

## **UNITED STATES v. VIRGINIA (1996)**

### **BACKGROUND**

The Virginia Military Institute, founded in 1839, was (until 1996) the only single-sex public college in Virginia. Enrollment: ~1300.

VMI's aim is to produce "citizen-soldiers" through an "adversative" method of education that includes "physical rigor, mental stress, ... absence of privacy, minute regulation of behavior, and indoctrination of values".

In 1990, a female high-school student was denied admission to VMI solely because of her sex. She complained to the U.S. Attorney General, who sued VMI and Virginia for violating prospective female applicants' rights under the EP Clause. (In the previous 2 years, 347 female applicants had been rebuffed on the same grounds.)

The District Court ruled in favor of VMI in 1991. The United States appealed the decision, and a three-judge panel of the Fourth Circuit Court of Appeals vacated the District Court's judgment in 1992.

The Appeals Court held that denying admission to women violated their rights under the EP Clause, but also ruled that admitting women would "materially affect" three aspects of VMI's program: physical training, absence of privacy, and the adversative model.

The Appeals Court found that the EP Clause protects women's right to equality of opportunity, a right that could be protected by establishing "parallel educational institutions" for women. [Think: "separate but equal"]

Virginia and VMI then established the Virginia Women's Institute for Leadership (VWIL), located at Mary Baldwin College (a private liberal arts college for women). The District Court and the Appeals Court approved the plan in 1995, with the latter Court holding that VMI and VWIL were "sufficiently comparable".

The Clinton administration appealed the Appeals Court's decision to the U.S. Supreme Court, which issued a 7-1 decision that reversed the Appeals Court's decision. [Thomas recused himself: his son Jamal was a VMI student.]

Faced with the potential loss of state support, VMI altered its admissions policy and began admitting women in 1996.

## PRECEDENT

*Mississippi Univ. for Women v. Hogan* (1982)

O'Connor's 5-4 opinion held that MUW, a public single-sex nursing school, violated prospective male applicants' rights under the EP Clause.

O'Connor applied Intermediate Scrutiny (see *Craig*):

“The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification... The burden is met only by showing at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives’”.

## GINSBURG'S OPINION

Ruth Bader Ginsburg, who wrote the decision in *United States v. Virginia*, had played a key role in drafting the ACLU brief for Sally Reed in *Reed* and had represented Sharron Frontiero in *Frontiero*.

Ginsburg endorsed O'Connor's version of Intermediate Scrutiny in *MUW v. Hogan* (see Section IV):

Need for an “exceedingly persuasive justification”

Law must bear a substantial relation to an important end.

“The burden of justification...rests entirely on the State”.

The fact that sex-based classifications are subjected to Intermediate Scrutiny does not entail that sex is a “proscribed classification”. Sex-classifications may be used for three purposes:

Compensating women for past economic disabilities

Promoting equal (employment) opportunity

Advancing full development of the talent and capacities of our Nation's people

## **VMI'S ARGUMENT**

Virginia argued that VMI's policy of excluding women served the important governmental objective of "diversity in educational approaches", that there would be no way for VMI to maintain its unique adversative method of education if it were to admit women, and hence that excluding women from VMI was substantially related (even necessary) to achieving an important end.

### **GINSBURG ON "DIVERSITY OF EDUCATIONAL APPROACHES"**

There is nothing in the record to suggest that the explanation for VMI's single-sex admissions policy lies in the state's having had the purpose of diversifying educational approaches. The State's claim is merely a "rationalization" for "actions in fact differently grounded".

History: "First, protection of women against higher education; next, [separate and unequal] schools for women; finally, conversion of the separate schools to coeducation."

### **GINSBURG ON WOMEN AND THE "ADVERSATIVE" METHOD**

Virginia's claim that the admission of women would destroy VMI's adversative system is based on "fixed [stereotypical] notions concerning the roles and abilities of males and females" and is "a prediction hardly different from other 'self-fulfilling prophecies' once routinely used to deny rights or opportunities [to women]".

Virginia's claim is also undermined by "women's successful entry into the federal military academies" where "women have graduated at the top of their class".

### **GINSBURG ON VMI AND INTERMEDIATE SCRUTINY**

Ginsburg concluded that the policy of excluding women from VMI fails the test of Intermediate Scrutiny, and hence violates prospective female applicants' rights under the EP Clause.

Virginia's claim that VMI's admissions policy was designed to achieve "diversity in educational approaches" is belied by the facts.

There is no reason to believe that VMI's unique adversative method would need to be changed to accommodate women.

## **THE PROPER REMEDY?**

The Appeals Court held that Virginia's remedial plan (involving "separate but equal" educational institutions: VMI for men, VWIL for women) was acceptable in so far as it offered women "sufficiently comparable" educational opportunities.

## **GINSBURG ON VWIL**

Ginsburg argued that the proper remedy for denial of equality of opportunity is "to place persons...in the position they would have occupied in the absence of discrimination," i.e., to render educational opportunities for men and women equal (not "sufficiently comparable").

But the VWIL program is "unequal in tangible and intangible facilities", and hence represents an inadequate remedy.

Contrasting VMI and VWIL

- No rigorous military training at VWIL
- No military-style residence at VWIL
- VWIL students need not live together for 4 years
- VWIL need not wear uniforms on school days
- Smaller range of curricular choices at VWIL
- Smaller proportion of VWIL faculty with PhD's
- VWIL has no history, prestige, or alumni network

## **VMI AND UT**

Ginsburg found Virginia's attempt to equalize educational opportunities by establishing VWIL reminiscent of UT's attempt to equalize educational opportunities prior to *Sweatt* by establishing a special law school for blacks.

## **SCALIA'S DISSENT**

The Intermediate Scrutiny Test is unprincipled

"We have no established criterion for 'intermediate scrutiny' ..., but essentially apply it when it seems like a good idea to load the dice."

The proper application of any Test depends on respect for both Plain Meaning and Tradition:

“When a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.”

### **SCALIA ON INTERMEDIATE SCRUTINY**

Ginsburg’s argument is that VMI’s policy fails Intermediate Scrutiny as long as there are women who are willing and able to undertake VMI’s program. But Intermediate Scrutiny requires “only a substantial relation between end and means, not a perfect fit”.

For Ginsburg, there is no real difference between Intermediate and Strict Scrutiny:

Ginsburg prefers the phrase “exceedingly persuasive justification” to the standard definition of IS. This standard approaches Strict Scrutiny.

Ginsburg’s opinion does not specifically preclude the application of Strict Scrutiny to sex-based classifications. But past cases have “categorically held strict scrutiny to be inapplicable” thereto.

If the Court is moving away from Intermediate Scrutiny, the stronger argument suggests that it should move to Rational Basis review rather than to Strict Scrutiny.

Precedent: Rational Basis review was applied until 1971

*Carolene Products*, fn. 4: Women are not a politically powerless “discrete and insular minority”.

### **SCALIA APPLIES INTERMEDIATE SCRUTINY**

The relevant “important state purpose” here is Virginia’s interest in providing effective college education for its citizens”.

Virginia has provided a body of “overwhelming” and “virtually uncontradicted” evidence to suggest that single-sex colleges are beneficial to both sexes.

Since some students are likely to fare better under the “adversative” method of education, the goal of providing an effective education to all State citizens is substantially furthered by State support of adversative institutions.

Thus, the support of single-sex adversative institutions bears a substantial relation to an important state purpose.

The fact that, among Virginia's public 4-year colleges, 14 are co-ed/traditional and 1 is single-sex/adversative is to be explained as follows:

- (a) "Virginia's financial resources...are not limitless".
- (b) Single-sex education for women is already being provided by 4 private colleges in the State.
- (c) An all-female adversative institution "would attract an insufficient number of participants to make the program work".

### **SCALIA'S WORRY**

Death of Single-Sex Public Colleges and Threat to Single-Sex Private Colleges

"Under the constitutional principles announced and applied today, single-sex public education is unconstitutional."

Single-sex private colleges are threatened given the principle that "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."