Increasingly, courts are being called on to determine what physical and social differences between the sexes matter legally. Laws and legal decisions send symbolic messages about what it means to be male and female, and those messages play a central part in shaping gender. In many individual cases, judicial constructions of sex facilitate gender separation. Courts consistently employ a naturalistic conception of gender, deeming physical differences between the sexes important when their relevance to issues in the case is questionable; courts hold fast to conventional gender stereotypes in areas ranging from dress and grooming codes to appropriate occupational channels for men and women to hazards affecting men in the workplace; and courts are often blind to the subtle stereotypes that construct masculinity. In short, the courts patrol the borders of gender.

This chapter begins with the Supreme Court’s interpretation of differences between men and women in constitutional cases. Embedded in the Court’s early decisions are the notions that biological differences between the sexes exist and that they matter. In cases from the mid-nineteenth to the mid-twentieth centuries, the Court repeatedly found that women’s innate fragility made them unfit for certain occupations. Even after the constitutional gender revolution in the 1970s—when the Court began applying an elevated level of scrutiny to classifications based on sex—the Court found physical differences between men and women determinative in cases involving civic service responsibilities, the reach of a criminal statute, and the
extension of disability benefits. In each of these cases the Supreme Court made a social choice about the importance of male and female physiology. It did not, however, rely on physiology in a consistent way: biological differences were not important to the Court in a case involving pregnancy disability benefits, but they were vital to the Court in determining that statutory rape laws should apply only to males.

Two recent Supreme Court cases—one regarding the admission of women to the all-male Virginia Military Institute (VMI) and the other involving a manufacturer’s fetal protection policy—suggest the modern Court’s perceptions of gender. In some ways, those perceptions have not changed much in the past century. While the Court rightly refuses to allow schools and employers to exclude women from occupational channels, lurking beneath the surface of the opinions are two forms of gender stereotyping that remain subtle but pervasive. First, the Court has made obvious steps toward occupational gender equity for women, but has ignored men’s pleas for equality in the realms of parenthood and reproduction. Second, the Court has tacitly accepted the very idea of gender separatism. To the Court, the existence of some separate educational facilities for men and women seems natural, perhaps inevitable. In the area of gender relations, vestiges of the separate but equal doctrine remain good law.

Moving from the level of Supreme Court decisions to that of lower courts across the nation, we will see what happens when petitioners test everyday practices of gender separatism. In areas as seemingly disparate as the law of voluntary associations, gender-based pricing, and hair and dress regulations, court decisions repeatedly reinforce the gender divide. Numerous decisions of federal and state courts keep the structures of gender separation firmly in place.

The Constitution and the Natural Order: Immutable Differences

The assumption of equal protection doctrine is that similarly situated people and situations must be treated similarly. If they are not, the state must come forward with some justification for the difference in treatment, the requisite strength of that justification depending on the nature of the classification. Equal protection analysis asks first whether there is discrimination or a difference in treatment. If so, the next question becomes whether it can be justified. Governmental reasons for classifications based on race require “the strictest judicial scrutiny,” while classifications based on gender
require the government to demonstrate an “exceedingly persuasive justification.” Equal protection doctrine does not say that differences in treatment cannot exist; it merely says that those differences must be justified by real differences in the situations of the groups subject to disparate treatment. If groups are not similarly situated, dissimilar treatment is not discrimination at all.

The constitutional analysis of gender has focused on a biological model for centuries. Embedded in constitutional decisions about gender is the idea of a natural order. The Supreme Court reads the Constitution in ways that protect this order. Heightened scrutiny is applied to gender classifications based, in large part, on the idea that sex is an immutable physical characteristic. This method of analysis reinforces the impression that the biological differences between men and women matter socially.

The early constitutional cases regarding gender assumed it was a biological category. In 1869 Myra Bradwell passed the Illinois bar exam with high honors and applied for admission to the bar. An Illinois statute prohibited married women from obtaining licenses to practice law. In 1873 the U.S. Supreme Court affirmed the Illinois Supreme Court’s decision denying Myra Bradwell admission to the bar, holding that the privileges and immunities of national citizenship under the Fourteenth Amendment did not extend to the right to practice law. In a concurring opinion, Justice Bradley developed the notion of separate “spheres” for men and women. He explained that the legal rights of women were minimal because of prevailing beliefs about women's physical capacities:

The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.¹

In a companion case, the Slaughterhouse Cases, in which butchers argued that the privileges and immunities clause prevented the state from creating a monopoly on slaughterhouses that would put them out of work,
Bradley had insisted in dissent that “citizens of the United States, lay claim to every one of the privileges and immunities which have been enumerated; and among these none is more essential and fundamental than the right to follow such profession or employment as each one may choose, subject only to uniform regulations equally applicable to all.” Thus he accepted the argument for the butchers that he rejected in Myra Bradwell’s case.

But women were different. According to Bradley, women had a natural “destiny” based on “the law of the Creator,” and that mission was “to fulfil the noble and benign offices of wife and mother.” Women apparently lacked those qualities of “decision and firmness which are presumed to pre-dominate in the sterner sex.” The laws of the country were required to reflect this natural order. That is, “the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”

In 1908 the Supreme Court repeated the idea that women’s biological capacities should determine their legal rights. In Muller v. Oregon, the Court held that differences between the sexes justified laws restricting working hours for women based on concerns for their reproductive health:

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

It is no coincidence that the revolutionary litigation technique of the Brandeis brief was first employed in Muller to show empirically the need for protective labor legislation for women. To defend the Oregon statute that limited women working in certain occupations to no more than ten hours per day, Louis D. Brandeis, who ascended to the High Court eight years after the famous briefing, and his coauthor and sister-in-law, Josephine Goldmark, collected data from more than a hundred authorities in factory work, hygiene, psychology, sociology, and medicine to show the vulnerability of women from long hours of work. Their 113-page brief contained fewer than three pages of legal arguments. The brief attempted to demonstrate
empirically that women, unlike men, were inherently ill suited for manual labor:

Woman is badly constructed for the purposes of standing eight or ten hours upon her feet. I do not intend to bring into evidence the peculiar position and nature of the organs contained in the pelvis, but to call attention to the peculiar construction of the knee and the shallowness of the pelvis, and the delicate nature of the foot as part of a sustaining column.5

When the Muller Court upheld the statute’s restrictive working hours, thus limiting women’s economic opportunities, it did so with an explicit reliance on the Brandeis brief (of course the brief took its father’s name). The Court noted that “history discloses the fact that woman has always been dependent upon man,” that males possessed “superior physical strength,” and that “in the struggle for subsistence she is not an equal competitor with her brother.” It concluded that “woman’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.”6 While the meaning of gender was attached to social roles, those roles were thought to be dictated by biology.

Even in midcentury the ideology of Bradwell and Muller still retained its hold on the Court. In Goesaert v. Cleary, decided in 1948, the Supreme Court upheld Michigan’s right to draw “a sharp line between the sexes” and to forbid women, except wives and daughters of male bar owners, to work as bartenders.7 The Court observed that “bartending by women may . . . give rise to moral and social problems” and reasoned that the “oversight assured through ownership of a bar by a barmaid’s husband or father minimizes hazards that may confront a barmaid without such protecting oversight.” This notion of inherent role differences persisted in 1961, when the High Court found constitutional a Florida statute that required men to serve as jurors, but said that only women who registered would be called for jury duty. The Court found that “a woman should be relieved from . . . jury service unless she herself determines that such service is consistent with her own special responsibilities,” reasoning that women are “still regarded as the center of home and family life.”8

Finally, in 1971, the Supreme Court issued its first decision striking a state law as unconstitutional gender discrimination under the equal protection clause. Reed v. Reed concerned an Idaho probate statute that preferred men over women as administrators of decedents’ estates.9 The Court unanimously struck the statute, finding no rational basis to “give a
mandatory preference to members of either sex over members of the other.” Two years later, in Frontiero v. Richardson, a plurality of the Court was willing to use strict scrutiny to invalidate a federal statute that assumed spouses of male service members would be dependents but required female service members to prove the dependency of their spouses to receive benefits. The Court recognized the stereotypic generalizations contained in the assumption that men would be breadwinners and women would be dependents.

These decisions began to acknowledge the ways social institutions create gender differences and make them into advantages and disadvantages. Gender was both a biological and social category. A classification based on gender triggered heightened scrutiny, said Justice Brennan in Frontiero, in part because of the immutable characteristic of sex, and in part because the “nation has had a long and unfortunate history of sex discrimination.”

The Supreme Court ultimately settled on intermediate scrutiny for gender cases, and of course real biological differences could justify differences in treatment of men and women. The idea of biological differences has, for example, been used to justify separation of the sexes for purposes of athletic activities, since physical differences are thought to be related to performance differences in athletics.

In the 1970s and 1980s the Court was willing to debunk more obvious gender stereotypes and remedy blatant gender imbalances. It appropriately recognized when purported physiological differences were being used by the government as a smokescreen for cultural difference. For example, in Craig v. Boren, the Court struck an Oklahoma statute that created disparate drinking ages for males and females. The statute had prohibited the sale of 3.2 percent beer to females under the age of eighteen and males under the age of twenty-one, on the theory that eighteen- to twenty-year-old males were more likely to drink and drive than females at that age. Although there may have been some physical differences, some social differences, and some small empirical differences in arrest rates between young adult males and females, the Court condemned “the stereotype that women mature earlier than men and are more responsible at an earlier age.”

Reproduction and Potential Pregnancy: Women

But the underlying theme that men and women are biologically different in ways not manifested in gross anatomy persisted. In several cases the Supreme Court capitalized on the intuitive appeal of the “physiological dif-
ferences” argument in contexts in which it was less than clear that such differences were at issue.

In 1981, in *Rostker v. Goldberg*, the Court upheld the male-only draft registration, finding that men and women were not similarly situated with respect to the Selective Service Registration Act because only men could fight in combat positions.  

The Court accepted, without probing, Congress’s determination that women were biologically unsuitable for combat positions. Thus women were excluded from the draft because they were excluded from combat. End of inquiry.

In the same year, in *Michael M. v. Superior Court of Sonoma County*, the Court upheld a statutory rape law that imposed criminal liability on males but not females for engaging in sexual intercourse when the female was under eighteen.  

California attempted to justify its law by arguing that since the burden of pregnancy falls exclusively on women, no additional criminal punishment was necessary for them. The Court was willing to view the possibility of young women becoming pregnant as a real physical difference between the sexes, justifying differences in treatment with respect to the criminal laws. The gender-specific statutory rape law did not violate the equal protection clause because “young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity.”

The Court’s location of responsibility in biological differences reveals its unwillingness to probe the cultural and historical creation of statutory rape law and gender. Dissenting in *Michael M.*, Brennan carefully traced the development of the California statutory rape law:

> the law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse. Because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the State’s protection. In contrast, young men were assumed to be capable of making such decisions for themselves; the law therefore did not offer them any special protection.

The gender classification of the law “was initially designed to further those outmoded sexual stereotypes,” not to address the problem of teen pregnancies.  

Pregnancy prevention was never among the law’s objectives, but was instead a post facto justification the state created for purposes of the law-
suit. Thus, sex stereotypes—placing punitive social responsibility on males as sexual aggressors—rather than real physical differences lay at the heart of the Court’s willingness to punish males but not females for statutory rape. Indeed, as Justice Stevens suggested in a separate dissent, if the state really wanted to eradicate teenage pregnancy, it should punish both males and females for twice the deterrent effect.15 (Justice Blackmun’s concurrence inadvertently reveals the danger behind the stereotypes of male aggression and female passivity: the victim in the case “consented” to intercourse only after she was “hit . . . back down.”)

The idea of pregnancy potential was a “real” difference that justified imposing criminal liability only on males. Yet in other contexts the Court has refused to recognize that discrimination based on pregnancy is gender discrimination. In Geduldig v. Aiello, a public employer excluded coverage of pregnancy-related disabilities from its comprehensive health insurance plan.16 In 1974 the Supreme Court upheld this pregnancy exclusion, reasoning that “[t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removed one physical condition—pregnancy—from the list of compensable disabilities.” In an infamous footnote to the opinion, the Court explained why the pregnancy exclusion was not gender discrimination: “While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”

Two years later, in General Electric Co. v. Gilbert, the Court applied its Geduldig equal protection analysis to the similar situation of a private employer sued under Title VII, holding that “it is impossible to find any gender-based discriminatory effect . . . simply because women disabled as a result of pregnancy do not receive benefits.”17 Congress disagreed with the conclusion in Geduldig and Gilbert that discrimination based on pregnancy is not gender-based discrimination. It passed the Pregnancy Discrimination Act, amending Title VII to include discrimination on the basis of pregnancy as a prohibited act.18 The Geduldig theme that “it does not follow that every legislative classification concerning pregnancy is a sex-based classification” is one that lives on in constitutional jurisprudence. In a 1993 case dealing with the blocking of access to an abortion clinic, the Court refused to find the antifemale animus to establish a violation of a federal civil rights statute because “the disfavoring of abortion . . . is not ipso facto sex discrimination.”19
A comparison of the holding in *Michael M.* with those in *Geduldig* and *Gilbert* indicates how the Court treats biology and gender. The fact of potential pregnancy is biological, but the Court makes distinctly social choices about when and whether to give that fact social importance. To vest pregnancy with significance for purposes of a criminal responsibility statute (when that was never the statute’s intended purpose) and yet not consider pregnancy significant when it affects the work life and health of the mother seems wrongheaded in the extreme.

One danger of giving biological categories great weight is that it diverts the Court from considering the social explanations for the construction of the categories and excuses the Court from taking into account the cultural ramifications of its decisions. Consider what remains unexplored when the Court focuses on biological facts. In *Michael M.*, the Court’s ready acceptance of potential pregnancy as a justification for the classifications in the statutory rape law masked the legislature’s true intent in constructing those classifications. Left unexamined was the cultural construction of what it means to be male and female. And embedded in that social construct were ideas about male sexual aggression, female vulnerability, and the assumption on the state’s part of a need, as Brennan expressed, “to protect the State’s young females from their own uninformed decisionmaking.”

The same mistake occurred in *Geduldig* and *Gilbert*, with the Court’s construction of what are essentially biological—albeit manufactured—categories to resolve the case. The artifice of the distinction between pregnant and nonpregnant persons is transparent. Although the “nonpregnant persons” category includes men and women, the “pregnant persons” category is composed exclusively of women. Once again for the Court, biology dictated the outcome. It was not the physical and social consequences of pregnancy that the Court considered important, but the fact that women (as a biological class) appear in both the “pregnant persons” and “nonpregnant persons” categories. Given the Court’s resolution of the case with the biological syllogism, what lay unexplored? The Court’s refusal to recognize that pregnancy is a disability deserving accommodation “reinforces cultural stereotypes that pregnancy is a ‘natural’ status for women, unlike injuries or diseases designated as disabling, and presumes that women will have no need of financial support should pregnancy render them incapable of working.”

The biological category is also lacking in integrity and stability. Biology is not the reliable empirical hallmark of gender differences that the Court seems to seek. While “potentially pregnant persons” and women constituted
the same class for the Court in Michael M., in Geduldig the Supreme Court clearly demarcated between pregnancy and gender. While not all legislative classifications based on pregnancy are equal, what is revealing are the circumstances under which the Court chose to vest pregnancy with significance. The biological reasoning was useful to the Court when it served to confirm social stereotypes about aggressive males and vulnerable females, but was jettisoned when it threatened to impose an obligation on the state to provide insurance benefits for pregnancy. This inconstancy of premises should generate some suspicion of claimed “givens” or “necessities.”

The tendency of the Court to look for real (defined as biological) differences comes and goes. In the 1989 case of Price Waterhouse v. Hopkins, the Supreme Court found a cause of action under Title VII for employment decisions that are based on sexual stereotypes. “[W]e are beyond the day,” Brennan wrote,

> when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group. . . . An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

But the Court’s record on recognizing and exploding cultural stereotypes is less than perfect. For example, the Court recognized a cause of action for hostile environment sexual harassment in Meritor Savings Bank FSB v. Vinson, but left the burden on the sexual harassment plaintiff to demonstrate that the sexual conduct was unwelcome—essentially that she did not “ask for it.”

In Mississippi University for Women v. Hogan the Court again bucked a cultural stereotype. In a five-to-four vote, the Court struck a state-supported university’s policy of admitting only women to its nursing school. In her first term on the Court, Justice Sandra Day O’Connor wrote the opinion in Hogan, which contains one of the most insightful explications of the construction of gender ever to appear in a Supreme Court opinion.

O’Connor stated that MUW’s policy of excluding male students was unconstitutional because it “tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job . . . and makes the assumption that nursing is a field for women a self-fulfilling prophecy.” In Hogan three of the dissenting justices thought the separatism of sexual segregation was not only acceptable but desirable.
In various other cases, the dissenters’ refrain has kept alive the idea of biologically based differences. For instance, in *Caban v. Mohammed* the Supreme Court heard a case in which an unwed mother left the biological father of her children to marry another man. When the stepfather wanted to adopt the children, the biological father filed a cross-petition for adoption. The Court invalidated a New York statute that permitted unwed mothers but not unwed fathers to withhold consent to the adoption of their children. While the *Caban* majority condemned “the stereotype that a biological mother always bears a more intimate relationship with a child than does a father,” the four dissenters held fast to it. The dissents by Justices Stewart and Stevens (the latter joined by then Chief Justice Burger and Justice Rehnquist) emphasized the unique physical bond between mother and child—“[o]nly the mother carries the child”—which, they thought, should confer exclusive rights on the mother to determine who could engage in the social relationship of fathering the child for the remainder of the child’s life. For the dissenters, parenting abilities and possibilities were matters of biology. Thus, even when a majority of the Court condemns stereotypes resulting from outdated notions of social relations, a strong refrain often emanates from dissenters holding fast to the anachronism.

Reproduction and Potential Parenthood: Men

*International Union, UAW v. Johnson Controls* concerned a Title VII challenge to a battery manufacturer’s fetal protection policy that excluded fertile women, but not fertile men, from jobs working with lead. Men were permitted to work at jobs requiring lead exposure exceeding OSHA standards, but women were required to demonstrate their infertility. One of the named plaintiffs, Mary Craig, chose to be sterilized in order to keep her higher-paying job; another, Elsie Nason, a divorced fifty-year-old, was involuntarily transferred to a lower-paying job in another division of the company when she could not prove she was sterile. The company defended its policy on the ground that occupational lead exposure might risk the health of fetuses. In 1989 the Seventh Circuit Court of Appeals upheld the company’s fetal protection policy, accepting the argument that the lead exposure might endanger fetuses and thus determining that female sterility in this workplace was a bona fide occupational qualification. The court based its decision on a finding of “real physical differences” between men and women that justified the difference in treatment. Women, whom the Seventh Circuit de-
scribed as potential “mothers,” might risk the health of their “unborn children.”

The Supreme Court reversed, holding that sterility was not a bona fide occupational qualification. The justices unanimously agreed that the fetal protection policy was discriminatory under Title VII because “[w]omen who are pregnant or potentially pregnant must be treated like others.” In *Johnson Controls*, the Supreme Court observed the pattern of its decisions since *Muller*, noting, “Concern for a woman’s existing or potential offspring historically has been the excuse for denying women equal employment opportunities.”

*Johnson Controls* was widely heralded as a feminist triumph. The decision recognized that women may face sex discrimination because of their reproductive capacity, irrespective of the absence of pregnancy and the lack of any future intent to become pregnant. The victory is far from hollow: women cannot be denied employment based on their reproductive status. But one aspect of this case lurks in the shadows. *Johnson Controls* is a metaphor for the unspoken bias against males in constitutional cases—and in life—and the ways that bias is difficult to detect.

The exclusive focus of the *Johnson Controls* opinion was the discriminatory treatment of women. The Court’s initial framing of the case viewed the matter solely as a woman’s issue: “May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?” Since the Court saw the problem as one of “fertile women in the workplace,” the harms to male workers receded from view. One of the named plaintiffs in the case, Donald Penney, was male. A married man who wanted to have children, Penney had requested a voluntary leave of absence to reduce his blood lead levels so that he and his wife could safely conceive a child. This leave of absence was denied.

In finding that the fetal protection policy constituted impermissible sex discrimination in violation of Title VII, Blackmun’s opinion for the Court stated, “Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.” That was factually incorrect. The fetal protection policy was sex-specific in not one but two directions, and men were not given the option to avoid confronting workplace lead exposure that might risk their fertility. Donald Penney was not afforded any such choice.

Masculinist bias—assuming the norm of male workers and thus barring females from workplace hazards—has its dark side for men. The company had not banned fertile men from jobs that exposed them to lead, despite ev-
idence that sperm exposed to lead may cause birth defects. In fact, the health risks to potential future offspring may be as or more serious through paternal exposure to toxins:

Few studies have been done on the reproductive risks associated with male exposure because of cultural assumptions that mothers are more closely linked to children and are more responsible for children’s problems and disabilities than are fathers. The studies that have been done on paternal exposure indicate it is likely that agents posing reproductive risks through maternal exposure are also dangerous through paternal exposure. . . . Often, a fertile male will pose a greater risk to fetal safety than a fertile non-pregnant female. Spermatogenesis, the rapid division of sperm cells in the testes, is an ongoing process, whereas the female’s ova all are produced by early infancy, and rapidly dividing cells are more susceptible to a number of injuries. Also, some substances such as lead and cadmium “concentrate in the male reproductive tract [and] are quite toxic to sperm.”

The Court did note that the record contained evidence “about the debilitating effect of lead exposure on the male reproductive system.” But this evidence was used only to show that women were being treated differently, and thus discriminated against, in a situation in which men and women were relevantly similar. The Court failed to reach the other logical conclusion. Nowhere does the opinion recognize that denying men the ability to avoid exposure to workplace hazards, while requiring it of women, is gender discrimination against men. The Court never addressed Donald Penney’s concerns.

Indeed, the Court attempted to distinguish an earlier case, *Dothard v. Rawlinson*, which had held that sex was a bona fide occupational qualification for guards in a maximum-security prison for males. In 1977 the Court in *Dothard* found no equal protection violation in excluding women from contact areas in the prison because some male inmates who were sex offenders might rape female prison guards due to their “very womanhood.” On one level, *Dothard* and *Johnson Controls* are easy to reconcile. Implicit in both cases is the assumption that if it is a tough, dirty job, somebody male has to do it.

Donald Penney represents male workers whose harms are not vocalized. The assumed norm of the male employee has excluded women from the workplace for centuries, but it is a norm that has been little explored relative to its effects on men. In *Johnson Controls*, the Court not only assumed that men belonged in the workplace, but virtually ignored their reproduc-
What assumptions about masculinity are implicit in this vision of the norm of the male worker? Men are risk defying, in need of no protection; and men have no reproductive concerns worthy of mention.

Commentators uniformly read *Johnson Controls* as a great victory for women’s rights. But that understanding invites deeper exploration. In one sense *Johnson Controls* typifies the Supreme Court’s gender cases, many of which involve outcomes in which women have fought hard for the same opportunities as those available to men, and, as part of the package, the rights to be subjected to the same hazards and punishments that men experience. The female workers in *Johnson Controls* sued to have the same right as men to be exposed to hazardous conditions in the workplace. In *Michael M.*, if women had won, they would have won the opportunity to be prosecuted for statutory rape. In *Rostker*, women wanted to be in combat-ready positions in the military. As we will see in the next section, in *United States v. Virginia* women won the right to the same military education, but also the right to endure the same mental stress, privacy invasions, humiliation, and abuse as male cadets. Of course, the price of fighting for equal treatment is swallowing its disadvantages as well as accepting its benefits. This offers women a Hobson’s choice in some gender cases: they could lose by ending up treated as naturally inferior—or they could win and become subjected to the same harms that men experience daily. They win the right to be treated badly too.

In a Constitutional Law class taught by a friend of mine a few years ago, the group was discussing *Rostker v. Goldberg*. One of the men in the class had been in the military for several years and had fought in Vietnam. He was simply perplexed at why women had ever sued for the right to fight in combat in the first place. As the discussion continued he became visibly upset; he told the class, “You just don’t know the horror of it. You just don’t know how terrible it is. Whoever convinced you that you want the right to fight is full of shit.” When my friend recounted the story of the student’s plea, I wondered if this failure to comprehend the burdens of masculinity accounts for some male resistance to feminism. Perhaps women do not understand how difficult masculinity can be, just as men do not understand how privileged and advantaged they are.

**The Virginia Military Institute and Gender Separatism**

In 1996 the Supreme Court decided a case with overtones of the stereotypes of the previous century about the “natural and proper timidity and deli-
cacy” of women. The case concerned the opportunities for women to attend a state-funded all-male military college.

Since its founding in 1839, the publicly supported Virginia Military Institute (VMI) had followed an all-male admissions policy. In 1990, after VMI refused a female high school applicant’s admission, the Justice Department sued the school. Virginia defended its decision to maintain a male-only institution based on its provision of “rigorous military training” that was inappropriate for females and effective for males only in a single-sex environment. This “adversative” training includes spartan barracks living, a class system, mental stress, shaved heads, a stringently enforced honor code, a complete absence of privacy, upperclass hazing, and harsh physical training. The trial court’s factual findings describe the conditions:

Entering students at VMI are called “rats” because the rat is “probably the lowest animal on earth.” In general, the rats are treated miserably for the first seven months of college. . . . Features of the rat line include indoctrination, egalitarian treatment, rituals (such as walking the rat line), minute regulation of individual behavior, frequent punishments, and use of privileges to support desired behaviors. . . . The rat line is more dramatic and more stressful than Army boot camp or Army basic training. . . . After the rat line strips away cadets’ old values and behaviors, the class system teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote. . . . The dyke system is closely linked to the class system, and is the arrangement by which each rat is assigned a first classman as a mentor, called a “dyke.” The dyke system provides some relief from the extreme stress of the rat line. . . . The barracks are designed to reduce all cadets to the lowest common denominator. . . . there is literally no place in the barracks that physically affords privacy. . . . The average occupancy rate of cadet rooms at VMI . . . was 3.7 cadets per room. The barracks are stark and unattractive. The windows and the doors ensure that cadets are never free from scrutiny. There is constant intermingling of cadets as a result of the close and intimate quarters and the number of cadets assigned to a room. Ventilation is poor. Furniture is unappealing. A principal object of these conditions is to induce stress. . . . There are no locks on the doors of cadet rooms in barracks, no windows in the barracks doors, no window shades or curtains. . . . On the fourth floor a cadet cannot go to the bathroom or go to take a shower without being observed by everyone in that quadrangle on all levels.31

The federal district court denied the government’s equal protection complaint, finding that by providing unique “adversative” training, Virginia actually was adding a “measure of diversity” to its educational system. The dis-
The appellate court reversed, holding that while VMI’s program of single-sex training was “justified by its institutional mission,” Virginia failed to explain “why it offers the unique benefit of VMI’s type of education and training to men and not to women.” It remanded the case to the district court for construction of a plan to remedy the equal protection violation, suggesting that Virginia might consider admitting women, eliminating state support, or developing an alternative program for women. Virginia responded to the appellate court’s decision by creating a separate, parallel program for women, the Virginia Women’s Institute for Leadership (VWIL), on the campus of nearby Mary Baldwin College.

A task force headed by the dean of Mary Baldwin College determined that “a military model and, especially VMI’s adversative method, would be wholly inappropriate for educating and training most women for leadership roles.” So the VWIL program had nothing like the rigors of VMI—no rat line, no dyke system, no barracks life, no uniforms, no hazing—but instead was based on a “cooperative method which reinforces self-esteem.” Compared to the approximately 1,300 students at VMI, VWIL was funded based on an expected student enrollment of 25 to 30 students. Mary Baldwin students would be permitted to live off campus or in student dorms, which were described as “plush and comfortable” with plenty of privacy. In lieu of military training, VWIL students would take part in ROTC programs and the “largely ceremonial” Virginia Corps of Cadets, and “would take courses in leadership, complete an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series.”

The VMI Foundation agreed to provide an endowment for VWIL of $5.5 million, while VMI’s endowment level was $131 million. The entry requirements for VWIL involved SAT scores averaging a hundred points lower than those at VMI. “VMI awards baccalaureate degrees in liberal arts, biology, chemistry, civil engineering, electrical and computer engineering, and mechanical engineering.” Students could be graduated from VWIL only with a bachelor of arts degree. Only 68 percent of the faculty at Mary Baldwin had Ph.D.’s, compared to 86 percent of the faculty at VMI. The Mary Baldwin campus housing the VWIL program offered “[o]ne gymnasium” and “two multi-purpose fields.” The physical facilities of VMI included “an NCAA competition level indoor track and field facility; a number of multi-
purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track.\textsuperscript{35}

The district court upheld this plan, declaring that Virginia was not required “to provide a mirror image VMI for women.”\textsuperscript{36} A divided court of appeals approved the VWIL program—which was designed to address “the different educational needs of most women”—as “substantively comparable” to VMI.\textsuperscript{37} The government petitioned the Supreme Court for certiorari.

Justice Ruth Bader Ginsburg, who, as a lawyer, argued the earliest winning gender cases before the Supreme Court, delivered the opinion of the Court. The Supreme Court found the male-only admissions policy unconstitutional and held that the parallel program at VWIL was inadequate to remedy the constitutional violation: “However ‘liberally’ this plan serves the state’s sons, it makes no provision whatever for her daughters. That is not equal protection.”\textsuperscript{38} Rejecting Virginia’s argument that the single-sex program at VMI promoted systemic educational diversity, the Court found the argument a post hoc rationalization for separatism, since the record revealed no evidence that the male-only admissions policy was prompted by diversity concerns. When VMI was established in 1839 it was not built for the purpose of educational diversity, and its founders assumed that only men could enter military service.

The Court acknowledged that the introduction of women would alter the educational experience at VMI, but noted that predictions that the admission of women would destroy the adversative method or the school were reminiscent of similar dire predictions about the admission of women to the bar, medical faculties, and federal military schools. In making judgments about whether single-sex educational programs were justified by “gender based developmental differences,” the state could not rely on generalizations about “typically male or typically female ‘tendencies.’” “[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”\textsuperscript{39}

Regarding the second question—whether the creation of VWIL as a parallel program for women remedied the constitutional defect—the Court unsurprisingly found the VWIL program at Mary Baldwin College a “pale shadow” of the educational experience at VMI. The Supreme Court noted that “VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed.”\textsuperscript{40} By all tangible measures—fund-
ing, resources, facilities, qualifications of faculty and students, curriculum and degree offerings, educational philosophy—VWIL differed markedly from VMI. The intangible differences of history, pedigree, alumni support, prestige, reputation, and future job opportunities were perhaps even greater. In short, Virginia failed to demonstrate an “exceedingly persuasive justification” for the exclusion of qualified women from the “premier training of the kind VMI affords.”

Images of Gender in the VMI Litigation

The outcome of United States v. Virginia represents some progress, since the Supreme Court expressed appropriate skepticism of gender separatism. Yet woven throughout the lower court opinions in the case, and even in the Supreme Court’s opinion, are conventional assumptions about gender and traditional ways of thinking about gender questions that are representative of why gender separatism persists.

Images of Women

The decisional record of the lower courts in the VMI litigation is rife with gender stereotypes. In the initial district court decision, Judge Jackson Kiser rushed to embrace some of the starkest stereotypes about the biological basis for gender differences. In his findings of fact, Kiser created a heading entitled “Gender-Based Physiological Differences,” under which he first remarked that “West Point[‘s Office of Institutional Research] has identified more than 120 physiological differences between men and women” that are “very real differences, not stereotypes.” He specified some of these physiological differences: most women are generally slower, fatter (which “imposes a burden on some kinds of physical performance”), and weaker (“only 80% as strong as males”) than most men. He accepted as evidence and reported as fact that female athletes were injured more frequently than male athletes, could perform fewer sit-ups and push-ups, and were generally outperformed by men “on all of the common physical aptitude tests.” Paramilitary training obviously would be dangerous for women’s delicate constitutions, and they couldn’t handle it.

In the next section of factual findings, “Gender-Based Developmental Differences,” the district court accepted the testimony of educators and academics that “females and males characteristically learn differently”: “Males tend to need an atmosphere of adversativeness or ritual combat in which
the teacher is a disciplinarian and a worthy competitor. Females tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students.” The court found that women have “distinctive psychological and sociological needs” and that those needs represented “real differences, not stereotypes.”

These factual findings related directly to the court’s holding that because most women could not measure up to men’s standards of performance, VMI was justified in excluding all women from its school. “Even if the female could physically and psychologically undergo the rigors of the life of a male cadet,” Kiser wrote, “her introduction to the process would change it. Thus, the very experience she sought would no longer be available.”

Women, in his view, were fundamentally different from men in ways that would inevitably infect the educational program. The institution should not be required to admit women because it would have to bend to their differences: “the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests.” In initially upholding Kiser’s findings, the court of appeals flatly stated, “Men and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated.”

Three years later, in upholding the proposed VWIL plan as “comparable” to VMI, Kiser ruled that the physical and pedagogical differences between VMI and VWIL were justified by “real differences between the sexes.” Approving the VWIL plan, a divided Fourth Circuit exhibited concerns about the feasibility of “adapting the adversative methodology to women, setting woman against woman with the intended purpose of breaking individual spirit and instilling values.”

Images of Men

Less obvious in the court opinions were the stereotypes about men. One stereotype implicit in the trial court opinion upholding the exclusion of women from VMI, the appellate court opinion approving the trial court’s “homogeneity of gender” rationale, and the later appellate opinion approving the VWIL remedial plan was the assumption that the all-male composition of VMI was essential not only to the character of the institution but also to the character development of the male students. The federal district court found that one of the benefits of single-sex education for men was that they would be “able to focus exclusively on the work at hand, without
the introduction of any sexual tension.” This represents a particular construct of masculinity. It first assumes an all-heterosexual student body. Beyond that, an essential ingredient of a good “citizen-solder” was the boys’ club mentality indoctrinated into all the cadets. Men were being shaped and defined in large part by the exclusion of women.

In 1839, when VMI opened its doors, women could not enter the military—“men alone were fit for military and leadership roles.” It was a model of masculinity that has not changed much in over a century and a half. In the 1990s this microcosm of the country was still raising its boys to be soldiers. Even though only 15 percent of VMI’s graduates enter military life, the harsh boot-camp conditions were considered an elemental part of the education. When the federal district court heard the testimony of experts that men benefited from adversative training while women needed a more supportive, nurturing education, it accepted these truisms with little reflection.

VMI’s unique “adversative” approach was considered character-building for men.

He is told where to stack his underwear and where to put his razor. He must submit to an array of theatrical abuses from upperclassmen; he can, for example, be stopped at any time and made to recite a passage from the “Rat Bible” (a compendium of sundry statistics having to do with things like . . . athletic teams); he might be asked what’s for dinner (rats must memorize the day’s menu); he might be ordered to drop and do 20 push-ups.

Carefully selected professional educators were willing to testify—and the district court was more than willing to accept—that comradeship and virility could be created through brutal and punitive physical conditions. One of those experts testified that “the VMI model is based on the premise that young men come with [an] inflated sense of self-efficacy that must [be] knocked down and rebuilt.” It was a system that few female but most male applicants could be expected to tolerate. Just as “shy, self-distrustful young women” could not withstand the “rigors” of adversative training, it was inconceivable that a man might be tender and loving, one who would blossom in a nurturing environment; that would be abnormal.

According to the value system inculcated at VMI, caring and nurturant behavior from men was a necessary evil—part of the system, but a baneful part nonetheless. The “dyke” system, whereby first-year “rats” were mentored by seniors, was an attempt to reintroduce some human concern into a system intentionally stripped of warmth, compassion, and nurturance.
But consider the etymology: when upperclassmen performed this function, they were called by a pejorative name typically used to refer to masculine lesbian women. The clear message is the devaluation of men who do women’s work.

As this condensed litany of gender demonstrates, a number of federal judges, at varying levels, were quick to move from obvious biological differences to accepted socio-moral stereotypes. Decisions at different junctures—initial approval of the male-only admissions policy; later approval of the “substantively comparable” VWIL plan—equated sociological stereotypes with biological differences. The lower federal courts expressly relied on gross sexual stereotypes, based on some modest evidence of physiological differences. Even the psychological and sociological differences between men and women were seen through a lens of biology. The trial and appellate courts were ready to accept that unchangeable biological and sociological sex differences exist and to allow those differences to have profound political consequences.

The various judges who ruled on the VMI litigation were not unanimous in committing the biological fallacy. Judge J. Dickson Phillips, Jr., dissenting from the Fourth Circuit’s approval of the VWIL remedial plan, was willing to acknowledge the error of consistently equating previous elections of a sexist society with biological necessity: “No conscious governmental choice between alternatives . . . dictated the original men-only policy; it simply reflected the unquestioned general understanding of the time about the distinctively different roles in society of men and women.” But the theme of equating gender roles and biology is a persistent one. It resonates in Justice Antonin Scalia’s dissent from the Supreme Court’s majority opinion. Although only a single voice, Scalia wrote an opinion almost as lengthy as the majority’s, in which he waxes nostalgic over “manly” virtues and regrets their disappearance. He quotes at length from The Code of a Gentleman, a booklet that the VMI “rats” are expected to keep with them at all times:

Without a strict observance of the fundamental Code of Honor, no man, no matter how “polished,” can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice . . . or he is not a Gentleman. A Gentleman . . . does not discuss his family affairs in public or with acquaintance. Does not speak more than casually about his girl friend. Does not go to a lady’s house if he is affected by alcohol. He is temperate in the use
of alcohol. Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public. Does not hail a lady from a club window. A gentleman never discusses the merits or demerits of a lady. Does not mention names exactly as he avoids the mention of what things cost. Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child are assumed by honorable men as a debt of honor. Does not display his wealth, money or possessions. Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be. Does not slap strangers on the back nor so much as lay a finger on a lady. Does not “lick the boots of those above” nor “kick the face of those below him on the social ladder.” Does not take advantage of another’s helplessness or ignorance and assumes that no gentleman will take advantage of him. A Gentleman respects the reserves of others, but demands that others respect those which are his. A Gentleman can become what he wills to be.\(^{51}\)

Scalia’s analysis did not go further than simply quoting the military scripture. The premise of the good old days is entirely unquestioned, as is the seeming inconsistency between the qualities of “gentlemen” and the adversative training methods used to construct them.

Separate but Equal

The Supreme Court in *United States v. Virginia* did not state that single-sex programs were categorically unconstitutional. For the Court, it was not a question of “separate but equal” because VMI and VWIL were so patently unequal. Yet even in a majority opinion architected by Ruth Bader Ginsburg, formerly the director of the ACLU Women’s Rights Project, there lingers a soft theme of gender separatism.

While attempting to eradicate stereotyping, the majority was willing to accept the idea of important natural differences between the sexes, observing that “‘[i]nherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” While the Court explicitly addressed overgeneralizations about females in one portion of the opinion (“estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description”), in another portion it indulged in stereotypic presuppositions: “It may be assumed, for
purposes of this decision, that most women would not choose VMI’s ad-
versative method.”

Second, the Supreme Court’s VMI opinion was guilty of a serious omis-
sion. Conspicuously absent was any reference to Brown v. Board of Educa-
tion. Petitioner’s brief to the Supreme Court raised the Brown issue, not as
one of the specific issues preserved for review, but as representative of the
law in the area of segregated education: “Although single-sex education may
not necessarily send a stigmatizing message that renders it ‘inherently un-
equal,’ cf. Brown v. Board of Education,… the exclusion of women from VMI
does send a powerful, harmful message.” Nowhere in the twenty-three-
page VMI opinion is Brown even mentioned as relevant precedent. The
Court never contemplates the possibility that, in the area of gender rela-
tions, separate, by its very nature, might never be equal.

In Brown, in the context of race, the Court flatly stated that “[s]eparate
educational facilities are inherently unequal.” The Brown Court recog-
nized that the equal protection inquiry regarding racial separatism should
not turn on comparisons of the “tangible factors” of educational “buildings,
curricula, qualifications and salaries of teachers,” but on the symbolic mes-
sage sent by the “segregation itself”: “To separate [grade school and high
school children] from others of similar age and qualifications solely because
of their race generates a feeling of inferiority as to their status in the com-
munity that may affect their hearts and minds in a way unlikely ever to be
undone.” In United States v. Virginia the Court was unwilling even to men-
tion the possibility that gender separatism might send similar messages of
inferiority. In Brown the Court assumed equality of facilities and tested
whether separation of the races was just; in United States v. Virginia the
Court ignored the issue of separation of the sexes and tested whether in-
equality in the provision of resources was just.

We can surmise the reasons for Brown’s omission from the VMI opinion.
The modern Court does not rely on Brown even in the racial desegregation
cases; its real vitality is almost purely symbolic. To transfer it to another
context would have required a certain revitalizing, and there were certainly
not five votes for that project. Perhaps the Court also wanted to preserve the
possibility of publicly funded all-female math or science classes or inner-
city male academies. In a footnote, the VMI Court explicitly left open this
possibility that gender-exclusivity might provide a unique educational op-
portunity, and hence educational diversity: “Several amici have urged that
diversity in educational opportunities is an altogether appropriate govern-
mental pursuit and that single-sex schools can contribute importantly to
such diversity. Indeed, it is the mission of some single-sex schools ‘to dissipate, rather than perpetuate, traditional gender classifications.’ . . . We do not question the State’s prerogative evenhandedly to support diverse educational opportunities.”56 Certainly the Fourteenth Amendment does not apply to private single-gender high schools and colleges. And an “exceedingly pervasive justification” may well exist to support public single-sex education or classes in a localized way, with a highly contextualized inquiry, showing an empirically demonstrable need and specific benefits flowing from the program.57 But the Court’s reluctance even to mention Brown is troubling.

In not explicitly recognizing the stigma associated with the very fact of sex segregation, the Court tacitly condones gender separatism. VMI’s practices were not unacceptable because sex-segregated institutions send the wrong message; VMI was in error because it blatantly underfunded the women’s program. This raises the question to what extent recognition of a gender dichotomy necessarily means a hierarchy: can there be a separation of the sexes without hierarchy? Given the history of gender relations—since exclusivity in both the public and private spheres for so many years implied a hierarchy of who was worthy to participate publicly—the presumption should probably be that the dichotomy implies a hierarchy. But the Court seems willing to indulge in the opposite assumption: separation of the sexes is fine, as long as the facilities provided are substantially equal.

Perhaps the Court’s neglect of Brown has something to do with the constitutional framework for equal protection analysis: the different levels of scrutiny applied to race and gender cases. Race cases are deserving of strict scrutiny because the history of racism has been one of invidious or malevolent treatment, while gender cases receive intermediate scrutiny because the history of sexism has been one of “benevolently” paternalistic decisions. The Fourth Circuit had expressly disavowed that this was a case to which the “separate but equal” principle would even apply, since males and females were relevantly different, rather than similarly situated: “When there is a difference between two classes of persons, then separate and different facilities for each class may satisfy equal protection if the difference in facilities is sufficiently related to the nature of the difference between the classes. In this case, we do not espouse a ‘separate-but-equal’ test and never discuss ‘separate-but-equal facilities.’”58 Instead, the Fourth Circuit, and ultimately the Supreme Court, tested whether VMI and VWIL were “substantively comparable facilities.” The truth is, there probably is not a majority of the Court that believes that sex-segregated schools are inherently unequal. They
apparently do not contemplate that the rationale in Brown extends to gender much at all, let alone with the same force.

Or perhaps the explanation lies in the opposite direction. Maybe gender differences are so sacred and pervasive, so structural to the family, to economics and politics—even more so than racial differences—that it is more threatening to the Court even to consider pronouncements about separation of the sexes. This may parallel the reasoning why certain basic necessities of life, such as food, shelter, and peace, are not guaranteed by or even mentioned in the Constitution—and not because we think they are unimportant. On the contrary, perhaps they are too important. In both instances—the Supreme Court leaving untouched the issue of gender separatism and the Constitution not providing for basic needs—there are unexpressed assumptions about what is appropriate for a government to do. Lucinda Finley explains that the conventional assumptions about gender differences set the standard for constitutional models of equality:

The idea of separating men and women in certain realms, and of some things being more appropriate for one sex than for the other, just does not strike most people as odd, or repugnant to ideals of equality, as does the notion of forced racial separation. When it comes to sex, the notion often seems appropriate, resonating with deeply entrenched cultural notions about the biologically based dissimilarity of men and women, and the inevitable alterity of masculinity and femininity.59

At this juncture, the Court is not going to enter the business of dismantling the walls separating the sexes. Maybe we simply aren’t ready for the gender equivalent of Brown.

What does it mean to say that the Court was unwilling to touch the gender separatism lurking just beneath the surface of the issues in VMI? In the context of the VMI litigation, it could mean something as innocuous as the absence of a fully briefed issue or as admirable as constitutional restraint in avoiding decisions on unnecessary issues. The plaintiff’s litigation strategy was, after all, to prove convincingly that VMI and VWIL were unequal. But Scalia’s dissent, deploring the majority’s abandonment of The Code of a Gentleman, spoke volumes about what was really at issue. The separation of the sexes is at the heart of masculinity. It was an issue that was too deep and too important for the VMI majority even to mention.

In a case that ran parallel to the VMI litigation—Shannon Faulkner’s attempt to gain entry to South Carolina’s all-male Citadel—the theme of lost masculinity is mentioned explicitly, again in a dissent. Judge Clyde Hamil-
ton, dissenting from the Fourth Circuit’s approval of a preliminary injunc-
tion ordering Faulkner’s admission, lamented that “the majority emas-
culates a venerable institution by jettisoning 150 years of impeccable tradition
and distinguished service.”60 The preservation of traditional forms of mas-
culinity is one of the last bastions of sexism. But it is a huge reservoir, and
one that is largely untouched by judicial decisions.

The Defense Litigation Strategy of VMI

Virginia and VMI’s defense of one of the only two publicly supported all-
sexual public institutions in the country consisted of, on the surface, the simple strategy
of resisting change and preserving tradition. The roots of that tradition date
back to an epic confrontation. Valorie Vojdik, lead counsel for Shannon
Faulkner and Nancy Mellette in their lawsuit to gain admission to the
Citadel, explains that

Because the VMI litigation was marked by the absence of any woman who
sought admission, the courts were able to frame the constitutional conflict as
a battle between Virginia and VMI, on the one hand, and the United States,
on the other. Recalling that the parties “first confronted each other” on “the
battlefield at New Market, Virginia,” the district court envisioned the lawsuit
as a continuation of the Civil War involving another “life-and-death” battle
over the existence of VMI.61

On a deeper level VMI was, quite simply, all about gender separatism:
preserving VMI’s exclusive all-male admissions policy. VMI professed,
though, that its purpose was not to exclude women, but to provide “single-
sex” education, which, VMI implied, would ultimately benefit all Virginia’s
sons and daughters with “system-wide diversity.”62 VMI stressed the peda-
gogical value of sex-separatism, citing expert testimony regarding the ben-
efits of single-sex education at the college level. “Single-sex education,” VMI
argued solemnly, “in fact helps to combat gender stereotypes by encourag-
ing students to pursue careers once associated primarily with the opposite
sex.”63 The federal district court accepted VMI’s expert testimony on the
benefits of single-sex education, and found as a matter of fact that “[o]ne
empirical study in evidence, not questioned by any expert, demonstrates
that single-sex colleges provide better educational experiences than coedu-
cational institutions.”64 The Fourth Circuit was willing to extrapolate from
this finding that “single-gender education at the college level is beneficial to
both sexes is a fact established in this case.”65
But the research on which VMI’s experts relied, and that the federal trial and appellate courts cited approvingly, was not, as the courts supposed, applicable to the experiences of both males and females. Almost all the studies were conducted at women’s colleges and secondary schools, since few all-male schools exist. Many of these studies are of questionable extensibility: the evidence of beneficial effects from single-sex educational experiences are principally studies of “women who graduated from the Seven Sister colleges. They are studies that date back from the 1940’s through the 1960’s. . . . The fact of the matter is that most of these women came from privileged backgrounds, had tremendous resources, and they were going to succeed no matter where they went. Yet, these studies did not control for socio-economic status.”66 The lower courts’ acceptance of the antiquated studies from a limited and unrepresentative sample of schools illustrates the very human tendency to confuse correlation with causation.

The Fourth Circuit did rely on research conducted by Dr. Alexander Astin in a 1977 book, Four Critical Years: Effects of College on Beliefs, Attitudes and Knowledge, showing benefits to both sexes from single-sex schooling. Astin, however, testified on behalf of the United States in the VMI litigation and for Shannon Faulkner in the Citadel case, based on his updated 1993 research, What Matters in College? Four Critical Years Revisited, that it was “not single sex status per se that yielded the positive effects observed for single sex colleges for men,”67 since the advantages remained after the all-male schools he studied admitted women.

One well-respected study of sixty nonparochial private high schools (divided equally among boys’, girls’, and coeducational schools) showed that teachers in all the settings initiated most of the sexist incidents: teaching students to sexually stereotype, actively devaluing females, and promoting male gender domination. According to the researchers, the number of sexist incidents in the different types of schools were “roughly equal,” but took different forms. In coeducational schools, sexism appeared more as gender domination and active discrimination against females. More common in the single-sex schools than the coeducational schools were two different forms of sexism: “gender reinforcement—the perpetuation of gender-differentiated ‘social definitions’ (conventional behaviors or styles typically associated with being male or female)”—and “embedded discrimination—the residual sexism of a gender-stratified society.”68

Single-sex environments might offer some educational advantages, but “[t]he current research demonstrates that the efficacy of single-sex education may be sex-specific—limited to young women—because it offers an
environment free from female-specific forms of educational discrimination, such as silencing, discouragement, and male-peer harassment. The reasons single-sex education can benefit young women obviously do not apply to men.”69 Indeed, “studies of male secondary schools fail to demonstrate any positive effects for male high school students, and some demonstrate a negative effect.”70 The consensus is that in “male single-sex settings there is increased incidence of violence and sexism” and, in the words of one expert in the Citadel case, a “hypermasculine ethos.”71 This could be an enormous problem for the “sons of Virginia” and South Carolina, not to mention their daughters, but the trial court in the VMI litigation discounted any evidence that did not comport with its theories.

It is truly curious that the district court, in one portion of the opinion, was adamant about the existence and pervasiveness of physical differences, psychological differences, and differences in learning styles between males and females, but in another portion of the opinion, was willing to assume blithely that the pedagogical research on the benefits to women from single-sex education applied equally to men.72 This is evidence of a relentless insistence on upholding traditional images of masculinity, despite realities to the contrary.

The dubious empirical basis of VMI’s arguments went well beyond its claims of purported benefits for single-sex schooling. VMI seized on the classic work of educational psychologist Carol Gilligan as justification for its all-male admissions policy. Gilligan, the author of In a Different Voice: Psychological Theory and Women’s Development, conducted research that showed that traditional psychological theories of human development, based on all-male study populations, gave undue positive weight to typically masculine ways of evaluating ethical issues, such as abstract thinking, rights, formal rationality, autonomy, separation, and detachment, while undervaluing typically feminine ways of thinking about moral problems, such as focusing on care, attachment, interdependence of relationships, and communication.

Relying on Gilligan’s work, VMI maintained that men and women develop and learn differently and have different psychological needs. The separate spheres were necessary, VMI contended, because men need adversarial training. Not only would women’s presence destroy the all-male atmosphere, but the type of education VMI offered would be all wrong for women: women need supportive education. Integration would be bad for both sexes, VMI said in its briefs to the Supreme Court, because “VMI would be forced to adopt different physical fitness standards and grading
criteria for men and women, just as West Point has done,” they VMI method would be counterproductive for, and have a ‘discriminatory impact on,’ many women students,” and, as the district court found, “the presence of women would add ‘a new set of stresses on the cadets.’”

Gilligan and others took the unusual step of filing a “friend of the court” or amicus brief in the litigation to argue that her research was being misconstrued. In the brief, amici first explained that the purpose of Gilligan’s research was to point out omissions of classical psychological theory. Her research noted the sampling problem of classical theorists: their work was conducted with all male subjects.

In a Different Voice . . . addresses a problem Gilligan observed in her research on psychological development: that women’s descriptions of their experiences and responses to experiences did not conform to descriptions of normal “human” emotional and cognitive development reflected in classical psychological theory articulated by Freud, Erikson, Piaget, and Kohlberg. While these classical theorists concluded there was something wrong with women, Gilligan concluded that there was something wrong with psychological theory.

The amici next told the Supreme Court that VMI’s reliance on Gilligan’s work was misplaced. She was not describing innate traits of men and women, nor should her conclusions be used to justify sex-segregated education. In fact, amici suggested that “[t]he observations about psychological development patterns that are generally associated with gender in In a Different Voice are not based on any premise of inherent differences between the sexes, but on the basis of their different opportunities and experiences.” Single-sex schooling, said the amici, would simply instantiate generalizations about men’s and women’s typical behavior. The point is not the wisdom of single-sex education, but the mistaking of observed differences for inherent differences.

Why did VMI pursue this litigation strategy? Why did VMI argue that men and women are inherently different? It almost seems that the empirically more supportable strategy would have been to argue that men and women are different, and that those differences are culturally constructed, but real nonetheless: that men and women have been made different.

The answer may be that VMI chose the natural differences strategy because that is a theme that resonates with the Court: that is the way the Court understands gender equality. The Supreme Court and lower federal courts still believe in biological constructions of race and gender. If the decisions
in *Rostker, Dothard,* and *Michael M.* were any indication, the Court might be most receptive to arguments about the gender-appropriateness for certain jobs based on biological differences. Certainly it is difficult to make a sharp distinction between different treatment based on supposed physical differences and different treatment based on supposed cultural differences. The laws in *Craig, Dothard,* and even *Johnson Controls* and the VMI litigation probably were based on both. But various members of the judiciary seem willing to put their thumbs on the biological side of the scale.

Second, if VMI had conceded the argument that gender is culturally constructed, then it would have implicitly acknowledged the role of the institution in reconstructing differences. Reconstruction is a process that needs to start somewhere. The argument almost had to be one of innate differences. Otherwise, VMI was potentially complicit in the construction of gender differences.

**Postscript**

The sequel to the VMI and Citadel litigation was like the aftermath of any battle: contentious, contemptuous, and creating its own casualties. Many alumni encouraged VMI to retain its all-male tradition by going private. The Board of Visitors debated for three months after the Supreme Court’s decision whether to privatize. The seventeen-member board voted by the narrowest possible margin—nine to eight—to admit women. One of the board members resigned in protest against the vote.

The other all-male, state-supported school, the Citadel, decided two days after the Supreme Court’s ruling in *United States v. Virginia* to “voluntarily” admit women. It admitted four women to the 1996 entering class. Of about six hundred cadets, the women cadets constituted *two-thirds of 1 percent* of the class. Unlike other institutions that have gone coed, the Citadel lacked a critical mass of women entrants. The first coeducational class at the Naval Academy had 81 women; there were 119 at West Point, and 157 at the Air Force Academy; they accounted for approximately 10 percent of each of the entering classes. The minority status of the women cadets at the Citadel was painfully visible. And the welcome they received was reminiscent of the welcome given to the Citadel’s first woman entrant, Shannon Faulkner.

Shannon Faulkner attended day classes at the Citadel beginning in January 1994, and formally entered the Citadel in August 1995, after a court order requiring her admission unless South Carolina developed a parallel program for women. By the time Faulkner entered the Citadel, she had re-
ceived numerous death threats, and graffiti had been spray painted on the side of her home. A special room, with a video camera and a panic button, was created to protect her; she entered the gates of the Citadel accompanied by federal marshals. The local citizenry was angry at Shannon—for being overweight, for not having her head shaved, and, worst of all, for being female. They staged demonstrations and picketed at the gates of the college carrying signs and wearing T-shirts that screamed, “Save the Males, Shave the Whale” and “1,952 Bulldogs and one Bitch.” They affixed bumper stickers to their cars: “It’s a Girl: 186 pounds, 6 ounces.” They showed up on campus to tell her she was not welcome.

This scene was reminiscent of a 1994 demonstration at Texas Women’s University (TWU) at which female students demonstrated in protest at the Regents’ decision to admit males, with signs reading “Better Dead than Coed” and “Raped by the Regents.” In a phrase hauntingly similar to those used several years later by students and officials at the Citadel and VMI, a TWU student said at the time, “We’re not anti-man. We’re for preserving this university’s 91 years of tradition.” In 1990 a similar student insurrection at Oakland, California’s private Mills College caused its trustees to reverse their decision to admit male students as undergraduates.

Faulkner became ill during Hell Week from doing drills in the 102-degree heat and then withdrew from the school after less than a week, citing illness, stress, and isolation. Some of the two thousand male cadets joyously celebrated her departure. They danced victory dances and ran in formation around the quadrangle, gleefully high-fiving, whooping, and chanting “Na-na na-na na-na na-na, hey, hey, goodbye.” Twenty-nine male cadets also dropped out that semester, amid much less fanfare.

One year later, in August 1996, four women entered the Citadel. By January 1997, only two remained. Jeanie Mentavlos and Kim Messer resigned from the Citadel because of physical abuse and sexual harassment. Mentavlos and Messer alleged that in addition to general isolation, animosity, and hazing, they were kicked and pushed, subjected to degrading language, rubbed, kissed, shown pornography, and forced to listen to sexually explicit songs. Messer was shoved against the wall with her rifle, and ordered to drink tea until she became ill. A junior cadet ordered Mentavlos to drink alcoholic beverages in the barracks. Messer received a death threat. Upper-classmen put kitchen cleanser in their mouths and poured nail polish remover on their shirts and set their clothes on fire. Three male cadets resigned over the incident, a fourth was dismissed, and ten others were punished with demerits, marching tours, and restrictions to campus.
Maybe the hazing was gender-neutral. Less than a month after reports of the sexual harassment incidents at the Citadel, Dateline NBC broadcast a video of the Marine Corps “blood pinning” ceremony. This initiation ritual consists of superior officers pounding newly earned paratrooper wings into the chests of young Marines. Decorated veteran and journalist David Hackworth defended the institutionalized hazing:

Until war disappears, warriors such as our extraordinary Marine Recon men of the bloodied chests are needed. They’re special men. Not stockbrokers, accountants and lawyers. They jump out of perfectly good airplanes, mainly at night, dropping behind enemy lines to slit throats and create instant carnage. They do brutal stuff in training because war is brutal, and they must be macho to survive.78

Perhaps listening to Hackworth’s cautions, or perhaps attending to alumni concerns that the end result of VMI litigation would be a dilution of military training to a program of “VMI Lite,” VMI officials have decided that female cadets will have their heads shaved and—unlike the guidelines at the Army, Navy, and Air Force academies—be subject to the same physical training requirements as male cadets. As VMI Superintendent Josiah Bunting III put it, “It would be demeaning to women to cut them slack.”79 The post-litigation strategy of VMI has been a posture of in-your-face equality: let’s see how many women can survive.

Spectators are appalled that adolescent girls will be shaved, stripped of privacy, and subjected to harsh discipline and humiliating hazing. Military sociologist Charles Moskos says, “Unisex physical standards are just a covert way to get women out.”80 VMI’s strict equality position has provoked outcries that VMI is just trying to circumvent court order, and is still resistant to change. After losing legally, VMI is still fighting socially to retain its traditional bastion of masculinity by trying to dissuade women from coming. It does seem at the very least disingenuous that an educational institution that convinced itself, and tried to convince the U.S. Supreme Court during the VMI litigation, that there are profound physical and psychological differences between males and females now insists on ignoring all those differences.

These reactions, however, miss an essential point: we should have been protesting the barbarism of this educational approach all along. And yet we have tacitly accepted this treatment of our adolescent boys. The paramilitary educational methods for males were not as unseemly as they now appear to be for females. We had accepted the assumptions of identifying
courage with a shaved head and correlating national independence with absolute individual conformity. We were willing to assume that the virtues we wanted—democracy, comradeship, and professionalism—could be created through terror-bonding. We were willing to defer to the institution, rather than asking of what relevance these behaviors are to the training of soldiers in a highly technological era in which war has become immensely less physical. We were, at bottom, quite complacent about the separation and differential treatment of the sexes.

If the sad history of *Brown v. Board of Education* is a guide, there will be flagrant resistance to the requirement of integration. The tragedy is that the resistance will probably be condoned. Certainly these things take time. But if we not only expect the resistance, but accept it, we risk losing the fight for gender equality. And that tacit acceptance of token compliance can take many forms: media stories talked about the Citadel’s admitting women. Four women is barely plural, not even enough to form a rat line. It is an occasion for celebration, but not complacency. Resistance can also involve ignoring the issues. The Citadel’s interim president, Brigadier General R. Clifton Poole, commented on the hazing incidents involving the female cadets: “But this whole thing, the issue wasn’t gender. The issue was maintaining traditions that are important to the school.”

Looked at differently, though, it is not VMI’s or the Citadel’s fault that there were so few applicants. We don’t raise our girls to be soldiers. The issue VMI brought to the forefront is one that is deeply rooted in American culture: the differing treatment of men and women. We are beginning to explode the myths concerning the limitations on women’s inherent capabilities. But what about men? Think about what VMI’s training program represents, with its spartan barracks living, hazing, and “rat line.” Adversative training is what we as a culture think it takes to turn boys into men.

**Boy Scouts and Girl Scouts**

Society’s increasing urban complexity, changing demographic patterns, and greater female participation in the labor force has broken down some gender barriers, so that larger societal institutions are less segregated by sex. Hit with aging and declining memberships, faced with demographic facts that baby-boomer men are reluctant to join all-male groups, and threatened with lawsuits, sex-segregated voluntary associations have also begun to
open their doors to women. The Jaycees, the Lions, and the Rotary, which formerly had diminutively titled women’s auxiliaries like the “Jaycettes, the Lionesses, and the Rotary-Annes,” began to admit women in the mid-1980s, on the heels of lawsuits finding that the exclusion of women was discriminatory.

In 1984 the Supreme Court used a state antidiscrimination statute, the Minnesota Human Rights Act, to hold that the Jaycees were essentially a place of public accommodation and could not exclude women from full membership. Three years later the Court held that the state had a “compelling interest in eliminating discrimination against women” that outweighed the infringement on Rotary members’ expressive associational rights.

But the endangered species groups have not rushed to embrace the opposite sex. Some members’ reactions to the decision of Lions Clubs International to admit women were less than welcoming. “We don’t want them, and 98 percent of Lions feel just like I do . . . We might close down first,” said Clarence Shastal, president of a local Lions Club chapter in Illinois. Not until 1995 did the national organization of the Benevolent and Protective Order of Elks vote to allow women to join. As one member of the Memphis Elks, Loyal Knight Wes Wheelock, said before the Elks vote, “Personally, I’m against it . . . I don’t see why we can’t stay a brotherhood.” Not until 1997, despite the grand exalted ruler of the national organization’s urging local Elks chapters to admit women, most have remained all-male. For example, in Hartford, Vermont, seven women were sponsored for membership by the husband of one of the women, but the members of Hartford Lodge 1541, in a secret vote, rejected them. The women are still free to come, as they have for years, to the Lodge’s dinners, picnics, and bingo games, and to volunteer their services of cooking, serving drinks, and cleaning up after the events.

In a telephone call to the Kansas City Elks chapter, the receptionist (a woman) seemed very proud of their chapter’s women’s groups, the “Elkettes” and the “Lady Does.” The Loyal Order of Moose, with close to two million members, and the Shriners, with over half a million members, have resisted the admission of women.

Self-segregation is part of our daily patterns of social intercourse. People feel more comfortable around others who are like them in various ways: sex, race, religion, and culture. In private groupings, of course, we still divide into traditional, Flintstones-like patterns: while Fred and Barney head off to the Water Buffalos Lodge, Betty and Wilma chat across the fence about domestic chores and put Bronto burgers on the table.
The last decade has been a time of transition for associational law, with legal challenges to exclusionary practices at social organizations ranging from the Boy Scouts to eating clubs to fraternities. While legal decisions in the late 1980s and early 1990s moved somewhat toward encouraging mixed-sex groups, the law generally approves exclusive associations based on sex, as long as those groupings either have a particular expressive purpose or can be characterized as private.

The Supreme Court has recognized a right to freedom of association for intimate or expressive purposes. The family, for example, is protected as an intimate associational group. Organizations that have as their express political purpose the advancement of some gender-based goals, such as a men’s rights group or a women’s consciousness-raising group, could presumably exclude the opposite sex, because admitting outsiders would impair the political purposes of those particular groups. \(^90\) Clubs like the Jaycees or the Rotary, which are large civic and service organizations that encourage non-member participation in activities and take no political positions, cannot discriminate on the basis of race or sex.

As long as the organization is not one created principally for expressive purposes, the Supreme Court has left it to the states to regulate. But state public accommodations laws may be interpreted not to reach the provision of services or groups meeting in different members’ homes, which is why the Boy Scouts of America—with over 5.3 million youth and adult members nationwide—have successfully excluded girls (and atheists) from membership and prevented women from becoming scoutmasters. \(^91\)

The gender divide is deep and firmly entrenched in our cultural heritage. In addition to the 5 million Boy Scouts, there are presently 3.4 million Girl Scouts. The nation’s seven thousand fraternities and sororities boast nine million active members. These numbers do not begin to include the tens of millions of alumni of single-sex clubs. The cultural heritage becomes part of the legal landscape. As just one example, when Congress was crafting Title IX of the Education Amendments of 1972, which prohibits gender discrimination in educational institutions that receive federal funds, it specifically exempted fraternities, sororities, and youth service groups out of respect for tradition. Senator Birch Bayh, sponsor of the amendment, argued in favor of the exception: “Fraternities and sororities have been a tradition in the country for over 200 years. Greek organizations, much like the single-sex college, must not be destroyed in a misdirected effort to apply Title IX.” \(^92\)
In defense of sex segregation in voluntary associations, First Amendment aficionados would point out that the right to associate must mean the right to congregate in ways that do not meet with government approval: it must include the right to exclude. Legally, the Ku Klux Klan can meet without the presence of blacks or Jews, and a women’s encounter group can meet without the presence of men. The law allows racial, sexual, and cultural separatism in the choice of people with whom we affiliate privately. Of course, if the group takes on public characteristics or uses public facilities, it may be legally required to integrate. Only when that public layer is added does the law recognize that associational interests run into equality interests.

Perhaps those equality concerns are something we should think more about in our “private” choice of associations, whether those groupings are a lunch bunch, a book club, or a professional association. They are voluntary associations for people who are in them; they are involuntary associations for people who are excluded from them.

The symbolic message sent by the sex separation promotes an orthodoxy of beliefs. Sex-segregated organizations seduce people into thinking that separation of the sexes is appropriate, even good, and perhaps necessary. But that separatism does not end with childhood. The parents of today’s Girl Scout will be the parents of tomorrow’s plaintiff in a sex discrimination suit alleging exclusionary employment practices.

**Controlling Cross-Dressing**

Legal precedents regarding dress codes that regulate identity and gender formation concretize the separation of the sexes. Employers and schools maintain different standards of appearance for men and women, boys and girls, and legal protests against these gendering practices are often futile. Courts generally allow employers and educational institutions to enforce dress and grooming codes that require employees and schools to sacrifice their personal preferences and conform to conventional norms of male and female appearance.

Courts support employers’ decisions to maintain rigid separation between skirts and pants. Employers may fire women who wear pantsuits, and they can require men to wear ties while exempting women from the regulation. Women have been discharged from employment for not wearing makeup and for wearing too much of it. Men have not been hired or have been terminated for having long hair and donning facial jewelry. Courts
even have local rules about appropriate courtroom attire. A 1994 survey of
the rules in federal district courts in Oklahoma revealed dress regulations
that explicitly prohibit women from wearing pantsuits and expressly re-
quire male lawyers and court personnel to wear coats and ties. In the words
of the survey’s author, the court’s own dress code “purposefully requir[es]
women personnel to feminize their professional appearance.”

The Equal Employment Opportunity Commission originally weighed in
on the side of male employees who challenged hair length regulations for
men. The federal appellate courts, however, unanimously supported em-
ployers’ rights to require male employees to have short hair while permit-
ting female employees to have long hair. The courts held that different stan-
dards of dress and different hair length regulations for males and females
was not discrimination on the basis of sex, because it was simply requiring
employees “to conform to community standards in their dress and appear-
ance.” While courts invalidate hiring policies that respond explicitly to
customer preferences for one sex over the other (such as passengers’ prefer-
ences for female flight attendants), they generally uphold employers’
grooming and attire requirements that keep employees within the confines
of their assigned gender roles, based on “commonly accepted social
norms.”

The generally accepted justification for allowing sex-differentiated
grooming standards is that employers have legitimate image concerns—
which may be couched as professionalism, competence, appropriateness, or
good taste—all of which are shorthand for preserving the gendered status
quo. Not surprisingly, then, employers impose and courts support stronger
prohibitions against men’s wearing earrings, long hair, and skirts than
against women’s wearing pants. One commentator summarized her sur-
vey of dress cases by saying, “Female employees have been more successful
in their challenges of employer dress codes and other appearance standards
than their male counterparts.” Again, it seems easier to cross the gender
divide in one direction than the other.

Parents usually dress children in clothes that convey the child’s gender. Of
course, these clothing and dressing practices persist into adulthood, some-
times amplified by school dress codes that require girls to wear dresses and
boys to wear pants. Many school districts across the country enforce both
dress codes and hair length regulations, and these grooming restrictions are
routinely upheld by courts. At the elementary and secondary levels, schools
can ban clothing that is indecent (although ideas of decency have changed
markedly in twenty or thirty years) or that displays gang affiliation, but
schools often reach beyond danger and decency to ban clothes that are distracting or inappropriate. For instance, in 1996 middle schools in both Seattle and Salt Lake City adopted “no dress” codes for boys, sending boys who wore skirts to school home to change their clothes. One boy chose to wear a skirt as part of his “gothic” dress style, which included wearing all black clothing; the other two boys wore skirts “because they liked them,” not with a purpose to violate school rules.\(^1\) When supporters of the boy in Salt Lake City gathered to protest rules that gave females, but not males, the choice of wearing skirts or pants, the junior high school principal said, “I just told them it wasn’t acceptable in society for men to wear skirts.”\(^2\)

These school clothing regulations, which impose conventional standards of gender decorum, usually withstand legal challenges. As just one example, the Texas Supreme Court in 1995 rejected an equal protection challenge to the school district’s policy that boys could not wear hair past their collars or dangling earrings.\(^3\) The majority accepted the authority, discipline, and hygiene rationales offered by the school district. The dissenting justice recognized the implicit gender messages, noting that girls with long hair also attended gym and biology classes and yet, according to the district, did not present the same health and safety hazards as boys with long hair.

In 1991, when Jimmy Hines was a fourth-grader in Fulton County, Indiana, he began to wear a single gold stud earring to school. Although the elementary school had no written dress code, the junior and senior high schools located in the same building had a rule prohibiting males from wearing earrings. The school superintendent sent Jimmy’s parents a letter, stating that their son’s earring was in violation of school policy. When Jimmy persisted in wearing the earring, the school’s board of trustees then passed a dress code for the elementary school that prohibited jewelry and clothes “not consistent with community standards.” Following his suspension for continuing to wear the earring, Jimmy’s parents sued the school district, arguing that the earring ban for males only had no rational relationship to the educational mission of the school. The Indiana Court of Appeals ruled that the earring ban was not gender discrimination, and accepted the Caston School Corporation’s argument that “the policy creates discipline, a sense of pride, and positive attitudes among students because it discourages rebellion against local community standards of dress, under which earrings are considered female attire.”\(^4\)

In *Harper v. Edgewood Board of Education*, a brother and sister were prohibited from attending their high school prom because they came dressed in the clothing of the opposite sex: Florence wore a tuxedo and Warren wore
a dress, stockings, heels, and earrings. The federal district court rejected the plaintiffs’ First Amendment and equal protection challenges to the school’s policy, holding that “the school dress code does not differentiate based on sex. The dress code requires all students to dress in conformity with the accepted standards of the community.” Of course the extreme fear is that schools will defer to community standards that say girls don’t need to know math or dissect frogs. The more modest and realistic outcome of the deference to community norms demonstrated in these cases is that gender changes in egalitarian directions will be slow, dragged by the inertia of the communities with the greatest resistance to social change.

Attire is a strong form of personal expression, and clothing regulates behaviors as well as appearances. What is lost with gender-coded dress and appearance regulations is more than expressive potential. Dress codes may have some very practical effects: girls and female teachers have less mobility on playgrounds if they are forced to wear dresses; when males are forced to wear jackets and ties, the formality of the dress may create some distance in interpersonal relations. Patriarchy has its couturiers: the rules of dress reinscribe the cultural norms of gender. Women’s appearance can be feminized and men’s appearance masculinized to comport with prevailing social norms that reflect stereotypes of gender, and may be accompanied by gender-specific behavior. The laws relating to gendered dressing do not just squelch expression, but may also inhibit activities. We lose the ability to cross the gender line in terms of attire, presentation, comfort, behavior, and relations. We carefully dress the gender line.

Even when the rules are not formalized, the social constraints on gender-appropriate dress are huge. In 1997 a student of mine at the law school was clerking for a midsize law firm in the Kansas City area. She wore a tailored suit with pants to work one day. A mildly surprised male partner at the firm said, “You’re wearing pants!” With her usual presence of mind, the student replied, “So are you!” Without dress codes or regulations, societal expectations certainly would promote gendered dressing, but judicial decisions give legal imprimatur to the correctness of one of society’s most visible means of sex separation.

Ladies’ Night

Your neighborhood dry cleaner probably charges more to launder women’s shirts than men’s. Your neighborhood bar may offer half-price or two-for-
one drinks for women, while charging men full price. Your local gas station may offer full-service gas pumping, tire and fluid checks, and window washing for women only at self-service prices. A study of hair salons in five major California cities, conducted by the California Assembly Office of Research, found that 40 percent of the salons surveyed “charged between $2.50 and $25 more for women’s services than for similar men’s services.” A study by Florida legislative staff determined that two out of three department stores charged women for alterations on suits, while offering the same service to men free.

Retail establishments across the country charge men and women different prices for essentially, and often precisely, the same services. John Banzhaf, a professor at George Washington University, encouraged students in his public interest law class to test dry cleaning practices: “A man would bring in [an extra large women’s] shirt, pick it up three days later and pay $1.50. He’d walk around the corner, take the shirt out of the wrapper, crumple it up and hand it to a female student to take in to the same cleaners. When she picked up the shirt three days later, the charge was $4.50.”

Men waged some of the first attacks on gender-based pricing, claiming that ladies’ nights at bars, restaurants, car washes, racquet clubs, and sporting events discriminated against them. A number of the earlier decisions, in the late 1970s and early 1980s, were less than sympathetic, and courts in Illinois, Michigan, and Washington accepted the retailers’ rationale for price differentials of wanting to encourage membership and patronage by women—pointing out that men were not refused or denied public accommodations, just charged the “regular” price. Some courts had trouble seeing how men were injured. Reviewing the policy of a dance club to offer discounted drink prices to women, one circuit court commented mildly that the club simply wanted “to increase the enjoyment of the males by enticing the attendance of more females for the males to socialize with.”

More recent decisions hold that stocking the bar with babes is not an adequate justification for price discrimination against men. Yet most of these courts base their decisions on the price discrimination rationale, rather than recognizing the harmful effects that giving women preferential pricing may have on gender stereotypes (that women need economic or ability patronization or that women are appropriately sexual bait). Only in the mid- to late 1990s have legislatures begun to enact statutes making illegal the practice of charging a consumer more based solely on gender. California, for example, passed the Gender Tax Repeal Act, which makes it illegal for businesses to discriminate by charging one sex more for similar ser-
vices.112 While the act is a step in the right direction, businesses may be able to perpetuate the current discrimination by claiming that delivery of services for one sex is inherently more costly than for the other.113 Under the act, businesses are allowed to charge higher prices for services that involve more time, difficulty, or cost. This means that a dry cleaner will be allowed to charge more for a plain woman’s shirt because it is too small to fit on the regular cleaning press, or a hair stylist will be able to charge more to cut a woman’s hair because of the extra time it takes to use a round brush when blow-drying the client’s hair.

In response to the legal assault on gender-based pricing, some retailers are discontinuing their promotions; others are blatantly trying to circumvent prohibitions against gender-based promotions. One restaurant, for example, in response to a human relations commissions complaint, replaced its “Ladies’ Night” with “Skirt and Gown Night,” offering a half-price discount for all patrons wearing a skirt or gown.114 Since society prescribes different attire for men and women and has many long-standing traditions of single-sex organizations, it should come as no surprise that some retail establishments will continue to engage in gender-based pricing, and that the public often will tolerate or encourage these promotions. They are still part of the social fabric in which subtle forms of discrimination based on gender are dismissed as inconsequential or trivial.

Given the lag time for legal institutions to respond to social changes, it may be unrealistic to expect proactivity on the part of courts in breaking down gender barriers. But courts, at times unwittingly, promulgate separation of the sexes.

The gender line is etched firmly into our social consciousness. It is reinscribed legally with decisions relating to occupations, crimes, dress, voluntary associations, and schooling. Legal analysis in cases ranging from evaluation of statutory rape laws to combat restrictions validates sexual stereotypes—stereotypes that are not based on biological differences, but on the traditional ways of doing things.