

The Legacy of Ruth Bader Ginsburg

Edited by

SCOTT DODSON

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A More Perfect Union: Sex, Race, and the VMI Case

Cary Franklin

May 17, 2014, marked the sixtieth anniversary of *Brown v. Board of Education*.¹ On that day, President Obama issued a proclamation commemorating the decision as “a turning point in America’s journey toward a more perfect Union.”² The president noted that *Brown* not only breathed life into the Equal Protection Clause of the Fourteenth Amendment but also provided impetus for the landmark civil rights statutes of the 1960s, most notably, the Civil Rights Act of 1964 and the Voting Rights Act of 1965. In so doing, the president declared, the decision “shifted the legal and moral compass of our Nation.”³

Yet for all these words of praise, there was an undercurrent running through the president’s proclamation: a suggestion that for too many Americans, the promise of *Brown* remains just that. The president left it to the First Lady and Secretary of Education Arne Duncan to make this point more explicitly. In a commencement address to graduating high school seniors in *Brown*’s home city of Topeka, Kansas, Michelle Obama observed that “our schools are as segregated [today] as they were back when Dr. King gave his final speech,” and that “many districts in this country have actually pulled back on efforts to integrate” – with the result that American children are once again attending school “with kids who look just like them.”⁴ Arne Duncan echoed these observations. He noted that although *Brown* ended de jure segregation, it did not end de facto segregation; in fact, many school districts that desegregated in the 1960s and 1970s have since reseggregated.⁵ Today, 40 percent of black and Latino students attend “intensely segregated schools,” and white students are similarly isolated: only 14 percent attend truly integrated schools.⁶ Thus, Duncan concluded that although *Brown* may once “have seemed like the end of a long struggle for educational equality,”⁷ it was actually just the beginning of a struggle that continues to this day.

The Executive Branch’s not-entirely-sanguine assessment of racial progress in the decades since *Brown* stands in stark contrast to the message emanating

from the Supreme Court in recent years in regard to the status of racial equality in the United States. While the Executive commemorated *Brown*'s anniversary by calling attention to the ongoing struggle to overcome our nation's long history of racial subordination, the Roberts Court has, in its recent decisions involving race discrimination, emphasized our emancipation from this history. Several years ago, the Court invalidated race-based school desegregation plans voluntarily adopted by Louisville and Seattle on the ground that those cities had already "removed the vestiges of past segregation"⁸ (or were innocent of *de jure* segregation in the first place) – and thus had nothing to remedy. More recently, the Court invalidated a key provision of the Voting Rights Act after finding that the United States had overcome the history of race discrimination that initially justified the act's passage.⁹ "History did not end in 1965,"¹⁰ Chief Justice Roberts declared: "things have changed dramatically since then."¹¹ He asserted that Congress had no business trying to protect racial minorities in the twenty-first century based on decades-old "facts having no logical relation to the present day."¹²

In fact, the Court has suggested – in these and other cases – that we have come so far in surmounting our history of race discrimination that measures designed to combat discrimination or "help" racial minorities are now often the true barriers to equality. On this view, such measures – whether they take the form of school integration plans, civil rights statutes, or affirmative action – are preventing us from achieving the genuine and original promise of the Fourteenth Amendment: a color-blind society in which the state refrains from classifying individuals on the basis of race.¹³

Of course, not all of the justices subscribe to this "color-blind" constitutionalism. In her twenty-one years on the Court, Ruth Bader Ginsburg has been a powerful proponent of a different understanding of equal protection and the aims of the Fourteenth Amendment. This understanding is not blind to race but attentive to the ways in which it affects people's lived experiences. It does not assume that we have overcome our long history of race discrimination but instead examines the ways in which this history continues to shape institutional structures and curtail opportunity. It is an understanding that has animated not only Ginsburg's service on the Court but her entire career as a lawyer. It has formed a central part of her life's work.

Thus, it is not surprising that (what is perhaps) Ginsburg's most famous opinion should be the one that most fully articulates this understanding. The opinion is a sweeping meditation on the meaning of the Fourteenth Amendment's equality guarantee, the role of history in constitutional interpretation, and the lengthy and ongoing efforts of the American people to form a "more perfect Union." As such, it ranks as one of the most important

commentaries on *Brown*, and on the entire strain of equal protection law that grew out of *Brown*, to issue from the Court in decades – even though it never once mentions that decision. In fact, the opinion is not even (on its face, at least) about race at all.

I. THE VMI CASE

Ruth Bader Ginsburg was a very junior justice on the Supreme Court when she was assigned to write the majority opinion in *United States v. Virginia*.¹⁴ At issue in the case was the admissions policy of the Virginia Military Institute, a highly regarded, public, all-male military academy. By the 1990s, VMI had been a single-sex school for more than a century and a half, and those in charge of the school wished it to remain that way. Thus, when a female high school student seeking admission to the school filed a complaint about its admissions policy with a sympathetic Justice Department, VMI found itself in court.

A large part of VMI's appeal – to a certain breed of teenagers and their parents – is its unusually rough and rigorous pedagogical style. To achieve its goal of transforming sophomoric youngsters into "citizen-soldiers," the school relies on an "adversative method" modeled on English public schools and once characteristic of military instruction.¹⁵ Entering students are subjected to a "rat line" comparable in intensity to Marine Corps boot camp; for their entire first year, they are incessantly tormented and punished by upperclassmen. The goal of this particular brand of pedagogy is to show new cadets what they are capable of when pushed to their physical and psychological limits, to bind them to "their fellow sufferers,"¹⁶ and to forge a unified corps of disciplined and highly regimented young men. To this end, VMI has long required cadets to wear uniforms, eat together, adhere to the same schedule, and live in spartan barracks where surveillance is ubiquitous and privacy nonexistent. Relatively few of these "citizen-soldiers" actually go on to join the United States military,¹⁷ but many – through some combination of skills acquired at VMI and the help of the school's remarkably cohesive and loyal alumni network¹⁸ – enter the upper echelons of the state's business and political communities.¹⁹

The "rat line" is not a standard element in most teenagers' vision of college life, but VMI's militaristic ethos does appeal to some young men and, as it turns out, to some young women as well. In the two years before the Justice Department brought suit against VMI, hundreds of teenage girls had inquired (but received no reply) about possible admission to the school.²⁰ The Justice Department filed its suit on behalf of these women and others like them. It argued that some women would want to attend VMI, given the chance, and that

some women were capable of meeting all of the school's admissions standards save the sex requirement.²¹ Although the framers of the Fourteenth Amendment may not have recognized Virginia's maintenance of an all-male military institute as a violation of equal protection, the Justice Department argued, the state's ongoing restriction of this valuable and unusual opportunity to men did not comport with contemporary understandings of citizenship and equality.²²

Virginia responded to these claims by arguing that an all-male environment was integral to VMI's ability to accomplish its mission – that VMI simply would not be VMI if it were forced to admit female cadets.²³ For a start, the state asserted that the incorporation of women would undermine the adversative method, which depended on a complete lack of privacy and personal space, and demanded a kind of physical closeness that would be inappropriate between men and women.²⁴ The school simply could not continue to function as it had been functioning, with great success, for most of the nation's history, if it were required to make the sort of accommodations that an influx of female cadets would require. Moreover, the state argued, the adversative method did not constitute a suitable approach to the education of women, most of whom “tend to thrive in a cooperative atmosphere”²⁵ rather than one that involves being berated on a regular basis. Thus, the state proposed to remedy the educational inequality caused by its maintenance of an all-male military academy not by permitting women to attend VMI but by creating a separate “leadership” program for women at a nearby women's college.²⁶ Instead of seeking to push female students to their physical and psychological breaking point, this program would aim to support and encourage them – and it would do so by sparing them almost all of the extreme lifestyle elements characteristic of education at VMI.²⁷

It seems fair to say that when *United States v. Virginia* reached the Supreme Court in the mid-1990s, no justice had thought more deeply about the constitutional questions implicated by this set of arguments than Ruth Bader Ginsburg. Long before she became a Supreme Court Justice, Ginsburg had been a litigator of constitutional sex discrimination cases. She co-founded the ACLU Women's Rights Project in the early 1970s with the aim of convincing the Court that discrimination on the basis of sex was no less a violation of equal protection than discrimination on the basis of race. Her campaign was fantastically successful. Within a few years of bringing her first case, Ginsburg had persuaded the Court that discrimination on the basis of sex implicated constitutional equality concerns and warranted heightened scrutiny under the Fourteenth Amendment. In 1993, when President Clinton nominated Ginsburg to the high court, he acknowledged this achievement by referring to her as the “Thurgood Marshall of gender equality law.”²⁸

The VMI case provided Ginsburg with her first opportunity to speak about sex discrimination as a justice, and on behalf of the Court – and she made the most of it. Her opinion in *United States v. Virginia* answers the question at issue, of course: whether the state of Virginia may continue to operate a military institute exclusively for men. But the opinion does more than that. It explicates, much more fully than the Court had in previous opinions, the “mediating principle”²⁹ that guides the application of the Fourteenth Amendment in cases involving sex-based state action. In other words, Ginsburg’s opinion in *United States v. Virginia* does not simply resolve the contest over VMI’s admissions policy. It articulates a “guide for decision”³⁰ – an interpretive principle the Court has used (and in Ginsburg’s view, ought to continue to use) to apply the broad generalities of the Constitution, such as “equal protection,” to actual cases on the ground.

United States v. Virginia explicitly rejects blindness – in this case, sex-blindness – as the guiding principle in constitutional equality law. In the course of her opinion, Ginsburg provides multiple examples of sex classifications that are likely consistent with equal protection. She suggests, for instance, that a sex-specific recruitment program aimed at achieving “a sufficient ‘critical mass’ to provide female cadets with a positive educational experience”³¹ at VMI would pass constitutional muster, despite the fact that such a program might be construed as treating women differently than men. She suggests, in addition, that the admission of women would require VMI to make “accommodations, primarily in arranging housing assignments and physical training programs for female cadets”³² – and that such sex-specific accommodations would not run afoul of equal protection. Indeed, Ginsburg goes so far as to suggest that some single-sex schools (and here she cites a collection of private women’s colleges) may advance, rather than impede, the pursuit of sex equality and thus satisfy legal requirements regarding the equal treatment of the sexes.³³ Yet she strikes down VMI’s admissions policy, holding in no uncertain terms that *this* classification violates the Equal Protection Clause. The operative principle here is obviously not sex-blindness, or anti-classification. So what is the principle guiding the Court’s determination that VMI is constitutionally compelled to admit women?

United States v. Virginia holds that the Fourteenth Amendment permits sex-based state action that “dissipate[s]”³⁴ traditional sex stereotypes but disallows sex-based state action that reflects or reinforces such stereotypes. Unlike the anti-classification principle, this anti-stereotyping principle is contextually grounded. To implement this principle, one needs to know something about the history of stereotyping and discrimination a group has faced before determining whether a given action by the state has deprived that group of equal

protection. To this end – and to a greater extent than any other opinion in the canon of constitutional sex discrimination law – *United States v. Virginia* excavates and analyzes the particular forms of discrimination women have historically faced in the American legal system.

Ginsburg's opinion points out that from the time of the founding until 1920, "women did not count among voters composing 'We the People.'"³⁵ Thomas Jefferson was merely stating the prevailing wisdom of his day when he observed that even if the United States were "a pure democracy," women would still be excluded from decision-making councils because propriety demanded that they refrain from "mix[ing] promiscuously in the public meetings of men."³⁶ Politics was not the only public pursuit from which women were historically excluded. Ginsburg notes that women were barred from a wide range of occupations, including law, medicine, policing, and bartending.³⁷ They were also systematically denied entrée to educational institutions that would have prepared them for most desirable and remunerative forms of work.³⁸ Underwriting all of these instances of discrimination, Ginsburg observes, was a stereotyped conception of women's (and men's) sex and family roles. Historically, sex-based regulation reflected the idea that women were, at best, secondary players in the public sphere, and it reinforced the notion that their proper place was in the home, caring for their children and families.³⁹

Justice Scalia did not see the point of this lengthy foray into the history of sex discrimination. In his dissenting opinion, he accused Justice Ginsburg of gratuitously "deprecating the closed-mindedness of our forebears"⁴⁰ by invoking a litany of historical examples of discrimination that had little bearing on the constitutionality of VMI's admissions policy. Indeed, Scalia noted that many of Ginsburg's historical examples involve "the treatment of women in areas that have nothing to do with education."⁴¹ But her aim, in invoking all of this history, was not to disparage previous generations of Americans but to make a point about equal protection: namely, that the past is not entirely past, and that history is relevant to the adjudication of contemporary discrimination claims under the Fourteenth Amendment. To determine whether a given regulation violates equal protection, it is necessary to assess whether it perpetuates a history of discrimination that has deprived the members of a particular group of full and equal citizenship. Thus, Ginsburg holds, the problem with VMI's all-male admissions policy is not that it classifies individuals on the basis of their sex but that it reflects and reinforces the set of stereotypes that have incited and justified discrimination against women for most of American history. The exclusion of women from VMI – and the hastily conceived women's "leadership" institute that was supposed to make up for it – perpetuate traditional stereotyped conceptions of men as soldiers, protectors, and public citizens, and

of women as passive, domestic creatures, more suited to caring than combat. It does not simply do this in the abstract: it reinforces inequality in practice by depriving women of access to a valuable educational opportunity and a career pipeline that feeds into positions of influence in the state of Virginia.

This is what differentiates VMI's all-male admissions policy from the other forms of sex-based state action Ginsburg seems to condone in *United States v. Virginia*. VMI's exclusion of women reinforces a long history of exclusion; it perpetuates a tradition in which women were denied equal access to the public sphere and deprived of educational and professional opportunities on the basis of stereotypes about their proper maternal and domestic roles. By contrast, targeted efforts to recruit female cadets and modest sex-specific accommodations in housing aim to end this history of exclusion. They are designed to integrate women into VMI and to help female cadets and the institution itself overcome the wall of stereotypes that long barred half the state's population from reaping the rewards of a VMI education. Ginsburg articulated this distinction quite succinctly in her opinion when she wrote that "sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promot[e] equal employment opportunity, [and] to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."⁴²

This approach to equal protection reflects a broader conception of the meaning and purpose of the Fourteenth Amendment. Ginsburg concludes her opinion in VMI by citing the observation of historian Richard Morris that "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."⁴³ *United States v. Virginia* suggests this history ought to serve as a guide for applying the Equal Protection Clause to today's constitutional controversies. It is likely true that a VMI with female cadets is different from a VMI without female cadets. As Ginsburg observes in her opinion, VMI after racial integration was not the same as it was before it integrated.⁴⁴ But in neither instance, she opines, was there reason to believe that a move toward greater inclusion "would destroy the institution rather than enhance its capacity to serve the 'more perfect Union.'"⁴⁵

II. VMI AS A MODEL FOR EQUAL PROTECTION

Justice Scalia dissented vigorously from almost all aspects of Ginsburg's majority opinion in *United States v. Virginia*. His central objection was to the level of scrutiny it seemed to apply to sex-based state action. Scalia asserted that

the Court had long applied intermediate scrutiny in the context of sex, asking whether the discrimination was "substantially related to an important government objective."⁴⁶ He argued that the tougher test of strict scrutiny was reserved for cases involving race discrimination.⁴⁷ Yet, the majority opinion in *United States v. Virginia* seemed to collapse this distinction. It seemed to treat sex discrimination the same as race discrimination for purposes of equal protection, subjecting it to a higher level of scrutiny than Scalia believed was warranted.⁴⁸

Justice Scalia may be right that *United States v. Virginia* does not leave much room between the levels of scrutiny that apply in cases involving sex- and race-based state action. The Court repeatedly declares that sex-based state action requires an "exceedingly persuasive justification"⁴⁹; it subjects the state's asserted justifications for VMI's all-male admissions policy to a fairly intense form of scrutiny. But in accusing the Court of subjecting sex discrimination to the same standard of review as race discrimination, Scalia overlooks what is almost certainly the bolder move Ginsburg makes in *VMI*, which is to suggest that race discrimination is, or ought to be, evaluated under the same set of constitutional principles that apply in the context of sex discrimination. Some of the most profound implications of Ginsburg's opinion in *VMI* concern how we ought to understand the constitutional project of equal protection – as much in the context of race as in the context of sex.

To say that *VMI* has these broader constitutional implications is not to say that the opinion does not make important observations about sex in particular. One of Ginsburg's most daunting and significant challenges as a litigator in the 1970s was to make the history of sex discrimination visible to a Court that had not previously demonstrated any familiarity with the subject. It was not an easy task. The Court was accustomed, by then, to hearing race discrimination claims, but it had far less experience adjudicating legal controversies that implicated sex. It sometimes struggled on the latter front, particularly in cases where the analogy to race was weakest, such as those involving pregnancy. In 1974, for instance, the Court failed to recognize pregnancy discrimination as sex discrimination, reasoning that not all women are pregnant: having a child is just something some women do.⁵⁰

Ginsburg's opinion in *United States v. Virginia* seeks to rectify these early missteps. It 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. Most striking, in this regard, is the opinion's treatment of "supposed 'inherent differences'"⁵¹ between men and women. "We have come to appreciate" that physical differences between the sexes "remain cause for celebration,"⁵² Ginsburg wrote. But, she observed, we have also come to appreciate that such differences may

not be used, as they once were, "for denigration of the members of either sex or for artificial constraints on an individual's opportunity."⁵³ As Ginsburg notes in *VMI*, the Court does not generally confront the issue of "inherent differences" in the context of race, where such "differences" ceased long ago to serve as a legitimate justification for race-based state action.⁵⁴ But women's capacity to become pregnant is "enduring,"⁵⁵ and Ginsburg's opinion in *VMI* makes an important contribution to the Court's understanding of its constitutional significance. It suggests not that the state should ignore pregnancy, but that it may not regulate pregnancy in ways that reflect or reinforce traditional stereotyped conceptions of women's sex and family roles. This is, undoubtedly, an important clarification of the Court's earlier constitutional reasoning regarding physical differences between the sexes.⁵⁶

Yet in focusing on the particular – the history of sex discrimination and the regulation of "supposed 'inherent differences'" between the sexes – Ginsburg's opinion in *United States v. Virginia* also makes important observations about equal protection law more generally. It suggests that judges ought to remain cognizant of the aims of the Fourteenth Amendment – to foster social inclusion and remedy group-based inequality – when interpreting the Equal Protection Clause. The only way to do this, the opinion suggests, is to attend to history, and to the particular experiences of different groups in the American legal system. Armed with such awareness, it becomes possible to determine whether a contested form of state action perpetuates or ameliorates the kinds of inequality the Fourteenth Amendment was designed to combat. *VMI* teaches that, sometimes, state action that helps to ameliorate inequality will take the form of group-based classifications. Classifications of this kind – though they sort people on the basis of a group characteristic – do not violate equal protection: they are equal protection.

Because *United States v. Virginia* engages in these broader forms of reasoning about the Fourteenth Amendment, its implications are not confined to the context of sex.⁵⁷ Indeed, in the nearly two decades that have passed since *VMI*, Ginsburg has consistently applied the principles articulated in that case to constitutional questions involving race.⁵⁸ She has, for instance, repeatedly voted to uphold race-based educational affirmative action programs – for much the same reason she condoned sex-based recruitment programs designed to achieve a "critical mass" of female cadets at *VMI*. Ginsburg observed in *Grutter and Gratz*, the 2003 University of Michigan affirmative action decisions, that despite our ostensible commitment to *Brown*, the American education system remains plagued by vast race-based disparities.⁵⁹ Such disparities are also present in housing, employment, government contracting, and health care; and in all of these contexts, she argued, race-based disparities reflect

historical and ongoing discrimination against racial minorities.⁶⁰ Affirmative action programs, like the ones employed by the University of Michigan, are designed to ameliorate these disparities and to distribute opportunities to communities that have long been denied them. They also serve, Ginsburg noted, to dissipate racial stereotypes – to challenge the “traditional and unexamined habits of thought”⁶¹ that continue to deprive racial minorities of equal standing in American society. “Were our Nation free of the vestiges of rank discrimination long reinforced by law,” it might make sense to treat all race-based classifications the same.⁶² But, she argued, “we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.”⁶³ In light of these historical realities, “consistency”⁶⁴ in the form of color-blindness impedes, rather than speeds, the realization of equal protection.

Ginsburg echoed this point a decade later in her tour de force dissent in *Shelby County v. Holder*,⁶⁵ a decision that gutted the preclearance requirement of the Voting Rights Act.⁶⁶ As noted earlier, the Court in *Shelby County* chided Congress for failing to recognize that “history did not end in 1965,”⁶⁷ and that Americans today have substantially overcome their taste for discrimination. Ginsburg responded to this assessment of the state of racial affairs circa 2013 by asserting that “the Court ignores that ‘what’s past is prologue,’”⁶⁸ and that “those who cannot remember the past are condemned to repeat it.”⁶⁹ Certainly, she acknowledged, times have changed, and jurisdictions that once blocked most racial minorities from voting do not do so today. But instances of blatant race discrimination in voting continue to occur, and perhaps even more ominously, Ginsburg noted, older forms of discrimination have “evolved into subtler second-generation barriers.”⁷⁰ Sometimes, such barriers can be difficult to recognize as such without appreciating the history that gave rise to them – which is why Ginsburg called attention to the Court’s whitewashing of the nation’s long and ongoing struggle with race discrimination in the context of voting. Just because these second-generation barriers are harder to see does not mean they are any easier to overcome – which is why Ginsburg argues that it makes no sense to interpret the Fourteenth Amendment as a bar to anti-discrimination measures. Race-consciousness in the pursuit of racial equality is not, and has never been, she argues in *Shelby County*, a problem under the Equal Protection Clause.

III. VMI AND THE PRESERVATION OF A CONSTITUTIONAL TRADITION

Ginsburg has frequently observed that this way of thinking about race-consciousness and equality has broad support around the globe. She notes

in the Michigan affirmative action cases, for instance, that the United Nations-initiated Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination against Women explicitly “distinguish between policies of oppression and measures designed to accelerate *de facto* equality.”⁷¹ But this dividing line between group-based classifications that serve to oppress and group-based classifications that serve to rectify injustice is not just part of a contemporary global conversation about equality. It has deep roots in our own constitutional tradition. The Court has long treated race as a “suspect category,” Ginsburg has explained, “not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.”⁷² She has noted that “the Court’s once lax review of sex classifications demonstrates the need for such suspicion.”⁷³ But strict scrutiny was not intended, and has not been deployed, as an automatic proscription of all group-based classifications. Its purpose is not to eliminate classifications as such but “to ferret out classifications in reality malign, but masquerading as benign.”⁷⁴ Thus, Ginsburg has argued, the recent suggestion by some of her colleagues that strict scrutiny is fatal even for classifications designed to ameliorate racial inequality is a new departure with little precedent in the history of American equal protection law.

Ginsburg has an unusually broad and deep understanding of this aspect of our constitutional tradition because she has been thinking and writing about it for over four decades. When Ginsburg first turned her attention to sex-based equal protection law, in 1970, there was very little of it.⁷⁵ Given the dearth of legal materials on sex discrimination, she and other legal feminists often looked to race-based equal protection law as a foundation for their claims.⁷⁶ What they found was not a doctrine that barred all racial classifications, but one that precluded the state from regulating race in ways that perpetuated the secondary status of racial minorities.

Courts in the late 1960s were often quite receptive to race-based state action that worked to dismantle traditional racial hierarchies. This was the period in which courts and legislatures began genuinely to implement *Brown*, which they typically interpreted as a command to eradicate a “system of segregation and its effects.”⁷⁷ In 1968, in *Green v. New Kent County School Board*, the Court read *Brown* as a directive to school districts “to take whatever steps might be necessary” to “convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.”⁷⁸ The Court amplified this point three years later in *Swann v. Charlotte-Mecklenburg Board of Education*,⁷⁹ which upheld a race-based busing plan designed to better integrate the district’s schools. *Swann* involved a court-ordered busing plan, and the Court suggested there

might be limits on the judiciary's power to order such plans. But regarding busing and other race-based integration plans voluntarily adopted by school districts, the Court made the following observation:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.⁸⁰

These decisions made clear that classification was not synonymous with discrimination in the context of race; what mattered, for purposes of equal protection law, were the ends to which the classification was directed.

Education was not the only context in which the Court suggested there was a difference between classification and discrimination. The Court made the same point, from a different angle, in *Griggs v. Duke Power Company*.⁸¹ *Griggs* held that facially neutral employment policies that have a disparate impact on racial minorities constitute discrimination on the basis of race unless justified as a business necessity. Though "fair in form," the Court held, such policies are "discriminatory in operation"⁸²; they cement a system of racial exclusion inconsistent with modern conceptions of equality. The Court in *Griggs* was interpreting the race provision of Title VII of the 1964 Civil Rights Act. But numerous federal appeals courts in the 1970s held that the same rule applied in the context of equal protection.⁸³ These holdings reflected the prevailing understanding in this period, which was that the form of the law (whether or not it explicitly classified on the basis of race) was less relevant to its constitutionality than its effect on the ground. Courts did not treat state action that had an integrative effect and worked to counteract race discrimination the same as state action that perpetuated segregation and inequality.

In fact, the Court's willingness to permit racial classifications designed to combat traditional forms of racial inequality at one point proved something of a problem for Ginsburg. One of her early cases for the ACLU Women's Rights Project, *Kahn v. Shevin*,⁸⁴ arrived at the Court at the same time as an early race-based affirmative action case, *DeFunis v. Odegaard*.⁸⁵ *Kahn* involved a Florida statute that granted widows, but not widowers, a property-tax exemption. Ginsburg's concern was that the Court would uphold the affirmative action program in *DeFunis* on the ground that group-based classifications designed to combat discrimination were permissible under equal protection – and that it would mistakenly place the classification in *Kahn* in the same category.⁸⁶ Ginsburg worked hard in her brief to try to explain the difference between the

two cases, arguing that affirmative action dissipated racial stereotypes, while Florida's tax law reinforced stereotypes of men as breadwinners and women as their dependents.⁸⁷ Her concerns proved prescient, however. The Court upheld the statute in *Kahn*, reasoning that equal protection did not bar all sex classifications and that this one seemed to help women, who faced greater challenges than men in the job market.⁸⁸

Kahn did not end up having great precedential value (nor did *DeFunis*, which the Court declared moot).⁸⁹ But this episode provides a striking illustration of the prevailing conception of group-based classifications in the early 1970s. For nearly a century after the Fourteenth Amendment was enacted, courts routinely upheld race- and sex-based classifications. That changed with *Brown* and the race- and sex-equality cases that followed in its wake. But the new rule did not dictate that all group-based classifications were impermissible; it held such classifications impermissible when they perpetuated a history of stereotyping and discrimination. It is only relatively recently that an appreciable number of justices have begun to suggest that equal protection makes no distinction "between a 'No Trespassing' sign and a welcome mat."⁹⁰ Indeed, this strict anti-classificationist view has really only emerged in full force during Ginsburg's time on the Court.

Against this backdrop, *United States v. Virginia* assumes a heightened constitutional significance. Ginsburg's opinion makes an important contribution to constitutional sex discrimination law by clarifying how the state may regulate "inherent differences" between men and women: namely, in ways that promote equal opportunity and dismantle sex-based hierarchies, but not in ways that perpetuate conventional stereotypes about men's and women's sex and family roles. But *United States v. Virginia* is just as important for what it preserves as for what it innovates. Ginsburg's opinion powerfully reasserts a long-standing conception of equal protection: one that is alert to histories of group-based discrimination, sensitive to law's effects on the ground, and tolerant of state action that seeks to foster equality while disallowing state action that perpetuates traditional patterns of injustice.

It has become commonplace today to divide Supreme Court justices into two camps: "originalists" and "living constitutionalists." In some ways, these labels are fair enough. Justice Ginsburg is a living constitutionalist, in the sense that she believes new generations of Americans may invoke the broad generalities of the Constitution to combat forms of inequality only dimly perceived by their ancestors. But too much emphasis on the progressive or forward-looking nature of living constitutionalism can obscure the degree to which Ginsburg's jurisprudence engages with the past. Her opinions often recount neglected stories – histories of discrimination that illuminate important aspects of

contemporary questions in equal protection law. But this is not all they do. In addition to describing traditions of injustice we are striving to overcome, Ginsburg's opinions seek to preserve a constitutional tradition of which we might be proud – a tradition that has long recognized that “the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.”⁹¹ This tradition is currently under threat, as the Court increasingly subscribes to a “color-blind” constitutionalism that makes no distinction between measures designed to oppress and measures designed to defeat oppression. Justice Ginsburg has made many contributions to American law in the decades she has served on the Court. But the greatest of these may be her preservation, for future generations of Americans, of a constitutional tradition that is capable of distinguishing between “actions designed to burden groups long denied full citizenship stature”⁹² and those designed to include such groups, on equal terms, in the life of the nation.

- 98 *Id.* at 759.
- 99 *Id.* at 766.
- 100 *Id.* at 767.
- 101 *Id.* at 774.
- 102 *Id.* at 795.
- 103 Carla Crowder, *Private White Academies Struggle in Changing World*, BIRMINGHAM NEWS, Oct. 27, 2002, available at <http://www.al.com/specialreport/birminghamnews/?blackbelt6.html>
- 104 *Id.*
- 105 Sarah Carr, *In Southern Towns, "Segregation Academies" Are Still Going Strong*, ATLANTIC, Dec. 13, 2012, available at <http://www.theatlantic.com/national/archive/2012/12/in-southern-towns-segregation-academies-are-still-going-strong/266207/>
- 106 *Id.*
- 107 518 U.S. 515 (1996).
- 108 *Id.*, Transcript of Oral Argument at 45.
- 109 518 U.S. at 598 (Scalia, J., dissenting).
- 110 *Bob Jones Univ. v. United States*, 461 U.S. 574, 598 (1983).
- 111 Brief for Twenty Six Private Women's Colleges as Amici Curiae Supporting Petitioner, *VMI*, 518 U.S. 515, 1995 WL 702837, at *23, *25.
- 112 *VMI*, 518 U.S. at 532 n.6.
- 113 *Id.* at 533 n.7.
- 114 Husband of Justice Ruth Bader Ginsburg for fifty-six years until his death in 2010, Professor Martin David Ginsburg was an internationally renowned tax expert and probably the greatest authority ever on the law of corporate taxation.
- 115 TAM 7744007, 1977 WL 50659.
- 116 Martin Ginsburg, *Sex Discrimination and the IRS: Public Policy and the Charitable Deduction*, 10 TAX NOTES 27 (Jan. 14, 1980).
- 117 *Id.*
- 118 *Id.*

7 A MORE PERFECT UNION

- 1 347 U.S. 483 (1954).
- 2 *Presidential Proclamation – 60th Anniversary of Brown v. Board of Education*, May 15, 2014, <http://www.whitehouse.gov/the-press-office/2014/05/15/presidential-proclamation-60th-anniversary-brown-v-board-education>
- 3 *Id.*
- 4 Sheryl Gay Stolberg, *Mrs. Obama, in Speech, Cites Growing Divisions*, N.Y. TIMES, May 17, 2014, at A14.
- 5 Arne Duncan, *Progress and Challenges 60 Years after Brown v. Board*, HOMEROOM: THE OFFICIAL BLOG OF THE U.S. DEP'T OF ED., May 15, 2014, http://www.ed.gov/blog/?guest_author_name=Arne+Duncan
- 6 *Id.*
- 7 *Id.*
- 8 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007).

- 9 See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).
- 10 *Id.* at 2628.
- 11 *Id.* at 2625.
- 12 *Id.* at 2629.
- 13 This view is perhaps best, and certainly most succinctly, summed up in Chief Justice Roberts's recent observation that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748.
- 14 518 U.S. 515 (1996).
- 15 *Id.* at 520.
- 16 *Id.* at 522.
- 17 *Id.* (noting that "only about 15% of VMI cadets enter career military service" (internal quotation marks omitted; alteration in original)).
- 18 *Id.* at 520, 523 (noting that "VMI has the largest per-student endowment of all public undergraduate institutions in the Nation" primarily "because its alumni are exceptionally close to the school").
- 19 *Id.* at 520 (noting that "VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives"); *id.* at 552 (discussing the "network of business owners, corporations, VMI graduates and non-graduate employers . . . interested in hiring VMI graduates" (internal quotation marks omitted; alteration in original)).
- 20 *Id.* at 523.
- 21 See Br. for the Pet'r at 5, *VMI*, 518 U.S. 515.
- 22 *Id.* at 24–25.
- 23 See Br. for the Resp. at 17, *VMI*, 518 U.S. 515.
- 24 *Id.* at 43–44. For a fascinating account of the fear that co-education would disrupt physical closeness between male cadets at what was the nation's only other all-male public military academy, see Susan Faludi, *The Naked Citadel*, *NEW YORKER*, Sept. 5, 1994, at 62.
- 25 *VMI*, 518 U.S. at 541 (quoting testimony by one of Virginia's expert witnesses (internal quotation marks omitted)).
- 26 *Id.* at 526.
- 27 *Id.* 526–27 (describing the proposed Virginia Women's Institute for Leadership, which did not have a military format, did not require its students to eat together or wear uniforms, and generally eschewed the "adversative method").
- 28 See Jason Farago, *Ruth Bader Ginsburg: The Supreme Court's Leading Lady Shouldn't Leave Yet*, *GUARDIAN*, Aug. 2, 2013, <http://www.theguardian.com/commentisfree/2013/aug/02/ruth-bader-ginsburg-supreme-court-20-years>
- 29 Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107, 108 (1976).
- 30 *Id.*
- 31 *VMI*, 518 U.S. at 523 (citing a finding to this effect by the district court (internal quotation marks omitted)). The idea of a "critical mass," which Ginsburg introduced here, has gone on to play an important role in the Court's affirmative action jurisprudence. See *Grutter v. Bollinger*, 539 U.S. 306, 330–33 (2003).
- 32 *Id.* at 540. Neither party in this case contested that such accommodations would be required, and the district court found, as a matter of fact, that admitting women to VMI would require the school to make such changes. *Id.*

- 33 *Id.* at 533 n.7 (noting that “it is the mission of some single-sex schools ‘to dissipate, rather than perpetuate, traditional gender classifications,’” but ultimately declining to reach the question of whether states can provide “separate but equal” undergraduate institutions for men and women (quoting Brief of Twenty-Six Private Women’s Colleges as Amici Curiae Supporting Petitioner, *VMI*, 518 U.S. 515)).
- 34 *Id.* (internal quotation marks omitted).
- 35 *Id.* at 531.
- 36 *Id.* at 531 n.5.
- 37 *Id.* at 531, 543–44.
- 38 *Id.* at 536–39.
- 39 *See id.* at 536 n.9 (noting that these stereotypes often took a rather literal form, as numerous “authorities” in the nineteenth century argued that education would interfere with women’s reproductive functions and incapacitate them for wife- and motherhood).
- 40 *Id.* at 566 (Scalia, J., dissenting).
- 41 *Id.*
- 42 *Id.* at 533–34.
- 43 *Id.* at 557.
- 44 *Id.* at 546 (noting that after *VMI* admitted its first African American cadets, in 1968, the student body stopped singing “Dixie” and saluting the Confederate flag and the tomb of General Robert E. Lee at ceremonies and sports events).
- 45 *Id.* at 558.
- 46 *Id.* at 576 (Scalia, J., dissenting); *see id.* at 570 (“To reject the Court’s disposition today . . . [i]t is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades.”).
- 47 *Id.* at 574.
- 48 *Id.* at 574–75 (suggesting that the stringent scrutiny to which the Court subjected *VMI*’s all-male admissions policy is “particularly out of place because it is perfectly clear that, if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review”).
- 49 *See, e.g., id.* at 531, 533, 534, 545, 546, 556. This language was not new. Courts had been using it in sex discrimination cases since at least the early 1980s. *See* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (asserting that a party seeking to uphold government action based on sex must establish an “exceedingly persuasive justification” for such action). Nonetheless, the Court’s avoidance of the term “intermediate scrutiny” in favor of “exceedingly persuasive justification,” and its observation that strict scrutiny had “thus far” been reserved to cases involving race, *VMI*, 518 U.S. at 533 n.6, was enough to raise questions about the level of scrutiny the Court actually applied in this case. *See, e.g.,* Cass R. Sunstein, *The Supreme Court, 1995 Term – Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) (asserting that “the Court did not merely restate the intermediate scrutiny test but pressed it closer to strict scrutiny” and that “after *United States v. Virginia*, it is not simple to describe the appropriate standard of review” in cases involving sex-based state action).
- 50 *See* *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (“The lack of identity between [pregnancy] and gender as such . . . becomes clear upon the most cursory analysis.

[Pregnancy discrimination] divides [humanity] into two groups – pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”).

51 *VMI*, 518 U.S. at 533.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 For more on *VMI*'s innovative approach to “real differences” between men and women, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 143–46 (2010). Most scholars have interpreted *Geduldig* as holding that pregnancy discrimination does not constitute discrimination on the basis of sex. Reva Siegel has pointed out, however, that the holding in *Geduldig* was narrower than this. *Geduldig* held that “not . . . every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . and *Frontiero*,” the first cases in which the Court invalidated sex-based state action under the Equal Protection Clause. See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (emphasis added). As Siegel notes, this holding leaves open the possibility that some legislative classifications involving pregnancy are sex-based classifications like those considered in *Reed* and *Frontiero*. See Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1873 (2006). Thus, we might read Ginsburg’s discussion of the regulation of “real differences” in *VMI* not as contradicting *Geduldig*, but as clarifying when, in fact, such regulation runs afoul of legal prohibitions of sex discrimination.

57 Indeed, Ginsburg observes in *VMI* that after the school integrated, it “established a program on ‘retention of black cadets’ designed to offer academic and social-cultural support to ‘minority members of a dominantly white and tradition-oriented student body,’” and that the school “maintains a ‘special recruitment program for blacks.’” *VMI*, 518 U.S. at 546 n.6 (quoting *U.S. v. Va.*, 766 F. Supp. 1407, 1436–37 (W.D. Va. 1991)). This does not constitute a holding, but it is certainly a strong suggestion that Ginsburg believes these programs to be constitutional for the same reasons she suggests in *VMI* that sex-specific accommodations and recruitment programs are constitutional: they aim to integrate formerly segregated institutions, break down stereotypes, and distribute opportunities to groups that have previously been denied them.

58 This essay focuses on the applications of Ginsburg’s constitutional reasoning in *VMI* to the context of race, but race is not the only context to which she has applied these ideas. See, e.g., Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding “We the People”: The Disability Rights Cases*, 104 COLUM. L. REV. 49, 56 (2004) (arguing that “the critique of paternalism that lies at the core of disability rights thinking has much in common with – and was surely influenced by – the women’s movement’s own attack on paternalistic practices that limited women’s opportunities, an attack exemplified by . . . Ginsburg’s litigation agenda throughout the 1970s,” and that her judicial opinions have, not coincidentally, done more than any of her colleagues’ to promote the full citizenship stature of people with disabilities).

- 59 See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 299–300 & nn. 4–5 (2003) (Ginsburg, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 345–46 (2003) (Ginsburg, J., concurring).
- 60 See, e.g., *Gratz*, 539 U.S. at 299–301 (Ginsburg, J., dissenting) (discussing racial disparities in a wide range of social contexts and asserting that “bias both conscious and unconscious . . . keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting))).
- 61 *Id.* (Ginsburg, J., dissenting) (internal quotation marks omitted).
- 62 *Id.* at 298 (Ginsburg, J., dissenting).
- 63 *Id.* (Ginsburg, J., dissenting).
- 64 *Id.* (Ginsburg, J., dissenting) (internal quotation marks omitted).
- 65 133 S. Ct. 2612 (2013).
- 66 *Id.* at 2631 (striking down §4 of the act, which contained the coverage formula the federal government had long used as a basis for subjecting jurisdictions to preclearance requirements).
- 67 *Id.* at 2628.
- 68 *Id.* at 2642 (Ginsburg, J., dissenting) (quoting WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1).
- 69 *Id.* (Ginsburg, J., dissenting) (quoting 1 GEORGE SANTAYANA, *THE LIFE OF REASON* 284 (1905)).
- 70 *Id.* (Ginsburg, J., dissenting).
- 71 *Gratz v. Bollinger*, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting); see also *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).
- 72 *Gratz*, 539 U.S. at 301 (quoting *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931–32 (2d Cir. 1968)).
- 73 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting).
- 74 *Id.* (Ginsburg, J., dissenting).
- 75 See Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 11 (recalling that reading all available material on women and the law in 1970 “proved not to be a burdensome venture” as “so little had been written, one could manage it all in a matter of weeks”). The first sex discrimination casebooks – including one authored by Ginsburg herself – did not appear until several years later. See Linda K. Kerber, *Writing Our Own Rare Books*, 14 YALE J.L. & FEMINISM 429, 430–31 (2002).
- 76 See Franklin, *supra* note 56, at 108–10 (discussing early legal feminists’ development of the race-sex analogy).
- 77 *Green v. New Kent Cnty. Sch. Bd.*, 391 U.S. 430, 440 (1968).
- 78 *Id.* at 440, 442 (internal quotation marks omitted).
- 79 402 U.S. 1 (1971).
- 80 *Id.* at 16.
- 81 401 U.S. 424 (1971).
- 82 *Id.* at 431.
- 83 See Reva B. Siegel, *The Supreme Court, 2012 Term – Foreword: Equality Divided*, 127 HARV. L. REV. 1, 14 (2013) (observing that “during the 1970s, when plaintiffs

brought equal protection challenges to public employment selection criteria with a racially exclusionary impact, at least eight federal courts of appeals employed disparate impact frameworks in adjudicating these lawsuits, all importing to the constitutional context the liability rule that had been set down in *Griggs*). Ultimately, the Supreme Court declined to import to the contextual context the liability rule in *Griggs*. See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976). These cases departed from an understanding that had been quite prevalent until that point.

84 416 U.S. 351 (1974).

85 416 U.S. 312 (1974).

86 For further discussion of the challenges Ginsburg faced as a result of the coinciding grants of certiorari in *Kahn* and *DeFunis*, see SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 87–90 (2011).

87 See, e.g., Br. for Appellants at 4, *Kahn*, 416 U.S. 351 (differentiating genuine “affirmative action measures tailored narrowly and specifically to rectify the effects of past discrimination” from “generalized provisions based on gender stereotypes of the variety here”).

88 *Kahn*, 416 U.S. at 355–56.

89 After *Kahn*, the Court issued a series of decisions invalidating apparently benign forms of sex-based state action on the ground that they reinforced traditional stereotyped conceptions of men’s and women’s sex and family roles. For further discussion of these cases, see Franklin, *supra* note 56, at 132–38. The Court deemed *DeFunis* moot because the plaintiff was set to graduate from law school by the time the justices began their deliberations. *DeFunis*, 416 U.S. at 319–20.

90 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting) (quoting *id.* at 245 (Stevens, J., dissenting)).

91 *Gratz v. Bollinger*, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting) (quoting *U.S. v. Jefferson Cnty. Bd. of Ed.*, 372 F.2d 836, 876 (5th Cir. 1966) (Wisdom, J.)).

92 *Id.* at 301 (Ginsburg, J., dissenting).

8 BARRIERS TO ENTRY AND JUSTICE GINSBURG’S

CRIMINAL PROCEDURE JURISPRUDENCE

1 See Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CALIF. L. REV. 735, 739 (2002) (“American women’s equality is a story of creative interpretation of the Equal Protection Clause and of advocates’ bravado . . . [I]ed with inventiveness and strategic brilliance by now-Justice Ruth Bader Ginsburg.”).

2 See Christopher Slobogin, *Justice Ginsburg’s Gradualism in Criminal Procedure*, 70 OHIO ST. L.J. 867, 870 (2009).

3 See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996).

4 Neil S. Siegel, “*Equal Citizenship Stature*”: *Justice Ginsburg’s Constitutional Vision*, 43 NEW. ENG. L. REV. 799, 825 (2009).

5 See generally Sarah E. Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 N.Y. CITY L. REV. 391 (2004). See also Slobogin, *supra* note 2, at 870 (“To date, no one has taken a sustained look at Justice Ginsburg’s approach to decision-making in the area of criminal procedure.”).