UNITED STATES, PETITIONER v. VIRGINIA ET AL. [1]

SUPREME COURT OF THE UNITED STATES

518 U.S. 515

January 17, 1996, Argued

June 26, 1996*, Decided

OPINION: JUSTICE GINSBURG delivered the opinion of the Court.

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

I. Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative method" [that] constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. [Neither] the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

II. From its establishment in 1839, [VMI] has remained financially supported by Virginia. [VMI] today enrolls about 1,300 men as cadets. [Its] "adversative, or doubting, model of education" [features] "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." [VMI] cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. Entering students are incessantly exposed to the rat line, "an extreme form of the adversative model," comparable in intensity to Marine Corps boot camp. Tormenting and punishing, the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their former [tormentors].

In 1990, prompted by a female high-school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment.

The District Court ruled in favor of VMI, [but the Court of Appeals reversed and remanded, suggesting] these options for the Commonwealth: Admit women to VMI;

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[1] **The following case has been heavily edited from the original and is not intended to be a full nor a representative reproduction. It is intended for use in academic purposes only.**

establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution.

[In response] to the Fourth Circuit's ruling, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL). The 4-year, state-sponsored undergraduate program would be located at Mary Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission -- to produce "citizen-soldiers" -- the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources.

[The] District Court [decided] the plan met the requirements of [equal protection]. [A] divided Court of Appeals affirmed the District Court's judgment.

III. The cross-petitions in this case present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI -- deny to women "capable of all of the individual activities required of VMI cadets," the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, -- as Virginia's sole single-sex public institution of higher education -- offends the Constitution's equal protection principle, what is the remedial requirement?

IV. We note, once again, the core instruction of this Court's pathmarking decisions in *J. E. B.* v. *Alabama ex rel. T. B.*(1994), and *Mississippi Univ. for Women,*: Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. [Since *Reed*], 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.

Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See *Loving* v. *Virginia* (1967). Physical differences between men and women, however, are enduring: "The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both."

"Inherent 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. [Such] classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women. Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth Amendment's Equal Protection Clause. Because the remedy proffered by Virginia -- the Mary Baldwin VWIL program -- does not cure the constitutional violation, *i.e.*, it does not provide equal opportunity, we reverse the Fourth Circuit's final judgment in this case.

V. Virginia [asserts] two justifications in defense of VMI's exclusion of women. First, "[single-sex] education provides important educational benefits," and the option of single-sex education contributes to "diversity in educational approaches." Second, "[the] unique VMI method of character development and leadership training," the school's adversative approach, would have to be modified were VMI to admit women. We consider these two justifications in turn.

A. Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good.

[Neither] recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. In 1839, when the Commonwealth established VMI, a range of educational opportunities for men and women was scarcely contemplated. Higher education at the time was considered dangerous for women; reflecting widely held views about women's proper place, the Nation's first universities and colleges.

[In] 1970, [the] University of Virginia, introduced coeducation and, in 1972, began to admit women on an equal basis with men. [Virginia] describes the current absence of public single-sex higher education for women as "an historical anomaly." But the historical record indicates action more deliberate than anomalous: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation. [In] 1990, an official commission [reported], "Because colleges and universities provide opportunities for students to develop values and learn from role models, it is extremely

important that they deal with faculty, staff, and students without regard to sex, race, or ethnic origin."

This statement, the Court of Appeals observed, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions."

[We] find no persuasive evidence in this record that VMI's male-only admission policy "is in furtherance of a state policy of 'diversity.'" [A] purpose genuinely to advance an array of educational options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan -- a plan to "afford a unique educational benefit only to males." However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection.

B. Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," VMI's program. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminate the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia."

The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect "at least these three aspects of VMI's program -- physical training, the absence of privacy, and the adversative approach." And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that "the VMI methodology could be used to educate women." The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. The parties, furthermore, agree that "*some* women can meet the physical standards [VMI] now impose[s] on men."

In support of its initial judgment for Virginia the District Court made "findings" on "gender-based developmental differences." These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." For example, "males tend to need an atmosphere of adversativeness," while "females tend to thrive in a cooperative atmosphere." "I'm not saying that some women don't do well under [the] adversative model," VMI's expert on educational institutions testified, "undoubtedly there are some [women] who do"; but educational experiences must be designed "around the rule," this expert maintained, and not "around the exception."

The United States emphasizes that [we] have cautioned reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia, and relied upon by the District Court. State actors controlling gates to opportunity, we have instructed,

may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women.*

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. [However], it is also probable that "many men would not want to be educated in such an environment." Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women -- or men -- should be forced to attend VMI"; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies]," see *Mississippi Univ. for Women* once routinely used to deny rights or opportunities.

Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded. The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.

[Surely] the Commonwealth's great goal [of producing great citizen-soldiers] is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier "citizen-soldier" corps. Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,'" *Mississippi Univ. for Women*, that must be the solid base for any gender-defined classification.

VI. In the second phase of the litigation, Virginia presented its remedial plan -- maintain VMI as a male-only college and create VWIL as a separate program for women. The plan met the [lower courts approval.] The United States challenges this "remedial" ruling as pervasively misguided.

A. A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]." The constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion, we have explained, aims to "eliminate [so far as possible] the discriminatory effects of the past" and to "bar like discrimination in the future."

[VWIL] affords women no opportunity to experience the rigorous military training for which VMI is famed. Instead, the VWIL program "deemphasize[s]" military education, and uses a "cooperative method" of education "which reinforces self-esteem."

VWIL students participate in ROTC and a "largely ceremonial" Virginia Corps of Cadets, but Virginia deliberately did not make VWIL a military institute. The VWIL House is not a military-style residence and VWIL students need not live together throughout the 4-year program, eat meals together, or wear uniforms during the school day. VWIL students thus do not experience the "barracks" life "crucial to the VMI experience," the spartan living arrangements designed to foster an "egalitarian ethic."

VWIL students receive their "leadership training" in seminars, externships, and speaker series, episodes and encounters lacking the "physical rigor, mental stress, . . . minute regulation of behavior, and indoctrination in desirable values" made hallmarks of VMI's citizen-soldier training. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the "feeling of tremendous accomplishment" commonly experienced by VMI's successful cadets.

Virginia maintains that these methodological differences are "justified pedagogically," based on "important differences between men and women in learning and developmental needs," "psychological and sociological differences" Virginia describes as "real" and "not stereotypes." [Generalizations] 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. [In] contrast to the generalizations about women on which Virginia rests, we note again these dispositive realities: VMI's "implementing methodology" is not "inherently unsuitable to women," "some women . . . do well under [the] adversative model,... some women, at least, would want to attend [VMI] if they had the opportunity," and "can meet the physical standards [VMI] now impose[s] on men," It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted.

Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs. Experience shows such adjustments are manageable. See U.S. Military Academy, A. Vitters, N. Kinzer, & J. Adams, Report of Admission of Women (Project Athena I-IV) (1977-1980) (4-year longitudinal study of the admission of women to West Point).

B. In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network.

Mary Baldwin does not offer a VWIL student the range of curricular choices available to a VMI cadet. [VWIL] students attend a school that "does not have a math and science focus,"; they cannot take at Mary Baldwin any courses in engineering or the advanced math and physics courses VMI offers.

[The physical training, available facilities and funding at VMI and VWIL are incomparable.]

Virginia, in sum, while maintaining VMI for men only, has failed to provide any "comparable single-gender women's institution." Instead, the Commonwealth has created a VWIL program fairly appraised as a "pale shadow" of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence.

Virginia's VWIL solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court's 1946 ruling that, given the equal protection guarantee, African Americans could not be denied a legal education at a state facility. See *Sweatt* v. *Painter*, (1950). Reluctant to admit African Americans to its flagship University of Texas Law School, the State set up a separate school for Heman Sweatt and other black law students. As originally opened, the new school had no independent faculty or library, and it lacked accreditation. Nevertheless, the state trial and appellate courts were satisfied that the new school offered Sweatt opportunities for the study of law "substantially equivalent to those offered by the State to white students at the University of Texas."

This Court contrasted resources at the new school with those at the school from which Sweatt had been excluded [and found them incomparable in] "those qualities which are incapable of objective measurement but which make for greatness" in a school, including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." Facing the marked differences reported in the *Sweatt* opinion, the Court unanimously ruled that Texas had not shown "substantial equality in the [separate] educational opportunities" the State offered. Accordingly, the Court held, the Equal Protection Clause required Texas to admit African Americans to the University of Texas Law School.

In line with *Sweatt*, we rule here that Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI.

C. The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." Valuable as VWIL may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade. sum, Virginia's remedy does not match the constitutional violation; the Commonwealth has shown no "exceedingly persuasive justification" for withholding from women qualified for the experience premier training of the kind VMI affords.

For the reasons stated, the initial judgment of the Court of Appeals, [finding a violation of equal protection] is affirmed, the final judgment of the Court of Appeals [as to the remedy] is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

DISSENT: JUSTICE SCALIA, dissenting.

As to facts: [This Court] explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: It drastically revises our established standards for reviewing sex-based classifications. And as to history: It counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

[The] virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter majoritarian preferences of the society's law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy -- so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States -- the old one -- takes no sides in this educational debate, I dissent.

I. I shall devote most of my analysis to evaluating the Court's opinion on the basis of our current equal protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case. Strict scrutiny, we have said, is reserved for state "classifications based on race or national origin and classifications affecting fundamental rights." [We] have no established criterion for "intermediate scrutiny" either, but essentially apply it when it seems like a good idea to load the dice. So far it has been applied to content-neutral restrictions that place an incidental burden on speech, to disabilities attendant to illegitimacy, and to discrimination on the basis of sex.

I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny. Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever

abstract tests we may choose to devise, they cannot supersede -- and indeed ought to be crafted *so as to reflect* -- those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."

The all-male constitution of VMI comes squarely within such a governing tradition. Founded by the Commonwealth of Virginia in 1839 and continuously maintained by it since, VMI has always admitted only men. And in that regard it has not been unusual. For almost all of VMI's more than a century and a half of existence, its single-sex status reflected the uniform practice for government-supported military colleges. Another famous Southern institution, The Citadel, has existed as a state-funded school of South Carolina since 1842. And all the federal military colleges -- West Point, the Naval Academy at Annapolis, and even the Air Force Academy, which was not established until 1954 -- admitted only males for most of their history. Their admission of women in 1976 came not by court decree, but because the people, through their elected representatives, decreed a change. In other words, the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.

[Today], however, change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court. Even while bemoaning the sorry, bygone days of "fixed notions" concerning women's education, the Court favors current notions so fixedly that it is willing to write them into the Constitution of the United States by application of custom-built "tests." This is not the interpretation of a Constitution, but the creation of one.

II. To reject the Court's disposition today, however, it is not necessary to accept my view that the Court's made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means. It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades. It is well settled [that] we evaluate a statutory classification based on sex under a standard that lies "between the extremes of rational basis review and strict scrutiny." We have denominated this standard "intermediate scrutiny" and under it have inquired whether the statutory classification is "substantially related to an important governmental objective."

Although the Court in two places recites the test [which] asks whether the State has demonstrated "that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," the Court never answers the question presented in anything resembling that form. When it engages in analysis, the Court instead prefers the phrase "exceedingly

persuasive justification" from *Hogan*. The Court's nine invocations of that phrase, and even its fanciful description of that imponderable as "the core instruction" of previous Court decisions would be unobjectionable if the Court acknowledged that *whether* a "justification" is "exceedingly persuasive" must be assessed by asking"[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." Instead, however, the Court proceeds to interpret "exceedingly persuasive justification" in a fashion that contradicts the reasoning of *Hogan* and our other precedents.

[Only] the amorphous "exceedingly persuasive justification" phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women willing and able to undertake VMI's program. [There] is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance.

Our task is to clarify the law -- not to muddy the waters, and not to exact overcompliance by intimidation. The States and the Federal Government are entitled to know *before they act* the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek-a-boo.

III. With this explanation of how the Court has succeeded in making its analysis seem orthodox -- and indeed, if intimations are to be believed, even overly generous to VMI -- I now proceed to describe how the analysis should have been conducted. The question to be answered, I repeat, is whether the exclusion of women from VMI is "substantially related to an important governmental objective."

A. It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men's and women's colleges. But beyond that, as the Court of Appeals here stated: "That single-gender education at the college level is beneficial to both sexes is a *fact established in this case*."

As an initial matter, Virginia demonstrated at trial that "[a] substantial body of contemporary scholarship and research supports the proposition that, although males and females have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated." While no one questioned that for many students a coeducational environment was nonetheless not inappropriate, that could not obscure the demonstrated benefits of single-sex colleges.

But besides its single-sex constitution, VMI is different from other colleges in another way. It employs a "distinctive educational method," sometimes referred to as the "adversative, or doubting, model of education." "Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational

experience." No one contends that this method is appropriate for all individuals; education is not a "one size fits all" business. Just as a State may wish to support junior colleges, vocational institutes, or a law school that emphasizes case practice instead of classroom study, so too a State's decision to maintain within its system one school that provides the adversative method is "substantially related" to its goal of good education. Moreover, it was uncontested that "if the state were to establish a women's VMI-type [*i. e.*, adversative] program, the program would attract an insufficient number of participants to make the program work," and it was found by the District Court that if Virginia were to include women in VMI, the school "would eventually find it necessary to drop the adversative system altogether." Thus, Virginia's options were an adversative method that excludes women or no adversative method at all.

[Virginia's] financial resources, like any State's, are not limitless, and the Commonwealth must select among the available options. Virginia thus has decided to fund, in addition to some 14 coeducational 4-year colleges, one college that is run as an all-male school on the adversative model: the Virginia Military Institute.

B. The Court contends that "[a] purpose genuinely to advance an array of educational options . . . is not served" by VMI. It relies on the fact that all of Virginia's *other* public colleges have become coeducational. The apparent theory of this argument is that unless Virginia pursues a great deal of diversity, its pursuit of some diversity must be a sham. This fails to take account of the fact that Virginia's resources cannot support all possible permutations of schools, and of the fact that Virginia coordinates its public educational offerings with the offerings of in-state private educational institutions that the Commonwealth provides money for its residents to attend and otherwise assists -- which include four women's colleges.

In addition to disparaging Virginia's claim that VMI's single-sex status serves a state interest in diversity, the Court finds fault with Virginia's failure to offer education based on the adversative training method to women. It dismisses the District Court's "'findings' on 'gender-based developmental differences'" on the ground that "these 'findings' restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female 'tendencies.'" How remarkable to criticize the District Court on the ground that its findings rest on the evidence (*i. e.*, the testimony of Virginia's witnesses)! That is what findings are supposed to do. It is indefensible to tell the Commonwealth that "the burden of justification is demanding and it rests entirely on [you]," and then to ignore the District Court's findings *because* they rest on the evidence put forward by the Commonwealth -- particularly when, as the District Court said, "the evidence in the case . . . is *virtually uncontradicted.*"

Ultimately, in fact, the Court does not deny the evidence supporting these findings. It instead makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial.

It is not too much to say that this approach to the litigation has rendered the trial a sham.

But treating the evidence as irrelevant is absolutely necessary for the Court to reach its conclusion.

[In addition the] Court contends that Virginia, and the District Court, erred, and "misperceived our precedent," by "training their argument on 'means' rather than 'end.'". The Court focuses on "VMI's mission," which is to produce individuals "imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . . . to defend their country in time of national peril." "Surely," the Court says, "that goal is great enough to accommodate women." This is lawmaking by indirection. What the Court describes as "VMI's mission" is no less the mission of *all* Virginia colleges. It can be summed up as "learning, leadership, and patriotism." To be sure, those general educational values are described in a particularly martial fashion in VMI's mission statement, in accordance with the military, adversative, and all-male character of the institution. But imparting those values *in that fashion -- i. e.*, in a military, adversative, all-male environment -- is the *distinctive* mission of VMI. And as I have discussed (and both courts below found), *that* mission is *not* "great enough to accommodate women."

The Court's analysis at least has the benefit of producing foreseeable results. Applied generally, it means that whenever a State's ultimate objective is "great enough to accommodate women" (as it always will be), then the State will be held to have violated the Equal Protection Clause if it restricts to men even one means by which it pursues that objective -- no matter how few women are interested in pursuing the objective by that means, no matter how much the single-sex program will have to be changed if both sexes are admitted, and no matter how beneficial that program has theretofore been to its participants.

The Court argues that VMI would not have to change very much if it were to admit women. The principal response to that argument is that it is irrelevant: If VMI's single-sex status is substantially related to the government's important educational objectives, as I have demonstrated above and as the Court refuses to discuss, that concludes the inquiry.

But if such a debate were relevant, the Court would certainly be on the losing side. The District Court found as follows: "The evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and 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." Changes that the District Court's detailed analysis found would be required include new allowances for personal privacy in the barracks, such as locked doors and coverings on windows, which would detract from VMI's approach of regulating minute details of student behavior, "contradict the principle that everyone is constantly subject to scrutiny by everyone else," and impair VMI's "total egalitarian approach" under which every student must be "treated alike"; changes in the physical training program, which would reduce "the intensity and aggressiveness of the current program"; and various

modifications in other respects of the adversative training program that permeates student life. As the Court of Appeals summarized it, "the record supports the district court's findings that at least these three aspects of VMI's program -- physical training, the absence of privacy, and the adversative approach -- would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training."

IV

As is frequently true, the Court's decision today will have consequences that extend far beyond the parties to the litigation. What I take to be the Court's unease with these consequences, and its resulting unwillingness to acknowledge them, cannot alter the reality.

A. Under the constitutional principles announced and applied today, single-sex public education is unconstitutional. By going through the motions of applying a balancing test -- asking whether the State has adduced an "exceedingly persuasive justification" for its sex-based classification -- the Court creates the illusion that government officials in some future case will have a clear shot at justifying some sort of single-sex public education. Indeed, the Court seeks to create even a greater illusion than that: It purports to have said nothing of relevance to *other* public schools at all. "We address specifically and only an educational opportunity recognized . . . as 'unique.'"

And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. Indeed, the Court indicates that if any program restricted to one sex is "unique," it must be opened to members of the opposite sex "who have the will and capacity" to participate in it. I suggest that the single-sex program that will not be capable of being characterized as "unique" is not only unique but nonexistent.

In any event, regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead. [The] enemies of single-sex education have won; by persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.

[The] only hope for state-assisted single-sex private schools is that the Court will not apply in the future the principles of law it has applied today. That is a substantial hope, I am happy and ashamed to say. After all, did not the Court today abandon the principles of law it has applied in our earlier sex-classification cases? And does not the Court positively invite private colleges to rely upon our ad-hocery by assuring them this litigation is "unique"? I would not advise the foundation of any new single-sex college (especially an all-male one) with the expectation of being allowed to receive any government support; but it is too soon to abandon in despair those single-sex colleges already in existence. It will certainly be possible for this Court to write a future opinion that ignores the broad principles of law set forth today, and that characterizes as utterly dispositive the opinion's perceptions that VMI was a uniquely prestigious all-male

institution, conceived in chauvinism, etc., etc. I will not join that opinion.