Nos. 94-1941 and 94-2107

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *ET AL.*,

Respondents.

COMMONWEALTH OF VIRGINIA, *ET AL.*,

Cross-Petitioners,

v.

UNITED STATES OF AMERICA,

Cross-Respondent.

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

BRIEF OF *AMICI CURIAE* STATES IN SUPPORT OF THE COMMONWEALTH OF VIRGINIA

BRADLEY B. CAVEDO
Counsel of Record
Shuford, Rubin & Gibney, P.C.
700 East Main Street
Suite 1250
Richmond, Virginia 23218
(804) 648-4442

(Continued on Inside Cover)

WILLIAM U. HILL
Attorney General of Wyoming
Office of the Attorney General
State Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

THOMAS W. CORBETT, JR.
Attorney General of Pennsylvania
Office of the Attorney General
Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 787-3391

CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

FEDERAL CODES AND REGULATIONS

STATE STATUTES

LEGISLATIVE MATERIALS

BOOKS, JOURNALS AND NEWSPAPER ARTICLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1941

UNITED STATES OF AMERICA

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

No. 94-2107

COMMONWEALTH OF VIRGINIA, *et al.*,

Cross-Petitioners,

v.

UNITED STATES OF AMERICA

Cross-Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF OF *AMICI CURIAE* STATES IN SUPPORT OF THE COMMONWEALTH OF VIRGINIA

INTEREST OF AMICI STATES

This brief is filed by the States of Wyoming and Pennsylvania as *amici curiae* in support of the Commonwealth of Virginia and the remedial decision of the Court of Appeals. The Amici States are committed to the legal and social equality of men and women. What this case involves, in large measure, is a dispute between two competing views of what sexual equality means under the Constitution and how it can be achieved, especially in the

context of education. The Amici States have an abiding interest in how this dispute is resolved.

On one side of the dispute is the Court of Appeals, whose decision fairly applies intermediate scrutiny to the facts of this case and permits the Commonwealth of Virginia to provide single-sex education. The Court of Appeals approved the single-sex status of Virginia Military Institute ("VMI") and the Virginia Women's Institute for Leadership ("VWIL") because of the recognized pedagogical value of single-sex education for some men and some women, and because of the diversity such educational opportunities bring to the primarily coeducational array of choices otherwise available. Likewise, the Court of Appeals based its approval of the VWIL methodology upon the opinions of those experts in women's education who designed the VWIL program, and upon the lack of demand for an all-women's program that exactly mirrors VMI. In short, the decision by the Court of Appeals represents an approach to educational opportunity and sexual equality that is thoughtful and pragmatic, and that increases the choices available to young women and men.

On the other side of the dispute are the Solicitor General, various interest groups and other *amici*, who want to see classifications based on sex subject to the same strict scrutiny as classifications based on race, a level of review that may be strict in theory but is fatal in fact.[1] While they sometimes complain that VWIL does not exactly mirror VMI, their real goal is the abolition of VMI and VWIL as single-sex institutions.[2] They seek this goal without any

---

[1]Gerald Gunther, *The Supreme Court, 1971 Term -- Foreword: In Search of Evolving Doctrine on a Changed Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

[2]While the constitutionality of VWIL may not be the immediate issue before this Court, the Amici States recognize that

[Footnote continued on next page]

regard for the realities of student demand; without any concern for diversity of opportunity and without any respect for the opinions of educational experts, whose views, being unable to rebut, they simply dismiss as "stereotypical." In short, they represent an approach to sexual equality that is rigid and dogmatic, and that limits rather than expands educational choice by denying single-sex education to those young women and young men who would benefit from it.

The Amici States support the remedial decision of the Court of Appeals because they believe that it not only represents the better view of the Constitution, but also because it represents an approach to educational policy and sexual equality that is better tailored to achieving and preserving real world opportunities for both men and women. Education is of central importance in enriching the individual lives of our citizens, in preserving and enhancing the values and accomplishments of our civilization and in curing those social ills that now beset us as a Nation. The Amici States are committed to fostering educational programs capable of achieving these objectives and, as such, place great value on preserving opportunities for diversity, experimentation and individual choice. In the context of this case, preserving these opportunities means affirming the constitutionality of single-sex education and the remedial decision of the Court of Appeals.

[Footnote continued from previous page]

Virginia's ability to offer a lawful single-sex program for women will be greatly undermined if it cannot constitutionally offer such a program for men.

SUMMARY OF ARGUMENT

The Amici States have an interest in protecting experimentation and diversity in education. Single-sex education has proven pedagogical value for some young men and some young women, and helps advance sexual equality in the job market. Those benefits exist at the college level, where thousands of students nationwide have chosen to attend single-sex institutions, including VMI and VWIL. Those benefits also exist at the secondary level. In a number of cities across the country, there is a growing interest in experimenting with (i) all-male academies to address social problems in the inner-cities, and (ii) all-girl math and science classes to help offset the traditional male dominance in these areas. This Court should not foreclose such experimentation and diversity by adopting the Solicitor General's overly-doctrinaire reading of the Constitution.

Contrary to the argument of the Solicitor General, strict scrutiny is not the appropriate standard for judging sex classifications. Adopting strict scrutiny would reduce educational choice by destroying single-sex education in both the public and private sectors, and would result in a wide range of other adverse consequences outside of the sphere of education. Moreover, to impose strict scrutiny on sex classification would put the Court in conflict with the rejection of the "Equal Rights Amendment" by the duly appointed process of constitutional amendment.

This Court should continue to apply intermediate scrutiny of sex classifications. Moreover, such an approach must leave room for facts and expertise about gender differences to be presented at trial. To dismiss such evidence out of hand by treating it as inherently stereotypical would destroy the meaning of intermediate scrutiny. If this Court treats as stereotypical the strong evidence accepted by the District

Court and by the Court of Appeals in this case, there will be no practical way for any other single-sex educational program to pass muster. The decision of the Court of Appeals approving VWIL as an appropriate remedial measure should be affirmed by this Court.

ARGUMENT

I. THE STATES HAVE A VALID INTEREST IN PROTECTING EXPERIMENTATION AND DIVERSITY IN EDUCATION, INCLUDING THE OPTION OF SINGLE-SEX EDUCATION.

> *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 (1932) (Brandeis, J., dissenting) (cited with approval in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)).

The Amici States urge this Court to recognize the importance of allowing them -- and their sister States -- to continue serving as laboratories, providing experimentation and diversity in the area of education. This Court has already recognized that "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education." *Rodriguez*, 411 U.S. at 50 n.106. The Court should allow this multiplicity and diversity to encompass single-sex education for those States that wish to pursue it.

From all of the States, there are young men and women who are today obtaining benefits of a single-sex collegiate

education at one of the many institutions across our nation that offer such a program.[3] Some of these institutions are overtly public in character, while those that are private receive substantial public assistance that is critical to their existence. All would be endangered by a ruling that Virginia cannot constitutionally support single-sex education at VMI or VWIL.[4] The Amici States strongly desire to preserve for their young people the broad array of collegiate opportunities now available to them nationwide, including the opportunity for single-sex education.

The Amici States support the opportunity for single-sex education for the very practical reason that, given an array of collegiate options that is overwhelmingly coeducational, significant numbers of young men and women still seek out those schools that offer single-sex settings.[5] Presumably, these young men and women know wherein their own benefit lies. Thus, while such settings may not be ideal for everyone, they are plainly beneficial for some.

This common sense assessment of the value of preserving single-sex education is confirmed by the record in this case.[6] As the District Court noted, the record is filled with

---

[3]A list of these institutions is attached as Appendix A.

[4]The destruction of single-sex education as a consequence of a loss by Virginia is discussed more fully at Parts II and III of this Argument.

[5]A total of 64,000 women and 11,400 men are enrolled in single-sex colleges nationwide. *See* Pet'r App. at 189a and 190a.

[6]Even the federal government conceded below that "there is ample evidence in the record on the value of single-gender education." Tr. of Remedy Trial at 238. While some educators may hold a contrary view, the Constitution does not require unanimity of opinion in order to afford deference to those charged with making educational decisions for a state,

[Footnote continued on next page]

testimony by educational experts that "single gender education at the undergraduate level is beneficial for both males and females." The District Court also found that "[f]or [some] students the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement." Pet'r App. at 167a, 184a; *see id.* at 225a-227a. Moreover, the findings of the District Court show that single-sex education helps contribute to the social equality of men and women:

> Women's colleges increase the chances that [those who attend] will obtain positions of leadership, complete the baccalaureate degree and aspire to higher degrees.
>
> * * *
>
> Research also shows that students attending single-sex colleges are more likely to take the risk of choosing a career normally associated with the other sex than are students in coeducational colleges.

Pet'r App. at 226a (citing Alexander Astin, *Four Critical Years* (1977), and Marvin Bressler and Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. Higher Educ. 650 (1980)).

These findings were echoed by the Court of Appeals, which held that single-sex education "provid[es] substantial benefits to college students" and "has been found to have *salutary consequences for sexual equality in the job*

[Footnote continued from previous page]

nor does the meaning of the Constitution ebb and flow with the cycle of analyses and counter-analyses that seems to characterize scholarly debate in the field of education.

market." Pet'r App. at 49a (emphasis added). Preserving opportunities for single-sex education is consistent with a thoughtful, pragmatic approach to sexual equality, an approach designed to maximize individual choice.

In addition to recognizing the needs of America's college students, the Amici States are acutely aware of the problems that plague the inner-cities of our nation. Drugs, poverty and street gangs contribute to a sense of futility and a high drop-out rate. Some educators have proposed experimentation with single-sex schools at the secondary level as a means of breaking the cycle of despair:

> [T]he idea of all-male schools makes sense. The lives of inner-city youth are so much at risk ... that radical measures are in order. And the principle behind this particular measure is a sound one. In fact, it is not especially radical ....
>
> * * *
>
> In communities with strong fathers at home and positive male role models in the neighborhood, coed schools ... can do a decent job in educating and socializing boys. But where those other conditions have broken down, the idea of all-male schools run by men makes sense. These might or might not be boarding schools. That would depend on the local situation. They don't have to be military schools, but — in this age of commitment to diversity — that option ought certainly to be entertained.

William Kilpatrick, *Why Johnny Can't Tell Right From Wrong*, 234, 236 (1992).

Experimentation along these lines is now actively underway in the City of Baltimore. *See* Mike Bowler, *All-Male, All-Black, All Learning,* The [Baltimore] Sun, October 15, 1995, at 2C. Other cities have shown an

interest, only to be forced to abandon the idea for fear of legal action. Philadelphia canceled its all-male program, even though it seemed to be producing higher grades, after being threatened with a lawsuit by the American Civil Liberties Union. Miami was also interested, but its efforts were killed by the federal Department of Education. Similarly, Detroit wanted to try all-male academies, but was forced to cancel the plan after being confronted with the high costs of defending a lawsuit. *Id.*; *see also Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991) (preliminary injunction enjoining the operation of public all-boys secondary school).

The potential advantages of single-sex education at the secondary level are not limited to the inner-city. A number of educators and commentators on women's issues have proposed "all-girl" math and science classes to help offset the traditional male dominance in these subjects. Susan Estrich is a professor of law and political science at the University of Southern California and a frequent writer in national journals. In her view, "[i]f the problem is that women don't do well in math or science, then single-sex classes, and single-sex schools, may be part of the answer." *See,* Susan Estrich, *For Girls' Schools and Women's Colleges, Separate is Better*, N. Y. Times, May 22, 1994, § 6, at 39.

Ventura, California implemented just such a program, but was told by the federal Department of Education it could not provide its young women with such a benefit, at least not overtly. While the "all-girl" classes were renamed as classes for the "mathematically challenged," they function much like they did before, with few, if any, males present and with heightened achievement by the women.[7] If school

---

[7]*See* Catherine Saillant, *Ventura's All-Girl Math Classes Pass*

[Footnote continued on next page]

systems believe their young women would benefit from single-sex math and science classes, they should not have to camouflage their efforts behind euphemism. They should be able to provide these benefits openly and proudly. As Professor Estrich wrote:

> If girls don't want to go to all-girls schools, or if parents don't want to send them, that's their choice. If the experiments with girls-only math classes or boys-only classes should fail, then educators can be trusted to abandon them. But short of that, let the educators and the parents and the students decide, and leave the lawyers and judges out of it.

See Estrich, *supra.*

Across the country, cities that want to experiment with single-sex programs are watching this case to see if this Court will affirm for them the freedom they need to try these bold -- albeit traditional -- forms of education. The Amici States desire to preserve for their people the right to make these decisions for themselves -- based on their own practical experience and the experience of others -- without being bound by the impractical and doctrinaire reading of the Constitution sought from this Court by the federal government.

While the Solicitor General stops short of openly challenging the value of single-sex education, not all of his *amici* are so restrained. Disdaining both the facts and any sense of fairness, some of his *amici* take the position that

---

[Footnote continued from previous page]

Test on Bias U. S. Civil Rights Authorities Suggest Courses Be Renamed but Find They Do Not Discriminate Against Boys, L. A. Times, March 8, 1995, at B1.

single-sex education may be appropriate and permissible for women, but not for men. *See, e.g.*, Amicus Br. of American Ass'n of Univ. Professors, *et al.* at 26 n.73. Thus, they reveal the extreme approach to women's rights that underlies much of the opposition to VMI and VWIL. A more pragmatic approach would be to allow a state to provide single-sex programs for *either* sex when doing so meets a demonstrated demand; or, alternatively, when comparable programs are offered to both sexes, the route followed by the Court of Appeals here.

II. STRICT SCRUTINY IS NOT THE APPROPRIATE STANDARD FOR JUDGING SEX CLASSIFICATIONS.

The Solicitor General asks this Court to decree that "strict scrutiny is . . . the correct constitutional standard for evaluating differences in official treatment based on sex...". Pet'r Br. at 33. Many of its *amici* seek the same result. Such a sweeping new judicial pronouncement would have devastating results. It would mean the destruction of single-sex educational opportunities in America, at both public and private institutions; it would undermine beneficial sex classifications in a number of other contexts, including prisons, selective service and programs designed to enhance the economic opportunity of women; and, it would reduce individual choice for women. Moreover, pronouncement of such a rule would be tantamount to judicial imposition of the so-called Equal Rights Amendment, a proposal that was rejected by the democratic processes designated for amending the Constitution.

A. STRICT SCRUTINY WOULD DESTROY SINGLE-SEX EDUCATIONAL OPPORTUNITIES.

The practical consequence of adopting strict scrutiny for sex classifications would be the destruction of single-sex

educational opportunities in America at both public and private institutions. To see that this is so, one need only examine the existing jurisprudence of *racial* equality, which would provide the obvious model for adjudicating issues of sexual equality if strict scrutiny were adopted. *See* Pet'r Br. at 34-35.

With respect to public education, it is self-evident that single-sex schools and programs could not survive strict scrutiny. If sex and race are now to be equated for purposes of equal protection analysis, then single-sex schools will be just as unconstitutional as schools segregated by race. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The Solicitor General makes no attempt to pretend otherwise. Indeed, he derides the decision by the Court of Appeals to approve parallel, public single-sex programs by likening the decision to the now-discredited case of *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See* Pet'r Br. at 48, n.35.

The destruction of public single-sex education by judicial decree would work real harm to those young people who, if given a choice, would seek the benefits of such programs. The blow would first be felt by the young men who have chosen VMI, and by the young women who have chosen VWIL. But, it would also be felt in those local school systems that want to improve education by offering all-girl math and science classes, or by establishing inner-city male academies. These students, too, would lose their right to choose. Experimentation would be constrained. Diversity would be diminished. The ability of the States to provide educational choice would be eroded.

The harm caused by strict scrutiny would not stop at the public institutions. Private education would also be harmed. If sex and race are to be equated for purposes of equal protection analysis, then private *single-sex* schools logically must become legal pariahs analogous to *racially*

discriminatory private schools. The implications are enormous.

First, private single-sex schools and their students would be in danger of losing eligibility for public financial aid. In *Norwood v. Harrison*, 413 U.S. 455, 463 (1973), this Court noted that it "has consistently affirmed decisions enjoining state tuition grants to *students* attending racially discriminatory private schools." (Emphasis added.) The Court then went on to hold that a program of aid to the *school*, in the form of textbook lending, is also impermissible:

> Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination. *Racial discrimination in state-operated schools is barred by the Constitution and "[i]t 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 463-65 (footnote and citation omitted) (emphasis added).[8] If sex classifications are to be judged by the same

---

[8]*Accord Cooper v. Aaron*, 358 U.S. 1, 19 (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

[Footnote continued on next page]

standard as racial discrimination, then the States will not only be prohibited from operating their own single-sex schools, they will also be prohibited from "induc[ing], encourag[ing] or promot[ing] private persons" to operate such schools.

The harm does not stop there. Under strict scrutiny, private, single-sex schools would also be in danger of losing (i) their charitable, tax exempt status; and (ii) their ability to receive tax-deductible charitable contributions, just as private, racially-discriminatory schools have lost these advantages. In *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), this Court upheld a ruling by the Internal Revenue Service that racially-discriminatory private educational institutions are not entitled to the tax benefits afforded to charitable institutions. The rationale for the decision was that, in order to qualify as a charity, an organization may not violate established public policy, such as the policy against racial discrimination in education. For this Court to apply strict scrutiny to sex classifications in education would be tantamount to saying that there is a public policy against such classifications. Logically, private, single-sex schools would no longer be entitled to charitable status, or to any of the valuable tax benefits such status entails.[9]

[Footnote continued from previous page]

to any person within its jurisdiction the equal protection of the laws.").

[9] *See* Martin D. Ginsburg, *Sex Discrimination and the IRS: Public Policy and the Charitable Deduction*, 10 Tax Notes 27, 28 (1980) (arguing that a contribution for a single-sex scholarship should not qualify for a charitable deduction as against "federal policy" unless "the scholarship substantially furthers an important objective or is otherwise compatible with

[Footnote continued on next page]

Faced with the loss of all forms of public support and with the loss of all tax benefits, the nation's private, single-sex schools simply could not survive. Many valuable, time-honored institutions would be lost. Also lost would be the diversity that these schools now provide to the young people -- and especially to the young women -- of our country. The Amici States have an interest in preserving the broadest possible range of educational choices for their citizens; thus, they urge this Court to reject the Solicitor General's extreme and overly-ideological plea for strict scrutiny.

In an effort to obscure the implications of the decision they seek, some of the *amici* opposing Virginia suggest it might still be constitutional to have single-sex education for women -- but not for men -- in order to compensate women for past discrimination. *See, e.g.*, Amicus Br. of American Association of Univ. Professors, *et al.* at 26 n.73. The lack of analysis with which they offer these vague reassurances reveals the spuriousness of their claims. If race and sex are to be equated for purposes of constitutional law, then the same rules that govern racially-exclusive programs intended to help minorities must also govern single-sex programs intended to help women. Under those rules, it is not enough that the racially exclusive program be intended to compensate for the past effects of *societal* discrimination. As this Court held in *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505-506 (1989):

> To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid

---

[Footnote continued from previous page]

federal law," contrary to IRS Letter Ruling 7744007 (1977)).

> racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.... We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

As recently as *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2112 (1995), this Court reaffirmed "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups." Thus, under strict scrutiny analysis, historic discrimination against women as a group would not furnish a justification for "compensatory" discrimination in favor of those individual young women who might seek admission to an all-women's program.[10] Moreover, notwithstanding the unfortunate

---

[10]In the context of higher education, the Court has made it clear since *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), that racial set asides for purposes of admission are unconstitutional. While *Bakke* did allow race to be considered as a "plus" in order to allow a university to pursue a policy of diversity in its student body, *Id.* at 317, 318, a single-sex program could not take advantage of any such approach. By definition, single-sex programs are a kind of "set-aside." Only by recognizing that sexual classifications -- unlike those based on race -- have a legitimate pedagogical purpose can this Court preserve single-sex programs for women.

Moreover, as the record in this case shows, some men as well as some women can benefit from single-sex education. Thus, keeping single-sex education constitutional for women necessarily entails keeping it constitutional for men as well. As Justice Robert H. Jackson once noted, "the validity of a doctrine does not depend on whose ox it gores." *Wells v.*

[Footnote continued on next page]

history of discrimination against women, in the context of higher education today, women have as many or more opportunities in terms of both attendance and graduation than men.[11]

To their credit, one group of *amici* supporting the Solicitor General have candidly admitted that adopting strict scrutiny for sex classifications "may harm women who currently benefit from existing affirmative action and other gender-based remedial programs . . . ." Br. of Employment Law Ctr., *et al.* at 4. *See id.* at 25-30. They recognize that, in order to rule against Virginia and yet avoid a result harmful to women, this Court must unravel its existing equal protection jurisprudence and weave an entirely new fabric. Thus, they expressly ask the Court to reverse the landmark cases of *Croson* and *Adarand* in which the Court ruled that the Constitution recognizes a consistent standard for evaluating "invidious" and "benign" classifications.[12] The fact that the ruling they seek against Virginia would necessitate extreme contortions to avoid manifestly undesirable consequences is a strong confirmation that their objective is extreme and ought to be avoided.

[Footnote continued from previous page]

Simonds Abrasive Co., 345 U.S. 514, 525 (1953) (dissenting opinion).

[11] *See* U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, Digest of Educ. Statistics 172, 186 (1993).

[12] "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simply racial politics." *Croson*, 488 U.S. at 493 (plurality opinion).

B. STRICT SCRUTINY WOULD DESTROY BENEFICIAL SEX CLASSIFICATIONS OUTSIDE OF EDUCATION.

A decision by the Court that sex classifications must be judged by strict scrutiny would not only destroy single-sex schools; it would also destroy sex classifications for a wide range of public and private endeavors outside of education. The classifications that would be thus invalidated include many that have manifest benefits and/or that should be within the discretion of Congress and/or state legislatures to enact. A few examples should suffice to demonstrate the magnitude of the adverse consequences.

Prisons: It is the common practice of the States and the federal government to maintain separate prisons for men and women. If strict scrutiny were to apply, this practice would be subject to challenge, just as racially segregated prisons have been held unconstitutional. *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (per curiam) (declaring statute requiring racial segregation in prisons unconstitutional).

Draft Registration: In *Rostker v. Goldberg*, 453 U.S. 57 (1981), this Court applied equal protection principles to adjudicate a challenge to the male-only draft registration law. Using the principles then prevailing, the Court held the sex classification was valid. Yet, if the Court now adopts a rule of strict scrutiny, a new test case will surely arise in which the courts will be asked to revisit the draft issue under an analysis in which all gender classifications will be in jeopardy.

Civic Groups: As noted above, private educational institutions would risk losing their charitable status and accompanying tax benefits under a strict scrutiny approach. By the same analysis, similarly harsh treatment could also be in store for other private groups that engage in

classifications based on sex. Potential losers would include the Girl Scouts, the Boy Scouts and a host of other men's and women's groups that have contributed immeasurably to the quality of life in America.

Battered Women's Shelters: Whether operated by government agencies or by private groups, battered women's shelters are a reasonable and necessary response to the problem of domestic violence. Yet, if this Court were to adopt strict scrutiny, the ability of such shelters to cater only to women would be highly suspect, even though opening up these shelters to both sexes could turn these places of refuge into places of confrontation.

Other State and Federal Programs: Imposition of strict scrutiny would also disrupt or destroy a variety of state and federal programs designed to benefit women, including programs designed to enhance the position of women in the economic life of our nation.[13]

---

[13] *See, e.g.*, Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (1987) (establishing set-asides in construction industry for women-owned businesses); 47 C.F.R. § 24.309 (Federal Communications Commission personal communication services narrowband bidding procedures granting women-owned businesses bidding credits); 28 C.F.R. § 66.36(e) (requiring state and local government grantees of Department of Justice grants to "take all necessary affirmative steps to assure . . . women's business enterprises" are used). Federal programs with similar requirements could also be invalidated. *See* 23 C.F.R. §§ 230.113(e), 230.204(a) (Federal Highway Administration aid program); 20 C.F.R. § 632.26(b) (Department of Labor Native American employment and training program); 21 C.F.R. § 1403.36(e) (Food and Drug Administration grants); 7 C.F.R. § 226.22(f) (Child and Adult Care Food Program); 7 C.F.R. § 227.14(e) (Food Stamp and Food Distribution Program); 10 C.F.R. § 600.144(b)(1) (Department of Energy financial assistance to educational

[Footnote continued on next page]

The Solicitor General does not address the wide-ranging implications of strict scrutiny, other than to offer a half-hearted and unpersuasive suggestion that sex classifications related to military policies could somehow escape the new rule. Pet'r Br. at 34 n.23. This will not do. Either there is to be strict scrutiny or there is not. This Court has made it clear that *racial* classifications are not just inherently suspect *some* of the time; they are suspect *all* of the time. They can only be justified if narrowly tailored to pursue compelling interests. *See Adarand*, 115 S. Ct. at 2113; *Croson*, 488 U.S. at 494. Moreover, while judicial scrutiny of such classifications may be strict in theory, it is fatal in fact.[14] Given the clear understanding of what strict scrutiny means under the law, for this Court to impose such a rule on sex classifications would be to open Pandora's

---

[Footnote continued from previous page]

institutions, hospital, and others); 7 C.F.R. § 1944.264 (Department of Agriculture rural housing grants); 12 C.F.R. § 1507, *et seq.* ([Thrift Regulator] minority and women contracting outreach program); 14 C.F.R. § 1260.510 (National Aeronautics and Space Administration grants); 22 C.F.R. § 135.36 (State Department grants); 24 C.F.R. §§ 84.44, 84.84, 85.36, 511.13 (Department of Housing and Urban Development grants); *see also generally* Alaska Stat. § 36.10.175 (1995) (Public Contracts Title) (conferring preference upon economically disadvantaged women for employment on public projects); Mass. Gen. L. Ch. 7, § 40N (1995) (requiring that 5% of the estimated value of capital facility projects contracts be reserved for women-owned businesses). *See also* Ind. Code § 4-33-14-5 (1995); La. Rev. Stat. Ann. § 39:1733 (1995); Mo. Ann. Stat. § 620.120 (1995); N.J. Stat. Ann. §§ 5:10-21.1a, 5:12-181, 5:12-186, 40A:11-42, 52:32-20 (1995); N.Y. Pub. Auth. Law § 1838 (1995); N.Y. Unconsol. Law § 6287 (1995).

[14] *See* n.1, *supra*.

box. The Amici States urge the Court not to do so.

C. STRICT SCRUTINY WOULD UNDERCUT DEMOCRATIC PROCESSES BY IMPOSING THE "EQUAL RIGHTS AMENDMENT" AFTER IT FAILED TO WIN RATIFICATION BY THE STATES.

In calling for strict scrutiny for sex classifications, the Solicitor General and his *amici* are, in effect, asking this Court to enact the "Equal Rights Amendment" by judicial fiat. The Court should decline to do so, not only because strict scrutiny would be bad law and bad policy, but because any creation of such a new rule by the judiciary, after it has been rejected by the people through the normal processes of constitutional amendment, would be a serious breach of the separation of powers.

An Equal Rights Amendment ("ERA") outlawing differences in official treatment based on sex was proposed by Congress in 1972 and submitted to the people for consideration through their state legislatures.[15] The

---

[15]The Congressional resolution proposing the amendment provided as follows:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:
>
> Section 1: Equality of rights under the law shall not be denied or abridged by the United States or

[Footnote continued on next page]

manifest purpose of the amendment was to make strict scrutiny the law of the land. *See Frontiero v. Richardson*, 411 U.S. 677 (1973) (Powell, J., concurring in the judgment.)

In 1978, when the seven years Congress originally provided for ratification by the states had almost expired, the amendment still had not obtained the three-quarters majority required by Article V of the Constitution. Congress then tried again and extended by three years the time available for advocates of the ERA to obtain the necessary ratification by the states.[16] Still, the amendment failed to gather the necessary support and it expired in 1982.[17] Having thus lost under the lawfully prescribed method for amending the Constitution, some who favor strict scrutiny now seek to hijack the Constitution by asking this Court to impose a new legal doctrine the American

---

[Footnote continued from previous page]

> by any State on account of sex.
>
> Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3: This amendment shall take effect two years after the date of ratification.

H.J.R. Res. 208, 92d Cong., 1st Sess., 86 Stat. 1523 (1971).

[16]H.R.J. Res. 638; 95 Cong. 1st Sess.; 92 Stat. 3799 (1978).

[17]As of 1982, 35 states had ratified the ERA, but no state had done so since 1977. Moreover, legislatures in five of those 35 states, Idaho, Kentucky, Nebraska, South Dakota and Tennessee, had adopted resolutions *rescinding* their previous ratifications. Andrea S. Christiansen, *Women In The United States Labor Force*, 5 Comp. Lab. L. 437, 440 (Fall, 1982).

people considered and rejected. This Court should not entertain such an unworthy plea, but should point the Solicitor General and his *amici* across First Street to the halls of Congress. If they wish to make strict scrutiny the law of the land, they can again seek an amendment through the proper, legislative channels appointed under the Constitution for making such changes.[18]

This case is, of course, not the first time that this Court has been asked to adopt strict scrutiny for sex classifications. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), a similar plea was made. In rejecting the plea, Justice Powell was joined by Chief Justice Burger and Justice Blackmun in an eloquent and incisive comment on the adjudicatory role of this Court vis-a-vis the process of constitutional amendment:

> There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. *The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution.* By acting prematurely and

[18]The fact that Congress has not proposed a new ERA since the last one died in 1982 is a strong indication that Congress (i) now understands the untoward consequences of strict scrutiny for sex classifications, and/or (ii) recognizes that the American people are still unwilling to approve any such change to their Constitution. In either event, the refusal of Congress to initiate another ERA for the past 13 years is another reason why this Court should not impose such an amendment by judicial decree.

> unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

411 U.S. at 692 (Powell, J., concurring in the judgment) (emphasis added).

This reluctance to make strict scrutiny the law by judicial decree is even more appropriate now that the people have given their verdict and rejected that doctrine by the defeat of the Equal Rights Amendment. As Justice Powell went on to say:

> [D]emocratic institutions are weakened, and confidence in the restraint of the Court impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time when they are under consideration within the prescribed constitutional processes.

Id.

These concerns apply with even greater force today. Surely, democratic institutions will be weakened most, and confidence in the restraint of the Court will be most impaired, if the Court decides the issue at hand *in a manner directly contrary* to the settled judgment of the people acting through their prescribed constitutional processes. The Solicitor General's call for strict scrutiny for sex classifications is but another indicia of the rigid and doctrinaire approach to sexual equality that motivates the opposition to VMI and VWIL. This purpose is misguided

and should be denied.

III. INTERMEDIATE SCRUTINY MUST ALLOW FOR FACTS AND EXPERTISE ABOUT GENDER DIFFERENCES.

This Court has never applied strict scrutiny -- but has applied intermediate scrutiny -- to differences in official treatment based on gender. In *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), this Court said that a party seeking to uphold a gender classification 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." (Citations and internal quotation marks omitted.) Now, the issue is whether a level of scrutiny deemed intermediate in theory will also be fatal in fact. Stated differently, the question is whether the Court will allow facts and expert conclusions established at trial to justify sex classifications, or whether courts will be required to stop their ears to such evidence and treat all sex classifications -- at least in the area of education -- as stereotypical as a matter of law.

The Solicitor General and his *amici* appear to labor under the prejudice that, because Virginia's single-sex program for women does not just blindly replicate its single-sex program for men, it *must* have been designed by "male chauvinists." Their thinking is so rigid that, for them, anyone who suggests different educational approaches for young men and women simply *must* be guilty of stereotypical thinking. The problem with their assessment is that the facts of this case refute it. VWIL has been designed and approved by experienced educators who are experts in women's education. They include, in addition to

others, the president of a women's college,[19] a noted feminist writer and professor,[20] a professor emeritus at Harvard University[21] and the chair of the most recent accreditation team for West Point.[22] Far from being stereotypical, these experts are -- by virtue of their training, experience and motivation -- among the very first people who would recognize and reject sexual stereotypes.

These educators testified that the VWIL program will

---

[19]Dr. Cynthia Tyson, President of Mary Baldwin College -- "Dr. Tyson has spent 25 years focusing on the education of women at two women's colleges as a teacher and an administrator. She has written and lectured widely on women's education . . . [and] . . . has served as president of the Southern Association of Colleges for Women and as a commissioner of the Southern Association of Colleges and Schools." Pet'r App. at 93a, 94a.

[20]Dr. Elizabeth Anne Fox-Genovese, Professor -- Dr. Fox-Genovese "testified as a defense expert in women's issues, feminist theory, gender, higher education with particular reference to women's education, single-sex education and curriculum development, and the history of American women." Professor Fox-Genovese is now a "professor of history and Eleonore Raoul Professor of the Humanities at Emory University in Atlanta, Georgia." Pet'r App. at 89a, 90a.

[21]Dr. David Riesman -- Dr. Riesman is "Henry Ford II Professor of Social Sciences, Emeritus, at Harvard University." He testified as an "expert in sociology, with a particular emphasis on culture, personality and character, higher education in the United States and single-sex education for women." Pet'r App. at 92a.

[22]Dr. Richard C. Richardson, Jr. -- Dr. Richardson "testified as a defense expert in higher education, with particular expertise and hands-on experience in developing academic co-curricular programs and in public policy and higher education . . . . [He] is also an expert in women's education . . . . He is Professor of Education Leadership and Policy Studies at Arizona State University." Pet'r App. at 91a.

make young women *better* prepared for military and civilian leadership than would a mere mirror image of VMI. The District Court found their testimony persuasive, and the Court of Appeals affirmed the trial court's findings. This Court should do likewise. Indeed, if this Court were to reject the conclusions of these experts by dismissing their opinions as stereotypical, then it would be difficult to see what room would be left for facts to play in discussing gender differences. If the record in this case does not support parallel but distinct educational programs for men and women, then it will be difficult if not impossible for any other educational endeavor ever to do so.

The losers under such an extreme approach would not only be the young men from Virginia and elsewhere who would no longer have the option of a single-sex program at VMI, but also the young inner-city men who would never have the chance to see whether all-male academies could help counteract some of the social ills that threaten to engulf them. But, the biggest losers would surely be the women, starting with the women at VWIL, who would be deprived of the benefits of a single-sex education, including the proven assistance such an education can provide in helping women break sexual stereotypes and achieve positions of leadership.[23]

The Amici States support a thoughtful and pragmatic approach to sexual equality, one that focuses on providing new opportunities for women instead of denying existing opportunities to men. This is exactly the approach followed by the Court of Appeals in approving VWIL as a remedial measure in Virginia. It is the approach this Court

---

[23] *See* Findings of Fact VII. B. 10 and 12, Pet'r App. at 226a. *See also* n.5 (comparing number of women attending single-sex colleges with number of men).

should adopt.

CONCLUSION

For the reasons given herein, the Amici States urge this Court to affirm the remedial decision of the Court of Appeals.

Respectfully submitted,

BRADLEY B. CAVEDO
Counsel of Record
Shuford, Rubin & Gibney, P.C.
700 East Main Street
Suite 1250
Richmond, Virginia 223218
(804) 648-4442

December 15, 1995