

PHOTOCOPY
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MEMORANDUM



To: Interested Parties

From: Nancy Zirkin, Director of Public Policy and Government Relations

Date: May 9, 2000

Subject: Hutchison Single-Sex Education Amendment to S 2

For your information, attached are materials sent the Senate this afternoon opposing the Hutchison Single-Sex Education Amendment to the Educational Opportunities Act (S 2), including the American Association of University Women (AAUW) letter and the National Coalition for Women and Girls in Education (NCWGE) *Myth vs. Reality* factsheet. We expect the amendment to be offered soon after consideration of the Kennedy Teacher Quality Amendment.

AAUW opposes the Hutchison Single-Sex Education Amendment because single-sex education programs must be "equal," not "comparable."

If you have any questions, please contact me at 202/785-7720.

BUC -
SINGLE-SEX

OPPOSE THE HUTCHISON SINGLE-SEX EDUCATION AMENDMENT: COMPARABLE IS NOT EQUAL

May 9, 2000



Dear Senator:

On behalf of the 150,000 members of the American Association of University Women (AAUW), I urge you to oppose Sen. Kay Bailey Hutchison's (R-TX) single-sex education amendment to the Educational Opportunities Act (S 2). The language on single-sex education already in S 2 would ensure that single-sex education is consistent with equal protection principles as articulated by the Supreme Court. In contrast, the amendment would allow local education agencies to spend federal dollars to offer single gender schools and classes so long as they are "separate" and "comparable." AAUW opposes the Hutchison Amendment because it violates the constitutional guarantee of equal protection by permitting a return to the separate and unequal programs to which women and girls have too often been relegated.

The Hutchison Amendment would not ensure that authorized single-sex programs provide equal opportunities for students of both sexes. Policy changes regarding single-sex programming could have far reaching implications and should be carefully considered. Unless single-sex programs are carefully designed to remedy particular sex-based disadvantages, such programs can deny equal educational opportunities and reinforce harmful stereotypes. For example, in the mid-1980s, Philadelphia's two sex-segregated magnet schools were found to shortchange girls in everything from course offerings and faculty credentials to recreation facilities and library resources. "Separate but equal" has often meant separate and unequal for girls and women, just as it has for African-Americans.

With the adoption of the Hutchison Amendment, which fails to guarantee equal educational opportunity, S 2 would open the door to sex-segregated programming that is based on harmful sex stereotypes including less challenging math classes for girls due to the belief that girls are not as good at math and science. While the Supreme Court has repeatedly recognized that single-sex education programs may be consistent with antidiscrimination principles if they are compensatory and operate to overcome barriers, the language in the Hutchison Amendment, which contains no legal protections and provides "comparable" as the standard, would permit schools to offer single-sex programs that fall far outside of these protections.

Once again, I urge you to oppose the Hutchison Amendment and support language in S 2 that would encourage a return to equality in education. Our nation must guarantee equal educational opportunity for both boys and girls. If you have any questions, please contact Nancy Zirkin, Director of Public Policy and Government Relations, at 202/785-7720, or Lisa Levine, Government Relations Manager, at 202/785-7730.

Sincerely,


Sandy Bernard
President

NCWGE

NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION

“Separate but Comparable” Single-Sex Programs: A Return to Inequality

Myth: *Single-sex opportunities will not exist if the standard is “equal.”*

Reality: Single-sex opportunities will not exist if the standard is “comparable” because “comparable” clearly is not the standard under the U.S. Constitution. The “comparable” standard is an open invitation to lawsuits.

- “Comparability,” which is a lesser standard than “equal”, is contrary to well-established law and therefore vulnerable to attack, potentially subjecting school districts to significant liability.
- In *United States v. Virginia*, the U.S. Supreme Court makes clear that schools must provide equal opportunities to female and male students. Under the decision, factors that may be relevant to determining whether schools, courses, and programs are equal include the quality and availability of curricular and extracurricular activities, facilities, services, resources, faculty and staff; and the quality and availability of “intangibles” such as institutional history, prestige, and influence of alumni network.
- The Court also stated that “sex classifications may be used to compensate women ‘for particular economic disabilities they have suffered ... to promote equal employment opportunity ... to advance full development of the talent and capacities of our Nation’s people.’”

Myth: *Single-sex educational programs don’t have to be equal to be constitutional.*

Reality: The Supreme Court made very clear in *United States v. Virginia*, that Virginia violated the Constitution by creating a separate school for women that was in every respect unequal to Virginia Military Institute (VMI).

- In the VMI case, the Supreme Court rejected the “substantive comparability” standard that the 4th Circuit had used, calling it “a standard of its own invention.” The Court held that sex-based classifications must be based on an “exceedingly persuasive justification” and that such classifications can meet this justification when they are aimed at overcoming barriers to opportunity for women.

- The Supreme Court also held that the creation of a separate all-women's program, which was unequal to VMI in both tangible and intangible benefits, was not an adequate remedy for the constitutional violation of excluding women from VMI's opportunities and advantages.

Myth: *Numerous lower courts have upheld single-sex elementary and secondary education based on the term "comparable."*

Reality: In the few reported court decisions regarding single-sex elementary and secondary schools, none has been upheld based on a "comparable" standard. In fact, the cases demonstrate that such schools must provide equal opportunities for students.

- For example, a court found that the academic school for boys and the academic school for girls in Philadelphia were unequal. As in VMI, the boys school was superior to the girls school: the campus was significantly larger, the library had more books, the boys had a computer room, and the graduates from the boys school received more money for college scholarships. The court found that the exclusion of girls from the superior boys' school, based solely on their sex, denied them their equal opportunities and was therefore a violation of the Constitution.

Myth: *Single-sex education is the answer to the problems plaguing public education.*

Reality: Little research exists on single-sex education, and no research has been done on public single-sex schools in the United States.

- The AAUW report, *Separated by Sex: A Critical Look at Single-Sex Education for Girls*, found that in general, there is "no evidence that single-sex education is better than coeducation." The report's authors stress that the long-term impact of single-sex education on girls or boys is unknown and that more research is needed.

Myth: *In order to address the different learning styles and needs of girls and boys, single-sex programs cannot be equal.*

Reality: The different learning styles and needs of students must be addressed by programs that provide equal opportunities, otherwise they can reinforce harmful stereotypes that may lead to less challenging academic opportunities for one sex.

- If equality is not required, girls could be tracked into less challenging math, science, or technology classes. Further, girls could find themselves in schools that don't offer such programming, based on the belief that girls' needs, learning styles, and abilities preclude them from handling such courses.
- The VMI case is an example of such tracking. In that case, VMI tried to justify its exclusion of women on the ground that women cannot withstand stress as well as men. The Supreme Court rejected this sex-stereotyped view as a rationale for the exclusion of women.

Myth: *The Hutchison amendment would not modify Title IX of the Education Amendments of 1972.*

Reality: Title IX prohibits sex discrimination in federally funded education. It allows same-sex programming under certain limited circumstances.

- Title IX permits single-sex programs to be used when they are designed to compensate women for barriers to opportunity. Further, the law permits single-sex classes in certain common sense circumstances (e.g. competitive athletics, human sexuality classes, choirs).
- The Title IX statute does not use the word "comparable." The statute does contain an exception for admissions in elementary and secondary schools and single-sex schools that were in existence before Title IX was enacted. However, the 1975 regulation uses "comparable" for the implementation of this exception only. This exception does not apply to vocational schools.

Myth: *The word "comparable" is already used by the Department of Education in determining whether a single-sex school is permissible under Title IX.*

Reality: The Department of Education is in the process of reviewing the Title IX regulations that apply to single-sex schools and classes.

- Congress should wait until the Department of Education has completed its review of the Title IX regulations to ensure that education policymaking is consistent with the law.

Contact: Leslie Annexstein, National Women's Law Center, 202/588-5180
Nancy Zirkin, American Association of University Women, 202/785-7720

May 4, 2000

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1996 U.S. LEXIS 4259 printed in FULL format.

UNITED STATES, PETITIONER 94-1941 v. VIRGINIA ET AL. VIRGINIA, ET AL., PETITIONERS
94-2107 v. UNITED STATES

200 C-
SINCE-
No. 94-1941

SUPREME COURT OF THE UNITED STATES

518 U.S. 515; 116 S. Ct. 2264; 1996 U.S. LEXIS 4259; 135 L. Ed. 2d 735; 64 U.S.L.W. 4638; 96 Cal.
Daily Op. Service 4694; 96 Daily Journal DAR 7573; 10 Fla. Law W. Fed. S 93

January 17, 1996, Argued

June 26, 1996 *, Decided

* Together with No. 94-2107, Virginia et al. v. United States, also on certiorari to the same court.

SUBSEQUENT HISTORY: As Amended July 3, 1996.

PRIOR HISTORY: ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT.

DISPOSITION: No. 94-2107, [***9] 976 F.2d 890,
affirmed; No. 94-1941, 44 F.3d 1229, reversed and

remanded.

CORE TERMS: single-sex, educational, adversative,
diversity, classification, training, female, sex, military,
cadet, male, higher education, equal protection, all-
male, faculty, exceedingly, persuasive, coeducational,
quotation, methodology, leadership, mission, citizen-
soldier, comparable, intermediate, concurrence, grad-
uate, strict scrutiny, gender, single-gender

<=3> View References <=4> Turn Off Lawyers' Edition Display

DECISION: Virginia held to violate equal protection with respect to male-only admission policy of Virginia Military Institute; proposed remedy of separate women's institute at private women's college held not to cure constitutional violation.

SUMMARY: Virginia Military Institute (VMI), a state-supported college subject to the state legislature's control, was founded as an all-male institution in 1839. By the mid-1970's, VMI was the sole single-sex public college in Virginia. VMI had a distinctive mission--in which the college was considered to have succeeded--of producing citizen-soldiers who were prepared for leadership in civilian life and military service. Also, VMI used an "adversative," or doubting, educational method, which featured physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values. In 1990, the United States (1) sued Virginia and VMI in the United States District Court for the Western District of Virginia, and (2) alleged that VMI's exclusively male admission policy violated the equal protection clause of the Federal Constitution's Fourteenth Amendment. In 1991, the District Court rejected the equal protection challenge, on the basis that--while some women would want to attend VMI and some women were capable of all of the individual activities required of VMI cadets--(1) VMI's school for men brought diversity to Virginia's otherwise coeducational system; (2) the only means of achieving this objective was to exclude women from VMI; and (3) if women were admitted, then some aspects of the school's distinctive method would have to be changed, with respect to (a) allowing for personal privacy, (b) altering physical education requirements, at least for women, and (c) modifying the adversative environment (766 F Supp 1407). In 1992, the United States Court of Appeals for the Fourth Circuit vacated and remanded, as the court expressed the view that (1) even if, as was doubtful, there was a state policy of educational diversity that included single-sex institutions, an explanation was lacking as to how this policy was furthered by affording a unique educational benefit only to males; (2) while VMI's absence of privacy, physical training, and adversative approach would be affected by admitting women, neither the goal of producing citizen-soldiers nor VMI's implementing methodology was inherently unsuitable for women; and (3) on remand, Virginia, in the first instance, would have the responsibility for selecting a remedial course, from

options including--so long as the Fourteenth Amendment was satisfied--(a) admitting women to VMI and adjusting its program, or (b) establishing a parallel program (976 F2d 890). In 1993, the United States Supreme Court denied certiorari (508 US 946, 124 L Ed 2d 651, 113 S Ct 2431). Virginia then proposed a separate program for women, the Virginia Women's Institute for Leadership (VWIL), which would (1) be located at a private women's college, and (2) have different academic offerings, a cooperative rather than an adversative method of education, and lesser financial resources. In 1994, the District Court ruled that this proposal met the requirements of the equal protection clause, as--even though the VMI methodology could be used to educate women and some women might prefer this methodology--VMI and VWIL would achieve substantially similar outcomes (852 F Supp 471). In 1995, the Court of Appeals affirmed in pertinent part, as the court expressed the view that (1) under a deferential standard of review, Virginia's goal of single-gender college education was legitimate; and (2) men at VMI and women at VWIL would obtain substantially comparable benefits (44 F3d 1229). The Court of Appeals then denied rehearing en banc (52 F3d 90).

On certiorari, the Supreme Court affirmed the Court of Appeals' 1992 judgment, reversed the Court of Appeals' 1995 judgment, and remanded the case for further proceedings. In an opinion by Ginsburg, J., joined by Stevens, O'Connor, Kennedy, Souter, and Breyer, JJ., it was held that (1) under the applicable standard of heightened review, Virginia's exclusion of women from VMI's extraordinary educational opportunities for military training and civilian leadership development denied, to women who were capable of all of the individual activities required of VMI cadets, the equal protection of the laws that was guaranteed by the Fourteenth Amendment, as (a) there was no persuasive evidence that VMI's male-only admission policy was in furtherance of a policy of diversity, and (b) the exceedingly persuasive justification required for equal protection purposes was not established by Virginia's argument that VMI's adversative method provided benefits that could not be made available, unmodified, to women; and (2) Virginia's proffered VWIL remedy did not cure the constitutional violation, because (a) Virginia had shown no exceedingly persuasive justification for withholding from qualified women premier training of the kind which VMI afforded, and (b) Virginia had not shown substantial equality in the separate educational opportunities which Virginia would support at VMI and VWIL.

Rehnquist, Ch. J., concurring in the judgment, expressed the view that (1) Virginia had violated the equal protection clause by maintaining VMI's all-male admission policy without providing any--much less a comparable--institution for women; and (2) VWIL failed as a remedy, because this proposed women's institution (a) was distinctly inferior to VMI, the existing male institution, and (b) would continue to be distinctly inferior for the foreseeable future.

Scalia, J., dissenting, expressed the view that (1) the Supreme Court, in order to shut down an institution that had served the people of Virginia with pride and distinction for more than a century and a half, improperly rejected the factual findings of two courts below, swept aside precedent concerning the review of sex-based classifications, and ignored the nation's long tradition of government-supported men's military colleges; and (2) Virginia's election to fund one public all-male institution and one on the adversative model--and to concentrate its resources in a single entity which served both these interests in diversity--was substantially related to Virginia's important educational interests.

Thomas, J., did not participate.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

< =11 > CONSTITUTIONAL LAW §345
equal protection -- state-supported military college -- male-only admission policy --

Headnote: < =12 > [***28] [***71] [1A] < =13 > [1B] < =14 > [1C] < =15 > [1D] < =16 > [1E] < =17 > [1F]
< =18 > [1G] < =19 > [1H] < =20 > [1I]

Under the standard of heightened review applicable with respect to the male-only admission policy of a state-supported military college subject to the state legislature's control, the state's exclusion of women from the military college's extraordinary educational opportunities for military training and civilian leadership development denies, to women who are capable of all of the individual activities required of the military college's cadets, the equal protection of the laws that is guaranteed by the Federal Constitution's Fourteenth Amendment, as (1) there is no persuasive evidence that the male-only admission policy is in furtherance of a state policy of diversity, where (a) the state has not shown that the military college was established, or has been maintained, with a view to diversifying, by the categorical exclusion of women, educational opportunities within the state, and (b) an equal protection purpose of genuinely advancing an array of educational options is not served by the military college's historic and constant plan to afford a unique educational

benefit only to males, because however "liberally" this plan serves the state's sons, this plan makes no provision for the state's daughters; (2) the exceedingly persuasive justification required for equal protection purposes is not established by the state's argument that the military college's "adversative," or doubting, educational method provides benefits that cannot be made available, unmodified, to women; (3) the military college offers an educational opportunity no other state institution provides; (4) the military college's prestige--associated with its success in developing citizen-soldiers--is unequalled; (5) women seeking and fit for an education of the military college's quality cannot be offered anything less, under the state's obligation to afford such women genuinely equal protection; and (6) there is no reason to believe that the admission of capable women would destroy the military college, rather than enhance its capacity to serve the nation. (Scalia, J., dissented from this holding; Rehnquist, Ch. J., dissented in part from this holding.)

<=21> CONSTITUTIONAL LAW §345

male-only military college -- equal protection violation -- remedy of separate women's institute --

Headnote: <=22> [2A] <=23> [2B] <=24> [2C] <=25> [2D] <=26> [2E] <=27> [2F] <=28> [2G] <=29> [2H]

Given that, with respect to the male-only admission policy of a state-supported military college, the state has been found to violate the equal protection clause of the Federal Constitution's Fourteenth Amendment by excluding women who are capable of all of the individual activities required of the military college's cadets, the state's proffered remedy of maintaining the military college as male-only and creating a separate women's institute for leadership, to be located at a private women's college, does not cure the constitutional violation and provide equal opportunity, because the state has shown no exceedingly persuasive justification for withholding from qualified women premier training of the kind which the military college affords, as (1) the women's institute would (a) afford women no opportunity to experience the rigorous military training for which the military college is famed, and (b) use a cooperative educational method which reinforces self-esteem, rather than the military college's "adversative," or doubting, educational method, which features physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values; (2) these methodological differences are not justified by the state's generalizations about what is appropriate for "most women," where (a) the state has never asserted that the military college's method of education suits "most men," (b) only about 15 percent of the military college's cadets enter career military service, (c) the military college's implementing methodology is not inherently unsuitable for women, and (d) even though admitting women to the military college would 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 that such adjustments are manageable; (4) in myriad respects other than military training, the proposed women's institute would not qualify as the military college's equal, where (a) the student body, faculty, course offerings, facilities, and financial reserves of the women's institute would not match those of the military college, and (b) a graduate of the women's institute could not anticipate the benefits associated with the military college's long history, prestige, and influential alumni network; (5) thus, the state has not shown substantial equality in the separate educational opportunities which the state would support at the military college and the women's institute; and (6) it is error to expose the state's plan of a women's institute to a deferential analysis, for all gender-based classifications warrant heightened scrutiny. (Scalia, J., dissented from this holding.)

<=30> CONSTITUTIONAL LAW §325

equal protection -- gender-based government action --

Headnote: <=31> [3]

Under the Federal Constitution's equal protection principle, parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action; for cases of official classification based on gender, a reviewing court, in focusing on the differential treatment or denial of opportunity for which relief is sought, must determine whether the proffered justification is exceedingly persuasive; the burden of justification is demanding and rests entirely on the government, which must show at least that (1) the challenged classification serves important governmental objectives, and (2) 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; moreover, the justification must not rely on overbroad generalizations about the different talents, capacities, or preferences of

males and females.

<=32> CONSTITUTIONAL LAW §325

equal protection -- sex classifications --

Headnote: <=33> [4A] <=34> [4B]

The heightened review standard established, under the Federal Constitution's equal protection principle, for gender-based government action does not make sex a proscribed classification, given that the physical differences between men and women are enduring; sex classifications may be used (1) to compensate women for particular economic disabilities which women have suffered, and (2) to advance full development of the talent and capacities of the nation's people; however, such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

<=35> CIVIL RIGHTS §1

race or national origin classifications --

Headnote: <=36> [5]

Under the Federal Constitution's equal protection principle, supposed "inherent differences" are not accepted as a ground for race or national origin classifications.

<=37> CIVIL RIGHTS §7.7

employment -- sex classifications --

Headnote: <=38> [6]

Under the Federal Constitution's equal protection principle, sex classifications may be used to promote equal employment opportunity.

<=39> CONSTITUTIONAL LAW §325

equal protection -- gender-based exclusions --

Headnote: <=40> [7]

Allegedly benign justifications proffered in defense of categorical exclusions on the basis of gender will not be accepted automatically under the Federal Constitution's equal protection principle; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.

<=41> CONSTITUTIONAL LAW §325

equal protection -- denying women opportunity --

Headnote: <=42> [8]

Under the Federal Constitution's equal protection principle, generalizations about "the way women are" or estimates of what is appropriate for "most women" do not justify denying opportunity to women whose talent and capacity place them outside the average description.

<=43> CONSTITUTIONAL LAW §345

male-only college -- equal protection violation -- remedy --

Headnote: <=44> [9]

Given that, with respect to the male-only admission policy of a state-supported military college, the state has been

found to violate the equal protection clause of the Federal Constitution's Fourteenth Amendment by excluding women who are capable of all of the individual activities required of the college's cadets, the state must craft a remedy for the women on whose behalf the United States instituted a suit against the state and the military college, that is, women who (1) are so capable, (2) would do well under the military college's "adversative" method of education, (3) would want to attend the military college if they had the opportunity, and (4) can meet the physical standards which the military college currently imposes on men; the remedy must (1) end such women's exclusion from a state-supplied educational opportunity for which the women are fit, and (2) bar like discrimination in the future. (Scalia, J., dissented from this holding; Rehnquist, Ch. J., dissented in part from this holding.)

SYLLABUS:

Virginia Military Institute (VMI) is the sole single-sex school among Virginia's 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. Using an "adversative method" of training not available elsewhere in Virginia, VMI endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. Reflecting the high value alumni place on their VMI training, VMI has the largest per-student endowment of all public undergraduate institutions in the Nation. The United States sued Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Fourteenth [***2] Amendment's Equal Protection Clause. The District Court ruled in VMI's favor. The Fourth Circuit reversed and ordered Virginia to remedy the constitutional violation. In response, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL), located at Mary Baldwin College, a private liberal arts school for women. The District Court found that Virginia's proposal satisfied the Constitution's equal protection requirement, and the Fourth Circuit affirmed. The appeals court deferentially reviewed Virginia's plan and determined that provision of single-gender educational options was a legitimate objective. Maintenance of single-sex programs, the court concluded, was essential to that objective. The court recognized, however, that its analysis risked bypassing equal protection scrutiny, so it fashioned an additional test, asking whether VMI and VWIL students would receive "substantively comparable" benefits. Although the Court of Appeals acknowledged that the VWIL degree lacked the historical benefit and prestige of a VMI degree, the court nevertheless found the educational opportunities at the two schools sufficiently comparable.

Held:

1. [***3] Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. *E. g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724. Neither federal nor state government acts compatibly

with equal protection 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. To meet the burden of justification, a State must show "at least that the [challenged] classification [***17] serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Ibid.*, quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150. The justification must be genuine, [***32] 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. See, e. g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648. The heightened review standard applicable to [***4] sex-based classifications does not make sex a proscribed classification, but it does mean that categorization by sex may not be used to create or perpetuate the legal, social, and economic inferiority of women. Pp. 531-534.

2. Virginia's categorical exclusion of women from the educational opportunities VMI provides denies equal protection to women. Pp. 534-546.

(a) Virginia contends that single-sex education yields important educational benefits and that provision of an option for such education fosters diversity in educational approaches. Benign justifications proffered in defense of categorical exclusions, however, must describe actual state purposes, not rationalizations for actions in fact differently grounded. 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. A purpose genuinely to advance an array of educational options is not served by VMI's historic and constant plan to afford a unique educational benefit only to males. However well this plan serves Virginia's sons, it makes no provision whatever for her daughters. Pp. 535-540.

(b) [***5] Virginia also argues that VMI's adversative method of training provides educational benefits that

cannot be made available, unmodified, to women, and that alterations to accommodate women would necessarily be so drastic as to destroy VMI's program. It is uncontested that women's admission to VMI would require [***45] accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that neither the goal of producing citizen-soldiers, VMI's *raison d'être*, nor VMI's implementing methodology is inherently unsuitable to women. The District Court made "findings" on "gender-based developmental differences" that restate the opinions of Virginia's expert witnesses about typically male or typically female "tendencies." Courts, however, must take "a hard look" at generalizations or tendencies of the kind Virginia pressed, for state actors controlling gates to opportunity have no warrant to exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women*, 458 U.S. at 725. The notion that admission of women would downgrade VMI's stature, destroy [***6] 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 *id.*, at 730, 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 VMI's future may not be solidly [***52] grounded. The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, does not rank as "exceedingly persuasive." Pp. 540-546.

3. The remedy proffered by Virginia -- maintain VMI as a male-only college and create VWIL as a separate program for women -- does not cure the constitutional violation. Pp. 546-558.

(a) A remedial decree 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. See *Milliken v. Bradley*, 433 U.S. 267, 280. The constitutional violation in this case is the categorical exclusion of women, in disregard of their individual merit, from [***7] an extraordinary educational opportunity afforded men. Virginia chose to leave untouched VMI's exclusionary policy, and proposed for women only a separate program, different in kind from VMI and unequal in tangible and intangible facilities. [***58] VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. 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 methodological differences are justified by the important differences between men and women in learning and developmental needs, but 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 myriad respects other than military training, VWIL does not qualify as VMI's equal. The VWIL program is a pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI. Cf. *Sweatt v. Painter*, 339 U.S. 629. Pp. 547-554.

(b) The Fourth Circuit failed to inquire whether the proposed remedy placed women denied the VMI advantage in the position they would have occupied in the absence of discrimination, *Milliken*, 433 U.S. at 280, and considered instead whether the Commonwealth could provide, with fidelity to equal protection, separate and unequal educational programs for men and women. In declaring the substantially different and significantly unequal VWIL program satisfactory, the appeals court displaced the exacting standard developed by this Court with a deferential standard, and added an inquiry of its own invention, the "substantive comparability" test. The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to such a deferential analysis, for "all genderbased classifications today" warrant "heightened scrutiny." See *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136. 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. Pp. 554-558.

Briefs of amici curiae urging affirmance in No. 94-1941 were filed for the State of South Carolina et al. by Charles Molony Condon, Attorney General, Treva Ashworth, Deputy Attorney General, Kenneth P. Woodington, Senior Assistant Attorney General, Reginald I. Lloyd, Assistant Attorney General, and M. Dawes Cooke, Jr.; and for Kenneth E. Clark et al. by James C. Roberts and George A. Somerville.

Briefs of amici curiae were filed in both cases for the State of Wyoming et al. by William U. Hill, Attorney General of Wyoming, Thomas W. Corbett, Jr., Attorney General of Pennsylvania, and Bradley B. Cavedo; for Bennett College et al. by Wendy S. White; for the Center for Military Readiness et al. by Melissa Wells-Petry and Jordan W. Lorence; for the Employment Law

Center et al. by Patricia A. Shiu and Judith Kurtz; for the Independent Women's Forum et al. by Anita K. Blair and C. Douglas Welty; for Mary Baldwin College by Craig T. Merritt and Richard K. Willard; for the South Carolina Institute of Leadership for Women by Julianne Farnsworth; for Wells College et al. by David M. Lascell; for Women's Schools Together, Inc., et al. by John C. Danforth and Thomas C. Walsh; and for Nancy Mellette by Valorie K. Vojdik, Henry Weisburg, Suzanne E. Coe, and Robert R. Black.

Briefs of amici curiae were filed in No. 94-1941 for the American Association of University Professors et al. by Joan E. Bertin and Ann H. Franke; and for Rhonda Cornum et al. by Allan L. Gropper.

Daniel F. Kolb, Herbert J. Hansell, Paul C. Saunders, Norman Redlich, Barbara R. Arnwine, Thomas J. Henderson, and Richard T. Seymour filed a brief for the Lawyers' Committee for Civil Rights Under Law as amicus curiae in No. 94-2107.

JUDGES: GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, post, p. 558. SCALIA, J., filed a dissenting opinion, post, p. 566. THOMAS, J., took no part in the consideration or decision of the case.

OPINIONBY: GINSBURG

OPINION: [**2269] [*519] 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.

[*520] 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" [***10] 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.

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

A

From its establishment in 1839 as one of the Nation's [***11] first state military colleges, see [**2270] 1839 Va. Acts, ch. 20, VMI has remained financially supported by Virginia and "subject to [*521] the control of the [Virginia] General Assembly," Va. Code Ann. § 23-92 (1993). First southern college to teach engineering and industrial chemistry, see H. Wise, *Drawing Out the Man: The VMI Story* 13 (1978) (*The VMI Story*), VMI once provided teachers for the Commonwealth's schools, see 1842 Va. Acts, ch. 24, § 2 (requiring every cadet to teach in one of the Commonwealth's schools for a 2-year period).ⁿ¹ Civil War strife threatened the school's vitality, but a resourceful superintendent regained legislative support by highlighting "VMI's great potential[,] through its technical know-how," to advance Virginia's postwar recovery. *The VMI Story* 47.

ⁿ¹ During the Civil War, school teaching became a field dominated by women. See A. Scott, *The Southern Lady: From Pedestal to Politics, 1830-1930*, p. 82 (1970).

VMI today enrolls about 1,300 men as cadets.ⁿ² Its academic offerings in the liberal [***12] 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 [***13] work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense [***54] of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in [*522] time of national peril." 766 F. Supp. 1407, 1425 (WD Va. 1991) (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

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." 766 F. Supp., at 1432.

n2 Historically, most of Virginia's public colleges and universities were single sex; by the mid-1970's, however, all except VMI had become coeducational. 766 F. Supp. 1407, 1418-1419 (WD Va. 1991). For example, Virginia's legislature incorporated Farmville Female Seminary Association in 1839, the year VMI opened. 1839 Va. Acts, ch. 167. Originally providing instruction in "English, Latin, Greek, French, and piano" in a "home atmosphere," R. Sprague, Longwood College: A History 7-8, 15 (1989) (Longwood College), Farmville Female Seminary became a public institution in 1884 with a mission to train "white female teachers for public schools," 1884 Va. Acts, ch. 311. The school became Longwood College in 1949, Longwood College 136, and introduced coeducation in 1976, id., at 133.

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." Id., at 1421. 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, . . . [***14] how much he can take under stress, . . . exactly what he can do when he is physically exhausted.'" Id., at 1421-1422 (quoting Col. N. Bissell).

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. Id., at 1424, 1432. Entering students are

incessantly exposed to the rat line, "an extreme form of the adversative model," comparable in intensity to Marine Corps boot camp. Id., at 1422. 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. Ibid.

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.'" Id., at 1422-1423.

[*523] VMI attracts some applicants because of its reputation as an extraordinarily challenging military school, and "because its [**2271] alumni are exceptionally [***15] close to the school." Id., at 1421. "Women have no opportunity anywhere to gain the benefits of [the system of education at VMI]." Ibid.

B

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. Id., at 1408. n3 Trial of the action consumed six days and involved an array of expert witnesses on each side. Ibid.

n3 The District Court allowed the VMI Foundation and the VMI Alumni Association to intervene as defendants. 766 F. Supp., at 1408.

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. Id., at 1436. "Some women, at least," the court said, "would want to attend the school if they had the opportunity." Id., at 1414. The court further recognized that, [***16] with recruitment, VMI could "achieve at least 10% female enrollment" -- "a sufficient 'critical mass' to provide the female cadets with a positive educational experience." Id., at 1437-1438. And it was also established that "some women are capable of all of the individual activities required of VMI cadets." Id., at 1412. 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." Id., at 1441.

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*, 458 U.S. 718, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982), was [*524] the closest guide. 766 F. Supp., at 1410. There, this Court underscored that a party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. *Mississippi Univ. for Women*, 458 U.S. at 724 (internal quotation marks omitted). 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." *Ibid.* (internal quotation marks omitted).

The District Court reasoned that education in "a single-gender environment, be it male or female," yields substantial benefits. 766 F. Supp., at 1415. 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." *Ibid.* 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." *Ibid.*

"Women are [indeed] denied a unique educational opportunity that is available only at VMI," the District Court acknowledged. *Id.*, at 1432. 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, *id.*, at 1413: "Allowance for personal privacy would have to be made," *id.*, at 1412; "physical education requirements would have to [***18] be altered, at least for the women," *id.*, at 1413; the adversative environment could not survive unmodified, *id.*, at 1412-1413. Thus, "sufficient constitutional justification" had been shown, the District Court held, "for continuing [VMI's] single-sex policy." *Id.*, at 1413.

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, [*525] under an announced policy of diversity, to afford VMI's unique type of program to men and not to women." 976 F.2d 890, 892 (1992).

[**2272] 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 nondiscrimina-

tion commitment: "'It is extremely important that [colleges and universities] deal with faculty, staff, and students without regard to sex, race, or ethnic origin.'" *Id.*, at 899 (quoting 1990 Report of the Virginia Commission on the University of the 21st Century). "That statement, [***19] " 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." 976 F.2d, at 899. 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." *Ibid.* 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." *Ibid.*

The parties agreed that "some women can meet the physical standards now imposed on men," *id.*, at 896, and the court was satisfied that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women," *id.*, at 899. The Court of Appeals, however, accepted the District Court's finding that " [***124] 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." *Id.*, at 896-897. Remanding the case, the appeals [***20] 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 [*526] or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution. *Id.*, at 900. In May 1993, this Court denied certiorari. See 508 U.S. 946; see also *ibid.* (opinion of SCALIA, J., noting the interlocutory posture of the litigation).

C

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. See 852 F. Supp. 471, 476-477 (WD Va. 1994).

The average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI

freshmen. See [***21] *id.*, at 501. Mary Baldwin's faculty holds "significantly fewer Ph. D.'s than the faculty at VMI," *id.*, at 502, and receives significantly lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin College), reprinted in 2 App. in Nos. 94-1667 and 94-1717 (CA4) (hereinafter Tr.). While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. See 852 F. Supp., at 503. 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. See *ibid.*

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. *Id.*, at 476. Training its attention on methods of instruction appropriate for "most women," the [*527] Task Force determined that a military model would be "wholly inappropriate" for VWIL. *Ibid.*; see 44 F.3d 1229, 1233 (CA4 1995).

VWIL students would participate in ROTC programs and a newly established, "largely ceremonial [***22] " Virginia Corps of Cadets, *id.*, at 1234, but the VWIL House would not have a military format, 852 F. Supp., at 477, and [**2273] VWIL would not require its students to eat meals together or to wear uniforms during the schoolday, *id.*, at 495. In lieu of VMI's adversative method, the VWIL Task Force favored "a cooperative method which reinforces self-esteem." *Id.*, at 476. 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. See 44 F.3d, at 1234.

Virginia represented that it will provide equal financial support for in-state VWIL students and VMI cadets, 852 F. Supp., at 483, and the VMI Foundation agreed to supply a \$ 5.4625 million endowment for the VWIL program, *id.*, at 499. Mary Baldwin's own endowment is about \$ 19 million; VMI's is \$ 131 million. *Id.*, at 503. Mary Baldwin will add \$ 35 million to its endowment based on future commitments; VMI will add \$ 220 million. *Ibid.* The VMI Alumni Association has developed a network of employers interested in hiring VMI graduates. [***23] The Association has agreed to open its network to VWIL graduates, *id.*, at 499, but those graduates will not have the advantage afforded by a VMI degree.

D

Virginia returned to the District Court seeking ap-

proval of its proposed remedial plan, and the court decided the plan met the requirements of the Equal Protection Clause. *Id.*, at 473. The District Court again acknowledged evidentiary support for these determinations: "The VMI methodology could be used to educate women and, in fact, some [*528] women . . . may prefer the VMI methodology to the VWIL methodology." *Id.*, at 481. But the "controlling legal principles," the District Court decided, "do not require the Commonwealth to provide a mirror image VMI for women." *Ibid.* The court anticipated that the two schools would "achieve substantially similar outcomes." *Ibid.* 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." *Id.*, at 484.

A divided Court of Appeals affirmed the District Court's judgment. 44 F.3d 1229 (CA4 1995). This time, the appellate court determined to give "greater scrutiny [***24] to the selection of means than to the [Commonwealth's] proffered objective." *Id.*, at 1236. The official objective or purpose, the court said, should be reviewed deferentially. *Ibid.* 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." *Ibid.*

"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, *id.*, at 1238; that objective, the court added, is "not pernicious," *id.*, at 1239. Moreover, the court continued, the adversative method vital to a VMI education "has never been tolerated in a sexually heterogeneous environment." *Ibid.* 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." *Ibid.*

Having determined, [***25] deferentially, the legitimacy of Virginia's purpose, the court considered the question of means. [*529] 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." *Ibid.*

The court recognized that, as it analyzed the case, means merged into end, and the merger risked "bypassing any equal protection scrutiny." *Id.*, at 1237. The

court therefore added another inquiry, a decisive test it called "substantive comparability." Ibid. 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 [**2274] means offered by the State." Ibid. 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." *Id.*, at 1241.

Senior Circuit Judge Phillips dissented. The court, in his judgment, had not held Virginia to the burden of showing an "'exceedingly persuasive [justification]' [***26] " for the Commonwealth's action. *Id.*, at 1247 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724). 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." 44 F.3d, at 1247. 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 in order to preserve its historic character and mission." Ibid.

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, [***82] funding, physical plant, administration [*530] and support services, and faculty and library resources." *Id.*, at 1250. 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 [***27] to men and women." Ibid.

The Fourth Circuit denied rehearing en banc. 52 F.3d 90 (1995). Circuit Judge Motz, joined by Circuit Judges Hall, Murnaghan, and Michael, filed a dissenting opinion. n4 Judge Motz agreed with Judge Phillips that Virginia had not shown an "'exceedingly persuasive justification'" for the disparate opportunities the Commonwealth supported. *Id.*, at 92 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724). She asked: "[H]ow can a degree from a yet to be implemented supplemental program [ILLEGIBLE WORD] Mary Baldwin be held 'substantively comparable' to a degree from a venerable Virginia military institution that was established more than 150 years ago?" 52 F.3d, at 93. "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." Ibid.

n4 Six judges voted to rehear the case en banc, four voted against rehearing, and three were recused. The Fourth Circuit's local Rule permits rehearing en banc only on the vote of a majority of the Circuit's judges in regular active service (currently 13) without regard to recusals. See 52 F.3d, at 91, and n. 1.

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 -- extraordinary opportunities for military training and civilian leadership development -- deny to women "capable of all of the individual activities required of VMI cadets," 766 F. Supp., at 1412, the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, *id.*, at 1413 -- as Virginia's sole single-sex public institution of [*531] 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.*, 511 U.S. 127, 136-137, 128 L. Ed. 2d 89, 114 S. Ct. 1419, and n. 6 (1994), and *Mississippi Univ. for Women*, 458 U.S. at 724 (internal quotation marks omitted): 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. As a plurality of this Court acknowledged [***29] a generation ago, "our Nation has had a long and unfortunate [**2275] history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; n5 not until 1920 did women gain a constitutional right to the franchise. *Id.*, at 685. 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. See, e. g., *Goesaert v. Cleary*, 335 U.S. 464, 467, 93 L. Ed. 163, 69 S. Ct. 198 (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 [*532] bartenders to . . . monopolize the calling" prompted the legislation).

n5 As Thomas Jefferson stated the view prevailing when the Constitution was new:

"Were our State a pure democracy . . . there would yet be excluded from their deliberations . . . women, who, to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men." Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), in 10 Writings of Thomas Jefferson 45-46, n. 1 (P. Ford ed. 1899).

[***30] 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*, 404 U.S. 71, 73, 30 L. Ed. 2d 225, 92 S. Ct. 251 (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. See, e. g., *Kirchberg v. Feenstra*, 450 U.S. 455, 462-463, 67 L. Ed. 2d 428, 101 S. Ct. 1195 (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*, 421 U.S. 7, 43 L. Ed. 2d 688, 95 S. Ct. 1373 (1975) (invalidating Utah requirement that parents support boys until age 21, girls only until age 18).

Without [***31] equating gender classifications, for all purposes, to classifications based on race or national origin, n6 the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). See *J. E. B.*, 511 U.S. at 152 (KENNEDY, J., concurring in judgment) (case law evolving since 1971 "reveal[s] 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 [*533] 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. See *Mississippi Univ. for Women*, 458 U.S. at 724. 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.'" *Ibid.* (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980)). 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. See [**2276] *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 223-224, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1977) (STEVENS, J., concurring in judgment).

n6 The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin, but last Term observed that strict scrutiny of such classifications is not inevitably "fatal in fact." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) (internal quotation marks omitted).

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*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967). Physical differences between men and women, [***33] 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*, 329 U.S. 187, 193, 91 L. Ed. 181, 67 S. Ct. 261 (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*, 430 U.S. 313, 320, 51 L. Ed. 2d 360, 97 S. Ct. 1192 (1977) (per curiam), to "promote equal employment opportunity," see *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289, 93 L. Ed. 2d 613, 107 S. Ct. 683 (1987), to

advance full development of the talent and capacities of our Nation's people. n7 [*534] But such classifications may not be used, as they once were, see *Goesaert*, 335 U.S. at 467, to create or perpetuate the legal, social, and economic inferiority of women.

n7 Several amici have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity. Indeed, it is the mission of some single-sex schools "to dissipate, rather than perpetuate, traditional gender classifications." See Brief for Twenty-six Private Women's Colleges as Amici Curiae 5. We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as "unique," see 766 F. Supp., at 1413, 1432; 976 F.2d, at 892, an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college. Cf. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720, n. 1, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982) ("Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.").

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

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." 976 F.2d, at 892. Virginia challenges that "liability" ruling and asserts two justifications in defense of VMI's exclusion of [*535] women. First, the Commonwealth contends, "single-sex education provides important educational benefits," Brief for Cross-

Petitioners 20, and the option of single-sex education contributes to "diversity in educational approaches," id., [***35] at 25. 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. Id., at 33-36 (internal quotation marks omitted). We consider these two justifications in turn.

A

Single-sex education affords pedagogical benefits to at least some students, [*2277] Virginia emphasizes, and that reality is uncontested in this litigation. n8 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 [*536] in fact differently grounded. See *Wiesenfeld*, 420 U.S. at 648, and n. 16 ("mere recitation of a benign [or] compensatory purpose" does not block "inquiry into the actual purposes" of government-maintained gender-based [***36] classifications); *Goldfarb*, 430 U.S. at 212-213 (rejecting government-proffered purposes after "inquiry into the actual purposes") (internal quotation marks omitted).

n8 On this point, the dissent sees fire where there is no flame. See post, at 596-598, 598-600. "Both men and women can benefit from a single-sex education," the District Court recognized, although "the beneficial effects" of such education, the court added, apparently "are stronger among women than among men." 766 F. Supp., at 1414. The United States does not challenge that recognition. Cf. C. Jencks & D. Riesman, *The Academic Revolution* 297-298 (1968):

"The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority -- assumptions for which women must eventually pay."

518 U.S. 515, *536; 116 S. Ct. 2264, **2277;
1996 U.S. LEXIS 4259, ***36; 135 L. Ed. 2d 735

[***37] 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." 458 U.S. at 727. Undertaking a "searching analysis," *id.*, at 728, the Court found no close resemblance between "the alleged objective" and "the actual purpose underlying the discriminatory classification," *id.*, at 730. 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; n9 reflecting [*537] 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. See E. Fareello, A History of the Education of Women in the United States 163 (1970). VMI was not at all novel in this respect: In admitting no [***38] women, VMI followed the lead of the Commonwealth's flagship school, the University of Virginia, founded in 1819.

n9 Dr. Edward H. Clarke of Harvard Medical School, whose influential book, *Sex in Education*, went through 17 editions, was perhaps the most well-known speaker from the medical community opposing higher education for women. He maintained that the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs. See E. Clarke, *Sex in Education* 38-39, 62-63 (1873); *id.*, at 127 ("identical education of the two sexes is a crime before God and humanity, that physiology protests against, and that experience weeps over"); see also H. Maudsley, *Sex in Mind and in Education* 17 (1874) ("It is not that girls have not ambition, nor that they fail generally to run the intellectual race [in coeducational settings], but it is asserted that they do it at a cost to their strength and health which entails life-long suffering, and even incapacitates them for the adequate performance of the natural functions of their sex."); C. Meigs, *Females and Their Diseases* 350 (1848) (after five or six weeks of "mental and educational discipline," a healthy woman would "lose . . . the habit of menstruation" and suffer numerous ills as a result of depriving her body for the sake of her mind).

" [***39] 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." 2 T. Woody, A History of Women's Education in the United States 254 (1929) (History of Women's Education). In [**2278] 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.'" *Ibid.* (quoting 10 Educ. J. Va. 212 (1879)). Despite this recognition, no new opportunities were instantly open to women. n10

n10 Virginia's Superintendent of Public Instruction dismissed the coeducational idea as "'repugnant to the prejudices of the people'" and proposed a female college similar in quality to Girton, Smith, or Vassar. 2 History of Women's Education 254 (quoting Dept. of Interior, 1 Report of Commissioner of Education, H. R. Doc. No. 5, 58th Cong., 2d Sess., 438 (1904)).

[***40] Virginia eventually provided for several women's seminaries and colleges. Farmville Female Seminary became a public institution in 1884. See *supra*, at 521, n. 2. Two women's schools, Mary Washington College and James Madison University, were founded in 1908; another, Radford University, was founded in 1910. 766 F. Supp., at 1418-1419. By the mid-1970's, all four schools had become coeducational. *Ibid.*

Debate concerning women's admission as undergraduates at the main university continued well past the century's midpoint. Familiar arguments were rehearsed. If women [*538] 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." 2 History of Women's Education 255.

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. See *Kirstein v. Rector and Visitors [***41] of Univ. of Virginia*, 309 F. Supp. 184, 186 (ED Va. 1970). 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." *Id.*, at 187.

Virginia describes the current absence of public single-sex higher education for women as "an historical anomaly." Brief for Cross-Petitioners 30. 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." 766 F. Supp., at 1419. 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.'" 976 F.2d, at 898-899 (quoting Report of the Virginia Commission on [***42] the University of the 21st Century). Significantly, the Commission reported:

"'Because colleges and universities provide opportunities for students to develop values and learn from role [*539] models, it is extremely important that they deal with faculty, staff, and students without regard to sex, race, or ethnic origin.'" *Id.*, at 899 (emphasis supplied by Court of Appeals deleted).

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." *Ibid.*

Our 1982 decision in *Mississippi Univ. for Women* prompted VMI to reexamine its male-only admission policy. See 766 F. Supp., at 1427-1428. Virginia relies on that reexamination as a legitimate basis for maintaining VMI's single-sex character. See Reply Brief for Cross-Petitioners 6. 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." See 766 F. Supp. at 1429 (internal quotation marks [**2279] omitted). Whatever internal purpose the Mission Study Committee [***43] 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." *Ibid.*

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.'" See 976 F.2d, at 899. No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. See *ibid.* That court also questioned "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." *Ibid.* A purpose genuinely to advance an array of educational [*540] 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." *Ibid.* However "liberally [***44] " 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. See Brief for Cross-Petitioners 34-36. 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." *Id.*, at 34.

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." 976 F.2d, at 896-897. And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. See Brief for Cross-Respondent 11, 29-30. It is also undisputed, however, that "the VMI methodology could be used to educate women." 852 F. Supp., at 481. The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. See *ibid.* "Some women, at least, would want to attend [VMI] if they had the opportunity," the District Court recognized, 766 F. Supp., at 1414, and "some women," the expert testimony established, "are [*541] capable of all of the individual activities required of VMI cadets," *id.*, at 1412. The parties, furthermore, agree that "some women can meet the physical standards [VMI] now impose[s] on men." 976 F.2d, at 896. In sum, as the Court of Appeals

stated, "neither the goal of producing citizen soldiers," VMI's *raison d'être*, "nor VMI's implementing methodology is inherently unsuitable to women." *Id.*, at 899.

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 [***46] differences." 766 F. Supp., at 1434-1435. These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." *Id.*, at 1434. For example, "males tend to need an atmosphere of adversativeness," while "females tend to thrive in a cooperative atmosphere." *Ibid.* "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." *Ibid.* (internal quotation marks omitted).

[**2280] 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*, 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971), 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. See O'Connor, *Portia's Progress*, 66 N. Y. U. L. Rev. 1546, 1551 (1991). State actors controlling [***47] 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*, 458 U.S. at 725; see *J. E. B.*, 511 U.S. at 139, n. 11 (equal protection principles, as applied to gender classifications, mean [*542] state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to . . . perpetuate historical patterns of discrimination").

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. As Fourth Circuit Judge Motz observed, however, in her dissent from the Court of Appeals' denial of rehearing en banc, it is also probable that "many men would not want to be educated in such an environment." 52 F.3d, at 93. (On that point, even our dissenting colleague might agree.) 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 atten-

dant opportunities that VMI uniquely [***48] affords. *Ibid.*

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, n11 is a judgment hardly proved, n12 a prediction [*543] hardly different from other "self-fulfilling prophec[ies]," see *Mississippi Univ. for Women*, 458 U.S. at 730, 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 [***49] 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 fogysm[.]' . . . It arises rather from a comprehension of the magnitude of the responsibilities connected with the successful [**2281] 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* (Minn. C. P. Hennepin Cty., 1876), in *The Syllabi*, Oct. 21, 1876, pp. 5, 6 (emphasis added).

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 [*544] 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!" *The Nation*, Feb. 18, 1925, p. 173.

n11 See post, at 566, 598-599, 603. Forecasts of the same kind were made regarding admission of women to the federal military academies. See, e. g., Hearings on H. R. 9832 et al. before Subcommittee No. 2 of the House Committee on Armed Services, 93d Cong., 2d Sess., 137 (1975) (statement of Lt. Gen. A. P. Clark, Superintendent of U.S. Air Force Academy) ("It is my considered judgment that the introduction of female cadets will inevitably erode this vital atmosphere."); *id.*, at 165 (statement of Hon. H. H. Callaway, Secretary of the Army) ("Admitting

women to West Point would irrevocably change the Academy. . . . The Spartan atmosphere -- which is so important to producing the final product -- would surely be diluted, and would in all probability disappear.").

n12 See 766 *F. Supp.*, at 1413 (describing testimony of expert witness David Riesman: "If VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether, and adopt a system that provides more nurturing and support for the students."). Such judgments have attended, and impeded, women's progress toward full citizenship stature throughout our Nation's history. Speaking in 1879 in support of higher education for females, for example, Virginia State Senator C. T. Smith of Nelson recounted that legislation proposed to protect the property rights of women had encountered resistance. 10 *Educ. J. Va.* 213 (1879). A Senator opposing the measures objected that "there [was] no formal call for the [legislation]," and "depicted in burning eloquence the terrible consequences such laws would produce." *Ibid.* The legislation passed, and a year or so later, its sponsor, C. T. Smith, reported that "not one of [the forecast "terrible consequences"] has or ever will happen, even unto the sounding of Gabriel's trumpet." *Ibid.* See also *supra*, at 537-538.

[***50] Medical faculties similarly [***51] resisted men and women as partners in the study of medicine. See R. Morantz-Sanchez, *Sympathy and Science: Women Physicians in American Medicine* 51-54, 250 (1985); see also M. Walsh, "Doctors Wanted: No Women Need Apply" 121-122 (1977) (quoting E. Clarke, *Medical Education of Women*, 4 *Boston Med. & Surg. J.* 345, 346 (1869) ("God forbid that I should ever see men and women aiding each other to display with the scalpel the secrets of the reproductive system")); cf. *supra*, at 536-537, n. 9. More recently, women seeking careers in policing encountered resistance based on fears that their presence would "undermine male solidarity," see F. Heidensohn, *Women in Control?* 201 (1992); deprive male partners of adequate assistance, see *id.*, at 184-185; and lead to sexual misconduct, see C. Milton et al., *Women in Policing* 32-33 (1974). Field studies did not confirm these fears. See Heidensohn, *supra*, at 92-93; P. Bloch & D. Anderson, *Policewomen on Patrol: Final Report* (1974).

Women's successful entry into the federal military academies, n13 and their participation in the Nation's military forces, n14 indicate that Virginia's fears for the future of VMI [*545] may not be solidly grounded.

n15 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.

n13 Women cadets have graduated at the top of their class at every federal military academy. See Brief for Lieutenant Colonel Rhonda Cornum et al. as Amici Curiae 11, n. 25; cf. Defense Advisory Committee on Women in the Services, *Report on the Integration and Performance of Women at West Point* 64 (1992).

n14 Brief for Lieutenant Colonel Rhonda Cornum, *supra*, at 5-9 (reporting the vital contributions and courageous performance of women in the military); see Mintz, *President Nominates 1st Woman to Rank of Three-Star General*, *Washington Post*, Mar. 27, 1996, p. A19, col. 1 (announcing President's nomination of Marine Corps Major General Carol Mutter to rank of Lieutenant General; Mutter will head corps manpower and planning); Tousignant, *A New Era for the Old Guard*, *Washington Post*, Mar. 23, 1996, p. C1, col. 2 (reporting admission of Sergeant Heather Johnsen to elite Infantry unit that keeps round-the-clock vigil at Tomb of the Unknowns in Arlington National Cemetery).

n15 Inclusion of women in settings where, traditionally, they were not wanted inevitably entails a period of adjustment. As one West Point cadet squad leader recounted: "The classes of '78 and '79 see the women as women, but the classes of '80 and '81 see them as classmates." *U.S. Military Academy, A. Vitters, Report of Admission of Women (Project Athena II)* 84 (1978) (internal quotation marks omitted).

[***53] 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, see 458 *U.S.* at 724-725, 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 func-

tions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready [**2282] . . . to defend [***121] their country in time of national peril.'" 766 F. Supp., at 1425 (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

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 [*546] 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. n16 Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,'" *Mississippi Univ. for Women*, 458 U.S. at 731, that must be the solid base for any gender-defined classification.

n16 VMI has successfully managed another notable change. The school admitted its first African-American cadets in 1968. See *The VMI Story* 347-349 (students no longer sing "Dixie," salute the Confederate flag or the tomb of General Robert E. Lee at ceremonies and sports events). As the District Court noted, VMI established a program on "retention of black cadets" designed to offer academic and social-cultural support to "minority members of a dominantly white and tradition-oriented student body." 766 F. Supp., at 1436-1437. The school maintains a "special recruitment program for blacks" which, the District Court found, "has had little, if any, effect on VMI's method of accomplishing its mission." *Id.*, at 1437.

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 District Court approval. The Fourth Circuit, in turn, deferentially reviewed the Commonwealth's proposal and decided that the two single-sex programs directly served Virginia's reasserted purposes: single-gender education, and "achieving the results of an adversative method in a military environment." See 44 F.3d, at 1236, 1239. Inspecting the VMI and VWIL educational programs to determine whether they "afforded to both genders benefits comparable in substance, [if] not in form and detail," *id.*, at 1240, the Court of Appeals concluded that Virginia had arranged for men and women opportunities "sufficiently

comparable" to survive equal protection evaluation, *id.*, at 1240-1241. The United States challenges this "remedial" ruling as pervasively misguided.

[*547] 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]." [***56] " See *Milliken v. Bradley*, 433 U.S. 267, 280, 53 L. Ed. 2d 745, 97 S. Ct. 2749 (1977) (internal quotation marks omitted). 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*, 380 U.S. 145, 154, 13 L. Ed. 2d 709, 85 S. Ct. 817 (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. n17 Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal "directly addressed and related [**2283] to" the violation, see *Milliken*, 433 U.S. at 282, i. e., the equal protection denied to women ready, willing, and able to benefit from educational [*548] 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 [***57] " and VMI's goals of providing "education, military training, mental and physical discipline, character . . . and leadership development." Brief for Respondents 24 (internal quotation marks omitted). If the VWIL program could not "eliminate the discriminatory effects of the past," could it at least "bar like discrimination in the future"? See *Louisiana*, 380 U.S. at 154. A comparison of the programs said to be "parallel" informs our answer. In exposing the character of, and differences in, the VMI and VWIL programs, we recapitulate facts earlier presented. See *supra*, at 520-523, 526-527.

n17 As earlier observed, see *supra*, at 529, Judge Phillips, in dissent, measured Virginia's plan against a paradigm arrangement, one that "could survive equal protection scrutiny": single-sex schools with "substantially comparable curricular and extra-curricular programs, funding, physical plant, admin-

istration and support services, . . . faculty[,] and library resources." 44 F.3d 1229, 1250 (CA4 1995). Cf. *Bray v. Lee*, 337 F. Supp. 934 (Mass. 1972) (holding inconsistent with the Equal Protection Clause admission of males to Boston's Boys Latin School with a test score of 120 or higher (up to a top score of 200) while requiring a score, on the same test, of at least 133 for admission of females to Girls Latin School, but not ordering coeducation). Measuring VMI/VWIL against the paradigm, Judge Phillips said, "reveals how far short the [Virginia] plan falls from providing substantially equal tangible and intangible educational benefits to men and women." 44 F.3d, at 1250.

VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. See 766 F. Supp., at 1413-1414 ("No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI."); *id.*, at 1421 (VMI "is known to be the most challenging military school in the United States"). Instead, the VWIL program "deemphasize[s]" military education, 44 F.3d, at 1234, and uses a "cooperative method" of education "which reinforces self-esteem," 852 F. Supp., at 476.

VWIL students participate in ROTC and a "largely ceremonial" *Virginia Corps of Cadets*, see 44 F.3d, at 1234, 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. See 852 F. Supp., at 477, 495. VWIL students thus do not experience the "barracks" life "crucial to the VMI experience," the spartan living arrangements designed to foster an "egalitarian ethic." See 766 F. Supp., at 1423-1424. "The most important aspects of the VMI educational [***59] experience occur in the barracks," the District Court [*549] found, *id.*, at 1423, 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, see 852 F. Supp., at 477, 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, see 766 F. Supp., at 1421. n18 Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, see *id.*, at 1422, VWIL students will not know the "feeling of tremendous ac-

complishment" commonly experienced by VMI's successful cadets, *id.*, at 1426.

n18 Both programs include an honor system. Students at VMI are expelled forthwith for honor code violations, see 766 F. Supp., at 1423; the system for VWIL students, see 852 F. Supp., at 496-497, is less severe, see Tr. 414-415 (testimony of Mary Baldwin College President Cynthia Tyson).

[***60] 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." Brief for Respondents 28 (internal quotation marks omitted). 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." 852 F. Supp., at 476 (emphasis added). See also 44 F.3d, at 1233-1234 (noting Task Force conclusion that, while "some women would be suited to and interested in [a VMI-style experience]," VMI's adversative method "would not be effective for women as a group") (emphasis added). The Commonwealth [*550] embraced the Task Force view, as did expert witnesses who testified for *Virginia*. See 852 F. Supp., at 480-481.

[**2284] As earlier stated, see *supra*, at 541-542, generalizations about "the way women are," estimates of what is appropriate for most women, no longer justify denying opportunity [***61] 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." 852 F. Supp., at 478. 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." See 766 F. Supp., at 1432.

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," 976 F.2d, at 899; "some women . . . do well under [the] adversative model," 766

F. Supp., at 1434 (internal quotation marks omitted); "some women, at least, would want to attend [VMI] if they had the opportunity," *id.*, at 1414; "some women are capable of all of the individual activities required of VMI cadets," *id.*, at 1412, and "can meet the physical standards [***62] [VMI] now impose[s] on men," 976 *F.2d*, at 896. 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, n19 a remedy that will end their [*551] exclusion from a state-supplied educational opportunity for which they are fit, a decree that will "bar like discrimination in the future." *Louisiana*, 380 U.S. at 154.

n19 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. See Brief for Petitioner 27-29; cf. note following 10 U.S.C. § 4342 (academic and other standards for women admitted to the Military, Naval, and Air Force Academies "shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). 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); Defense Advisory Committee on Women in the Services, Report on the Integration and Performance of Women at West Point 17-18 (1992).

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 College, whose degree VWIL students will gain, enrolls first-year women with an average combined SAT score about 100 points lower than the average score for VMI freshmen. 852 *F. Supp.*, at 501. The Mary Baldwin faculty holds "significantly fewer Ph. D.'s," *id.*, at 502, and receives substantially lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin College), than the faculty at VMI.

Mary Baldwin does not offer a VWIL student the

range of curricular choices available to a VMI cadet. VMI awards baccalaureate degrees in liberal arts, biology, chemistry, civil engineering, electrical and computer engineering, and mechanical engineering. See 852 *F. Supp.*, at 503; Virginia Military Institute: More than an Education 11 (Govt. exh. 75, [*552] lodged with Clerk of this Court). VWIL students attend a school that "does not have a math and science [***64] focus," 852 *F. Supp.*, at 503; they cannot take at Mary Baldwin any courses in engineering or the advanced math and physics courses VMI offers, see *id.*, at 477.

For physical training, Mary Baldwin has "two multi-purpose fields" and "one gymnasium." *Id.*, at 503. VMI has "an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor [*2285] running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track." *Ibid.*

Although Virginia has represented that it will provide equal financial support for in-state VWIL students and VMI cadets, *id.*, at 483, and the VMI Foundation has agreed to endow VWIL with \$ 5.4625 million, *id.*, at 499, the difference between the two schools' financial reserves is pronounced. Mary Baldwin's endowment, currently about \$ 19 million, will gain an additional \$ 35 million based on future commitments; VMI's current endowment, \$ 131 million -- the largest public college per-student endowment in the Nation -- will gain \$ 220 [***65] million. *Id.*, at 503.

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. See 976 *F.2d*, at 892-893. "[VMI] alumni are exceptionally close to the school," and that closeness accounts, in part, for VMI's success in attracting applicants. See 766 *F. Supp.*, at 1421. A VWIL graduate cannot assume that the "network of business owners, corporations, VMI graduates and non-graduate employers . . . interested in hiring VMI graduates," 852 *F. Supp.*, at 499, will be equally responsive to her search for employment, [*553] see 44 *F.3d*, at 1250 (Phillips, J., dissenting) ("the powerful political and economic ties of the VMI alumni network cannot be expected to open" for graduates of the fledgling VWIL program).

Virginia, in sum, while maintaining VMI for men only, has failed to provide any "comparable single-gender women's institution." *Id.*, at 1241. Instead, the Commonwealth has created a VWIL program fairly ap-

praised as a "pale shadow" of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support [***66] and influence. See *id.*, at 1250 (Phillips, J., dissenting).

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*, 339 U.S. 629, 94 L. Ed. 1114, 70 S. Ct. 848 (1950). Reluctant to admit African Americans to its flagship University of Texas Law School, the State set up a separate school for Herman Sweatt and other black law students. *Id.*, at 632. As originally opened, the new school had no independent faculty or library, and it lacked accreditation. *Id.*, at 633. 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." *Id.*, at 632 (internal quotation marks omitted).

Before this Court considered the case, the new school had gained "a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; [***67] and one alumnus who had become a member of the Texas Bar." *Id.*, at 633. This Court contrasted resources at the new school with those at the school from which Sweatt had been excluded. The University of Texas Law School had a full-time faculty of 16, a student body of 850, a library containing over [*554] 65,000 volumes, scholarship funds, a law review, and moot court facilities. *Id.*, at 632-633.

More important than the tangible features, the Court emphasized, are "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." *Id.*, at 634. Facing the marked differences reported in the Sweatt opinion, the Court unanimously ruled that Texas had not [***8] shown " [***68] substantial equality in the [separate] educational opportunities" the State offered. *Id.*, at 633. Accordingly, the Court held, the Equal Protection Clause required Texas to admit African Americans to the University of Texas Law School. *Id.*, at [**2286] 636. 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

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*, 433 U.S. at 280 (internal quotation marks omitted). 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." 44 F.3d, at 1241. 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." *Ibid.* Nevertheless, the appeals court declared the substantially different and significantly unequal VWIL program satisfactory. [*555] The court reached that result by revising the applicable standard of review. The Fourth Circuit displaced the standard [***69] developed in our precedent, see *supra*, at 532-534, and substituted a standard of its own invention.

We have earlier described the deferential review in which the Court of Appeals engaged, see *supra*, at 528-529, a brand of review inconsistent with the more exacting standard our precedent requires, see *supra*, at 532-534. 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." 44 F.3d, at 1235, 1236. 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, *id.*, at 1237, and proceeded to find that new test satisfied, *id.*, at 1241.

The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." See *J. E. B.*, 511 U.S. at 136. Valuable as VWIL may prove for students who seek the program [***70] 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. See *supra*, at 549-554. n20 In [**2287] sum, Virginia's [*556] 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.

n20 Virginia's prime concern, it appears, is that "placing men and women into the adversative relationship inherent in the VMI program . . . would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." 44 F.3d, at 1239; see supra, at 540-546. It is an ancient and familiar fear. Compare *In re Lavinia Goodell*, 39 Wis. 232, 246 (1875) (denying female applicant's motion for admission to the bar of its court, Wisconsin Supreme Court explained: "Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety."), with Levine, Closing Comments, 6 Law & Inequality 41 (1988) (presentation at Eighth Circuit Judicial Conference, Colorado Springs, Colo., July 17, 1987) (footnotes omitted):

"Plato questioned whether women should be afforded equal opportunity to become guardians, those elite Rulers of Platonic society. Ironically, in that most undemocratic system of government, the Republic, women's native ability to serve as guardians was not seriously questioned. The concern was over the wrestling and exercise class in which all candidates for guardianship had to participate, for rigorous physical and mental training were prerequisites to attain the exalted status of guardian. And in accord with Greek custom, those exercise classes were conducted in the nude. Plato concluded that their virtue would clothe the women's nakedness and that Platonic society would not thereby be deprived of the talent of qualified citizens for reasons of mere gender."

For Plato's full text on the equality of women, see 2 *The Dialogues of Plato* 302-312 (B. Jowett transl., 4th ed. 1953). Virginia, not bound to ancient Greek custom in its "rigorous physical and mental training" programs, could more readily make the accommodations necessary to draw on "the talent of [all] qualified citizens." Cf. supra, at 550-551, n. 19.

VII

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*, 309 F. Supp., at 186. Commencing in 1970, Virginia opened to women "educational opportunities at the

Charlottesville campus that [were] not afforded in other [state-operated] institutions." *Id.*, at 187; see supra, at 538. A federal court approved the Commonwealth's innovation, emphasizing that the University of Virginia "offered courses of instruction . . . not available elsewhere." 309 F. Supp., at 187. The court further noted: "There exists at Charlottesville a 'prestige' factor [*557] [not paralleled in] other Virginia educational institutions." *Ibid.*

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 [***72] and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization. Cf. *Sweatt*, 339 U.S. at 633. 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." *Id.*, at 634. 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. n21 VMI's story continued as our comprehension of "We the People" expanded. See supra, at 532, n. 6. [*558] 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."

n21 R. Morris, *The Forging of the Union, 1781-1789*, p. 193 (1987); see *id.*, at 191, setting out letter to a friend from Massachusetts patriot (later second President) John Adams, on the subject of qualifications for voting in his home State:

"It is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and

prostrate all ranks to one common level." Letter from John Adams to James Sullivan (May 26, 1776), in 9 Works of John Adams 378 (C. Adams ed. 1854).

* * *

[***73] For the reasons stated, the initial judgment of the Court of Appeals, 976 F.2d 890 (CA4 1992), is affirmed, the final judgment of the Court of Appeals, 44 F.3d 1229 (CA4 1995), is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS took no part in the consideration or decision of this case.

CONCURBY: REHNQUIST

CONCUR:

CHIEF JUSTICE REHNQUIST, concurring in the judgment.

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 and so I write separately.

[**2288] I

Two decades ago in *Craig v. Boren*, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976), we announced that "to withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." We have adhered to that standard of scrutiny ever since. See *Califano v. Goldfarb*, [***74] 430 U.S. 199, 210-211, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1977); *Califano v. Webster*, 430 U.S. 313, 316-317, 51 L. Ed. 2d 360, 97 S. Ct. 1192 (1977); *Orr v. Orr*, 440 U.S. 268, 279, 59 L. Ed. 2d 306, 99 S. Ct. 1102 (1979); *Caban v. Mohammed*, 441 U.S. 380, 388, 60 L. Ed. 2d 297, 99 S. Ct. 1760 (1979); *Davis v. Passman*, 442 U.S. 228, 234-235, 235, n. 9, 60 L. Ed. 2d 846, 99 S. Ct. 2264 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979); [*559] *Califano v. Westcott*, 443 U.S. 76, 85, 61 L. Ed. 2d 382, 99 S. Ct. 2655 (1979); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980); *Kirchberg v. Feenstra*, 450 U.S. 455, 459-460, 67 L. Ed. 2d 428, 101 S. Ct. 1195 (1981); *Michael*

M. v. Superior Court, Sonoma Cty., 450 U.S. 464, 469, 67 L. Ed. 2d 437, 101 S. Ct. 1200 (1981); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982); *Heckler v. Mathews*, 465 U.S. 728, 744, 79 L. Ed. 2d 646, 104 S. Ct. 1387 (1984); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 137, n. 6, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994). While the majority adheres to this test today, ante, at 524, 533, it also says that the Commonwealth must demonstrate an "exceedingly persuasive justification" to support a gender-based classification. See ante, at 524, 529, 530, 531, 533, 534, 545, 546, 556. It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test.

While [***75] 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. See, e. g., *Feeney, supra*, at 273 ("These precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment require an exceedingly persuasive justification"). To avoid introducing potential confusion, I would have adhered more closely to our traditional, "firmly established," *Hogan, supra*, at 723; *Heckler, supra*, at 744, standard that a gender-based classification "must bear a close and substantial relationship to important governmental objectives." *Feeney, supra*, at 273.

Our cases dealing with gender discrimination also require that the proffered purpose for the challenged law be the actual purpose. See ante, at 533, 535-536. It is on this ground that the Court rejects the first of two justifications Virginia offers for VMI's single-sex [***76] admissions policy, namely, the goal of diversity among its public educational institutions. While I ultimately agree that the Commonwealth [*560] 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, as the Court notes, ante, at 536-537, 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.

518 U.S. 515, *560; 116 S. Ct. 2264, **2288;
1996 U.S. LEXIS 4259, ***76; 135 L. Ed. 2d 735

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*, 335 U.S. 464, 93 L. Ed. 163, 69 S. Ct. 198 (1948). Likewise representing that now abandoned view was [*2289] *Hoyt v. Florida*, 368 U.S. 57, 7 L. Ed. 2d 118, 82 S. Ct. 159 (1961), where the Court upheld a Florida [***77] 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." *Id.*, at 62.

Then, in 1971, we decided *Reed v. Reed*, 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251, which the Court correctly refers to as a seminal case. But 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 [*561] sex over members of the other, merely to accomplish the elimination of hearings," was an "arbitrary legislative choice forbidden by the Equal Protection Clause." *Id.*, at 76. The brief opinion in *Reed* made no mention of [***78] either *Goesaert* or *Hoyt*.

Even at the time of our decision in *Reed v. Reed*, therefore, Virginia and VMI were scarcely on notice that its holding would be extended across the constitutional board. They were entitled to believe that "one swallow doesn't make a summer" and await further developments. Those developments were 11 years in coming. In *Mississippi Univ. for Women v. Hogan*, *supra*, 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*. 766 F. Supp. 1407, 1427 (WD Va. 1991). But the committee ended up cryptically recommending against changing VMI's status as a single-sex college. After

three years of study, the committee found "'no information'" that would warrant a change in VMI's status. *Id.*, at 1429. Even the District Court, ultimately sympathetic [***79] 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." *Ibid.* 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*.

[*562] Before this Court, Virginia has sought to justify VMI's single-sex admissions policy primarily on the basis that diversity in education is desirable, and that while most of the public institutions of higher learning in the Commonwealth are coeducational, there should also be room for single-sex institutions. I agree with the Court that there is scant evidence in the record that this was the real reason that Virginia decided to maintain VMI as men only. * But, unlike the majority, [**2290] I would consider only evidence that postdates our decision in *Hogan*, and would draw no negative inferences [***80] from the Commonwealth's actions before that time. I think that after *Hogan*, the Commonwealth was entitled to reconsider its policy with respect to VMI, and not to have earlier justifications, or lack thereof, held against it.

* The dissent equates our conclusion that VMI's "asserted interest in promoting diversity" is not "'genuine,'" with a "charge" that the diversity rationale is "a pretext for discriminating against women." *Post*, at 579-580. Of course, those are not the same thing. I do not read the Court as saying that the diversity rationale is a pretext for discrimination, and I would not endorse such a proposition. We may find that diversity was not the Commonwealth's real reason without suggesting, or having to show, that the real reason was "antifeminism," *post*, at 580. Our cases simply require that the proffered purpose for the challenged gender classification be the actual purpose, although not necessarily recorded. See *ante*, at 533, 535-536. The dissent also says that the interest in diversity is so transparent that having to articulate it is "absurd on its face." *Post*, at 592. Apparently, that rationale was not obvious to the Mission Study Committee which failed to list it among its reasons for maintaining VMI's all-men admissions policy.

[**81] 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 [***133] sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women. When Hogan placed Virginia on notice that [*563] VMI's admissions policy possibly was unconstitutional, VMI could have dealt with the problem by admitting women; but its governing body felt strongly that the admission of women would have seriously harmed the institution's educational approach. Was there something else the Commonwealth could have done to avoid an equal protection violation? Since the Commonwealth did nothing, we do not have to definitively answer that question.

I do not think, however, that the Commonwealth's options were as limited as the majority may imply. The Court cites, without expressly approving it, a statement from the opinion of the dissenting judge in the Court of Appeals, to the effect that the Commonwealth could have "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." Ante, at 529-530 (internal quotation marks omitted). If this statement is thought to exclude other possibilities, it is too stringent a requirement. VMI had been in operation for over a century and a half, and had an established, successful, and devoted group of alumni. No legislative wand could instantly call into existence a similar institution for women; and it would be a tremendous loss to scrap VMI's history and tradition. In the words of Grover Cleveland's second inaugural address, the Commonwealth faced a condition, not a theory. And it was a condition that had been brought about, not through defiance of decisions construing gender bias under the Equal Protection Clause, but, until the decision in Hogan, a condition that had not appeared to offend the Constitution. 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 [*564] one hand, or abandoning VMI [***83] 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 avail-

able 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)." Post, at 595. 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 [***84] 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 [**2291] pedagogically beneficial for some students, see 766 F. Supp., at 1414, 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.

[*565] II

The Court defines the constitutional violation in these cases as "the categorical exclusion of women from an extraordinary educational opportunity afforded to men." Ante, at 547. 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]," *ibid.*, the Court necessarily implies that the only adequate remedy would be the admission of women [***85] to the all-male institution. As the foregoing discussion suggests, 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. An adequate remedy

in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution. To demonstrate such, the Commonwealth does not need to create two institutions with the same number of faculty Ph. D.'s, similar SAT scores, or comparable athletic fields. See ante, at 551-552. Nor would it necessarily require that the women's institution offer the same curriculum as the men's; one could be strong in computer science, the other could be strong in liberal arts. 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.

If a State decides to create single-sex [***86] programs, the State would, I expect, consider the public's interest and demand in designing curricula. And rightfully so. But the State should avoid assuming demand based on stereotypes; it must not assume a priori, without evidence, that there would be [*566] no interest in a women's school of civil engineering, or in a men's school of nursing.

In the end, the women's institution Virginia proposes, 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. VWIL simply is not, in any sense, the institution that VMI is. In particular, VWIL is a program appended to a private college, not a self-standing institution; and VWIL is substantially underfunded as compared to VMI. I therefore ultimately agree with the Court that Virginia has not provided an adequate remedy.

DISSENTBY: SCALIA

DISSENT: JUSTICE SCALIA, dissenting.

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 [***87] 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. Closedminded they were -- as every age is, including our own, with regard to matters it cannot guess, because it simply does not [*567] consider them debatable. The [**2292] 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 [***88] 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 countermajoritarian 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 [***89] 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," *Clark v. Jeter*, 486 U.S. 456, 461, 100 L. Ed. 2d 465, 108 S. Ct. 1910 (1988) (citation omitted). It is my position that the term "fundamental rights" should be limited to "interest[s] traditionally protected by our society," *Michael H. [568] v. Gerald D.*, 491 U.S. 110, 122, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) (plurality opinion of SCALIA, J.); but the Court has not accepted that view, so that strict scrutiny will be applied to the deprivation of whatever sort of right we consider "fundamental." We have no established cri-

terion 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 [***90] on the basis of sex. See, e. g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994); *Mills v. Habluetzel*, 456 U.S. 91, 98-99, 71 L. Ed. 2d 770, 102 S. Ct. 1549 (1982); *Craig v. Boren*, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976).

I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). 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 [***91] 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." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990) (SCALIA, J., [*569] dissenting). The same applies, mutatis mutandis, to a practice asserted [**2293] to be in violation of the post-Civil War Fourteenth Amendment. See, e. g., *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 109 L. Ed. 2d 631, 110 S. Ct. 2105 (1990) (plurality opinion of SCALIA, J.) (Due Process Clause); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 156-163, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994) (SCALIA, J., dissenting) (Equal Protection Clause); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 979-984, 1000-1001, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) (SCALIA, J., dissenting) (various alleged "penumbras").

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 [***92] 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 (upon which the Court today relies, see ante, at 544-545, nn. 13, 15) came not by court decree, but because the people, through their elected representatives, decreed a change. See, e. g., § 803(a), 89 Stat. 537, note following 10 U.S.C. § 4342. 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 [***93] is not law, but politics-smuggled-into-law.

And the same applies, more broadly, to single-sex education in general, which, as I shall discuss, is threatened by [*570] today's decision with the cutoff of all state and federal support. Government-run nonmilitary educational institutions for the two sexes have until very recently also been part of our national tradition. "[It is] coeducation, historically, [that] is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the Nation's population during much of our history has been educated in sexually segregated classrooms." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 736, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982) (Powell, J., dissenting); see *id.*, at 736-739. These traditions may of course be changed by the democratic decisions of the people, as they largely have been.

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, see ante, at 536-537, and n. 10, 537-539, 542-545, the Court [***94] 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, as JUSTICE O'CONNOR stated some time ago for a unanimous Court, that we evaluate a statutory classification based on sex under a standard that lies "between the extremes of rational basis review and strict scrutiny." *Clark v. Jeter*, 486 U.S. at 461. We have denominated this standard "intermediate scrutiny" and under it have inquired whether the statutory classification is "substantially [*571] related to an important governmental objective." Ibid. See, e. g., *Heckler v. Mathews*, 465 U.S. 728, 744, [*2294] 79 L. Ed. 2d 646, 104 S. Ct. 1387 (1984); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, [***95] 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980); *Craig v. Boren*, 429 U.S. at 197.

Before I proceed to apply this standard to VMI, I must comment upon the manner in which the Court avoids doing so. Notwithstanding our above-described precedents and their "'firmly established principles,'" *Heckler*, *supra*, at 744 (quoting *Hogan*, *supra*, at 723), the United States urged us to hold in this litigation "that strict scrutiny is the correct constitutional standard for evaluating classifications that deny opportunities to individuals based on their sex." Brief for United States in No. 94-2107, p. 16. (This was in flat contradiction of the Government's position below, which was, in its own words, to "state unequivocally that the appropriate standard in this case is 'intermediate scrutiny.'" 2 Record, Doc. No. 88, p. 3 (emphasis added).) The Court, while making no reference to the Government's argument, effectively accepts it.

Although the Court in two places recites the test as stated in *Hogan*, see ante, at 524, 532-533, 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 [***96] of those objectives," 458 U.S. at 724 (internal quotation marks omitted), 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, see ante, at 524, 529, 530, 531, 533, 534, 545, 546, 556, and even its fanciful description of that imponderable as "the core instruction" of the Court's decisions in *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S.

127, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994), and *Hogan*, *supra*, see ante, at 531, would be unobjectionable if the Court acknowledged that whether a "justification" is "exceedingly persuasive" must be assessed by asking [*572] "[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.

That is essential to the Court's result, which can only be achieved by establishing that intermediate scrutiny [***97] is not survived if there are some women interested in attending VMI, capable of undertaking its activities, and able to meet its physical demands. Thus, the Court summarizes its holding as follows:

"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." Ante, at 550 (internal quotation marks, citations, and punctuation omitted; emphasis added).

Similarly, the Court states that "the Commonwealth's justification for excluding all women from 'citizen-soldier' training for which some are qualified . . . cannot rank as 'exceedingly persuasive'" Ante, at 545. n1

n1 Accord, ante, at 541 ("In sum . . . , neither the goal of producing citizen-soldiers, VMI's *raison d'être*, nor VMI's implementing methodology is inherently unsuitable to women") (internal quotation marks omitted; emphasis added); ante, at 542 ("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"); ante, at 547-548 (the "violation" is that "equal protection [has been] denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers"); ante, at 550 ("As earlier stated, see *supra*, at 541-542, 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").

[*573] [***98] Only the amorphous "exceedingly persuasive justification" phrase, and not the [**2295] 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 (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a "substantial relation" between the classification and the state interests that it serves. Thus, in [***101] *Califano v. Webster*, 430 U.S. 313, 51 L. Ed. 2d 360, 97 S. Ct. 1192 (1977) (per curiam), we upheld a congressional statute that provided higher Social Security benefits for women than for men. We reasoned that "women . . . as such have been unfairly hindered from earning as much as men," but we did not require proof that each woman so benefited had suffered discrimination or that each disadvantaged man had not; it was sufficient that even under the former congressional scheme "women on the average received lower retirement benefits than men." *Id.*, at 318, and n. 5 (emphasis added). The reasoning in our other intermediate-scrutiny cases has similarly [***99] required only a substantial relation between end and means, not a perfect fit. In *Rostker v. Goldberg*, 453 U.S. 57, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981), we held that selective-service registration could constitutionally exclude women, because even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." *Id.*, at 81. In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 579, 582-583, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990), overruled on other grounds, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995), we held that a classification need not be accurate "in every case" to survive intermediate scrutiny so long as, "in the aggregate," it advances the underlying [*574] objective. 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.

Not content to execute a de facto abandonment of the intermediate scrutiny that has been our standard for sex-based classifications for some two decades, the Court purports to reserve the question whether, even in principle, [***100] a higher standard (i. e., strict scrutiny) should apply. "The Court has," it says, "thus far reserved most stringent judicial scrutiny for classifications

based on race or national origin . . .," ante, at 532, n. 6 (emphasis added); and it describes our earlier cases as having done no more than decline to "equate gender classifications, for all purposes, to classifications based on race or national origin," ante, at 532 (emphasis added). The wonderful thing about these statements is that they are not actually false -- just as it would not be actually false to say that "our cases have thus far reserved the 'beyond a reasonable doubt' standard of proof for criminal cases," or that "we have not equated tort actions, for all purposes, to criminal prosecutions." But the statements are misleading, insofar as they suggest that we have not already categorically held strict scrutiny to be inapplicable to sex-based classifications. See, e. g., *Heckler v. Mathews*, 465 U.S. 728, 79 L. Ed. 2d 646, 104 S. Ct. 1387 (1984) (upholding state action after applying only intermediate scrutiny); *Michael M. v. Superior Court, Sonoma Cty.*, 450 U.S. 464, 67 L. Ed. 2d 437, 101 S. Ct. 1200 (1981) (same) (plurality and both concurring opinions); *Califano v. Webster*, *supra* (same) (per curiam). And the statements are irresponsible, insofar as they are calculated to destabilize current law. 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.

The Court's intimations are particularly out of place because it is perfectly clear that, if the question of the applicable [*575] standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to [**2296] strict scrutiny, but for reducing it to rational-basis review. The latter certainly has a firmer foundation in our past jurisprudence: Whereas no majority of the Court has ever applied strict scrutiny in a case involving sex-based classifications, we routinely applied rational-basis review until the 1970's, see, e. g., *Hoyt v. Florida*, 368 U.S. 57, 7 L. Ed. 2d 118, 82 S. Ct. 159 (1961); *Goesaert v. Cleary*, 335 U.S. 464, [***102] 93 L. Ed. 163, 69 S. Ct. 198 (1948). And of course normal, rational-basis review of sex-based classifications would be much more in accord with the genesis of heightened standards of judicial review, the famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 82 L. Ed. 1234, 58 S. Ct. 778 (1938), which said (intimately) that we did not have to inquire in the case at hand

"whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordi-

narily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.*, at 152-153, n. 4.

It is hard to consider women a "discrete and insular minority" unable to employ the "political processes ordinarily to be relied upon," when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns. See, e. g., ante, at 536-537, 542-545 (and accompanying notes). Moreover, a long list of legislation proves the proposition false. See, e. g., Equal Pay Act of 1963, 29 U.S.C. § 206(d); Title [***103] VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; Women's Business Ownership Act of 1988, Pub. L. 100-533, 102 Stat. 2689; [*576] Violence Against Women Act of 1994, Pub. L. 103-322, Title IV, 108 Stat. 1902.

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." 44 F.3d 1229, 1238 (CA4 [***104] 1995) (emphasis added).

The evidence establishing that fact was overwhelming -- indeed, "virtually uncontradicted" in the words of the court that received the evidence, 766 F. Supp. 1407, 1415 (WD Va. 1991). 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." *Id.*, at 1434. While no one questioned that for many students a coeducational environment was nonetheless not inappro-

priate, that could not obscure the demonstrated benefits of single-sex colleges. For example, the District Court stated as follows:

"One empirical study in evidence, not questioned by any expert, demonstrates that single-sex colleges provide [*577] better educational experiences than coeducational institutions. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their [***105] counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business [**2297] and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees." *Id.*, at 1412.

See also *id.*, at 1434-1435 (factual findings). "In the light of this very substantial authority favoring single-sex education," the District Court concluded that "the VMI Board's decision to maintain an all-male institution is fully justified even without taking into consideration the other unique features of VMI's teaching and training." *Id.*, at 1412. This finding alone, which even this Court cannot dispute, see ante, at 535, should be sufficient to demonstrate the constitutionality of VMI's all-male composition.

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 [***106] education." 766 F. Supp., at 1413, 1421. "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." *Id.*, at 1421. 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 [*578] 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," 44 F.3d, at 1241; 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," 766 F. Supp., at 1413. Thus, Virginia's options were an adversative method that excludes [***107] women or no adversative method at all.

There can be no serious dispute that, as the District Court found, single-sex education and a distinctive educational method "represent legitimate contributions to diversity in the Virginia higher education system." Ibid. As a theoretical matter, Virginia's educational interest would have been best served (insofar as the two factors we have mentioned are concerned) by six different types of public colleges -- an all-men's, an all-women's, and a coeducational college run in the "adversative method," and an all-men's, an all-women's, and a coeducational college run in the "traditional method." But as a practical matter, of course, 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.

Virginia did not make this determination regarding the make-up of its public college system on the unrealistic assumption that no other colleges exist. Substantial evidence in the District [***108] Court demonstrated that the Commonwealth has long proceeded on the principle that "higher education resources should be viewed as a whole -- public and private" [*579] -- because such an approach enhances diversity and because "it is academic and economic waste to permit unwarranted duplication." *Id.*, at 1420-1421 (quoting 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia). It is thus significant that, whereas there are "four all-female private [colleges] in Virginia," there is only "one private all-male college," which "indicates that the private sector is providing for the [former] form of education to a much greater extent that it provides for all-male education." 766 F. Supp., at 1420-1421. In these circumstances, Virginia's election to fund one public all-male institution and one on the adversative model -- and to concentrate its resources in a single entity that serves both these interests in diversity -- is substantially related to the Commonwealth's important educational interests.

[**2298] B

The Court today has no adequate response to this clear demonstration of the conclusion produced by application of intermediate scrutiny. Rather, it [***109] relies on a series of contentions that are irrelevant or erroneous as a matter of law, foreclosed by the record in this litigation,

or both.

1. I have already pointed out the Court's most fundamental error, which is its reasoning that VMI's all-male composition is unconstitutional because "some women are capable of all of the individual activities required of VMI cadets," 766 F. Supp., at 1412, and would prefer military training on the adversative model. See *supra*, at 571-574. This unacknowledged adoption of what amounts to (at least) strict scrutiny is without antecedent in our sex-discrimination cases and by itself discredits the Court's decision.

2. The Court suggests that Virginia's claimed purpose in maintaining VMI as an all-male institution -- its asserted interest in promoting diversity of educational options -- is not "genuine," but is a pretext for discriminating against women. Ante, at 539; see ante, at 535-540. To support this [*580] charge, the Court would have to impute that base motive to VMI's Mission Study Committee, which conducted a 3-year study from 1983 to 1986 and recommended to VMI's Board of Visitors that the school remain all male. The committee, a majority of whose [***110] members consisted of non-VMI graduates, "read materials on education and on women in the military," "made site visits to single-sex and newly coeducational institutions" including West Point and the Naval Academy, and "considered the reasons that other institutions had changed from single-sex to coeducational status"; its work was praised as "thorough" in the accreditation review of VMI conducted by the *Southern Association of Colleges and Schools*. See 766 F. Supp., at 1413, 1428; see also *id.*, at 1427-1430 (detailed findings of fact concerning the Mission Study Committee). The Court states that "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." Ante, at 539. But whether it is part of the evidence to prove that diversity was the Commonwealth's objective (its short report said nothing on that particular subject) is quite separate from whether it is part of the evidence to prove that antifeminism was not. The relevance of the Mission Study Committee is that its very creation, its sober 3-year study, [***111] and the analysis it produced utterly refute the claim that VMI has elected to maintain its all-male student-body composition for some misogynistic reason.

The Court also supports its analysis of Virginia's "actual state purposes" in maintaining VMI's student body as all male by stating that there is no explicit statement in the record "in which the Commonwealth has expressed itself" concerning those purposes. Ante, at 535, 539

(quoting 976 F.2d 890, 899 (CA4 1992)); see also ante, at 525. That is wrong on numerous grounds. First and foremost, in its implication that such an explicit statement of "actual purposes" [*581] is needed. The Court adopts, in effect, the argument of the United States that since the exclusion of women from VMI in 1839 was based on the "assumptions" of the time "that men alone were fit for military and leadership roles," and since "before this litigation was initiated, Virginia never sought to supply a valid, contemporary rationale for VMI's exclusionary policy," "that failure itself renders the VMI policy invalid." Brief for United States in No. 94-2107, at 10. This is an unheard-of doctrine. Each state decision to adopt or maintain a governmental policy [***112] need not be accompanied -- in anticipation of litigation and on pain of being found to lack a relevant state interest -- by a lawyer's contemporaneous recitation of the State's purposes. The Constitution is not some giant Administrative Procedure Act, which imposes upon the States the obligation to set forth a "statement of basis and purpose" for their sovereign Acts, see 5 U.S.C. § 553(c). The situation would be different if what the Court assumes to have been the 1839 policy had been enshrined and remained enshrined in legislation -- a VMI charter, perhaps, pronouncing that the institution's purpose is to keep women in their place. But since the [**2299] 1839 policy was no more explicitly recorded than the Court contends the present one is, the mere fact that today's Commonwealth continues to fund VMI "is enough to answer [the United States'] contention that the [classification] was the 'accidental by-product of a traditional way of thinking about females.'" *Michael M.*, 450 U.S. at 471, n. 6 (plurality opinion) (quoting *Califano v. Webster*, 430 U.S. at 320) (internal quotation marks omitted).

It is, moreover, not true that Virginia's contemporary reasons [***113] for maintaining VMI are not explicitly recorded. It is hard to imagine a more authoritative source on this subject than the 1990 Report of the Virginia Commission on the University of the 21st Century (1990 Report). As the parties stipulated, that report "notes that the hallmarks of Virginia's educational policy are 'diversity and autonomy.'" Stipulations [*582] of Fact 37, reprinted in Lodged Materials from the Record 64 (Lodged Materials). It said: "The formal system of higher education in Virginia includes a great array of institutions: state-supported and independent, two-year and senior, research and highly specialized, traditionally black and single-sex." 1990 Report, quoted in relevant part at Lodged Materials 64-65 (emphasis added). n2 The Court's only response to this is repeated reliance on the Court of Appeals' assertion that "'the only explicit [statement] that we have found

in the record in which the Commonwealth has expressed itself with respect to gender distinctions'" (namely, the statement in the 1990 Report that the Commonwealth's institutions must "deal with faculty, staff, and students without regard to sex") had nothing to [***114] do with the purpose of diversity. Ante, at 525, 539 (quoting 976 F.2d, at 899). This proves, I suppose, that the Court of Appeals did not find a statement dealing with sex and diversity in the record; but the pertinent question (accepting the need for such a statement) is whether it was there. And the plain fact, which the Court does not deny, is that it was.

n2 This statement is supported by other evidence in the record demonstrating, by reference to both public and private institutions, that Virginia actively seeks to foster its "'rich heritage of pluralism and diversity in higher education,'" 1969 Report of the Virginia Commission on Constitutional Revision, quoted in relevant part at Lodged Materials 53; that Virginia views "'one special characteristic of the Virginia system [as being] its diversity,'" 1989 Virginia Plan for Higher Education, quoted in relevant part at Lodged Materials 64; and that in the Commonwealth's view "higher education resources should be viewed as a whole -- public and private" because "'Virginia needs the diversity inherent in a dual system of higher education,'" 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia, quoted in 766 F. Supp. 1407, 1420 (WD Va. 1991). See also Budget Initiatives for 1990-1992 of State Council of Higher Education for Virginia 10 (June 21, 1989) (Budget Initiatives), quoted at n. 3, *infra*. It should be noted (for this point will be crucial to my later discussion) that these official reports quoted here, in text and footnote, regard the Commonwealth's educational system -- public and private -- as a unitary one.

[*583] [***115] The Court contends that "[a] purpose genuinely to advance an array of educational options . . . is not served" by VMI. Ante, at 539-540. It relies on the fact that all of Virginia's other public colleges have become coeducational. *Ibid.*; see also ante, at 521, n. 2. 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, see *supra*, at 578, 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. n3

n3 The Commonwealth provides tuition assistance, scholarship grants, guaranteed loans, and work-study funds for residents of Virginia who attend private colleges in the Commonwealth. See, e. g., Va. Code Ann. §§ 23-38.11 to 23-38.19 (1993 and Supp. 1995) (Tuition Assistance Grant Act); §§ 23-38.30 to 23-38.44:3 (Virginia Student Assistance Authorities); Va. Code Ann. §§ 23-38.45 to 23-38.53 (1993) (College Scholarship Assistance Act); §§ 23-38.53:1 to 23-38.53:3 (Virginia Scholars Program); §§ 23-38.70, 23-38.71 (Virginia Work-Study Program). These programs involve substantial expenditures: for example, Virginia appropriated \$ 4,413,750 (not counting federal funds it also earmarked) for the College Scholarship Assistance Program for both 1996 and 1997, and for the Tuition Assistance Grant Program appropriated \$ 21,568,000 for 1996 and \$ 25,842,000 for 1997. See 1996 Va. Appropriations Act, ch. 912, pt. 1, § 160.

In addition, as the parties stipulated in the District Court, the Commonwealth provides other financial support and assistance to private institutions - including single-sex colleges -- through low-cost building loans, state-funded services contracts, and other programs. See, e. g., Va. Code Ann. §§ 23-30.39 to 23-30.58 (1993) (Educational Facilities Authority Act). The State Council of Higher Education for Virginia, in a 1989 document not created for purposes of this litigation but introduced into evidence, has described these various programs as a "means by which the Commonwealth can provide funding to its independent institutions, thereby helping to maintain a diverse system of higher education." Budget Initiatives 10.

[***116] [**2300] Finally, the Court unreasonably suggests that there is some pretext in Virginia's reliance upon decentralized decisionmaking [*584] to achieve diversity -- its granting of substantial autonomy to each institution with regard to student-body composition and other matters, see 766 F. Supp., at 1419. The Court adopts the suggestion of the Court of Appeals that it is not possible for "one institution with autonomy, but with no authority over any other state institution, [to] give effect to a state policy of diversity among institutions." Ante, at 539 (internal quotation marks omitted). If it were impossible for individual human beings (or groups of human beings) to act autonomously in effective pursuit of a common goal, the game of soccer would not

exist. And where the goal is diversity in a free market for services, that tends to be achieved even by autonomous actors who act out of entirely selfish interests and make no effort to cooperate. Each Virginia institution, that is to say, has a natural incentive to make itself distinctive in order to attract a particular segment of student applicants. And of course none of the institutions is entirely autonomous; if and when the legislature [***117] decides that a particular school is not well serving the interest of diversity -- if it decides, for example, that a men's school is not much needed -- funding will cease. n4

n4 The Court, unfamiliar with the Commonwealth's policy of diverse and independent institutions, and in any event careless of state and local traditions, must be forgiven by Virginians for quoting a reference to "the Charlottesville campus" of the University of Virginia. See ante, at 538. The University of Virginia, an institution even older than VMI, though not as old as another of the Commonwealth's universities, the College of William and Mary, occupies the portion of Charlottesville known, not as the "campus," but as "the grounds." More importantly, even if it were a "campus," there would be no need to specify "the Charlottesville campus," as one might refer to the Bloomington or Indianapolis campus of Indiana University. Unlike university systems with which the Court is perhaps more familiar, such as those in New York (e. g., the State University of New York at Binghamton or Buffalo), Illinois (University of Illinois at Urbana-Champaign or at Chicago), and California (University of California, Los Angeles, or University of California, Berkeley), there is only one University of Virginia. It happens (because Thomas Jefferson lived near there) to be located at Charlottesville. To many Virginians it is known, simply, as "the University," which suffices to distinguish it from the Commonwealth's other institutions offering 4-year college instruction, which include Christopher Newport College, Clinch Valley College, the College of William and Mary, George Mason University, James Madison University, Longwood College, Mary Washington University, Norfolk State University, Old Dominion University, Radford University, Virginia Commonwealth University, Virginia Polytechnic Institute and State University, Virginia State University -- and, of course, VMI.

[*585] [***118] 3. 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.'" Ante, at 541 (quoting 766 F. Supp., at 1434-1435). 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]," ante, at 533, 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 [**2301] virtually uncontradicted," 766 F. Supp., at 1415 (emphasis added).

Ultimately, in fact, the Court does not deny the evidence supporting [***119] these findings. See ante, at 541-546. 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. The Court simply dispenses with the evidence submitted at trial -- it never says that a single finding of the District Court is clearly erroneous -- in favor of the Justices' own view of the world, which the Court proceeds to support with (1) references to observations of someone [*586] who is not a witness, nor even an educational expert, nor even a judge who reviewed the record or participated in the judgment below, but rather a judge who merely dissented from the Court of Appeals' decision not to rehear this litigation en banc, see ante, at 542, (2) citations of nonevidentiary materials such as amicus curiae briefs filed in this Court, see ante, at 544-545, nn. 13, 14, and (3) various historical anecdotes designed to demonstrate that Virginia's support for VMI as currently constituted reminds the Justices of the "bad old days," see ante, at 542-544.

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 [***120] the Court to reach its conclusion. Not a single witness contested, for example, Virginia's "substantial body of 'exceedingly persuasive' evidence . . . that some students, both male and female, benefit from attending a single-sex college" and "[that] for those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement." 766 F. Supp., at 1411-1412. Even the United States' expert witness "called himself a 'believer in single-sex education,'" although it was his

"personal, philosophical preference," not one "born of educational-benefit considerations," "that single-sex education should be provided only by the private sector." *Id.*, at 1412.

4. The Court contends that Virginia, and the District Court, erred, and "misperceived our precedent," by "training their argument on 'means' rather than 'end,'" ante, at 545. 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." 766 F. Supp., at 1425 (quoting Mission Study Committee of the VMI Board of [*587] Visitors, Report, May 16, 1986). "Surely," the Court says, "that goal is great enough to accommodate women." Ante, at 545.

This is lawmaking by indirection. What the Court describes as "VMI's mission" is no less the mission of all Virginia colleges. Which of them would the Old Dominion continue to fund if they did not aim to create individuals "imbued with love of learning, etc.," right down to being ready "to defend their country in time of national peril"? 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 [***122] 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.

5. The Court argues that VMI would not have to change very much if it were to admit women. See, e. g., ante, at 540-542. The [***2302] 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, [*588] that concludes the inquiry. There should be no debate in the federal judiciary over "how much" VMI would be required to change if it admitted women and whether that would constitute "too much" change.

But if such a debate were relevant, the Court would certainly be on the losing side. The [***123] 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." 766 F. Supp., at 1411. 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. See *id.*, at 1412-1413, 1435-1443. 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." 976 F.2d, at 896-897.

In the face of these findings by two courts below, amply supported by the evidence, and resulting in the conclusion that VMI would be fundamentally altered if it admitted women, this Court simply pronounces that "the notion that [*589] admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved." Ante, at 542 (footnote omitted). The point about "downgrading VMI's stature" is a straw man; no one has made any such claim. The point about "destroying the adversative system" is simply false; the District Court not only stated that "evidence supports this theory," but specifically concluded that while "without a doubt" VMI could assimilate women, "it is equally without a doubt that VMI's present methods of training and education would have to be changed" by a "move away from its adversative new cadet system." 766 F. Supp., at 1413, [***125] and n. 8, 1440. And the point about "destroying the school," depending upon what that ambiguous phrase is

intended to mean, is either false or else sets a standard much higher than VMI had to meet. It sufficed to establish, as the District Court stated, that VMI would be "significantly different" upon the admission of women, 766 F. Supp., at 1412, and "would eventually find it necessary to drop the adversative system altogether," *id.*, at 1413. n5

n5 The Court's do-it-yourself approach to factfinding, which throughout is contrary to our well-settled rule that we will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error," *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 93 L. Ed. 672, 69 S. Ct. 535 (1949) (and cases cited), is exemplified by its invocation of the experience of the federal military academies to prove that not much change would occur. See ante, at 542, n. 11; 544-545, and n. 15; 550-551, n. 19. In fact, the District Court noted that "the West Point experience" supported the theory that a coeducational VMI would have to "adopt a [different] system," for West Point found it necessary upon becoming coeducational to "move away" from its adversative system. 766 F. Supp., at 1413, 1440. "Without a doubt . . . VMI's present methods of training and education would have to be changed as West Point's were." *Id.*, at 1413, n. 8; accord, 976 F.2d 890, 896-897 (CA4 1992) (upholding District Court's findings that "the unique characteristics of VMI's program," including its "unique methodology," "would be destroyed by coeducation").

[*590] [***126] 6. Finally, the absence of a precise "all-women's analogue" to VMI is irrelevant. In *Mississippi Univ. for Women v. Hogan*, [**2303] 458 U.S. 718, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982), we attached no constitutional significance to the absence of an all-male nursing school. As Virginia notes, if a program restricted to one sex is necessarily unconstitutional unless there is a parallel program restricted to the other sex, "the opinion in *Hogan* could have ended with its first footnote, which observed that 'Mississippi maintains no other single-sex public university or college.'" Brief for Cross-Petitioners in No. 94-2107, at 38 (quoting *Mississippi Univ. for Women v. Hogan*, *supra*, at 720, n. 1).

Although there is no precise female-only analogue to VMI, Virginia has created during this litigation the Virginia Women's Institute for Leadership (VWIL), a state-funded all-women's program run by Mary Baldwin College. I have thus far said nothing about VWIL be-

cause it is, under our established test, irrelevant, so long as VMI's all-male character is "substantially related" to an important state goal. But VWIL now exists, and the Court's treatment of it shows how far reaching today's decision is.

VWIL was [***127] carefully designed by professional educators who have long experience in educating young women. The program rejects the proposition that there is a "difference in the respective spheres and destinies of man and woman," *Bradwell v. State*, 83 U.S. 130, 16 Wall. 130, 141, 21 L. Ed. 442 (1873), and is designed to "provide an all-female program that will achieve substantially similar outcomes [to VMI's] in an all-female environment," 852 F. Supp. 471, 481 (WD Va. 1994). After holding a trial where voluminous evidence was submitted and making detailed findings of fact, the District Court concluded that "there is a legitimate pedagogical basis for the different means employed [by VMI and VWIL] to achieve the substantially [*591] similar ends." Ibid. The Court of Appeals undertook a detailed review of the record and affirmed. 44 F.3d 1229 (CA4 1995). n6 But it is Mary Baldwin College, which runs VWIL, that has made the point most succinctly:

" [***128] It would have been possible to develop the VWIL program to more closely resemble VMI, with adversative techniques associated with the rat line and barracks-like living quarters. Simply replicating an existing program would have required far less thought, research, and educational expertise. But such a facile approach would have produced a paper program with no real prospect of successful implementation." Brief for Mary Baldwin College as Amicus Curiae 5.

It is worth noting that none of the United States' own experts in the remedial phase of this litigation was willing to testify that VMI's adversative method was an appropriate methodology for educating women. This Court, however, does not care. Even though VWIL was carefully designed by professional educators who have tremendous experience in the area, and survived the test of adversarial litigation, the Court simply declares, with no basis in the evidence, that [*592] these professionals acted on "'overbroad' generalizations," ante, at 542, 550.

n6 The Court is incorrect in suggesting that the Court of Appeals applied a "deferential" "brand of review inconsistent with the more exacting standard our precedent requires." Ante, at 555. That court "inquired (1) whether the state's objective is 'legitimate and important,' and (2) whether 'the requisite direct, substantial relationship between objective

and means is present,'" 44 F.3d, at 1235 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982)). To be sure, such review is "deferential" to a degree that the Court's new standard is not, for it is intermediate scrutiny. (The Court cannot evade this point or prove the Court of Appeals too deferential by stating that that court "devised another test, a 'substantive comparability' inquiry," ante, at 555 (quoting 44 F.3d, at 1237), for as that court explained, its "substantive comparability" inquiry was an "additional step" that it engrafted on "the traditional test" of intermediate scrutiny, *ibid.* (emphasis added).)

C

A few words are appropriate in response to the concurrence, which finds VMI unconstitutional on a basis that is more moderate than the Court's but only at the expense of being even more [***129] implausible. The concurrence offers three reasons: First, that there is "scant evidence in the record," ante, at 562, that diversity of educational offering was the real reason for Virginia's maintaining VMI. "Scant" has the advantage of being [**2304] an imprecise term. I have cited the clearest statements of diversity as a goal for higher education in the 1990 Report, the 1989 Virginia Plan for Higher Education, the Budget Initiatives prepared in 1989 by the State Council of Higher Education for Virginia, the 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia, and the 1969 Report of the Virginia Commission on Constitutional Revision. See *supra*, at 579, 581-582, and n. 2, 583, n. 3. There is no evidence to the contrary, once one rejects (as the concurrence rightly does) the relevance of VMI's founding in days when attitudes toward the education of women were different. Is this conceivably not enough to foreclose rejecting as clearly erroneous the District Court's determination regarding "the Commonwealth's objective of educational diversity"? 766 F. Supp., at 1413. [***130] Especially since it is absurd on its face even to demand "evidence" to prove that the Commonwealth's reason for maintaining a men's military academy is that a men's military academy provides a distinctive type of educational experience (i. e., fosters diversity). What other purpose would the Commonwealth have? One may argue, as the Court does, that this type of diversity is designed only to indulge hostility toward women -- but that is a separate point, explicitly rejected by the concurrence, and amply refuted by the evidence I have mentioned in discussing [*593] the Court's opinion. n7 What is now under discussion -- the concurrence's making central to

the disposition of this litigation the supposedly "scant" evidence that Virginia maintained VMI in order to offer a diverse educational experience -- is rather like making crucial to the lawfulness of the United States Army record "evidence" that its purpose is to do battle. A legal culture that has forgotten the concept of *res ipsa loquitur* deserves the fate that it today decrees for VMI.

n7 The concurrence states that it "read[s] the Court" not "as saying that the diversity rationale is a pretext" for discriminating against women, but as saying merely that the diversity rationale is not genuine. Ante, at 562, n. The Court itself makes no such disclaimer, which would be difficult to credit inasmuch as the foundation for its conclusion that the diversity rationale is not "genuine," ante, at 539, is its antecedent discussion of Virginia's "deliberate" actions over the past century and a half, based on "familiar arguments," that sought to enforce once "widely held views about women's proper place," ante, at 537, 538.

[***131] Second, the concurrence dismisses out of hand what it calls Virginia's "second justification for the single-sex admissions policy: maintenance of the adversative method." Ante, at 564. The concurrence reasons that "this justification does not serve an important governmental objective" because, whatever the record may show about the pedagogical benefits of single-sex education, "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." Ibid. That is simply wrong. See, e.g., 766 F. Supp., at 1426 (factual findings concerning character traits produced by VMI's adversative methodology); *id.*, at 1434 (factual findings concerning benefits for many college-age men of an adversative approach in general). In reality, the pedagogical benefits of VMI's adversative approach were not only proved, but were a given in this litigation. The reason the woman applicant who prompted this suit wanted to enter VMI was assuredly not that she wanted to go to an all-male school; it would cease being all-male as [*594] soon as she entered. She wanted the distinctive adversative [***132] education that VMI provided, and the battle was joined (in the main) over whether VMI had a basis for excluding women from that approach. The Court's opinion recognizes this, and devotes much of its opinion to demonstrating that "'some women . . . do well under [the] adversative model'" and that "it is on behalf of these women that the United States has instituted this suit." Ante, at 550 (quoting 766 F. Supp., at 1434). Of course, in the last analysis it does not matter whether

there are any benefits to the adversative method. The concurrence does not contest that there are benefits to single-sex education, and that alone suffices to make Virginia's case, since admission of a woman will even more surely put an end to VMI's single-sex education [**2305] than it will to VMI's adversative methodology.

A third reason the concurrence offers in support of the judgment is that the Commonwealth and VMI were not quick enough to react to the "further developments" in this Court's evolving jurisprudence. Ante, at 561. Specifically, the concurrence believes it should have been clear after Hogan that "the difficulty with [Virginia's] 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." Ante, at 562. If only, the concurrence asserts, Virginia had "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." Ante, at 563. That is to say, the concurrence believes that after our decision in Hogan (which held a program of the Mississippi University for Women to be unconstitutional -- without any reliance on the fact that there was no corresponding Mississippi all-men's program), the Commonwealth should have known that what this Court expected of it was . . . yes!, the creation of a state all-women's program. Any lawyer who gave that advice to the Commonwealth [*595] ought to have been either disbarred or committed. (The proof of that pudding is today's 6-Justice majority opinion.) And any Virginia politician who proposed such a step when there were already four 4-year women's colleges in Virginia (assisted by state support that may well exceed, in the aggregate, what VMI costs, see n. 3, *supra*) ought to have been [***134] recalled.

In any event, "diversity in the form of single-sex, as well as coeducational, institutions of higher learning" is "available to women as well as to men" in Virginia. Ante, at 564. The concurrence is able to assert the contrary only by disregarding the four all-women's private colleges in Virginia (generously assisted by public funds) and the Commonwealth's longstanding policy of coordinating public with private educational offerings, see *supra*, at 579, 581-582, and n. 2, 583-584, and n. 3. According to the concurrence, the reason Virginia's assistance to its four all-women's private colleges does not count is that "the private women's colleges are treated by the State exactly as all other private schools are treated." Ante, at 564. But if Virginia cannot get credit for assisting women's education if it only treats women's private schools as it does all other private schools, then why should it get blame for assisting men's education if it

only treats VMI as it does all other public schools? This is a great puzzlement.

IV

As is frequently true, the Court's decision today will have consequences that extend far beyond the parties to the litigation. What [***135] 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 [*596] 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.'" Ante, at 534, n. 7.

The Supreme Court of the United States does not sit to announce "unique" dispositions. Its principal function is to establish precedent -- that is, to set forth principles of law that every court in America must follow. As we said only this Term, we expect both ourselves and lower courts to adhere to the "rationale upon which the Court [***136] based the results of its earlier decisions." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) (emphasis added). That is the principal reason we publish our opinions.

[**2306] 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. See supra, at 571-574. 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. Ante, at 542. I suggest that the single-sex program that will not be capable of being characterized as "unique" is not only unique but nonexistent. n8

n8 In this regard, I note that the Court -- which I concede is under no obligation to do so -- provides no example of a program that would pass muster under its reasoning today: not even, for example, a football or wrestling program. On the Court's theory, any woman ready, willing, and physically able

to participate in such a program would, as a constitutional matter, be entitled to do so.

[***137] 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. [*597] The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials. Any person with standing to challenge any sex-based classification can haul the State into federal court and compel it to establish by evidence (presumably in the form of expert testimony) that there is an "exceedingly persuasive justification" for the classification. Should the courts happen to interpret that vacuous phrase as establishing a standard that is not utterly impossible of achievement, there is considerable risk that whether the standard has been met will not be determined on the basis of the record evidence -- indeed, that will necessarily be the approach of any court that seeks to walk the path the Court has trod today. No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program. The enemies of single-sex education have won; by persuading only seven Justices [***138] (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.

This is especially regrettable because, as the District Court here determined, educational experts in recent years have increasingly come to "support [the] view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting." 766 F. Supp., at 1415 (emphasis added). "The evidence in this case," for example, "is virtually uncontradicted" to that effect. Ibid. Until quite recently, some public officials have attempted to institute new single-sex programs, at least as experiments. In 1991, for example, the Detroit Board of Education announced a program to establish three boys-only schools for inner-city youth; it was met with a lawsuit, a preliminary injunction was swiftly entered by a District Court that purported to rely on Hogan, see *Garrett v. Board of Ed. of School Dist. of Detroit*, 775 F. Supp. 1004, 1006 (ED Mich. 1991), and the [*598] Detroit Board of Education voted to abandon the litigation and thus abandon the plan, see [***139] *Detroit Plan to Aid Blacks with All-Boy Schools Abandoned*, Los Angeles Times, Nov. 8, 1991, p. A4, col. 1. Today's opinion assures that no such experiment will be tried again.

B

There are few extant single-sex public educational programs. The potential of today's decision for widespread disruption of existing institutions lies in its application to private single-sex education. Government support is immensely important to private educational institutions. Mary Baldwin College -- which designed and runs VWIL -- notes that private institutions of higher education in the 1990-1991 school year derived approximately 19 percent of their budgets from federal, state, and local government funds, not including financial aid to students. See Brief for Mary Baldwin College as Amicus Curiae 22, n. 13 (citing U.S. Dept. of Education, National Center for Education Statistics, Digest of Education Statistics, p. 38 and Note (1993)). Charitable status under the tax laws is also highly significant for private educational institutions, and it is certainly not beyond the Court that rendered today's decision to hold [**2307] that a donation to a single-sex college should be deemed contrary to public [***140] policy and therefore not deductible if the college discriminates on the basis of sex. See Note, The Independent Sector and the Tax Laws: Defining Charity in an Ideal Democracy, 64 S. Cal. L. Rev. 461, 476 (1991). See also *Bob Jones Univ. v. United States*, 461 U.S. 574, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983).

The Court adverts to private single-sex education only briefly, and only to make the assertion (mentioned above) that "we address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as 'unique.'" Ante, at 534, n. 7. As I have already remarked, see supra, at 596, that assurance assures nothing, unless it is to be taken as a promise that in the future [*599] the Court will disclaim the reasoning it has used today to destroy VMI. The Government, in its briefs to this Court, at least purports to address the consequences of its attack on VMI for public support of private single-sex education. It contends that private colleges that are the direct or indirect beneficiaries of government funding are not thereby necessarily converted into state actors to which the Equal Protection Clause is then applicable. See Brief for United States in No. 94-2107, at [***141] 35-37 (discussing *Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982), and *Blum v. Yaretsky*, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982)). That is true. It is also virtually meaningless.

The issue will be not whether government assistance turns private colleges into state actors, but whether the government itself would be violating the Constitution by providing state support to single-sex colleges. For example, in *Norwood v. Harrison*, 413 U.S. 455, 37 L. Ed. 2d 723, 93 S. Ct. 2804 (1973), we saw no room

to distinguish between state operation of racially segregated schools and state support of privately run segregated schools. "Racial discrimination in state-operated schools is barred by the Constitution and 'it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" *Id.*, at 465 (quoting *Lee v. Macon County Bd. of Ed.*, 267 F. Supp. 458, 475-476 (MD Ala. 1967)); see also *Cooper v. Aaron*, 358 U.S. 1, 19, 3 L. Ed. 2d 5, 78 S. Ct. 1401 (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within [***142] its jurisdiction the equal protection of the laws"); *Grove City College v. Bell*, 465 U.S. 555, 565, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984) (case arising under Title IX of the Education Amendments of 1972 and stating that "the economic effect of direct and indirect assistance often is indistinguishable"). When the Government was pressed at oral argument concerning the implications of these cases for private single-sex education if government-provided single-sex education is unconstitutional, [*600] it stated that the implications will not be so disastrous, since States can provide funding to racially segregated private schools, "depending on the circumstances," Tr. of Oral Arg. 56. I cannot imagine what those "circumstances" might be, and it would be as foolish for private-school administrators to think that that assurance from the Justice Department will outlive the day it was made, as it was for VMI to think that the Justice Department's "unequivocal" support for an intermediate-scrutiny standard in this litigation would survive the Government's loss in the courts below.

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 [***143] 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 [**2308] 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.

* * *

Justice Brandeis said it is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, [***144] 76 L. Ed. 747, 52 S. Ct. 371 [*601] (1932) (dissenting opinion). But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a "'more perfect Union,'" ante, at 558 (a criterion only slightly more restrictive than a "more perfect world"), can impose its own favored social and economic dispositions nationwide. As today's disposition, and others this single Term, show, this places it beyond the power of a "single courageous State," not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old. See, e. g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996); *Romer v. Evans*, 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996). The sphere of self-government reserved to the people of the Republic is progressively narrowed.

In the course of this dissent, I have referred approvingly to the opinion of my former colleague, Justice Powell, in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982). Many of the points made in his dissent apply with equal force here -- in particular, the criticism of judicial opinions that purport [***145] to be "narrow" but whose "logic" is "sweeping." *Id.*, at 745-746, n. 18. But there is one statement with which I cannot agree. Justice Powell observed that the Court's decision in *Hogan*, which struck down a single-sex program offered by the Mississippi University for Women, had thereby "left without honor . . . an element of diversity that has characterized much of American education and enriched much of American life." *Id.*, at 735. Today's decision does not leave VMI without honor; no court opinion can do that.

In an odd sort of way, it is precisely VMI's attachment to such old-fashioned concepts as manly "honor" that has made it, and the system it represents, the target of those who today succeed in abolishing public single-sex education. The record contains a booklet that all first-year VMI students [*602] (the so-called "rats") were required to keep in their possession at all times. Near the end there appears the following period piece, entitled "The Code of a Gentleman":

"Without a strict observance of the fundamental Code of Honor, no man, no matter how 'polished,' can be

considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility [***146] of his principles. He is the descendant of the knight, the crusader; he is the defender of the defense-less and the champion of justice . . . or he is not a Gentleman.

"A Gentleman . . .

"Does not discuss his family affairs in public or with acquaintances.

"Does not speak more than casually about his girl friend.

"Does not go to a lady's house if he is affected by alcohol. He is temperate in the use of alcohol.

"Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public.

"Does not hail a lady from a club window.

"A gentleman never discusses the merits or demerits of a lady.

"Does not mention names exactly as he avoids the mention of what things cost.

"Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child are assumed by honorable men as a debt of honor.

" [**2309] Does not display his wealth, money or possessions.

"Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be.

[*603] "Does not slap strangers on the back nor [***147] so much as lay a finger on a lady.

"Does not 'lick the boots of those above' nor 'kick the face of those below him on the social ladder.'

"Does not take advantage of another's helplessness or ignorance and assumes that no gentleman will take advantage of him.

"A Gentleman respects the reserves of others, but demands that others respect those which are his.

"A Gentleman can become what he wills to be. . . ."

I do not know whether the men of VMI lived by this code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.

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COMMONWEALTH OF VIRGINIA, ET AL., CROSS-PETITIONERS v. UNITED
STATES OF AMERICA

No. 94-2107

1994 U.S. Briefs 2107

October Term, 1995

December 15, 1995

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT

DREW S. DAYS, III, Solicitor General, DEVAL L. PATRICK, Assistant Attorney General, PAUL BENDER, Deputy Solicitor General, CORNELIA T.L. PILLARD, Assistant to the Solicitor General, JESSICA DUNSAY SILVER, THOMAS E. CHANDLER, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217

QUESTION PRESENTED

Whether the exclusion of women from the Virginia Military Institute, based solely on their sex, violates the Equal Protection Clause of the Fourteenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals regarding liability (VMI I) (Pet. App. 134a-157a), n1 is reported at 976 F.2d 890. The opinion of the district court regarding liability (Pet. App. 158a-245a) is reported at 766 F. Supp. 1407. The opinion of the court of appeals regarding remedy (VMI II) (Pet. App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (Pet. App. 53a-131a) is reported at 852 F. Supp. 471.

n1 References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in United States v. Commonwealth of Virginia, No. 94-1941 (filed May 26, 1995).

JURISDICTION

The judgment of the court of appeals regarding liability (VMI I) was entered on October 5, 1992. A petition for rehearing was denied on November 19, 1992. Pet. App. 157a. A petition for a writ of certiorari was denied on May 24, 1993.

Pet. App. 132a-133a. The district court on remand approved a remedy. The United States appealed to challenge the remedy as inadequate, and cross-petitioners cross-appealed to challenge the original finding of liability. The judgment of the court of appeals regarding remedy (VMI II) was entered on January 26, 1995. The court of appeals voted sua sponte not to rehear the case en banc, and entered an order to that effect on April 28, 1995 (Pet. App. 246a-257a). On April 18, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. The United States filed a petition for a writ of certiorari on May 26, 1995 (No. 94-1941). The cross-petitioners filed a conditional cross-petition for a writ of certiorari on June 23, 1995. This Court granted the petition and cross-petition on October 5, 1995. 116 S. Ct. 281. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This brief addresses cross-petitioners' challenge (No. 94-2107) to the court of appeals' VMI I decision regarding liability, in which that court held that the sex-based exclusion of women students from the Virginia Military Institute (VMI) violates the Equal Protection Clause of the Fourteenth Amendment. We earlier filed a brief in support of our challenge (No. 94-1941) to the court of appeals' VMI II decision approving as a remedy for that violation the establishment of a new, separate college program that would exclude men. The procedural and factual background of the case is set forth in the Statement in our brief in No. 94-1941, at 2-15. That Statement is supplemented below with a further description of the liability holdings.

1. The proceedings in the district court were bifurcated. After a trial regarding liability, the district court on June 14, 1991, entered judgment in favor of cross-petitioners, holding that VMI's exclusion of women did not violate the Equal Protection Clause. Pet. App. 158a-245a. The district court recognized and found that "the system of education at VMI is not offered elsewhere in the United States," *id.* at 192a, n2 and that women therefore "are denied a unique educational opportunity that is available only at VMI," *id.* at 218a. n3

n2 The district court acknowledged that the Virginia Polytechnic Institute and State University (VPI), although it has a coeducational residential program offering military-style training, is a "dramatically different institution[]" offering "dramatically different experiences" from those offered at VMI. Pet. App. 192a.

n3 Women also have no opportunity to compete for the VMI State Cadetships, a group of state-funded college scholarships that the Commonwealth of Virginia awards exclusively to men who attend VMI. The Commonwealth awarded \$ 147,104 in VMI-designated scholarship funds to 35 male VMI cadets in 1990-1991. Pet. App. 189a.

The court held, however, that VMI's exclusion of women met the constitutional test for sex-based classifications set forth in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). See Pet. App. 164a-165a. Under that test, VMI's policy is unconstitutional unless cross-petitioners can show that that exclusion "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." 458 U.S. at 724 (internal quotation marks omitted).

During the proceedings regarding liability, the Commonwealth of Virginia denied that VMI's discriminatory policy fostered any state objectives. n4 Counsel for the VMI Foundation, Inc., and the VMI Alumni Association, private organizations that intervened as defendants, represented VMI, its superintendent and its Board of Visitors at trial. Those defendants asserted two "governmental" objectives allegedly supporting VMI's discriminatory exclusion of women: "educating cadets for lives as 'citizen-soldiers,'" and fostering "system-wide diversity by providing an opportunity for single-sex education and by providing a distinctive program of military-style education." R. 152 (VMI Defendants' Proposed Findings of Fact and Conclusions of Law (liability phase) (Apr. 26, 1991)), at 114 (P 28), 115 (P 38).

n4 The Governor stated in his Answer that "no person should be denied admittance to a state supported school because of his or her gender." Pet. App. 142a (L. 7-8). The Virginia Attorney General concluded that the "positions of the Governor and the Commonwealth" were "inseparable." VMI I C.A. App. 134 (L. 25); see Pet. App. 142a. Because neither the Governor of Virginia nor the Commonwealth defended VMI's sex-based exclusionary policy at the trial on liability, id. at 142a, 160a, the Commonwealth obtained a stay of the proceedings against it on the condition that it would be bound by any liability determination, id. at 160a.

The district court determined that system-wide "diversity in education" is a "legitimate objective" for a State to pursue, Pet. App. 167a; see id. at 159a, and that, because "some students, both male and female, benefit from attending a single-sex college," single-sex education is a constitutionally legitimate form of diversity within an educational system, id. at 168a. It also concluded that "VMI's unique method of instruction" contributes to diversity in Virginia's educational offerings. Id. at 176a. n5

n5 The district court did not address the asserted interest in educating cadets for lives as citizen-soldiers.

The district court next determined that VMI's exclusion of women was substantially related to the achievement of diversity in Virginia's higher education system, because "[VMI's] single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women." Pet. App. 173a. The court noted that "the sole way to attain single-gender diversity is to maintain a policy of admitting only one gender to an institution," id. at 167a, and that, "even though some women are capable of all the individual activities required of VMI cadets, a college where women are present would be significantly different from one where only men are present," id. at 170a. n6 The court acknowledged that the successful assimilation of women at West Point shows that, "without a doubt, VMI could do likewise." Id. at 172a n.8. But "the VMI Board has decided that providing a distinctive, single-sex educational opportunity is more important than providing an education equally

available to all." Id. at 170a. The court concluded that VMI's desire to avoid the changes that admitting women would bring "provide[s] sufficient constitutional justification for continuing the single-sex policy." Id. at 172a.

n6 The court found that VMI would have to adopt less stringent physical education requirements for women, even though the court credited "expert testimony establishing that * * * some women are capable of all of the individual activities required of VMI cadets." Pet. App. 170a-171a, 233a-235a. The court also found that VMI would have to alter its facilities to allow men and women privacy from the other sex during activities such as undressing and showering, id. at 171a, 233a, and that the presence of women would add "a new set of stresses on the cadets," id. at 171a.

2. The court of appeals vacated and remanded, holding that VMI's admissions policy violated the Equal Protection Clause. Pet. App. 134a-156a (VMI I). The court held that neither prong of the Hogan test was satisfied. n7 The Commonwealth of Virginia, the court noted, "failed to articulate an important objective which supports the provision of [VMI's] unique educational opportunity to men only." Id. at 137a; see id. at 155a. The court rejected the district court's attribution to Virginia of the objective of providing single-sex education to promote a diverse array of educational options. Id. at 152a-153a. n8 It found that Virginia lacked any "stated policy justifying single-sex education in state-supported colleges and universities"; Virginia's only policy statement "with respect to gender distinctions" in higher education required that its colleges and universities treat students "without regard to sex, race, or ethnic origin," id. at 153a (emphasis added by court of appeals). n9 The court noted that Virginia has in fact abandoned public single-sex education at every institution of higher education other than VMI. Id. at 154a. n10

n7 As a preliminary matter, the court determined that "single-sex education is pedagogically justifiable" for "both men and women" and that "VMI's male-only policy is justified by its institutional mission." Pet. App. 150a-151a. But those conclusions did not answer the question "whether the unique benefit offered by VMI's type of education can be denied to women by the state under a policy of diversity, which has been advanced as the justification and which was relied on by the district court." Id. at 151a. The court emphasized that, by "commenting on the potential benefits of single-gender education," the court "did not mean to suggest the specific remedial course that the Commonwealth should or must follow." Id. at 155a-156a.

n8 Cross-petitioners did not assert on appeal, and the court did not consider, the interest in training students for lives as citizen-soldiers.

n9 Moreover, "the lack of a state-announced policy to justify gender classifications is aggravated by the reluctance of the Commonwealth, as a party, and its governor to participate in this case and in this appeal." Pet. App. 153a. Indeed, as the Commonwealth's policy was articulated by the governor, "VMI's single-sex admissions policy violates state policy." Ibid. (emphasis added).

n10 Several of Virginia's public colleges had previously been single-sex, but "all Virginia statutes requiring individual institutions to admit only men or women have been repealed." Pet. App. 188a.

The court of appeals also found no substantial relationship between an interest in diversity and the categorical exclusion of women from VMI: Even "if VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender." Pet. App. 153a-154a.

Cross-petitioners sought review in this Court, which denied certiorari. *VMI v. United States*, 113 S. Ct. 2431 (1993) (Pet. App. 132a-133a). n11 After the court of appeals affirmed the decision approving VMI's proposed remedy, the Court granted the United States' petition challenging the remedy and also granted the conditional cross-petition challenging the liability holding. *United States v. Commonwealth of Virginia*, 116 S. Ct. 281 (1995).

n11 On remand, the district court approved a remedial plan that continues to exclude women from VMI and establishes an all-female Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, a private, liberal arts college primarily for women. Pet. App. 53a-131a. The court of appeals affirmed. *Id.* at 1a-52a (VMI II). We have addressed that remedial plan in the Brief for the United States in No. 94-1941.

SUMMARY OF ARGUMENT

The court of appeals applied established equal protection principles to hold that the Virginia Military Institute unconstitutionally excludes women based on their sex. That holding is constitutionally unassailable. The Commonwealth of Virginia reserves VMI for men, and thus provides no opportunity for women to enjoy its benefits. The Commonwealth offers nothing to meet the needs of women who are, but for their sex, qualified for VMI and want to attend. A formal state policy that offers an educational opportunity to men that is not offered to women is presumptively unconstitutional.

That presumption is especially strong where, as here, the policy not only denies women a valued opportunity, but in doing so relies on and reinforces harmful and archaic sex-role stereotypes. VMI's rigorous, military-style education is renowned, and the Institute's alumni network is an extraordinarily powerful one, especially in historically male-dominated fields. In defending its exclusionary policy, VMI has relied on archaic notions that men are more confident and aggressive than women and has concluded that men alone would therefore want and benefit from VMI's military-style educational method. VMI's exclusion of women echoes and reinforces historical patterns of discrimination and stereotyping that, for most of our history, closed to women the most rigorous educational opportunities and excluded them from leadership roles in business and public life.

Such formal sex-based barriers, and the stereotypes that support them, have no place under our modern Constitution. This Court's equal protection cases squarely reject governmental reliance on the kinds of psychological and sociological generalizations about women and men that cross-petitioners assert. Although the United States believes that strict scrutiny is the correct standard of constitutional review for official discrimination based on sex, the unconstitutionality of VMI's exclusionary admissions policy is evident under

intermediate scrutiny as well. Indeed, this Court's decision in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), alone compels affirmance of the liability determination in this case. Just as Mississippi could not constitutionally reserve a public nursing school for women based on "a stereotyped view of nursing as an exclusively women's job," so, too, is Virginia's reservation for men of a stereotypically male form of military-style leadership training constitutionally forbidden.

Cross-petitioners have failed to show that VMI's exclusionary admissions policy is necessary to serve any important governmental objective. This Court's cases require that the policy be evaluated with reference to the State's actual goals in employing it. The actual objective of excluding women from VMI when that policy was initiated at the founding of the school in 1839 reflected the assumptions of that time--assumptions that men alone were fit for military and leadership roles. Before this litigation was initiated, Virginia never sought to supply a valid, contemporary rationale for VMI's exclusionary policy. That failure itself renders the VMI policy invalid.

In any event, no current rationale justifies continuing to exclude women from VMI. The only objective cross-petitioners have asserted, post-hoc, is an interest in enhancing the "diversity" of options in Virginia's system of public higher education. As the court of appeals correctly observed, however, Virginia does not in fact have any policy of enhancing diversity by providing single-sex, military-style education. And the court of appeals correctly concluded that, in any event, a policy of diversity in higher education is patently inadequate to justify providing men, but not women, an enhanced diversity of choices.

Cross-petitioners' assertion that a State must be able to provide single-sex education to one sex alone amounts to a contention that single-sex education is constitutional per se. This Court in *Hogan* rejected that view, and instead required an exceedingly persuasive justification in each instance in which a State excludes persons from an educational opportunity based on their sex. Although it is possible that single-sex education for only one sex may be constitutionally justifiable in order to compensate for discrimination that only one sex has suffered, no such rationale is present here. And, contrary to cross-petitioners' contention, the fact that private colleges in Virginia offer single-sex education to women provides no excuse for VMI's policy of excluding women. No other school in Virginia, public or private, provides to women the opportunity they are denied at VMI, and private schools cannot, in any event, alleviate the Commonwealth's constitutional obligation to treat the sexes equally.

VMI need not exclude women in order to continue to offer "a distinctive program of military-style education." It is undisputed that some women can perform all the tasks required at VMI and would thrive under VMI's military-style methodology. Although minor changes in physical training and privacy accommodations would accompany the admission of women, the Commonwealth has no interest in avoiding such changes, and certainly none strong enough to justify the continued exclusion of women. VMI could continue effectively to fulfill its stated mission of educating citizen-soldiers if both qualified men and women were admitted as students.

ARGUMENT

I. VMI'S ADMISSIONS POLICY IS UNCONSTITUTIONAL BECAUSE IT EXCLUDES QUALIFIED WOMEN FROM A UNIQUE EDUCATIONAL OPPORTUNITY SOLELY BECAUSE OF THEIR SEX

A. The unconstitutionality of VMI's policy is clear

The Virginia Military Institute (VMI), a state college, n12 has an admissions policy that bars all women as students solely on account of their sex. The policy excludes women without regard to their actual qualifications. No woman is permitted to experience VMI's unique, military-style educational program, or take advantage of VMI's enormous prestige and alumni network. Cross-petitioners ask this Court to hold that the Equal Protection Clause permits a State to offer a unique and prestigious educational program at a 150-year-old institution of higher education only to men, without offering any alternative whatsoever to women.

n12 VMI is one of 15 state institutions of higher education in Virginia. Pet. App. 138a. It is "financially supported by the Commonwealth of Virginia and remains 'subject to the control of the [Virginia] General Assembly.'" Va. Code Ann. § 23.92. It is governed by a Board of Visitors, which the Commonwealth expressly charges with prescribing "the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service, and the duration thereof." Va. Code Ann. § 23-104." Ibid.

In our opening brief in No. 94-1941, we argue that the only way to achieve equal protection here is to admit women to VMI, and that the Virginia Women's Institute for Leadership (VWIL) is a patently inadequate and unconstitutional alternative. Cross-petitioners have argued in that case that VWIL provides an adequate remedy to women for the unconstitutionality of VMI's admissions policy. Here they make the much more extreme contention that they can continue to operate VMI for men only, without offering any alternative whatever to women. No conceivable theory of equal protection can sustain that proposition.

1. VMI's policy substantially harms women

The practical consequences for women of VMI's exclusionary policy are pernicious. The policy deprives women who seek to attend VMI of valued educational benefits--benefits that cross-petitioners themselves have repeatedly characterized as "unique." VMI is a small college offering a rigorous, military-style educational program. It has been successful in "instilling physical and mental discipline, character, and a kind of moral code." Pet. App. 204a. The barracks-centered military program at VMI is unavailable elsewhere in Virginia. See 94-1941 U.S. Br. 2-5, 16, 22.

VMI's policy also excludes women from life-long opportunities, responsibilities, and powerful connections that VMI has long afforded its graduates. VMI's alumni network is "enormously influential," 94-1667 & 94-1717 (VMI II) Tr. 1227, especially in the male-dominated fields of engineering, the military, business, and public service, in which VMI graduates most often tend to pursue careers, id. at 1228. This case, like the parallel case against the similar exclusionary policy of The Citadel in South Carolina, therefore concerns not only education, but also "wealth, power, and the ability of those who have it now to determine who will have it later." *Faulkner v. Jones*, 51 F.3d 440, 451 (Hall, J., concurring), motion to stay mandate denied, 66 F.3d 661 (4th Cir.), cert. dismissed, 116 S. Ct. 331, cert. denied, 116 S. Ct. 352 (1995). See

94-1941 U.S. Br. 2-3, 16, 22-23.

The sex-based distinction at issue in this case is particularly harmful to women because of its reliance on sexual stereotypes. Rejection of sex-stereotyping lies at the core of the equal protection concern with classifications based on sex. VMI's exclusion of women from the Commonwealth of Virginia's military-style leadership educational program communicates the message that, in the Commonwealth's official view, rigorous, military-style training is not appropriate for women. That impermissible state policy is vividly highlighted by cross-petitioners' defense of the exclusion of women in this case, which rests in large part on archaic and overbroad notions about men's and women's personalities and preferences, including the view that men are more confident, aggressive, and suited to hierarchy than women, and that women are more emotional, caring, and interested in marrying than men. See 94-1941 U.S. Br. 37-42. n13 In this context, cross-petitioners' suggestion (Br. 26) that "single-sex education performs a valuable service in uprooting inaccurate stereotypes" is bewildering.

n13 To invalidate VMI's exclusion of women because it is based on overbroad stereotypes is not to denigrate individuals for whom such stereotypes are accurate, but rather to reject the premise that, merely because stereotypes are true for some individuals, the State has a right to apply them to everyone. Reliance on stereotypes is harmful because it forecloses individual opportunity for persons who do not fit the traditional mold. Such reliance impedes accurate, current assessment of the needs and abilities of individual members of both sexes. See 94-1941 U.S. Br. 40-44 (discussing case law prohibiting reliance on overbroad sex-based generalizations and stereotypes).

2. Established law compels invalidation of VMI's policy

No modern sex discrimination case has upheld a policy of excluding one sex from an educational institution to the advantage of the other. n14 Nor have any of this Court's modern cases accepted sociological or psychological generalizations about men and women as rendering the sexes not similarly situated for equal protection purposes. n15 The Court has found women to be differently situated in the equal protection context only because of biological sex differences, n16 unchallenged legal disabilities, n17 or for compensatory reasons. n18 Cross-petitioners ask this Court to rely, for the first time, on sociological and psychological stereotypes to restrict educational opportunity for women. That position is contrary to the established meaning of equal protection, and should be rejected.

n14 See *United States v. Hinds County School Bd.*, 560 F.2d 619 (5th Cir. 1977) (invalidating system of separate single-sex public high schools); *Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991) (granting preliminary injunction against males-only public elementary schools); *Kirstein v. Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (requiring women's admission to University of Virginia); *Newberg v. Board of Pub. Educ.*, 478 A.2d 1352 (Pa. Super. Ct. 1984) (requiring girls' admission to Philadelphia's boys-only Central High School); but see *Vorchheimer v. School Dist.*, 532 F.2d 880, 881-882, 886 (3d Cir. 1976) (upholding Central High School's exclusionary admissions policy in litigation in federal court in which plaintiff "did not allege a deprivation of an education equal to that which the school board makes available to boys"), *aff'd* by an equally divided Court, 430

U.S. 703 (1977).

n15 Indeed, this Court in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994), invalidated sex-based preemptory challenges based on the sociological generalization that women "hold particular views simply because of their gender."

n16 In approving a statutory rape law that applied differently to men and women, this Court expressly disavowed relying, as the lower court did here, on males' greater aggressiveness, and instead relied on the anatomical fact that "females can become pregnant as a result of sexual intercourse; males cannot." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 473, 475, 476 (1981) (opinion of Rehnquist, J.) ("the statute does not rest on the assumption that males are generally the aggressors"); but cf. *International Union, United Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that a sex-based policy of excluding women with childbearing capacity from lead-exposed job constitutes sex discrimination under Title VII).

n17 See *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981) (upholding draft registration for men and not for women because unchallenged combat restrictions on all women made men and women "simply not similarly situated for purposes of a draft or registration for a draft").

n18 In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), for example, the Court upheld a federal statute that afforded women Navy officers longer than men to gain promotion or face mandatory discharge, not because of any notion that women's personalities or sociological role make them achieve promotions more slowly, but because legal restrictions on all women in combat and sea duty--which were not challenged--made women and men "not similarly situated with respect to opportunities for professional services." *Id.* at 508.

As we argued in our opening brief in No. 94-1941, at 33-36, we believe that strict scrutiny is the correct constitutional standard for evaluating classifications that deny opportunities to individuals based on their sex. Because this Court has not previously applied strict scrutiny to sex-based classifications, however, we argued below, and show here, that cross-petitioners have not established that VMI's exclusionary policy satisfies intermediate scrutiny. Indeed, VMI's exclusion of women fails even meaningful rational-basis review. See *Kirstein v. Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (requiring admission of women to the University of Virginia).

Under intermediate scrutiny, "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); see also *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). That burden is met "only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Hogan*, 458 U.S. at 724, quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980). Cross-petitioners fail to meet both parts of that burden.

Cross-petitioners' liability is evident from a straightforward application of

Hogan. Just as this Court's "searching analysis" in Hogan revealed that the State lacked any actual compensatory objective for excluding men from a state educational program, 458 U.S. at 728-730 & n.16, the objectives proffered here for the exclusion of women are not actual, nondiscriminatory reasons for the challenged policy. Like the single-sex admissions policy in Hogan, which rested on the "stereotyped view of nursing as an exclusively woman's job," *id.* at 729, cross-petitioners' justifications reflect archaic stereotypes, and reinforce the view that men alone are fit for leadership and military careers. And just as the exclusion of men from the Mississippi University for Women (MUW) was not necessary to Mississippi's educational goals, *id.* at 731, VMI's men-only admissions policy is not necessary to serve any valid educational goals asserted here.

B. Cross-Petitioners Have Not Established That The Actual Reasons For Excluding Women From VMI Are Legitimate

A sex-based classification must be evaluated with reference to the actual reason the State has chosen to employ it. *Hogan*, 458 U.S. at 730 & n.16. Courts "need not in equal protection cases accept at face value assertions of [state] purposes, when an examination of the [challenged sex-based classification] and its history demonstrates that the asserted purpose could not have been a goal" of the classification. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). Yet, despite cross-petitioners' burden to justify VMI's policy in terms of the actual reasons it was adopted, they have not sought to identify and rely on those reasons.

VMI adopted its men-only admissions policy at its founding in 1839, and it has never changed that policy. See Dianne Avery, *Institutional Myths, Historical Narratives, and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. Cal. Rev. L. & Women's Stud. (forthcoming Spring 1996), manuscript at 59-92 (regarding VMI early history) (lodged with the Court and served on opposing counsel). In 1839, prevailing social norms presumed that men alone were capable of military or leadership training. See, e.g., Pet. App. 41a-43a (Phillips, J., dissenting); Ann Firor Scott, *The Southern Lady: From Pedestal to Politics, 1830-1930*, at 68 (1970) (referring to severely restricted educational opportunities for women in the antebellum South). Even by the end of the nineteenth century, few women had access to any public higher education at all, and that education was focused on practical, "feminine" skills such as typing, drawing, cooking, needlework and housekeeping. See, e.g., *Hogan*, 458 U.S. at 720 n.1 (regarding MUW, founded in 1884); *Williams v. McNair*, 316 F. Supp. 134, 136 n.3 (D.S.C. 1970) (regarding Winthrop College for girls, founded in 1891), *aff'd mem.*, 401 U.S. 951 (1971). Rigorous public higher education was reserved for men, see, e.g., Kirstein, *supra*, as was service in the military, see, e.g., Martin Binkin & Shirley J. Bach, *Women and the Military* 4-6 (1977).

The original grounds for VMI's admissions policy, founded on officially unquestioned and harmfully constraining assumptions about men's and women's proper roles, are patently illegitimate today. Before this litigation was instituted, neither VMI nor the Commonwealth identified or acted upon any other basis for continuing to exclude women from VMI's student body. n19 To affirm the court of appeals' liability holding, this Court need go no further than to recognize the current constitutional invalidity of the reasons for which VMI initially adopted its discriminatory admissions policy.

n19 In the 1980s VMI conducted a Mission Study of its exclusionary admissions policy in the wake of this Court's decision in *Hogan*, *supra*. Pet. App. 208a. The Mission Study failed to supply any current, constitutional rationale for continuing to exclude women from VMI. The Committee's final report rejected admission of women, but "the Report provided very little indication of how this conclusion was reached." Id. at 212a; see generally L. 103-109, 110-117 (Mission Study Committee data); L. 195-199 (Final Report of Mission Study Committee). The report stated in a conclusory fashion that admission of women would "alter the mission" of VMI, and that, "given the experience of the U.S. Service Academies," demand among women from VMI would be inadequate. L. 196.

C. Cross-Petitioners' Post-Hoc Rationalizations Also Do Not Justify Excluding Women From VMI

Cross-petitioners have not sought to defend VMI's admissions policy in terms of the actual reasons for which it was adopted. They have, instead, proffered a post-hoc objective. They now assert (Br. 28) that women must be excluded from VMI to serve the Commonwealth's interest in "offering a diversity of choices in higher education." n20 As cross-petitioners describe it, the diversity interest has two components: (1) enhancement of diversity by offering single-sex education within a system that is otherwise coeducational, and (2) enhancement of diversity by providing a distinctive style of military education. The court of appeals considered and correctly rejected that post-hoc "diversity" objective. This Court should do the same.

n20 Cross-petitioners do not assert here the second objective upon which they relied in the district court: an interest in producing citizen-soldiers. See pages 4, 5 n.5, 7 n.8, *supra*.

1. Virginia has no state policy of advancing diversity in higher education through the provision of single-sex, military-style education

Cross-petitioners have failed to demonstrate that either of the two components of system-wide diversity that they identify--enhancing diversity by providing single-sex education and a distinctive military-style educational method--are actually aspects of the Commonwealth of Virginia's interest in diversity in its higher education system. The court of appeals correctly held that Virginia lacks any state policy of advancing diversity in its system of higher education through the provision of single-sex education. Pet. App. 151a-154a; see also 94-1941 U.S. Br. 46-47. n21 Cross-petitioners appear to acknowledge (Br. 31) that Virginia does, in fact, lack any such policy at the state level. n22 Instead, they argue (Br. 31-32) that, because the Commonwealth delegates the authority for setting admissions policies to each individual state institution of higher education, VMI's own "decision to pursue the benefits of single-sex education and the VMI method" is a state purpose.

n21 State policy requires each institution of higher education to deal with students without regard to sex. Pet. App. 153a. The Governor of Virginia thus stated in his Answer in this case that "no person should be denied admittance to a State supported school because of his or her gender." L. 7. The absence of a state policy in favor of single-sex education in higher education is borne out by the fact that all state statutes that formerly required single-sex admissions policies at certain institutions of higher education have been repealed, and none of Virginia's public colleges, other than VMI, is single-sex. More women

than men in Virginia are enrolled in private single-sex institutions of higher education in Virginia, Pet. App. 189a, and the district court thus concluded that demand for single-sex public higher education is "greater among women than among men," id. at 190a. This suggests that, if the Commonwealth actually had a policy of offering single-sex education as an aspect of system-wide diversity in higher education, it would have offered such single-sex education to women. In light of those facts, cross-petitioners' contention (Br. 30) that the absence of single-sex public higher education for women in Virginia for almost a quarter of a century is the result of "an historical anomaly" in the application of an otherwise consistent policy favoring single-sex education is wholly implausible.

n22 Cross-petitioners' only suggestion to the contrary relies on the fact that, during the remedial stage of this case, state officials, including the Governor, made statements supporting the remedial plan to offer women a public single-sex leadership program at Mary Baldwin College. Cross-Pet. Br. 31 n.15; see L. 289-296. Those statements were made after the Commonwealth's liability had already been determined, and are thus irrelevant to a review of the court of appeals' liability determination.

The Commonwealth of Virginia's delegation of admissions-policy authority to VMI, however, undermines, rather than supports, cross-petitioners' position. If single-sex, military-style education is offered by the Commonwealth for its educational benefits for some students, the state educational system must include both men's and women's military-style single-sex options (and presumably a coeducational option as well). No single institution of higher education has the capability to provide more than one of those options. Delegation to individual institutions thus cannot be a rational means of implementing a nondiscriminatory state policy of enhancing educational diversity by providing single-sex, military-style education. As the court of appeals correctly concluded, "if responsibility for implementing diversity has somehow been delegated to an individual institution, no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." Pet. App. 154a. n23

n23 Whether a subdivision of a State can assert the State's objective in support of a challenged classification depends in each instance on the subdivision's authority and the nature of the objective. For example, in *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell concluded that an interest in diversity within the student body of any single institution was the kind of interest that a single institution was competent to assert. Id. at 311-312 (opinion of Powell, J.). And the opinions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), upon which cross-petitioners also rely (Br. 32), determined only that a city or school district may take steps to remedy its own discrimination, not, as cross-petitioners assert here, that those entities could assert interests beyond their own ability to effectuate. See *Croson*, 488 U.S. at 491 (opinion of O'Connor, J.) ("a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction"); *Wygant*, 476 U.S. at 277 (opinion of Powell, J.) (a public employer may adopt remedial affirmative action if it has "a strong basis in evidence" for doing so).

2. Virginia cannot enhance the diversity of choices in higher education for

men alone

The basic flaw in cross-petitioners' diversity rationale is that it completely fails to justify offering a diversity of choices to men but not to women. A State may not maintain a sex-based classification merely by showing that it confers a benefit on the favored sex; it must also justify benefitting that sex alone. The Court in *Hogan* rejected dissenting Justice Powell's suggestion that a public nursing school's exclusion of men could be justified by the State's interest in providing to women the additional educational option of attending a single-sex nursing school. The Court observed that reliance on the value of a benefit provided to one class "begs the question" of "whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." 458 U.S. at 731 n.17; see also *Wengler*, 446 U.S. at 151. If the rule were otherwise, virtually all discriminatory classifications would be self-justifying. A State could, for example, designate its only engineering or medical school for men or its only school of education or art for women. In each of those cases, the favored class, like the men who attend VMI, would have a more diverse range of educational options from which to choose than they would in the absence of the single-sex school.

The Commonwealth's interest in fostering system-wide diversity of educational choices can therefore be a legitimate, nondiscriminatory rationale only insofar as the Commonwealth offers diversity for both men and women equally. As the court of appeals correctly held, "if VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking." Pet. App. 153a-154a. The addition of a men-only VMI to the educational options otherwise available in Virginia to both men and women cannot be substantially related to a nondiscriminatory interest in diversity.

Cross-petitioners contend (Br. 38) that a State that offers a single-sex, military-style education to enhance diversity need not offer such education to both sexes, and they point to *Hogan* for support. The interest asserted by the State in *Hogan*, however, was not diversity, but compensation for discrimination against women. 458 U.S. at 727. Offering a single-sex educational option exclusively to one sex alone can, perhaps, be justified on compensatory grounds. Unlike an interest in enhancing diversity, an interest in compensating one sex for discrimination is not undermined by the absence of an equal opportunity for the other sex. The goal of providing compensation for prior or present discrimination against one sex is necessarily served by providing benefits only to the disadvantaged group. Because the plaintiffs in *Hogan* argued (albeit unsuccessfully) that MUW excluded men in order to compensate women for discrimination, the Court did not view "the absence of any state-provided single-sex educational opportunity for the excluded gender [as] itself sufficient to render the challenged admissions policy unconstitutional." Cross-Pet. Br. 38. The absence of an opportunity for women is, however, dispositive in this case, where no compensatory rationale is present. n24

n24 To the extent that cross-petitioners mean to suggest that VMI serves a compensatory rationale (Br. 46) ("VMI's males-only admissions policy serves to roughly equalize overall single-sex educational opportunities in Virginia for men and women" (internal quotation marks omitted)), they have their history backward. It is women, not men, who have experienced discrimination in higher

education in Virginia. See, e.g., *Kirstein*, 309 F. Supp. at 187.

To the extent that cross-petitioners assert that VMI itself has an interest in providing the pedagogical benefits of single-sex education to men only, VMI's admissions policy certainly serves that interest. Their argument (Br. 36-42) that single-sex education may constitutionally be provided to men alone, however, is simply a contention that single-sex education, whether or not provided equally to women and men, is constitutional per se. Under cross-petitioners' analysis, it would be a matter of constitutional indifference whether a State or school district offered some or all of its education through single-sex institutions, even if all or almost all the single-sex institutions were for men only. This Court considered and rejected that argument in *Hogan*.

Hogan contemplated that single-sex education might be permissible where its benefits for particular populations serve legitimate, important governmental objectives that cannot be served by sex-neutral alternatives. But the exclusion of one sex from an educational institution reserved for the other is clearly not a valid end in itself. A decision invalidating VMI's men-only admissions policy will not, contrary to cross-petitioners' suggestion (Br. 41-42), invalidate single-sex public education in all circumstances; it will, however, properly invalidate it where, as here, it is not justified by an important, nondiscriminatory state interest. n25 A decision upholding VMI's policy would, on the other hand, sweep away any meaningful constitutional scrutiny of programs that exclude persons based on sex.

n25 As a practical matter, single-sex public education in the United States is extremely rare. There are only three public colleges in the United States that have sex-based admissions policies: VMI and The Citadel, both of which are men-only military schools, and the women-only Douglass College, in New Brunswick, New Jersey, on the Rutgers University campus. Pet. App. 189a-190a. At the high school level, there appear to be only two public single-sex schools: Girls High School in Philadelphia, and Western High School in Baltimore, both exclusively for girls. See Traci Johnson Mathena, *Best Western: As It Celebrates Its Vaunted Past, the City's All-Girls High School Prepares for a Future That Will Keep It at the Head of the Class*, Balt. Sun, Oct. 30, 1994, at 8 (Magazine). We are unaware of any single-sex public elementary schools. With respect to single-sex classes in coeducational schools, Title IX (the federal statute that bars sex discrimination by educational institutions that receive federal funds) prohibits the provision of courses separately on the basis of sex, except in certain limited circumstances. See 20 U.S.C. 1681; 34 C.F.R. 106.34(c) (certain physical education classes), (e) (classes dealing exclusively with human sexuality); 34 C.F.R. 106.3 (permitting sex-based remedial action).

In citing examples of circumstances in which it believes public single-sex education may be beneficial, VMI refers (Br. 41) to a Virginia statute as "authorizing local school boards to offer single-sex classes in the Commonwealth's public schools." The statute, however, expressly notes that its authorization is limited to circumstances in which offering such classes would be "consistent with constitutional principles." 1995 Va. Acts ch. 582 (to be codified at Va. Code Ann. § 22.1-212.1:1 (Michie Supp. 1995)). To the extent that Virginia's public schools receive federal funds, Title IX's limitations would also apply.

Cross-petitioners contend (Br. 45) that the exclusion of women from VMI must

be evaluated in the context "of the range of educational opportunities and public financial assistance afforded to women in Virginia's higher education system," including four private women's colleges in Virginia and one private men's college. They suggest (Br. 46) that VMI "helps fill a gap created by the private sector's failure to provide greater or more attractive single-sex opportunities for male college students." But, as the court of appeals correctly

noted, "no other school in Virginia or in the United States, public or private," offers to women what they are denied at VMI. Pet. App. 151a (emphasis added). n26 In any event, the existence of private women's colleges in Virginia has no bearing on the Commonwealth's constitutional obligation to treat men and women equally within its own system of public higher education. The Constitution requires that the State treat all persons equally.

n26 A State may of course design its public education system with an eye to the offerings already available in the private sector, and thus, for example, set up a medical school but not a law school to complement a private system that includes a law school but not a medical school. But the permissibility of viewing public and private resources as a whole for such sex-neutral purposes, see, e.g., Pet. App. 191a, cannot detract from the State's obligation to treat men and women equally in its own institutions.

3. VMI need not exclude women in order to offer "a distinctive program of military-style education"

a. Cross-petitioners assert (Br. 27) that "VMI's methodology has proven to be particularly beneficial to the adolescent male students it attracts." But it is undisputed that some women can do everything that is required of cadets at VMI, Pet. App. 170a, and that "some women will thrive in the adversative environment," id. at 172a. There is therefore no valid justification for providing VMI's military-style education to men and not to women.

If VMI admitted women, the diversity of educational options in Virginia's system of public higher education would remain enhanced by the VMI program, but that diversity interest would be served in a legitimate, nondiscriminatory manner. The lower courts recognized that VMI is strikingly different from every other college in Virginia for a multitude of reasons beyond its exclusion of women. n27 Cross-petitioners' claim (Br. 34) that admission of women would eliminate the "very aspects of [VMI's] program that distinguish it from * * * other institutions of higher education in Virginia" is thus simply incorrect.

n27 VMI's suggestion (Br. 9-10, 36) that Virginia Polytechnic Institute and State University (VPI) is a coeducational equivalent to VMI was correctly rejected by the district court and the court of appeals. Indeed, cross-petitioners themselves previously repudiated that position. See, e.g., R. 152 (VMI Defendants' Proposed Findings of Fact and Conclusions of Law (liability phase) (Apr. 26, 1991)), at 97 (P 536). The court of appeals in its liability opinion concluded that VPI is not similar to VMI. Pet. App. 151a n.8. The district court, too, concluded that "VMI and the military barracks at [VPI] are dramatically different institutions that offer dramatically different experiences," id. at 192a, and that "the differences between VPI and VMI's educational experiences outweigh the similarities, independent of gender," id. at 218a. VPI maintains only a 394-person residential corps of cadets within a larger, non-military-oriented student body of 18,000. Id. at 214. Thus, a

coeducational VMI "would remain the only small college campus in Virginia offering a military program." Id. at 173a-174a; see also id. at 218a. The district court also contrasted the operation of the respective corps: "VMI emphasizes uniformity, hierarchy, and the adversative method. VPI recognizes individual differences and is more informal." Ibid. And, most importantly, VPI's corps of cadets lacks the traditions, prestige and alumni ties that VMI enjoys. Id. at 192a.

Although admission of women to VMI would require some changes at that institution, those changes also do not justify excluding women. The only changes that the court of appeals anticipated would result from admitting women to VMI are changes in "physical training, the absence of privacy, and the adversative approach." Pet. App. 147a-148a. Cross-petitioners have failed to identify any state interest whatsoever in preserving those particular attributes of VMI's method in exactly their current form -- and they certainly have not identified any such interest sufficiently important to justify excluding women from VMI.

Admission of women would not require VMI to change materially the distinctive, military-style educational benefits it currently affords. See 94-1941 U.S. Br. 28-33. n28 As we argued in our opening brief, accommodations necessary to preserve privacy or account for physical differences would be minimal, and would not adversely affect the ability of VMI to continue to fulfill its mission of producing "citizen-soldiers" through its military-style program. The court of appeals' concern that the "decency that still permeates the relationship between the sexes" (Pet. App. 23a) would suffer if the "adversative" method were conducted in a coeducational environment is constitutionally invalid; women who are qualified to attend VMI and who want to go there cannot be excluded in the name of advancing archaic notions of appropriate interaction between women and men. n29 Moreover, the benefits to men of attending VMI would probably be enhanced, rather than diminished, if women were admitted. Leadership and military careers in today's society require men and women to interact in a mature, respectful and professional manner with members of the other sex. See, e.g., Pet. App. 241a-242a (district court finding that, upon the admission of women, "if anything, 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").

n28 VMI asserts (Br. 34, 36) that it is "the simple truth * * * that 'VMI's mission can be accomplished only in a single-gender environment,'" and that "that factual issue was resolved against the Government by both courts below." The United States does not contest that some limited changes, such as separate toilets, would be needed. The dispute focuses, rather, on the legal conclusions to be drawn regarding such changes -- specifically, whether the admission of women would change VMI in a manner material to any actual state interest of the Commonwealth, and whether the refusal to make those changes is constitutional in light of the fact that the result of that refusal is the exclusion of women from a unique educational program. These are purely legal issues subject to de novo review.

n29 Cross-petitioners' assertion (Br. 35) that, if women were present, "the strict egalitarianism that pervades all aspects of the program[] would undergo radical change or disappear altogether" is absurd. Egalitarianism would be advanced, not hindered, by admitting qualified women to VMI, just as egalitarianism was advanced when African American students were first admitted

to VMI in 1968. No one suggests that "tensions" that are "incompatible with VMI's educational method" (ibid.) arise because VMI has special programs devoted to "Retention of Black Cadets," Pet. App. 229a-230a, providing them with academic assistance, VMI I C.A. App. 1435, and fostering "social-cultural support and black student morale within a dominantly white institution," id. at 1438. See also 94-1941 U.S. Br. 29 (recounting existing differences in treatment of male cadets). The notion that egalitarianism suffers when women and men are together, because minor accommodations need to be made, is inconsistent with the most fundamental meaning of the Equal Protection Clause.

b. Cross-petitioners contend (Br. 43-45) that VMI may continue to exclude women in the absence of any alternative because of an asserted lack of demand among women for a VMI-type education. There is no factual basis for that argument, and it is also contrary to established law because based on stereotyped views of women's preferences and abilities. n30 The district court thus correctly viewed the level of demand as irrelevant as a matter of law. Pet. App. 174a. It found, in addition, that "VMI would be able to achieve at least 10% female enrollment" and that "this would be a sufficient 'critical mass' to provide the female cadets with a positive educational experience." Id. at 232a. n31

n30 VMI's failure to raise this argument in the lower courts also waived it.

n31 See also Pet. App. 231a (crediting cross-petitioners' expert witness testimony that "successful recruitment of women would likely yield VMI a cadet corps of approximately 10% women, or 130 women"); id. at 174a ("some women, at least, would want to attend [VMI] if they had the opportunity"). VMI engages in "extensive recruiting activities" to attract men and makes no effort to recruit women, id. at 228a; yet "during the two years preceding the filing of this action, * * * [VMI] received over 300 inquiries from women," id. at 141a; see also id. at 229a (district court finding); see, e.g., L. 156.

Cross-petitioners do not disagree with that factual determination. Instead, they allege a lack of demand for a separate, women-only "VMI." Even if that factual allegation were supported (which it is not), a low level of demand for a separate opportunity -- even one, like a school, that requires investment of substantial resources -- cannot justify otherwise unconstitutional discrimination. Thus, at a time when separate-but-equal racial segregation was constitutionally permissible, the Court held that a black person could not be denied admission to the State's only (all-white) law school on the ground that not enough blacks were interested in law to justify the State's establishment of a black law school. *Missouri. ex rel. Gaines v Canada*, 305 U.S. 337 (1938). The equal protection right of the black law school applicant was "a personal one," and he was entitled to be furnished an educational program equal to that provided to whites "whether or not other negroes also sought the same opportunity." Id. at 351. And as early as 1914 the Court held that the failure to offer black travelers luxury railroad accommodations could not be justified on the ground that the carrier wished to segregate the races and too few black travelers could afford luxury accommodations to justify their provision for blacks. *McCabe v Atchison, T. & S.F. Ry.*, 235 U.S. 151. Cross-petitioners have failed to cite a single case to support their demand-based defense, and we know of none. n32

n32 But see *Faulkner v Jones*, 51 F.3d at 445 (emphasis omitted) (speculating, in absence of evidence of lack of demand, whether established rule that "demand is not relevant to an equal protection analysis" might differ when the State confers not a "civil right" but an "economic benefit").

As a factual matter, cross-petitioners failed to show that there is an actual lack of demand for a separate, women's VMI. The only evidence cited regarding allegedly low levels of presumed demand for a women's VMI was offered in the remedial proceedings, in an effort to justify VWIL's substantial differences from VMI. That evidence is avowedly completely speculative and not based on empirically reliable surveys or other reliable methodology, n33 and was, in all events, introduced too late to be relevant to the already completed liability proceeding.

n33 One of the experts whose testimony cross-petitioners cite merely extrapolated from his own conclusions about women's personalities to conclude that there would be little demand for a women's VMI. Pet. App. 73a-74a. A second expert arrived at the same conclusion by referring to demand among women for West Point and VPI, *id.* at 75a n.12, both of which in fact successfully appeal to ample numbers of women.

It would, moreover, be impossible suddenly to create a new institution for women only that would be equal to VMI. See 94-1941 U.S. Br. 20-25. Given the inevitable deficiencies in facilities, faculty, prestige, traditions and alumni connections of a new, separate "women's VMI," it thus would not be at all surprising if some women who are interested in attending VMI itself would not want to attend such a new, separate institution. The impossibility of quickly duplicating for women an established and successful men-only college is a reason that qualified women must be admitted to the existing institution, not a justification for continuing to exclude them. See *Sweatt v Painter*, 339 U.S. 629 (1950) (requiring admission of black plaintiff to whites-only law school due to absence of constitutionally adequate separate alternative for blacks); *Faulkner v Jones*, 51 F.3d 440, 450 (requiring admission of woman plaintiff to men-only military college if the State failed to provide a constitutionally adequate single-sex alternative for women), motion to stay mandate denied, 66 F.3d 661 (4th Cir.), application for stay of enforcement denied, No. A-127 (Aug. 11, 1995).

Demand is also a product of the historical availability of opportunities. The fact that Virginia has never offered -- and still does not offer -- a VMI education to women thus undoubtedly plays a large role in the apparent level of women's interest in such an institution. n34 Sex-based official policies that restrict opportunity based on stereotypes are harmful precisely because they reinforce restrictive roles for men and women. When the roles deemed appropriate for men and women are thus restricted, individuals' sense of possibility is artificially curtailed. Arguments based on "demand" are accordingly especially suspect in this setting. n35

n34 Cf. *Dothard v Rawlinson*, 433 U.S. 321, 330 (1977) (under Title VII, the actual applicant pool for a particular position may be artificially depressed "since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory"); *International Bhd. of Teamsters v United States*, 431 U.S. 324, 365-367 (1977).

n35 It is noteworthy, for example, in light of the 1972 enactment of Title IX, that, from 1971 to 1978, girls' participation in organized high school sports rose by over 600% (notwithstanding a 5% decrease in overall enrollment of girls in high school during that period). See 44 Fed. Reg. 71,419 (1979). Women's participation in college intramural and intercollegiate sports rose by over 100% during the same period. Ibid.

II. THE LEGALITY OF PRIVATE SINGLE-SEX EDUCATION WOULD BE UNAFFECTED BY A HOLDING THAT VMI'S ADMISSIONS POLICY IS UNCONSTITUTIONAL

Contrary to cross-petitioners' suggestion (Br. 41), the unconstitutionality of VMI's men-only admissions policy, like the unconstitutionality of the MUW women-only admissions policy invalidated in *Hogan*, does not affect the continued legality of private single-sex education. Private entities are not state actors under the United States Constitution; thus a ruling that VMI cannot constitutionally continue to exclude women would not, for example, require private, men's institutions such as Hampton-Sydney and Morehouse Colleges, or private, women's institutions such as Randolph-Macon and Spelman Colleges, to admit members of the other sex. n36

n36 With certain specified exceptions, private educational institutions that receive federal financial assistance may maintain single-sex admissions policies without violating the non-discrimination requirements of Title IX, 20 U.S.C. 1681(a). But see 20 U.S.C. 1681(a)(1) (excepting private "institutions of vocational education, professional education, and graduate higher education"). Under federal law, private schools may not, however, refuse admission to qualified individuals based on race -- a prohibition that applies without regard to receipt of federal funds. See 42 U.S.C. 1981; *Runyon v McCrary*, 427 U.S. 160 (1976). Section 1981 is inapplicable to sex discrimination.

Because the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful," *Shelley v Kraemer*, 334 U.S. 1, 13 (1948), such a ruling also will not prevent governments from providing financial assistance to private educational institutions, including single-sex institutions, pursuant to nondiscriminatory governmental assistance programs. n37 The provision of even substantial public assistance has been held not to convert an otherwise private entity into a governmental actor. See 94-1941 U.S. Br. 45 n.31. In *Rendell-Baker v Kohn*, 457 U.S. 830, 843 (1982), for example, the Court held that, even where public funds accounted for virtually all of a private school's operating budget, the school was not subject to constitutional constraints. A State is held constitutionally liable for a private institution's policies "only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains"; such responsibility exists only where the State has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v Yaretsky*, 457 U.S. 991, 1004 (1982). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Id.* at 1004-1005.

n37 That would be true whether intermediate or strict scrutiny applies.

Cross-petitioners err in contending (Br. 41-42) that this Court's decision in

Norwood v Harrison, 413 U.S. 455 (1973), is to the contrary. *Norwood* held that a State that was under a federal desegregation order, and that therefore had an affirmative constitutional duty to dismantle its segregated system of education, could not provide aid to all-white private schools founded in order to avoid public school desegregation. *Id.* at 467-468. Providing public assistance to private institutions that admit only members of certain groups has not been held to violate equal protection when that aid is part of a non-discriminatory government program serving legitimate governmental objectives. See, e.g., *Moose Lodge No. 107 v Irvis*, 407 U.S. 163, 176 (1972) (State's grant of valuable liquor license to private club does not render State liable for club's policy of racial exclusion).

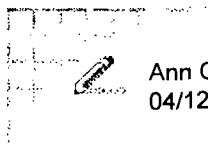
CONCLUSION

The judgment of the court of appeals on liability should be affirmed.

Respectfully submitted.

DREW S. DAYS, III, Solicitor General, DEVAL L. PATRICK, Assistant Attorney General, PAUL BENDER, Deputy Solicitor General, CORNELIA T.L. PILLARD, Assistant to the Solicitor General, JESSICA DUNSAY SILVER, THOMAS E. CHANDLER, Attorneys

DECEMBER 1995



Ann O'Leary
04/12/2000 01:51:26 PM

Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP
cc: Anna Richter/OPD/EOP@EOP
Subject: FW: Single Sex ed reg

Eric -

Below please find the draft revision of the reg sent from DOJ to ED on Friday. I spoke with Peter Rundlet yesterday to get a sense of WH Counsel's involvement in the passback -- they had no involvement whatsoever. The quick reading by ED is that they are trying to get some clarification on changes made -- they believe that DOJ has made it a bit more confusing, but not necessarily worse. I have not had a chance to review it thoroughly.

At this point, I suggest we call an internal meeting with Beth, Peter, Karen, etc. to discuss both the substance as well as the next steps. Beth recently had a conference call with some of the women's groups and felt a bit more worried about moving ahead with our flexibility position. After this meeting, I think we should write a joint memo to POTUS and FLOUTS outlining the substantive changes, constitutional concerns, and a read on the lack of support from the women's groups.

Lets have a chat after we both get a chance to review it -- tomorrow?

Thanks.

-Ann

----- Forwarded by Ann O'Leary/OPD/EOP on 04/12/2000 01:43 PM -----



"Liu, Goodwin" <Goodwin_Liu@ed.gov>
04/12/2000 01:33:34 PM

Record Type: Record

To: Ann O'Leary/OPD/EOP
cc:
Subject: FW: Single Sex ed reg

> -----Original Message-----
> From: Winston, Judith
> Sent: Friday, April 07, 2000 5:08 PM

> To: Cantu, Norma V; Winnick, Steve; Palmer, Scott; Anthony, Lisa; Liu,
> Goodwin; Lahring, Karl; Craig, Susan
> Subject: FW: Single Sex ed reg
> Importance: High

>
> I am forwarding the e-mail and attachment below without having reviewed
> either, knowing we have all been waiting with baited breathe

>

> -----Original Message-----

> From: Pillard, Nina [mailto:Nina.Pillard@usdoj.gov]

> <mailto:[mailto:Nina.Pillard@usdoj.gov]>

> Sent: Friday, April 07, 2000 5:50 PM

> To: 'Judith_winston@Ed.gov'

> Subject: Single Sex ed reg

>

> <<ss reg edited (EDU).wpd>> Dear Judy,

>

> Here is our proposed revision of the draft single-sex education regulation

> you sent over. Although any approach to this subject will inevitably

> raise significant litigation risk, we believe this approach is reasonable

> and defensible. We anticipate further discussion regarding this draft,

> but wanted you to have a chance to look it over in advance of meeting

> again. The Civil Rights Division and the Acting Associate Attorney

> General have reviewed this revision and would be happy to join in further

> discussions.

> In making our revisions, we were guided by our understanding that the

> Secretary has the discretion to - and wants to - construe the

> discrimination prohibition in Title IX as generally tracking the equal

> protection standard. We have also been guided by our view that the

> admissions exemption applicable to single-sex schools can be interpreted

> to relieve LEAs of the statutory obligation to justify decisions to

> provide sex-segregated schools, and to permit them to offer a single-sex

> school to one sex and not the other (so long as, in all other respects,

> the educational benefits available to each sex are substantially equal).

> As we have discussed, however, for purposes of the Equal Protection Clause

> (if not for title IX), a public school district still would have to

> provide an exceedingly persuasive justification both for its decision to

> offer sex-segregated schools and for its decision to provide such a school

> to one sex only. While we think that a school district could satisfy the

> constitutional requirements for justifying its decision to provide

> sex-segregated schools, we believe that any choice to offer such schools

> only to one sex inevitably would raise grave constitutional concerns and

> implicate the Department of Justice's enforcement responsibilities. The

> enclosed draft would not preclude conduct that the Constitution would

> prohibit, and the Constitution is very restrictive in this area. Let's

> talk further about this and, in particular, discuss what the preamble

> should say on the constitutional issue.

> The amended draft raises other issues that we believe should, at a

> minimum, be explained in the preamble in order to avoid misapplication of

> the regulation. For example, the Justice Department believes that the

> regulation should explain that the prohibition in draft §106.34(A)(2)(a)

> against relying on "overbroad" sex-based generalizations prohibits

> sociological, psychological or educational generalizations about girls and

> boys, even if those generalizations are not based on archaic stereotypes

> and are supported by reputable empirical research reflecting actual
> statistical tendencies. A sex-based generalization that is untrue for
> even a very few individuals is, in the Court's parlance, "overbroad."
> Outside the remedial context, the Court has permitted classifications
> grounded on sex-based generalizations in only two types of situations:
> First, the Court permitted a generalization based on biological
> differences that distinguish all members of one sex in *Michael M. v.*
> *Superior Court of Sonoma County*, 450 U.S. 464, 480 (1981), where the Court
> upheld a law defining statutory rape as sexual intercourse with a minor
> woman (and not a minor man) on the ground that "males and females are not
> similarly situated with respect to the risks of [pregnancy from] sexual
> intercourse"; second, the Court has permitted generalizations based on
> existing, sex-based legal disabilities affecting one sex, as in *Rostker v.*
> *Goldberg*, 453 U.S. 57, 78 (1981), where the Court upheld a male-only draft
> based on the existence of the unchallenged rule excluding women from
> combat. We would be happy to meet again with you to discuss this, and
> other issues in connection with the draft preamble, once you have had a
> chance to review the enclosed draft of the regulatory text.
> We very much appreciate your cooperation on this complex project, and we
> look forward to meeting with you again soon to discuss it.

> Best regards,

> Randy



- ss reg edited (EDU).wpd

PROPOSED REGULATORY LANGUAGE

Replace existing sections 106.34 and 106.35 with the following:

106.34.1 Access to course offerings

(A) Permissible sex-segregated courses, programs or activities. A recipient may provide courses or otherwise offer its programs or activities separately on the basis of sex in a non-vocational elementary or secondary school only –

(1) as part of a remedial or affirmative action program under §106.3; or

(2) as part of an even-handed effort to enhance students' educational achievement by offering voluntary choice among equivalent sex-segregated and coeducational programs.

A recipient meets this standard if the recipient demonstrates that –

(a) a sex-segregated option is provided based on the recipient's educational judgment, supported by research or other reliable evidence and not using overbroad sex-based generalizations; that exclusion of members of the other sex will substantially enhance educational achievement or other benefit for some students; that such enhanced benefit is not reasonably attainable for those students in a coeducational setting; and

(b) participation in any sex-segregated course is voluntary, an equivalent sex-segregated option is provided to both sexes, and an equivalent coeducational course is also available; *provided, however*, that a sex-segregated course may be provided to only one sex if participation in the sex-segregated course is voluntary, an equivalent coeducational course is also provided, and the recipient has demonstrated that, for the current school year or semester, equivalent sex-segregated courses were offered to both sexes and an inadequate number of students of one sex decided to participate to make a sex-segregated course feasible for that sex. The number of students is inadequate only if it is fewer than the number of students in the smallest course (excluding special education and remedial courses) that the recipient's established policies and practices permit; or

(3) within chorus activities to the extent that requirements based on vocal range or quality may result in a chorus or choruses of one or predominantly one sex; or

(4) within physical education classes or activities to the extent that they involve wrestling, boxing, rugby, ice hockey, football, basketball and other sports a major activity of which involves bodily contact; or

(5) during portions of classes that deal exclusively with human sexuality; or

(6) as part of a mother-daughter or father-son activity at an educational institution, authorized by 20 U.S.C. §1681(a)(8), where opportunities for equivalent activities are provided for students of the other sex.

(B) Prohibitions on sex-segregation of certain courses, programs or activities. Recipients may not offer sex-segregated courses, programs or activities except in the circumstances described in subpart 106.34(A). For example –

(1) a recipient may not, except as provided in §106.34(a)(4), offer sex-segregated physical education classes or programs. Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such an effect;

(2) a recipient may not offer sex-segregated vocational, technical, home economics, industrial, or business classes or programs.

106.34.2 Admission to schools operated by local educational agencies. Title IX does not prohibit a recipient that is a local educational agency (“LEA”) from operating one or more sex-segregated, non-vocational, elementary or secondary schools if –

(A) the school is part of a remedial or affirmative action program under §106.3; or

(B) enrollment in any sex-segregated school is voluntary, and an equivalent coeducational school is also provided.

This section addresses the requirements of Title IX, but does not address the constitutionality of any such sex-segregated school.¹

106.35 Equivalence. In order to be equivalent for purposes of subpart 106.34 or 106.34.1, schools, courses, programs or activities must be geographically accessible and substantially equal in all material respects. Factors relevant to equivalence include, where applicable, policies and criteria of admissions (excluding policies that restrict admission to schools based on sex); the character, quality, range, and availability of curricular and extracurricular activities; the character, quality, range and availability of facilities, services, resources, funding, financial aid, student body, institutional history, prestige, position and influence of alumni network, and other benefits; and the quality and experience of administration, and qualifications and distribution of faculty and staff.

¹ For discussion of the relevant constitutional constraints, see [cite the preamble].



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

MEMORANDUM

Date: December 13, 1999

To: Randy Moss
Acting Assistant Attorney General for Legal Counsel

Bill Lann Lee
Acting Assistant Attorney General for Civil Rights

Peter Rundlet
Associate Counsel to the President

From: Judith A. Winston 

Subject: Draft Proposed Amendments to Title IX regulations concerning single sex schools and programs

Attached, for your review, is a draft of proposed amendments to Title IX regulations concerning single sex schools and programs. To assist in your review, I have also attached a summary of the proposal that was used in briefing Secretary Riley. We would be happy to meet to discuss the proposal and to answer any questions that you may have.

Please note that the preamble to the regulations is not in the proper Federal Register format and does not include all the required boilerplate language that must be included in a notice of proposed rule making. We are prepared to make those changes once there is clearance of the substantive approach.

In addition to discussing the substance of the document, we also need to discuss how best to vet the proposal with appropriate stakeholders before it is published as a proposed regulation. We would appreciate it if, in distributing this draft within the White House and the Department of Justice for review, you emphasize that it should neither be shared nor even discussed with persons outside our agencies until we have agreement on both the substance and the vetting strategy.

Previous guidance that we received from you has been very helpful in preparing this draft, and we greatly appreciate your review of this draft. As you know, the issues are very difficult, and it has taken us considerable time to formulate an approach that we

believe is both legally defensible and consistent with good educational practice. We look forward to an early discussion so that we can move forward on this project.

Thank you.

Attachments

cc: Mike Smith
Leslie Thornton
Norma Cantu
Art Coleman

PREAMBLE

I. Purpose of the Proposed Regulatory Amendments

The Department proposes to amend its existing Title IX regulation regarding single-sex programs and activities, consistent with the purposes of the Title IX statute and subject to appropriate safeguards against discrimination, to assist school districts in responding to important and legitimate educational needs of students. The proposed amendments are intended to support efforts of schools and school districts to improve educational outcomes for children, and to provide public school parents with a diverse array of educational options that respond to the educational needs of their children.

II. Background

Title IX of the Education Amendments of 1972 prohibits sex-based discrimination in education programs or activities receiving federal financial assistance. 20 U.S.C. § 1681. The Title IX statute specifically exempts from its coverage admissions policies of non-vocational elementary and secondary schools, private undergraduate postsecondary institutions, and public undergraduate postsecondary institutions that traditionally and continually from their establishment have had a policy of admitting only students of one sex. The statute does not specifically prohibit single-sex classes or programs in coeducational schools.

Title IX is implemented by rules promulgated by agencies providing federal assistance to education programs and activities. 20 U.S.C. § 1682. The Department's current regulation issued by its predecessor agency, the Department of Health, Education, and Welfare (HEW), became effective July 21, 1975. See 34 CFR Part 106.

The regulation does not apply to the single-sex admission policies of non-vocational elementary and secondary schools, among other institutions exempted by the statute. 34 CFR 106.15. Accordingly, recipients can operate single-sex elementary and secondary schools consistent with Title IX. However, the regulation requires that where a local educational agency (LEA) operates a school for one sex, it must provide the other sex, pursuant to the same policies and criteria of admission, with comparable courses, services, and facilities. 34 CFR 106.35.

With limited exceptions, the existing regulation prohibits recipients that operate coeducational schools from conducting single-sex classes, programs, or activities.¹ The regulation reflects

¹ The exceptions are if separation based on sex (1) results from the application of objective standards of physical ability, or vocal range or ability, 34 CFR 106.34(b), (d), and (f); (2) is in a physical education class involving contact sports or is in a class involving human sexuality, 106 CFR 106.34(c) and (e); (3) involves a program offered to pregnant students on a voluntary basis that is comparable to that offered non-pregnant students, 34 CFR

congressional concerns that coeducational institutions were using sex-based policies and practices that reflected out-dated and stereotyped notions of the differences between the sexes and of the limited abilities of girls and women.

III. Summary of Proposed Changes to the Department's Title IX Regulation

The proposed regulation is intended to increase the ability of school districts to respond to educational needs and problems in their schools consistent with the intent and purpose of Title IX. Recent attempts by some school districts to experiment with single-sex programs, as well as recent congressional proposals regarding single-sex programs, reflect important and legitimate efforts to improve educational outcomes for all students. These programs generally are not based on outdated notions regarding the limitations or limited goals of members of one sex. Rather, they aim to provide new and better ways to help all students learn and succeed to high standards.

The three major proposed changes to the regulation can be summarized as follows –

The first and most significant change relates to single-sex classes, programs, or activities in coeducational schools. The proposed regulation permits non-vocational elementary and secondary schools to operate single-sex classes, programs, or activities, in addition to those situations permitted by the existing regulation, if a school can meet the constitutional standard used by the federal courts to review gender classifications. Under this standard, a school must demonstrate an “exceedingly persuasive justification” for the single-sex class, program, or activity. The proposed regulation identifies “even-handed diversity” as a justification that can meet this standard. It also describes two ways that a school can demonstrate “evenhandedness.”

Second, the proposed regulation clarifies how LEAs that operate single-sex schools under the existing regulation can provide equal educational opportunity to both sexes.

Third, as discussed in more detail below, there are situations where either evenhandedly providing classes or programs, or ensuring equal educational opportunity in schools, will require “equivalent” programs or schools. The proposed regulation defines “equivalence” and deletes the word “comparable” found in the existing regulation. This change does not alter the intent of the existing regulation, but clarifies that “equivalent” programs and schools under this regulation need not be identical, and that differences between programs and schools cannot be based on stereotypes about the sexes, and such programs and schools must be equal in all fundamental respects. These include admissions criteria, the quality, range, and availability of curriculum, facilities, services, and other benefits, and the qualifications and distribution of staff and faculty. Equivalence will be determined on a case-by-case basis.

106.40(b); or (4) constitutes remedial or affirmative action. 34 CFR 106.3. In addition, pursuant to an OCR policy determination, recipients may offer sex-segregated classes for students who object to coeducational classes on religious grounds. 43 Fed. Reg. No 84 (May 1, 1978).

The proposed changes only apply to elementary and secondary schools, classes and programs. This is where the need for flexibility to respond to students' diverse educational needs is most prevalent, and where the current Title IX regulation limits the discretion of educators to provide single-sex program choices.

IV. Constitutional Standards

The Supreme Court has determined that the Constitution requires equal educational opportunity for men and women. However, sex is not a prohibited classification. For instance, sex classifications may be used "to compensate women 'for particular economic disabilities [they have] suffered,' 'to promot[e] equal employment opportunity,' [and] 'to advance full development of the talent and capacities of our Nation's people.'" United States v. Virginia (VMI), 116 S. Ct. 2264, 2276 (1996) (citations omitted). See also Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3338 (1982) (holding that in limited circumstance, gender-based classifications can be justified).

Nevertheless, gender classifications require an "exceedingly persuasive justification." VMI, 116 S. Ct. at 2275. Gender classifications are permissible if they serve important governmental goals and if the means employed are substantially related to those goals. Id. This is a "demanding" legal hurdle for a school. Id. The governmental 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." Id. See also Hogan, 102 S. Ct. at 3337 (holding that sex-based classifications must be based on "reasoned analysis" rather than through the application of "traditional and often inaccurate assumptions" about the roles of men and women). Because courts will take a "hard look" at the rationales for single-sex programs, schools that establish such programs must make sure they are not relying on generalizations and "tendencies" of girls and boys that are likely to perpetuate patterns of discrimination. VMI, 116 S. Ct. at 2280.

Importantly, the court in VMI suggested a rationale for single-sex schools and programs that may meet the "exceedingly persuasive justification" test: "We do not question the State's prerogative evenhandedly to support diverse educational opportunities." Id. at 2276. Consistent with its mission "to ensure equal access to education and to promote educational excellence throughout the nation," the Department encourages educators to investigate disparities in educational attainment between boys and girls, and to develop and allow parents to choose among a broad array of educational strategies capable of meeting the potentially different learning needs of many boys and girls.

Yet whatever educational opportunities schools or school districts offer to boys and girls, they must offer such opportunities "evenhandedly." Id. In VMI, not only did the State offer "no persuasive evidence that VMI's male-only admissions policy [furthers] a state policy of 'diversity,'" id. at 2279 (internal quotation marks omitted), but the State also failed to show "evenhandedness" in the educational opportunities it did offer to men and women. Indeed, the

core of the equal protection violation was the State's failure to provide VMI-type adversative military training "to women ready, willing, and able to benefit" from such training. *Id.* at 2283. Thus, under VMI, where a school or school district operates a single-sex program or school, it must ensure "substantial equality in the ... educational opportunities" it offers not simply to members of the excluded sex who have the same educational need addressed by the school or program, but specifically to members of the excluded sex who are "ready, willing, and able to benefit from educational opportunities of the kind [the State] offers" to the included sex. *Id.* at 2286, 2283; *see id.* at 2284 ("[G]eneralizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to those women whose talent and capacity place them outside the average description."). "Evenhandedness," so construed, reflects the basic principle that equal protection is a constitutional right held by individuals, not by groups.

V. Application of constitutional standards to the proposed regulation

The proposed regulatory language continues to treat schools and classes differently because of the Title IX statutory exemption for elementary and secondary school admissions.

A. Single-sex classes and programs

Single-sex classes and programs are not exempt from the Title IX statute. Thus, Title IX requires schools and school districts to justify single-sex classes and programs in coeducational elementary and secondary schools. The Department's proposed regulation would permit single-sex classes, programs, or activities under Title IX to the full extent permissible under the Equal Protection Clause.

Accordingly, the Department will examine on a case-by-case basis whether the school provides single-sex classes or programs in coeducational schools "evenhandedly to support diverse educational opportunities." *Id.* at 2276 n. 7. The following discussion describes situations in which a school demonstrates an evenhanded use of single-sex classes or programs:

(1) Voluntary choice among equivalent educational options

The Department encourages educators to investigate disparities in educational attainment between girls and boys and to attempt innovative educational methods to improve student achievement. The Department recognizes that to promote educational excellence it is important that educators have an array of educational options to meet the diverse needs of this nation's students. An array of educational opportunities including single-sex educational options can promote greater choice for parents and students within the public school system. Such opportunities may encourage the consideration and adoption of innovative teaching practices to improve the academic achievement of all students.

The Department believes that the requirements of VMI leave public schools and school districts with sufficient flexibility to offer the option of single-sex education programs. These options would be based on judgments, supported by research or other reliable evidence, that providing such options would improve educational outcomes for their students. These judgments, for example, could be based on evidence that some students in some circumstances will do better in a single-sex environment, and evidence that students within the attendance area are leaving the public schools to attend private single-sex schools within the district. The Department believes that the school clearly indicates its interest in “evenhandedly ... support[ing] diverse educational opportunities,” VMI, 116 S. Ct. at 2276 n.7, when it offers choice among educational options that include equivalent single-sex classes or programs for each sex as well as an equivalent coeducational class or program. Equivalence is a rigorous standard that requires the school or district to offer substantially equivalent curriculum, teaching methods, teacher quality, facilities, and services through each educational option. This standard ensures that the exclusion of one sex from a particular class or program does not deny equal protection to members of that sex, given the other educational opportunities that the school has made available. Moreover, voluntary admissions to each class or program ensures that students are not placed in single-sex programs based on overbroad generalizations about the needs, abilities, or interests of either sex.

(2) Addressing specific educational needs of boys and girls

Educational research suggests that boys and girls may have different learning needs that single-sex educational strategies may effectively address. The Department believes that under VMI, a school may offer single-sex classes or programs to address the legitimate, demonstrated educational needs of one sex, as long as it ensures “evenhanded[ness],” 116 S. Ct. 2276 n.7, or “substantial equality in the separate educational opportunities,” id. at 2286, it offers to the other sex. Three points are relevant to meeting this standard.

First, the school must demonstrate that members of one sex (the included sex) have an identified educational need, that the class or program must be targeted to members of the included sex with that need, and that exclusion of members of the other sex (the excluded sex) substantially enhances the effectiveness of the class or program in meeting the need of the included sex.

Second, Title IX and the Constitution require “evenhandedness.” This means that where a school has identified and documented specific learning needs of members of one sex that may effectively be addressed through single-sex education, the school must demonstrate that it is effectively serving members of the excluded sex who have the same or similar learning needs. The program offered to the similarly situated members of the excluded sex does not have to be the same as that offered the included sex, nor does it have to be offered in a single-sex environment. Rather, the educational strategies used to address the learning needs of the excluded sex should turn on educational research, good practice, and expert judgment. Strategies that effectively address a particular learning need for most students of one sex may or may not resemble strategies that effectively address the same need for most students of the other sex.

Finally, evenhandedness requires that if a school properly justifies a single-sex program offered to members of one sex, but some members of the excluded sex can benefit from and are willing and able to participate in the program offered the included sex, the school must provide the excluded sex with a class or program that is equivalent to that program. Equal opportunity does not necessarily mean that the single-sex program must be opened up to the excluded sex. Nor does it mean that the program offered the excluded sex must be offered in a single-sex environment, if a coeducational environment is effective for members of the excluded sex. The school would also have flexibility to offer the program to members of the excluded sex in a somewhat different format based on the difference in numbers of students that would benefit from the program, as long as the program is equivalent in fundamental respects.

Schools should monitor and evaluate their classes and programs under this regulation, including those offered to the included sex and the excluded sex, to ensure that the class or program continues to effectively meet the need identified by the school.

Example of evenhanded response to the needs of both sexes:

Example 1 -- A school demonstrates that its female students are not participating or achieving in advance level mathematics classes to the same degree as boys. It also provides evidence of studies from similarly situated schools or school districts showing that girls do better in these classes if they are single-sex. Based on this evidence, it offers a single-sex mathematics class that is open to girls who have the prerequisites to take upper level classes but who are not taking such classes, or who are taking such classes but getting low grades. Enrollment is voluntary. The class uses a traditional teaching method and covers the same core material taught in other upper level mathematics courses. For boys, as well as girls who chose not to enroll in the single-sex class, the school offers advance level math in coeducational classes with substantially equal class size, curriculum, and teacher quality. The school also demonstrates that the best way to increase boys' participation and achievement in upper level mathematics courses is to provide tutoring sessions. It provides these services to any student, boy or girl, who has the prerequisites to take upper level classes but who is not taking such classes, or who is taking such classes but getting low grades. In addition, the school monitors the effectiveness of both the all-girls class and the tutoring sessions in raising the mathematics achievement of the students served. It does not offer a single-sex upper level mathematics class for boys. The excluded sex is being provided equal educational opportunities.

Example 2 -- An urban high school serving primarily African-American students demonstrates a serious dropout problem among its male students. The school does an assessment and learns that boys are dropping out because of peer pressure on them to follow "codes of masculinity" which emphasize hiding one's feelings, experimenting with violence and drugs, and doing poorly in school rather than being labeled a "nerd." The

school also has evidence from a program offered at a school district with similar demographics that boys respond effectively to an intensive counseling and mentoring program to address these issues. The evidence also shows that boys are much more likely to sign-up for and remain in the program if it is single-sex. In response, the school establishes an intensive after-school mentoring and counseling program for boys. The school also has done an assessment that shows that most girls who drop out do so due to heavy family obligations, and that providing a more flexible schedule as well as a one-on-one program advisor for girls at risk of dropping out to work with the family in coordinating school and family obligations is effective in keeping such girls in school. Accordingly, it has established a flexible schedule option and a program advisor program for at-risk high school girls. A small number of girls with serious drug and discipline problems that put them at risk for dropping out are also interested in the intensive mentoring and counseling program offered the boys. There is no evidence that these girls do not effectively respond in a coeducational environment, so the school district offers a smaller, but in other ways identical, coeducational mentoring program. The school monitors the effectiveness of its dropout prevention strategies for both boys and girls. The school offers the excluded sex equal educational opportunity.

B. Single-sex schools

Because of the exemption in 20 U.S.C. 1681(a)(1), Title IX does not apply to the single-sex admissions policies of nonvocational elementary and secondary schools. This precludes the Department from regulating a school's justification for offering a single-sex school. On the other hand, the Department has consistently interpreted Title IX to require that an LEA ensure that when it chooses to offer single-sex schools to one sex – absent a remedial basis – it is providing equal educational opportunities to the other sex.² The proposed regulation does not change this fundamental principle.

The Department believes that in practice similar legal standards apply both to single-sex schools and to single-sex classes or programs. Because of the exemption for admissions to nonvocational elementary and secondary schools, the district does not have to justify establishment of this single-sex school under Title IX. (It will have to do so under the Constitution if it is challenged in court.) However, the justification for and nature of the single sex school shapes the extent of the obligation of the LEA to provide equal educational opportunity for the excluded sex. The Department cannot determine whether similarly situated members of the excluded sex are being provided equal educational opportunity without understanding what need or problem the LEA seeks to address in establishing the single-sex school. In this sense, the focus and goal of the Constitution and Title IX are the same: evenhandedness. Where a school or LEA pursues a single-sex educational strategy, the equality analysis focuses on what educational opportunities the school or LEA is providing to members of the excluded sex. And the goal is to ensure substantial equality in the educational opportunities offered to those members of the excluded

² Moreover, Congress deferred to federal agencies further to determine through regulations the meaning of an equal educational opportunity when an LEA chooses to establish one or more single-sex schools. 20 U.S.C. § 1682

sex who have the same or similar needs to those addressed for the students served by the single-sex school.

Thus, the proposed regulatory language clarifies that a LEA that operates a single-sex school provides equal educational opportunity for the excluded sex where it evenhandedly supports diverse educational opportunities. As with single-sex classes and programs, evenhandedness can be satisfied by providing equivalent single-sex schools as well as an equivalent coeducational school. As discussed above and demonstrated below, equivalence is rigorously defined in order to ensure equal educational opportunity:

Example of nonequivalent schools

A school district establishes single-sex academies for grades 10-12 in addition to offering coeducational schools for students at these grade levels. Admission is voluntary. The schools are given identical resources and facilities, equivalent quality teachers and administrators, and offer an identical curriculum based on core courses in mathematics, science, English, and history. At this point, the school district has evenhandedly supported diverse educational opportunities. However, after several years, the girls' academy develops a close relationship with local business and community leaders. Over time, these outside groups increasingly offer significant mentoring services to the students at the girls academy, such as putting on educational programs for the students, and using their contacts to help the students obtain summer jobs, internships, and interviews with alumni of highly competitive colleges. The groups also joined together to raise and donate money to build a new sports complex at the girls academy. The school district no longer offers equivalent educational opportunities for boys and girls.

As with single sex classes or programs, evenhandedness alternatively may be satisfied where an LEA uses a single-sex school to address a specific educational need affecting members of one sex, as long as the school district provides a school or program that effectively serves members of the excluded sex with the same educational need, and provides an equivalent program to that offered the included sex to those members of the excluded sex who would benefit from and seek this opportunity. LEAs should monitor and evaluate schools and programs offered to both the included and excluded sex to ensure that these LEAs continue to effectively meet the needs identified.

Example of evenhanded response to the needs of both sexes:

An LEA establishes a single-sex leadership high school for girls. The school employs a curriculum and pedagogical and counseling approaches designed to develop leaders. Because of the Title IX statutory exemption for admissions to nonvocational elementary and secondary schools, the LEA does not have to justify establishment of this single sex school under Title IX. (It will have to do so under the Constitution if it is challenged in court.) Nevertheless, the LEA would have to show that it is providing for boys with the

same need or problem addressed in the girls school a program that is effective in addressing that need. Thus, the LEA demonstrates that it offers the leadership school because most girls in its school district are not assuming or even trying for leadership positions in the schools that would prepare them to be leaders in their adult lives. For several years they have been significantly under-represented in school government positions and other extracurricular programs such as the editorial boards of school newspapers. In assessing the needs of boys, the LEA shows evidence that boys avoid leadership positions, not because of anything girls do, but because they lack public speaking skills and role models. Thus, the school district offers a mentoring program at the coeducational high school. Its assessment also showed that a small number of non-leader boys would be interested in the intensive curriculum and counseling program found at the girls school. Thus, the school district offers a smaller, but otherwise equivalent, coeducational program with curriculum and pedagogical and counseling approaches designed to develop leaders in one of its coeducational high schools. The school monitors the effectiveness of its leadership programs for both boys and girls.

VI. The Department seeks comments on other examples of exceedingly persuasive justifications

The Department welcomes educators and others to share their expertise and insight regarding other possible examples of the evenhanded use of single-sex programs and schools, or examples of other "exceedingly persuasive justifications" for single-sex programs or schools. It is important that suggested justifications are consistent with the rigorous legal standards set out above. Depending on comments received during the public comment process, the Department may conclude that there are other examples of justifications that are sufficient to include in the final regulation as categorical types of permissible single-sex programs.

VII. Additional aspects of the proposed regulation

The proposed regulation also retains two longstanding regulatory exceptions that permit single-sex programs and schools consistent with constitutional standards:

Section 106.3 permits single-sex schools, programs and activities that are undertaken to overcome the effects of sex-based-discrimination and to overcome the effects of conditions that have resulted in limited participation by members of one sex. 34 CFR Part 106.3. See e.g. VMI, 116 S. Ct 2276 ("sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,'" citing Califano v. Webster, 430 U.S. 313,320 (1977); Hogan, 102 S. Ct. 3338 ("a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened"). Because programs under § 106.3 are intended to remedy existing inequities in a program for one sex, it is not necessary to evaluate whether equivalent opportunities are provided to members of the other sex.

Section 106.34 permits physical education classes involving contact sports, and sex-segregated classes involving human sexuality, as long as equivalent opportunities are provided to members of both sexes. Sex-segregation in these circumstances is based on real differences between the sexes and on compelling issues of privacy. See e.g., VMI, 116 S. Ct. at 2276 (noting that there are enduring physical differences between men and women). Moreover, neither sex is denied equal educational opportunity.

The proposed regulation also retains the existing regulatory provisions that explicitly permit grouping students based on: ability in physical education classes, 34 CFR § 106.34(b), vocal range or quality, 34 CFR § 106.34(f), or pregnancy. 34 CFR § 106.4(b). These provisions and/or classifications are not based on sex and, thus, are not affected by the "exceedingly persuasive justification" standard.

As discussed above, the proposed regulation retains the permissibility of separating students by sex within physical education classes during participation in contact sports. The proposed regulation would not, however, otherwise permit sex-segregated physical education activities. The provision requiring coeducational physical education classes was the subject of thorough debate at the time when the Title IX regulations were promulgated, see 108 Fed. Reg. 24133 (June 4, 1975) and stereotyping in physical education classes was a particular concern of Congress when it enacted Title IX. Nor does the proposed regulation permit sex-segregated vocational education classes. Congress was also specifically concerned with gender-based stereotyping in this area. See 118 Cong. Rec. 5806. To permit single-sex vocational education classes, programs, or activities would be inconsistent with congressional intent since Congress did not permit single-sex vocational education schools at the elementary and secondary level.

PROPOSED REGULATORY LANGUAGE

Replace existing sections 106.34 and 106.35 with the following:

106.34 Access to course offerings

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient that operates a non-vocational elementary or secondary school may provide or carry out courses, programs, or activities (referred to in this section as "classes or programs") separately on the basis of sex:

- (1) Remedial basis. As part of a program to redress sex-based discrimination or to overcome the effects of conditions that resulted in limited participation by members of one sex under §106.3;
- (2) Even-handed diversity to enhance educational achievement. If the school is even-handedly supporting a diverse array of educational opportunities to enhance educational achievement for students of both sexes at the same ages or grade levels. A school meets this standard if the recipient demonstrates that –

(i) Voluntary choice among equivalent programs. (A) The school is providing for voluntary choice among equivalent single sex classes or programs to students of both sexes, as well as an equivalent coeducational class or program at the same ages or grade levels;

(B) These options are provided based on the recipient's educational judgment, supported by research or other reliable evidence, that voluntary choice will enhance the educational achievement of students served by these classes or programs; or

(ii) Addressing specific educational needs. (A) The single sex class or program is demonstrably responsive to a significant educational need affecting members of the sex included in the class or program (the "included sex"); the class or program is targeted to students with this need; exclusion of members of the other sex (the "excluded sex") substantially enhances the effectiveness of the class or program in meeting that need for the included sex; and the school is providing for members of the excluded sex with the same educational need, a class or program that is effective in addressing that need.

(B) Subject to sub-clauses (C) and (D), the class or program provided for members of the excluded sex, under this clause—

(I) May be different in subject matter, approach, or emphasis from the class or program for the included sex, depending upon the recipient's educational judgment of how best to serve most members of the excluded sex experiencing the same educational need as the included sex; and

(II) May be a coeducational class or program if that is effective in meeting that need.

(C) The recipient's justification of a single sex class or program under clause (A), and its judgment under clause (B) of how best to meet the same educational need for members of the excluded sex must be based on educational research or other reliable evidence of both the needs of students served by the school and the effectiveness of the education approach used to meet these needs, and may not be based on gender-based stereotypes.

(D) (I) If one or more members of the excluded sex with the need identified under this clause would benefit from, and seeks the opportunity to participate in, the type of program offered the included sex, they must be given an equivalent class or program--subject to appropriate adjustments in format if only a few students would benefit from and are interested in the program.

(II) The equivalent class or program may be coeducational if such a class or program effectively meets the need of the members of the excluded class described in subclause (I).

(3) Body-contact physical education and human sexuality. Within physical education classes or activities while participating in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact, or during portions of classes that deal exclusively with human sexuality.

(b) Physical education. Except as provided in paragraph (a)(3), a recipient may not offer sex-segregated physical education classes or programs.

(1) This paragraph does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance and applied without regard to sex.

(2) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such an effect.

(c) Vocational, home economics, and business education. A recipient may not offer sex-segregated vocational, technical, home economics, industrial, or business classes or programs.

(d) Chorus. Recipients may impose requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

(e) Equivalence. Factors to consider in determining whether a class or program is equivalent under this section include whether there is equivalence in the policies and criteria of admissions (excluding a policy to restrict admissions based on sex); the quality, range, and availability of curriculum; the quality, range and availability of facilities, services, resources, financial aid, and other benefits; and the qualifications and distribution of faculty and staff.

106.35 Access to schools operated by local educational agencies

A local educational agency that operates a non-vocational, single sex elementary or secondary school for members of one sex does not discriminate against students of the excluded sex if --

(a) Remedial basis. The school is part of a program to redress sex-based discrimination or to overcome the effects of conditions that resulted in limited participation by members of one sex under §106.3; or

(b) Even-handed diversity. The local educational agency evenhandedly supports diverse educational opportunities for students of both sexes at the same age or grade level in the same geographic area. A recipient meets this standard if it demonstrates that--

(1) Voluntary choice among equivalent programs. (i) It is providing for voluntary choice among equivalent single sex schools to students of both sexes, as well as an equivalent coeducational school; or

(2) Equal opportunity for the excluded sex in addressing specific educational needs.
In a situation where the single sex school is designed to address an educational need affecting members of the sex included in the school (the “included sex”), the recipient is providing for members of the excluded sex with the same educational need, a program that is effective in addressing that need.

(A) Subject to clauses (B) and (C), the educational program for the excluded sex may be a separate school, a school within a school, or one or more programs or classes; it may be different in subject matter, approach, or emphasis from the school for the included sex, depending on the recipient’s educational judgment of how best to meet the same educational need for most members of the excluded sex; and it may be a coeducational program if that is effective in meeting that need.

(B) The recipient’s judgment of how best to meet the same educational need for members of the excluded sex must be based on educational research or other reliable evidence of both the needs of students served by the LEA and the effectiveness of the education approach used to meet those needs, and may not be based on gender-based stereotypes.

(C) If one or more members of the excluded sex with the need identified under this subparagraph would benefit from and seeks this opportunity, they must be given a school or, if their numbers do not justify a whole school, a school within a school or one or more programs or classes equivalent to the single sex school for the included sex. The equivalent school, class, or program may be coeducational if such school, class, or program effectively meets the needs of the members of the excluded sex described in this clause.

(c) Equivalence. Factors to consider in determining whether a school is equivalent under this section include whether the schools being compared are offered to students in the same geographic area, and whether there is equivalence in the policies and criteria of admissions (excluding a policy to restrict admissions based on sex); the quality, range, and availability of curricular and extracurricular activities; the quality, range and availability of facilities, services, resources, financial aid, and other benefits; and the qualifications and distribution of faculty and staff.

Summary of Proposed Regulations on Single Sex Education

Purpose -- To amend the Title IX regulations to provide more flexibility to LEA's to establish single sex elementary and secondary schools and programs that respond to the needs of their students, based on educational judgments of how best to meet those needs and subject to safeguards against discrimination and stereotyping.

Current Title IX Regulations

- Generally forbid single sex classes and programs in coed schools. Based on Title IX statutory exemption for non-vocational school admissions, the regulations do not forbid single sex schools but provide that if an LEA establishes one, it must provide comparable opportunities for the excluded sex.
- Absent this provision, an LEA could, for example, establish its only advanced math/science program as a boys school and thereby deny access to advanced math/science instruction for girls. The regulations are ambiguous as to whether comparable opportunities mean the excluded sex may receive comparable programs in a coed school, although OCR's view has been that they require a comparable single sex school.

Legal Landscape

- The cases in this area generally interpret the Constitution's Equal Protection Clause rather than Title IX. To the extent possible, we believe that Title IX regulations should adhere to the constitutional standards to avoid the anomaly that the government may be applying standards that fall short of constitutional requirements.
- The Supreme Court's VMI decision and other cases create a presumption against government classifications or decisions based on gender. While not as tough as the strict scrutiny standard that applies to racial classifications, gender classifications also require heightened scrutiny. They must be based on an "**exceedingly persuasive justification.**" The Department of Justice has advised us that to have a single sex school or program under the Constitution, there must be both an exceedingly persuasive justification for excluding one sex and there must be equal opportunities for the excluded sex.
- VMI clearly holds that equal educational opportunity is an individual right, and a student who is otherwise qualified for and interested in a type of program cannot be denied that opportunity because the program is targeted to address the needs of the other sex. In VMI itself, the Court found that VMI was unique, so the only solution was to admit young women to VMI. However, where a single-sex program is not unique, we do not read VMI to compel admission of qualified members of the other sex, thereby undermining its single sexness, but rather to compel the school to

provide them an equivalent program. We also do not read VMI to compel that the equivalent program be single sex. If a coeducational program is effective in meeting the need of members of the excluded sex, they can be provided an equivalent program in a coeducational setting.

The Proposed Regulations -- Even-Handed Diversity. In addition to citing existing Title IX regulations that already permit single sex schools and programs to remedy discrimination, the proposed regulations would provide that **single sex classes and programs** are permissible if the justification is even-handedly providing a diverse array of educational opportunities to improve educational achievement of students of both sexes. This standard--which appears to be supported in a footnote in the VMI case--would be met in one of two ways--

(a) Voluntary Choice of Equivalent Programs. A school provides for voluntary choice of equivalent single sex classes for students of both sexes, as well as an equivalent coeducational class; and an educational judgment has been made by the school, supported by research or other reliable evidence, that voluntary choice will enhance educational achievement of students served by these classes (the proposed regulations would define "equivalent" as essentially the same in quality and range of curriculum, and quality of teaching staff and other inputs); or

(b) Addressing Specific Educational Needs -- Classes and Programs in Coed Schools

- A school provides a single sex class that is responsive to a significant educational need affecting members of the sex included in the class; the class is targeted to students with this need; exclusion of members of the other sex substantially enhances the effectiveness of the class in meeting that need for the included sex; and the school provides for members of the excluded sex who have the same educational need a class that is effective in addressing that need. The class for the excluded sex may be different in subject matter, approach, or emphasis from the class or program for the included sex, depending on the educational judgment of how best to serve most members of the excluded sex with that same educational need, and it could be a coeducational class if that is effective in meeting that need.
- However, if one or more members of the excluded sex who have the same need as the included sex and would benefit from and seek the opportunity to participate in the type of program given to the included sex, they would have to be given an equivalent program. It could be coeducational if a coeducational program is effective in meeting their need, and there may be adjustments in the format of the program if only a few students would benefit from and are interested in the program.

Schools -- Because admissions to schools are exempt from coverage under the Title IX statute, an LEA would not need to justify how the single sex school addresses specific educational needs and the basis for excluding the other sex. However, the same proposed

principles described above for applying the concept of even-handed diversity to classes would also apply to schools.

Examples of Permissible Single Sex Programs (These examples are in addition to the case where a school district or school provides for voluntary choices among equivalent single sex classes or schools for boys and girls, as well as an equivalent coeducational class or school, in order to enhance academic achievement.)

(a) Drop-outs of Boys -- A school is experiencing a serious drop-out problem among its students. The school does an assessment and makes an educational judgment that boys are dropping out because of peer pressure on them to follow "codes of masculinity" which emphasize hiding one's feelings, experimenting with violence and drugs, and doing poorly in school rather than being labeled a nerd. The school also makes an educational judgment that it needs an intensive counseling and mentoring program to address these issues and that the presence of girls in the program would undercut its effectiveness for many boys at risk of dropping out. Girls may be excluded from the program. But the school also has an obligation to provide equal opportunity for girls. Its assessment shows that most girls who drop-out do so not because of the same problems that boys have, but rather due to heavy family obligations. So the school establishes a separate program addressed to this need. That program could be coeducational if that would be effective in meeting this need. In addition, under VMI, if there are some girls who are at risk of dropping out for the same reasons as boys, and they wish the same type of counseling and mentoring program as the boys, the school would have to provide it. However, the scale and format of the program could be reasonably designed to reflect the smaller numbers of such girls as compared to boys who would benefit from this program. Also, if a coeducational program would be effective for these girls, the program would not need to be single sex.

(b) Math/Science for Girls -- A school demonstrates that girls are not participating or achieving in advance level math to the same degree as boys, and it provides evidence that girls' success in advanced math is negatively affected by the presence of boys. It may offer a single sex, advanced math class for girls. ~~If there were boys with similar needs,~~ the school would need to devise a program or instructional strategy that is effective in addressing their needs. It might be a different program from that for the girls, such as an intensive tutoring program. The program for the boys could be coeducational if that were effective in meeting their needs.

(c) Leadership School for Girls -- By comparison to boys, most girls in a school district are not assuming or even trying for leadership positions in the schools that would prepare them to be leaders in their adult lives. They are underrepresented in school government positions and other extracurricular programs. The district concludes that a single sex school for girls is needed to address this issue, with a curriculum and pedagogical and counseling approaches designed to develop leaders. Because of the Title IX statutory exemption for admissions to nonvocational elementary and secondary schools, the district does not have to justify establishment of this single sex school under Title IX. (It will have to do so under the Constitution if it is challenged in court.)

However, the justification for and nature of the single sex school shapes the extent of the obligation of the LEA to provide equal educational opportunity for the excluded sex. In this hypothetical, the LEA would have to show that it is providing for boys with the same non-leadership problem as the girls a program that is effective in addressing that need. That program could be a whole school, a school within a school, or a set of programs or classes; it could be different in emphasis or approach from the school for the included sex, depending on the LEA's judgment, based on research or other reliable evidence, of how best to meet the same educational need for most boys; and it may be a co-educational program if that is effective in meeting that need. If one or more boys would benefit from and were interested in the very same type of leadership program that is provided for the girls, they would have to be given an equivalent school, or if their numbers do not justify a school, an equivalent program, which could be coeducational if that were effective in meeting their need.

Special Rules -- The proposed regulations would retain special rules in the existing Title IX regulations barring single sex classes in vocational schools; barring single sex physical education classes, apart from activities involving body contact; and permitting classes involving discussion of human sexuality.

Continuing Problem -- Because of the school admissions exemption in Title IX, OCR could find a school in compliance with Title IX or potentially even enter a compliance agreement, where the school (or agreement) is in conflict with the Constitution. The single-sexness of the school may not be adequately justified under the Constitution, but that is an issue we are foreclosed from addressing under Title IX.

SINGLE SEX PROPOSED REGULATION

Background

In August of 1996, the New York chapters of the National Organization for Women and the American Civil Liberties Union filed a complaint with U.S. Department of Education's Office of Civil Rights. The complaint asserted that the Young Women's Leadership Academy, a public single-sex school for girls located in Harlem, violates Title IX. During 1997 and 1998, OCR conducted numerous discussions to try to reach a voluntary agreement between the New York City School Board and the organizations filing the complaint. Within the context of these negotiations, OCR suggested that the school board create new and similar opportunities for boys in the district. The School Board was not willing to create any new opportunities for boys and OCR found that unacceptable under the current regulations.

This case, in combination with the increase in public single sex schools and classrooms, led OCR to propose a regulation change that would provide for greater flexibility in interpreting Title IX. The goal of the proposed regulation is to assist school districts in responding to the diverse educational needs of their students, while safeguarding against discrimination.

The need for clarification is great. In the last three years, 27 independent and public schools for girls have been established, and more than a dozen school districts have begun offering single-sex classes. This year, the Chicago School Board, for example, approved the first all-girls charter school focusing on mathematics, science, and technology to open next fall on the city's South Side. In addition, the issue of the YWLA in Harlem continues to be unresolved as the school district awaits guidance from the proposed regulation change. The YWLA expanded this year from 210 to 400 students and, in doing so, contacted both ED and DOJ to request an explanation for the delay in the new regulations or any guidance.

Legislative Action and Anticipated Leg Action

In addition to action in school districts across the country, several times over the past two years Senator Kay Bailey-Hutchinson has put forth a proposal to amend ESEA in order to provide funding for single sex schools and classrooms. During the FY 1999 and the FY 2000 appropriations debates, the Senator introduced an amendment that would have permitted ESEA Title VI funds (flexible block grants to States for general education reform) to be spent on "educational reform projects that provide same gender schools or classrooms, as long as comparable educational opportunities are offered for students of both sexes."

The Administration did not take a position on this amendment. Instead, we argued on procedural grounds that it should be considered within the context of the reauthorization of ESEA and that the Department of Education would soon be releasing guidance to offer greater flexibility in developing single sex classrooms and schools. ESEA is now being considered in the Senate. It will be marked up by the Senate HELP Committee on Wednesday, March 1st and will be on the floor shortly thereafter. Senate Bailey-Hutchinson is expected to offer her amendment and we will need to be prepared to take a position on it.

The women's groups have opposed the amendment in the past on two grounds: (1) concerned that we do not have the research to support single-sex education in elementary and secondary education (2) concerned that "comparability" will not be monitored or implemented effectively.

Historically, the groups have also been concerned that schools would promote sex-based policies, programs, and classes based on out-dated and stereotyped notions of the differences between the sexes and of the limited abilities of girls and women.

Title IX Regulation on Single Sex Education

Current

Under the current regulation, single sex classes and programs in coeducational schools are generally forbidden. Single sex schools, however, are not forbidden provided that if a school district establishes a single sex school it must provide comparable opportunities for the excluded sex. OCR has generally interpreted “comparable” opportunity to mean a “comparable” single sex school, rather than a comparable opportunity in a coed school.

Proposed

The goal of the proposed regulation is to provide greater flexibility to school districts in developing programs and policies that support the diverse educational needs of their students in aiming to reach high academic standards. The proposed regulation makes three major changes to meet this goal: (1) provides for single sex classes, programs, or activities in a coeducational school (2) clarifies how school districts that operate single-sex schools under the existing regulation can provide equal educational opportunity to both sexes (3) defines “equivalence” and deletes reference to “comparable” educational opportunities.

Single Sex Classes, Programs, or Activities: The proposed regulation would allow school districts to provide single sex classes, programs, or activities in coeducational schools if the school district is “even-handedly” providing a diverse array of educational opportunities to improve educational achievement of students of both sexes. The standard of “even handed diversity” could be met in two ways: (1) voluntary choice of equivalent single sex programs for students of both sexes (2) addressing specific educational needs of one sex through a single sex class or program provided that the excluded sex is provided with an opportunity to meet their needs (class could be different in subject matter, approach, or emphasis), but, if one or more member of the excluded sex had the same need they would have to be provided with an equivalent program.

Single Sex Schools: The proposed regulation does not change the fundamental principle that if a school district offers a single sex school to one sex it must provide equal educational opportunities to the other sex. The proposed regulation clarifies “equal education opportunity” through the lens of “even handed diversity” meaning that a school district that operates a single sex school provides equal educational opportunity for the excluded sex where it evenhandedly supports diverse educational opportunities.

Definition of “Equivalence”: The proposed change from “comparable” to “equivalent” does not alter the intent of the regulation, but rather clarifies that “equivalent” programs need not be identical, that the differences in programs or schools cannot be based on stereotypes about the sexes, and that such programs and schools must be equal in all fundamental respects. It urges school districts to consider the following factors in determining whether a class or program is equivalent: policies and criteria for admission; the quality, range, and availability of facilities,

services, resources, financial aid, and other benefits; and the qualifications and distribution of faculty and staff.

Possible Difference between the Departments of Education and Justice

In developing the proposed regulation the Department of Education worked to ensure that the proposed Title IX regulation adhered to the standards set forth by the Constitution's Equal Protection Clause. The Department of Justice has expressed concern that the proposed regulation could be in violation of the Constitution. The basic difference between the two Departments seems to stem from differing interpretations of the Supreme Court's VMI decision. The two main differences that will need to be resolved are: (1) whether VMI should be interpreted to mean that a school district must provide both the "exceedingly persuasive justification" and an "equal" opportunity for the excluded sex and (2) the definition of "equal" opportunity.

The VMI decision establishes that gender classifications must be based on an "exceedingly persuasive justification." The Department of Justice interprets this to mean that there must be both an exceedingly persuasive justification for excluding one sex and there must be equal opportunities for the excluded sex. While the Department of Justice has not submitted any written response to the proposed regulation, it is unclear how Justice would be satisfied with a definition of equality other than as "identical" educational opportunities. The Department of Education, on the other hand, believes that under VMI a school may offer single-sex classes or programs to address the legitimate, demonstrated educational needs of one sex, as long as it ensures "evenhanded diversity" or "substantial equality in the separate educational opportunities." This interpretation leads the Department of Education to outline one option for providing a single sex classroom or program that does not require an "equal" educational opportunity for the excluded sex. If a school district can establish that members of one sex have an identified education need and that excluding members of the opposite sex will help to address that educational need, the school district can offer the program or class as long as it is effectively serving members of the excluded sex who have the same or similar learning needs. The Education Department does not determine that the program or class for the excluded sex need to be the same, rather the educational strategies used for both sexes need to be based on educational research, good practice, and expert judgement.

Next Steps

- (1) Resolve differences between DOJ and ED that ensures resolution of constitutional concerns, but also ensures the promotion of flexibility for school districts to develop and implement single sex schools or classes to meet the educational needs of their students
- (2) Begin to meet with stakeholder groups to ensure that they are comfortable with proposed regulation before it is formally submitted to the Federal Register
- (3) Formally submit to Federal Register for comment
- (4) Develop a position on the Senator Bailey-Hutchinson Amendment that is consistent with proposed regulations

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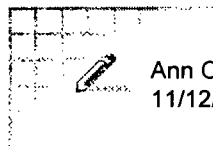
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Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP, Bethany Little/OPD/EOP@EOP
cc: Anna Richter/OPD/EOP@EOP, Nicole R. Rabner/WHO/EOP@EOP
Subject: Single Sex regs

Eric -

Given that our schedules have not yet permitted us to catch up on single sex, I thought I would give you an update on email and suggest that we meet when some of these issues are closer to resolution.

Status of Title XI regs:

The Dept. of ED has informally shared the latest draft of the regs. In reviewing them, I have been reacting to them with both a policy lense and a political lense. On the policy side, I have tried to ensure that the regs are responsive to the Administration's desire to support the movement in the education field to offer greater choice and flexibility for single sex classes and schools where such programs can be justified due to the educational needs of one gender.

To date, the regs argue for three major changes: (1) permits single sex classes or programs in a co-educational school if the school can demonstrate an "exceedingly persuasive justification" for the class (standard set by the VMI case) (2) Clarifies that if a school district operates a single sex school, it must provide "equal" educational opportunity to both sexes (rather than the standard of comparable as now outlined in the 1975 regulation) (3) Clarifies the options for providing such "equal opportunities," by outlining three possibilities: district offers equivalent single sex schools for each sex and an equivalent co-ed school - all voluntary; school district offers equivalent single sex schools for each sex, but no co-ed school; or, district offers a voluntary enrollment single sex school for one sex and provides an equivalent co-ed school.

In terms of a pure policy perspective, I am very fearful that this latest draft of regs will have the unintended consequence of further restricting single sex programs rather than encouraging them to blossom. The reason that I predict this will happen is that I fear that districts will conservatively interpret the regs to mean that they must have equal resources and inputs for programs that serve each sex rather than evaluating the different educational needs of the sexes and determining differential resources based on these needs. For example, the regs narrowly define an "exceedingly persuasive justification" by stating that schools can show three basic underlying reasons as part of a justification: compensation for effects of sex-based discrimination, real differences in terms of physical education, or as part of goal of offering diverse array of educational opportunities (but in doing so must offer "equal" opportunities both sexes). The concern here is that I do not believe that the argument for differing educational needs is being addressed -- two prominent examples are schools in which girls are performing far below boys in math/science achievement tests and the school develops a voluntary separate math/science class for girls or school districts have an exceedingly high dropout rate for boys and offer a mentoring program for boys. Under these regs, I fear that schools will feel that they must offer "equivalent" classes or programs for the other sex even without the educational need.

I have discussed these concerns with Goodwin Liu who is handling the issue in Mike Smith, the Deputy

W: we're
asked Goodwin
for add'l language
on differing needs.

Secretary's office. He is shepherding these concerns through the process now and they hope to have a draft over to us in a week or so. In the meantime, I will send an email directly to Mike urging him to push this process along to get us regs for official review.

Other Considerations:

DOJ Constitutionality issues: Due to the fact that the regs as currently drafted very conservatively interpret VMI, I predict that DOJ is going to be fine with the regs in terms of constitutionality. Once they have a draft closer to final, they expect to send them over to DOJ.

Women's groups: We are, unfortunately, in a fundamentally different place than the women's groups and this issue is one that we will need to grapple with the most. The groups would probably appreciate the draft as now written -- it pushes for "equality" of opportunity under nearly every scenario. The problem, however, is that "equality" may be far too restricting and does not adequately take into account differing educational needs.

Timing: The groups, the Hill, and the field have been waiting for these regs for over a year. We must get them up before ESEA hits full steam in the early spring. Bethany and I spoke about timing and both agreed that we should push ED to get us a final draft for clearance by Monday, Nov. 22nd. Once we have the draft regs and they are sent through the OMB process to DOJ, we might want to consider sharing the content behind the regs with the women's groups.

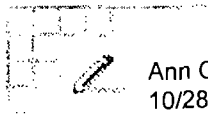
Let us know your thoughts and if you would like to meet later today or wait until the regs get back to us (and I get back from Italy) on the week of Thanksgiving.

Thanks.

-Ann

6200 -

SINCE - WY 8000



Ann O'Leary
10/28/99 09:51:33 AM

Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP, Peter Rundlet/WHO/EOP@EOP, Andy Rotherham/OPD/EOP@EOP

cc:

Subject: single-sex reg

All -

In our effort to understand and push the single sex regulations, I thought it would be helpful to share this email from Goodwin Liu who raises some of the concerns and questions regarding the interpretation of the VMI case.

The Department plans to have revised regs available for us in the next few days. Once we get the revisions, I think it would be helpful to have an internal discussion to determine how we can push this process to get some resolution between ED and DOJ in order to get these regs out.

I will forward copies of the draft regs as soon as I get them.

Thanks.

-Ann

----- Forwarded by Ann O'Leary/OPD/EOP on 10/28/99 09:47 AM -----



goodwin@stanfordalumni.org

10/14/99 08:28:14 PM

Record Type: Record

To: lisa_anthony@ed.gov

cc: mike_cohen@ed.gov, steve_winnick@ed.gov, mike_smith@ed.gov, judith_winston@ed.gov

Subject: single-sex reg

My principal comment on the draft single-sex reg is that the legal framework it sets forth does not accurately reflect the equal protection framework established by VMI. The ideas I'll put down here only have to do with the Constitution. I must confess that I know very little about Title IX law, but I assume that our general thrust is to harmonize our reading of Title IX with the Constitution. Seems to me that this is the approach DOJ would take to reviewing our reg in any case.

As you know, VMI has a two-part holding: (1) Virginia failed too supply an "exceedingly persuasive justification" for including men while excluding women in the "adversative," military educational method

offered at VMI. See 518 U.S. at 546. (2) Having failed to supply an "exceedingly persuasive justification," and having thus violated the Equal Protection Clause, Virginia further failed to implement an adequate remedy because it "has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI." Id. at 554.

I read VMI to say that under the Equal Protection Clause, the "exceedingly persuasive justification" analysis is separate from - and occurs prior to - the "substantial equality" analysis. In other words, if Virginia had shown an "exceedingly persuasive justification" for including men while excluding women from VMI, then that would be the end of the analysis. VMI would be a constitutional program, regardless of whether Virginia offered "substantially equal" (or, in our language, "equivalent") opportunities for women. It was only because Virginia had not supplied an "exceedingly persuasive justification" that the Court went further to examine whether Virginia provided "substantially equal" opportunities for women. Put another way, the "exceedingly persuasive justification" analysis serves to resolve whether there is a good reason for different treatment of the sexes. When no good (enough) reason exists, different treatment is impermissible -- and the state must then show how it provides "substantially e

Our draft reg requires schools and districts to show both an "exceedingly persuasive justification" for single-sex classes, programs, or schools, and "substantial equality" or "equivalence" in the educational opportunities offered to both sexes. I find this hard to square with VMI. In fact, VMI seems to say that schools or district must either offer an "exceedingly persuasive justification" or else show "substantial equality." The draft reg puts schools and districts into the dilemma of explaining why the educational needs of one sex are so special that single-sex education is justified, while also explaining how alternative methods (including co-ed methods) might meet the same needs equally well. I'm not sure it makes sense that schools and district should have to walk such a fine line.

This leads me to think that our draft reg should be based on a legal framework with two parts that are applied sequentially, not simultaneously:

1. "Exceedingly persuasive justification"

In assessing the constitutionality of single-sex programs, courts will first ask whether the school or district has supplied an "exceedingly persuasive justification" for the sex classification. There seem to be two parts to this inquiry under VMI: (a) Are there good reasons for educating one sex separately (e.g., responding to special needs of one sex, providing a diversity of learning options)? (b) Are there good reasons for excluding the other sex (e.g., the educational method is inappropriate for the other sex or meets no real need of the other sex)? For both questions, the answers must be based on the school's or district's actual reasons, not simply what it proffers in litigation. Indeed, I'd like to see our reg say more about the need for schools and districts to compile a careful and substantial record of its justification for single-sex programs. In VMI, Virginia failed both questions: (a) The Court found the state's diversity justification for serving only men at VMI to be a total smokescre

Our reg should clarify that this first analytic step, especially (b), may be difficult for schools and districts to meet. Schools may have good reasons for education a particular sex separately, but less good reasons for excluding all members of the other sex. VMI seems to say that even if one member of the excluded sex is capable of taking advantage of the opportunities offered to the included sex, then there is no "exceedingly persuasive justification" for including one while excluding the other. (Though faithful to its language, this reading of VMI seems too rigorous, and I wonder whether we might discuss with DOJ a less restrictive interpretation.)

In any case, if a school or district can supply an "exceedingly persuasive justification," then that is the end of the analysis. No further demonstration of "equivalence" is required, because the school or district has shown (for constitutional purposes) that non-equivalence is justified. If the school or district cannot supply an "exceedingly persuasive justification," then it violates equal protection unless it can demonstrate "equivalence" or "substantial equality" in the opportunities offered to the included and excluded sex.

2. "Substantial equality"

At this point in the analysis, the school or district with a single-sex program has conceded that it cannot justify excluding all members of the other sex (even if it can justify excluding most). It must now demonstrate that it is providing the other sex with "substantially equal" or "equivalent" educational benefits or opportunities as it is providing the included sex through the single-sex program. It must establish an "equivalent" co-ed program, an "equivalent" single-sex program for the other sex, or both. This parallels the three-option framework in the draft reg. But analytically, this framework only comes into play after the "exceedingly persuasive justification" requirement has not been satisfied.

Hope these thoughts are helpful. I haven't thought through all the implications of these ideas for our reg. Nor have I figured out how Title IX plays into all of this - e.g., whether we want to interpret Title IX to require more or less than the Equal Protection Clause. If you'd like to discuss this further before the draft goes to the Secretary, I'm happy to talk Friday or over the weekend.

Goodwin
205-9895
h (703) 685-0532

E-mail@stanfordalumni.org is brought to you by
the Stanford Alumni Association and Critical Path.



THE SECRETARY OF EDUCATION
WASHINGTON, D.C. 20202

October 29, 1999

Ms. Nancy Zirkin
Chair
National Coalition for Women
and Girls in Education
c/o American Association of
University Women
1111 16th Street, NW
Washington, DC 20036

Dear Ms. Zirkin:

Thank you for your letter expressing concern regarding recent positions taken by the Department of Education related to gender equity in education. I also am sending a response to Leslie Annexstein.

Gender equity issues remain a high priority for the Department and this Administration, and we appreciate the opportunity to work more closely with you. Let me address each of the concerns you raise in your letter.

As you may know, the Education Development Center (EDC) submitted a draft of Volume II to the Department late last year. Department staff reviewed this draft and found that it included some important information but contained serious deficiencies in documenting its conclusions, in providing a balanced view of the research and by not focusing on the educational status of girls and women. Thus, it was not the type of document that we could submit to Congress. Subsequently, the EDC agreed to revise the report according to specific written instruction provided by the Department and, as a first step, to provide us with a draft sample chapter this spring. The strong consensus of those throughout the Department who reviewed the draft chapter was that it did not correct the serious problems with the previous draft and that EDC should not continue work on it. Based on that consensus, the Department terminated work on Volume II in early July. We believe that Volume I, being completed by the National Center for Education Statistics, will present a comprehensive national picture of the progress of girls and women in education and the challenges still at hand.

As for the duties of the Special Assistant for Equity, these have not changed since the position was originally created in 1994. Though we have attempted to focus this position on coordinating equity issues across the Department, the primary responsibility of this official is still to promote, coordinate, and evaluate gender equity programs. She is charged with advising me and the Deputy Secretary on all matters related to gender equity. More importantly, the Department considers gender equity to be the responsibility of all offices. Every Senior Officer has been

Page 2 - Ms. Nancy Zirkin

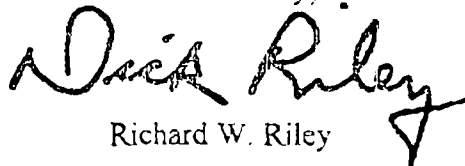
charged with making gender equity a high priority. We would like to hear your recommendation on the needs and priorities for that position, to ensure that the Special Assistant's work is effective.

As part of the 1999 Senate Appropriations Committee report, the Department was asked to review and report on its Title IX regulations "to ensure that if funds were used to ... provide same gender schools or classrooms, comparable educational opportunities are offered to students of both sexes." The Department's Title IX regulation -- in place since 1975 -- permits LEAs to operate single-sex non-vocational schools as long as "comparable" educational opportunities are available to the other sex. The Department has always interpreted "comparable" to be consistent with Title IX's requirement of equal educational opportunity, not to reflect a less stringent concept than equality. If we propose to change the Title IX regulation as it relates to single-sex programs, we will certainly seek your views on the appropriate regulatory standard.

Finally, the Administration's ESEA reauthorization bill does continue the commitment to gender equity. It includes provisions to update the Women's Educational Equity Act, such as new language on the gender gap in upper-level mathematics and science, and computer science courses. We have also added language in Title III, Technology for Education, to give that title an appropriate focus on gender equity issues. We believe, of course, that the focus of the ESEA reauthorization should be on *all* children. Our proposals for high standards in every classroom, accountability for student performance, strengthening teacher and principal quality, and supporting safe, healthy, disciplined and drug-free learning environments will benefit all children, regardless of their gender, race, ethnic or economic background. We look forward to working with you to ensure that this focus on gender equity is retained as the bill moves through Congress.

I have asked Judith Winston, General Counsel, as well as Norma Cantu, the Assistant Secretary for Civil Rights, Judith Johnson, the Acting Assistant Secretary for Elementary and Secondary Education, and Brenda Wolff, my Special Assistant for Equity, to follow up and ensure that we collaborate with you in pursuing our gender equity work.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "Dick Riley", with a stylized flourish at the end.

Richard W. Riley



THE SECRETARY OF EDUCATION
WASHINGTON, D.C. 20202

October 29, 1999

Ms. Leslie Annexstein
Vice Chair
National Coalition for Women
and Girls in Education
c/o American Association of
University Women
1111 16th Street, NW
Washington, DC 20036

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Page 2 - Ms. Leslie Annexstein

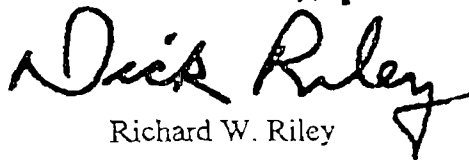
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Yours sincerely,

A handwritten signature in black ink, appearing to read "Dick Riley", with a stylized flourish at the end.

Richard W. Riley

PHOTOCOPY
PRESERVATION

BOOK -
Single-Sex Schools

October 26, 1999

**TALKING POINTS - FOR EXTERNAL USE FOR
PRINCE GEORGE'S COUNTY SCHOOL DISTRICT
YOUTH DEVELOPMENT/MENTORING PROGRAMS
OCR Case # 03-94-1207**

Issue of Case:

District's implementation of all-male youth development/mentoring programs.

Applicable Law:

OCR Regulations implementing Title IX of the Education Amendments of 1972:

The Title IX regulations **generally prohibit single-sex classrooms or programs in co-educational schools**. There are some exceptions such as:

- Contact sports offered in physical education classes;
- Chorus, when based on vocal requirements or quality;
- Portions of classes dealing with human sexuality; and
- Separate classes may be provided for pregnant students, but must be voluntary.

In addition, allows for single sex classes and programs in two other instances:

If the Assistant Secretary find finds discrimination on the basis of sex, recipient may be required to take **remedial action** to overcome the effects of the discrimination; and

Single sex classes and programs may be permissible as **voluntary affirmative action** to overcome the effect of conditions that have limited participation by gender. The classifications that result in single-sex classes must be directly related to the reasons for the institution of the single-sex classes.

OCR has previously interpreted (see GAO report) the voluntary affirmative action provision to mean that: 1) the beneficiaries of the single-sex classes or programs (girls or boys, depending on the group for whom the classes or programs have been instituted) have had limited opportunities to participate in a school's programs or activities due to their sex; 2) less restrictive or segregated alternatives that may have accomplished the goals of the single-sex classes or programs must have been considered and rejected; and, 3) there must be evidence that comparable sex neutral means could not be reasonably expected to produce the results sought through the single-sex classrooms or

programs.

Background of Case

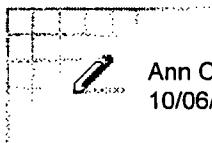
In 1994, OCR received a complaint against the Prince Georges' County School District, which alleged that the District was operating an all-male mentoring program in many of its schools. At that time, the District was unable to show that the all-male mentoring program could be justified under the existing Title IX regulation or that a less segregated approach has been considered. As a result, OCR and the District entered into a resolution agreement in November 1995 that focused on co-ed mentoring programs in all schools, rather than all male programs. OCR has been monitoring the implementation of the resolution agreement.

Current Status of Case

In July of 1999, the district requested a modification of the November, 1995 resolution agreement and submitted to OCR an extensive memorandum detailing its rationale for needing a modification of the existing agreement to permit the use of all male mentoring programs.

Based on that documentation and further conversation with the District, OCR has determined that the District has provided the necessary justification to support the use of all-male development/mentoring programs at some schools consistent with the voluntary affirmative action provision of the Title IX regulation. The documentation includes evidence showing that less segregative solution, co-educational programs, were tried for four years and that those measures did not succeed in attaining the District's goals. The District provided evidence showing that there had been a significant decline in the participation of male students in the programs and, thus, the coed programs were not succeeding in addressing the disproportionate achievement and opportunity gaps that exist for male students in Prince Georges' County.

Accordingly, on October 14, 1999, the School Board approved a revised resolution agreement that outlines the conditions under which the District can operate male mentoring programs. The resolution agreement contains an assurance by the District that if it institutes male mentoring programs, the existing co-ed programs will continue with full resources.



Ann O'Leary
10/06/99 12:44:59 PM

Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP, Andy Rotherham/OPD/EOP@EOP, Peter Rundlet/WHO/EOP@EOP
cc: Anna Richter/OPD/EOP@EOP
Subject: RE: Single Sex education

As a follow-up to the rumor that Hutchinson could offer her single sex education amendment to the Labor-H bill, I tracked down the latest information and pulled the documentation together that was created when she offered the amendment last year.

Nancy Zirkin from AAUW informed me this morning that Hutchinson will not be able to bring up the amendment in the context of Labor-H due to Rule 16. Nancy, however, did urge us to get our position straightened out due to the fact that this issue will inevitably be part of ESEA (although the issue has not come up in the context of the House Title I mark-up). Nancy also continues to be concerned that the Administration did not fully support gender equity in our ESEA reauthorization package.

On single sex, Art Coleman from ED's OCR forwarded the talking points when the issue came up last year (see attachments below). Generally, the talking points rest on process stating that we should not do this as a rider to appropriations, it needs to be considered carefully in the context of ESEA, and can already be done in the context of Title IX. Further, Art informs me that we should soon receive draft copies of the proposed Title IX regs that the Department has put together for guidance on single sex schools and classrooms. (See Art's note below on the intent of the regs)

I understand we have a meeting with Karen Tramantano on Friday to discuss further, but wanted to make sure everyone had the background info.

-Ann

----- Forwarded by Ann O'Leary/OPD/EOP on 10/06/99 12:32 PM -----



"Coleman, Arthur" <Arthur_Coleman@ed.gov>
10/06/99 12:14:55 PM

Record Type: Record

To: Ann O'Leary/OPD/EOP
cc: See the distribution list at the bottom of this message
Subject: RE: Single Sex education

In a nutshell, though, the question is whether the increased flexibility that we would consider proposing (including, possibly, allowing for a single sex

program for one sex and not requiring a single sex program for the other as long as an equitable program is provided in a coeducational setting) meets the exceedingly persuasive justification standard set forth in the VMI case. Suffice it to say, reasonable lawyers (oxymoronic??) could disagree about this, which in effect compels my conclusion that we should move forward to meet the educational goals of this administration. There is no dispute within OCR that the regulations as currently written are overly rigid...the hard part (as you shall see) is how to improve on this foundation without creating harmful unintended consequences.

I look forward to talking further. Feel free to call with questions. Art

<<TalkingPointsHutchison.doc>> <<HUTCHISON2.DOC>>



- TalkingPointsHutchison.doc



- HUTCHISON2.DOC

Message Copied To:

"Cohen, Mike" <Mike_Cohen@ed.gov>
"Liu, Goodwin" <Goodwin_Liu@ed.gov>
"Veta, Jean" <Jean_Veta@ed.gov>
"Winnick, Steve" <Steve_Winnick@ed.gov>
"Bowers, Susan" <Susan_Bowers@ed.gov>

Talking Points Regarding
Sen. Hutchison's proposed Amendment to Title VI of the Elementary and Secondary
Education Act¹
Re: Single-Sex Schools and Classes
8/26/98 11:00 a.m. draft

1. We support the goal of increased educational opportunity in a range of public education contexts, including single sex educational schools and classes, provided that there is no discrimination when such opportunities are provided.
2. The Hutchison Amendment is unnecessary because Title IX currently allows for comparable single-sex schools.
3. The Hutchison Amendment also is unnecessary because the U.S. Department of Education is currently working on modifications to its Title IX regulations (which date back to 1975) in order to provide more flexibility for schools that seek to offer single-sex classes and programs.
4. The Hutchison Amendment is unwise and confusing.
 - The Amendment will create an anomaly in which schools could use Title VI federal—but not other federal or state and local—funds when establishing certain single sex classes and programs.
 - The Amendment will create significant administrative burdens on courts and ED's OCR to "trace" funds as a condition of determining whether schools, classes and programs are established in accordance with federal law.
5. A change in the long-standing civil rights standard governing the establishment of single-sex classes and programs should be the product of careful deliberation. It should not be addressed as a rider to an appropriations act.
 - The regulatory process—which includes the opportunity for extensive notice and comment by interested parties—can ensure a thoughtful approach to an emerging issue.
 - If Congress is not satisfied with the regulatory result, Congress may pursue legislative options, at that point with the benefit of input received through the regulatory process.

¹ The ESEA is a state-administered block grant program.

Question and Answer

- Q1. What does comparability mean in the context of establishing “comparable” single-sex opportunities for girls and boys?
- A1. Comparability involves an assessment of the kind and quality of facilities, courses, and services provided to students of both genders. As part of its effort to provide more meaningful guidance to schools in this area, ED contemplates further clarification of this term as part of its regulatory proposal, which will be subject to public notice and comment in the near future.



UNITED STATES DEPARTMENT OF EDUCATION
Office of the General Counsel

Telephone: (202) 401-6000

Facsimile: (202) 205-2689

FACSIMILE TRANSMITTAL SHEET

TO:	Peter Runlet	FROM:	Steve Winnick
COMPANY:	White House	DATE:	10/8/99
FAX NUMBER:	202-456-5053	TOTAL NO. OF PAGES INCLUDING COVER:	13 pages
PHONE NUMBER:	456-1984	SENDER'S REFERENCE NUMBER:	202-401-6000
RE:	Single Sex Regs.	YOUR REFERENCE NUMBER:	

☒ URGENT
 ☒ FOR REVIEW
 ☐ PLEASE COMMENT
 ☐ PLEASE REPLY
 ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Meeting is ~~is~~ set for Tuesday,

Tues 1:30

Errc -

I got this on Friday
p.m. re: Title 9 +

SD -
Single Sex
Regs

Single - Sex regs.

I'll go to his mtg today.

Peter Runlet

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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

October 7, 1999

THE GENERAL COUNSEL

MEMORANDUM

TO: Mike Smith
Leslie Thornton
Scott Fleming
Judith Johnson
Mike Cohen
David Frank
Terry Peterson

FROM: Judith A. Winston *JAW*
General Counsel

SUBJECT: Single Sex Regulations

Attached, for your review, is a draft of proposed amendments to the Title IX regulations prepared by OCR and OGC that would permit single sex schools and programs in certain circumstances. Before sending it to the Department of Justice, we would appreciate an opportunity to discuss it with you. There are a number of difficult issues involving trade-offs between flexibility and legal support and how the standards mesh with practical choices that school officials need to make.

Attachment

cc: Norma Cantu
Art Coleman

10/1/99 DRAFT ---- Single Sex Regulation ---- For Discussion Purposes Only

PREAMBLE

Purpose of the Proposed Regulatory Amendments

The Department proposes to amend its existing Title IX regulation, consistent with the purposes of the Title IX statute and subject to appropriate safeguards against discrimination, to provide greater flexibility to school districts and greater choice to elementary and secondary school parents regarding single-sex programs and activities. The proposed amendments are intended to support efforts of schools and school districts to improve educational outcomes for children, to assist school districts in responding to parents' desires for different pedagogical methods, and to provide public school parents with a diverse array of educational options.

Background

✓ Title IX of the Education Amendments of 1972 prohibits sex-based discrimination in education programs or activities receiving federal financial assistance. 20 U.S.C. § 1681. The Title IX statute specifically exempts from its coverage admissions policies of non-vocational elementary and secondary schools, private undergraduate postsecondary institutions, and public undergraduate postsecondary institutions that traditionally and continually from their establishment have had a policy of admitting only students of one sex. The statute does not specifically prohibit single-sex classes or programs in coeducational schools.

✓ Title IX is implemented by rules promulgated by agencies providing federal assistance to education programs and activities. 20 U.S.C. § 1682. The Department's current regulation issued by its predecessor agency the Department of Health, Education, and Welfare (HEW) became effective July 21, 1975.

The regulation does not apply to the single-sex admission policies of non-vocational elementary and secondary schools, among other institutions exempted by the statute. 34 CFR 106.15. Accordingly, recipients can operate single-sex elementary and secondary schools consistent with Title IX. However, the regulation requires that where a local educational agency (LEA) operates a school for one sex, it must provide the other sex, pursuant to the same policies and criteria of admission, with comparable courses, services, and facilities. 34 CFR 106.35.

With limited exceptions, the existing regulation prohibits recipients that operate coeducational schools from conducting single-sex classes, programs, or activities.¹ The regulation reflects

¹ The exceptions are if separation based on sex (1) results from the application of objective standards of physical ability, or vocal range or ability, 34 CFR 106.34(b), (d), and (f); (2) is in a physical education class involving contact sports or is in a class involving human sexuality, 106 CFR 106.34(c) and (e); (3) involves a program offered to pregnant students on a voluntary basis that is comparable to that offered non-pregnant students, 34 CFR 106.40(b); or (4) constitutes remedial or affirmative action. 34 CFR 106.3. In addition, pursuant to an OCR policy

congressional concerns that coeducational institutions were using sex-based policies and practices that reflected out-dated and stereotyped notions of the differences between the sexes and of limited the abilities of girls and women.

Summary of proposed changes to the Department's Title IX regulation

The proposed regulatory changes continue to treat schools and classes differently because of the statutory exemption for single-sex schools. In both cases, however, the proposed regulation is intended to increase flexibility, diversity, and choice consistent with the intent and purpose of Title IX. Recent attempts by some school districts to experiment with single-sex programs, as well as recent congressional proposals regarding single-sex programs, reflect important and legitimate efforts to improve educational outcomes for all students. The purposes behind these programs generally are not based on outdated notions regarding the limitations, or limited goals, of members of one sex. Rather the goal is to find new and better ways to help all students learn and succeed to high standards.

The three major proposed changes to the regulation can be summarized as follows –

The first and most significant, change, relates to single-sex classes, programs, or activities in coeducational schools. The proposed regulation permits three separate options for operating single-sex classes, programs, or activities under Title IX. Each of these options requires the school district to meet standards that are consistent with constitutional standards used by the federal courts in cases involving gender classifications, i.e., a school must demonstrate an exceedingly persuasive justification for the single-sex class, program, or activity. Whether a school's particular goals and factual circumstances satisfy the requirements of the regulation will need to be decided on a case-by-case basis.

Second, the proposed regulation clarifies the responsibilities of a school district that operates single-sex schools to provide equal educational opportunity to both sexes. The proposed regulation specifically outlines three options for school districts to meet this responsibility.

Third, the proposed regulation substitutes a requirement that educational opportunities for both sexes be "equivalent," rather than "comparable" in order to ensure equal educational opportunity. Moreover, the proposed regulation provides a more detailed definition of the factors to consider in determining equivalence. These changes do not alter the intent of the existing regulation, but clarify that, while a school district does not have to provide schools or programs that are identical, they must be equal in key aspects. These include admissions criteria, the quality and availability of curriculum, facilities, services and other benefits, and the qualifications and distribution of staff and faculty. The proposed definition also clarifies that schools and programs may be equivalent even if they do not share a single-sex admissions policy.

determination, recipients may offer sex-segregated classes for students who object to coeducational classes on religious grounds. 43 Fed. Reg. No 84 (May 1, 1978).

The proposed changes only apply to elementary and secondary schools, classes and programs. It is at these levels that the issues of flexibility, diversity, and choice are most prevalent, and where the current Title IX regulation unduly limits the discretion of educators to provide single-sex program choices.

The proposed regulation would not amend or affect 34 CFR Part 106.3, which permits recipients to operate single-sex schools and classes in order to remedy discrimination, or to overcome the effects of conditions which have limited participation in educational programs or activities, based on sex.

Single-sex classes

Proposed regulation

The proposed regulation would permit single-sex classes, programs, or activities in coeducational schools in any one of the following circumstances:

- (1) To provide a diverse array of educational options (which is an exceedingly persuasive justification), a school offers a single-sex class, program, or activity; the school also offers an equivalent single-sex class, program, or activity for the other sex; it offers an equivalent coeducational class, program, or activity; and admission to all three classes, programs, or activities is voluntary; or
- (2) The school offers an equivalent single-sex class, program, or activity for each sex, without offering an equivalent coeducational class, program, or activity; and the school has an exceedingly persuasive justification for segregating based on sex; or
- (3) The school offers a single-sex class, program, or activity for one sex, without offering a single-sex class, program, or activity for the other sex; the school provides an equivalent coeducational class, program, or activity for both sexes; admission to the single-sex class, program, or activity is voluntary; and the school has an exceedingly persuasive justification for offering the single-sex option only to one sex.

The proposed regulation would retain the existing provision regarding the permissibility of sex segregated physical education classes involving contact sports. Otherwise, however, the proposed regulation would not permit sex-segregated physical education activities. The provision requiring coeducational physical education classes was the subject of thorough debate at the time when the Title IX regulations were promulgated, see 108 Fed. Reg. 24133 (June 4, 1975), and stereotyping in physical education classes was a particular concern of Congress when it enacted Title IX. Nor does the proposed regulation permit sex-segregated vocational education classes. Congress was also specifically concerned with gender-based stereotyping in this area. See 118 Cong. Rec. 5806. To permit single-sex vocational education classes, programs, or activities would be inconsistent with congressional intent since Congress did not permit single-

sex vocational education schools at the elementary and secondary level.

Finally, the regulation provides a definition of "equivalent" educational opportunities in the context of single sex classes, programs, and activities. Examples of classes, programs and activities that are and are not equivalent are provided below.

Legal basis

Title IX applies to class and program selections and assignments in coeducational elementary and secondary schools. Thus, schools must adequately justify the creation of a single-sex program to comply with Title IX. To ensure an interpretation of Title IX that is consistent with the Constitution, the Department proposes to permit single-sex classes, programs, or activities under standards that would satisfy the Equal Protection Clause. This means that a recipient must have an exceedingly persuasive justification for creating a single-sex program(s), and for not providing an equivalent single-sex program for the excluded gender, if it does not do so. It would also have to provide equivalent educational opportunities to both sexes.

The proposed regulations set out three options under which the Department believes that a school district may be able to meet these standards. When investigating Title IX complaints, OCR would evaluate on a case-by-case basis the recipient's justification for the single-sex class, program or activity. OCR would also examine whether equivalent educational opportunities are provided to both sexes. The framework for OCR's legal analysis would be as follows.

The Supreme Court has provided general parameters for addressing gender-based classifications. The Constitution requires equal educational opportunity for men and women. However, sex is not a prohibited classification. Real differences between men and women can be used to support sex-based classifications as long as they do not create or perpetuate the inferiority of women. United States v. Virginia (VMI), 116 S. Ct. 2264, 2276 (1996). See also, Mississippi for Women v. Hogan, 102 S. Ct. 3331, 3338 (1982) (holding that in limited circumstance, gender-based classifications can be justified).

Gender classifications require an exceedingly persuasive justification. VMI, 116 S. Ct. at 2275. This means that gender classifications are permissible if they serve important governmental goals, and the means employed are substantially related to those goals. Id. The governmental justification must be genuine and must not rely on overbroad, unexamined stereotypes or generalizations about the different talents, capacities, or preferences of men and women. Id. See also Hogan, 102 S. Ct. 3337 (holding that sex-based classifications must be based on "reasoned analysis" rather than through the application of "traditional and often inaccurate assumptions" about the roles of men and women).

All three proposed options can be applied in circumstances that would pass constitutional review. The Department believes that the first option (equivalent single-sex program for both sexes, in addition to an equivalent coeducational program) is permissible if it is adopted for the purpose of offering a diverse range of educational options and if the enrollment among the single-sex and

coeducational programs is voluntary for students (and parents). The fact the Supreme Court "do[es] not question the State's prerogative evenhandedly to support diverse educational opportunities" means that there is an exceedingly persuasive justification for this option.). See VMI, 116 S. Ct. at 2276 and n. 7. The goal of providing a diverse array of educational options is not an effort to limit the opportunities of a particular sex. Instead, it is intended to improve education choices and outcomes for all students. The proposed regulatory requirement that each of the programs must be equivalent, ensures that programs would not be based on impermissible stereotypes. Moreover, voluntary admissions to the programs ensures that students are not placed in programs based on overbroad generalizations about the needs or interests of members of one sex or the other. Thus, option 1 is substantially related to the important goal of providing parents a diverse array of educational options.

The second option (equivalent single-sex program for each sex, without a coeducational option) is also permissible under the Constitution. The Department believes that the second option can be substantially related to important educational goals in certain circumstances. For example, while this scenario does not provide parents with a full array of choices for their children (*i.e.*, single-sex or coeducational), it gives the school districts the necessary flexibility to respond to parents' requests for single-sex programs when their children are not succeeding in the existing school program.

This option requires the school to demonstrate an exceedingly persuasive justification for sex segregation. The following are types of information that OCR would consider to be an adequate justification for sex-segregation under option 2: [NOTE: The proposed examples are intended to keep this requirement from being overly burdensome. However, in order for the regulation to move forward, we will need to agree on the type of information that OCR will accept as sufficient to show an exceedingly persuasive justification, *e.g.*, does research need to "validated;" does it need to be directly related to the school in question or can it be extrapolated from national/general research, etc. We also will need to determine whether schools can reasonably be expected to obtain such types of information/research.]

- As part of its educational goal to promote student performance for both sexes (see VMI, 116 S. Ct. 2776 (sex classifications can be used to advance full development and capacities of people), a school provides a research study demonstrating that, due to developmental differences based on sex at the grade levels for which the school has single-sex classes, members of both sexes do better if educated separately.
- As part of its educational goal to promote student performance for both sexes, a school provides a study demonstrating that single-sex classes at other schools of similar size and socioeconomic make-up, and at the same grade levels, resulted in improved performance on state assessments for both sexes.
- In order to protect legitimate privacy interests for members of each sex, a school provides a single-sex class or program related to human sexuality.

Of course, to be permissible, members of both sexes must be provided equivalent educational opportunities in a single-sex program. Thus, Option 2 requires that the programs be equivalent. This ensures that no one is denied equal educational opportunity and that the justification for the programs is not based on impermissible generalizations or stereotypes about the special needs or inherent limitations of one sex.

Thus, if a school can demonstrate a legitimate need for this type of educational flexibility, and where members of both sexes are provided equivalent educational opportunities, a school could demonstrate that option 2 is substantially related to the goal of providing a diverse array of educational options, or other important educational goals identified by the school. The school should consider whether its justification would be strengthened by having a plan to end the single-sex program if improvement is not shown, or to limit the program to those subject areas or grade levels where improvement is demonstrated. [NOTE: Should the proposed regulation require an evaluation of the success and/or continuing need for the single-sex programs as a necessary part of demonstrating an exceedingly persuasive justification? Such a requirement may strengthen the regulation against legal challenge, but will it make the regulation overly burdensome?]

The third option (single-sex program for one sex, equivalent coeducational program for the other sex) is also consistent with the Constitution. It allows schools to use single-sex education to respond to legitimate educational needs primarily facing one sex. See VMI 116 S. Ct. at 2276. Moreover, students of the other sex are provided with educational curricula, services, facilities, and staff that are fully equal in quality, range, and availability. Thus, this option is significantly different from the situation declared unconstitutional in VMI. There, the State relied on generalizations about the sexes to deny members of one sex a "unique," premier educational opportunity. Id. at 2276 n. 7, 2279, 2284. [NOTE: This option rests on the assumption that "single-sexness" itself is not a benefit that must be equally provided to the other sex. We believe that we can make this argument legally, in part because it has not yet been squarely addressed by the Court. Before we go forward, we need to decide whether this is an educationally sound assumption.]

To qualify under option 3 the school would be required to provide an exceedingly persuasive justification for why it is not providing the other sex with a single-sex program. While this hurdle is high, the Department believes that a school could provide appropriate evidence in support of option 3. For example, by providing evidence of an identifiable and particular need of one sex, and evidence of how that need is addressed by a single-sex program, the school can avoid relying on unexamined assumptions or stereotypes. Moreover, since admission to the single-sex program is voluntary, the school district is not making generalizations about the needs of that sex. Moreover, the regulatory requirement for an equivalent coeducational program for the other sex ensures that the school provides equal, nonstereotyped educational opportunity for both sexes. [NOTE: Before moving forward with this option, we need to decide whether it would create a significantly stronger constitutional framework to require a school under option 3 to be equally responsive to similar evidence of needs of the other sex. Even if it does so, does such an obligation so undermine the goals of flexibility or become so unmanageable for schools

that we should press for a less restrictive reading of the Constitution?]

The following are types of information that OCR would consider to be an adequate justification for offering a particular single-sex program only to one sex under option 3:

- As part of an effort to encourage greater participation by girls in higher-level science classes, the school provides a research study showing, that at the grade levels and subject matter for which the school has an all-girls program, most girls state that they find it difficult to speak up in class and ask questions when boys are present.
- A school district establishes a single-sex program as part of a plan to experiment with single-sex education as a means to address a high drop out rate for boys. The school's plan includes a detailed evaluation component, and a plan to establish a single-sex program for girls within a reasonable time if the single-sex program for boys results in a reduced drop out rate.

Examples of equivalent classes, programs and activities

Title IX's exemption for single-sex schools recognizes that neither sex-segregation nor the establishment of single-sex programs or schools only for one sex is inherently inconsistent with equal educational opportunity. The key to ensuring equal educational opportunity is to ensure that each sex is provided a school or program that is equivalent – but not necessarily identical – in all key respects. Thus, even where a school demonstrates a need or problem primarily affecting one sex that it intends to address in a single-sex environment, Title IX still requires an equivalent educational program (apart from the single-sexness) for the other sex. The following examples are intended to illustrate programs that do and do not satisfy the regulatory definition of equivalent. These examples assume that the school has provided an adequate justification for the single-sex program. [NOTE: As the examples indicate, we believe that the VMI decision requires fairly strict equivalence between programs (apart from single-sexness) because the Court squarely held that if even one person of the other sex is denied the method of instruction/quality of resources offered to the other sex, that person is denied equal educational opportunity. Before we move forward with the regulation, we need to decide whether this legal requirement is so burdensome as to undermine the desired flexibility of the proposed regulation.]

Example 1 – Coeducational Middle School A offers several single-sex math and science classes for freshman and sophomore girls and several single-sex English and foreign language classes for freshman and sophomore boys. The single-sex math and science class is open to all girls at these grade levels, and the single-sex English and foreign language classes are open to all boys at these grade levels. There are slight but insignificant differences in curriculum, class size, and teacher quality (as measured by preparation and certification in the area of instruction) between the single-sex classes and the coeducational classes in the same subject matter. The school offers equal educational opportunities for boys and girls under option 3.

Example 2 – Middle School B offers middle school boys, on a voluntary basis, an innovative

mentoring program in which boys are encouraged to develop a close, one-on-one relationship with an adult in the community who is not their parent or teacher. The school provides opportunities for community leaders to make presentations to the boys and provides regular opportunities within the school curriculum for the boys and mentors to meet as a group to discuss gang involvement, drug abuse, and other risk factors affecting boys in the community. The mentors regularly provide one-on-one counseling and other support services. For students that are not in the program, the school maintains a list of adult professionals who are willing to be mentors, but the school does not provide any other opportunities for mentoring of these students. The school is not providing equal educational opportunities for boys and girls.

Remedial or affirmative action

We note that under the existing Title IX regulation schools can offer a single-sex program for one sex, without offering the other sex an equivalent single-sex or coeducational program, if the single-sex program constitutes remedial affirmative action. For example, under the existing regulation a school district could offer a single-sex science program for girls if it can demonstrate that its female students are disproportionately underrepresented in its highest level science courses, the girls are not taking the prerequisite courses and exams that would place them in such courses, and girls and women historically have been discouraged from taking advanced science classes or pursuing science professions.

Single-sex schools

As to schools, the statutory exemption for the admissions policies of nonvocational elementary and secondary schools precludes OCR from regulating the single-sex admissions policies of these schools. On the other hand, Title IX requires that a school district ensure that when it chooses to offer single-sex schools to one sex, it must provide equal educational opportunities to the other sex. The proposed regulation clarifies Part 106.35 regarding the circumstances under which a school district meets this obligation under Title IX:

Proposed regulation

The proposed regulation would clarify that an LEA operating a single-sex school has three options for satisfying the requirement for equal educational opportunity:

- (1) An LEA offers a single-sex school for one sex; it also offers an equivalent single-sex school for the other sex; it offers an equivalent coeducational school; and admission to all three schools is voluntary; or
- (2) An LEA offers equivalent single-sex schools for each sex, without offering an equivalent coeducational school; or
- (3) An LEA offers a single-sex school for one sex, without offering a single-sex school for the other sex; admission to the single-sex school is voluntary; and the LEA provides an

equivalent coeducational school.

Finally, the regulation provides a definition of "equivalent" educational opportunities in the context of single sex schools. Examples of schools that are and are not equivalent are provided below.

Legal basis

Congress expressly authorized federal agencies to implement Title IX through rules and regulations. 20 U.S.C. § 1682. Thus, while Congress precluded federal agencies from establishing admissions policies for exempted schools, at the same time it deferred to federal agencies further to determine the meaning of an equal educational opportunity in an LEA that chooses to establish one or more single-sex schools. The Department has determined that Title IX requirements are satisfied in the above-described circumstances. Under the proposed regulation, due to the statutory exemption, an LEA would not be required to justify to OCR the basis for its single-sex schools. Instead, the focus of the regulation is on whether both sexes are provided equivalent educational opportunities. School districts should be aware that constitutional requirements apply to public school districts operating single-sex schools.

Examples of equivalent educational opportunities

Example 1 -- School District A operates an all-girls middle school that offers an "alternative" program. The school emphasizes very small class size, mentoring opportunities, and daily one-on-one time between students and their teachers, and mentors. The school also uses portfolio assessments instead of grades. The required curriculum is based on core subjects and subject matter established by the school board. The school district also operates a coeducational middle school that teaches the same core curriculum taught in the all-girls school. Class size at the coeducational school is average to large and the classes offer a traditional format including final exams and little one-on-one contact during class. The school district does not offer boys and girls equivalent educational opportunities.

Example 2 -- Charter School B operates in School District B. It has been chartered by a group of local community leaders, business leaders, and philanthropists as an alternative to traditional public schools in the district. The school focuses primarily on mathematics and science and has obtained significant contributions from the business community in order to outfit the school with state-of-the-art laboratory and computer equipment. Enrollment is limited to boys, but is otherwise open. There are no other schools operating in the district that have a special focus on mathematics and science. School District B does not offer boys and girls equivalent educational opportunities.

Example 3 -- School District C operates an all-boys high school with a "hands on" curriculum that involves small classes, team projects, frequent "hands-on" experiments, projects and field trips, and portfolio assessments instead of grades. Admission is open to all high school boys in the school district. At the coeducational high school, students chose all courses after freshman

year. While class size is somewhat larger, the difference is not significant. Course offerings are open to all students, and apart from certain core courses, students can choose their courses. Available courses include a significant number that utilize various aspects of the "hands on" approach. For instance, some classes concentrate on team projects, some offer frequent field trips, others offer portfolio assessments, and some classes offer all these. The school district offers boys and girls equivalent educational opportunities. However, if at the coeducational high school only students with a GPA of 3.0 and above can enroll in courses offering a "hands on" curriculum, the school district would not offer boys and girls equivalent educational opportunities.

Example 4 -- School District D establishes single-sex academies for grades 10-12. The schools are given identical resources and facilities, equivalent quality teachers and administrators, and offer an identical curriculum based on core courses in mathematics, science, English, and history. After several years, the boys school has developed a close relationship with local business and community leaders. Over time, these outside groups increasingly offer significant mentoring services to the students at the boys school, such as putting on educational programs for the students, and using their contacts to help the students obtain summer jobs, internships, and interviews with alumni of highly competitive colleges. The groups also joined together to raise and donate money to build a new sports complex at the boys school. The single-sex academies are no longer equivalent.

Example 5 -- School District E establishes single-sex academies for students in the seventh grade. The schools are given identical resources and facilities, equivalent quality teachers and administrators, and offer an identical curriculum based on core subject matter areas. As part of the operating plan for the academies, each school will add an additional grade each year. In addition, when the original class has reached the high school grade level, each school will offer several advance placement courses to qualified students. Both academies offer advanced placement calculus. The girl's academy also offers advanced placement English because a student survey indicated the most interest in this course. The boys academy offers advanced placement physics based on its survey results. Advanced placement physics and advanced placement English are also available in coeducational schools in the district. The educational opportunities offered boys and girls by the school district are equivalent because all students have the opportunity to take courses in the subject matter offered at the single-sex academies.

PROPOSED REGULATORY LANGUAGE

Replace existing sections 106.34 and 106.35 with the following:

106.34 Access to course offerings

- (a) Except as provided in paragraphs (b) and (c) of this section, a recipient may provide or carry out courses, programs, or activities separately on the basis of sex in the following circumstances:

- (1) To provide a diverse array of educational options, a school offers a single-sex class, program, or activity; the single-sex class, program, or activity is voluntary; the school also offers an equivalent single-sex class, program, or activity for the other sex; and it offers an equivalent coeducational class, program, or activity.
 - (2) A recipient offers equivalent single sex classes to members of each sex, without offering an equivalent coeducational class; and it has an exceedingly persuasive justification for segregating based on sex.
 - (3) A recipient offers a single-sex class to only one sex; it offers an equivalent coeducational class to the other sex; the recipient has an exceedingly persuasive justification for offering the single-sex option only to one sex; and admission to the single-sex class is voluntary.
- (b) A recipient may not offer sex-segregated physical education classes or activities except during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.
- (c) A recipient may not offer sex-segregated vocational, technical, home economics, industrial, or business classes, programs or activities.
- (d) Factors to consider in determining whether courses, programs, or activities are equivalent, as used in this section include whether the programs being compared are offered to students at the same age or grade level in the same school, and whether there is equivalence in the policies and criteria of admissions (excluding a policy to restrict admissions based on sex), the quality and range of the curriculum, and the qualifications and ratio of faculty and staff.

106.35 Access to schools operated by LEAs

- (a) A local educational agency (LEA) that operates a nonvocational, single-sex school for members of one sex does not discriminate against students of the excluded sex if –
- (1) The LEA also offers an equivalent single-sex school for the other sex; it offers an equivalent coeducational school; and admission to the single-sex schools is voluntary.
 - (2) The LEA does not offer an equivalent coeducational school, but offers equivalent single-sex schools for each sex.
 - (3) The LEA does not offer a single-sex school for the other sex, but the LEA provides an equivalent coeducational school for the other sex; and admission to the single-sex school is voluntary.
- (b) Factors to consider in determining whether a school is equivalent as used in this section, include whether the schools being compared are offered to students at the same age or grade level

in the same geographic area and whether there is equivalence in the policies and criteria of admissions (excluding a policy to restrict admissions based on sex); the quality, range, and availability of curricular and extracurricular activities; the quality, range and availability of facilities, services, resources, financial aid, and other benefits; and the qualifications and distribution of faculty and staff.

EDUC
Single-Sex

STEVE CHAPMAN

Separating classes by gender

Across the nation, public school educators are trying new experiments with an old teaching approach — separating the sexes. And across the country, they are being strenuously opposed by critics who fear the experiments will put us on a short path back to the Paleolithic era.

In Detroit, a public school for boys called Paul Robeson Academy was subjected to so much pressure that it finally capitulated and accepted girls. New York is operating a Young Women's Leadership Academy despite challenges from the National Organization for Women and the New York Civil Liberties Union, which filed a complaint with the federal Department of Education claiming the school violates Title IX, which guarantees equal access to educational opportunities regardless of sex.

Pellston, Mich., has been under fire recently, not for offering single-sex schools but for offering single-

sex classes in a coeducational middle school. NOW officials say the Pellston program is "based on stereotyping" and warn, "We tried separate but equal a long time ago, and it didn't work."

As this last remark illustrates, the critics regard separation of the sexes as akin to racial segregation, whose point was to oppress one race for the benefit of another. But no one really truly believes this. Does anyone think having a girl's locker room is no different from having a "colored" drinking fountain? Is a women's World Cup soccer team the moral equivalent of baseball's old Negro Leagues — an artifact of bigotry and discrimination? Is NOW planning a lawsuit to shut down Wellesley College?

In the current controversy, it's

hard to imagine who is in danger of being oppressed. Segregation was forced on blacks in the South without their consent. Separate was never equal under Jim Crow because blacks lacked not only numbers but the right to vote, making it impossible for them to protect their interests in a democratic political arena. Neither men nor women, however, face that disadvantage — leaving aside the fact that their political interests intertwine in ways that those of blacks and whites in the Old South did not.

We insist on identical treatment of the races for the simple reason that they don't differ from one another in any important way — only in the superficial matter of skin color. But the differences between men and women are basic, obvious and unal-

terable. The differences don't warrant treatment that is unequal, but they may argue for treatment that is different.

That's what a few dozen school districts have been trying with single-sex institutions or classes. The thinking behind these is not hard to comprehend. Viewed as groups, the two sexes have distinct strengths and weaknesses.

Girls tend to lag behind boys in math and science; boys are more likely to struggle with verbal skills and to suffer from learning disabilities. Boys generally cause more disruptions and are more apt to be punished, while girls are prone to shrink from asking questions and participating in discussions. Principal Jill Rojas of the Jefferson Leadership Academies in Long Beach, Calif.,

(where all classes are single-sex) says, "I think we're failing both sexes equally in a different regard."

These patterns don't apply to everyone. But they apply to enough kids to suggest that single-sex education might have some value. The arrangement also has the potential advantage of removing the often significant distraction of the other sex. Some males and females may focus better if they aren't tailoring their classroom behavior for its effect on their romantic prospects.

These experiments are hardly at war with the spirit of Title IX, which was enacted to give males and females equal opportunities, not identical ones. Federal law doesn't compel colleges to field only coed athletic teams — it merely requires them to give women comparable chances to compete as the men.

NOW and the NYCLU say the Young Women's Leadership Academy in New York denies boys certain educational advantages pure-

ly because of their sex. What is important, though, is the broad range of opportunities available to males in the entire New York schools system. The effect of their being shut out of a single school has no more than a trivial effect on their well-being.

If single-sex education turns out to improve the performance of boys or girls or both, it may be worth doing. Separate, in some instances, could mean not only equal but better.

This approach may not benefit all children or maybe even most children. But no one proposes it for all public school children — only for children whose parents volunteer for it. If we can accommodate those students who perform best in a coed setting, we ought to be able to do something for those who don't.

Steve Chapman is a nationally syndicated columnist.

AMOS PERLMUTTER

Inevitable march of folly

Saturday, the Russians did the inevitable — they marched into Chechnya.

The current battle is reminiscent of the Soviet invasion of Afghanistan that ended in dismal failure after years of guerrilla warfare with fanatic Muslims who had bitterly struggled against Russian and Soviet imperialism. All experts predict the battle will be barbaric, damaging to Russia, with the same counterproductive results as the 1996 Russian war against Chechnya. The Soviet army is not trained to fight guerrilla warfare. The Russian political and military options have gone from bad to worse.

One needs to examine some historical, tribal and demographic background of Transcaucasia to understand why Russia's options are so dim. First, the geographic conditions. The Caucasus extend more than 1,100 kilometers between the Taman Peninsula on the Black Sea in the northwest and the Apsheron Peninsula on the Caspian Sea in the southeast.

The historian of Chechnya and Dagestan, Professor Moshe Gammmer, analyzes the historical and demographic conditions of Muslim resistance against the Russian monarchy, which are identical to

conditions during the current struggle. In his comprehensive book, "Muslim Resistance to the Tsar" (Frank Cass, 1994), Mr. Gammmer identifies the following conditions:

First, "The Caucasus is probably the most varied area in the world with regard to the ethnic and linguistic composition of its population. Dagestan takes the lion's share of this variety. No fewer than 30 ethno-linguistic groups inhabit this area, some being confined to the population of a single village." Second, the Russian imperial forces were the backbone of the Caucasian corps and bore the main burden of the fight to protect the empire. The wars in Transcaucasia, past and present, have been anti-colonial wars against Russia, which has occupied the area since the 18th century.

Furthermore, the wars in Chechnya and Dagestan are Muslim wars against imperial Russia. It is only in that context that we can understand the current war, its complexities, and the stubbornness of both the Muslims and the Russian political and military elite.

For the Russians, this war is part of a chain of events in the disintegration of the Russian Empire since the end of communism. The Eastern European states were never part of the Soviet Union, and were

liberated without much pain after the fall of communism. On the other hand, Transcaucasia is part of the Commonwealth of Independent States (CIS) that was created after the collapse of communism and is politically, psychologically and strategically significant to Russia, as are Belarus, Ukraine, and the Siberian provinces. Therefore, the battle over Chechnya and Dagestan is a struggle to sustain Russian domination over CIS.

The only non-violent option is to accept the complete independence of Chechnya and the independence of Dagestan. The Yeltsin regime is not ready for this option. Russian President Boris Yeltsin has no intention to allow the Caucasus area to split from historical Russia under his watch because it is a threat to Mr. Yeltsin and to Russian power. This war is being waged to prevent continued hemorrhaging of member states of the CIS. However weak, corrupt and ineffective the present Russian regime, liberals and moderate democrats are reluctantly supporting the war. The march of folly is not unique to Russia. Great powers, including Russia, do not entertain the idea of territorial or political concessions and surrender even if it is militarily unwise to resist. We followed this



path in Vietnam. Certainly no military option will resolve the political conflict of Muslims and nationalists against the Moscovite Regime.

A number of strategic doomsayers argue the Russian invasion of Chechnya is a political mess, could possibly expand into a regional war and that escalation "imperils its neighbors." Also, this time "they may risk losing a lot more" than control over Chechnya, as noted by

William Odom in an article titled "Russia's next blunder" in the Oct. 1 New York Times. However, when weighing a stalemate in Chechnya against the loss of rule and reputation in the Russian State, the war in Chechnya, from the Yeltsin and Russian nationalist point of view, may not be as detrimental to the regime. Mr. Yeltsin faces a very serious dilemma: not go to war and lose Chechnya, which will lead to the loss of Dagestan and more; or to

go to war and take his chances with the brutal consequences to Russia. Even a stalemate would be preferable to non-intervention from the Russian nationalist perspective.

The author of "Chechnya: Tombstone of Russian Power," Anatol Lieven, writes in "Why Dagestan needs the Russians" in the Sept. 15 New York Times, that without Russian intervention, the chances that the region will plunge into violent ethnic religious and political warfare are considerable. In fact, the threat of an independent Dagestan, with some 30 nationalities, to Azerbaijan is greater than that of

Russian intervention in Chechnya. This is not the first time a power has pursued a costly undertaking with a potentially ruinous outcome, a war that is militarily unpromising but politically inevitable, a march to folly.

Amos Perlmutter is a professor of political science and sociology at American University and editor of the Journal of Strategic Studies.

The Washington Times

TUESDAY, OCTOBER 5, 1999

NCWGE

NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION

OPPOSE SEN. HUTCHISON'S SINGLE-SEX EDUCATION AMENDMENT IN LABOR/HHS/EDUCATION APPROPRIATIONS

September 29, 1999

Dear Senator:

ok -
Single-Sex Education

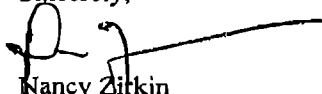
The National Coalition for Women and Girls in Education (NCWGE) is a nonprofit organization of more than 50 organizations dedicated to improving educational opportunities and equality for women. We are writing to urge you to oppose Senator Kay Bailey Hutchison's (R-TX) amendment to the FY 2000 Labor, Health and Human Services, and Education (Labor/HHS) Appropriations bill which would allow local education agencies (LEAs) to offer single-sex schools or classes. NCWGE opposes this amendment because any such education policy amendment should be thoroughly and thoughtfully reviewed by the Senate Health, Education, Labor, and Pensions Committee during consideration of the Elementary and Secondary Education Act (ESEA) reauthorization next month. In addition, any amendment regarding single-sex education must be considered in the context of the process that the U.S. Department of Education is currently undergoing to examine whether there is a legal basis for interpreting Title IX to permit single-sex classrooms as well as schools.

First, policy changes regarding single-sex programming could have far reaching implications and should be carefully considered during the reauthorization of ESEA. Unless single-sex programs are carefully designed to remedy particular sex-based barriers, such programs can deny equal educational opportunities and reinforce harmful stereotypes. An amendment that requires only "comparable" educational opportunities would permit a return to separate and unequal programs to which women and girls have often been relegated. For example, in the mid-1980s, Philadelphia's two sex-segregated magnet schools were found to shortchange girls in everything from course offerings and faculty credentials to recreation facilities and library resources. Further, there is little research that examines the effectiveness of single-sex schools and classes. A 1997 AAUW Educational Foundation report on single-sex education indicates that elements of a good education, such as smaller classes, attention to eliminating gender bias, focus on core curriculum, and discipline can lead to success for all public schools. Thus, it is critical that an education policy such as single-sex programming be considered deliberatively.

Second, the U.S. Department of Education is considering changes to the Title IX regulations regarding single-sex education programming. On February 12, 1999, at the request of the U.S. Senate, the U.S. Department of Education submitted to the Senate Subcommittee on Labor, Health and Human Services, and Education Appropriations, a report on its review of the Title IX regulations and policies regarding sex-single education programs. The report provides the process that the Department of Education is currently undergoing to determine the correct legal basis under Title IX for permitting single-sex classrooms and schools. The U.S. Department of Education's careful examination and analysis of this issue will assist policymakers in crafting legislative language that can meet constitutional scrutiny.

Again, NCWGE urges you to oppose the Hutchison Amendment because any such education policy change should be thoroughly and thoughtfully considered during ESEA reauthorization, which will begin next month in the Senate, and in the context of the U.S. Department of Education's process for examining whether changes should be made to the Title IX regulations regarding single-sex education programming. If you have any questions, please contact Nancy Zirkin at the American Association of University Women, 202/785-7720, or Leslie Annexstein at the National Women's Law Center, 202/588-5180.

Sincerely,


Nancy Zirkin
Chair


Leslie T. Annexstein
Vice Chair

MEMORANDUM

To: Interested Parties

From: Nancy Zirkin, Director of Public Policy and Government Relations

Date: September 28, 1999

Subject: Single-sex education amendment to Labor/HHS

For your information, attached is the American Association of University Women (AAUW) letter and talking points opposing Senator Hutchison's amendment to the FY 2000 Labor, Health and Human Services, and Education Appropriations bill which would allow local education agencies to offer single-sex schools or classes.

If you have any questions, or need more information, please call me at 202/785-7720.

8206 -

Single-sex schools



OPPOSE EDUCATION POLICY CHANGES TO TITLE IX IN LHHS/EDUCATION APPROPRIATIONS

September 28, 1999



Dear Senator:

On behalf of the 150,000 members of the American Association of University Women (AAUW), I urge you to oppose Senator Kay Bailey Hutchison's (R-TX) amendment to the FY 2000 Labor, Health and Human Services, and Education (Labor/HHS) Appropriations bill which would allow local education agencies (LEAs) to offer single-sex schools or classes. AAUW opposes this amendment because any education policy amendment should be thoroughly and thoughtfully reviewed by the Senate Health, Education, Labor, and Pensions Committee during consideration of the Elementary and Secondary Education Act (ESEA) reauthorization next month. In addition, any amendment regarding single-sex education must be considered in the context of the new regulations that are being finalized by the U.S. Department of Education.

Policy changes regarding single-sex programming could have far reaching implications and should be carefully considered during the reauthorization of ESEA. For example, unless single-sex programs are carefully designed to remedy particular sex-based disadvantages, such programs can deny equal educational opportunities and reinforce harmful stereotypes. For example, in the mid-1980s, Philadelphia's two sex-segregated magnet schools were found to shortchange girls in everything from course offerings and faculty credentials to recreation facilities and library resources. "Separate but equal" has often meant separate and unequal for girls and women, just as it has for African-Americans.

Further, there is little research that examines the effectiveness of single-sex schools and classes. In 1997, the AAUW Educational Foundation released the first compilation of research, *Separated by Sex*, which challenges the popular generalization that single-sex education is better for girls than coeducation. The report indicates that elements of a good education, such as smaller classes; attention to eliminating gender bias; focus on core curriculum; and discipline, can lead to the success of all public schools and not just sex-segregated classes and schools.

The U.S. Department of Education is finalizing new Title IX regulations for single-sex education. On February 12, 1999, at the request of the U.S. Senate, the U.S. Department of Education submitted a report on single-sex education to the Senate Subcommittee on Labor, Health and Human Services, and Education Appropriations. The report provides the process that the Department of Education is currently undergoing to determine the correct legal basis under Title IX for permitting single-sex classrooms and schools. The Department of Education should be allowed to continue to consider this issue through its processes; including, if necessary, publishing a notice of proposed rulemaking in the Federal Register for public comment.

Again, I urge you to oppose the Hutchison Amendment because any substantive changes to education policy should be thoroughly and thoughtfully considered during ESEA reauthorization, which will begin next month in the Senate. If you have any questions, please contact Nancy Zirkin, Director of Government Relations, at 202/785-7720, or Lisa Levine, Government Relations Manager, at 202/785-7730.

Sincerely,



Sandy Bernard
President

THE HUTCHISON AMENDMENT: AN ATTACK ON TITLE IX AND A RETURN TO SEPARATE AND UNEQUAL



AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

At Issue: Senator Kay Bailey Hutchison (R-TX) is planning to offer an amendment to the FY 2000 Labor, Health and Human Services, and Education (Labor/HHS) Appropriations bill to allow local education agencies (LEAs) to spend federal dollars to "provide same-gender schools or classrooms."

Policy changes to Title IX should be carefully considered during the reauthorization of the Elementary and Secondary Education Act (ESEA). It is inappropriate for the Senate to consider the implementation of changes to Title IX during the appropriations process. Any substantive changes made to Title IX should be thoroughly and thoughtfully considered during ESEA reauthorization, which will begin next month in the Senate.

The U.S. Department of Education is finalizing new Title IX regulations for single-sex education. On February 12, 1999, at the request of the U.S. Senate, the U.S. Department of Education submitted a report on single-sex education to the Senate Subcommittee on Labor, Health and Human Services, and Education Appropriations. The report provides the process that the Department of Education is currently undergoing to determine the correct legal basis under Title IX for permitting single-sex classrooms and schools. The Department of Education should be allowed to continue to consider this issue through its processes, including; if necessary, publishing a notice of proposed rulemaking in the Federal Register for public comment.

Title IX already allows for same-sex programming under certain circumstances. Regulations under Title IX allow for single-sex programming as long as there are protections against sex discrimination. For example, if an all-girl science class addressed past or present inequities that discouraged girls from pursuing science, then the class might be permissible under current regulations. However, if the class were based on the stereotypes that girls do not like physics or find science difficult, then it would not be permissible under Title IX.

The data on the benefits of single-sex education is inconclusive. The 1998 AAUW Educational Foundation report, *Separated by Sex: A Critical Look at Single-Sex Education for Girls*, analyzed more than 100 studies since 1980 on single-sex education in the United States and abroad and found that, at best, the research is inconsistent. Further, it challenges the idea that single-sex education works or is better for girls than coeducation.

Qualities for a good education, not a sex-segregated environment, make the difference in student achievement. While single-sex education experiments do produce some positive results for some students in some cases, much of the research indicates that it is the properties of a good education, not a sex-segregated environment, that make the difference. These properties include: small classes, a rigorous curriculum, high standards, discipline, good teachers, and attention to eliminating gender bias.

Contact: Nancy Zirkin, Director of Government Relations, 202/785-7720
Lisa Levine, Government Relations Manager, 202/785-7730

September 27, 1999