UNITED STATES v. VIRGINIA
SUPREME COURT OF THE UNITED STATES
518 U.S. 515
June 26, 1996
[7 – 1][1]

Here is a recent "equal protection" case of great interest. Do you remember this one?

OPINION: GINSBURG / STEVENS / O'CONNOR / KENNEDY / SOUTER / BREYER / REHNQUIST…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.

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" modeled on English public schools and once characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course.

VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals. VMI's endowment reflects the loyalty of its graduates; VMI has the largest per-student endowment of all public undergraduate institutions in the Nation.

[1] Justice Thomas did not take part.

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.

From its establishment in 1839 as one of the Nation's first state military colleges, VMI has remained financially supported by Virginia and "subject to the control of the Virginia General Assembly."…

VMI today enrolls about 1,300 men as cadets. Its academic offerings in the liberal arts, sciences, and engineering are also available at other public colleges and universities in Virginia. But VMI's mission is special. It is the mission of the school "to produce educated and honorable men, prepared for the varied work of civil life, 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 as citizen-soldiers to defend their country in time of national peril." In contrast to the federal service academies, institutions maintained "to prepare cadets for career service in the armed forces," VMI's program "is directed at preparation for both military and civilian life"; "only about 15% of VMI cadets enter career military service."

VMI produces its "citizen-soldiers" through "an adversative, or doubting, model of education" which features "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." As one Commandant of Cadets described it, the adversative method "dissects the young student," and makes him aware of his "limits and capabilities," so that he knows "how far he can go with his anger,…how much he can take under stress,…exactly what he can do when he is physically exhausted."

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.

VMI's "adversative model" is further characterized by a hierarchical "class system" of privileges and responsibilities, a "dyke system" for assigning a senior class mentor to each entering class "rat," and a stringently enforced "honor code," which prescribes that a cadet "does not lie, cheat, steal nor tolerate those who do."

VMI attracts some applicants because of its reputation as an extraordinarily challenging military school, and "because its alumni are exceptionally close to the school." **"Women have no opportunity anywhere to gain the benefits of [the system of education at VMI]."**

In 1990, prompted by a complaint filed with the Attorney General 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**…

In the two years preceding the lawsuit, the District Court noted, VMI had received inquiries from 347 women, but had responded to none of them. "Some women, at least," the court said, "would want to attend the school if they had the opportunity." The court further recognized that, with recruitment, VMI could "achieve at least 10% female enrollment" -- "a sufficient 'critical mass' to provide the female cadets with a positive educational experience." And it was also established that "some women are capable of all of the individual activities required of VMI cadets." In addition, experts agreed that if VMI admitted women, "the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army."

The District Court ruled in favor of VMI, however, and rejected the equal protection challenge pressed by the United States. That court correctly recognized that *Mississippi Univ. for Women v. Hogan* (1982), was the closest guide. There, this Court underscored that a party seeking to uphold government action based on sex must establish an **"exceedingly persuasive justification"** for the classification. To succeed, the defender of the challenged action must show **"at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."**

The District Court reasoned that education in "a single gender environment, be it male or female," yields substantial benefits. VMI's school for men brought diversity to an otherwise coeducational Virginia system, and that diversity was "enhanced by VMI's unique method of instruction." If single-gender education for males ranks as an important governmental objective, it becomes obvious, the District Court concluded, that the only means of achieving the objective "is to exclude women from the all-male institution -- VMI."

"Women are indeed denied a unique educational opportunity that is available only at VMI," the District Court acknowledged. But "VMI's single-sex status would be lost, and some aspects of the school's distinctive method would be altered" if women were admitted: "Allowance for personal privacy would have to be made"; "physical education requirements would have to be altered, at least for the women"; the adversative environment could not survive unmodified. Thus, "sufficient constitutional justification" had been shown, the District Court held, "for continuing VMI's single-sex policy."

The Court of Appeals for the Fourth Circuit disagreed and vacated the District Court's judgment. The appellate court held: "The Commonwealth of Virginia has not…advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women."

The appeals court greeted with skepticism Virginia's assertion that it offers single-sex education at VMI as a facet of the Commonwealth's overarching and undisputed policy to advance "autonomy and diversity." The court underscored Virginia's nondiscrimination commitment: "It is extremely important that colleges and universities deal with faculty, staff, and students without regard to sex, race, or ethnic origin." "That statement," the Court of Appeals said, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions." Furthermore, the appeals court observed, in urging "diversity" to justify an all-male VMI, the Commonwealth had supplied "no explanation for the

movement away from single-sex education in Virginia by public colleges and universities." In short, the court concluded, "a policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."

The parties agreed that "some women can meet the physical standards now imposed on men" and the court was satisfied that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." The Court of Appeals, however, accepted the District Court's finding 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." Remanding the case, the appeals court assigned to Virginia, in the first instance, responsibility for selecting a remedial course. The court suggested these options for the Commonwealth: Admit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution. In May 1993, this Court denied certiorari.

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 average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen. Mary Baldwin's faculty holds "significantly fewer Ph.D.'s than the faculty at VMI" and receives significantly lower salaries. While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. A VWIL student seeking to earn an engineering degree could gain one, without public support, by attending Washington University in St. Louis, Missouri, for two years, paying the required private tuition.

Experts in educating women at the college level composed the Task Force charged with designing the VWIL program; Task Force members were drawn from Mary Baldwin's own faculty and staff. Training its attention on methods of instruction appropriate for "most women," the Task Force determined that a military model would be "wholly inappropriate" for VWIL.

VWIL students would participate in ROTC programs and a newly established, "largely ceremonial" Virginia Corps of Cadets, but the VWIL House would not have a military format and VWIL would not require its students to eat meals together or to wear uniforms during the school day. In lieu of VMI's adversative method, the VWIL Task Force favored "a cooperative method which reinforces self-esteem." In addition to the standard bachelor of arts program offered at Mary Baldwin, VWIL students would take courses in leadership, complete an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series.

Virginia represented that it will provide equal financial support for in-state VWIL students and VMI cadets and the VMI Foundation agreed to supply a $5.4625 million endowment for the VWIL program. Mary Baldwin's own endowment is about $19 million; VMI's is $131 million.

Mary Baldwin will add $35 million to its endowment based on future commitments; VMI will add $220 million. The VMI Alumni Association has developed a network of employers interested in hiring VMI graduates. The Association has agreed to open its network to VWIL graduates, but those graduates will not have the advantage afforded by a VMI degree.

Virginia returned to the District Court seeking approval of its proposed remedial plan, and the court decided the plan met the requirements of the Equal Protection Clause. The District Court again acknowledged evidentiary support for these determinations: "The VMI methodology could be used to educate women and, in fact, some women...may prefer the VMI methodology to the VWIL methodology." **But the "controlling legal principles," the District Court decided, "do not require the Commonwealth to provide a mirror image VMI for women." The court anticipated that the two schools would "achieve substantially similar outcomes." It concluded: "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."**

A divided Court of Appeals affirmed the District Court's judgment. This time, the appellate court determined to give "greater scrutiny to the selection of means than to the [Commonwealth's] proffered objective." The official objective or purpose, the court said, should be reviewed deferentially. Respect for the "legislative will," the court reasoned, meant that the judiciary should take a "cautious approach," inquiring into the "legitimacy" of the governmental objective and refusing approval for any purpose revealed to be "pernicious."

"Providing the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education," the appeals court observed; that objective, the court added, is "not pernicious." Moreover, the court continued, the adversative method vital to a VMI education "has never been tolerated in a sexually heterogeneous environment." The method itself "was not designed to exclude women," the court noted, but women could not be accommodated in the VMI program, the court believed, for female participation in VMI's adversative training "would destroy...any sense of decency that still permeates the relationship between the sexes."

Having determined, deferentially, the legitimacy of Virginia's purpose, the court considered the question of means. Exclusion of "men at Mary Baldwin College and women at VMI," the court said, was essential to Virginia's purpose, for without such exclusion, the Commonwealth could not "accomplish its objective of providing single-gender education."

The court recognized that, as it analyzed the case, means merged into end, and the merger risked "bypassing any equal protection scrutiny." The court therefore added another inquiry, a decisive test it called "substantive comparability." The key question, the court said, was whether men at VMI and women at VWIL would obtain "substantively comparable benefits at their institution or through other means offered by the State." Although the appeals court recognized that the VWIL degree "lacks the historical benefit and prestige" of a VMI degree, it nevertheless found the educational opportunities at the two schools "sufficiently comparable."

Senior Circuit Judge Phillips dissented. The court, in his judgment, had not held Virginia to the burden of showing an "exceedingly persuasive justification" for the Commonwealth's action. In

Judge Phillips' view, the court had accepted "rationalizations compelled by the exigencies of this litigation," and had not confronted the Commonwealth's "actual overriding purpose." **That purpose, Judge Phillips said, was clear from the historical record; it was "not to create a new type of educational opportunity for women,...nor to further diversify the Commonwealth's higher education system,...but was simply...to allow VMI to continue to exclude women <u>in order to preserve its historic character and mission</u>."**

Judge Phillips suggested that the Commonwealth would satisfy the Constitution's equal protection requirement if it "simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources." But he thought it evident that the proposed VWIL program, in comparison to VMI, fell "far short…from providing substantially equal tangible and intangible educational benefits to men and women."

The Fourth Circuit denied rehearing…Circuit Judge Motz, joined by Circuit Judges Hall, Murnaghan, and Michael, filed a dissenting opinion. Judge Motz agreed with Judge Phillips that Virginia had not shown an "exceedingly persuasive justification" for the disparate opportunities the Commonwealth supported. She asked: "How can a degree from a yet to be implemented supplemental program at Mary Baldwin be held 'substantively comparable' to a degree from a venerable Virginia military institution that was established more than 150 years ago?" **"Women need not be guaranteed equal results," Judge Motz said, "but the Equal Protection Clause does require equal opportunity…and that opportunity is being denied here."**

The cross-petitions in this case present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI -- extraordinary opportunities for military training and civilian leadership development -- 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?

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

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero v. Richardson* (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. *Goesaert v. Cleary* (1948) (rejecting challenge of female tavern owner and her daughter to Michigan law denying bartender licenses to females -- except for wives and daughters of male tavern owners; Court would not "give ear" to the contention that "an unchivalrous desire of male bartenders to…monopolize the calling" prompted the legislation).

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. *Reed v. Reed* (holding unconstitutional Idaho Code prescription that, among "several persons claiming and equally entitled to administer a decedent's estate, males must be preferred to females"). 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. *Kirchberg v. Feenstra* (1981) (affirming invalidity of Louisiana law that made husband "head and master" of property jointly owned with his wife, giving him unilateral right to dispose of such property without his wife's consent); *Stanton v. Stanton* (1975) (invalidating Utah requirement that parents support boys until age 21, girls only until age 18).

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). *J. E. B.* (case law evolving since 1971 "reveals a strong presumption that gender classifications are invalid"). 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. *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." *Ballard v. United States* (1946).

"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. Sex classifications may be used to compensate women "for particular economic disabilities they have suffered," *Califano v. Webster* (1977), to "promote equal employment opportunity," see *California Fed. Sav. & Loan Assn. v. Guerra* (1987), to advance full development of the talent and capacities of our Nation's people. **But 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.

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination "to afford VMI's unique type of program to men and not to women." Virginia challenges that "liability" ruling and asserts two justifications in defense of VMI's exclusion of women. First, the Commonwealth contends, "single-sex education provides important educational benefits" and the option of single-sex education contributes to "diversity in educational approaches." Second, the Commonwealth argues, "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.

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. But 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 Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded. *Wiesenfeld* (mere recitation of a benign or compensatory purpose does not block inquiry into the actual purposes of government-maintained gender-based classifications); *Goldfarb* (rejecting government-proffered purposes after "inquiry into the actual purposes").

Mississippi Univ. for Women is immediately in point. There the State asserted, in justification of its exclusion of men from a nursing school, that it was engaging in "educational affirmative action" by "compensating for discrimination against women." Undertaking a "searching analysis," the Court found no close resemblance between "the alleged objective" and "the actual purpose underlying the discriminatory classification." Pursuing a similar inquiry here, we reach the same conclusion.

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 -- for example, Harvard in Massachusetts, William and Mary in Virginia -- admitted only men. VMI was not at all novel in this respect: In admitting no women, VMI followed the lead of the Commonwealth's flagship school, the University of Virginia, founded in 1819.

"No struggle for the admission of women to a state university," a historian has recounted, "was longer drawn out, or developed more bitterness, than that at the University of Virginia." In 1879, the State Senate resolved to look into the possibility of higher education for women, recognizing that Virginia "has never, at any period of her history," provided for the higher education of her

daughters, though she "has liberally provided for the higher education of her sons." Despite this recognition, no new opportunities were instantly open to women.

Virginia eventually provided for several women's seminaries and colleges. Farmville Female Seminary became a public institution in 1884. Two women's schools, Mary Washington College and James Madison University, were founded in 1908; another, Radford University, was founded in 1910. By the mid-1970's, all four schools had become coeducational.

Debate concerning women's admission as undergraduates at the main university continued well past the century's midpoint. Familiar arguments were rehearsed. If women were admitted, it was feared, they "would encroach on the rights of men; there would be new problems of government, perhaps scandals; the old honor system would have to be changed; standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trailed in the dust."

Ultimately, in 1970, "the most prestigious institution of higher education in Virginia," the University of Virginia, introduced coeducation and, in 1972, began to admit women on an equal basis with men. A three-judge Federal District Court confirmed: "Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the State."

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. The state legislature, prior to the advent of this controversy, had repealed "all Virginia statutes requiring individual institutions to admit only men or women." And in 1990, an official commission, "legislatively established to chart the future goals of higher education in Virginia," reaffirmed the policy "of affording broad access" while maintaining "autonomy and diversity." Significantly, the 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."

Our 1982 decision in *Mississippi Univ. for Women* prompted VMI to reexamine its male-only admission policy. Virginia relies on that reexamination as a legitimate basis for maintaining VMI's single-sex character. A Mission Study Committee, appointed by the VMI Board of Visitors, studied the problem from October 1983 until May 1986, and in that month counseled against "change of VMI status as a single-sex college." Whatever internal purpose the Mission Study Committee served -- and however well meaning the framers of the report -- we can hardly extract from that effort any commonwealth policy evenhandedly to advance diverse educational options. As the District Court observed, the Committee's analysis "primarily focused on anticipated difficulties in attracting females to VMI," and the report, overall, supplied "very little indication of how the conclusion was reached."

In sum, we find no persuasive evidence in this record that VMI's male-only admission policy is in furtherance of a state policy of diversity…However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not equal protection.

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. "Some women, at least, would want to attend VMI if they had the opportunity," the District Court recognized and "some women," the expert testimony established, "are capable of all of the individual activities required of VMI cadets." The parties, furthermore, agree that "some women can meet the physical standards VMI now imposes on men." In sum, as the Court of Appeals stated, "neither the goal of producing citizen soldiers," VMI's raison d'etre, "nor VMI's implementing methodology is inherently unsuitable to women."

In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, 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 does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in *Reed v. Reed*, 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**."…

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method…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 prophecies" once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. For example, in 1876, the Court of Common Pleas of Hennepin County, Minnesota, explained why women were thought ineligible for the practice of law. Women train and educate the young, the court said, which "forbids that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice…is to any extent the outgrowth of…'old fogyism.'…It arises rather from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to grade up the profession." *In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law* (1876). A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although "the faculty…never maintained that women could not master legal learning…No, its argument has been…more practical. If women were admitted to the Columbia Law School, the faculty said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!"…

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.

Virginia and VMI trained their argument on "means" rather than "end," and thus misperceived our precedent. Single-sex education at VMI serves an "important governmental objective," they maintained, and exclusion of women is not only "substantially related," it is essential to that objective. By this notably circular argument, the "straightforward" test *Mississippi Univ. for Women* described, was bent and bowed.

The Commonwealth's misunderstanding and, in turn, the District Court's, is apparent from VMI's mission: to produce "citizen-soldiers," 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 that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men. Just as surely, the Commonwealth's great goal 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" that must be the solid base for any gender-defined classification.

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…

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." *Louisiana v. United States* (1965).

Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities. Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal "directly addressed and related to" the violation, see *Milliken*, i. e., the equal protection denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers. Virginia described VWIL as a "parallel program," and asserted that VWIL shares VMI's mission of producing "citizen-soldiers" and VMI's goals of providing "education, military training, mental and physical discipline, character…and leadership development." If the VWIL program could not "eliminate the discriminatory effects of the past," could it at least "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 "de-emphasizes" 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." "The most important aspects of the VMI educational experience occur in the barracks," the District Court found, yet Virginia deemed that core experience nonessential, indeed inappropriate, for training its female citizen-soldiers.

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." The Task Force charged with developing the leadership program for women, drawn from the

staff and faculty at Mary Baldwin College, "determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training **most** women."…The Commonwealth embraced the Task Force view, as did expert witnesses who testified for Virginia.

As earlier stated, 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. Notably, Virginia never asserted that VMI's method of education suits most men. It is also revealing that Virginia accounted for its failure to make the VWIL experience "the entirely militaristic experience of VMI" on the ground that VWIL "is planned for women who do not necessarily expect to pursue military careers." By that reasoning, VMI's "entirely militaristic" program would be inappropriate for men in general or as a group, for "only about 15% of VMI cadets enter career military service."

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;" "some women are capable of all of the individual activities required of VMI cadets;" and "can meet the physical standards VMI now imposes 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, a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit, a decree that will "bar like discrimination in the future."

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…

Although Virginia has represented that it will provide equal financial support for in-state VWIL students and VMI cadets and the VMI Foundation has agreed to endow VWIL with $5.4625 million, the difference between the two schools' financial reserves is pronounced…

The VWIL student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the legions of VMI "graduates who have distinguished themselves" in military and civilian life…Virginia, in sum, while maintaining VMI for men only, has failed to provide any "comparable single-gender women's institution."…

When Virginia tendered its VWIL plan, the Fourth Circuit did not inquire whether the proposed remedy, approved by the District Court, placed women denied the VMI advantage in "the position they would have occupied in the absence of discrimination." *Milliken*. Instead, the Court of Appeals considered whether the Commonwealth could provide, with fidelity to the equal protection principle, separate and unequal educational programs for men and women.

The Fourth Circuit acknowledged that "the VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of a degree from VMI." The Court of Appeals further observed that VMI is "an ongoing and successful institution with a long history," and there remains no

"comparable single-gender women's institution." Nevertheless, the appeals court declared the substantially different and significantly unequal VWIL program satisfactory. The court reached that result by revising the applicable standard of review. The Fourth Circuit displaced the standard developed in our precedent and substituted a standard of its own invention.

We have earlier described the deferential review in which the Court of Appeals engaged a brand of review inconsistent with the more exacting standard our precedent requires. Quoting in part from *Mississippi Univ. for Women*, the Court of Appeals candidly described its own analysis as one capable of checking a legislative purpose ranked as "pernicious," but generally according "deference to the legislative will." Recognizing that it had extracted from our decisions a test yielding "little or no scrutiny of the effect of a classification directed at single-gender education," the Court of Appeals devised another test, a "substantive comparability" inquiry and proceeded to find that new test satisfied.

The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." *J.E.B.* 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. In 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.

A generation ago, "the authorities controlling Virginia higher education," despite long established tradition, agreed "to innovate and favorably entertained the then relatively new idea that there must be no discrimination by sex in offering educational opportunity." *Kirstein.* Commencing in 1970, Virginia opened to women "educational opportunities at the Charlottesville campus that were not afforded in other state-operated institutions." A federal court approved the Commonwealth's innovation, emphasizing that the University of Virginia "offered courses of instruction…not available elsewhere." The court further noted: "There exists at Charlottesville a 'prestige' factor not paralleled in other Virginia educational institutions."

VMI, too, offers an educational opportunity no other Virginia institution provides, and the school's "prestige" -- associated with its success in developing "citizen-soldiers" -- is unequaled. Virginia has closed this facility to its daughters and, instead, has devised for them a "parallel program," with a faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization. VMI, beyond question, "possesses to a far greater degree" than the VWIL program "those qualities which are incapable of objective measurement but which make for greatness in a…school," including "position and influence of the alumni, standing in the community, traditions and prestige." **Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection.**

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded. VMI's story continued as our comprehension of "We the People" expanded. **There is no reason to believe that the admission of women capable of all the activities required of VMI cadets**

would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."

* * *

For the reasons stated, the initial judgment of the Court of Appeals is affirmed, the final judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCURRENCE: CHIEF JUSTICE REHNQUIST…The Court holds first that Virginia violates the Equal Protection Clause by maintaining the Virginia Military Institute's (VMI's) all-male admissions policy, and second that establishing the Virginia Women's Institute for Leadership (VWIL) program does not remedy that violation. While I agree with these conclusions, I disagree with the Court's analysis…

Two decades ago in *Craig v. Boren* (1976), we announced that "to withstand constitutional challenge,…classifications by gender **must serve important government-tal objectives and must be substantially related to achievement of those objectives**." We have adhered to that standard of scrutiny ever since…While the majority adheres to this test today, it also says that the Commonwealth must demonstrate an **"exceedingly persuasive justification"** to support a gender-based classification. It is unfortunate that the Court thereby introduces an element of **uncertainty** respecting the appropriate test.

While terms like "important governmental objective" and "substantially related" are hardly models of precision, they have more content and specificity than does the phrase "exceedingly persuasive justification." That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself…I would have adhered more closely to our traditional, "firmly established" standard that a gender-based classification "must bear a close and substantial relationship to important governmental objectives."

Our cases dealing with gender discrimination also require that the **proffered purpose** for the challenged law be the **actual purpose**. It is on this ground that the Court rejects the first of two justifications Virginia offers for VMI's single-sex admissions policy, namely, the goal of diversity among its public educational institutions. While I ultimately agree that the Commonwealth has not carried the day with this justification, I disagree with the Court's method of analyzing the issue.

VMI was founded in 1839, and…admission was limited to men because under the then-prevailing view men, not women, were destined for higher education. However misguided this point of view may be by present-day standards, it surely was not unconstitutional in 1839. **The adoption of the Fourteenth Amendment, with its Equal Protection Clause, was nearly 30 years in the future.** The interpretation of the Equal Protection Clause to require heightened scrutiny for gender discrimination was yet another century away.

Long after the adoption of the Fourteenth Amendment, and well into this century, legal distinctions between men and women were thought to raise no question under the Equal Protection Clause. The Court refers to our decision in *Goesaert v. Cleary* (1948). Likewise representing that now abandoned view was *Hoyt v. Florida* (1961), where the Court upheld a Florida system of jury selection in which men were automatically placed on jury lists, but women were placed there only if they expressed an affirmative desire to serve. The Court noted that despite advances in women's opportunities, the "woman is still regarded as the center of home and family life."

Then, in 1971, we decided *Reed v. Reed*...[b]ut its facts have nothing to do with admissions to any sort of educational institution. An Idaho statute governing the administration of estates and probate preferred men to women if the other statutory qualifications were equal. The statute's purpose, according to the Idaho Supreme Court, was to avoid hearings to determine who was better qualified as between a man and a woman both applying for letters of administration. This Court held that such a rule violated the Fourteenth Amendment because "a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings," was an "arbitrary legislative choice forbidden by the Equal Protection Clause." The brief opinion in *Reed* made no mention of either *Goesaert* or *Hoyt*…[Then, in] *Mississippi Univ. for Women v. Hogan*, a case actually involving a single-sex admissions policy in higher education, the Court held that the exclusion of men from a nursing program violated the Equal Protection Clause. This holding did place Virginia on notice that VMI's men-only admissions policy was open to serious question.

The VMI Board of Visitors, in response, appointed a Mission Study Committee to examine the legality and wisdom of VMI's single-sex policy in light of *Hogan*. But…the committee found "no information" that would warrant a change in VMI's status. Even the District Court, ultimately sympathetic to VMI's position, found that "the Report provided very little indication of how its conclusion was reached" and that "the one and one-half pages in the committee's final report devoted to analyzing the information it obtained primarily focuses on anticipated difficulties in attracting females to VMI." The reasons given in the report for not changing the policy were the changes that admission of women to VMI would require, and the likely effect of those changes on the institution. That VMI would have to change is simply not helpful in addressing the constitutionality of the status after *Hogan*.

…Even if diversity in educational opportunity were the Commonwealth's actual objective, the Commonwealth's position would still be problematic. The difficulty with its position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women…

Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation. I do not believe the Commonwealth was faced with the stark choice of either admitting women to VMI, on the one hand, or abandoning VMI and starting from scratch for both men and women, on the other.

But, as I have noted, neither the governing board of VMI nor the Commonwealth took any action after 1982. If diversity in the form of single-sex, as well as coeducational, institutions of higher

learning were to be available to Virginians, that diversity had to be available to women as well as to men.

The dissent criticizes me for "disregarding the four all-women's private colleges in Virginia (generously assisted by public funds)." The private women's colleges are treated by the Commonwealth exactly as all other private schools are treated, which includes the provision of tuition-assistance grants to Virginia residents. Virginia gives no special support to the women's single-sex education. But obviously, the same is not true for men's education. Had the Commonwealth provided the kind of support for the private women's schools that it provides for VMI, this may have been a very different case. For in so doing, the Commonwealth would have demonstrated that its interest in providing a single-sex education for men was to some measure matched by an interest in providing the same opportunity for women.

Virginia offers a second justification for the single-sex admissions policy: maintenance of the adversative method. I agree with the Court that this justification does not serve an important governmental objective. A State does not have substantial interest in the adversative methodology unless it is pedagogically beneficial. While considerable evidence shows that a single-sex education is pedagogically beneficial for some students, and hence a State may have a valid interest in promoting that methodology, there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies.

The Court defines the constitutional violation in these cases as "the categorical exclusion of women from an extraordinary educational opportunity afforded to men." By defining the violation in this way, and by emphasizing that a remedy for a constitutional violation must place the victims of discrimination in "the position they would have occupied in the absence of discrimination," **the Court necessarily implies that the only adequate remedy would be the admission of women to the all-male institution…**I would not define the violation in this way; it is not the "exclusion of women" that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any -- much less a comparable -- institution for women.

Accordingly, the remedy should not necessarily require either the admission of women to VMI or the creation of a VMI clone for women…It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber…

In the end,…VWIL fails as a remedy because it is distinctly inferior to the existing men's institution and will continue to be for the foreseeable future…I therefore ultimately agree with the Court that Virginia has not provided an adequate remedy.

DISSENT: JUSTICE SCALIA…Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. **As to facts:** It 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.

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed minded they were -- as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. 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…**

This dissent is very lengthy and, given that this is a 7 – 1 decision, the rest of it will not be provided.

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