United States v. Virginia

Date
1996

Author
Ruth Bader Ginsburg

Vote
7–1 (Clarence Thomas took no part in the case)

Citation
518 U.S. 515

Significance
Held that the Virginia Military Institute's male-only admissions policy, even with its proposal for a comparable women's-only institute, was a violation of the Fourteenth Amendment's equal protection clause and therefore unconstitutional

Overview

The Virginia Military Institute (VMI), founded in 1839, was Virginia's only exclusively male undergraduate institution of higher learning and had enjoyed a long tradition as a training ground for military officers. The United States brought suit against VMI and the state of Virginia, arguing that the male-only admissions policy of the school was an unconstitutional violation of the Fourteenth Amendment's equal protection clause. Initially, the district court ruled in favor of VMI, but the Fourth Circuit Court of Appeals reversed the decision of the district court, finding VMI's admissions policy to be unconstitutional. In response, VMI proposed a solution: the creation of the Virginia Women's Institute for Leadership as a parallel program for women. After the district court affirmed the plan, the Fourth Circuit ruled that despite the difference in the prestige of the Women's Institute and VMI, the two would be "substantively comparable" in educational benefits. The United States disagreed and appealed to the Supreme Court, which ruled in *United States v. Virginia* that the VMI admissions policy was unconstitutional.

About the Author

Ruth Bader was born on March 15, 1933, in Brooklyn, New York. She graduated from Cornell University in 1954 and that year married Martin Ginsburg, a classmate. She enrolled at Harvard Law School, but after her husband found employment with a New York City law firm, she transferred to Columbia University, where she graduated tied for first in her class in 1959. That year she accepted a two-year clerkship for U.S. District Court Judge Edmund L. Palmieri in New York. After working on the Columbia Law School Project on International Procedure from 1961 to 1963, Ginsburg accepted a post as a law professor at Rutgers University, where she taught until 1972. She also served as volunteer counsel to the New Jersey chapter of the American Civil Liberties Union (ACLU). At the ACLU, Ginsburg litigated sex discrimination cases and cofounded the Women's Rights Project. Ironically, during her time at Rutgers she became pregnant with her son, James, and because she was not tenured, she concealed her pregnancy with oversized clothes. In 1972 Ginsburg accepted a position at Columbia University, the law school's first woman with the rank of full professor.

Justice Ruth Bader Ginsburg wrote the majority opinion.
(Library of Congress)

In 1980 President Jimmy Carter nominated Ginsburg as a justice on the U.S. Court of Appeals for the District of Columbia. Then, in 1993, President Bill Clinton nominated her to replace Justice Byron White on the U.S. Supreme Court. Ginsburg's reputation as a moderate on the U.S. Court of Appeals was helpful to her confirmation. In her years on the Supreme Court, her written decisions in numerous key cases made her a leading voice in the judicial branch for sex equality, thus expanding the rights of the American public, including both women and men.

Ginsburg was dogged in her determination to remain active on the Court in spite of numerous serious health problems, but ultimately those problems won out. She died on September 18, 2020, in Washington, D.C.

Explanation and Analysis of the Document

In this highly publicized 1996 case, Ginsburg, writing the majority opinion, had the opportunity to apply her knowledge and passion for gender equality to the postsecondary education context. This case involved a Fourteenth Amendment equal protection challenge by the United States to the Commonwealth of Virginia and the Virginia Military Institute (VMI), a public all-male military college. It was prompted by a complaint filed with the attorney general by a female high-school student seeking admission to VMI. After the district court ruled for VMI, the U.S. Court of Appeals for the Fourth Circuit reversed the decision and ordered the state of Virginia to remedy the constitutional violation. Although the district court then found the remedy to be constitutional, the case was appealed to the U.S. Supreme Court.

VMI is the only single-sex public institution of higher education in Virginia. Established in 1839, the school has the mission to create "citizen soldiers" and, as Ginsburg describes it, "to instill physical and mental discipline in its cadets and impart to them a strong moral code." Graduates of the school, Ginsburg writes, "leave VMI with heightened comprehension of their

capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course." VMI argued that this type of education, based on the English public school model and once common to military instruction, and which Ginsburg describes as "comparable in intensity to Marine Corps boot camp," was not suitable to a coeducational environment in general and specifically to female cadets.

Ginsburg notes, though, that the attributes needed to succeed in such an environment are not limited to males: "Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women." Nonetheless, Ginsburg goes on, "Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords." She notes that at the district court level, experts testified that if VMI admitted women, "the VMI ROTC [Reserve Officers' Training Corps] experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army."

VMI argued that a single-sex, all-male public college (the only one in Virginia) provided diversity to an otherwise coeducational Virginia system and served an important governmental interest. Nevertheless, the state of Virginia proposed a parallel program for women that Ginsburg asserts was akin to the all-Black colleges proposed by segregated southern universities in the 1940s and early 1950s in response to equal protection challenges. Virginia proposed the creation of the Virginia Women's Institute for Leadership, to be located at Mary Baldwin College, a private liberal arts school for women. The district court, treating VMI deferentially, found that Virginia's proposal satisfied the Constitution's equal protection requirement. The Fourth Circuit affirmed, applying the test of whether VMI and Virginia Women's Institute for Leadership students would receive "substantively comparable" benefits. The U.S. Supreme Court, disagreeing with the Fourth Circuit, held that the appropriate standard when a sex-based classification is used is, as Ginsburg states, "an exceedingly persuasive justification."

Ginsburg emphasizes that substantively speaking, the parallel program did not compare with that of VMI. She notes that the program's curriculum was limited in comparison with VMI's, adding that "while VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees." Further, Ginsburg points out that "Mary Baldwin's own endowment is about $19 million; VMI's is $131 million." In addition, Ginsburg notes that "the average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen." She quotes the dean of Mary Baldwin College, who testified that Mary Baldwin's faculty held "significantly fewer Ph.D.'s than the faculty at VMI," and that the faculty "receives significantly lower salaries."

Ginsburg argues that the proposal that female applicants to Virginia Women's Institute for Leadership would have a "substantively comparable" experience and degree was not supported by the numbers or by history. Virginia argued that VMI's all-male student body was an important source of diversity, for it gave the state's students an alternative type of institution to attend. Ginsburg, however, emphasizes that recent history undermines this argument, recalling that it was the standard until relatively recently to segregate women from male university students and that after decades of slow change, Virginia's most prestigious institution of higher education, the University of Virginia, introduced coeducation and in 1972 began to admit women on an equal basis with men.

Referring to precedent, Ginsburg cites *Reed v. Reed*, a 1971 case in which the Court struck down an Idaho law that said that males must be preferred to females where several equally entitled persons are claiming to administer a decedent's estate. She writes: "In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws." After *Reed*, she says, "the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."

Ginsburg notes that the heightened level of scrutiny used for Court review of gender classifications did not equate for all purposes with "classifications based on race or national origin." The Court, in decisions after

the *Reed* case, "has carefully inspected official action that closes a door or denies opportunity to women (or to men)." She notes too that the inherent differences between men and women "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." Exhibiting a nuanced approach, she concludes that the Court can use gender-based classifications to compensate women for economic inequities but not "to create or perpetuate the legal, social, and economic inferiority of women."

Ginsburg agrees with Virginia that "single-sex education affords pedagogical benefits to at least some students" and notes that those benefits are not contested in this case. She argues, though, that legal precedent requires that Virginia's reasons for using a gender-based classification not be accepted automatically but must be shown to be a "tenable justification" that describes "actual state purposes, not rationalizations for actions in fact differently grounded." She argues that on this important element of the law, Virginia's rationale for the benefits of single-sex education was not tenable and thus was discriminatory, in violation of the equal protection clause.

Ginsburg emphasizes that VMI "offers an educational opportunity no other Virginia institution provides, and the school's 'prestige'—associated with its success in developing 'citizen-soldiers'—is unequaled." But, she writes, "Virginia has closed this facility to its daughters and, instead, has devised for them a 'parallel program'" that fails to approach the standards set by VMI. Thus, she concludes, "Women seeking and fit for a VMI-quality education cannot be offered anything less, under the State's obligation to afford them genuinely equal protection."

Antonin Scalia wrote the sole dissenting opinion.

Impact

The Court's decision in *United States v. Virginia* gave added impetus to the drive to provide equal protection guarantees for men and women. The "skeptical scrutiny" standard placed government actors on notice that gender discrimination would be combatted in the court system. It is worth noting that the Court was not out to dismantle single-sex education in the United States, for numerous private single-sex school continued to exist. The Court's focus in *Virginia* was on public institutions and dubious claims of providing equal opportunity for men and women. In the wake of the Court's decision, proposals were made to turn VMI into a private institution, thus releasing it from the ruling in *Virginia*. The federal government responded by saying that it would withhold ROTC funds from any institution that took such a step. The point became moot when the VMI board voted 9–8 to admit women.

In 1997, one Beth Hogan became the first woman to enroll at VMI, joining 30 other women to be the first to enroll at the school. As of the fall of 2021, VMI had a total of 1,652 students. The student body consisted of 86 percent males and 14 percent females. In the 2022–23 class, enrollment in the freshman class was down in both categories, with 322 entering male freshmen and 53 entering female freshman. As of 2021, 602 women had graduated from VMI.

Questions for Further Study

1. What emotional issues might a jurist need to set aside in reaching a decision in this case?

2. On what basis did the government bring suit against Virginia and VMI?

3. Should VMI's very long tradition as a training ground for male warriors have played any role in the Court's decision?

4. On what basis did the Court find that VMI and the Women's Institute would provide unequal opportunities?

Further Reading

Books

Strum, Philippa. *Women in the Barracks: The VMI Case and Equal Rights*. Lawrence: University Press of Kansas, 2002.

Articles

Bowsher, David K. "Cracking the Code of *United States v. Virginia*." *Duke Law Journal* 48, no. 2 (November 1998): 305–39. https://www.jstor.org/stable/1373108.

Gleason, Christina. "*United States v. Virginia*: Skeptical Scrutiny and the Future of Gender Discrimination Law." *St. John's Law Review* 70, no. 4 (Fall 1996): 801–20. https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1624&context=lawreview.

Rolando, Kevin N. "A Decade Later: *United States v. Virginia* and the Rise and Fall of 'Skeptical Scrutiny.'" *Roger Williams University Law Review* 12, no. 1 (Fall 2006): 182–228. https://core.ac.uk/download/pdf/56705654.pdf.

Stobaugh, Heather L. "The Aftermath of *United States v. Virginia*: Why Five Justices Are Pulling in the Reins on the 'Exceedingly Persuasive Justification.'" *SMU Law Review* 55, no. 4 (Fall 2002): 1755–79. https://www.academia.edu/22557034/Privilege_Gender_and_the_Fourteenth_Amendment_Reclaiming_Equal_Protection_of_the_Laws.

Stockel, Eric J. "Note, *United States v. Virginia*: Does Intermediate Scrutiny Still Exist?" *Touro Law Review* 13 (1996): 229ff.

—Commentary by Michael Chang and Michael J. O'Neal

United States v. Virginia

Document Text

JUSTICE GINSBURG delivered the opinion of the Court

. . . Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative method" modeled on English public schools and once characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course. . . .

Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords. . . .

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

VMI cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. Entering students are incessantly exposed to the rat line, "an extreme form of the adversative model," comparable in intensity to Marine Corps boot camp. Tormenting and punishing, the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their former tormentors. . . .

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

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

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

The parties agreed that "some women can meet the physical standards now imposed on men," and the court was satisfied that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." The Court of Appeals, however, accepted the District Court's finding that "at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation." Remanding the case, the appeals court assigned to Virginia, in the first instance, responsibility for selecting a remedial course. The court suggested these options for the State: Admit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution. . . .

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

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

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

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

The Fourth Circuit denied rehearing en banc. . . . Judge Motz agreed with Judge Phillips that Virginia had not shown an "&thin'exceedingly persuasive justification'" for the disparate opportunities the State supported. . . .

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

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.

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

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

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. . . .

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the State. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded. . . .

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

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

Glossary

en banc: literally, "on the bench"; refers to a case heard with the judges sitting together

endowment: the reserve of money and investments used to help fund an institution such as a college or university

fungible: alike; interchangeable

proscribed: prohibited

remanding: sending back to a lower court for further consideration

spartan: barren, primitive