

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. VIRGINIA, ET AL.;  
and VIRGINIA, ET AL., Petitioners v. UNITED STATES  
CASE NO: 94-1941, 94-2107  
PLACE: Washington, D.C.  
DATE: Wednesday, January 17, 1996  
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1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   UNITED STATES,                   :  
4                   Petitioner                   :  
5                   v.                   :   No. 94-1941  
6   VIRGINIA, ET AL.;                   :  
7   and                   :  
8   VIRGINIA, ET AL.,                   :  
9                   Petitioners                   :  
10                   v.                   :   No. 94-2107  
11   UNITED STATES                   :  
12   - - - - -X  
13                   Washington, D.C.  
14                   Wednesday, January 17, 1996  
15                   The above-entitled matter came on for oral  
16   argument before the Supreme Court of the United States at  
17   10:07 a.m.  
18   APPEARANCES:  
19   PAUL BENDER, ESQ., Deputy Solicitor General, Department  
20                   of Justice, Washington, D.C.; on behalf of the United  
21                   States.  
22   THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of  
23                   Virginia, et al.  
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1 PROCEEDINGS

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 94-1941, United States v.  
5 Virginia, and Virginia v. United States.

6 Mr. Bender.

7 ORAL ARGUMENT OF PAUL BENDER

8 ON BEHALF OF THE UNITED STATES

9 MR. BENDER: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 VMI, the Virginia Military Institute, was  
12 established by the Commonwealth of Virginia in 1839 as a  
13 State college for young men between the ages of 16 and 25.  
14 Initially, its students were cadets who were assigned to  
15 guard the State militia arsenal in Lexington, Virginia,  
16 where VMI is located.

17 VMI since that time has remained a State  
18 institution and in 1989-'90, for example, it contributed,  
19 the State contributed about \$10 million to VMI's operating  
20 budget, that's about 35 percent of the budget, and the  
21 Board of Visitors of VMI, which decides things like its  
22 admissions policy, is appointed by the Governor and  
23 confirmed by the legislature.

24 Although it has remained a State institution in  
25 that way it has also, at the same time, enormously



1 broadened its educational mission so that it's no longer  
2 just a place to produce cadets for the military. Indeed,  
3 today only about 15 percent of VMI graduates enter the  
4 military. VMI graduates enter the professions, law,  
5 medicine, engineering quite a lot, public service quite a  
6 lot.

7           While restricting VMI to men might have been  
8 inevitable, indeed required at the time VMI was initially  
9 established because the military at that time was all  
10 male, as VMI's mission has broadened that's obviously no  
11 longer true. VMI nevertheless has continued only to admit  
12 men, and continues only to admit men until this day.

13           During the 150 years or more of VMI's existence,  
14 it has developed what everyone concedes is a unique,  
15 adversative method of education. It is -- was developed  
16 in an all-male context, and it is stereotypically a male  
17 form of education. It emphasizes adversity, it emphasizes  
18 competition, it emphasizes standing up to stress, it  
19 emphasizes the development of strong character in the face  
20 of adversity, of self-reliance, of self-confidence.

21           The VMI degree has, through that unique method,  
22 become a very valuable asset in two ways, I think. First  
23 of all, it demonstrates that the person who has the degree  
24 has succeeded in a highly adversative environment. Many  
25 people value that when looking for leaders and looking for

1 people to hire.

2 QUESTION: As you read the findings of the  
3 district court and the assessment of those findings in the  
4 court of appeals, what is your understanding of those  
5 courts' conclusions as to the extent to which the  
6 adversative method would be altered and affected by the  
7 admission of women?

8 MR. BENDER: I think there's general agreement  
9 on what would have to be changed by the admission of women  
10 in physical terms.

11 I think there isn't agreement about how to  
12 characterize that. For example --

13 QUESTION: There is not?

14 MR. BENDER: There is not agreement about how to  
15 characterize the change. I think the main -- there is,  
16 for example, general agreement that for privacy reasons,  
17 if women were admitted to VMI there would have to be an  
18 opportunity for women and men to go to the toilet, to  
19 shower, to dress, without being seen by members of the  
20 opposite sex.

21 QUESTION: Do we have the institutional  
22 competence at this level and are we required in order to  
23 decide this case to make our own assessment of the extent  
24 to which the adversative method a) would change and b)  
25 whether that change would be detrimental to the school?

1 MR. BENDER: No.

2 QUESTION: Is it for us to decide?

3 MR. BENDER: No, I don't think that's necessary  
4 in this case.

5 As you say, another change that is said would  
6 have to occur is a change in the adversative method, and  
7 that is something that I don't think is true, and that you  
8 can only reach that conclusion that a change would have to  
9 be in the adversative method by accepting certain  
10 stereotypical characterizations of men and women.

11 QUESTION: Didn't both of the lower courts make  
12 that finding, that the effect of admitting women would be  
13 to destroy the adversative method?

14 MR. BENDER: Yes. I --

15 QUESTION: Now, you say that's wrong, but both  
16 of the lower courts found that, didn't they?

17 MR. BENDER: They -- that finding was based  
18 entirely on a stereotypical view of women and men which  
19 says that women -- men cannot administer the adversative  
20 method to women, women would not be able to survive with  
21 the adversative method.

22 QUESTION: It was not based on expert testimony?

23 MR. BENDER: Expert testimony was in turn based  
24 on --

25 QUESTION: But it was --

1 MR. BENDER: -- exactly those characterizations.

2 QUESTION: I see. All of these experts are --  
3 can be dismissed as stereotypical.

4 MR. BENDER: No, they can't be dismissed as  
5 stereotypical, Justice Scalia.

6 QUESTION: What does stereotypical mean? When  
7 anybody comes out and says something that is what? What  
8 makes it stereotypical?

9 MR. BENDER: It means what the experts really  
10 said, which is not that all women can't do this, but that  
11 most women can't do this, and we are willing to accept the  
12 finding that most women can't do this.

13 The question in this case is whether, because  
14 most women can't do it, you are constitutionally -- the  
15 State is constitutionally entitled to exclude all women --

16 QUESTION: As I recall the experts --

17 MR. BENDER: -- even those women who can.

18 QUESTION: -- it was not that women can't do it,  
19 it was that it would interfere with the kind of  
20 relationship among the students that produces the  
21 adversative method, that men and women would not engage in  
22 the same kind of adversariness that men and men or,  
23 perhaps, women and women would, that the sexual difference  
24 would make a difference.

25 It has nothing to do with whether women can take



1 the heat. That's not what the experts testified to.

2 MR. BENDER: It has to do with whether men will  
3 perceive that women can take the heat.

4 QUESTION: That's right.

5 MR. BENDER: Well, I don't think, just as in the  
6 area of race --

7 QUESTION: And is that stereotypical, too?

8 MR. BENDER: Just as in the area of race, an  
9 institution would not be able to remain uniracial by  
10 saying, if you let black people into VMI, white students  
11 would not feel comfortable in applying the adversative  
12 method to them, or the other way around, if you let white  
13 students into an all-black institution that has an  
14 adversative method, black people will not feel comfortable  
15 in applying the adversative method to them.

16 QUESTION: Mr. Bender --

17 MR. BENDER: Just as that cannot be used, this  
18 can't. Excuse me.

19 QUESTION: It's a predictive thing, isn't it?  
20 It's never been tried, so these are opinions of what might  
21 be.

22 MR. BENDER: What I'm saying is that even if you  
23 accept them as opinions of what might be, 1) that they are  
24 not opinions that are universal -- no one could say that  
25 men universally would not be able to use the adversative

1 method on women, and to me more fundamentally it rests  
2 upon men having a certain perception of what women are  
3 capable of.

4 QUESTION: And do you want us to make that  
5 predictive judgment?

6 MR. BENDER: No.

7 QUESTION: As -- to the extent we're talking  
8 about the remedy, I suppose we'd have a certain leeway to  
9 do that.

10 MR. BENDER: I don't want you to make the  
11 predictive judgment.

12 I think what this Court is called upon to decide  
13 is whether a State institution can model its program and  
14 its exclusion of women on the assumption that there are  
15 certain things that women can't do in general, there are  
16 certain things that men will not do with women because  
17 those men think that women are not capable of that, can  
18 model its institution and its educational method on the  
19 notion that this educational method, developed by men,  
20 emphasizing what they think of as manly qualities, is a  
21 place that women can't go, so that women cannot  
22 demonstrate that they have the same qualities.

23 QUESTION: Can it model it on the assumption  
24 that many experts testified to that single sex education  
25 has certain advantages --

1 MR. BENDER: Yes.

2 QUESTION: -- for at least some men and for at  
3 least some women? Can it model it on that?

4 MR. BENDER: They can model their institutions  
5 on that with regard to single sex education.

6 QUESTION: Well, why isn't that alone enough to  
7 support this, then? Never mind the military, never mind  
8 the adversariness, it's a men's college.

9 MR. BENDER: Because, Justice Scalia, in this  
10 case what we have is not simply a single sex institution  
11 for men and a single sex institution for women that are  
12 equal in their treatment of their students, in their  
13 objectives, in their feelings about men's and women's  
14 capabilities.

15 What we have here is a single sex institution  
16 for men that's designed as a place to teach manly values  
17 that only men can learn, to show that men can suffer  
18 adversity and succeed, and a single sex institution for  
19 women --

20 QUESTION: I don't understand --

21 MR. BENDER: -- that is openly, expressly,  
22 deliberately designed to teach to women womanly values,  
23 feminine values.

24 QUESTION: Mr. --

25 QUESTION: I don't understand that. You're not

1 challenging, then, the ability of a State to run a single  
2 sex college. That is not part of your argument.

3 MR. BENDER: No, we are not challenging -- we  
4 are not -- it may be difficult --

5 QUESTION: What it says here is that it's a  
6 single sex military adversarial college, is that --

7 MR. BENDER: That one is that, and that the  
8 other is quite a different thing which teaches different  
9 values and which teaches different capabilities in the  
10 students.

11 In thinking about this case, Justice Scalia --

12 QUESTION: Well, Mr. Bender, we have two  
13 separate questions, I think, one whether the original  
14 finding of the lower courts that there was an equal  
15 protection violation here of the Constitution for Virginia  
16 to have VMI but no comparable program for women, whether  
17 that was a correct determination and, secondly, I think we  
18 have to decide whether Virginia's proposed remedy of the  
19 development of the Mary Baldwin College program is  
20 constitutionally adequate as a remedy.

21 And the discussion thus far doesn't really  
22 direct us to either of those questions, and I notice that  
23 in your brief the Solicitor General urges the Court to  
24 adopt the highest standard of strict scrutiny to decide  
25 this case. Does your case depend on that?



1 MR. BENDER: No.

2 QUESTION: Can it be decided, as the lower  
3 courts did, on the basis of intermediate scrutiny --

4 MR. BENDER: Yes.

5 QUESTION: -- as the Court has done in the past?

6 MR. BENDER: Yes, absolutely.

7 QUESTION: Well, why is this case singled out,  
8 then, for urging us to adopt some different standard?  
9 What advantage is there --

10 MR. BENDER: The Court --

11 QUESTION: -- to that?

12 MR. BENDER: Justice O'Connor, the Court has  
13 said repeatedly, I think on five different occasions over  
14 the last 10 years or so, that the question of the standard  
15 to be applied to gender discrimination is an open  
16 question, and so we thought that the question might come  
17 up of asking us what we thought the right standard is.

18 QUESTION: Well, it's not exactly an open  
19 question in the sense that the Court has decided a number  
20 of cases.

21 MR. BENDER: Well, whether -- whether -- the  
22 Court has decided --

23 QUESTION: Applying a sort of intermediate  
24 scrutiny.

25 MR. BENDER: Right.

1 QUESTION: And if you look at Mississippi  
2 University for Women v. Hogan, the Court certainly tried  
3 to articulate a standard.

4 QUESTION: And Craig v. Boren --

5 MR. BENDER: That did not --

6 QUESTION: -- they said that was the standard.

7 MR. BENDER: That's right, but since then the  
8 Court has said --

9 QUESTION: Well, why do you say it's an open  
10 question?

11 MR. BENDER: The Court has said it's an open  
12 question whether there should be a higher level of  
13 scrutiny.

14 QUESTION: Well, it seems to me --

15 MR. BENDER: The Court has never found it  
16 necessary --

17 QUESTION: -- not only, Mr. Bender, is there  
18 some doubt as to whether or not it's an open question, it  
19 seems to me that strict scrutiny is inconsistent with what  
20 I thought you told Justice Scalia, and I'd like to explore  
21 with you for just a moment that you say there are certain  
22 values to single sex schools, say at the -- let's talk  
23 about the secondary level for a moment. Is it  
24 unreasonable for parents to choose a single sex school for  
25 a high school --

1 MR. BENDER: No.

2 QUESTION: -- girl or a high school boy?

3 MR. BENDER: No, it is not. The --

4 QUESTION: But how does that comport with strict  
5 scrutiny, then?

6 MR. BENDER: You -- assuming that you can have  
7 single sex education that represents an equal opportunity  
8 to both sexes, I don't think that you can have single sex  
9 education that offers to men a stereotypical view of this  
10 is what men do. This is a profession that men go into.

11 QUESTION: Mr. Bender --

12 QUESTION: But how does the first part of your  
13 statement square with your urging strict scrutiny? How  
14 can single sex high schools, say, comply with the doctrine  
15 of -- the rule of strict scrutiny? I just don't think  
16 they can.

17 MR. BENDER: Well, I think there are two  
18 questions with regard to the extent of the strict scrutiny  
19 doctrine. Our submission here is that in the kind of  
20 discrimination that occurs in this case, which is offering  
21 a distinctly different opportunity to men and women based  
22 on their gender alone, should be subject to strict  
23 scrutiny.

24 I think in the gender area, unlike the race  
25 area, the Court -- there's a question the Court needs to

1 decide before deciding whether all gender classifications  
2 would be subject to strict scrutiny. In the race area,  
3 the Court has made the decision that racial  
4 classification, racial separation is inherently unequal.  
5 The Court has never faced that question except in the  
6 Vorchheimer case, which was affirmed by four to four, as  
7 to whether the same thing is true in the gender area.

8 QUESTION: Now, wait a minute. I don't  
9 understand what you're saying. You're -- you started by  
10 saying that single sex schools would be okay so long as  
11 you're not depriving anybody of, you know, essentially the  
12 same things, but then you say that you may be depriving  
13 somebody of essentially the same things if you don't let a  
14 woman go to a man's school or a man go to a woman's  
15 school. Is that what you're --

16 MR. BENDER: No, that's not what I'm saying.

17 QUESTION: You're depriving, certainly, the  
18 woman of a men's school education, or the man of a woman's  
19 school. Is that enough of a --

20 MR. BENDER: No.

21 QUESTION: That is not --

22 MR. BENDER: You're giving them each the same.  
23 what you can't do, Justice Scalia, is say we're going to  
24 have a single sex school for men which is the engineering  
25 school, and it's the only engineering school we have --



1 QUESTION: Mr. Bender --

2 MR. BENDER: -- and we're going to have a single  
3 sex school for women which is a nursing school.

4 QUESTION: -- may I ask you specifically with  
5 respect to this case, do you have any quarrel with Judge  
6 Phillips, who said in dissent that if we were starting  
7 from scratch we could have in this area what we couldn't  
8 have in the race area, that is, genuine freedom of choice  
9 plan, where you would have a VMI for both sexes, and you  
10 would have a military academy for men and a military  
11 academy for women, and we're starting them all on the same  
12 day, and they all have equal funding and equal engineering  
13 and math programs. Would that be constitutional?

14 MR. BENDER: We have no problem with that.

15 QUESTION: Then why doesn't --

16 MR. BENDER: If they're equal.

17 QUESTION: -- this -- we have VPI, which as I  
18 understand it is coeducational, and we have VWIL, which is  
19 one sex, and VMI, which is the other sex. Why doesn't  
20 that fit --

21 MR. BENDER: Because they are enormously  
22 different programs, in two ways. One, the nature of the  
23 program is different. None of those other institutions,  
24 VPI or VWIL, have the adversative method that VMI has  
25 developed as a way of testing one's ability to survive

1 adversity.

2 QUESTION: In terms of opportunity, is that what  
3 the concentration is on when the Government is urging that  
4 VMI admit people of both sexes? Is it the adversative  
5 method that's the key?

6 MR. BENDER: It is two things, it is the  
7 adversative method, and it is the value of having the VMI  
8 degree as a mark of your ability to survive that program  
9 as a member of the, up until now, brotherhood of VMI  
10 graduates.

11 The VMI degree means a lot. It means you've  
12 survived the system. VMI has developed a reputation for  
13 producing tough leaders. What this system does is  
14 preclude women from getting that --

15 QUESTION: Mr. Bender --

16 MR. BENDER: -- qualification.

17 QUESTION: -- supposing, as Justice Ginsburg's  
18 hypothesis, we were starting from scratch, or Virginia was  
19 starting, and they opened VMI for men and a VMI for women,  
20 and 200 men signed up to go to the VMI for men, and 10  
21 women signed up to go to the VMI for women, would the  
22 State be justified in saying we just -- there's just not  
23 enough demand for the VMI for women?

24 MR. BENDER: It might be justified in saying  
25 that, but then I think it would have to permit the women

1 and the men to go to the same -- that is, they couldn't  
2 vindicate their single sex education interest in that  
3 context.

4 QUESTION: Well, would that be --

5 MR. BENDER: The single sex education  
6 interest --

7 QUESTION: Would that be true -- would that be  
8 true if there were no implication of inferiority?  
9 Doesn't -- isn't the, sort of the essential part of your  
10 case the assumption that everybody -- certainly that you  
11 were making. I guess your opponents are not -- that the  
12 fact that the course is not offered, the adversity  
13 training is not offered, is in the real world in which we  
14 live an indication of an implicit judgment of inferiority.

15 If there were no implicit judgment of  
16 inferiority, if we were sort of starting on the world's  
17 first morning, your answer might be different, wouldn't  
18 it?

19 MR. BENDER: Right. I -- that's right, Justice  
20 Souter. I may have misspoke, or miscommunicated in  
21 answering Chief Justice Rehnquist's question.

22 I was assuming his question was of a VMI like  
23 VMI and a VWIL like VWIL, that is, a VWIL program that  
24 didn't have the adversative method, that was premised, as  
25 VWIL is explicitly premised in its planning documents, on

1 the statement that women cannot handle, most women cannot  
2 handle --

3 QUESTION: But --

4 MR. BENDER: -- that method.

5 QUESTION: But -- right --

6 MR. BENDER: Then it's --

7 QUESTION: But if we were starting sort of at  
8 square 1, and the college for men did not offer a course  
9 in home economics and the college for women did not offer  
10 adversative training, if there were no reason in that kind  
11 of a world to assume that there was an implication of  
12 inferiority either against men or against women, you would  
13 not make an Equal Protection claim.

14 MR. BENDER: Right. I think it's very hard -- I  
15 agree completely. It's very hard to prejudge how such a  
16 system would work out.

17 Before the court makes a judgment about whether  
18 a particular system like that would be valid, I think it's  
19 really important to see the system, to see what the  
20 State's reasons are for setting it up, to see what the  
21 differences are, in order to see whether there is this  
22 explicit, as here, or implicit assertion that women are  
23 not suitable for certain things.

24 QUESTION: Mr. Bender --

25 QUESTION: Well, Mr. Bender, if VMI were to



1 establish a separate program for women students within  
2 VMI, a separate dormitory, and provide adversative  
3 training for women but somehow have two parallel tracks,  
4 but the degree would be a degree from VMI, would the  
5 Government be pressing its case against VMI?

6 MR. BENDER: It would depend, I think, Justice  
7 O'Connor, on whether the separate programs were simply  
8 women sleeping in some room set aside for women but still  
9 having the barracks experience which is central to the  
10 VMI --

11 QUESTION: The same, the same thing, just --

12 MR. BENDER: No, we would not.

13 QUESTION: -- like the men have, but --

14 MR. BENDER: In fact, we assume --

15 QUESTION: -- they have their own separate track  
16 here. I mean, their -- in their --

17 MR. BENDER: Well, when you say their own  
18 separate track, I --

19 QUESTION: They have a separate dormitory, and  
20 they have their own adversative training, just as tough,  
21 just as mean.

22 MR. BENDER: No, that I don't think --

23 (Laughter.)

24 MR. BENDER: That I don't think would work,  
25 because the thing that women, the opportunity that women

1 are not given in Virginia is to show that they can do it  
2 on a level with men.

3 QUESTION: Oh, but just the same, the same  
4 requirements, and they get a degree from VMI.

5 MR. BENDER: But it's not with men. I think one  
6 of the powerful things that's going on here by excluding  
7 women from VMI is the message that women cannot compete in  
8 an --

9 QUESTION: I thought you said they could do it  
10 in a separate institution. I thought you said before if  
11 they had a fully adversative experience in a totally  
12 separate institution, that would be okay.

13 MR. BENDER: If, as Justice Souter says, it  
14 doesn't express a State notion of inferiority of women,  
15 and I think that, coupled with the history of VMI, that  
16 men have developed this adversative method, to then say  
17 that women are not going to be permitted to show that they  
18 can succeed in that same environ -- in thinking about this  
19 case, Justice Scalia --

20 QUESTION: What is your basis for saying that  
21 the committee that set up this alternative institution,  
22 VWIL, decided not to have the same adversative method that  
23 VMI has because it thought women couldn't handle it, as  
24 opposed to the fact, which is what they said, that they  
25 thought not enough women would be interested in it?

1 among the MR. BENDER: They said that it would not be  
2 appropriate -- the graduates of that school -- and it was a  
3 place the QUESTION: Which is not at all denigrating. It  
4 shows to my mind that they're pretty smart.  
5 MR. BENDER: The planning documents -- as became  
6 (Laughter.)  
7 MR. BENDER: -- says that it's not appropriate  
8 for most women. Our point is not -- we don't quarrel  
9 with, because I think it's unknowable, whether it's  
10 appropriate for most women or not most women. Our point  
11 is that it is inappropriate to say to a particular woman  
12 who says I want that training, you can't have it solely  
13 because you're a woman.  
14 In thinking about this case, Justice Scalia,  
15 I've tried to relate it, as we're all trying to relate it  
16 to our own situations and things we're familiar with.  
17 I've tried to relate it to something that I've had some  
18 experience with, which is legal education.  
19 And I thought, what if a State set up a State  
20 law school in 1839, all for men, because at that time only  
21 men could be lawyers, and over 150 years it developed an  
22 extremely adversative method of legal education, the  
23 toughest kind of Socratic teaching, tremendous time  
24 pressures, tremendous pressures in exams, tremendous  
25 combativeness by the faculty, tremendous competitiveness

1 among the students, and developed a reputation for that.

2 And the graduates of that school -- and it was a  
3 place that was known as hard to succeed at, and a third or  
4 so of the people flunked out in the first year, and the  
5 graduates of that school who survived that process became  
6 known as expert leading lawyers and judges in that State  
7 and Nationwide.

8 And then as women came into the legal profession  
9 and started to apply to the school, to ask it to change  
10 its admission policy, the school made a judgment that most  
11 women really wouldn't be comfortable in this environment,  
12 and the faculty would have trouble cross-examining them in  
13 the same way they cross-examine women, and other students  
14 would have difficulty relating to them in the same  
15 competitive way, and so it's better not to let women into  
16 the school.

17 What we'll do is, we'll set up a new women's law  
18 school, and it won't have the tough Socratic method, it  
19 will have a much warmer, a much more embracing  
20 environment, and it won't have large classes with a lot of  
21 pressure, it will have seminars, and it won't have tough  
22 exams, it will have papers, and things like that --

23 (Laughter.)

24 MR. BENDER: -- and every woman has to go to  
25 that law school, and no man can, and no woman can go to



1 the old law school. I think we all understand that that  
2 is not by any means equal treatment of women with regard  
3 to their access to the legal profession.

4 QUESTION: It depends on whether, in fact, those  
5 findings that the law school would be destroyed, that  
6 its -- in the hypothetical you pose, those findings are  
7 obviously absurd. Those findings are not absurd in the  
8 context of VMI.

9 MR. BENDER: I disagree with that.

10 QUESTION: That it would destroy the nature of  
11 the institution.

12 MR. BENDER: We disagree with that, and I'd like  
13 to turn to that if possible. I think the principal basis  
14 for the State's and VMI's assertion that it would destroy  
15 VMI to permit women to come in is the finding which we  
16 have mentioned before that the adversative method is  
17 unsuitable to women, and therefore we couldn't continue to  
18 use the adversative method at VMI.

19 QUESTION: No, Mr. Bender, I think the toughest  
20 finding is the one that says if you allow women in, you  
21 won't be able to have the same success with the  
22 adversative method, and therefore women can't get what  
23 they seek. That's the thing that was the hang up for the  
24 court of appeals.

25 MR. BENDER: I don't think you can say that no

1 woman will be successful with the adversative --

2 QUESTION: No, it isn't whether it will be  
3 successful. The point of the finding that the -- I'm  
4 wondering if you agree with the court of appeals  
5 construction of the district court finding that, in  
6 concluding if they were to require the admission of women,  
7 so forth and so on, the very opportunity they sought,  
8 because it would not be available to them because the  
9 characteristics of the institution would be different, and  
10 what's your response to that finding?

11 MR. BENDER: My response is the characteristics  
12 of the institution would not have to be different if women  
13 were admitted.

14 QUESTION: Are you saying, then, that the court  
15 of appeals misconstrued the district court's findings, or  
16 that the district court's findings were clearly erroneous?

17 MR. BENDER: They are clearly erroneous insofar  
18 as they have made a decision that it would be impossible  
19 to carry on the adversative method with women in the  
20 institution. I think the reason they're clearly erroneous  
21 is because that finding, it can only be based upon an  
22 overgeneralization that women would not be able to deal  
23 with it --

24 QUESTION: Mr. Bender --

25 MR. BENDER: -- or that the men would have such

1 respect for women that they wouldn't do that. I don't  
2 think -- I don't think that a State is entitled to --

3 QUESTION: Mr. Bender, one brief -- the women in  
4 the military made a point that I didn't notice the  
5 Government making, and I'm wondering what your position is  
6 on it, and that concentration was on the men, not the  
7 women, and the point was that if women are to be leaders  
8 in life and in the military, then men have got to become  
9 accustomed to taking commands from women, and men won't  
10 become accustomed to that if women aren't let in.

11 MR. BENDER: And I think that's true not only in  
12 the military but it's true in the professions, it's true  
13 in corporate leadership.

14 I don't think, Justice Scalia, that --

15 QUESTION: You can't have any male schools, I  
16 guess, because -- right?

17 MR. BENDER: I think you can have male schools.  
18 I don't think you can have male schools that are  
19 fundamentally different in their educational approach --

20 QUESTION: Well, Mr. --

21 MR. BENDER: -- that only males can go to.

22 QUESTION: Mr. Bender, does the Government's  
23 case turn on the degree of modification or change that the  
24 admission of women would make to this adversative method,  
25 or does the Government's case essentially turn on the --

1 on a more complex analysis, and that is the degree to  
2 which the present adversative method can be said to be  
3 essential to some different kind of leadership training  
4 than is produced in, say, West Point or Annapolis, that  
5 don't have these things?

6 Because I was assuming, and I guess I'm handing  
7 you something, and maybe you will not want it, but I was  
8 assuming that even if we say, yes, the adversative method  
9 is going to be modified in some obvious respects if women  
10 come in, that that's not the end of the issue. The issue  
11 is, does that destroy the capacity of VMI to produce a  
12 distinctive kind of leader that nobody else is producing  
13 by another method? Is that latter way the way you look at  
14 it?

15 MR. BENDER: We -- yes. We look at it both  
16 ways.

17 I don't think you can assume that the  
18 adversative method would have to be changed, but even if  
19 you assume that the adversative method would have to be  
20 changed, unless the adversative method is essential to  
21 what the ultimate objective of the institution is,  
22 producing citizen soldiers, then the State has to make  
23 that change in the adversative method in order to  
24 accommodate women in that citizen soldier program.

25 I'd like to reserve the rest of my time.



1 QUESTION: Very well, Mr. Bender.

2 Mr. Olson, we'll hear from you.

3 ORAL ARGUMENT OF THEODORE R. OLSON

4 ON BEHALF OF VIRGINIA, ET AL.

5 MR. OLSON: Mr. Chief Justice, and may it please  
6 the Court:

7 Although the Government has tried virtually  
8 everything in its power to deny it, this case involves the  
9 inescapable central question of whether the States can  
10 support single sex education. While 98 percent of  
11 Virginia's higher educational resources go into  
12 coeducation, educators are virtually united, both the  
13 Government's experts and the experts for the respondents,  
14 that many young men and young women significantly benefit  
15 from a single sex education.

16 QUESTION: Mr. Olson, may I ask you right there  
17 a question that has troubled me right along about this  
18 argument? I assume there are all sorts of people who  
19 would like single sex education but who would not like to  
20 go through the adversative method.

21 MR. OLSON: Yes.

22 QUESTION: What does Virginia do for them?

23 MR. OLSON: Well, what Virginia has done is  
24 devote 98 percent of its educational resources to  
25 single -- to coeducation, and it's created two single sex

1 education programs --

2 QUESTION: But what does it do for the male who  
3 wants to go to an all-male school but not VMI?

4 MR. OLSON: Well, the problem, Justice Stevens,  
5 is that you cannot create a school without an adequate  
6 student body, and resources are limited, and the  
7 Government's --

8 QUESTION: Are you then saying there are fewer  
9 males who want single sex education -- most of those would  
10 like the VMI program rather than a less --

11 MR. OLSON: What I'm saying is, Virginia has  
12 allocated a certain amount of its scarce educational  
13 resources to single sex education. It has turned to  
14 experts in education --

15 QUESTION: Yes, but if most people who want  
16 single sex education don't want VMI, it's discriminating  
17 against them.

18 MR. OLSON: I think that what the judge --  
19 unless -- as long as the State is going to be permitted to  
20 have single sex education at all, then it must turn over  
21 to experts in education the best method, to divine the  
22 best method that would succeed for the young men or the  
23 young women that seek out and would benefit from single  
24 sex education. That is what Virginia has done.

25 This system that VMI has developed works well

1 for young men. The experts --

2 QUESTION: It doesn't help the young man who  
3 doesn't want the adversative method at all.

4 MR. OLSON: That's correct.

5 QUESTION: And I would assume that most men who  
6 want single sex education don't want the rigorous  
7 training.

8 MR. OLSON: Well, I -- the marketplace in part  
9 comes into play here, and the fact that resources are  
10 limited. Virginia could not create a single sex  
11 educational school for young men that wanted an  
12 adversative system and a single sex education for young  
13 men who wanted a less than a co -- adversative system.

14 QUESTION: But Mr. Olson, didn't --

15 QUESTION: Why not?

16 QUESTION: Wasn't that what Virginia in fact had  
17 until 1972? It had the Charlottesville facility virtually  
18 reserved to men. The curiosity is that you are defending  
19 single sex education when Virginia itself abandoned single  
20 sex education in all schools but one.

21 MR. OLSON: The -- there were a number of  
22 women's only public schools in Virginia that chose  
23 themselves to go to coeducation because of the demands  
24 that occurred and that the trends that were away in the  
25 seventies --

1 QUESTION: Demands from whom?

2 MR. OLSON: The trends that were away from  
3 single sex education. The fact is that a growing body of  
4 experts throughout the country are -- continue to develop  
5 the belief that single sex education is valuable for some  
6 young people.

7 QUESTION: But Mr. Olson --

8 MR. OLSON: There's no stereotypes.

9 QUESTION: We get back to the posture of this  
10 case, and one issue we have to decide is whether Virginia  
11 can provide single sex education to just one sex, to just  
12 men. That's one of these cases, isn't it?

13 MR. OLSON: It -- well --

14 QUESTION: And you want to defend that.

15 MR. OLSON: Well --

16 QUESTION: You want to say it is not a violation  
17 of the Constitution to provide a single sex education just  
18 for men.

19 MR. OLSON: It was the posture --

20 QUESTION: Well, isn't that right?

21 MR. OLSON: It is the posture of this --

22 QUESTION: I mean, that's one of the cases we  
23 have before us.

24 MR. OLSON: That's correct, Justice O'Connor,  
25 and the point at which time that liability decision comes



1 up is a point at which Virginia is providing public  
2 resources, pursuant to two constitutional amendments, to  
3 private schools.

4 Five private schools in Virginia provide single  
5 sex education for women, and the State of Virginia is  
6 supporting those programs at that time, and there is not a  
7 sufficient demand at that point in time to create a  
8 separate institution.

9 Now, Virginia is nonetheless, despite the fact  
10 that it feels that that program is defensible, because  
11 when the States choose to develop and finance a program  
12 that is for the benefit of people of one gender, it  
13 doesn't necessarily have to create the exact program for  
14 the other gender if there isn't a sufficient demand or  
15 need for it.

16 QUESTION: Well, I guess that gets us into the  
17 second question, which is remedy.

18 MR. OLSON: Yes, it does, and there are  
19 essentially three choices here. What Virginia has chosen  
20 to do is to provide single sex education designed by  
21 experts to serve the people who need and want and would  
22 benefit from single sex --

23 QUESTION: Mr. Olson, just to clarify, Virginia  
24 didn't choose to do that, because you are, as Justice  
25 O'Connor pointed out, defending keeping things just as

1 they were. You're defending the judgment that you wanted  
2 to get, which is VMI for all males, and no public program  
3 for women.

4 MR. OLSON: But at the time of that liability  
5 decision, Virginia had a choice to make. Virginia made  
6 the choice to create a remedy in response to the liability  
7 decision, and then Virginia had three choices. As I --

8 QUESTION: So are we -- is that first judge --  
9 your brief, the cross-appeal, do we take that as being  
10 moot?

11 MR. OLSON: No, it is not moot. We are  
12 defending that position. What we are saying, however,  
13 because Justice O'Connor has asked the question, an  
14 entirely appropriate question, suppose you are not  
15 successful on that point, and suppose that the court of  
16 appeals was correct and that there must be a remedy, what  
17 should that remedy be?

18 We are saying that the State of Virginia, or the  
19 Commonwealth of Virginia had three choices. It could  
20 eliminate single sex education at all, altogether, by  
21 allowing men -- by allowing women into VMI, and I will  
22 come back to this point, but that would change the system  
23 at VMI, and there wouldn't be single sex education. In  
24 other words, it would deprive both men and women of the  
25 benefit of single sex education.

1           Or it could have created an absolutely identical  
2 institution like VMI or at VWIL or at some other place,  
3 maybe even at VMI, but the fact is that the -- we -- the  
4 State of Virginia put that decision in the hands of  
5 experts, how best to design the program. The experts --

6           QUESTION: But why are those the only choices?  
7 One choice might be -- I think you said in your brief that  
8 the State is committed to VWIL and that you will have  
9 that -- even if you emerge a total winner you're going to  
10 still defend that program.

11           MR. OLSON: Yes.

12           QUESTION: You could have that program at Mary  
13 Baldwin. Mary Baldwin will continue to exist even if VMI  
14 either goes private or admits women. You could still  
15 support the program that you've just now instituted.

16           MR. OLSON: Well, if VMI went private, then the  
17 State of Virginia would no longer be supporting through  
18 its public resources in the same way single sex education  
19 for young men.

20           If single sex education is only available  
21 through private schools, it's only available to the  
22 wealthy, the people who can afford it, and there are  
23 findings in the record here that people that benefit the  
24 most from and derive the most benefit from single sex  
25 education are people that are not in the upper income

1 strata.

2 QUESTION: But couldn't you continue with VWIL  
3 no matter what? I mean in the interest of diversity, in  
4 creating citizen-soldiers, leaders --

5 MR. OLSON: If --

6 QUESTION: -- creating more women who have that  
7 capacity, couldn't you continue VWIL?

8 MR. OLSON: You could continue it with -- well,  
9 I submit that if this Court decides that the VMI program  
10 is unconstitutional because it's unique and has its own  
11 tradition and faculty and that sort of thing, then a  
12 single sex program that denies men the opportunity to  
13 participate in that program will be held unconstitutional  
14 on exactly the same grounds.

15 What Virginia has attempted to do is if it has  
16 accepted --

17 QUESTION: I don't understand that, because you  
18 set yourself at a -- you're assisting a program at a  
19 private school for the reason of promoting diversity, is  
20 that not so?

21 MR. OLSON: The effort is, by Virginia is to  
22 promote diversity by creating opportunities in a very,  
23 very large coeducational system for people of both sexes  
24 to make the choice of single sex education.

25 QUESTION: Well, Mr. Olson, when this lawsuit



1 was brought Virginia funded VMI. Did it fund any single  
2 sex school for women?

3 MR. OLSON: Yes. Well, it provided tuition  
4 assistance grants to the five single sex colleges for  
5 women.

6 QUESTION: And what percent of a student's  
7 expenses in that case would be covered?

8 MR. OLSON: I'm not sure that the record is  
9 completely clear, but the single sex institutions for  
10 women in Virginia derive something -- I believe the record  
11 indicates something between 5 and 10 percent of their  
12 resources from either the Federal Government or the State  
13 government, plus there's the factor that the Federal  
14 Government and the State government provide tax  
15 deductions --

16 QUESTION: Well, I know, but what I'm trying to  
17 get at is, is the assistance that is provided by Virginia  
18 to these private schools comparable in dollar amount to  
19 the assistance that is provided to VMI?

20 MR. OLSON: It was smaller in total amounts.  
21 The amount coming from the State of Virginia itself, if  
22 you eliminate Federal assistance --

23 QUESTION: Yes.

24 MR. OLSON: -- that was going to those programs,  
25 it was smaller than the amount by which Virginia supported

1 VMI.

2 VMI on an annual basis gets, as Mr. Bender  
3 pointed out, about 9 -- he said 10, but I believe the  
4 figure is closer to \$9 million, which is about 30 percent  
5 of VMI's revenues, resources per year. The bulk of VMI's  
6 resources per year on an operating basis come from  
7 students in the form of tuition, or from other sources.  
8 Thirty percent comes from the Commonwealth of Virginia.

9 Our point, with respect to the remedy, and I  
10 would --

11 QUESTION: May I ask you one more question about  
12 liability? I think this is implicit in what you're  
13 saying, but I don't want to make a mistake.

14 I understand that you're defending VMI's  
15 position on liability essentially by arguing the basis --  
16 by arguing that the combination of single sex education  
17 and adversative method is sufficiently valuable to be the  
18 State interest, the important State interest which  
19 justifies what it's doing.

20 I do not understand you to be arguing that this  
21 combination of single sex education and adversative method  
22 is somehow essential to the accomplishment of the broader  
23 objective of producing a distinctive kind of leader who  
24 can be distinguished, for example, from the sort of  
25 leaders that West Point produces and Annapolis produces.

1 Am I right that your justification on liability  
2 ultimately is, this is a good way to educate people, as  
3 distinct from, we are producing a kind of leader who could  
4 not otherwise be produced?

5 MR. OLSON: I -- if I understand your question  
6 correctly, I agree with you, and let me restate it as I  
7 understand it.

8 What Virginia has decided, and the experts, both  
9 the Government's experts and the private experts agree,  
10 that single sex education is valuable for some young  
11 people of both sexes, and there's no stereotypes  
12 whatsoever made in that conclusion.

13 And so then Virginia has decided that as a  
14 matter of education -- and this Court has said that the  
15 most important function that a State can perform is  
16 educating its young citizens. Now, as a matter of  
17 educating its young citizens and performing that important  
18 governmental function, single sex education should be an  
19 important part of that.

20 Virginia has turned the creation, the design,  
21 and the operation of those programs over to the people who  
22 have spent their entire life deciding how best to educate  
23 young people, and --

24 QUESTION: But Mr. Olson, how do you factor in  
25 title IX? As I understand it, Virginia, having abandoned

1 all of its public women's colleges for whatever reason,  
2 cannot now set one up. My understanding is that title IX  
3 grandparents schools like VMI, but doesn't permit the  
4 institution of new single sex schools. Is that wrong?

5 MR. OLSON: I don't think that that has been  
6 definitively decided, and I can't cite the case for you,  
7 Justice Ginsburg, but I believe that the one case that has  
8 dealt with the issue has suggested that a new system that  
9 is -- there's a single sex system from its beginning would  
10 meet the definition in 20 U.S.C. 1681(5), that the words  
11 traditionally and continually from its inception may be  
12 interpreted to apply to a new institution, but that  
13 question has not been decided by the courts.

14 QUESTION: I thought that the text of the  
15 statute says something about if you've been that way from  
16 the beginning --

17 MR. OLSON: It --

18 QUESTION: -- you can continue, but that new  
19 schools cannot --

20 MR. OLSON: The words of the statute say, that  
21 traditionally and continually from its establishment has  
22 been. Now, the VWIL program will be continuously and from  
23 its establishment a single sex institution. The only --

24 QUESTION: Was there no interpretation of that  
25 by the Department of Education? I don't have the text of



1 the statute in front of me.

2 MR. OLSON: I'm not aware of any. I am -- I  
3 looked into that question in preparation for the argument  
4 and I read a case in which a -- I don't think it was a  
5 college program, but a high school program or something of  
6 that sort -- maybe it was a college program -- was  
7 created, and that was the interpretation. I know of  
8 nothing inconsistent with that.

9 QUESTION: Mr. --

10 QUESTION: There are guidelines under title IX.  
11 It's not covered in the guidelines, is it?

12 MR. OLSON: I can't answer that.

13 QUESTION: Was title IX involved in this case,  
14 Mr. Olson?

15 MR. OLSON: No. Well, I don't -- it wasn't --  
16 this case was a constitutional case, and title IX has not  
17 been involved in this case.

18 QUESTION: I was just curious whether by statute  
19 Virginia is impeded from setting up a public college.

20 MR. OLSON: We believe that Virginia is not.

21 QUESTION: Mr. Olson, with respect to the value  
22 of single sex education, are there ways to identify in  
23 advance the students from a broad mass of 17-year-olds who  
24 would benefit from a single sex education from those who  
25 would not?

1 MR. OLSON: I don't know the answer to that  
2 question, Justice Souter. I suspect that that's one of  
3 those decisions that are made by -- there are -- it's a  
4 self-selective process between --

5 QUESTION: I should say, there's nothing but  
6 self-selection --

7 MR. OLSON: I -- I --

8 QUESTION: I take it, going on here to match the  
9 students with the theory?

10 MR. OLSON: Based upon what I know, those tests  
11 that they give people to decide whether you might do best  
12 in that sort of situation usually are not as successful  
13 predictors as the students and the parents themselves.

14 Our point with respect to the methodology, if I  
15 can continue to answer your question, is that the  
16 educational experts have not made decisions that men can't  
17 do this or women can't do that, or women won't be any more  
18 successful or any less successful in one type of  
19 institution or another, but that the experts know how best  
20 to educate young people.

21 The experts that set up the VWIL program said we  
22 could have created an institution that looked very much  
23 like VMI. We did not feel it would be right to design a  
24 program based on litigation considerations because we  
25 know -- and this is in the record -- we know how best to

1 design a program for young people. If we're going to have  
2 a single sex educational --

3 QUESTION: Yes, but Mr. Olson, that didn't go to  
4 academics, because there's a square finding that the  
5 academic program would not be affected by --

6 MR. OLSON: The academic program itself is --  
7 would not be affected, and in fact the academic --

8 QUESTION: It's only the adversity and all  
9 this --

10 MR. OLSON: It's the --

11 QUESTION: -- special business.

12 MR. OLSON: It's the environment in which the  
13 students learn.

14 QUESTION: Right.

15 MR. OLSON: And the -- in fact --

16 QUESTION: But that doesn't go to academic  
17 achievement. It only goes to the --

18 MR. OLSON: Well --

19 QUESTION: -- special ethos at VMI.

20 MR. OLSON: But it results in academic  
21 achievement, but you're correct, the --

22 QUESTION: Well, but their finding is that on  
23 academics it makes no difference. There's a square  
24 finding on that.

25 MR. OLSON: Well, there's a finding in the

1 record, and I can't give you the page number, to the  
2 effect that people succeed better in a single sex  
3 educational program across the board, both young men and  
4 young women. They do better, they achieve more, including  
5 the academics --

6 QUESTION: Academically or otherwise?

7 MR. OLSON: Academically and otherwise.

8 QUESTION: But the finding on page 212a of the  
9 appendix to the cert petition says squarely the presence  
10 of women in the institute would not alter the program  
11 academically.

12 MR. OLSON: I believe, Justice Stevens, that the  
13 evidence and the findings that are on page 168 of the  
14 appendix, 167, 176, pages 225, page 125 --

15 QUESTION: You've given us four different pages.

16 MR. OLSON: I apologize.

17 QUESTION: Which one do you want us to read?

18 MR. OLSON: Well --

19 (Laughter.)

20 MR. OLSON: Let me start with page 176.

21 QUESTION: Well, I gather your point is that it  
22 wouldn't alter the program academically, but it would  
23 alter the participant's capacity to benefit from the  
24 program.

25 MR. OLSON: Well, I agree with that, and I



1 believe that that is implicit. I'm not sure that if you  
2 have a single sex education that you're going to have a  
3 higher distribution of A's, and I don't -- as opposed to  
4 B's, C's, or D's. What I'm saying is that the experts,  
5 including the Government experts, agreed that the outcome,  
6 the student learns better, becomes more successful, and I  
7 believe, Justice Stevens --

8 QUESTION: Mr. Olson, how many States today fund  
9 single sex education programs at the college and/or high  
10 school level?

11 MR. OLSON: There are only two single sex male  
12 college -- institutions remaining in the United States,  
13 and that's South Carolina --

14 QUESTION: The Citadel, in South Carolina, and  
15 VMI?

16 MR. OLSON: That's correct.

17 QUESTION: And they're the only two remaining?

18 MR. OLSON: And there are programs in New Jersey  
19 and in Texas for women that are single sex, or have been  
20 single sex programs. It's my understanding that the  
21 program at the University of Texas, the Texas program, has  
22 just started to change or is changing and becoming a  
23 coeducational program.

24 Many States do support some level of single sex  
25 education through --

1 QUESTION: Is it possible for a State to provide  
2 tuition funds to students on a per capita basis for higher  
3 education and say, now, you take the money and go where  
4 you want to go?

5 MR. OLSON: Well, I suspect under the Norwood  
6 case decided by this Court, if this Court were to  
7 determine that single sex education, if supported by a  
8 State completely, violated the Equal Protection Clause of  
9 the Constitution, the -- that it would be similarly  
10 unconstitutional for the State to support indirectly  
11 through tuition grants or assistance with books, and  
12 possibly even tax deduction --

13 QUESTION: Although under the religion clauses I  
14 don't think the Court has held, has it, that a State is  
15 prohibited from providing aid on a per capita basis of  
16 some kind?

17 MR. OLSON: I believe that you have that unusual  
18 intersection between the First Amendment, Establishment,  
19 and Free Exercise Clauses that may make a difference  
20 there. The -- if -- there -- with -- if there is a  
21 finding by this Court that single sex education violates  
22 the Equal Protection Clause of the United States, the  
23 Norwood case seems to stand, to me, for the proposition  
24 that --

25 QUESTION: Well, I mean, how would the Court

1 decide that? We would only decide whether, in this case,  
2 on these facts, at the time this case came up, whether  
3 Virginia had violated the Equal Protection Clause.

4 MR. OLSON: Well, but my point, and I repeat  
5 this point, that if Virginia cannot support single sex  
6 education in this context it's difficult for me to  
7 understand how any State can provide support for single  
8 sex education, because Virginia has done it --

9 QUESTION: Mr. Olson, if we think --  
10 concentrating on Virginia, I was struck by the resemblance  
11 of some aspects of this case to the case against the  
12 University of Virginia Charlottesville.

13 That never came to this Court because it  
14 settled, but the three-judge court there did make two  
15 points, and one was that the University of Charlottesville  
16 couldn't continue all male because there were educational  
17 opportunities, opportunities for education at that  
18 facility uniquely that were not available to women in the  
19 women's colleges and elsewhere.

20 And the second point that was made by that  
21 three-judge court in that litigation was that there  
22 exists, because of history, a prestige factor at the  
23 Charlottesville facility that was not matched by the other  
24 institutions.

25 MR. OLSON: And if I -- if I may answer the

1     latter part of that question first, one would hope that if  
2     single sex education can exist in this country and receive  
3     public support, that every single sex institution will  
4     have prestige, it will be unique. Yes, VMI is unique and  
5     it does have prestige, but so does the Mary Baldwin  
6     program, and --

7             QUESTION: Which is a private school. You  
8     mentioned in public colleges two women's colleges, the one  
9     in Texas, the one in New Jersey, if it's Douglas, is part  
10    of a -- close to the Rutger's campus, with total cross-  
11    registration.

12            Any male can take a course in Douglas, as I  
13    understand it, and any woman can take a course at  
14    Rutger's.

15            MR. OLSON: Our point, Justice Ginsburg, is if  
16    single sex education at the college level can exist, one  
17    would hope that it would be very good education, that a  
18    single sex institution for boys or young men here would be  
19    a distinguished, successful place that anybody would want  
20    to go, and the same would be true of a program like VWIL,  
21    that it would be distinguished, unique.

22            Even if -- and I come back to this, but that if  
23    you're going --

24            QUESTION: But this is all imaginary. What we  
25    have here and now is, we have two all male public



1 colleges, they're both military schools. We have nothing  
2 comparable for women, with the exception of this program  
3 just started up in response to a court decree.

4 MR. OLSON: And this program, the courts below  
5 have examined this program and found that the goals are  
6 the same and that the outcome will be the same, and that  
7 this will be a successful program. Hopefully this program  
8 will be so successful and continue to be so successful --  
9 and it already is unique, and it does deny the opportunity  
10 for admission to young men. If we're --

11 QUESTION: Well, Mr. Olson -- Mr. Olson, I'd  
12 like, when we're talking about goals, to get back to the  
13 question Justice Souter asked, because I was very  
14 interested in your answer. I'm not sure you were able to  
15 complete it.

16 Does the adversative method produce a different  
17 product than the West Point method? I think the  
18 Government is in effect trying to say, don't worry about  
19 changing VMI because the product will be very good. It  
20 will be like West Point in Annapolis, and those are  
21 marvelous products. Is there something in the adversative  
22 method that produces a different quality leader?

23 MR. OLSON: Let me put it this way --

24 QUESTION: And I think that was the thrust of  
25 his question, and I wasn't sure what the answer --

1 MR. OLSON: And I'd like to answer that  
2 question. It's a very good question. I think that the  
3 answer to that question is best answered this way, is that  
4 because we are each different, we each respond to  
5 different educational methods and different educational  
6 stimuli.

7 The West Point program is designed to create  
8 officers of the United States. The VMI program is  
9 designed to create leaders and adults who can operate in  
10 the civilian or in the military world, who have a sense of  
11 responsibility, the same goals, in other words, that the  
12 VWIL program is set up to do.

13 The fact is that some young people do very well  
14 in a coeducational program, and come out the other end to  
15 be successful. Some young men and some young women aren't  
16 successful in coeducational programs. They are  
17 distracted. There's a million things that can go on in  
18 those programs --

19 QUESTION: Mr. Olson, I think you're saying not  
20 that there is a distinctive difference in the product, but  
21 that there is a distinctive difference in the method of  
22 education which is suited to the people who go there, and  
23 that really does not answer the question.

24 MR. OLSON: I -- well, I think that -- I am  
25 saying that, and if I'm not answering the question, I'm

1 not understanding the question.

2 QUESTION: Let me put the question, or subsume  
3 the question in something else.

4 It is -- isn't it true that the district court  
5 judge never made any finding that there was a difference  
6 in the kind of leadership product, if you want to use that  
7 term, that VMI produces from what West Point or Annapolis  
8 or the other military schools --

9 MR. OLSON: That's correct, but it did make a  
10 finding that this system and this methodology works for  
11 the people that go to that school, and that --

12 QUESTION: Okay, which goes to the point which  
13 you made quite candidly, that you are resting your case  
14 essentially on the position that this is a valuable method  
15 of education because it serves a distinct group of people.  
16 You are not resting your case on the proposition that it  
17 is necessary to produce a distinctive kind of leader who  
18 is produced by it and can only be produced by it.

19 MR. OLSON: I agree with you, yes.

20 QUESTION: Well then, why couldn't you say  
21 exactly the same thing about ethnic or racial or any other  
22 kind of -- religious, I mean, somebody could have a  
23 school, and they say, we're keeping a religious group,  
24 ethnic group or whatever, out of our public school because  
25 we have a certain unique kind of education that focuses on

1 certain curricula in a certain way, and once they're in  
2 here they'll change the nature of that curricula because  
3 they won't have the same backgrounds, et cetera, and  
4 therefore we will use this unique kind of curriculum,  
5 method, et cetera, that we had in the past, and there  
6 would be some truth to that.

7 I mean, don't we have to look at the importance  
8 of this thing? It may be you don't have exactly the same  
9 rat line. Maybe you don't have exactly the same hazing  
10 type, but not complete hazing activity. That may be true  
11 with any ethnic group coming into a school, any religious  
12 group, any kind of a group.

13 Isn't the answer to that, so what? You'd have  
14 to show that it's important enough to maintain this  
15 adversative process, and what is it in this record that  
16 shows it's important enough to maintain that --

17 MR. OLSON: The evidence --

18 QUESTION: -- to overcome the answer to a woman  
19 who says I want to go there? I want to go there. I want  
20 this.

21 MR. OLSON: The evidence is overwhelming that  
22 that system would not exist in the company of co --

23 QUESTION: Well, maybe it wouldn't. Maybe you  
24 wouldn't have precisely the same system with ethnic  
25 groups, racial groups, et cetera, but my question is, what



1 is it that's so important about this really hard to grasp  
2 adversative thing that warrants saying --

3 (Laughter.)

4 QUESTION: I don't mean to be facetious about  
5 it, either. I want -- I'm serious about it. What is it  
6 that is so important about it that enables you to say to a  
7 young woman I'm very sorry, even though you want to go  
8 there and you want this result, you can't?

9 MR. OLSON: The answer -- the experts testified,  
10 and people who are professional educators, who have spent  
11 their life in education, saying that the system could not  
12 exist. It would fundamentally have to be changed.

13 QUESTION: I take that as a given. What I'm  
14 asking is, what's so important about that particular rat  
15 line, et cetera?

16 MR. OLSON: Because --

17 QUESTION: You could have the same -- are you  
18 getting my point?

19 MR. OLSON: Yes. The answer is that it works,  
20 Justice Breyer, in a single sex environment for young men.

21 Now, given the opportunity to design something  
22 exactly identical to that, the people who spent their life  
23 in education designing a system for young women, and the  
24 Government experts really don't disagree with that, say we  
25 know what would work, we would know what would attract

1 sufficient numbers of people --

2 QUESTION: And even a woman who says, I  
3 understand that, but for me, she says, for me, I think it  
4 would work better at VMI, and it may be true as to her,  
5 irrespective of the majority, mightn't it?

6 MR. OLSON: A choice would have to be made,  
7 since the system would fundamentally have to be altered in  
8 the presence of coeducation. It will not work. It may  
9 work well with just women. It may work well with just  
10 men, and there's no stereotypes associated with that.

11 QUESTION: No, but you say --

12 QUESTION: But if it --

13 QUESTION: -- there's no stereotype, but isn't  
14 it the case, as Justice Breyer said, that if you are going  
15 to justify your system by its distinctness, then you  
16 always have a built-in justification, because you can say,  
17 if you change it, it's no longer distinct, the value is  
18 gone, and that's why, it seems to me, under middle tier  
19 scrutiny, you've got to say the distinctness is worth it  
20 for some other reason.

21 MR. OLSON: The distinction -- the  
22 distinctiveness is worth it because young people educate  
23 differently and we must, in this society, find ways to  
24 educate them successfully, and we must develop systems,  
25 not a student body for each student, but systems that will

1 attract people, and according to the experts, not to the  
2 lawyers, work well for young people.

3 Now, that is worth it. That is an exceeding --  
4 this Court has said that is the most important  
5 governmental function for State and local governments.

6 QUESTION: The question is, wouldn't something  
7 else work almost as well without denying opportunity to  
8 anyone?

9 MR. OLSON: The experts across the board, and  
10 the Government did not deny this, that single sex  
11 education for substantial numbers of people work best, and  
12 the program --

13 QUESTION: And a lot of parents for many years  
14 have spent a lot of money to send young men to military  
15 schools who supposedly needed the discipline that military  
16 training provides without -- surely that's worth  
17 something.

18 MR. OLSON: That's absolutely correct.

19 QUESTION: It's a judgment of parents --

20 MR. OLSON: Because --

21 QUESTION: -- and of the State that establishes  
22 such institutions that it's worth something.

23 MR. OLSON: Unless we're all to be educated the  
24 same, and unless we abandon single sex education, we ought  
25 to allow those programs which work to be designed by

1 experts --

2 QUESTION: But there's one flaw in your  
3 presentation that troubles me. You haven't given the  
4 people, the women who go to the other school, the same  
5 adversative program that you say is essential --

6 MR. OLSON: Because the experts --

7 QUESTION: Yet you say there's a difference  
8 between men and women.

9 MR. OLSON: It works for -- experts tell us that  
10 young men who want a single sex education succeed in that  
11 environment, and the experts that designed VWIL say that  
12 that program will produce the same results.

13 QUESTION: Thank you, Mr. Olson.

14 Mr. Bender, you have 2 minutes remaining.

15 REBUTTAL ARGUMENT OF PAUL BENDER

16 ON BEHALF OF THE UNITED STATES.

17 QUESTION: I've a very quick question, which is,  
18 the main point, single sex education will disappear if we  
19 adopt your brief word for word. Suppose you decided that  
20 you needed single sex academies in inner cities. If we  
21 adopt your brief word for word, have we decided that case?

22 MR. BENDER: No, not at all.

23 First of all, of course, you haven't decided the  
24 private single sex education for reasons that I think are  
25 clear, but even with regard to public single sex --



1 QUESTION: Wait, only private single sex  
2 education that gets any assistance from the Government.

3 MR. BENDER: No, I don't think that's true,  
4 Justice Scalia. The Court State action cases since  
5 Norwood I think have made very clear that simply giving --

6 QUESTION: Can States give money to segregated  
7 schools, racially segregated schools, for example?

8 MR. BENDER: Can States give money --

9 QUESTION: Yes.

10 MR. BENDER: -- to racially segregated schools?  
11 Under this Court's State action cases I think  
12 they can.

13 QUESTION: They can?

14 MR. BENDER: Norwood was a different situation.

15 QUESTION: That's the position of the Justice  
16 Department --

17 MR. BENDER: Norwood --

18 QUESTION: -- that States can provide funding to  
19 racially segregated schools?

20 MR. BENDER: It depends on the circumstances.  
21 In Norwood --

22 QUESTION: It depends on the circumstances.

23 MR. BENDER: Yes. In Norwood --

24 QUESTION: That's astounding.

25 MR. BENDER: It was a school system under a

1       desegregation decree.

2                   (Laughter.)

3               MR. BENDER:   Coming back to your question,  
4       Justice Breyer, if I may, certainly a compensatory program  
5       that is -- has a compensatory reason to compensate for  
6       prior discrimination, for example, could be a single sex  
7       program that would be for only that gender because only  
8       that gender has a need for that, so at least in those two  
9       areas --

10              QUESTION:   No, but I would suppose you could  
11       go --

12              MR. BENDER:   -- you could have that.

13              QUESTION:   -- one step further.  I thought you  
14       could, consistently with your position, and that is, if  
15       you've got a school system in which everybody says the  
16       results are terrible for everybody, and the school system  
17       made a decision that in fact they would get better results  
18       for everybody if certain classes at certain levels were  
19       segregated by sex, all males schools and all female  
20       schools, you wouldn't start with this implication of  
21       inferiority, and I would suppose that that might be okay.

22              MR. BENDER:   That's also true, right.  That's, I  
23       think, the third part of the answer.

24              QUESTION:   You mean you can do it case-by-  
25       case --

1 MR. BENDER: Yes.

2 QUESTION: -- and by a lawsuit.

3 MR. BENDER: I think single sex education that a  
4 State proposes for single sex reasons, unlike this case,  
5 where this is done just to comply with a court decree, if  
6 a State proposes a single sex system, the issue then is,  
7 is it truly an equal system, and that would have to be  
8 decided.

9 Justice O'Connor, with regard to the remedial  
10 question you raised before, I just -- can I finish the  
11 sentence?

12 QUESTION: Yes.

13 MR. BENDER: That might be more difficult if it  
14 were voluntary. I think in the remedial context, there's  
15 a lot of problem with that kind of total separation unless  
16 it's necessary.

17 Thank you.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bender.  
19 The case is submitted.

20 (Whereupon, at 11:08 a.m., the case in the  
21 above-entitled matter was submitted.)  
22  
23  
24  
25