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Diversity: The Red Herring of Equal Protection

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I want to thank Ann Shalleck and the Washington College of Law community for inviting me to participate in their Centennial Celebration. I am honored to be a member of this panel and have this chance to explore equal protection analysis with you. Listening to Donna Lendoff and Debbie Brake talk about the VMI case\(^1\) reminded me of a small triumph I had at VMI a few years ago. I was visiting Washington & Lee Law School for a few days as part of the ABA site evaluation team. Each morning, before the team gathered for breakfast, I went for my morning run. The first day, I ran toward VMI and noticed that the gates to its track were open. I am unable to resist an open track and this one was no exception. I did not see any “no trespassing” signs and so I decided to run a lap. As I was running, I felt strange because I knew that women are excluded from VMI and I wondered if I would be welcome to use the track, or if the public exclusion of women was so well known that signs indicating this were unnecessary. I remember thinking it was just a matter of time before the cadets woke up and found me on the track and shot me. That was probably the fastest quarter mile I’ve ever ran, and it felt great!

For all I know, VMI may have let women use the track and I may not have been an unwelcome intruder that morning. But even if that is true, I still felt like I had “beaten” VMI’s male-only policy if only for a few minutes and even if in such an insignificant way. Given the public animosity that VMI shows toward women, I ran under the presumption that I would not be welcome, even though that may not have been the case. Violating rules and customs in a male-dominated world that discriminates against women is part of most women’s every day lives. Many women believe they have to keep their triumphs over male-dominated rules to themselves for fear their gains will be taken

\(^1\) United States v. Virginia, 116 S. Ct. 2264 (1996) (holding that an all male institution violates equal protection).
away if the men find out what they are up to. The silent rebellion against male norms has been going on for a long time.

Fortunately, more women are openly testing some of those rules and bringing public attention to the inequalities women face. Justice Ruth Bader Ginsburg's pioneering efforts to secure women's equal protection\(^2\) paved the way for young women like Shannon Faulkner to openly challenge a state military college's male-only policy. Ms. Faulkner wanted more than a secret, personal triumph; she aspired to be a graduate of the Citadel, which had an exclusionary policy similar to VMI's. She wanted to permanently dismantle the Citadel's and VMI's male-only policies and expose them as violations of women's equal protection. Her personal triumph at defeating such policies would potentially empower other women to go about their day-to-day activities without fear of being "shot down" by discriminatory rules and practices.

When this conference was held in April, 1996, we wondered how the VMI case would be decided. Virginia offered three primary justifications for its policy. It asserted that the policy promoted diversity among educational opportunities in Virginia, and also that its "adversative method of training provided educational benefits that could not be made available, unmodified, to women," and that alterations to accommodate women would necessarily have been so 'drastic' as to 'destroy' VMI's program.\(^3\) One of VMI's primary missions was to turn young men into "citizen-soldiers."\(^4\)

I was particularly intrigued by Virginia's argument that the policy is constitutional because it promotes diversity. I wondered if this stated purpose would pass intermediate scrutiny and whether the Court would find that the policy was substantially related to promoting diversity. We also speculated whether the Court would apply strict scrutiny, requiring Virginia to demonstrate that the exclusion of women is necessary to achieve its compelling interest in having diverse educational opportunities for its male citizens. Regardless of the level of review the VMI Court might apply in the case, I thought how ironic it would be if the diversity rationale allowed VMI to stay


\(^3\) 116 S. Ct at 2279.

\(^4\) Id. at 2270 (explaining that as an adversative, hierarchical model featuring "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values").
sex-segregated, but was an insufficient reason to let the U.C. Davis Medical School racially integrate in *Regents of University of California v. Bakke*.

The *Bakke* Court invalidated the medical school's admissions policy because it set aside 16 of 100 seats for racial minorities, for among other reasons, to promote diversity.

Since the conference, the Court held against VMI in an opinion written by Justice Ginsburg and joined by six other justices, including Chief Justice Rehnquist who concurred. Justice Scalia is the lone dissent, and Justice Thomas recused himself. Highlighting language from *Mississippi University for Women v. Hogan*, a 1982 decision in which the Court invalidated an all-female nursing school program, Justice Ginsburg held that VMI had shown no "exceedingly persuasive justification" for its male-only policy. She called this standard of review "skeptical scrutiny." Notwithstanding this new language, it seems that the level of scrutiny for sex-based classifications is still intermediate. For example, in applying skeptical scrutiny, Justice Ginsburg referred to the more common understanding of intermediate scrutiny and held that Virginia failed to show that the "male-only" admissions policy is substantially related to an important governmental interest. In the opinion, Justice Ginsburg reviewed the Court's treatment of sex discrimination cases, relying on precedent and established law to evaluate VMI's exclusively male-only policy.

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5. 438 U.S. 265 (1978) (holding that the race-based admissions program was illegal).

6. 438 U.S. at 274-75. See infra notes 282-84 & 290 and accompanying text.


8. 116 S. Ct. at 2291-309 (Scalia, J., dissenting).


12. Id. at 2274 ("[T]oday's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.").

13. Chief Justice Rehnquist suggests in his concurrence that this new language adds uncertainty to the law and he thinks the Court should have avoided it. 116 S. Ct. at 2287-91 (Rehnquist, C.J., concurring). Justice Scalia states that the Court's use of skeptical scrutiny is another way of using strict scrutiny, which he states is the wrong standard to use. Id. at 2291-309 (Scalia, J., dissenting).


15. Id. at 2275 (reviewing cases from 1971 to present which paved the way for the VMI decision).
She cited with approval the Court's position stating that sex classifications are not exactly analogous to race and ethnicity classifications, that are subject to strict scrutiny. Moreover, she stated that laws classifying on the basis of sex are not constitutionally proscribed because there are differences between men and women; differences that can be accommodated not to disparage men's or women's equal protection rights, but rather to promote equality between the sexes.

Although the Court rejected both of VMI's arguments, VMI's use of the diversity justification, which persuaded the District Court, and received considerable attention from the Supreme Court, emphasizes how terribly misunderstood diversity is. Specifically, the emphasis on diversity detracts from the profound value at stake in admissions and hiring policies that aim to increase the number of people of color and white women in state programs. Commonly known as affirmative action, these policies deal with integration, and government officials originally designed and implemented these policies to increase the representation of minority groups in state programs.

Affirmative action is about integrating state programs on the basis of sex and race. It demonstrates that the diversity rationale is overvalued by both minority and majority groups in equal protection analysis. Although diversity is an attractive goal, it is the wrong issue to focus on in cases like VMI and even Bakke. A fuller understanding of diversity obviates the inquiry into the level of review that should be applied in evaluating the constitutionality of government hiring and admissions policies whose justifications rest partially on

16. Id. (refusing to equate "gender classifications, for all purposes, to classifications based on race or national origin ... ").
17. Id. at 2276 (stating that "[t]he heightened review standard our precedent establishes does not make sex a proscribed classification. ... Physical differences between men and women, however, are enduring" and "remain cause for celebration, but not for denigration of the members of either sex ... ").
19. United States v. Virginia, 116 S. Ct. 2264 (1996), (citing 976 F.2d 890, 899 (4th Cir. 1992)) (stating that VMI failed to establish how a program that benefits only males furthered the Virginia state "diversity" policy).
20. See generally, Sharon Elizabeth Rush, Understanding Affirmative Action: One Feminist's Perspective, in An Ethical Education: Community and Morality in the Multicultural University 195, 203 (M.N.S. Sellers ed., 1994) (noting that the hiring of "poor white men, or the white male critic" through hardship or ideological diversity, respectively frustrates the purpose of affirmative action. Therefore, facial diversity must be included in the context of affirmative action.).
State officials who implement affirmative action policies can rely on the value of integration to achieve their goals. Racial integration is a compelling state interest and integration on the basis of sex is an "exceedingly persuasive justification," if not also compelling.

The exclusively-male policy at issue in VMI was not an affirmative action policy. Quite the contrary; the policy jeopardized the value of integration. State officials who invoke diversity to justify policies that exclude minority groups from state programs must explain why involuntary segregation, masquerading as diversity, is worthier of constitutional protection than is integration. When diversity competes with integration, it should be insufficient to pass even the most minimum level of scrutiny.

Naturally, this view depends on what I mean by the concepts of integration and diversity. Given their complexities, I am not able to define them conclusively in this essay, but I nevertheless want to offer a minimum understanding of them - an understanding I believe is well-accepted. Previously, I suggested that integration means the hiring and admitting people of color and white women into predominantly white, male-state institutions, programs, and jobs. This understanding of integration is well-settled. Racial integration became a primary focus of equal protection when the NAACP worked to desegregate the schools during Jim Crow. The Supreme Court held in Brown v. Board of Education that de jure racial segregation creates a racial caste system where Blacks are denied equal citizenship. The Brown Court held that racial integration is essential for

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24. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 311-12 (1978) (stating that attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education but is one of many in a range of factors).

25. See id. at 314 (remarking that the interest of racial diversity is compelling in the context of a university's admissions program).


27. Programs that exclude majority groups raise different concerns. See text supra at pp. 52-56.

28. For example, perhaps integrating on the basis of sexual orientation, religion, class, or handicap should be the focus of affirmative action policies. It is difficult to dispute that including people in these categories in state programs also promotes equality. I explore this in the context of sexual orientation in, Sharon Elizabeth Rush, Equal Protection Analogies - Identity and "Passing": Race and Sexual Orientation, 13 HARV. BLACKLETTER J. 65 (1997).


31. Id. at 493 (stating that segregation of children in public schools solely on the basis of race
racial equality. Similarly, it is well-settled in American jurisprudence that state programs should be integrated on the basis of sex. In this area, Congress took the leading role and ensured equal protection for women through Title VII of the Civil Rights Act. The Supreme Court started invalidating sex-based laws in the early 1970s, and Justice Ginsburg is very deliberate about detailing the historical discrimination against women in the VMI opinion. Significantly, laws that discriminate on the basis of sex are subject to heightened scrutiny because the Court acknowledges that sex discrimination is somewhat similar to race discrimination, an anathema to a democratic society. Justice Ginsburg uses the analogy between race and sex discrimination throughout the VMI opinion, emphasizing that the importance of equal citizenship for women is similar to that for Blacks.

Thus, integration on the basis of sex seems to be a common, well-accepted value. This is not to say that the government can never treat men and women differently. For example, in Rotsker v. Goldberg, the Court held that only men have to register for the draft. Congress defers to military personnel with respect to rules limiting certain military combat positions to men. Neither the Court nor Congress has taken the position, however, that it is constitutional to although physical facilities and other ‘tangible’ factors maybe equal, deprive black children equal educational opportunities.

32. Id. at 493-94 ("[T]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."). See generally Sharon Elizabeth Rush, The Heart of Equal Protection: Education and Race, 25 N.Y.U. Rev. L. & Soc. Change 1 (1997).


34. United States v. Virginia, 116 S. Ct. 2264, 2278-79 (1996) (indicating that historically Virginia’s discrimination against women has been deliberate).

35. Id. at 2275 (suggesting that "supposed ‘inherent differences’” should not be accepted as grounds for gender classifications because they are no longer accepted for race or national origin classifications).

36. Id. at 2277.


38. Id. (holding that women who were excluded from combat service by statute or military policy and men were not similarly situated for purposes of a draft or registration for a draft).

39. For a background on Congress’ role in the issue of women in the military, see Pamela R. Jones, Note, Women in the Crossfire: Should the Court Alleviate It?, 78 Cornell L. Rev. 252 (1993). See, e.g., Joel Greenberg, Ruling Expands Women’s Roles in the Israeli Military, N.Y. Times, Jan. 3, 1996 at A5 (stating that “American women may fly combat aircraft in the Air Force and Navy. But they still may not serve in the Army’s infantry, armored and helicopter units slated for direct ground combat,” while also noting that other countries like Israel are less protective of women’s roles in the military.).
“categorically” exclude women from serving in the military, or from participating in other state programs. As Justice Ginsburg reaffirms in the VMI case, "the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." Just as race is an insufficient reason to categorically discriminate against minorities, so too is sex an insufficient reason to categorically discriminate against women. Clearly, integration on the basis of race and sex is an accepted and important (compelling) government interest in equal protection analysis.

Finally, I want to emphasize that integration does not mean that people of color and women should assimilate into White, male culture. Reinforcing hegemony by requiring a minority or historically subordinated group to assimilate is unacceptable. True equality for people of color and women in an integrated environment means that they share equal power - "full citizenship stature" - with all others. The differences that people of color and women bring when they integrate an environment must be valued and respected to achieve the equality that integration offers.

Turning to the concept of diversity, several years ago, I wrote an article entitled, "Understanding Diversity," in which I tried to define diversity. It was not easy then, and it is made easier now only because I realize how integration and diversity overlap. In my article, I identified three different kinds of diversity: facial, hardship, and ideological. Briefly, facial diversity applies to government policies whose goals are to increase the number of people of color and white women in their programs. Hardship diversity would target for inclusion "people whose lives are more difficult, and who, as groups, generally do not share in the power structure because of various attributes or characteristics (other than being a man of color or a

40. See United States v. Virginia, 116 S. Ct. at 2282. See also id. at 2295 (Scalia, J., dissenting).
41. Id. at 2275.
43. Id. at 2 (proposing that more possibilities and names exist for the three possibilities chosen, however "these three terms highlight many of the misunderstandings that can arise absent a common definition").
44. Id. (defining a facially diverse group as one that includes members who are not all of one race and gender).
woman) they have that deviate from normative standards." In this group, I included "poor people, working-class people, non-Christians, handicapped persons, homosexuals, [and] the elderly . . . ." Finally, ideological diversity is achieved when an institution has among its members persons who share different views. In the context of law school faculty, for example, it would mean having traditional scholars, critical race theorists, feminist theorists, law and economic theorists, among others on the faculty. My article explores the complexities surrounding diversity, highlighting that none of these definitions is intended to be essentialist; a person can diversify an environment in all three ways, as well as others.

I posited in my article that we, as a society, should strive to achieve all three kinds of diversity. Laws preventing discrimination on the basis of hardship characteristics are necessary and consistent with equality principles. Moreover, ideological diversity is consistent with the First Amendment values we hold dear. As we struggle to define integration and diversity with respect to groups other than people of color and white women, we must remain committed to achieving facial diversity in state institutions, programs, and jobs. Otherwise, it will be all too easy to promote white, male hegemony by hiring white men who fit hardship or ideological diversity goals. 

45. Id. at 3.
46. Id.
47. See generally Rush, supra note 42, at 3-4.
49. Rush, supra note 42, at 3-4.
50. Fortunately, most groups who satisfy hardship diversity are somewhat protected by law. Title VII protects people from government discrimination based on race, color, religion, sex, or national origin. Some groups also receive protection from other laws: the First Amendment guarantees religious freedom and the Americans With Disabilities Act of 1990, 42 U.S.C. §12101, provides protection for disabled persons. Older people are protected by age discrimination laws, and the elderly and poor persons are given some government subsidies to help them combat income deficiencies. Noticeably absent from the group of people who satisfy hardship diversity and who receive some kind of government protection are gays and lesbians. But for the occasional local ordinance providing them equal protection, there are no laws that protect them from government discrimination. In fact, many governments try to pass laws that allow discrimination based on sexual orientation. The House Judiciary Committee approved a bill that would absolve states from recognizing same-sex marriages that were performed in other states. Eric Schmitt, Panel Passes Bill to Let States Refuse to Recognize Gay Marriages, N.Y. Times June 13, 1996 at A15. Significantly, the Supreme Court held in Romer v. Evans, 116 S. Ct. 1620 (1996), that states cannot pass legislation or constitutional amendments prohibiting anti-discrimination laws based on sexual orientation because such laws are motivated by "animus," Id. at 1628, and deny gays and lesbians equal protection. Perhaps the Romer decision will be a turning point for the Gay Civil Rights Movement.
51. See Rush, supra note 42, at 12 (citing as an example Galludet University for hearing impaired, hired non-hearing impaired women as President, only to force her resignation and hire a hearing-impaired white male instead).
and whiteness alone empower... in ways that our present power structure disempowers men of color and women.\textsuperscript{52} How much clearer my understanding of diversity would have been if I had recognized that by facial diversity I meant integration.

Integration on the basis of race and sex achieves diversity. The goal of integration has become lost in the diversity debate, however, because diversity can also be achieved by admitting or hiring applicants who have other "preferred" characteristics not predominant among people in the existing state programs or jobs. For example, the \textit{Bakke} Court defined diversity to include factors in addition to race, such as geographical residency of the applicants, and personal traits, such as musical or athletic talent.\textsuperscript{53} The \textit{Bakke} Court held that the U.C. Davis Medical School should follow Harvard's lead and look at many diversifying characteristics in choosing its class.\textsuperscript{54} In defining diversity, the \textit{Bakke} Court was much more creative than I; according to it, diversity means virtually any differences among people.\textsuperscript{55}

If integration is seen as only one aspect of diversity (facial diversity), it is clear that diversity is always promoted when integration is achieved. In the context of education, an integrated class comprised of both sexes and people of different colors is a more diverse class than is a class comprised of only men or only whites. Conversely, integration on the basis of sex and race is not always achieved when hardship or ideological or other types of diversity are promoted. An educational institution that admits the white applicant from Minnesota and the white piano player into a predominantly white medical school promotes diversity but otherwise leaves the school racially segregated.

A critical question becomes: what kind of diversity does equal protection protect? At the core of equal protection analysis is the concept of protecting equal citizenship.\textsuperscript{56} Justice Ginsburg in the

\begin{itemize}
\item \textsuperscript{52} Rush, supra note 42, at 11 (footnote omitted).
\item \textsuperscript{53} "[T]he race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer... . In Harvard college admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316-18 (1978) (citing Appendix to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as amicus curia) (comparing the U.C. Davis admissions policy that set-aside 16 of 100 seats for minority applicants to Harvard admissions policy).
\item \textsuperscript{54} \textit{Id.} at 317 (stating "[the Harvard Program] treats each applicant as an individual in the admissions process. ... The applicant's qualifications would [be] weighed fairly, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.").
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} See KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE
VMI opinion provides a simple and powerful definition of citizenship, referred to above, but worth repeating here. She states that "full citizenship stature" means having "equal opportunity to aspire, achieve, participate in and contribute to society based on [an individual's] talents and capacities." Thus, the equal protection clause should protect those kinds of diversity that promote equal citizenship. Promoting facial diversity is consistent with the purpose of equal protection; it provides equal opportunities for people of color and white women to participate in society as equal citizens.

Just as it is clear that equal protection guarantees people of color and white women equal citizenship stature, it is also clear that equal protection does not guarantee the superior citizenship stature of historically privileged groups. This interpretation of equal protection would undermine the accepted goal of integration and render meaningless the concept of diversity. Simultaneously, a meaningless definition of diversity would become the focus of equal protection, which, in turn, would maintain the status quo. Men would continue to be valued more than women, and whites would continue to be valued more than people of color. In short, an interpretation of equal protection that valued majority group privileged citizenship stature over the citizenship rights of women and people of color would basically render the equal protection clause superfluous.

Moreover, some kinds of diversity have nothing to do with promoting equal citizenship and are beyond the scope of equal protection. The equal protection clause has never protected everyone from every kind of discrimination. In fact, the nature of law is to discriminate and the challenge for governments is to justify why some laws privilege some people and not others. For example, an applicant to a state military school who plays the piano and is rejected from the school would not be able to successfully challenge the school's decision as a denial of equal protection because only non-piano players were admitted to the school. This would be so even though the entering class will be less diverse because of the admissions committee's decision.

In contrast, if the musician is a woman trying to get into VMI, her...

58. Id. at 2276.
59. See id. at 2275; see also Reed v. Reed, 404 U.S. 71 (1971) (illustrating the first time the Supreme Court ruled in favor of a woman claiming denial of equal protection by state laws); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (recognizing women's equal protection rights under Louisiana law); Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating a Utah child support law with separate support ages for boys and girls).
rejection raises equal protection concerns because she is a woman, not because she plays the piano. The diversity she brings as a piano player is irrelevant to the equal protection claim, but the diversity she brings as a woman is at the core of equal protection analysis: she integrates the school. To discriminate against her on the basis of her sex is to deny her equal citizenship.

Understanding that diversity in the equal protection context should be synonymous with integration, it is clear that the Bakke Court defined diversity much too broadly. Had the Court focused on integration, it is difficult to dispute that integrating state schools on the basis of race is a compelling governmental interest. An affirmative action policy designed to racially integrate the medical school was the only realistic and practical way to accomplish this well-accepted, constitutional goal. This understanding of diversity supports the constitutionality of the medical school’s plan. If the Bakke Court had adhered to the Brown Court’s principle of racial equality in public education, the medical school’s affirmative action policy would have been upheld. The U.C. Davis Medical school plan could then have been publicly held out as a policy consistent with our democratic value and commitment to achieving racial equality. Integrating a public school on the basis of race does not interfere with achieving diversity; integrating public schools enhances the goal of achieving diversity.

The Court was correct to invalidate the exclusively-male policy in VMI. However, the decision fails to clarify the meaning of diversity in equal protection analysis and instead actually adds to the existing confusion. Significantly, VMI lost on the diversity justification only because the state could not prove that the purpose behind the policy was to promote diversity. Quoting the Court, “Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the State.” This holding on the diversity justification suggests an all-male public school might be considered diverse for equal protection purposes if it were established for the purpose of promoting diversity. An all-male public school like VMI fails to promote the values of integration and equal citizenship which are at

60. See Regents of the Univ. of California v. Bakke, 483 U.S. 265, 315 (1978) (Powell, J., concurring) (stating “the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which race or ethnic origin is but a single though important element.”). See also Marty B. Lorenzo, Racially Conscious Diversity Admissions Programs: Furthering a Compelling State Interest, 2 Mich. J. Race & L. 361 (1977).


62. Id. at 2277.
the core of equal protection. A state’s decision to create such a program for the purpose of offering a diverse educational experience to its male citizens should not allow the state to escape its obligation to provide equal protection to its female citizens.

The VMI Court’s rejection of Virginia’s second proffered justification for its policy, to produce “citizen-soldiers,” indirectly supports this understanding of the role of diversity in an equal protection analysis. For example, the Court held “[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’” The Court explicitly acknowledges the equal citizenship stature of men and women stating, “[s]urely [VMI’s goal of producing citizen-soldiers] is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men.” While this language supports the conclusion that VMI should be integrated, the Court does not use the term “integration” to support its holding that the exclusively-male policy violates women’s equal protection.

The Court’s choice of words, “may not exclude women,” is an oblique way of saying the school should be integrated on the basis of sex. The Court could have taken a more aggressive approach and asked whether the Constitution required VMI to integrate, consistent with equal protection. This focus places the male-only policy in historical context, exposing it as an age-old method of denying women equality. This focus also reinforces our commitment to eradicating discriminatory policies.

The VMI Court explicitly left open the question whether “separate but equal” state schools for college men and women would be con-

63. Interestingly, the majority opinion does not mention diversity as a possible rationale for maintaining the sex-segregated university. Justice Scalia’s dissent, however, argues that Mississippi University for Women offers “an element of diversity that has characterized American education and enriched much of American life.” United States v. Virginia, 116 S. Ct. at 2308 (Scalia, J., dissenting) (quoting Hogan, 458 U.S. at 735 (1982) (Powell, J., dissenting)). I think the Hogan Court was correct to avoid the diversity trap, but it nevertheless reached the wrong conclusion. Similarly, the Hogan dissent was correct to uphold the constitutionality of the school, but should not have placed its justification on diversity. A voluntarily sex- (or race) segregated school for women (or people of color) is constitutional because it promotes the equal citizenship of women (or people of color) in a male-(or white) dominated world. See Hogan, 458 U.S. at 735 (Powell, J., dissenting).

64. United States v. Virginia, 116 S. Ct. at 2276.
65. Id. at 2280 (quoting Hogan, 458 U.S. at 725).
66. Id. at 2282.
67. Id.
68. Plessy v. Ferguson, 163 U.S. 537 (1896) (establishing the separate-but-equal rule for applying the Fourteenth Amendment’s equal protection guarantee).
Chief Justice Rehnquist's concurring opinion posits that VMI could have avoided a constitutional attack if Virginia had created a separate school for women of equal caliber to VMI. Justice Scalia believes Virginia's goal of diversity was achieved and beyond constitutional infirmity because the state also had four women's colleges in addition to VMI.

Establishing "separate but equal" schools on the basis of sex is a complex issue and I want to touch on it only briefly to demonstrate how the diversity rationale does not belong in this debate either. In my opinion, male-only segregation like that in VMI can never be equal for reasons similar to the reasons that white-only segregation like that in Brown can never be equal. White-only segregation denies people of color their rights to equal citizenship. This is the very foundation of Brown and should apply just as forcefully in the context of sex discrimination. Male-only state schools create a hierarchy where men's citizenship stature is valued more than women's citizenship rights. A defense of diversity should not save them under the equal protection clause.

Closely related and somewhat ironically but nevertheless understandably, state programs permitting voluntary segregation by minority groups like women and people of color should be constitutional, but, again, not because they promote diversity. Such programs should be constitutional because they empower minority groups who can then compete as equal citizens with their majority counterparts and they do not threaten the equal citizenship rights of privileged groups. In this way, the VMI Court's reliance on Hogan was misplaced because the Court in Hogan was also diverted from the critical issue of deciding whether Mississippi's all-female nursing program was constitutional.

In Hogan, one male plaintiff claimed the University's female-only admissions policy was unconstitutional. Mississippi offered him other available nursing programs, but he wanted to attend the all-female nursing school because it was convenient for him. Mississippi asserted the program was part of an affirmative action policy to

69. United States v. Virginia, 116 S. Ct. at 2276 n.7 (quoting Hogan, 458 U.S. at 720 n.1).
70. Id. at 2290 (Rehnquist, C.J., concurring).
71. Id. at 2299 n.3 (Scalia, J., dissenting).
73. Id. at 494 (finding that segregation deprives people of equal protection of the laws guaranteed by the Fourteenth Amendment).
75. Id. at 724 n.8 (explaining that in order to attend a co-educational nursing program, he would have to drive a "considerable distance" to reach school).
remedy some of the past discrimination women suffered in Mississippi’s educational system.\textsuperscript{76} The \textit{Hogan} Court rejected this argument, finding no evidence that the actual purpose of the exclusively-female policy was to remedy past discrimination because nursing programs had always been available to women in Mississippi.\textsuperscript{77} Notice how the \textit{Hogan} Court’s confusion about differences between majority-only and minority-only exclusive policies and the role of diversity in equal protection resurfaces in \textit{VMI}. For example, just as the \textit{Hogan} Court invalidated the all-female nursing program because it was not created with the purpose of helping women become nurses because Mississippi had always made nursing programs available to women, the \textit{VMI} Court also rejected Virginia’s argument that the Military Institute was created to promote diversity, when it clearly was not.\textsuperscript{78} If the \textit{Hogan} Court had seen the actual purpose of the Women’s University was to promote the equal citizenship of women (regardless of what they were studying or that they might be able to study nursing at sex-integrated schools and regardless that nursing is a predominantly female field), then perhaps the \textit{VMI} Court would have focused on \textit{Hogan} to expose the actual purpose of VMI’s policy, which was to promote the superior citizenship stature of men at the expense of denying equal citizenship rights of women.\textsuperscript{79} This focus obviates the need to discuss the irrelevant issue of diversity.

Thus, diversity simply has nothing to do with either case, as the \textit{Hogan} Court understood because it did not discuss the issue. On the other hand, Chief Justice Rehnquist and Justice Powell dissented in \textit{Hogan} because they believed the all-female school offered “an element of diversity that has characterized American education and enriched much of American life.”\textsuperscript{80} Chief Justice Rehnquist’s dissent in \textit{Hogan} carried over to his concurrence in \textit{VMI}, thus augmenting the confusion over the proper role of diversity in equal protection.\textsuperscript{81} Recall that he suggests that \textit{VMI} would have promoted diversity if only Virginia had created an all-female school of equal caliber to \textit{VMI}.\textsuperscript{82} Thus, in both cases, Chief Justice Rehnquist reached the right result; he would have upheld the all-female nursing school and he

\textsuperscript{76} \textit{Id.} at 727 (noting that “[t]he State’s primary justification for maintaining the single-sex admissions policy . . . is that it compensates for discrimination against women”).

\textsuperscript{77} \textit{Id.} at 729 (stating that women had received the vast majority of nursing degrees in Mississippi prior to the opening of the Mississippi University School of Nursing).

\textsuperscript{78} United States v. Virginia, 116 S. Ct. at 2279.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Hogan}, 458 U.S. at 735 (Powell, J., dissenting).

\textsuperscript{81} United States v. Virginia, 116 S. Ct. at 2290.

\textsuperscript{82} \textit{Id.} (Rehnquist, C.J., concurring).
DIVERSITY: THE RED HERRING

invalidated VMI’s male-only policy. However, neither he nor the majority of justices in VMI understand that the proper justification for upholding the constitutionality of an all-female program is because it promotes the equal citizenship of women without simultaneously damaging men’s equal citizenship rights. Conversely, the all-male policy in VMI promotes men’s superior citizenship rights and denies equal citizenship rights to women.

Similarly, people of color should be allowed state support for voluntarily created racially-segregated schools as a way of empowering themselves in a white-dominated world. Unfortunately, efforts to help inner-city children of color by creating public schools for their exclusive use are being stymied because of the confusion around the differences between majority-only and minority-only exclusive policies. The programs are dramatically different and it is disingenuous for white society to challenge voluntarily created minority-only programs as a denial of their equal protection given the profound racial inequality in our society where white is valued over black, brown and other skin colors.

A day may come, hopefully will come, when women and people of color will be equal to men and whites, respectively, making the use of minority-only exclusive policies unconstitutional. But just as we are not yet a colorblind society, neither are we a society unmindful of the privileged status of men. To pretend otherwise is to deny reality and reinforce the status quo where white is valued over other skin colors and men are valued over women.

In summary, then, couching the constitutional inquiry in cases like Bakke and VMI in the context of integration also puts in perspective the diversity justification. Affirmative action policies are constitutional because they integrate state programs. Integration on the basis of race and sex also diversifies state programs. In contrast, attempts to justify sex-segregation in state programs by arguing the policy promotes diversity is irrelevant to an equal protection analysis. Voluntarily created all-female schools should be constitutional because they promote the equal citizenship of women without

83. I use the word “voluntarily” with reservation because often the racism is so pervasive in our society that people of color seek solace in isolation from white society to regain their identities. In this way, social isolation is not truly voluntary. See Nancy A. Denton, The Persistence of Segregation: Links Between Residential Segregation and School Segregation, 80 MINN. L. REV. 795, 808 (1996) (“[T]he issue really is whether such a ‘choice’ can be called voluntary if it results from a need to escape racism and racists.”).

84. See Jacques Steinberg, Plan for Harlem Girls School Faces Concern Over Sex Bias, N.Y. TIMES, July 16, 1996 at A1 (stating that “studies often show that girls, particularly from poor neighborhoods, learn better when boys are not in the classroom”).

damaging the equal citizenship stature of men. This is true for voluntarily race-segregated programs for minorities, as well. Similarly, the diversity justification offered by Virginia merely highlights the inequality perpetuated by the exclusively-male policy. Equal protection does not protect the privileged citizenship stature of men at the expense of the equal citizenship rights of women. Moreover, the implicit suggestion that a male-only policy could pass constitutional muster if adopted with the actual purpose of promoting diversity undermines that part of the opinion that strikes down Virginia’s second justification that the policy is necessary to create “citizen-soldiers” out of the male cadets. VMI’s policy is unconstitutional because it denies women equal citizenship. This rationale alone is sufficient to invalidate the policy and would also be sufficient to invalidate a similar white-only policy in a state program like VMI. In short, cases like Bakke and VMI are about integration, not diversity. Diversity is the red herring of equal protection analysis.