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"Equal Protection: Serving Sons and
Daughters"

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In 1996, the Supreme Court delivered a landmark opinion in *United States v. Virginia* that exalted women's rights under the Equal Protection Clause of the 14th Amendment by ending the 157-year-old tradition of all-male education at the Virginia Military Institute, one of the nation's most distinguished military colleges.

Writing for a 7-1 majority, Justice Ruth Bader Ginsburg described VMI as "incomparable," a school justly known for its "unparalleled record as a leadership training program," dating back to its founding in 1839. The problem was, this "unique program," the only single-sex school among Virginia's public institutions of higher learning, was reserved exclusively to men. Women were not permitted to attend. As such, Justice Ginsburg wrote: "While Virginia serves the state's sons, it makes no provision whatever for her daughters. That is not equal protection."

The Court rejected Virginia's remedy—the creation of the Virginia Women's Institute for Leadership (VWIL) at a private women's college, Mary Baldwin College. That school was dramatically inferior to VMI, as measured by the quality of its faculty, the academic skills of its students and its facilities. Virginia's "remedy" did not even meet the infamous constitutional standard of "separate but equal," set forth in 1896, in *Plessy v. Ferguson*, which sought to justify the separation of whites from blacks.

The Court did not require VMI to admit all women, of course, just as VMI would not admit all men. What the Court did require, as a matter of the equal protection of the law, was the admission of women capable of performing the same activities expected of men. Justice Ginsburg wrote: "Some women, at least, can meet the physical standards VMI imposes on men, are capable of all the activities required of VMI cadets, prefer VMI's methodology over VWIL's, could be educated using VMI's methodology, and would want to attend VMI if they had the chance."

The question before the Court was whether Virginia could constitutionally deny to women who have the will and capacity to attend VMI. The measuring rod, that is the standard of review set forth by the Court, based on its precedents, as explained by Justice Ginsburg, was this: "Defenders of sex-based government action must demonstrate an 'exceedingly persuasive justification' for that action." To meet this demonstration, the "defender of a gender line in law," Ginsburg emphasized, must show, "at least, that the challenged classification serves important governmental objectives and that any discriminatory means employed are substantially related to the achievement of those objectives."

As Justice Ginsburg stated, the heightened review applied to sex-based classifications" does not make sex a proscribed classification, but it does mark as presumptively invalid" under the Equal Protection Clause, any law or official policy that denies to women, "simply because they are women," the "equal opportunity to aspire, achieve, participate in, and contribute to society based upon what they can do."

Justice Ginsburg's ringing endorsement of equal protection reflected Justice Sandra Day O'Connor's generosity. When the Court took its vote in conference to determine the outcome of the VMI case, Chief Justice

William Rehnquist initially supported the school's admission policy, which meant that Justice John Paul Stevens, the senior most member of the Court voting in the majority, had the right to choose which Justice would be tasked to write the opinion. Stevens assigned the opinion to O'Connor, but she demurred, saying, "I really think Ruth ought to write this."

Justice Ginsburg had long since established her credentials as an advocate for gender equality, first as a young law professor, then as an author of scholarly articles and court briefs, then as an attorney appearing before the Supreme Court, and finally as a sitting Justice. She welcomed the opportunity to write the opinion. She demonstrated her appreciation, and scholarly acuity, by citing as precedential authority Justice O'Connor's 1982 opinion for the Court in *Mississippi University for Women v. Hogan*, in which the first woman appointed to the Court struck down as an equal protection violation the school's policy of admitting only women to its nursing program. Justice O'Connor, appointed by President Ronald Reagan, had declared that the female only admissions policy was grounded on "archaic and stereotypic notions" of the "proper" roles of men and women in American society.

When Justice Ginsburg read her VMI opinion from the Supreme Court Bench, she glanced at Justice O'Connor, and nodded. To some observers in the courtroom that day, it appeared that the two female Justices made eye contact, held their gaze and exchanged a knowing smile, a clear demonstration of their deep bond and abiding affection, a genuine sisterhood engaged in fighting for the cause of gender equality and equal protection under the law. Justice Ginsburg had said, many times, that the VMI opinion was the most "satisfying" that she had written in promoting civil liberties. In turn, Justice O'Connor told Justice

Ginsburg how "proud" she was of her for writing the opinion.

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