In Memoriam: Ruth Bader Ginsburg

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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.”

—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 accomplish, with no artificial barriers blocking their way?”

—Ruth Bader Ginsburg

On September 18, 2020, we mourned the loss of Justice Ruth Bader Ginsburg, whom many considered not just a cultural icon,
but a national treasure. Among many other things, Justice Ginsburg became a later-in-life feminist “rock star,” 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, movies, t-shirts, “dissent collar” accessories, and Halloween costumes. 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).

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

3. The Justice was, in fact, an opera fanatic. RBG (Magnolia Pictures 2018).
5. E.g., ON THE BASIS OF SEX (Focus Features 2018); RBG (Magnolia Pictures 2018).
7. Id.
13. Id.
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. 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.” 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. Long before she knew the meaning of feminism, Ruth chaffed 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. She liked Nancy Drew novels because Nancy “did things.” She admired Amelia Earhart and Rosie the Riveter.

Ruth met her beloved husband, Marty, as a freshman at Cornell University, which she attended on a full scholarship. 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.
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 infant 27 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
upfront in saying they wanted no women.” 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. 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.”

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. While researching international procedure (procedure became a lifelong passion), she divided her time between New York and Sweden. 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. It was there that she discovered the word vägmärken, meaning “pathmarker” or “waypaver”—words she would invoke with frequency in her writings.

Ms. Ginsburg became Professor Ginsburg in 1963, when she joined the law faculty at Rutgers School of Law. 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. It was during her time as a law professor that Ginsburg began her project to secure women’s equality under law. Inspired by her women students at Rutgers Law, she chaired a student panel on “women’s liberation” in 1970. Later that year, she attended the annual meeting of the Association of American Law Schools, where she argued that the legal

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36. GINSBURG, MY OWN WORDS, supra note 2, at xv.
38. GINSBURG, MY OWN WORDS, supra note 2, at 372.
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.”

At the request of her students, Professor Ginsburg also developed a course on sex discrimination and taught her first seminar in spring 1971. 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. That summer, Professor Ginsburg worked with the ACLU national office on two briefs. The first, “grandmother” brief, was filed in the Tenth Circuit case of Moritz v. Commissioner. 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. 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. 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. 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.”

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.” Soon after Reed was decided, the ACLU created the Women’s Rights Project with Professor Ginsburg as Director. 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. 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.
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.\textsuperscript{59} Ginsburg later described the work of the Project as seeking to “advance, simultaneously, public understanding, legislative change, and change in judicial doctrine.”\textsuperscript{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.\textsuperscript{61} Ginsburg gave her first oral argument at the Supreme Court in \textit{Frontiero v. Richardson}, the case in which she first pressed the Supreme Court to adopt strict scrutiny for sex-based classifications.\textsuperscript{62} While she was unsuccessful in that effort, her advocacy ultimately lead the Court to adopt intermediate scrutiny for sex classifications in \textit{Craig v. Boren}.\textsuperscript{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: \textit{Sex-Based Discrimination: Text, Cases and Materials}, which was published in 1974.\textsuperscript{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 \textit{VMI} case.\textsuperscript{65} During her work as a professor in the 1970s, she published more than twenty-five articles on gender equality.\textsuperscript{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.\textsuperscript{67} But it was Ginsburg’s

\begin{itemize}
\item \textsuperscript{59} \textit{Id.} at 114–15.
\item \textsuperscript{60} Ruth Bader Ginsburg, \textit{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.
\item GINSBURG, MY OWN WORDS, supra note 2, at 116.
\item \textsuperscript{62} \textit{Id.} at 17, 131–32. \textit{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).
\item See GINSBURG, MY OWN WORDS, supra note 2, at 137. \textit{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).
\item GINSBURG, MY OWN WORDS, supra note 2, at 115.
\item Id.
\item Id. at 113.
\item Id. at xxi.
\end{itemize}
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. It was, as she describes, her “most significant opinion on the constitutional equality principle as applied to gender distinctions.”

II. THE LAWSUIT

“Save The Males!”

—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 1839 and has been financially supported and regulated by the Commonwealth since its inception. 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. 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.

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 advocates of the American democracy and free enterprise system, and

68. Id. at 116–17.
69. Id. at 117.
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

77. VMI, 518 U.S. at 520.
79. Id. at 1408.
80. Id.
81. Id. at 1408.
82. Id. at 1412.
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.
86. Id.
88. Id. at 481.
89. Id. at 484.
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.
96. See De Hart, supra note 18, at 341.
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. Recognizing the country’s “long and unfortunate history of sex discrimination,” the opinion traced the evolution of law on women’s equality.

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.” 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.” 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.”

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.” 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.”

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.” 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.”

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.

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.” Instead, the opinion chronicled Virginia’s (and the country’s) historical exclusion of women from higher education, which was thought to be dangerous. In 1879, for example,

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.”

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.” 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.’” 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.”

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.”

Ginsburg responded to the Commonwealth’s parade of horribles 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.

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. 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.

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)).
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. 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.

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.

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. She concluded it was not.

Virginia’s violation of equal protection was “the categorical exclusion of women from an extraordinary educational opportunity afforded men.” 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.” But instead, VWIL was a “separate program, different in kind from VMI and unequal in tangible and intangible facilities.” 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.”

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. VWIL did not provide rigorous military training consistent with VMI’s “adversative method,” but instead used a “cooperative” pedagogical approach to “reinforce self-esteem.” 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 combative nature of 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.

> 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.


140. VMI, 518 U.S. at 520, 548.
hours.\textsuperscript{141} Whereas VMI’s coeducational curriculum provided “physical rigor, mental stress, . . . minute regulation of behavior, and indoctrination of desirable values,”\textsuperscript{142} VWIL students received leadership training through seminars, externships, and a speaker series.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{142} Id. at 548 (internal citation omitted).
\item \textsuperscript{143} Id. at 549.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id. at 550.
\item \textsuperscript{146} Id. at 549.
\item \textsuperscript{147} Id. at 550.
\item \textsuperscript{148} Id. at 550–51.
\end{itemize}
for students, and the extensive network of VMI alumni. 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. “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.” Ultimately the Commonwealth had failed to provide “substantial equality” between the opportunities at VMI and VWIL.

In the concluding paragraphs of the majority opinion, Justice Ginsburg invoked Virginia’s historical lack of provision for her daughters. 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.” 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.”  

Justice Scalia, the lone dissenter, rejected the majority’s approach to Equal Protection analysis 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.” He concluded his dissent with a warning: “I do not think any of us, women included, will be better off for [VMI’s] destruction.” 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.”

* * *

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).
Within the legal academy, many consider the VMI case a landmark opinion. 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. Others have praised her “methodical and sweeping” analysis. They have also noted VMI’s important doctrinal implications not only for gender, but also for race and the rights of other marginalized citizens.

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.” 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.” 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.”

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

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

165. GIBSON, supra note 97, at 71.


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.

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.” 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.”

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.”

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. 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.


171. Id.


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.”

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.” 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.’” 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.”

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.

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 Currinden, 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.
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-fc98-47ec-9483-6342c2b03029/ [https://perma.cc/N67B-G98H].
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. 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.” 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. In the first year of coeducation, two women left VMI within days of the start of the “rat line.” 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.” 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.”

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.”

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

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191. Id.
192. Id.
195. Id.
196. Vozzella, supra note 110.
harassment and sexual assault. 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. 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. VMI entered into a resolution agreement with OCR to conduct annual climate assessments, provide trainings on prevention, and revise tenure and promotion policies.

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,” 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.


199. Id.


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.\footnote{First Women Graduate from VMI, ASSOCIATED PRESS (May 15, 1999), https://apnews.com/article/80b0f5df4f2d835f23a01237ee9ca0a59e [https://perma.cc/4BEG-LU2W].} As of the summer of 2019, women made up approximately thirteen percent of the Corps.\footnote{Women at Virginia Military Institute: Define Yourself, VA. MIL. INST. (July 2019), https://www.vmialumni.org/wp-content/uploads/2019/09/2019_Women_at_VMI.pdf [https://perma.cc/LNR2-AMK3].} 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.”\footnote{Id.} 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.\footnote{JENNIFER CARROLL FOY—FOR VIRGINIA GOVERNOR, https://jennifercarrollfoy.com/ [https://perma.cc/N5CQ-CGRJ].} During her time in the Virginia General Assembly, Foy was a chief sponsor of the Equal Rights Amendment,\footnote{Justice Ginsburg had long championed the Equal Rights Amendment. See GINSBURG, MY OWN WORDS, supra note 2, at 139–49.} which Virginia’s General Assembly passed in Richmond on January 15, 2020.\footnote{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].} Of learning about the Court’s decision in \textit{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.”\footnote{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-rbg’s-legacy [https://perma.cc/57XE-KRKK].}

VMI continues to emphasize its “mission of producing leaders—educated men and women of unimpeachable character and absolute integrity.”\footnote{History, VA. MIL. INST., https://www.vmi.edu/about/history/ [https://perma.cc/CMV4-G7J7].} The \textit{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.”\footnote{Avery, supra note 130, at 210.} As one historian reflected, “the Institute has worked hard, and not always successfully, to
teach the cadets to ignore individual differences that are inherited but not earned.” 212 That work continues today. 213

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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).


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.”

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.”

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. 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.”

Another 2003 graduate gave Ginsburg her steel combat ring “to thank her for battling for us.” And yet another reflected that she “allowed all these women to not only come here but to succeed in whatever they wanted to do.”

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.

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217. Vozzella, supra note 110.
219. Id.
220. Id.
221. de Vogue, supra note 14.
222. Id.
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.”

—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.”

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.” “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.” Although I applaud Sullivan’s sentiment, I must disagree. Ruth Bader Ginsburg directly impacted many, many lives. Through her persevering work for equality, she

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

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

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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.