supra note 138, at 4 (citations omitted) (quoting CATALOGUE, supra note 13, at 12-13).

142. The components include the Converse General Education Program, the Major Program, the Converse Leadership Program (21 credit hours), and the SCIL Program (39 credit hours). Id. at 5-7. The major degree programs available at Converse include Bachelors of Arts, Music, and Fine Arts, career programs, preprofessional and professional programs, and graduate degrees. SOUTH CAROLINA INSTITUTE OF LEADERSHIP FOR WOMEN AT CONVERSE COLLEGE, Introducing SCIL, (n.d.); cf. CATALOGUE, supra note 13, at 129 (listing the major courses of study available at The Citadel).

143. Each student must enroll in ROTC for four years. The area Army ROTC Unit is hosted at Wofford College in Spartanburg. Students must also participate in an intensive six week summer camp following their junior year. Other field trips, seminars, and residential experiences may be required. HANDBOOK, supra note 138, at 7-8.

144. Honor refers to the Honor Tradition existing at Converse, which is similar to the Honor Code of The Citadel. Self-development includes the central aspects of speaking, writing, and self-presentation. Id. at 8-9.

145. This component includes study abroad programs, as well as cultural activities such
Each SCIL participant receives a scholarship from South Carolina equivalent to its subsidy for each Citadel cadet. South Carolina gave Converse $3.4 million to fund SCIL and The Citadel contributed another $5 million from a private foundation. Currently, the SCIL class consists of twenty-two women. SCIL received 174 inquiries, and fifty-four women applied to the program during a seven week recruitment window.

The Fourth Circuit explicitly said in the VMI case that a parallel program represented a permissible remedy available to Virginia. However, the court left unanswered the question of whether this option will be constitutional in all cases. The parallel program suggested by The Citadel fails to meet the demands of equal protection for at least two reasons.

First, *Sweatt* requires the consideration of not only the tangible physical factors, but also the intangible factors associated with the institution. A parallel program will never equal The Citadel in prominence, prestige, and networking. The Citadel has been in

---

146. Orientation is a week long process during which cadets develop personal and academic mission statements, undergo physical fitness assessments, participate in an Outward Bound program, conduct personal assessments of leadership style, and establish an *esprit de corps*. *Id.* at 10.

147. "The co-curricular program is organized to move the student from an environment in which many decisions have been made for her (and in which her role is to meet the demands established for her) to an environment of increasing freedom and responsibility." *Id.* at 11. The program includes mandatory study hours and the development of self-governing community standards relating to smoking, alcohol, nutrition, and exercise. Time management sheets are also mandatory. *Id.* at 13-14. Participants are issued three types of uniforms that coincide with the various aspects of the program: ROTC, physical training, and SCIL. Extensive rules have been promulgated with respect to hair, jewelry, and cosmetics. *Id.* at 18-19. For a more extensive discussion of the co-curricular program, see generally *id.* at 11-21.


150. United States v. Virginia, 976 F.2d 890, 900 (4th Cir. 1992) ("[VMI] might establish parallel institutions or parallel programs . . . ").


152. See *id.* at 672; see also Charles J. Russo & Susan J. Scollay, *All Male State-
existence for over 150 years and will always remain ahead of its proposed sister school with respect to the intangible factors enumerated in *Sweatt*. At some distant point in the future, this discrepancy might be deemed insignificant; however, for at least the next few generations, the discrepancy will be quite significant and the schools will not be "equal."

Furthermore, the parallel program perpetuates stereotypes about women and cannot avoid the stigma associated with such stereotypes.

A separate VMI for women perpetually will be deemed second class as measured against the "real" military experience of men. The women will be continually striving to meet a male-created standard, destined by definition to come up short. A VMI-Women's Division might even be deemed very good, you know, for a girl's school, but the fact of separateness will perpetuate the stereotype of the military superiority of men.

The same observation can be made regarding The Citadel.

Women will inevitably be perceived as unable to handle the rigors of The Citadel itself; the sister institution will be viewed as a watered-down version of the true original. This problem will be exacerbated by the decision not to employ an adversative methodology. The decision will be seen as supporting the contention that women would be unable (not merely unwilling) to succeed in the

---


154. "[S]eparate can never be equal. And guess which group is almost always treated 'less equal' than the other." Bonnie Erbe, *Should We Fund Single-Sex Colleges?*, ROCKY MOUNTAIN NEWS (Denver), Dec. 29, 1994, at 53A; see also Saferstein, supra note 151, at 672. This is not to diminish the accomplishments of Converse College graduates. In existence since 1889, Converse is a respected institution in its own right. But it is not Converse alone from which women are seeking to graduate. Graduation from a program in existence for a few months, which by its very nature is subject to trial and error techniques, cannot begin to compare with the established, century-and-a-half-old tradition of The Citadel. The program looks good on paper, and to its credit, identifiable objectives and methods for evaluating the achievement of those objectives have been established. However, it is inescapable that the program was truly conceived, articulated, and implemented over the course of a summer in direct response to litigation.

military institute as it currently exists. As Professor David Cole noted,

the differences on which the [Fourth Circuit in VMI] pre-
mised its decision look suspiciously like the sex-role stereot-
types that the Supreme Court's gender-discrimination doc-
trine is designed to outlaw. Men need discipline; women
need affirmation. Men should undergo rigorous physical
training; women should take health education. Men are
tough; women are weak.156

Second, the structure of the parallel program fails to replicate
the complete Citadel experience. The essence of a Citadel educa-
tion is the Fourth Class System structured around barracks life.157 The Citadel's use of military training is the means to an end, and
only for a minority is it an end unto itself. Although all cadets are
required to be members of the Corps of Cadets,158 membership in
any ROTC commissioning program with its ensuing obligation of
armed forces service is not a requirement;159 and the majority of
graduates of The Citadel do not enter the armed services.160 The
goal of The Citadel is not to train men for the military; rather, it
is to train men using military techniques for leadership positions in
all aspects of life.161

156. David Cole, Training "Rats" and the Fair Sex, LEGAL TIMES, Feb. 20, 1995, at
25.
157. See CATALOGUE, supra note 13, at 13, 51.
158. Id. at 12.
159. Id. at 57. Every semester, each student must successfully complete a course in one
of four ROTC programs, however. Id.
160. Approximately 30% of graduates are commissioned into one of the armed services.
Rick Mill, Director of Public Relations for The Citadel, Unclassified Point Paper (Sept.
14, 1994) (unpublished informational handout on file with author). The following data in-
cludes past and projected commissioning figures (expressed as cadets per year), broken
down by branch of service.

<table>
<thead>
<tr>
<th>Branch</th>
<th>'91</th>
<th>'92</th>
<th>'93</th>
<th>'94</th>
<th>'95</th>
<th>'96</th>
<th>'97</th>
</tr>
</thead>
<tbody>
<tr>
<td>Army</td>
<td>76</td>
<td>68</td>
<td>52</td>
<td>53</td>
<td>58</td>
<td>65</td>
<td>65</td>
</tr>
<tr>
<td>Navy</td>
<td>20</td>
<td>18</td>
<td>12</td>
<td>7</td>
<td>15</td>
<td>12</td>
<td>12</td>
</tr>
<tr>
<td>Air Force</td>
<td>20</td>
<td>15</td>
<td>17</td>
<td>40</td>
<td>40</td>
<td>45</td>
<td>45</td>
</tr>
<tr>
<td>Marine Corps</td>
<td>22</td>
<td>23</td>
<td>15</td>
<td>20</td>
<td>20</td>
<td>18</td>
<td>15</td>
</tr>
</tbody>
</table>

Rick Mill, Director of Public Relations for The Citadel, Commissioning/Summer Training
Data for The Citadel's ROTC Programs (received Jan. 4, 1995) (unpublished informational
handout on file with author).
161. See CATALOGUE, supra note 13, at 12 ("The primary mission of The Citadel . . .
If a woman enrolled in SCIL, she would not experience the barracks life and the Fourth Class System. Converse College does not even have its own ROTC units on campus.162 Enrollment in ROTC for a few hours a day is not even remotely equivalent to the constant supervision, lack of privacy, physical requirements, and military discipline that are the hallmark of barracks life at The Citadel. If women want only an ROTC military experience, numerous opportunities exist outside of The Citadel.163

SCIL, unlike the sketchy WLI, attempts to provide a comprehensive program aimed at exposing women to various aspects of leadership. Many women may benefit from such a program. Standing alone, it is a valuable option for the women of South Carolina. However, it is simply an inadequate remedy to address the constitutional violation raised in this litigation.164

[is] to prepare [cadets] for post-graduate positions of leadership though academic programs of recognized excellence supported by the best features of a disciplined military environment."


163. In South Carolina alone, a number of ROTC programs exist. The following schools either host ROTC units or maintain cooperative agreements with ROTC host schools.

<table>
<thead>
<tr>
<th>Air Force</th>
<th>Army</th>
<th>Navy/Marines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benedict College</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Central Wesleyan College</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Charleston Southern Univ.</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>The Citadel</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Clemson University</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>College of Charleston</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Furman University</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Medical University of SC</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Presbyterian College</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>South Carolina State College</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>University of South Carolina</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Winthrop College</td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

*AMERICAN COUNCIL ON EDUCATION, AMERICAN UNIVERSITIES AND COLLEGES 1916 (14th ed. 1992).*

164. Another possible argument can be made under Missouri *ex rel.* Gaines v. Canada,
Since the parallel program set forth by The Citadel is unequal with respect to its intangible factors, perpetuates gender stereotypes and stigmas, and fails to address the nature of the violation, it should be constitutionally impermissible.

B. VMI's Proposed Parallel Program: VWIL

It appears the Fourth Circuit takes a different view with respect to the constitutionality of parallel programs. In a split opinion handed down in the remedial phase of the VMI case, the court upheld Virginia's proposed remedial plan (VWIL). SCIL seems to be patterned on VWIL. The Speaker of the South Carolina House of Representatives indicated that the South Carolina legislature was waiting for guidance from the VMI case. VWIL

305 U.S. 337, 350 (1938), where Missouri attempted to shift its burden of equal protection to neighboring states. See id. at 342-43. According to the Supreme Court, "The obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction." Id. at 350. The assertion can also be applied to the Converse situation. Although Converse is within South Carolina's geographic jurisdiction, South Carolina's ability to offer a parallel program can only extend where it has authority, that is, within the public school system. In the present instance, South Carolina's ability to offer a parallel program is directly dependent upon Converse's cooperation. Instead of shifting its burden to another state, South Carolina is shifting its burden from the public system to the private system of higher education. Arguably, the latter should be as impermissible as the former. However, this argument is not as persuasive as the earlier arguments since South Carolina is providing funding for SCIL, albeit grudgingly, and has therefore not entirely defaulted on its equal protection obligations.

South Carolina does provide tuition grants to students in general to enable them to attend private schools within the state. Faulkner v. Jones, 858 F. Supp. 552, 557 (D.S.C. 1994). Arguably, South Carolina is shifting the burden of educating its youth to the private system of higher education rather than providing more spaces within its own public system. However, that procedure has not been challenged by anyone alleging a violation of equal protection, as in this case. As noted previously, the state has no obligation to provide education to its citizens and therefore is not required to meet the demand of every single citizen that wants higher education. See supra notes 122-25 and accompanying text.

166. Faulkner v. Jones, 51 F.3d 440, 447 (4th Cir. 1995). For a summary of the details of VWIL, see United States v. Virginia, 852 F. Supp. 471, 476-78 (W.D. Va. 1994). Interestingly enough, during the winter and early spring of 1995, The Citadel could not convince Converse College or Columbia College to participate in WLI, though it had already labelled them as participants. Sid Gaulden, Panel Votes $1.25 Million Boost in Tuition Grants Funding, POST & COURIER (Charleston, S.C.), Feb. 15, 1995, at 13-A, 16-A. Converse College has obviously changed its mind. According to Stephen Parris, Director of Communications, Converse supports the establishment of the program because we believe that single-gender education on a national level is at risk. Although the Fourth Circuit Federal Court has ruled that the Virginia Women's Institute for Leadership is a substantively comparable alternative to the all-male leader-
“takes into account the differences and the needs of college-age men and women.” It therefore proposes a cooperative method, focusing not on the leveling process of the current system used at VMI (and The Citadel), but rather on reinforcing self-esteem. According to education experts who testified, “an adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter-productive.”

The Fourth Circuit analyzed the proposed parallel program under a modified intermediate scrutiny standard:

[W]e will . . . determine (1) whether the state’s objective of providing single-gender education to its citizens may be

ship program at VMI, that case has been appealed to the Supreme Court, as has the case against The Citadel and the state of South Carolina. If the Supreme Court chooses to hear these cases, and if “strict scrutiny” is applied in the decision, then any separation on the basis of gender could become unconstitutional. . . . Should the level of scrutiny change, the future of single-gender education is in question, since all private colleges depend on a certain level of public support.


Although Converse’s rationale is plausible, it is also rational to conclude that the Supreme Court will not allow private single gender education to fail. Under Hogan, the Court expressly reserved judgment on the issues of other MUW programs and single-sex education in general. See supra note 41 (quoting the relevant language from the opinion). Since the Court went to great lengths to define the scope of its holding in Hogan, there is no reason to believe that a Citadel or VMI appeal would deserve any less attention. In fact, more attention might be given to the issue since Grove City College v. Bell, 465 U.S. 555 (1984), was decided after Hogan. Grove City held that financial aid directly to students was state action sufficient to impose the requirements of Title IX on a school’s financial aid program. For a discussion of this case and its impact, see generally Dianne M. Piche, Note, Grove City College v. Bell and Program-Specificity: Narrowing the Scope of Federal Civil Rights Statutes, 34 Cath. U. L. Rev. 1087 (1985) (concluding that statutory amendment by Congress is necessary to achieve administrative consistency and to preserve the original legislative mandate against tax-supported discrimination in education); Beverly Brandt Tiesenga, Comment, Title IX and the Outer Limits of the Spending Powers: Grove City College v. Bell, 61 Chi.-Kent L. Rev. 711 (1985) (concluding that unsolicited funds that happen to trace back to a federal source should not be considered “federal financial assistance” for purposes of Title IX coverage when the affected educational institution has sought to minimize federal involvement).

It is reasonable to conclude that the Court is fully aware of the Grove City precedent and its implications, and will define the scope of its ruling accordingly.

168. Id.
169. Id. But see generally Opposing All-Male Admission Policy at Virginia Military Institute: Amicus Curiae Brief of Professor Carol Gilligan and the Program on Gender, Science, and Law, 16 WOMEN’S RTS. L. REP. 1 (1994) (casting doubt on the validity of the conclusion that the adversative method would be counterproductive for women) [hereinafter Gilligan Brief].
considered a legitimate and important governmental objective; (2) whether the gender classification adopted is directly and substantially related to that purpose; and (3) whether the resulting mutual exclusion of women and men from each other's institutions leaves open opportunities for those excluded to obtain substantively comparable benefits at their institution or through other means offered by the state. This is the special intermediate scrutiny test that we shall apply in deciding this case.\textsuperscript{170}

The first two prongs of this test mirror those articulated in \textit{Hogan}.\textsuperscript{171} The VMI court added the third prong to ensure that the case received the appropriate amount of scrutiny since the classification is not directed at men or women per se, but at gender homogeneity.\textsuperscript{172} Thus, according to the Fourth Circuit, if the state's objective is important, classification by gender is automatically necessary to accomplish such objective. Without the third prong, the substantiality of the relationship between the classification and the objective would go virtually untested.\textsuperscript{173}

After concluding that single-gender education was an important governmental objective, the Fourth Circuit scrutinized the means used by Virginia to obtain its objective.\textsuperscript{174} It reiterated that admitting women to VMI would irrevocably alter its program thereby denying both men and women the opportunity to experience its unique methodology.\textsuperscript{175} It conceded that women could be trained at VMI, but the training would be closer to what cadets receive at the coeducational military academies; therefore VMI would cease to be unique.\textsuperscript{176}

The court then decided that women and men are sufficiently different that they do not need to be treated exactly alike. It opined, "the state must mitigate the effects of the resulting gender classification by affording to both genders benefits comparable in substance, but not in form and detail."\textsuperscript{177} The court relied upon

\begin{enumerate}
\item[170.] United States v. Virginia, 44 F.3d 1229, 1237 (4th Cir. 1995) (citations omitted).
\item[171.] \textit{See supra} notes 35-47 and accompanying text (discussing \textit{Mississippi Univ. for Women v. Hogan} and the intermediate scrutiny standard).
\item[172.] United States v. Virginia, 44 F.3d at 1237.
\item[173.] \textit{Id}.
\item[174.] \textit{Id} at 1239-40.
\item[175.] \textit{Id} at 1240.
\item[176.] \textit{Id}.
\item[177.] \textit{Id}.
\end{enumerate}
experts who testified that women may not respond to the adversative model of VMI in the same way that men do. It also took into consideration that a program for women based on the adversative model would not attract a sufficient number of participants to make it work.

The Fourth Circuit's opinion contains several deficiencies. First, the opinion fails to properly analyze the demand justification, in both fact and theory. In the district court proceedings, one expert testified that based on her study of literature and people, there would be little demand for a female-VMI. Another expert examined demand at Virginia Polytechnic Institute and West Point and concluded that potential demand for a female-VMI would be so small as to make the project unfeasible. No full-scale study on the potential demand for a VMI-type experience among women was conducted. Furthermore, both Virginia Polytechnic Institute and West Point are coeducational. Students who elect to attend those institutions may genuinely not be interested in a holistic single-gender education such as the one that would be available at a female-VMI. An examination of the applicant pool demonstrates a certain amount of initial female interest, although admittedly the seriousness of the interest cannot be determined. However, due to the deterrent effect of the admissions policy on the applicant pool, interest may actually be higher.

178. Id. at 1241. See generally Nanci M. Monaco & Eugene L. Gaier, Single-Sex Versus Coeducational Environment and Achievement in Adolescent Females, 27 ADOLESCENCE 579, 592 (1992) ("Women in coeducational settings...demonstrate less confidence and self-regard."). But see Gilligan Brief, supra note 169, at 14 ("The fact that certain differences are associated with (but not caused by) gender also does not support the conclusion that men should be separated from women for educational purposes... ").

179. United States v. Virginia, 44 F.3d at 1241. The court realized that VWIL was merely a proposal, but gave it an opportunity to succeed. Id. at 1241-42.

180. For a general criticism of the opinion, see Cole, supra note 156, at 25.


182. Id. at 481 n.12.


186. See supra note 116 (discussing The Citadel's experience regarding inquiries from women).

187. See supra notes 116-18 (demonstrating the skewed effects on the applicant pool in the context of The Citadel litigation and in Title VII cases); see also Faulkner v. Jones, 51 F.3d 440, 445 (4th Cir. 1995) (holding that The Citadel failed to meet its evidentiary
The Fourth Circuit and the district court both failed to address *Gaines* and its conclusion that lack of demand is an unacceptable justification for denying an individual the equal protection of laws, instead discussing the finite resources and the choices a state must make regarding educational availability.\(^{188}\) The Fourth Circuit hypothesized that a state may offer a medical school without also offering a law school, and "its selection from among many similarly permissible beneficial programs does not in and of itself constitute 'unequal protection.'"\(^{189}\) That conclusion is correct. Lawyers would not have a claim against the state since they are not a protected class. The decision to fund a medical school would merely be subject to rational basis scrutiny and would be upheld. But that is not the case that is before the court.

The decision under attack in this case is the decision to provide a Citadel or VMI-type education solely to men. It is within the state's prerogative not to fund institutions of higher education. It is also within the state's prerogative not to fund The Citadel or VMI, while continuing to fund all coeducational universities within the state. However, since South Carolina and Virginia elected to fund The Citadel and VMI, each should provide that opportunity to its citizens upon the basis of an equality of right.\(^{190}\)

Second, the Fourth Circuit previously stated that, except for the rigor of the physical training, "[n]o other aspect of the program has been shown to depend upon maleness rather than single-genderedness."\(^{191}\) It stated in the liability phase\(^{192}\) and even repeated in the remedial phase, "*It is not the maleness, as distinguished from the femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI.*"\(^{193}\) Now the

---

188. *See* United States v. Virginia, 44 F.3d at 1238; United States v. Virginia, 852 F. Supp. at 475.
189. United States v. Virginia, 44 F.3d at 1238.
190. *See* Saferstein, *supra* note 151 ("The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right."); Colker, *supra* note 111 at 1007-08 (arguing that both facially differentiating and facially neutral policies are invidious if they perpetuate racial or sexual hierarchy).
192. *Id.* at 897 (emphasis added).
193. United States v. Virginia, 44 F.3d at 1233 (emphasis added).
Fourth Circuit accepts the notion that on average men need an adversative methodology and women need a cooperative methodology. Specifically, the Fourth Circuit endorsed one educational expert’s proposition that, “you [do not] design educational experiences around the exception. You have to design them around the rule, and I think you would find that the... adversative model ... would have to be gradually adapt[ed] so that it incorporated more of the positive motivation, positive reenforcement [sic].”

However, not all men function well in the adversative model. The Citadel itself maintains a suitability board to determine the fitness of a cadet to adapt to military life. VMI is the only other school in the country employing such harsh practices. Therefore, most male undergraduates in this country do not experience the adversative method. It is obviously not suitable for everyone, and perhaps not even for the “average man.” Not all women, and perhaps not even the “average woman” would want to attend an all-female Citadel or VMI. Yet that is precisely the point. Only a certain type of individual thrives in an adversative setting. Experts acknowledge that some women will succeed using the adversative methodology. When comparing those who are willing to endure the adversative system, men and women are similarly situated and thus should be treated equally.

The court sanctions the state’s subordination of women by allowing Virginia to decide for its female citizens what is the optimal way to educate them. According to one author, “[t]he
roots of single-sex education lie in the sexist notion of relegating women to those educational opportunities men considered appropriate for them."

Furthermore, the alleged gender distinctions upon which the district court and the Fourth Circuit based their decisions are suspect. Professor Carol Gilligan, in an amicus curiae brief, flatly repudiated the implication that her research supports VMI's contention that developmental and psychological differences between the genders justify the proposed plan. Gilligan argued that "[t]here is too much variation within each sex to argue that psychological differences result from 'real' differences between the sexes." Her work also documents the "concrete harms that flow to both the individual and society from rigid and unrealistic sex-based expectations and stereotypes of the sort reflected in the record in [the VMI] case." In fact, Gilligan noted, and the VMI witnesses conceded, that

there is great variability in characteristics and abilities among members of the same sex, that some members of each sex want and are responsive to each form of education, and that individual factors are substantially more important than sex in determining whether a particular student wants or will benefit from a particular educational

Egalitarianism is the philosophical foundation of our political process and the principle which energizes the equal protection clause of the Fourteenth Amendment. The emergence of female interest in an active involvement in all aspects of our society requires abandonment of many historical stereotypes. Any notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality.

200. Saferstein, supra note 151, at 682.
201. See Gilligan Brief, supra note 169, § II(B), at 13-15.
202. Id. at 14.
203. Id. at 15. Gilligan's brief cites some illuminating excerpts from the trial transcript, demonstrating upon what anecdotes the district court and the Fourth Circuit based their respective decisions. "The young men [in fraternities] will paddle their pledges; they will brand them; they will make them consume alcohol and eat disgusting things... Young women [in sororities] will give flowers, write poems..." Id. at 8. "One reason I suspect [women] don't do as well on verbal tests, they don't read as many sports stories as boys do." Id. "[W]omen bond, too, but women bond from experiences that are wonderful." Id. at 9 (emphasis omitted). The Dean of Students of Mary Baldwin College cited the movie Aladdin as an example of how women are taught passivity from an early age. Id. at 8. Another expert testified about the future of women's colleges based on newspaper clippings sent by a friend and discussions with college presidents. Id. at 11.
Thus, the accepted "real" differences between genders are not at all real, but instead are based on the archaic stereotypes condemned in *Hogan*. As such, the accepted "real" differences between the genders are not accurate when predicting the abilities and responsiveness of an individual seeking access to either VMI or The Citadel.

Third, although the Fourth Circuit did not address the issue directly, the district court acknowledged *Sweatt* and its holding with regard to the intangible inequalities that would exist between VMI and a female-VMI. It concluded that a female-VMI in its infancy could not equal the history and prestige of the original VMI. Instead of concluding that VMI must admit women, however, the district court took the opposite path and found that the state has no obligation to attempt to provide a female-VMI. It is difficult to follow the logic involved. First, the district court recognized that women would most likely be treated unequally if a female-VMI was created. Then the court blatantly sanctioned unequal treatment by continuing to deny women access to VMI. *Sweatt* resulted in the admission of an African-American student to a white school, not the denial of the very opportunity that was the subject of the litigation. Thus, in prohibiting the admission of women, the court failed to follow the teaching of *Sweatt*.

The Fourth Circuit did not address the inequality of a female-VMI since that issue was not before the court. Instead, it merely acknowledged that VWIL was a proposal and VMI was a longstanding, successful institution (impliedly recognizing the distinction), and then decided to provide VWIL with the opportunity to succeed.

In his dissenting opinion, Judge Phillips properly acknowledged *Sweatt*. He concluded that the paradigm separate but equal case would involve two separate institutions beginning from ground zero

---

204. *Id.* at 9.
206. *Id.*
207. *Sweatt* v. Painter, 339 U.S. 629, 636 (1950) (holding that since the alternative offered was not equal, the student should have access to the white school).
at the same time, with the same physical arrangements, the same financial outlay, and the same educational offerings in order to eliminate stigma.\textsuperscript{210} Such an arrangement, he argued, had the greatest possibility of surviving equal protection scrutiny.\textsuperscript{211} He then concluded that even viewed in the best possible light, VWIL does not measure up to VMI in terms of most, if not all, intangible criteria. He stated, "The catch-up game is an impossible one, as any honest reflection upon the matter must reveal."\textsuperscript{212} Judge Phillips continued, "it is difficult to believe that one who had a free choice between these schools would consider the question close."\textsuperscript{213} The question is emphatically not close\textsuperscript{214} and therefore any proposed parallel program is constitutionally impermissible.\textsuperscript{215}

\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id. (internal citations, emphasis, and brackets omitted).
\textsuperscript{214} See Cole, supra note 156, at 25.
\textsuperscript{215} As defined by this Note, a separate program is one in which the adversative methodology is employed in an entirely separate institution for women. While this method attempts to address the nature of the constitutional violation, it is also impermissible for several reasons. First, the intangible factors associated with a separate institution, as enumerated in \textit{Sweatt}, see supra notes 151-54 and accompanying text (discussing the intangible factors associated with the proposed parallel program), will never equal the history and prestige of The Citadel. See Russo & Scollay, supra note 152, at 1084. Second, a stigma would attach to a female military institution. Women will be viewed as incapable of competing and succeeding against men. Particularly since The Citadel is a military institution and the military is dominated by males, a female military institution will always be seen as second best. Cheh, supra note 155, at 55-57.

Finally, another option would be for The Citadel to refuse to accept financial support from the state of South Carolina. This would eliminate the state action and the application of the equal protection clause. However, students attending The Citadel might receive federal funds and be subject to Title IX, which exempts from non-discrimination requirements both military schools and schools that have historically admitted students on the basis of sex. For an analysis of Title IX and its implications for single gender education see generally Patricia Werner Lamar, Comment, \textit{The Expansion of Constitutional and Statutory Remedies for Sex Segregation in Education: The Fourteenth Amendment and Title IX of the Education Amendments of 1972}, 32 \textit{Emory} L.J. 1111 (1983), which discusses the potential ramifications of heightened judicial scrutiny of gender distinctions for single-sex public and private institutions of higher education. Irrespective of the legal implications of privatization, it is not viable due to the prohibitive costs involved. Interview with Wallace West, Director of Admissions for The Citadel, in Charleston, S.C. (Jan. 4, 1995). Mr. West indicated that although no formal study has been undertaken to determine the exact cost of privatization, the costs would be prohibitive. Furthermore, The Citadel has no desire to sever its ties with the state of South Carolina. Id.; see also Faulkner v. Jones, 858 F. Supp. 552, 561 (D.S.C. 1994).
V. INTEGRATION PROPOSAL

Since a parallel program for women should be constitutionally impermissible, integration represents the only solution that satisfies the demands of the Fourteenth Amendment. Concededly, there are problems associated with integration; it is not a perfect remedy. However, it can be implemented at The Citadel in a way that provides advantages for both men and women.

A. Benefits of Integration

1. Maintenance of the Adversative Methodology

Separate barracks for men and women would provide a remedy for women while maintaining the adversative method that is the hallmark of The Citadel. The adversative method includes minute regulation of behavior and lack of privacy, such as no locks on the doors and group showers. By segregating men and women within the institution, a lack of privacy can be maintained. A class of women could occupy one unit of the barracks, one entire barracks, one floor, or one wing of one floor. Each gender would experience the minute regulation of behavior and the lack of privacy, without sacrificing "sexual privacy" by being intimately exposed to members of the other gender. Any objection to such intimate living quarters would be legitimate, regardless of any discriminatory intent on the part of the cadets or The Citadel.

See generally Berman, supra note 197 (concluding that neither public nor private all-male military academies can withstand equal protection analysis, particularly given the inclusion of women at the federal military academies and in the regular armed forces); Sharon K. Mollman, Note, The Gender Gap: Separating the Sexes in Public Education, 68 Ind. L.J. 149 (1992) (concluding that all male schools offering services not available to women are constitutionally impermissible); Saferstein, supra note 151 (arguing that the crucial safeguard against potential inequity lies in requiring that single-sex options be unique only in their admissions policy and concluding that VMI fails to meet this requirement). But see Brian S. Yablonski, Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute, 47 U. Miami L. Rev. 1449 (1993) (concluding that VMI should be allowed to remain segregated).

Cole, supra note 156, at 25.

See Saferstein, supra note 151, at 661; Interview with Wallace West, Director of Admissions for The Citadel, in Charleston, S.C. (Jan. 4, 1995). Mr. West admitted that the logistics of the admission of women is the easiest part of the whole process. Id. Therefore, it is not the physical layout of the campus that is the barrier to an entering class of women.

Saferstein, supra note 151, at 661-62.

For example, widely held notions of decency and actual physical differences between the sexes dictate that separate restroom facilities exist. Cf. EEOC Guidelines on
In addition, the first class of women could function under the Fourth Class System administered by female military academy graduates or female ROTC graduates specially trained in the requirements of such a system. After the first year, a class of sophomore women could exist to administer the Fourth Class System to new female recruits. This would further enable the adversative methodology to work optimally for each gender, while alleviating any concerns that the court and educators may have regarding privacy and cross-sexual confrontation.

Discrimination Because of Sex, 29 C.F.R. § 1604.2(b)(5) (1995) (making it an unlawful employment practice to refuse to hire an applicant in order to avoid providing separate restrooms according to state law); Burning Tree Club v. Bainum, 501 A.2d 817, 840 (Md. 1985) (noting that separate restroom facilities would be appropriate for men and women, but not for blacks and whites). But see Colker, supra note 111, at 1060 n.254 (attacking this innocuous example of restrooms as one more type of female subordination).

221. With respect to cross-gender competition, two Notre Dame psychologists noted that "when placed in a situation that requires direct competition between two persons of different genders who have a close relationship and when the prize is singular and the outcome is known, men are less willing to compete and see more negative consequences to the competition than do women." Naomi M. Meara & Jeanne D. Day, Perspectives on Achieving via Interpersonal Competition Between College Men and College Women, 28 SEX ROLES 91, 109 (1993).

222. See United States v. Virginia, 44 F.3d 1229, 1239 (4th Cir. 1995). The court stated,

The methodology described, however, has never been tolerated in a sexually heterogeneous environment; indeed, we condemn it for good reason. If we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes.

Id. But see Cole, supra note 156, at 25 (commenting that decency, like chivalry, is a convenient justification for gender subordination and is not a substantial governmental interest). Also, one of the VMI experts concluded that women would impair the system "because of 'the dating' and young women's 'aspirations' to marry that are 'still in the South very common.'" U.S. Brief, supra note 84, at 22 (citing to VMI I Court of Appeals Appendix 196-97). As stated in an amicus brief filed by military officials, "This self-discipline should enable cadets to control themselves irrespective of 'sexual distractions.'" Brief of Amicus Curiae Lt. Col. Rhonda Cornum et al. in Support of Petitioner, at 11, United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995) (No. 94-1941) (available in LEXIS, Genfed library, Briefs file) [hereinafter Military Brief]. It is highly doubtful that a woman seeking a husband will choose VMI or The Citadel, with all its attendant difficulties, as her happy husband hunting ground. There are much easier ways of finding a husband than subjecting oneself to a rat-line or Fourth Class System. If women and men have the discipline to survive the system, they will have the discipline to refrain from sexual relationships while participating in the system.
2. Intangible Factors

Integration also addresses intangible concerns such as the history, reputation, prestige, and influential alumni. These represent major benefits that women are denied as a result of the perpetuation of past discrimination via The Citadel’s admissions policy. Although some prospective employers or alumni may continue to treat women graduates of The Citadel differently because of their sex, the disparity would be less than it would be with a parallel program. At a parallel institution, women would be removed enough from The Citadel that employers and alumni would not be as receptive to the ambitions and requests for help of the female cadets.

3. Integrated Classroom

Integration would also allow men and women to learn in an environment more closely approximating society. A single-gender atmosphere does not prepare men to work with women on a daily basis. The opportunity to view female professors may have less of an effect on male cadets than the opportunity to view female colleagues succeed in the classroom or as campus leaders. Allowing women and men to interact in the dining halls, in the class-

223. See supra notes 132-36 and accompanying text (demonstrating harm to women based on access to the power structure of South Carolina).

224. The Citadel had pledged the full support of its career placement office and its alumni network to WLI. WLI, supra note 75, at 4. Presumably this holds true for SCIL as well, but it is not explicitly stated in SCIL literature. The Citadel did donate $5 million from a private foundation to SCIL. See supra note 111. However, this may be due more to relief that The Citadel is not integrated than from any altruistic motive to help female graduates. See Q & A on the News, ATLANTA J., Oct. 8, 1994, at A2 (“Cynically, there would be a debt of gratitude. Why shouldn’t [women] have the benefit of the network since they are contributing to protecting single-sex education at The Citadel?”) (quoting Elizabeth Fox-Genovese, history professor and founder of women’s studies program at Emory University). Admittedly, some alumni may be willing to help graduates regardless of gender. See CNN News (Cable News Network television broadcast, Sept. 7, 1995) (transcript available in LEXIS, News library, CNN file) (discussing Citadel alumni who want their daughters to attend their alma mater).

225. There are at least 20 female faculty members at The Citadel. See CATALOGUE, supra note 13, at 351-367 (listing current faculty). Each of the faculty members is accorded a military rank in the Unorganized Militia of South Carolina, but they do not participate in any Corps activities. Interview with Major Lawrence Dunlop, Professor of Electrical Engineering at The Citadel, in Mt. Pleasant, S.C. (Jan. 4, 1995). Some ROTC officers are also female. Ray Porter, 1992 Citadel graduate, Sonya Live (Cable News Network television broadcast, Aug. 15, 1994) (transcript available in LEXIS, News library, CNN file).
room, and in extracurricular activities will enable them each to experience school in a more realistic environment. Furthermore, integration may be the first step in breaking the cycle of sexism. According to one author,

> In assessing the costs and benefits of single-sex education, analysts need to remember that academic performance is not the only relevant criteria. Researchers should also measure the effect of single-sex education on self-esteem, socialization, and the development of sexist behavior.

Exposing men and women to each other’s abilities and contributions may decrease the misconceptions upon which stereotypes are likely to be based.

### B. Perceived Difficulties with Integration

Integration presents difficulties such as safety, lost benefits of single-gender education, the implications for women of forced integration, and the actual physical requirements of The Citadel. Each difficulty can be adequately addressed, however, to accommodate many of the competing interests involved in The Citadel controversy and to maintain the adversative method to the greatest extent possible.

#### 1. Safety

The lack of locks on doors in a coeducational environment is a serious safety concern which can be addressed by making it an Honor Code violation for a member of the opposite sex to enter each barracks. A cadet who is reported for an Honor Code violation is afforded a thorough investigation and an Honor Court hearing. If the cadet is found guilty and the verdict is confirmed by the President, he is expelled from the Corps of Cadets. The absence of intermediate punishments and the swiftness of punishment should deter most students from entering the barracks to harass women simply because of the hierarchical nature of a military academy. In the extreme event that an actual assault takes

---

229. Id.
place, the attacker will obviously face criminal charges, as well as immediate expulsion from The Citadel.

Such action by itself will not help the woman who would be harassed or attacked in the barracks. However, if a large enough class of women were admitted, the structure of the barracks could provide ample deterrence. The rooms and hallways are laid out in the form of a square. Each cadet’s room faces the inner courtyard and he must travel in plain view of all other cadets every time he leaves his room. The entrances to the barracks can be locked in such a way so that no one could enter from the outside, but the occupants could leave safely in the case of a fire. Partitions could be erected to separate the sexes if women did not fill an entire barracks. Furthermore, the rooms on the first floor could have the windows barred or locked for safety while still leaving the door unlocked for the lack of privacy which is essential to the adversative system. Even shades on the windows are not necessary. Each gender can change in the strictly segregated restroom facilities, which is the current procedure employed in coeducational basic training in the army.® Therefore the lack of privacy can be maintained primarily by scrutiny from one’s own gender. Using window coverings as little as possible would increase the scrutiny afforded by all cadets to each other, decrease isolation on the part of the female cadet, and perhaps decrease the perceived special treatment of females on the part of male cadets.

If only one woman enters The Citadel, the safety concerns are exacerbated since the structure of the barracks will not provide any deterrence. There is no one clear cut way to address this difficulty, nor does this Note offer a grand solution that has escaped the litigants for months, if not years. Suffice it to say that mounted video cameras, guards, witness requirements, dressing delays, separate restroom facilities, and locks or shades are all methods to be explored if women are not admitted as a class.™ These methods could also be explored if fewer women enter than the minimum number needed to allow the adversative system to function properly.

231. See generally Citadel Ordered to Present Housing Plan for Faulkner, ATLANTA CONST., June 8, 1995, at 5E (articulating the aforementioned suggestions).
2. Lost Benefits of Single-Gender Education

Single-gender institutions may provide many benefits to students that would be lost if they were integrated. First, some authors have found in the past that single-gender education provides a conducive learning environment. Students at single-gender institutions have reported greater satisfaction than students at coeducational institutions with almost all aspects of college life.\textsuperscript{232}

Single-gender colleges may also allow women to excel in every aspect of college life and to increase self-esteem through such participation.\textsuperscript{233} During these formative years when many college students are attempting to define their own "self-concepts," women will realize that they are perfectly capable of performing all the tasks required of leadership.\textsuperscript{234} Also, evidence exists that women's college graduates are particularly effective in the competitive world.\textsuperscript{235} This may imply that integration would be detrimental for both men and women. However, several arguments counter this implication.

The latest data regarding single-gender men's schools demonstrates that homogeneity of gender was not the causative factor for the schools' successes. Alexander Astin, in his oft-cited book \textit{Four Critical Years}, expounded upon the benefits of men's schools.\textsuperscript{236} He now discounts that evidence because schools he studied retained their positive effects even after integrating.\textsuperscript{237}

\textsuperscript{232} Alexander W. Astin, \textit{Four Critical Years} 232 (1978).
\textsuperscript{233} See Monaco & Gaier, supra note 178, at 592 ("Women in single-sex settings are exposed to more leadership experiences than are women in coeducational settings, and these experiences are generally of a higher quality.").
\textsuperscript{234} See Valerie E. Lee & Anthony S. Bryk, \textit{Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes}, 78 J. EDUC. PSYCHOL. 381, 394 (1986) ("[S]ingle-sex secondary schooling may in fact serve to sensitize young women to their occupational and societal potentials in an atmosphere free of some of the social pressures that female adolescents experience in the presence of the opposite sex."). Although this study focused on secondary schools, there is no reason to think that such sensitizing cannot continue to occur in college.
\textsuperscript{235} Although women's college graduates account for only 2.5% of the female undergraduate population, they comprise 25% of the women in Congress and 33% of the women on Fortune 1,000 boards. Furthermore, they are twice as likely as female graduates from a coeducational school to get a Ph.D. or medical degree, and 81% attend graduate school. Reeves & Marriott, supra note 18, at 105, 106.
\textsuperscript{236} Astin, supra note 232, at 246.
\textsuperscript{237} See Brief Amici Curiae in Support of Petitioner by American Association of University Professors et al., at 20, United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995) (No. 94-1941) (available in LEXIS, Genfed library, Briefs file) [hereinafter University Brief].
Furthermore, some authors question the validity of the underlying research on women's schools. For example, studies typically referring to the benefits of single gender education for women examined the Seven Sister Colleges. These studies neglected to control for socioeconomic status, which may have been a large contributing factor for the success of these women.\footnote{238. See \textit{Single Gender Education and the Constitution}, 40 LOY. L. REV. 253, 268 (1994) (speech by Sara L. Mandelbaum).}

Even more recent studies are not conclusive. "The [Department of Education] researchers produced several findings that the results are \textit{inconclusive}—specifically, the researchers are at odds on the question of whether it is the single-sexedness of the educational environment that actually contributes to the apparent success of students or some other factor or factors."\footnote{239. \textit{Id.} at 269.} Another difficulty is that researchers begin a study looking for gender differences; if similarities are found, the results of the study are not as noteworthy.\footnote{240. \textit{Id.}} A final criticism notes that a hypermasculine atmosphere may engender feelings of male superiority, racism, and homophobia.\footnote{241. \textit{Id.} at 270.} This should not be surprising, considering that the worst insult to be hurled at a cadet at The Citadel is "woman" (or some other less flattering synonym).\footnote{242. \textit{Id.} at 270.}

Even if the benefits of women's colleges are controverted, some may choose to attend because of the alleged discrimination that occurs in coeducational classrooms. Studies suggest that coeducational classrooms are hostile towards women in ways that are sometimes subtle and other times blatant, and thus women experience a "chilly climate." Studies of elementary and secondary schools commissioned by the American Association of University Women Educational Foundation found that teachers pay less attention to girls than boys, reports of sexual harassment are increasing, certain tests remain biased against women, and textbooks either ignore or stereotype women with the result that girls were found to be losing their self-esteem.\footnote{243. \textit{The Wellesley College Center for Research on Women, How Schools Shortchange Girls: The AAUW Report} (1992). But see \textit{Fact or Fiction?} (ABC News 20/20 television broadcast, Mar. 31, 1995) (transcript #1513 available from Journal Graphics, Inc. 1535 Grant St., Denver, CO 80203 and on file with author). "[T]he association
essarily apply with the same force to institutions of higher education.

The evidence regarding the chilly climate for women in university or college settings is mixed. One major study suggested that women are disfavored by professors' conduct: making overtly discriminatory remarks concerning women and their intellectual capabilities; reacting more to male students by nodding to indicate interest; and asking women lower order questions, while saving the questions that require critical thinking for men. However, more recent research has criticized the former study after finding that women students participate less and are less assertive, but not as a result of professor discrimination. While the evidence is inconclusive, it does warrant serious consideration by university administrators.

The Citadel can pursue different avenues to ensure that women do not have to experience discrimination within the classroom in order to participate in the adversative methodology. One possible and easily implemented solution is to train professors to recognize and combat discrimination if it exists. Such training could include workshops, journals, and videotaped class sessions. In conjunction, professors could be trained to be aware of actual or perceived gender differences and encouraged to create a more student-friendly classroom.

focused on the statement, 'I am happy the way I am,' and publicized only the ‘always true’ responses. Most teenage girls answered ‘sort of true’ and ‘sometimes true.’ That doesn't mean they have low self esteem.” Id. at 9.


245. Id. at 7.

246. Id. at 9.

247. Mary Crawford & Margo MacLeod, Gender in the College Classroom: An Assessment of the “Chilly Climate” for Women, 23 SEX ROLES 101, 121 (1990). Also, some dispute the “politicized” research that allegedly serves as a marketing ploy for women’s colleges. See, e.g., Reeves & Marriott, supra note 18, at 106 (attributing comment to Christina Hoff Sommers, Clark University philosophy professor and author).

248. HALL & SANDLER, supra note 244, at 14.

249. Crawford & MacLeod, supra note 247, at 121. One such relevant gender difference is why men and women do not participate in class. Women are likely not to participate if they feel their ideas are not formulated or they do not know enough about the subject matter, not wanting to appear unintelligent in front of classmates and teachers. Men are likely not to participate only when they have not done the assigned reading. Id. at 116. These differences are not unexpected in view of earlier research that women and men learn how to attribute the meaning of criticism differently. For example, one study found that teachers’ criticisms of boys and girls differed.
3. Implications of Forced Integration

Forced integration may imply that women cannot do it alone and are inferior to men; that women must conform to the male way of doing things in order to succeed; that men are the benefactors, holding something innately valuable that is desired by women, and women are the beneficiaries, the recipients of such male generosity. This argument suggests that women need their own institution to have the opportunity to prove themselves. The premise of this argument assumes, however, that two separate institutions already exist (as in the case of desegregation) and even though physical facilities may be equal, it is the absence of men that makes the all-female school’s reputation suffer. This is obviously not the case here, since women have been denied even the opportunity to prove themselves in the military-style college.

Furthermore, women are not the “beneficiaries” of some inborn trait or skill that only men can provide. Men can be seen as “benefactors” in only one respect: they have access to an opportunity that women do not. They must now share access to that opportunity.

Girls are criticized when they make an academic error (“You got that one wrong—I guess you don’t know how to do it.”). Their intellectual competence and abilities are brought into question. Boys are criticized when they misbehave or are sloppy (“You got that wrong Billy—you’re being lazy again.”). Their effort is brought into question.

*Id.* at 117.


251. Cf. Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 Emory L.J. 791, 804-811 (1993) (arguing that desegregation cases imply that the intangible difference between white schools and black schools is the absence of whites in the latter).

252. Women’s colleges that had over a century to earn and develop their own reputations, such as Radcliffe, Smith, and Wellesley, all enjoy outstanding reputations as all-women’s colleges. WOMEN’S COLLEGE COALITION, PAMPHLET 20 (n.d.). Famous graduates include Hillary Rodham Clinton (Wellesley), Gloria Steinem (Smith), and Barbara Walters (Sarah Lawrence). *Id.* at 2, 5, 8. Women did not enjoy widespread access to the military or military education a century ago and were therefore denied the opportunity to prove their worth. See HERMA HILL KAY, SEX-BASED DISCRIMINATION 108-10 (3d ed. 1988) (discussing the involvement of women in military service); Military Brief, *supra* note 222, at 5-10.
4. Physical Requirements of The Citadel

The physical requirements of The Citadel, like any military academy, are challenging and strenuous. Each individual physical requirement is not pedagogically related to leadership; however, it is the entire challenging program that is the hallmark of the adversative method. While some women would be able to meet these standards as they exist, a disproportionate number of women would be excluded, even though women could be similarly challenged by lesser standards.

The specific physical requirements could be modified for women without straying from their primary purpose: testing each cadet’s mettle. Physical requirements do not exist for their own sake. Rather, such requirements are one aspect of a methodology designed to achieve a specific outcome. Any type of dual-tracking would be based on real physiological differences and not on stereotypical notions of women’s physical abilities. Modifying activities based on physiological differences is done successfully at all federal military academies. Modification can be achieved by either changing the activity—such as lifting a lighter load—or by changing the allotted time—such as receiving an extra thirty seconds on

---

253. For example, completing specific training exercises during the summer is recommended prior to enrolling in the Fourth Class System. CATALOGUE, supra note 13, at 54-55.

254. This type of analysis is comparable to disparate impact analysis under Title VII. See generally 42 U.S.C. § 2000e-2 (1994) (unlawful employment practices). For example, in Dothard v. Rawlinson, 433 U.S. 321 (1977), an Alabama statute established height and weight requirements for correction counselor applicants. Id. at 323-24. The female plaintiff demonstrated that such requirements had a combined disparate impact on women by excluding 41.13% of women but less than 1% of men from the applicant pool. Id. at 329-30. The corrections officials alleged that these requirements ensured that applicants possessed enough strength to adequately perform the job. Id. at 331. The Dothard Court held that such requirements violated Title VII because they were not job related. Id. Strength to subdue an inmate could be measured more directly and in such a way as to “measure the person for the job and not the person in the abstract.” Id. at 332. Such is the case with The Citadel.


256. Physical requirements are one aspect of the Fourth Class System, which is “designed to test a cadet’s mettle and to determine his motivation for cadet life. [Its] value lies in developing a cadet’s ability to perform his duty successfully under trying and stress-producing conditions.” CATALOGUE, supra note 13, at 55. The Army has recently instituted coeducational basic training at Fort Leonard Wood. According to Lt. Col. Bob Crawford, although the Army may demand “less physically of its women—fewer push-ups, fewer sit-ups, less running speed . . . the standards demanded the same output of energy from both.” Levins, supra note 230, at 16A.

257. See Military Brief, supra note 222, at 10.
the obstacle course. Although camaraderie may not be the ultimate goal of the federal military academies, it is an important component of The Citadel experience. Therefore, it is important to make changes that are only absolutely necessary, while continuing to challenge women to the same degree as men.258

As far as Faulkner is concerned, the reports conflict as to whether she was able to handle the physical requirements of The Citadel, aside from stress. If she was unable to handle its rigors, then perhaps she should not have been there. But this refers to Faulkner the individual, not Faulkner the woman. The focus should be on each cadet's ability to succeed at The Citadel, and not the opportunity to succeed.

PART VI: CONCLUSION

Since the difficulties of integration can be adequately addressed within the framework of the proposed modified integration order, they do not provide a barrier to integration for the women wishing to gain access to The Citadel. They also do not provide a barrier for the competing interest: men wishing to maintain their way of life at The Citadel. The proposed modified integration order is structured to provide The Citadel education for everyone. It can preserve the adversative methodology without denying women access to the reputation, prestige, and alumni network. With respect to these intangible factors, a parallel institution will not, and cannot, be equal.

The most recent VMI decision blatantly sanctions unequal treatment under the guise of actual, non-stereotypical differences between the sexes. The Fourth Circuit purports to provide women with a choice within a system of higher education. It then allows a

258. Fewer modifications may be necessary than perceived because women likely to apply to VMI or The Citadel may be more athletic. "Female and male athletes are more similar to one another than they are to non-athletic members within their own sexes." University Brief, supra note 237, at 13 (citing M. BOUTILIER & L. SAN GIOVANNI, WOMEN AND SPORTS: REFLECTIONS ON HEALTH AND POLICY, IN WOMEN, HEALTH, AND HEALING: TOWARD A NEW PERSPECTIVE 209 (Lewin & Olsesen eds., 1985)). Furthermore, many of the males that enter VMI are not selected for athletic ability, id. at n.43 (50% of entering cadets do not meet the physical fitness standard), and therefore may be below the norm for the "average" male. Even if women entering The Citadel or VMI are not above-average athletes, they can be trained to perform almost precisely the same tasks as men. Robin Estrin, Strength Potential of Women is Confirmed by Army Study, PLAIN DEALER (Cleveland), Jan. 30, 1996, at 1-A, 4-A (indicating that women could, with proper training, qualify for Army jobs considered "very heavy").
state to determine "the best way" to educate its women, denying women the choice for which the Department of Justice was suing: an education with the adversative methodology.

It is unfortunate for Faulkner and many others across the country that the state of South Carolina, The Citadel, and many of its alumni are spending large amounts of taxpayer dollars and private donations to "Save the Males." If women are admitted to The Citadel on a permanent basis, one can only hope that the Board of Governors will resign itself to offering a first class program to women in the same manner that it has offered a first class program to men. Hopefully, at least some of the honorable men that The Citadel claims to have produced will be enlightened enough to help all worthy graduates of their alma mater, regardless of gender. Those men who continue to cling to a notion of idyllic life in the ivory tower, where men reign supreme, may find themselves captive in that very tower. Over time, the more recent graduates of The Citadel will know no other way but coeducation. The notion of The Citadel as one of the last male bastions in society will be but a chapter in the history of the institution, another panel in its museum. Its reputation will be untarnished from the addition of women. It will, in fact, increase its prestige by producing leaders of both genders at a time when society is moving towards equality.

Laurie A. Keco*

*I would like to thank Ms. Tara Swafford and Professor Peter Joy for their helpful comments on earlier drafts and Ms. Tracey Turnbull for her professionalism and dedication while editing this piece.