

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

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UNITED STATES V. VIRGINIA (1996)

View the case on the National Constitution Center's website [here](#).

SUMMARY

Beginning in the 1970s, the Supreme Court decided a series of cases that applied the 14th Amendment's Equal Protection Clause to policies that discriminated on the basis of sex. These cases culminated in Justice Ruth Bader Ginsburg's landmark opinion in *United States v. Virginia*. In 1990, the United States sued Virginia on behalf of several women who wanted to attend the Virginia Military Institute (VMI)—a public, all-male university. The Supreme Court ruled that VMI's male-only admissions policy violated the 14th Amendment's Equal Protection Clause. In her majority opinion for the Court, Justice Ginsburg explained that for a state policy providing differential treatment on the basis of sex to survive 14th Amendment scrutiny, the state must offer an "exceedingly persuasive justification." In the end, Justice Ginsburg concluded that Virginia's attempts to justify VMI's all-male admission policy failed such a test. As a result, the Court ruled that women had a constitutional right to be admitted to VMI.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Justice Ginsburg

VMI's male-only admissions policy violates the Fourteenth Amendment's Equal Protection Clause. Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree. . . .

VMI offers a unique form of education. 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.

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VMI has many successful alums. VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals. . . .

VMI's approach to education is not inherently unsuitable for women; and it shouldn't be surprising that some women want to attend VMI because of its successful alums; even so, VMI maintains its all-male admissions policy. 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. . . .

Virginia has tried to create an alternative program for women. In response to [a previous lower-court 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. . . .

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

Virginia has committed to equal funding for this alternative program and access to the VMI alumni network. 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. . . . 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. . . .

Justice Ginsburg presents the constitutional questions in the case. The cross-petitions in this suit present two ultimate issues. First, does Virginia's exclusion of women from the

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educational opportunities provided by VMI – extraordinary opportunities for military training and civilian leadership development – deny to women “capable of all of the individual activities required of VMI cadets,” the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's “unique” situation – as Virginia's sole single-sex public institution of higher education – offends the Constitution's equal protection principle, what is the remedial requirement? . . .

Ginsburg lays out the relevant legal standard for sex discrimination claims under the Fourteenth Amendment. Parties who seek to defend gender-based government action must demonstrate an “exceedingly persuasive justification” for that action.

This demanding standard is justified by our nation's long history of sex discrimination. Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, “our Nation has had a long and unfortunate history of sex discrimination.” Through a century plus three decades and more of that history, women did not count among voters composing “We the People”; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any “basis in reason” could be conceived for the discrimination.

The Court began applying the Fourteenth Amendment to sex discrimination in the 1970s; these cases demand equal citizenship for women. In 1971 (in *Reed v. Reed*), 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 . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men).

Ginsburg derives her demanding legal standard from the Court's previous sex discrimination cases. 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.

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There are some differences between men and women; example: certain physical differences. 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.”

States may not use bogus claims of “inherent differences” as an excuse to discriminate against women. “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.

Excerpt: Dissent, Justice Scalia

The Court has shut down a longstanding institution that has served Virginians well; in so doing, it ignores the factual record, casts aside tradition, and issues a decision that conflicts with the Court’s previous sex discrimination cases. Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: It explicitly rejects the finding that there exist “gender-based developmental differences” supporting Virginia’s restriction of the “adversative” method to only a men’s institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution’s character. As to precedent: It drastically revises our established standards for reviewing sex-based classifications. And as to history: It counts for nothing the long tradition, enduring down to the present, of men’s military colleges supported by both States and the Federal Government.

The Court should have left this issue to the elected branches; instead it imposes its own elite values on everyone else; the Constitution takes no sides in this debate. Much of the Court’s opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women’s education, and even with regard to the treatment of women in areas that have nothing to do with education. Closedminded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court’s criticism of our

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ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the countermajoritarian preferences of the society's law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy—so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent. . . .

The Court should look to preserve our nation's values, not revolutionize them; and our tests and rulings shouldn't conflict with longstanding traditions that extend back to the time when a given provision was added to the Constitution. [I]n my view the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that “when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.” The same applies . . . to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment.

VMI's male-only admissions policy is one such tradition; and it is consistent with longstanding approaches at other military colleges throughout the nation; any changes should be left to the elected branches. The all-male constitution of VMI comes squarely within such a governing tradition. Founded by the Commonwealth of Virginia in 1839 and continuously maintained by it since, VMI has always admitted only men. And in that regard it has not been unusual. For almost all of VMI's more than a century and a half of existence, its single-sex status reflected the uniform practice for government-supported military colleges. . . . [T]he tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.

The Court's ruling threatens single-sex education in other contexts; this was the norm throughout American history; this norm has changed over time, but with the elected branches driving policy changes in this area. And the same applies, more broadly, to single-sex education in general, which . . . is threatened by today's decision with the cutoff of all state

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and federal support. Government-run nonmilitary educational institutions for the two sexes have until very recently also been part of our national tradition. “[It is] [c]oeducation, historically, [that] is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the Nation’s population during much of our history has been educated in sexually segregated classrooms.” These traditions may of course be changed by the democratic decisions of the people, as they largely have been.

Here, the Court is imposing the change; it is rewriting the Constitution. Today, however, change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court. Even while bemoaning the sorry, bygone days of “fixed notions” concerning women’s education, the Court favors current notions so fixedly that it is willing to write them into the Constitution of the United States by application of custom-built “tests.” This is not the interpretation of a Constitution, but the creation of one. . . .

The Court has made up a new test to reach the result in this case. Only the amorphous “exceedingly persuasive justification” phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI’s single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court’s reasoning, a single woman) willing and able to undertake VMI’s program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a “substantial relation” between the classification and the state interests that it serves. . . . There is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance. . . .

Virginia is promoting an important state interest here; and it is promoting it in a way consistent with longstanding tradition. It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men’s and women’s colleges. But beyond that, “That single-gender education at the college level is beneficial to both sexes is a fact established in this case.” The evidence establishing that fact was overwhelming—indeed, “virtually uncontradicted”

VMI is a unique institution, providing a distinctive education; and the factual record shows that this approach is only consistent with male-only admissions. But besides its single-sex constitution, VMI is different from other colleges in another way. It employs a “distinctive educational method,” sometimes referred to as the “adversative, or doubting, model of education.” “Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience.” . . . No one contends that this method is appropriate for all individuals; education is not a “one size fits all” business. Just as a State may wish to support junior colleges, vocational institutes, or a law school that emphasizes case practice instead of

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classroom study, so too a State's decision to maintain within its system one school that provides the adversative method is "substantially related" to its goal of good education. Moreover, it was uncontested that "if the state were to establish a women's VMI-type [i. e., adversative] program, the program would attract an insufficient number of participants to make the program work," and it was found by [the lower court] that if Virginia were to include women in VMI, the school "would eventually find it necessary to drop the adversative system altogether." Thus, Virginia's options were an adversative method that excludes women or no adversative method at all. . . . **We should reaffirm the value of federalism and oppose this turn to judicial arrogance.** Justice Brandeis said it is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a "more perfect Union," (a criterion only slightly more restrictive than a "more perfect world"), can impose its own favored social and economic dispositions nationwide. As today's disposition . . . show[s], this places it beyond the power of a "single courageous State," not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old. The sphere of self-government reserved to the people of the Republic is progressively narrowed. . . .

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**