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With Gratitude from Our Daughters: Reflecting on Justice Ginsburg and United States v. Virginia

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IN MEMORIAM RUTH BADER GINSBURG

WITH GRATITUDE FROM OUR DAUGHTERS: REFLECTING
ON JUSTICE GINSBURG AND *UNITED STATES V. VIRGINIA*

Meredith Johnson Harbach *

“You may be whatever you resolve to be.”¹

*—Inscription over the entrance to the Barracks at the
Virginia Military Institute*

INTRODUCTION

*“What enabled me to take part in the effort to free our daughters
and sons to achieve whatever their talents equipped them to accom-
plish, with no artificial barriers blocking their way?”²*

—Ruth Bader Ginsburg

On September 18, 2020, we mourned the loss of Justice Ruth
Bader Ginsburg, whom many considered not just a cultural icon,

* Professor of Law, University of Richmond School of Law. I thank the editors of the *University of Richmond Law Review*, especially Annual Survey Editor Jamie Wood, for the invitation and opportunity to write this *In Memoriam* Essay. It has been an honor and a joy to work on this piece. Gemma Fearn provided fantastic—and fast!—research for this project. This Essay is dedicated to my daughters.

1. *Stonewall Jackson FAQ*, VA. MIL. INST., <https://www.vmi.edu/archives/stonewall-jackson-resources/stonewall-jackson-faq/> [<https://perma.cc/GN8K-EENQ>]. This quote, found in a notebook kept by Stonewall Jackson while attending West Point, is attributed to Reverend Joe Hawls in *Letters to Young Men, on the Formation of Character*. *Id.* Jackson, a former faculty member at VMI and Confederate general, has long been a controversial symbol at VMI. Just before this Essay went to print, the VMI Board of Visitors voted unanimously to remove Stonewall Jackson’s statue from the campus. For more on recent events at VMI, see *infra* note 213.

2. RUTH BADER GINSBURG WITH MARY HARTNETT & WENDY W. WILLIAMS, *MY OWN WORDS*, at xiv (2016) [hereinafter GINSBURG, *MY OWN WORDS*].

but a national treasure. Among many other things, Justice Ginsburg became a later-in-life feminist “rock star,”³ celebrated for her rousing and impassioned dissents, her fearless defense of equality and autonomy rights, her championing of civil rights, and her persistent determination in the face of injustice. RBG’s pop-culture status led to books,⁴ movies,⁵ t-shirts,⁶ “dissent collar” accessories,⁷ and Halloween costumes.⁸ But long before she became “notorious,” she was a daughter, a mother, a law student, an advocate, a professor, a judge, and then—finally—a Justice. In this Essay, I will reflect on the opinion that manifests her life in all those roles and stands in many ways as the culmination of her life’s work: *United States v. Virginia (VMI)*.⁹

Scholars and observers have characterized the *VMI* case as Justice Ginsburg’s finest opinion—“her most celebrated case,” a “landmark,” and her “crowning achievement.”¹⁰ When Ginsburg herself was asked which of her decisions were most influential and made her most proud, she, too, singled out *VMI*.¹¹ “*VMI* was a very special case for me,” she said.¹² “It was a bright sign of the changing times.”¹³ Many agree that Ginsburg’s opinion in *VMI* was the most important opinion she wrote while on the Court.¹⁴

3. The Justice was, in fact, an opera fanatic. RBG (Magnolia Pictures 2018).

4. *E.g.*, IRIN CARMON & SHANA KNIZHNIK, NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG (2015).

5. *E.g.*, ON THE BASIS OF SEX (Focus Features 2018); RBG (Magnolia Pictures 2018).

6. *RBG Merchandise: Where to Get T-shirts, Face Masks Featuring Ruth Bader Ginsburg*, M LIVE (Sept. 22, 2020), <https://www.mlive.com/news/2020/09/rbg-merchandise-where-to-get-t-shirts-face-masks-featuring-ruth-bader-ginsburg.html> [<https://perma.cc/84AB-2Y9K>].

7. *Id.*

8. *Adult Ruth Bader Ginsburg Robe*, HALLOWEENCOSTUMES.COM, <https://www.halloweencostumes.com/rbg-robe-adults.html> [<https://perma.cc/3L6F-CNMB1>]; *Kids’ Ruth Bader Ginsburg Costume*, HALLOWEENCOSTUMES.COM, <https://www.halloweencostumes.com/rbg-robe-kids-1-xl.html> [<https://perma.cc/9Y6S-NRS8>].

9. 518 U.S. 515 (1996).

10. James A. Kushner, *Introducing Ruth Bader Ginsburg and Predicting the Performance of a Ginsburg Court*, 32 SW. U. L. REV. 181, 183 (2003).

11. Ruth Bader Ginsburg, *A Conversation with Associate Justice Ruth Bader Ginsburg*, 84 U. COLO. L. REV. 909, 928 (2013) [hereinafter Ginsburg, *Colorado Conversation*].

12. Ruth Bader Ginsburg, Gillian Metzger & Abbe Gluck, *A Conversation with Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 6, 12 (2013) [hereinafter Ginsburg et al., *Columbia Conversation*].

13. *Id.*

14. *See, e.g.*, Ariana de Vogue, *At VMI, Ruth Bader Ginsburg Reflects on a Monumental Ruling*, CNN POLITICS (Aug. 13, 2018, 8:26 AM) (quoting University of Texas School of Law Professor Steve Vladeck), <https://www.cnn.com/2017/02/02/politics/ruth-bader-ginsburg-vmi/index.html> [<https://perma.cc/3QQU-WGB6>].

I chose to reflect on this case, not only—or even primarily—because this Essay comes in the *University of Richmond Law Review's Annual Survey of Virginia Law*. Rather, I chose to reflect on *VMI* because of its personal and professional significance for Justice Ginsburg and her continued significance for the Institute, its cadets, and its graduates. As I went back to study Justice Ginsburg's life and the *VMI* opinion, several threads stood out, which have resonated through her life and her work, as well as the opinion. First, I was struck by how, in many ways, the narrative in the *VMI* case is a story about Ginsburg's own personal and professional life. With echoes of Ginsburg's own life and career, the *VMI* opinion was in many ways the pinnacle of Ginsburg's ambitious gender equality project. Second, throughout her life and career, Justice Ginsburg had an abiding faith in the American project to become "a more perfect union," and the Constitution's expanding capacity to recognize and protect "We the People." Third, from the beginning, Ginsburg's gender equality project was aimed at dismantling what she often called "sex-role pigeonholing"¹⁵—removing "artificial barriers" to what citizens could dream and achieve based on stereotyped views of women's and men's roles. And finally, she was unfailingly focused on future generations—our daughters (and our sons)—as the rightful beneficiaries of gender equality and the key to effecting social change over time.

In the pages that follow, I will explore these themes along with the course and significance of the *VMI* case. I will begin with Justice Ginsburg's story, then turn to the litigation, the opinion, and what happened afterward.

I. THE JUSTICE

*"How fortunate I was to be alive and a lawyer when, for the first time in U.S. history, it became possible to urge, successfully, before legislatures and courts, the equal-citizenship stature of women and men as a fundamental constitutional principle."*¹⁶

—Ruth Bader Ginsburg

"In my long life, I have seen great changes!" Justice Ginsburg exclaims to her "good readers" in the preface to her biography, *My*

15. Ginsburg had long referred to gender-based classifications as "sex-role pigeonholing." GINSBURG, MY OWN WORDS, *supra* note 2, at 131.

16. *Id.* at xiv.

Own Words, written in collaboration with Mary Hartnett and Wendy W. Williams.¹⁷ Justice Ginsburg had a front-row seat to the history of women's struggle for equality in life and in law, experiencing many of the changes she heralded in *VMI* herself. To understand the significance of *VMI* for Justice Ginsburg, one needs know a bit more about her life and personal background, as well as her role in developing the Supreme Court's Equal Protection jurisprudence prior to her appointment to the bench.

Justice Ginsburg was born on March 15, 1933, in Brooklyn, New York, and was known during her childhood as "Kiki."¹⁸ Her early years foretold the career trajectory that was to follow. Her mother, Celia, raised her daughter to be independent—focusing on Ruth's academic success and living up to her potential.¹⁹ Long before she knew the meaning of feminism, Ruth chafed at gender stereotypes and tracks. She didn't care for "home economics" in school, intended to prepare girls to become housewives and homemakers, but instead envied the boy classmates who could take "shop" and use the saw.²⁰ She liked Nancy Drew novels because Nancy "did things."²¹ She admired Amelia Earhart and Rosie the Riveter.²²

Ruth met her beloved husband, Marty, as a freshman at Cornell University, which she attended on a full scholarship.²³ She and Marty lived a marriage of equal partners long before it became a goal to which women might regularly aspire. Marty was, according to Ginsburg, "the first guy ever interested in me because of what

17. *Id.*

18. *Id.*; see JANE SHERRON DE HART, RUTH BADER GINSBURG: A LIFE 3 (2018).

19. GINSBURG, MY OWN WORDS, *supra* note 2, at 5. Ruth was very close to Celia, who came of age during a time in which women's domain was tethered firmly to the private sphere. Celia's opportunities were thus narrowly circumscribed. She had to forego higher education to support her family and help her brother attend university. See DE HART, *supra* note 18, at 7–8. But she was determined that things would be different for Ruth. Sadly, Celia died young, just days before Ruth's high school graduation. GINSBURG, MY OWN WORDS, *supra* note 2, at 37. Ruth's closing remarks at her Supreme Court nomination ceremony were to her mother: "I have a last thank-you. It is to my mother, Celia Amster Bader, the bravest and strongest person I have known, who was taken from me much too soon. I pray that I may be all that she would have been had she lived in an age when women could aspire and achieve and daughters are cherished as much as sons." *Transcript of President's Announcement and Judge Ginsburg's Remarks*, N.Y. TIMES (June 15, 1993), <https://www.nytimes.com/1993/06/15/us/supreme-court-transcript-president-s-announcement-judge-ginsburg-s-remarks> [<https://perma.cc/G2P3-P98M>].

20. GINSBURG, MY OWN WORDS, *supra* note 2, at 4.

21. *Id.* at 5.

22. *Id.*

23. *Id.* at 5, 7.

was in my head.”²⁴ He was chief chef to the family, an active co-parent, and a regular editor of her writing, as well as a talented tax lawyer.²⁵ He was her constant encourager and champion, and she credited him with pushing for her appointment to the Supreme Court.²⁶

When she began law school a year behind Marty at Harvard, Ruth was married with an infant²⁷ and was one of only nine women in her first-year class of about 500 students.²⁸ During these “ancient days” of 1956, women comprised less than three percent of lawyers in the United States, and there was a single woman federal appellate court judge.²⁹ In her first year, she was famously grilled by Dean Erwin N. Griswold over dinner, who asked each of the women to stand up and explain why they thought they should be in law school, taking a place that could have gone to a man.³⁰ Of her time in law school in the “not so good old days,” Ginsburg reflected that the women “thought all eyes were on us, so we had better be prepared because if we weren’t it would reflect not only on ourselves, but on all women.”³¹ Ruth and Marty moved to New York City after Marty’s graduation.³² She asked Harvard whether she could finish her final year at Columbia Law while still receiving a Harvard degree; Harvard denied the request.³³ She went on to graduate from Columbia in 1959, tied for first in her class.³⁴

After law school graduation, Ruth struggled to find a job. As she told it, “in the 1950s, law firms and some of the finest judges were

24. *Id.* at 25.

25. *Id.* at xvi–xvii. Ruth and Marty had two children: Jane, born while the couple lived in Fort Sill, Oklahoma, for Marty’s service to the Army; and James, born during Ruth’s tenure at Rutgers as a law professor. *Id.* at xx–xxi.

26. Her biography is dedicated to Marty, her “dear partner in life and constant uplifter.” *Id.* at vi.

27. *Id.* at xvi, 26. Ruth worried over her ability to begin law school with a young child. Yet her father-in-law urged her, “[I]f you really want to study law, you will stop worrying and find a way to manage child and school.” *Id.* at xvi. She and Marty hired a daytime babysitter, and they managed. As she described her time in law school: “I attended classes and studied diligently until four in the afternoon; the next hours were Jane’s time, spent at the park, playing silly games or singing funny songs, reading picture books and A.A. Milne poems, and bathing and feeding her. After Jane’s bedtime, I returned to the law books with renewed will.” *Id.* at xvi.

28. *Id.* at xx.

29. GINSBURG, MY OWN WORDS, *supra* note 2, at xiv.

30. See DE HART, *supra* note 18, at 55; see generally *id.* at 55–76.

31. Ginsburg, *Colorado Conversation*, *supra* note 11, at 911.

32. DE HART, *supra* note 18, at 73.

33. See *id.* at 73.

34. GINSBURG, MY OWN WORDS, *supra* note 2, at xxi.

upfront in saying they wanted no women.”³⁵ Ultimately, she secured a federal court clerkship despite having a four-year-old daughter, only through the “heroic” efforts of a mentor and champion law professor at Columbia.³⁶ Of her time as a younger lawyer, she would later reflect, “[w]hen a woman spoke, it was time to tune out. She was not going to say anything very important.”³⁷

After clerking, Ruth joined the Columbia Law School Project on International Procedure, where she was a research associate and then associate director of the Project.³⁸ While researching international procedure (procedure became a lifelong passion),³⁹ she divided her time between New York and Sweden.⁴⁰ In addition to learning about the Swedish approach to procedure, Ruth also observed a country in which the push for gender equality was farther along: Women made up about twenty-five percent of law students then, and society had come to assume that a family should have two wage earners.⁴¹ It was there that she discovered the word *vägmärken*, meaning “pathmarker” or “waypaver”⁴²—words she would invoke with frequency in her writings.⁴³

Ms. Ginsburg became Professor Ginsburg in 1963, when she joined the law faculty at Rutgers School of Law.⁴⁴ She spent nine years at Rutgers before joining Columbia Law School as its first tenured woman law professor in 1972, where she researched and taught for another eight years.⁴⁵ It was during her time as a law professor that Ginsburg began her project to secure women’s equality under law.⁴⁶ Inspired by her women students at Rutgers Law, she chaired a student panel on “women’s liberation” in 1970.⁴⁷ Later that year, she attended the annual meeting of the Association of American Law Schools, where she argued that the legal

35. Ginsburg, *Colorado Conversation*, *supra* note 11, at 912.

36. GINSBURG, MY OWN WORDS, *supra* note 2, at xv.

37. Ginsburg, *Colorado Conversation*, *supra* note 11, at 916.

38. GINSBURG, MY OWN WORDS, *supra* note 2, at 372.

39. Ginsburg et al., *Columbia Conversation*, *supra* note 12, at 7.

40. GINSBURG, MY OWN WORDS, *supra* note 2, at xxi.

41. Ginsburg et al., *Columbia Conversation*, *supra* note 12, at 8.

42. GINSBURG, MY OWN WORDS, *supra* note 2, at 63. “Many consider the Justice herself to be an exemplary ‘waypaver’ and ‘pathmarker,’ blazing the gender equality trail and expanding opportunities for women and men.” *Id.*

43. *See, e.g., id.* at 237, 245, 299, 319.

44. *Id.* at xxi.

45. *Id.* at xxi, 115.

46. *Id.* at 113–15.

47. *Id.* at 113.

academy should work urgently on “the elimination from law school texts and classroom presentations of attempts at comic relief via stereotyped characterizations of women,” and “the infusion into standard curricular offerings of material on sex-based discrimination.”⁴⁸

At the request of her students, Professor Ginsburg also developed a course on sex discrimination and taught her first seminar in spring 1971.⁴⁹ She incorporated a practicum into the course, requiring her students to work on cases being brought by the American Civil Liberties Union’s (“ACLU”) New Jersey office.⁵⁰ That summer, Professor Ginsburg worked with the ACLU national office on two briefs.⁵¹ The first, “grandmother” brief, was filed in the Tenth Circuit case of *Moritz v. Commissioner*.⁵² In it, she argued that the Fifth Amendment’s Equal Protection Clause required that federal tax benefits for workers providing care to dependents must be extended to single men.⁵³ The second—the “mother” brief, in *Reed v. Reed*—argued that under the Fourteenth Amendment’s Equal Protection Clause, sex-based classifications should be analyzed under strict scrutiny.⁵⁴ The Supreme Court’s opinion in *Reed* marked an historic moment in constitutional jurisprudence: the first time the Court struck down a state sex-classification law under the Equal Protection Clause.⁵⁵ As later observed by Justice Brennan, treating women differently based on sex was “rationalized by an attitude of ‘romantic paternalism,’ which, in practical effect, put women, not on a pedestal, but in a cage.”⁵⁶

Beginning with *Reed*, Ginsburg became the most influential advocate to shape the Supreme Court’s gender equality jurisprudence, and was christened “the Thurgood Marshall of the women’s movement.”⁵⁷ Soon after *Reed* was decided, the ACLU created the Women’s Rights Project with Professor Ginsburg as Director.⁵⁸ She

48. *Id.* at 113 (internal quotation marks omitted).

49. *Id.* at 113–14.

50. *Id.* at 114.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* *Reed* concerned an Idaho statute requiring that men were to be preferred to women as estate administrators. *See Reed v. Reed*, 404 U.S. 71, 75 (1971).

55. *See Reed*, 404 U.S. at 74, 76–77.

56. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

57. GINSBURG, MY OWN WORDS, *supra* note 2, at 116.

58. *Id.* at 115.

then joined two other lawyers as general counsel to the ACLU, where she continued to work through the 1970s.⁵⁹ Ginsburg later described the work of the Project as seeking to “advance, simultaneously, public understanding, legislative change, and change in judicial doctrine.”⁶⁰ While at the ACLU, she worked on twenty-four briefs submitted to the Supreme Court and gave six oral arguments at the Court, losing only one case.⁶¹ Ginsburg gave her first oral argument at the Supreme Court in *Frontiero v. Richardson*, the case in which she first pressed the Supreme Court to adopt strict scrutiny for sex-based classifications.⁶² While she was unsuccessful in that effort, her advocacy ultimately led the Court to adopt intermediate scrutiny for sex classifications in *Craig v. Boren*.⁶³

Professor Ginsburg continued to teach while working as Director of the Women’s Rights Project. In 1972, she collaborated with two other professors to create the first American casebook on gender and law: *Sex-Based Discrimination: Text, Cases and Materials*, which was published in 1974.⁶⁴ In addition to writing the first chapter on women’s legal history under the Constitution, she also wrote a chapter on sex discrimination in educational institutions, a nascent glimmer of the work she would later do in the *VMI* case.⁶⁵ During her work as a professor in the 1970s, she published more than twenty-five articles on gender equality.⁶⁶

President Jimmy Carter appointed Professor Ginsburg to the United States Court of Appeals for the D.C. Circuit in 1980, where she served for thirteen years before President Bill Clinton appointed her to the Supreme Court in 1993.⁶⁷ But it was Ginsburg’s

59. *Id.* at 114–15.

60. Ruth Bader Ginsburg, *Advocating the Elimination of Gender-Based Discrimination: The 1970s New Look at the Equality Principle*, in GINSBURG, MY OWN WORDS, *supra* note 2, at 166.

61. GINSBURG, MY OWN WORDS, *supra* note 2, at 116.

62. *Id.* at 17, 131–32. *Frontiero* found that a federal statute denying married female military officers the same benefits for dependents as it did married male officers “violates the Due Process Clause of the Fifth Amendment.” *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973).

63. See GINSBURG, MY OWN WORDS, *supra* note 2, at 137. *Craig v. Borden* struck down an Oklahoma statute permitting women to drink alcohol at age eighteen but requiring men to wait until age twenty-one to do the same. 429 U.S. 190, 215 (1976).

64. GINSBURG, MY OWN WORDS, *supra* note 2, at 115.

65. *Id.*

66. *Id.* at 113.

67. *Id.* at xxi.

time as law professor and advocate that set the stage for the significance of her majority opinion in *VMI*. Justice Ginsburg's *VMI* opinion was the capstone of her gender equality project, in which she explicated and fortified the Court's jurisprudence on sex-based classifications, which the Court had recognized as a consequence of her advocacy in the 1970s.⁶⁸ It was, as she describes, her "most significant opinion on the constitutional equality principle as applied to gender distinctions."⁶⁹

II. THE LAWSUIT

*"Save The Males!"*⁷⁰

—Popular slogan of those opposing coeducation at *VMI*

VMI became one of the country's first state military colleges when it was founded by the Virginia General Assembly in 1839⁷¹ and has been financially supported and regulated by the Commonwealth since its inception.⁷² Until *VMI*'s Board of Visitors voted to admit women in 1996 in response to the *VMI* judgment, *VMI* admitted, trained, and educated only young men.⁷³ By the time the decision was announced, *VMI* was—and had been for decades—the only single-sex college among Virginia's fifteen public colleges and universities.⁷⁴

At the time of the lawsuit, the school's mission was

to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and

68. *Id.* at 116–17.

69. *Id.* at 117.

70. David Reed, *VMI Ponders Going Private to "Save the Males,"* ASSOCIATED PRESS (June 27, 1996), <https://apnews.com/article/0363b26c4fcdee7f9efadc7038bf05f2> [<https://perma.cc/PSU9-4K22>].

71. See Act of Mar. 29, 1839, ch. 20, 1839 Va. Acts 17.

72. See VA. CODE ANN. § 23.1-2500 (Cum. Supp. 2020).

73. United States v. Virginia (*VMI*), 518 U.S. 515, 519–20 (1996).

74. *Id.* at 520. Virginia did (and still does) have one private, all-male institution: Hampden-Sydney College. See *About Hampden-Sydney College*, HAMPDEN-SYDNEY C., <http://www.hsc.edu/about-h-sc> [<https://perma.cc/CPR8-5658>]. The Commonwealth opened the doors of the University of Virginia to women in 1970, citing the University's "prestige factor" and unique course offerings. See *Kirstein v. Rector & Visitors of the Univ. of Va.*, 309 F. Supp. 184, 187 (E.D. Va. 1970). Justice Ginsburg had long known of the case, having cited it in remarks she gave in a women's liberation panel on Law Day at Rutgers in 1970. See Ruth Bader Ginsburg, *Introduction to Women and the Law—A Symposium*, 25 RUTGERS L. REV. 1, 6 (1970).

ready as citizen-soldiers to defend their country in time of national peril.⁷⁵

VMI had long been known for its pedagogical approach, which it characterizes as “a unique commitment to character development, self-discipline and physical challenge, conducted in a military environment.”⁷⁶ Justice Ginsburg described VMI’s pedagogical approach as follows:

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.⁷⁷

The “adversative, or doubting,” method included “physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.”⁷⁸

VMI’s exclusively male educational system was challenged in 1990, when the United States Department of Justice sued the Commonwealth of Virginia and VMI after receiving a complaint from a female high-school student who wanted to attend the Institute.⁷⁹ After a six-day trial,⁸⁰ the district court rejected the United States’ claim that VMI’s policy violated the Equal Protection Clause of the Fourteenth Amendment.⁸¹ The trial court found that VMI’s all-male policy created diversity within the coeducational system in Virginia, and that aspects of VMI’s approach would be compromised and lost if women were admitted.⁸² On appeal, the Fourth Circuit Court of Appeals disagreed and vacated the lower-court opinion, concluding that “[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender.”⁸³ The court of appeals remanded, instructing that VMI could admit

75. *United States v. Virginia*, 766 F. Supp. 1407, 1425 (W.D. Va. 1991) (quoting the final report of the VMI Board of Visitors’ Mission Study Committee, issued in May 1986).

76. *Mission and Vision*, VA. MIL. INST., <https://www.vmi.edu/about/governance/mission-and-vision/> [https://perma.cc/GHN5-J9Q6].

77. *VMI*, 518 U.S. at 520.

78. *Virginia*, 766 F. Supp. at 1421–22.

79. *Id.* at 1408.

80. *Id.*

81. *Id.* at 1408.

82. *Id.* at 1412.

83. *United States v. Virginia*, 976 F.2d 892, 899 (4th Cir. 1992).

women, establish a parallel program, or forego state support and become a private institution.⁸⁴

In response, Virginia proposed the Virginia Women's Institute for Leadership ("VWIL"), a four-year state program to be provided at Mary Baldwin College.⁸⁵ Although VWIL was intended to pursue VMI's mission of producing "citizen-soldiers," the programming differed from VMI's in terms of academic opportunities, pedagogical methods, and financial resources.⁸⁶ Virginia committed to providing VWIL with support equal to VMI and the VMI Foundation also offered a \$5.4625 million endowment.⁸⁷ The district court accepted Virginia's proposed remedial plan, finding that the two programs would "achieve substantially similar outcomes."⁸⁸ The district court continued: "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."⁸⁹ A divided Fourth Circuit panel affirmed, finding that providing single-sex education was a legitimate government objective and that VMI and VWIL would provide men and women students with "substantively comparable benefits."⁹⁰ The United States appealed to the Supreme Court.⁹¹

III. THE OPINION

*"However 'liberally' [VMI's provision of education exclusively to male students] serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not equal protection."*⁹²

—*United States v. Virginia*

As described above, the VMI litigation had begun in 1990, several years before Justice Ginsburg joined the Court. But the case didn't arrive at the Court until October 1995, and oral arguments proceeded in January 1996. The story goes that Justice Stevens

84. *Id.* at 900.

85. *VMI*, 518 U.S. 515, 526 (1996).

86. *Id.*

87. *United States v. Virginia*, 852 F. Supp. 471, 483, 499 (W.D. Va. 1994).

88. *Id.* at 481.

89. *Id.* at 484.

90. *United States v. Virginia*, 44 F.3d 1229, 1237–38 (4th Cir. 1995).

91. *United States v. Virginia*, 516 U.S. 910 (1995).

92. *VMI*, 518 U.S. 515, 539–40 (1996).

had originally assigned the opinion to Justice Sandra Day O'Connor.⁹³ But recognizing the significance of the case for her sister justice, Justice O'Connor insisted it be Ginsburg who should draft the opinion.⁹⁴ As one commentator would later observe, by the time *VMI* reached the Supreme Court, “no justice had thought more deeply about the constitutional questions implicated by [*VMI*’s] set of arguments than Ruth Bader Ginsburg.”⁹⁵ In the end, she wrote about fifteen drafts⁹⁶ and “literally worried over every word in the opinion.”⁹⁷

As Justice Ginsburg saw it, the case “was about a state that invested heavily in a college designed to produce business and civic leaders, that for generations succeeded admirably in the endeavor, and that strictly limited this unparalleled opportunity to men.”⁹⁸ She framed the ultimate issue as follows: “[D]oes Virginia’s exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—deny to women capable of all the individual activities required of VMI cadets . . . the equal protection of the laws guaranteed by the Fourteenth Amendment?”⁹⁹

Justice Ginsburg’s opinion for the majority is, as Justice Ginsburg might herself have characterized it, “pathmarking.”¹⁰⁰ It includes an extended explanation of the Court’s “skeptical scrutiny” of gender-based classifications¹⁰¹ and was, according to Ginsburg, “the culmination of the 1970s endeavor to open doors so that women could aspire and achieve without artificial constraints.”¹⁰² As will become apparent, in many ways, the opinion is a story

93. See DE HART, *supra* note 18, at 340.

94. See *id.* at 340–41.

95. Cary Franklin, *A More Perfect Union: Sex, Race, and the VMI Case*, in *THE LEGACY OF RUTH BADER GINSBURG* 91 (Scott Dodson ed., 2015).

96. See DE HART, *supra* note 18, at 341.

97. KATIE L. GIBSON, *RUTH BADER GINSBURG’S LEGACY OF DISSENT* 65 (2018).

98. GINSBURG, *MY OWN WORDS*, *supra* note 2, at 163.

99. *VMI*, 518 U.S. 515, 530 (1996) (internal citations and quotation marks omitted). Ginsburg posed the second ultimate issue as what the appropriate remedial requirement would be if VMI’s sex-based classifications offended the Equal Protection Clause. *Id.* at 530–31.

100. *Id.* at 531. See also GINSBURG, *MY OWN WORDS*, *supra* note 2, at 350 n.1 (“Justice Ginsburg, who often uses the terms ‘pathmarking’ and ‘waypaving’ . . . came across the term when she read former UN Secretary General Dag Hammarskjöld’s book *Vägmärken*.”); *supra* note 45 and accompanying text.

101. *VMI*, 518 U.S. at 531.

102. GINSBURG, *MY OWN WORDS*, *supra* note 2, at 163.

about the history of women's equality in the United States—in particular the history of women's equality *in law*, and Ginsburg's own role in those histories.

Justice Ginsburg began with an exploration of the genesis and evolution of sex discrimination law. The narrative Ginsburg employed was a story of women's equality—or better, *lack* of equality—in law. The “skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history” of official action denying rights and opportunities on the basis of sex.¹⁰³ Recognizing the country's “long and unfortunate history of sex discrimination,”¹⁰⁴ the opinion traced the evolution of law on women's equality.¹⁰⁵

Ginsburg opened her account with the history of “We the People,” noting that women weren't included among voters until 1920, when the 19th Amendment was ratified. And for many decades thereafter, states could withhold opportunities from women as long as they had any “basis in reason.”¹⁰⁶ The turning point came with *Reed v. Reed*, her first Supreme Court brief with the ACLU's Women's Rights Project and “the first case in which the Court ruled for a woman challenging a state law as gender discrimination violative of equal protection.”¹⁰⁷ Summarizing the advancement of the law after *Reed*, Ginsburg observed:

“[T]he 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.”¹⁰⁸

Justice O'Connor's earlier decision for the Court, *Mississippi v. Hogan*, was especially significant in Ginsburg's estimation. The case, brought by a man seeking to go to nursing school at an all-women's college, “was the principal authority for the women who

103. *VMI*, 518 U.S. at 531. Readers will recall that she first traced this history in her 1974 casebook. See *supra* notes 64–65 and accompanying text.

104. *Id.* (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

105. “[*VMI*] provides an unprecedentedly comprehensive account of the history of women's experiences in the American legal system, making visible aspects of that history the Court had previously overlooked.” Franklin, *supra* note 95, at 95.

106. *VMI*, 518 U.S. at 531.

107. *Id.* at 532.

108. *Id.*

wanted to attend VMI.”¹⁰⁹ Ginsburg would later say of both *Hogan* and *VMI* that “[b]oth cases made the same point, that government can’t prefer men or can’t prefer women for an opportunity, that all doors must be open to our sons and daughters.”¹¹⁰

Expanding on these volumes of history, the opinion summarized the standard of review for sex-based classifications and warned against gender stereotyping. Courts must determine whether a state’s justification for such a classification is “exceedingly persuasive.” That justification must be genuine, rather than a “*post hoc*” response to litigation. And it cannot “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”¹¹¹ Justice Ginsburg concluded: “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.” “[S]uch classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”¹¹²

Virginia offered two justifications for VMI’s all-male policy: that single-sex education provided educational benefits and advanced diverse educational opportunities; and that “the unique VMI method of character development and leadership training” would have to be modified—and ultimately destroyed—if VMI admitted women.¹¹³

As to the first explanation, while Ginsburg allowed that single-sex education could confer benefits, she found that VMI was neither established nor maintained “with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth.”¹¹⁴ Instead, the opinion chronicled Virginia’s (and the country’s) historical exclusion of women from higher education, which was thought to be dangerous.¹¹⁵ In 1879, for example,

109. Ginsburg, *Colorado Conversation*, *supra* note 11, at 928.

110. Laura Vozzella, *Justice Ginsburg Makes Her First Visit to the Military Institute She Remade*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/local/virginia-politics/justice-ginsburg-makes-her-first-visit-to-the-military-institute-she-remade/2017/02/01/4ae42b70-e89b-11e6-b82f-687d6e6a3e7c_story.html [<https://perma.cc/426M-KRPB>].

111. *VMI*, 518 U.S. at 532–33 (internal citations and quotation marks omitted).

112. *Id.* at 534.

113. *Id.* at 535 (quoting Brief for Cross-Petitioners at 33–36).

114. *Id.*

115. *Id.* at 536–40.

the Virginia Senate acknowledged that Virginia had “never, at any period of her history, provided for the higher education of her daughters, though she has liberally provided for the higher education of her sons.”¹¹⁶ And although Virginia eventually funded women’s colleges and universities (which later became coeducational), it wasn’t until the 1970s that the University of Virginia introduced coeducation and eventually admitted women.¹¹⁷

Ultimately, Justice Ginsburg found no indication that VMI’s policy was *in fact* intended to further diversity in higher education. Instead, she observed that VMI’s arguments to retain all-male institutions based on pluralism or diversity were “likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay.”¹¹⁸ Justice Ginsburg incisively concluded her analysis: “A purpose genuinely to advance an array of educational options . . . is not served by VMI’s historic and constant plan—a plan to afford a unique educational benefit only to males. However ‘liberally’ this plan serves the Commonwealth’s sons, it makes no provision whatever for her daughters. That is not *equal* protection.”¹¹⁹

Virginia’s second proffered justification provided Justice Ginsburg with more grist for her rejection of “sex-role pigeonholing.” Evidence in the case had established that coeducation would materially affect three primary features of VMI’s co-curricular program: physical education and training, the lack of privacy in Barracks, and the “adversative” approach.¹²⁰ Virginia argued that the accommodations required to admit women would be so “radical” and “drastic” that they would “destroy” VMI’s program.¹²¹ Likewise, the Fourth Circuit determined that VMI’s method had “never been tolerated in a sexually heterogeneous environment,” and the

116. *Id.* at 537.

117. *Id.* at 538. In 1970, a three-judge panel in the Eastern District of Virginia held that four women plaintiffs were “denied their constitutional right to an education equal with that offered by men at Charlottesville and that such discrimination on the basis of sex violates the Equal Protection Clause of the Fourteenth Amendment.” *Kirstein v. Rector & Visitors of the Univ. of Va.*, 309 F. Supp. 184, 187 (E.D. Va. 1970). The same panel refused to hold that Virginia could not operate any single-sex institutions of higher learning, observing that one such institution was a military school and asking, rhetorically, “Are women to be admitted on an equal basis, and, if so, are they to wear uniforms and be taught to bear arms?” *Id.*

118. *VMI*, 518 U.S. at 535 n.8 (internal quotation marks omitted).

119. *Id.* at 539–40 (internal citation and quotation marks omitted).

120. *Id.* at 540.

121. *Id.*

participation of women “would destroy . . . any sense of decency that still permeates the relationship between the sexes.”¹²²

Justice Ginsburg was not persuaded. Concerns about the presence of women destroying a sense of decency between the sexes was an “ancient and familiar fear.”¹²³ She was troubled by the lower court’s finding on “gender-based developmental differences,” which were based on expert testimony concerning “typically male or typically female ‘tendencies.’”¹²⁴ Rather, she insisted, “[s]tate actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females.”¹²⁵ Beyond such fixed notions, the district court itself had recognized that at least some women would be able to meet all of the requirements of VMI’s programming and the Fourth Circuit concluded that “neither the goal of producing citizen soldiers nor VMI’s implementing methodology is inherently unsuitable to women.”¹²⁶

Ginsburg responded to the Commonwealth’s parade of horrors¹²⁷ with assurance:

The notion that admission of women would downgrade VMI’s stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other self-fulfilling prophecies once routinely used to deny rights or opportunities.¹²⁸

Rather than accept these doomsday predictions, she recounted a sampling of the contexts in which the possibility of including women was once deemed dangerous and destructive, but is now commonplace.¹²⁹ In her own life, after all, Ginsburg had been a part of this revolution. She herself was a waypaver, illustrating throughout her career that the inclusion of women strengthened and enhanced the legal profession, rather than diminished it.

122. *United States v. Virginia*, 44 F.3d 1229, 1239 (4th Cir. 1995).

123. *VMI*, 518 U.S. at 555 n.20.

124. *Id.* at 541.

125. *Id.* at 541 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

126. *United States v. Virginia*, 976 F.2d 890, 899 (1992).

127. Ginsburg was, by then, long accustomed to responding to “horribles” concerning women’s equality. She dispensed with four of them quite handily in a 1973 article titled *The Need for the Equal Rights Amendment* in the American Bar Association Journal. See Ruth Bader Ginsburg, 59 A.B.A. J. 1013 (1973); GINSBURG, MY OWN WORDS, *supra* note 2, at 140–49.

128. *VMI*, 518 U.S. at 542–43 (internal citation and quotation marks omitted).

129. *Id.* at 543–44.

Despite pervasive narratives of history and tradition at VMI, the Institute itself had evolved and changed multiple times, altering and sometimes abandoning formal and informal rules and practices.¹³⁰ Justice Ginsburg observed, for example, that modifications accompanying VMI's admission of Black cadets in 1968 after a long history of racial discrimination and exclusion had little impact on VMI's pedagogical methods.¹³¹

Ultimately, VMI's longstanding goal was to produce "citizen-soldiers" with strong leadership skills and dedication to public service. Justice Ginsburg concluded:

Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men. And just as surely, the Commonwealth's great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier "citizen-soldier" corps.¹³²

Having concluded that VMI's gender-based policy was not in furtherance of an exceedingly persuasive justification, and that VMI's policy of exclusion of women was not substantially related to any such goals, Justice Ginsburg's final task was to consider whether Virginia's remedial plan was constitutionally sufficient.¹³³ She concluded it was not.¹³⁴

Virginia's violation of equal protection was "the categorical exclusion of women from an extraordinary educational opportunity afforded men."¹³⁵ To constitutionally remedy this violation, Virginia's proposal had to "closely fit" the constitutional violation and be designed to place women who were denied admission to VMI in

130. Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. CAL. REV. L. & WOMEN'S STUD. 189, 197, 201 (1996). According to one scholar, "the institution has been marked as much by the reality of change as it has been by the myth of its unchanging traditions." *Id.* at 201. Early in its history, for example, the Institute accommodated and attempted to democratize class and religious differences. *Id.* at 204. And though VMI has long had, and continues to have, a fraught relationship with race, after its admission of Black cadets, it modified or abandoned some traditions that would have been inappropriate to continue after their admission. *Id.* at 206 (salute of the chapel in which Robert E. Lee is buried; the requirement that all cadets sing "Dixie"; the salute of the Confederate flag at the New Market ceremony). Prior to the Civil War, VMI owned slaves. *Id.* at 204. Despite the *Brown v. Board* ruling in 1954, VMI did not admit Black students until 1968. *Id.* at 206.

131. *VMI*, 518 U.S. at 546 n.16.

132. *Id.* at 545–46.

133. *Id.* at 546–48.

134. *Id.* at 556–57.

135. *Id.*

“the position they would have occupied in the absence of discrimination.”¹³⁶ But instead, VWIL was a “separate program, different in kind from VMI and unequal in tangible and intangible facilities.”¹³⁷ This proposal, Ginsburg concluded, was no remedy. It did not provide equal protection to “women ready, willing, and able to benefit from educational opportunities of the kind VMI offers.”¹³⁸

The VWIL program fell short of VMI’s in significant ways, many of which played to the gender-based stereotypes Justice Ginsburg spent her career prior to the bench working to dismantle.¹³⁹ VWIL did not provide rigorous military training consistent with VMI’s “adversative method,” but instead used a “cooperative” pedagogical approach to “reinforce[] self-esteem.”¹⁴⁰ The VWIL program did not follow VMI’s renowned regimental approach, with military-style barracks, communal meals, and required uniforms during school

136. *Id.* at 547.

137. *Id.*

138. *Id.* at 548.

139. In considering whether VWIL remedied Virginia’s constitutional violation, one imagines Justice Ginsburg might have thought back to a particularly dramatic exchange at oral argument, when Deputy Solicitor General Paul Bender was responding to questioning from Justice Scalia:

[W]hat if a State set up a State law school in 1839, all for men, because at that time only men could be lawyers, and over 150 years it developed an extremely adversative method of legal education, the toughest kind of Socratic teaching, tremendous time pressures, tremendous pressures in exams, tremendous combativeness by the faculty, tremendous competitiveness among the students, and developed a reputation for that.

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

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

What we’ll do is, we’ll set up a new women’s law school, and it won’t have the tough Socratic method, it will have a much warmer, a much more embracing environment, and it won’t have large classes with a lot of pressure, it will have seminars, and it won’t have tough exams, it will have papers, and things like that—and every woman has to go to that law school, and no man can, and no woman can go to the old law school. I think we all understand that that is not by any means equal treatment of women with regard to their access to the legal profession.

Oral Argument at 20:14, *VMI*, 518 U.S. 515 (1996) (No. 94-1941), <https://oyez.org/cases/1995/94-1941> [<https://perma.cc/R43U-YG8L>].

140. *VMI*, 518 U.S. at 520, 548.

hours.¹⁴¹ Whereas VMI's coeducational curriculum provided "physical rigor, mental stress, . . . minute regulation of behavior, and indoctrination of desirable values,"¹⁴² VWIL students received leadership training through seminars, externships, and a speaker series.¹⁴³

The Commonwealth argued these pedagogical differences were justified based on "important differences between men and women in learning and developmental needs," and "psychological and sociological differences."¹⁴⁴ And yet, stereotyped generalizations about "the way women are" or "what is appropriate for *most women*," Ginsburg responded, "no longer justify denying opportunity to women whose talent and capacity place them outside the average description."¹⁴⁵ The working group assigned to develop the leadership program at VWIL found that some women would be interested in and suited to VMI's program, despite the fact that it might not be desirable or effective for women as a group.¹⁴⁶ Thus, contrary to the stereotypes relied on by Virginia, the evidence in the case established that VMI's program was not inherently unsuited to women, that some women would do well in the program, that some women were capable of the individual activities and physical standards expected of male cadets, and that some women would want to attend VMI if they had the opportunity.¹⁴⁷ "It is on behalf of these women that the United States has instituted this suit," Ginsburg concluded, "and it is for them that a remedy must be crafted, a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit."¹⁴⁸

In addition to the lack of regimental/military training, the VWIL program was inferior to VMI's in a number of other ways: the composition of its student body, the training and prestige of its faculty, the available range of course offerings (particularly in stereotypically male domains of engineering, advanced math, and physics), athletic and physical training facilities, financial support available

141. *Id.* at 548. While the lower court had found that "the most important aspects of VMI's educational experience occur in the barracks . . . Virginia deemed that core experience nonessential, indeed inappropriate, for training its female citizen-soldiers." *Id.* at 548–49.

142. *Id.* at 548 (internal citation omitted).

143. *Id.* at 549.

144. *Id.*

145. *Id.* at 550.

146. *Id.* at 549.

147. *Id.* at 550.

148. *Id.* at 550–51.

for students, and the extensive network of VMI alumni.¹⁴⁹ Rather than placing excluded women in the same position they would have occupied had they been admitted to VMI, the VWIL program was a “pale shadow” of VMI.¹⁵⁰ “Valuable as VWIL may prove for students who seek the program offered, Virginia’s remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade.”¹⁵¹ Ultimately the Commonwealth had failed to provide “substantial equality” between the opportunities at VMI and VWIL.¹⁵²

In the concluding paragraphs of the majority opinion, Justice Ginsburg invoked Virginia’s historical lack of provision for her daughters.¹⁵³ Like its earlier refusal to admit women to UVA, the Commonwealth had closed VMI to women. “Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth’s obligation to afford them genuinely equal protection.”¹⁵⁴ Ending, as she began, with “We the People,” Justice Ginsberg concluded:

A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded. VMI’s story continued as our comprehension of “We the People” expanded. There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would

149. *Id.* at 551–52.

150. *Id.* at 553; *cf.* Transcript of Oral Argument at 71, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307) (stating that same sex marriage was being treated as a lesser “skim milk” marriage).

151. *VMI*, 518 U.S. at 555.

152. *Id.* The opinion did not consider whether “separate but equal” in the context of a state school like VMI would be inherently unequal, and such a consideration might have posed problems for single-sex education for women and girls. According to the opinion, the question was not squarely before the Court. Noting some amici’s arguments that single-sex education contributes to diversity and dissipates traditional classifications, Justice Ginsburg responded as follows:

We do not question the Commonwealth’s prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized . . . as “unique,” an opportunity available only at Virginia’s premier military institute, the Commonwealth’s sole single-sex public university or college.

Id. at 533 n.7 (internal citations omitted). Thus, she concluded, the Court was “not faced with the question of whether States can provide ‘separate but equal’ undergraduate institutions for males and females.” *Id.* (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 720 n.1 (1982)). Later in the opinion she recognized that “[s]ingle-sex education affords pedagogical benefits to at least some students.” *Id.* at 535.

153. *Id.* at 556–57.

154. *Id.* at 557.

destroy the Institute rather than enhance its capacity to serve the “more perfect union.”¹⁵⁵

Justice Scalia, the lone dissenter,¹⁵⁶ rejected the majority’s approach to Equal Protection analysis¹⁵⁷ and began his dissent with a familiar theme: the sky is falling. “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.”¹⁵⁸ He concluded his dissent with a warning: “I do not think any of us, women included, will be better off for [VMI’s] destruction.”¹⁵⁹ Thus far, as we will see below, Justice Scalia’s fears have not come to pass.

Justice Ginsburg’s disagreement with Scalia in the case was pointed, but amicable, and the two had been friends since their time sitting together on the D.C. Circuit. She frequently relayed the story of him sharing a draft of his *VMI* dissent with her in order to afford her more time to respond to it in her majority opinion. The dissent, she said, was a “zinger,” but the final opinion was more persuasive for his critique, and it provided “just the stimulation I needed to strengthen the Court’s decision.”¹⁶⁰

* * *

155. *Id.* at 557–58.

156. Justice Thomas was recused from the case because his son attended VMI at the time. *See* GINSBURG, MY OWN WORDS, *supra* note 2, at 150. While disagreeing with the majority’s constitutional analysis, Chief Justice Rehnquist agreed with Justice Ginsburg that there was little evidence that “diversity” was Virginia’s real goal in pursuing a male-only admission policy at VMI, and also that the remedy did not cure the equal protection violation because VWIL was “distinctly inferior to the existing men’s institution and [would] continue to be so for the foreseeable future.” *VMI*, 518 U.S. at 559–63 (Rehnquist, C.J., concurring). Chief Justice Rehnquist characterized the equal protection violation as “the maintenance of an all-men school without providing any—much less a comparable—institution for women.” *Id.* at 565. Thus, VMI would not necessarily have had to admit women or clone VMI to cure the violation. *Id.* Instead, a sufficient remedy would have been “if the two institutions offered the same quality of education and were of the same overall caliber.” *Id.* Ultimately, however, he concluded that “VWIL simply is not, in any sense, the institution that VMI [was].” *Id.* at 566.

157. *Id.* at 567–70 (Scalia, J., dissenting).

158. *Id.* at 566; *cf.* *Obergefell v. Hodges*, 576 U.S. 644 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003). He relied on the district court finding that VMI would be altered significantly after admitting women and “would eventually find it necessary to drop the adversative system altogether.” *VMI*, 518 U.S. at 589 (Scalia, J., dissenting) (internal citation omitted) (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1413 (W.D. Va. 1991)).

159. *VMI*, 518 at 603 (Scalia, J., dissenting).

160. Ruth Bader Ginsburg, *Remembrances of a Treasured Colleague: Remarks at Memorial Services for Justice Antonin Scalia*, in GINSBURG, MY OWN WORDS, *supra* note 2, at 39, 40.

Within the legal academy, many consider the *VMI* case a landmark opinion.¹⁶¹ Scholars have praised Justice Ginsburg's jurisprudence of "opportunity and equality" in *VMI*, describing her equality analysis as drawing heavily on notions of opportunity, the progressive commitment to equality, and equality as a way to enhance both self-actualization and social welfare.¹⁶² Others have praised her "methodical and sweeping" analysis.¹⁶³ They have also noted *VMI*'s important doctrinal implications not only for gender, but also for race¹⁶⁴ and the rights of other marginalized citizens.¹⁶⁵

In keeping with her many years of scholarship and advocacy, Justice Ginsburg's opinion represented a full-throated rejection of gender-based stereotypes and generalizations and an insistence that Virginia consider instead the merits, abilities, and desires of the *actual* women desirous of and qualified for a VMI education. She posed the ultimate question in the case as whether Virginia could constitutionally deny a VMI education to women "*capable of all of the individual activities required of VMI cadets.*"¹⁶⁶ She insisted the question was, at bottom, "[w]hether the Commonwealth can constitutionally deny to *women who have the will and capacity*, the training and attendant opportunities that VMI uniquely affords."¹⁶⁷ And later she categorized the constitutional injury as "the equal protection denied to *women ready, willing, and able* to benefit from educational opportunities of the kind VMI offers."¹⁶⁸

As viewed through the lens of feminist legal theory, Justice Ginsburg employed what theorists might characterize as a "liberal feminism" analysis,¹⁶⁹ focused on removing barriers and providing

161. See, e.g., Deborah L. Brake, *Reflections on the VMI Decision*, 36 J. GENDER & L. 35, 35 (1997); Nadine Strossen, *Introduction of Justice Ruth Bader Ginsburg*, 44 N.Y. L. REV. 1, 1 (2000) ("It will surely go down in history as one of the landmarks in the long, ongoing struggle for liberty and justice for all, including women.").

162. Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39, 42 (2004).

163. Linda Greenhouse, *The Supreme Court: Discrimination; Military College Can't Bar Women*, *High Court Rules*, N.Y. TIMES, June 27, 1996, at A1.

164. See Franklin, *supra* note 95, at 96–97.

165. GIBSON, *supra* note 97, at 71.

166. *VMI*, 518 U.S. 515, 530 (1996) (emphasis added) (citing *United States v. Virginia*, 766 F. Supp. 1407, 1412 (W.D. Va. 1991)).

167. *Id.* at 542 (emphasis added).

168. *Id.* at 547–48 (emphasis added). The formal equality tenor of the opinion also was shaped by the Department of Justice's advocacy in the case.

169. Katherine Franke, *Symposium: The Liberal, Yet Powerful, Feminism of Ruth Bader Ginsburg*, SCOTUSBLOG (Oct. 9, 2020, 2:00 PM), <https://scotusblog.com/2020/10/symposium-the-liberal-yet-powerful-feminism-of-ruth-bader-ginsburg> [<https://perma.cc/LF2G-PU>]

women equal access to a VMI education. This was consistent with Ginsburg's earlier approach to gender equality as a scholar and advocate. In the 1970s, she wrote, advocates were not yet urging "elaborate theory."¹⁷⁰ Instead, they argued that law's reflection of gender stereotypes "impeded both men and women from pursuit of the opportunities and styles of life that could enable them to break away from familiar stereotypes The endeavor was . . . to remove artificial barriers to women's aspiration and achievement; if women became political actors in numbers, it was thought, they could then exercise their will and judgment to help make the world and the rules fit for all mankind."¹⁷¹

In response to critiques of her approach as an "assimilationist" feminist rather than an "accommodationist," Justice Ginsburg responded, "I would call myself a pragmatist, dealing with the art of the possible The overall picture was that of separate spheres: the paid work sphere for men, the home and child care sphere for women That separate spheres view of the world was harmful to women, and our effort was to break it down, to end law-enforced separate spheres, for men as well as women [W]e were trying to . . . break down the separate-spheres-and-gender-roles mentality."¹⁷²

Eliminating artificial barriers based on gender for both women *and* men was essential to Ginsburg's gender equality project. To that end, the Women's Rights Project had also prosecuted cases in which men were disadvantaged by gender stereotypes. In fact, she once noted that she was sometimes referred to as a champion of men's rights.¹⁷³ As she put it: "The message we were trying to get

AX]. Some scholars have critiqued this limitation in the majority's opinion, arguing that the VMI program was "unconstitutionally male," based on gender stereotypes of male supremacy. See, e.g., Katharine T. Bartlett, *Unconstitutionally Male?: The Story of United States v. Virginia*, in *WOMEN AND THE LAW STORIES* 133, 136 (Elizabeth Schneider & Stephanie Wildman eds., 2011). Professor Bartlett argues that "the case remained caught in a paradigm in which women's right of access to existing institutions could depend upon assurances that women would not change those institutions. Yet just below the surface, *United States v. Virginia* raised unanswered questions about whether a state should be allowed to fund an educational program defined by particular, hyper-masculine norms As a result, the decision in the case opened VMI to women, but it did nothing to address the objectionable gender norms that defined the school." *Id.* at 136–37.

170. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1204 n.124 (1992), reprinted in 3 *FEDERAL ABORTION POLITICS: JUDICIAL NOMINATIONS* 382–83 (Neal Devins & Wendy L. Watson eds., 2019).

171. *Id.*

172. Ruth Rubio-Marín, "Notorious RBG": A Conversation with United States Supreme Court Justice Ruth Bader Ginsburg, 15 INT'L J. CONST. L. 602, 608 (2017).

173. Ginsburg et al., *Columbia Conversation*, *supra* note 12, at 9.

across was simply this: when you pigeonhole people on grounds of race, religion, whatever, you don't allow them to be free to be you and me—to borrow from the title of a wonderful song introduced in the 1970s by Marlo Thomas. People should not be held back by human-made laws from using whatever God-given talent they have. Girls as well as boys should be free to aspire and achieve.”¹⁷⁴

Beyond her pursuit of formal equality and quest to free men as well as women from the strictures of gender stereotypes, the *VMI* opinion represented Justice Ginsburg's personal philosophy of judging. She believed that the Supreme Court works best in conversation with the other branches and the citizenry, when it makes law via “measured motions” and “cautious dispositions” rather than “doctrinal limbs too swiftly shaped.”¹⁷⁵ Indeed, Ginsburg described the Court's sex discrimination jurisprudence of the 1970s and early '80s thus: “The Supreme Court wrote modestly, it put forward no grand philosophy, but by requiring legislative reexamination of once customary sex-based classifications, the Court helped to ensure that laws and regulations would ‘catch up with a changed world.’”¹⁷⁶ She observed that the type of changes effected for women's equality in the 1970s involved, in fact, “a movement that addressed not simply or dominantly the courts but primarily the people's representatives and the people themselves.”¹⁷⁷

174. Ginsburg, *Colorado Conversation*, *supra* note 11, at 922.

175. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

176. *Id.* at 1204–05.

177. *Id.* at 1208. Justice Ginsburg has noted that some of her dissents were similarly aimed at initiating a conversation with the legislative branch. Her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), for example, concluded by intimating the ball was then in Congress's court to amend Title VII to say what she, Ginsburg, had always interpreted it to mean. *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting). The Lilly Ledbetter Act passed within two years of the decision, and was the first piece of legislation signed by President Barack Obama. Ginsburg et al., *Columbia Conversation*, *supra* note 12, at 16–17.

IV. AFTERWARD

“*Wait and see. You will be proud of the women who become graduates of VMI.*”¹⁷⁸

—Justice Ruth Bader Ginsburg

On the day *United States v. Virginia* was issued, Justice Ginsburg delivered the bench announcement—one of the most personally satisfying during her time on the Court.¹⁷⁹ She would later remark that the sex equality project remained incomplete until *United States v. Virginia*. She reflected, “I regard the *VMI* case as the culmination of the 1970s endeavor to open doors so that women could aspire and achieve without artificial constraints.”¹⁸⁰

After the judgment issued, Ginsburg remarked on multiple occasions that VMI had survived the admission of women and continued to successfully fulfill its mission of producing citizen-soldiers, just as she had predicted in the opinion.¹⁸¹ Yet even many years after the decision, people would still express skepticism. Her response? “I wouldn’t want [to join the rat line]. My daughter and granddaughters wouldn’t want it. But there are women who do want that experience and are fully capable of holding their own in the cadet corps. Why shouldn’t they have the opportunity?”¹⁸²

Some time after the decision issued, Justice Ginsburg would receive the following poem from a critic:

*A scampering of dainty feet is heard across the plain
The VMI cadet corps is on parade again.
“I broke a nail! Oh, I could cry,”
A cuddly corporal shrieks.
A buxom sergeant dabs her eyes
To blot mascara’s streaks.
Captain Bertha splits a seam,
These pants weren’t made for girls.*

178. Va. Military Inst., *Justice Ginsburg Speaks at VMI* at 41:42, YOUTUBE (Feb. 1, 2017) [hereinafter *Ginsburg Speaks at VMI*], <https://www.youtube.com/watch?v=6ZXRk6TlSvq> [<https://perma.cc/GUL4-KHAP>].

179. GINSBURG, MY OWN WORDS, *supra* note 2, at 150–53.

180. *Id.* at 163. As significant as the opinion was, however, Ginsburg would later say, “[i]n my [time on the Court], I’ve never had an opinion come out exactly as I would have it if I were queen.” Mark Curriden, *Justice Ruth Bader Ginsburg*, in SMU DEDMAN SCHOOL OF LAW 2011 ALUMNI MAGAZINE 6, 7 (2011).

181. GINSBURG, MY OWN WORDS, *supra* note 2, at 151.

182. Ginsburg, *Colorado Conversation*, *supra* note 11, at 928.

*“Oh darn this perm!” cries private Pam
And struggles with her curls.
So flouncing out, the tittering throng
Lines up at Stonewall’s feet.
Feminists triumphant,
Their victory complete.*¹⁸³

At least one VMI alumnus had a more generous response, however. A class of ‘67 graduate sent Justice Ginsburg his mother’s “keydet” pin. He explained that a pin was given to every mother of a graduating cadet that year. He sent his mother’s pin to Ginsburg after his mother’s death.

In an abstract way, you will be mother of VMI’s first and succeeding women graduates. This pin makes you an adjunct member of the VMI family. I am sure she would it would have made my mother proud to know that it is in your possession. Feel free to wear it proudly, any time, but especially if you are ever invited to VMI. Be of good spirit; love, tolerance, and compassion will someday prevail without laws to mandate them.¹⁸⁴

Unsurprisingly, the overall reaction at VMI was far from celebratory. In the immediate aftermath of the ruling, VMI’s then-superintendent called it a “savage disappointment.”¹⁸⁵ Cadets also expressed dissatisfaction with the ruling, worrying that it would interfere with solidarity within the corps of cadets.¹⁸⁶ The judgment left VMI with two options: either admit women or forego state funding and become a private institution. It was a close vote, indicating the depth of VMI’s resistance to admitting women.¹⁸⁷ The Board of Visitors voted nine to eight to admit women and not to abandon support from the Commonwealth.¹⁸⁸ Although some VMI alumni welcomed the decision,¹⁸⁹ many more did not.

183. *Ginsburg Speaks at VMI, supra note 178.*

184. *Id.*

185. *Vozzella, supra note 110.*

186. *Greenhouse, supra note 163, at A1.*

187. Board Chairman William Barry relayed that there was “no question that 100 percent of the board would have preferred keeping the school all-male and state supported.” Donald P. Baker, *By One Vote, VMI Decides to Go Coed*, WASH. POST (Sept. 22, 1996), <https://www.washingtonpost.com/archive/politics/1996/09/22/by-one-vote-vmi-decides-to-go-coed/2a5807c7-fcf8-47ec-9483-6342c2b03029/> [<https://perma.cc/N67B-G9SH>].

188. *Id.*

189. Ginsburg tells the story of an alumnus who wrote to her, “In my life, I have met women who are as determined as I am, tougher than I am. Why shouldn’t women have the choice.” Ginsburg, *Colorado Conversation, supra note 11, at 929*. Later, the same alumnus would send Justice Ginsburg his mother’s keydet pin. *Id.*

The first women arrived at VMI as cadets in August 1997.¹⁹⁰ VMI announced it would make minimal changes to its practices, stating that “fully qualified women would themselves feel demeaned by any relaxation in the standards the VMI system imposes on young men.”¹⁹¹ Physical fitness requirements would be the same as those for men, but VMI installed toilets and showers for women, along with shades for barracks doors and windows, to be drawn only when cadets were dressing.¹⁹² In the first year of coeducation, two women left VMI within days of the start of the “rat line.”¹⁹³ But by the end of their freshman year, twenty-three women remained and “broke out” of the rat line. Before then, they “endured the spit-filled harangues; the forced marches; the push-ups demanded on a whim, sometimes as many as 300 in a day; the nighttime workouts called ‘sweat parties’; and the dozens of other daily humiliations in barracks that remind freshmen that they are what they are called here: rats.”¹⁹⁴ The core experiences of VMI’s adversative methods and the rat line remained intact: “[t]he bar was not lowered, and women proved themselves equal to the school’s unforgiving traditions.”¹⁹⁵

The implementation of coeducation did not go altogether smoothly, nor has the VMI experience been easy for women. As one graduate characterized it: “It was like living in the boys’ locker room for four years. It was like having 1,000 brothers. Some brothers give you wedgies. Some brothers are endearing. Some brothers don’t talk to you. Some brothers kick you from here to next week. It was a lot of roughhousing. But it was fun. It was never boring.”¹⁹⁶

Not all of the challenges were so benign. Male cadets have expressed resentment and hostility toward the new women cadets.¹⁹⁷ Consistent with the experiences of undergraduate women in colleges across the country, VMI women also have experienced sexual

190. Baker, *supra* note 187.

191. *Id.*

192. *Id.*

193. Peter Finn, *Second Female Cadet Quits VMI’s Rat Line*, WASH. POST (Aug. 26, 1997), <https://www.washingtonpost.com/archive/local/1997/08/26/second-female-cadet-quits-vmis-rat-line/20164a93-3c74-4a9e-93bb-6190a09a4571/> [<https://perma.cc/6GKS-S4ZD>].

194. Peter Finn, *VMI Women Reach End of Rat Line*, WASH. POST (Mar. 17, 1998), <https://www.washingtonpost.com/wp-srv/local/longterm/library/vmi/vmi0317.htm> [<https://perma.cc/3XPP-J9M7>].

195. *Id.*

196. Vozzella, *supra* note 110.

197. PHILIPPA STRUM, *WOMEN IN THE BARRACKS: THE VMI CASE AND EQUAL RIGHTS* 316 (2002).

harassment and sexual assault.¹⁹⁸ In 2014, VMI was one of more than 100 colleges and universities investigated by the Department of Justice's Office of Civil Rights ("OCR") for Title IX violations relating to its management of sexual-violence complaints.¹⁹⁹ Investigators found that "female cadets were exposed to a sexually hostile environment," that the Institute did not resolve cadet complaints of harassment and assault promptly and fairly, and that it violated the rights of pregnant and parenting cadets.²⁰⁰ VMI entered into a resolution agreement with OCR to conduct annual climate assessments, provide trainings on prevention, and revise tenure and promotion policies.²⁰¹

Ultimately, *United States v. Virginia* signaled significant changes at VMI, but it was hardly the death knell for the Institute. As VMI advertises, the *U.S. News and World Report* rankings have placed VMI "among the nation's top undergraduate public liberal arts colleges since 2001,"²⁰² beginning several years *after* women were admitted. VMI continues to contribute to the diverse offerings among state institutions of higher learning in Virginia. But now, it offers its unique approach to a more diverse group of young people who aspire to attend VMI. It also contributes to the diversity of the armed services by training exceptional young women for leadership in the military. And similarly, VMI's unique approach and unparalleled alumni network are now deployed to prepare a more inclusive group of young citizen-soldiers for leadership in public service, business, and other pursuits.

198. See, e.g., Elizabeth Bell, *Cadets' Arrests Bring Attention to Issue of Campus Sexual Assault*, ROCKBRIDGE REP. (Nov. 21, 2019), <https://rockbridgereport.academic.wlu.edu/2019/11/21/cadets-arrests-bring-attention-to-issue-of-campus-sexual-assault/> [https://perma.cc/SC4G-VB3E].

199. *Id.*

200. Michael Stratford, *OCR Stays Busy on Sexual Assaults*, INSIDE HIGHER ED (May 12, 2014), <https://www.insidehighered.com/news/2014/05/12/us-civil-rights-office-finds-title-ix-violations-vmi-and-settles-tufts> [https://perma.cc/5UAP-49DA].

201. *Id.* VMI's Policy on Discrimination, Harassment, and Sexual Misconduct is embodied in General Order 16, and requires all cadets, employees, and visitors to promptly report any violations of the order. VA. MILITARY INST., GENERAL ORDER NO. 16: DISCRIMINATION, HARASSMENT, AND SEXUAL MISCONDUCT 5 (2020), <https://www.vmi.edu/media/content-assets/documents/general-orders/GO16.pdf> [https://perma.cc/2nTA-AMEX].

202. *About*, VA. MIL. INST., <https://www.vmi.edu/about/> [https://perma.cc/43H3-6EX7].

Women have now graduated from VMI's Corps of Cadets for over twenty years.²⁰³ As of the summer of 2019, women made up approximately thirteen percent of the Corps.²⁰⁴ According to VMI, "They are pivotal members of the Corps—they hold leadership positions, play NCAA and club sports, pursue internships, and conduct original research. In short, they excel in every aspect of the VMI experience."²⁰⁵ Like the many generations of men who preceded them, VMI women alumnae now serve as leaders in the military, business, academia, and beyond. Among VMI's first Black women graduates, Delegate Jennifer Foy (VMI '03) is currently running for governor of Virginia.²⁰⁶ During her time in the Virginia General Assembly, Foy was a chief sponsor of the Equal Rights Amendment,²⁰⁷ which Virginia's General Assembly passed in Richmond on January 15, 2020.²⁰⁸ Of learning about the Court's decision in *VMI*, Foy related: "I heard Ruth Bader Ginsburg when she said that women can do all things if given the opportunity, and I agreed. So when I heard her speak those words, I . . . said you know what? I'm going to VMI. Because I'm just as powerful and capable and smart as any man in this classroom."²⁰⁹

VMI continues to emphasize its "mission of producing leaders—educated men and women of unimpeachable character and absolute integrity."²¹⁰ The *VMI* case illustrates that the Institute's history "is long, complex," and "challenges the fidelity of the Institute and cadets to the ideal of equality."²¹¹ As one historian reflected, "the Institute has worked hard, and not always successfully, to

203. *First Women Graduate from VMI*, ASSOCIATED PRESS (May 15, 1999), <https://apnews.com/article/80b0f5d4f2d83f523a01237feca0a59e> [<https://perma.cc/4BEG-LU2W>].

204. *Women at Virginia Military Institute: Define Yourself*, VA. MIL. INST. (July 2019), https://www.vmi alumni.org/wp-content/uploads/2019/09/2019_Women_at_VMI.pdf [<https://perma.cc/LNR2-AMK3>].

205. *Id.*

206. JENNIFER CARROLL FOY—FOR VIRGINIA GOVERNOR, <https://jennifercarrollfoy.com/> [<https://perma.cc/N5CQ-CGRJ>].

207. Justice Ginsburg had long championed the Equal Rights Amendment. See GINSBURG, MY OWN WORDS, *supra* note 2, at 139–49.

208. See Gregory S. Schneider, Laura Vozella & Patricia Sullivan, "A Long Time to Wait": Virginia Passes Equal Rights Amendment in Historic Vote, WASH. POST (Jan. 15, 2020), https://www.washingtonpost.com/local/virginia-politics/2020/01/15/0475d51a-36f1-11ea-9541-9107303481a4_story.html [<https://perma.cc/2AVP-R832>].

209. Heather Graf, *Virginia Military Institute's Female Cadets and Graduates Reflect on RBG's Legacy*, ABC 7 WJLA (Sept. 22, 2020), <https://wjla.com/news/local/virginia-military-institutes-female-cadets-graduates-reflect-on-rbgs-legacy> [<https://perma.cc/57XE-KRKK>].

210. *History*, VA. MIL. INST., <https://www.vmi.edu/about/history/> [<https://perma.cc/CMV4-GJ7B>].

211. Avery, *supra* note 130, at 210.

teach the cadets to ignore individual differences that are inherited but not earned.”²¹² That work continues today.²¹³

* * *

To commemorate the twentieth anniversary of coeducation at the Institute, VMI, along with the Washington and Lee University School of Law, invited Justice Ginsburg to speak in Cameron Hall on February 1, 2017, where she received a “rock-star” welcome from approximately 3800 cadets, law students, faculty, alumni, and others.²¹⁴ She arrived wearing black lace gloves and her “keydet” pin.²¹⁵ Justice Ginsburg summarized the *VMI* opinion for the audience as follows: “Government can’t prefer men or can’t prefer women for an opportunity; . . . all doors must be open to our sons and daughters, and they will choose to open those doors if they have the will and the talent to do so.”²¹⁶ When asked what she

212. *Id.* at 203 (describing efforts in the early years of VMI to eliminate social, class, and wealth distinctions).

213. Last summer, a former faculty member reported witnessing an environment hostile to cadets of color, LGBTQ cadets, and non-Christian cadets, and a former assistant athletic director confirmed that he also had witnessed racism at VMI. Black VMI alumni began a campaign asking the Institute to acknowledge racism at VMI, make changes, and remove the prominent statue of Confederate Lt. Gen. “Stonewall” Jackson. See Claire Mitzel, *VMI Alumni Speak Out About Racism, Demand Changes Amid Swell of Racial Justice Protests*, ROANOKE TIMES (June 13, 2020), https://roanoke.com/news/virginia/vmi-black-alumni-speak-out-about-racism-demand-changes-amid-swell-of-racial-justice-protests/article_12dbae31-7dbae31-7-cba-5b*a-b948-1b932b6c435b.html [<https://perma.cc/3ESV-8SDX>]. In October 2020, *The Washington Post* published a story citing more than a dozen current and former students of color describing an environment of “relentless racism” at VMI. See Ian Shapira, *At VMI, Black Cadets Endure Lynching Threats, Klan Memories, and Confederacy Veneration*, WASH. POST (Oct. 17, 2020), https://www.washingtonpost.com/local/at-vmi-black-cadets-endure-lynching-threats-klan-memories-and-confederacy-eneration/2020/10/17/3bf53cec-0671-11eb-859b-f9c27abe638d_story.html [<https://perma.cc/K38R-4Z4Q>]. Three days later, Virginia Governor Ralph Northam announced an investigation into VMI’s culture, policies, practices, and disciplinary procedures. See *Probe Ordered of Virginia Military Institute After Washington Post’s Report on Racist Incidents*, ASSOCIATED PRESS (Oct. 20, 2020), <https://apnews.com/article/race-and-ethnicity-virginia-bc3ea4159a4a8cefb952bfd30420732d> [<https://perma.cc/XU3U-FVYD>]. In response, on October 29, the VMI Board of Visitors announced that it would remove the statue of Stonewall Jackson, create a permanent diversity office, establish a building and naming committee for the campus, and develop diversity initiatives “to include a focus on gender.” See *Actions of the VMI Board of Visitors*, VA. MIL. INST. (Oct. 29, 2020), <https://www.vmi.edu/news/headlines/2020-2021/actions-of-the-vmi-board-of-visitors.php> [<https://perma.cc/97T3-35NG>]. The president of the Board of Visitors stated: “VMI, like all aspects of society, must honestly address historical inequities and be intentional about creating a better future. We care deeply about the individual experiences of all our cadets and alumni.” *Id.*

214. See Vozzella, *supra* note 110; see generally *Ginsburg Speaks at VMI*, *supra* note 178.

215. *Ginsburg Speaks at VMI*, *supra* note 178, at 34:35–35:00.

216. *Id.*

would say to male cadets at VMI who were opposed to the admission of women, she replied, “I think they learn from their women classmates how much good women could do for the institution.”²¹⁷ And as for Justice Scalia’s ominous prediction of VMI’s imminent demise in 1996, Justice Ginsburg observed: “Well I knew it wouldn’t [destroy VMI]. I knew it would make VMI a better place.”²¹⁸

Among those in the audience was a woman who graduated from VMI in 2003—a land developer in the Richmond region and member of VMI’s Board of Visitors.²¹⁹ Of Ginsburg, she said: “She changed my life. She changed the life of all the women who attended here. And she’s changed the lives of women all over the world.”²²⁰ Another 2003 graduate gave Ginsburg her steel combat ring “to thank her for battling for us.”²²¹ And yet another reflected that she “allowed all these women to not only come here but to succeed in whatever they wanted to do.”²²²

After Justice Ginsburg’s death on September 18, 2020, VMI issued a statement and shared a photo of her 2017 visit to campus:

During her 2017 visit to VMI, Justice Ruth Bader Ginsburg said she knew that her landmark decision to allow women among the ranks of the Corps of Cadets would make VMI a better school. Nearly 25 years later, VMI’s female alumni are among our nation’s leaders in corporate boardrooms, within our military, and within our communities.

VMI is saddened to hear of the passing of Justice Ginsburg. She was a courageous legal scholar whose impact on our Institute and our nation is an inspiration for all.²²³

217. Vozzella, *supra* note 110.

218. *Ginsburg Speaks at VMI*, *supra* note 178, at 37:27–37:55.

219. *Id.*

220. *Id.*

221. de Vogue, *supra* note 14.

222. *Id.*

223. *A Statement on the Passing of Justice Ruth Bader Ginsburg*, VA. MIL. INST., <https://www.vmi.edu/news/headlines/2020-2021/a-statement-on-the-passing-of-justice-ruth-bader-ginsburg.php> [<https://perma.cc/Q282-RTYZ>].

CONCLUSION

*“I would like my granddaughters, when they pick up the Constitution, to see that notion that women and men are persons of equal stature—I’d like them to see that that is a basic principle of our society.”*²²⁴

—Justice Ruth Bader Ginsburg, April 2014

In the closing paragraph of the Preface to her biography, Justice Ginsburg paused to make clear that much work remains to be done to achieve full equality for women in the United States and around the world. Still, she remained positive: “I am optimistic,” she said, “that movement toward enlistment of the talent of all who compose ‘We the People,’ will continue.”²²⁵

United States v. Virginia was of course only one of many important opinions Justice Ginsburg wrote while on the Court, and just one case embedded within a lifetime of advocacy and service. Yet it was the perfect coda to her earlier work as a scholar, teacher, and advocate to eliminate laws based on gender stereotypes and generalizations. It contributed to a more expansive understanding of “We the People.” And it made good on her longstanding commitment to our daughters.

Shortly after Ginsburg’s death, VMI alumna Kelly Sullivan—one of the first woman graduates of VMI—posted on SCOTUSBLOG that attending VMI was the best decision of her life, all “possible because one woman was brave enough to carve out a pathway for us to travel.”²²⁶ “Not many people,” Sullivan said, “can claim that their lives were directly impacted by a Supreme Court justice. I am proud to say that I can.”²²⁷ Although I applaud Sullivan’s sentiment, I must disagree. Ruth Bader Ginsburg directly impacted many, many lives. Through her persevering work for equality, she

224. GINSBURG, MY OWN WORDS, *supra* note 2, at 140; *The Kalb Report: Justices Antonin Scalia and Ruth Bader Ginsburg on the First Amendment and Freedom* (CSPAN television broadcast Apr. 17, 2014), <https://www.c-span.org/video/?318884-1/conversation-justices-scalia-ginsburg-2014> [<https://perma.cc/4LHH-2MBZ>].

225. The majority of those living in poverty are women; women’s earnings lag behind those of men; parental leave and employment policies in the United States are insufficient to allow parents to balance work and childrearing; and sexual harassment and domestic violence persist. See GINSBURG, MY OWN WORDS, *supra* note 2, at xviii.

226. Kelly Sullivan, *How a Landmark Ruling From Justice Ginsburg Changed My Life*, SCOTUSBLOG (Sept. 22, 2020, 1:26 PM), <https://www.scotusblog.com/2020/09/how-a-landmark-ruling-from-justice-ginsburg-changed-my-life/> [<https://perma.cc/T6UE-8F5H>].

227. *Id.*

2020]

IN MEMORIAM

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made it more possible for “We the People” (our daughters,²²⁸ yes, but also so many others) to be whatever we resolve to be.²²⁹

Thank you, Justice Ginsburg. Your life’s work has been, and will continue to be, a blessing.

228. I include my own daughters among them, and hope readers will indulge one personal anecdote. When the United States Department of Justice filed its suit against VMI in 1990, the Commandant of Cadets was Colonel David V. Harbach, VMI Class of 1961. (That name might sound familiar; he is my dear father-in-law.) *See* *United States v. Virginia* 766 F. Supp. 1407 (W.D. Va. 1991). Fast forward several decades, and you would find, hanging framed in two little girls’ rooms, a “Provisional Appointment to the Virginia Military Institute,” Classes of 2029 and 2033, requested by their grandfather, David V. Harbach, and signed by VMI’s Director of Admissions. As Justice Ginsburg observed, men “[have] daughters and granddaughters and they [begin] to recognize that some of, some of the so-called favors for women were not favors at all, but they were locking women into a small piece of man’s wide world.” *Transcript: Interview with Supreme Court Justice Ruth Bader Ginsburg*, WNYC STUDIOS: THE TAKEAWAY (Sept. 16, 2013), <https://www.wnycstudios.org/podcasts/takeaway/segments/transcript-interview-justice-ruth-bader-ginsburg> [<https://perma.cc/9EP3-T8CK>].

229. *See supra* note 1 and accompanying text.