

# Gender Equality and the Constitution— A Comparative Activity

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*For use in conjunction with “The Trial of Susan B. Anthony,” by Ann D. Gordon, available at <http://www.fjc.gov/history/home.nsf>. A unit in the Teaching Judicial History Project, developed by the Federal Judicial Center in partnership with the American Bar Association’s Division for Public Education.*

## Activity Objectives

By comparing two cases separated by more than a century—*United States v. Susan B. Anthony* and *United States v. Virginia*—students will gain insights into the federal courts’ recognition of gender equality under the Fourteenth Amendment.

## Essential Questions

- When does the constitutional guarantee of equal protection of the laws prohibit distinctions based on gender?
- What distinctions have federal courts recognized between the rights of United States citizenship and the rights of state citizenship?
- How has the application of the Fourteenth Amendment to protect individual rights changed over time?

## Legal Issues Raised by the Susan B. Anthony Trial and *United States v. Virginia*

In both cases, the courts were asked to determine if state laws that discriminated against women were in violation of the Fourteenth Amendment.

## Estimated Time Frame

Two to three 50-minute class periods.

## Recommended Prep Work

Teachers should be familiar with “The Trial of Susan B. Anthony,” by Ann D. Gordon, particularly “A Short Narrative” (pp. 1–8); “Legal Questions Before the Federal Courts,” pp. 15–20; and “Legal Arguments in Court” (pp. 21–23). (*Note:* Page citations refer to the PDF version of the Anthony trial unit, available online at <http://www.fjc.gov>.)

Teachers should also be familiar with the *United States v. Virginia* Supreme Court decision. Excerpts of Justice Ginsburg’s opinion are attached below. The entire majority opinion, the concurring opinion of Chief Justice Rehnquist, and

the dissenting opinion of Justice Scalia are available in 518 U.S. 515 (1996). Teachers may also want to consult the entry on “Gender” in *The Oxford Companion to the Supreme Court of the United States, second edition* (New York, 2005), pp. 379–87.

Prepare copies of the following excerpts and documents:

1. Section 1 of the Fourteenth Amendment (pp. 50–51)
2. Narrative “The Trial of Susan B. Anthony” (pp. 1–8)
3. Legal Questions Before the Federal Courts: On what authority did citizens acquire a right to vote? Did the Fourteenth and Fifteenth Amendments to the Constitution of the United States provide federal protection for voting rights? Did women have voting rights under the Constitution as amended? (pp. 15–16)
4. *United States v. Virginia* (excerpts) (attached below)

## Description of the Activity

### *Activity Overview*

Students will compare the interpretation and application of the Fourteenth Amendment in *United States v. Susan B. Anthony* (1873) and *United States v. Virginia* (1996).

### *Introduction*

Provide students with a general background to the Anthony trial and *United States v. Virginia*.

1. Review section 1 of the Fourteenth Amendment. Explore the following questions:

- When was this amendment added to the Constitution?
- What does this section say about the relationship of federal to state law? Which has final jurisdiction over citizens’ rights and freedoms?
- What three freedoms of persons are explicitly protected from state interference?

(Note that these are conventionally referred to as the “Privileges or Immunities Clause,” the “Due Process Clause,” and the “Equal Protection Clause” of the Fourteenth Amendment.)

2. Explore with the students what each of these clauses means:

- What are the privileges and immunities of citizens?
- What is “due process of law”? (And what is this “due process” meant to protect?)
- What would characterize “equal protection of the laws”?

(*Note:* It may be—in fact, should be—difficult for students to come to consensus on the meaning of these clauses. Courts have struggled to interpret and apply these clauses under a range of diverse circumstances since the Fourteenth Amendment was ratified.)

3. Inform students that since its ratification, the Fourteenth Amendment has become an important authority for securing individuals' rights and freedoms through the judicial process, and that the students are going to look at two cases in which courts addressed rights protected and not protected by the amendment. Provide students with copies of the Susan B. Anthony trial material and the *United States v. Virginia* opinion excerpts and provide time for reading. (This reading may be a homework assignment if class time is too limited.) Working individually or in small groups, students will use the accompanying worksheet to write comparisons of the two cases.

### Debrief and Wrap-up

Conclude the debriefing by returning to the students' earlier explanations of the equal protection and the privileges or immunities clauses. How have these cases provided the students with additional insights as to the scope and meaning of the clauses?

Then, provide students with the first three "Legal Questions Before the Federal Courts" from the Anthony case. After relating these questions and responses to what they now know about that case, have the students rephrase the questions to fit the VMI case and provide responses accordingly.

Possible restatements of these questions for VMI would be:

- On what authority did women acquire a right to be admitted to publicly supported education institutions such as VMI?
- Did the Fourteenth Amendment to the Constitution of the United States provide federal protection for equal access to publicly supported education institutions such as VMI?
- Did women have a right of access to education under the Constitution as amended?

### Assessment

- Evaluation of student worksheet.
- Essays on each of the three freedoms and rights clauses of the Fourteenth Amendment.
- Informal assessment of student engagement and responses.

## Alternative Modalities and Enrichment Activities

1. Both of the cases studied here were influenced by rulings in cases that preceded them. Have students research how the Susan B. Anthony trial was affected by the Slaughter-House cases and *Bradwell v. Illinois*, and how the Virginia Military Institute case was affected by *Mississippi University for Women v. Hogan*.
2. Have students put themselves in the place of the female high school student who filed the complaint against the Virginia Military Institute with the Attorney General. Students should write their own complaint using the information about VMI and its position on admitting women.
3. Challenge students to depict the VMI trial proceedings from differing points of view in cartoons and/or in newspaper reports. These should depict or report on the case at different points in its progress through the court system.

## Involving a Judge

Invite a judge to discuss contemporary understandings of the Fourteenth Amendment's "rights and freedoms" clauses. Which of these clauses is most frequently used in litigation today?

## Standards Addressed

### *U.S. History Standards (Grades 5–12)*

#### Era 5—Civil War and Reconstruction (1850–1877)

*Standard 3C:* The student understands the successes and failures of Reconstruction in the South, North, and West. Therefore the student is able to: Evaluate Reconstruction ideals as a culminating expression of the mid-19th-century impulse of social democratization and perfectionism; and Analyze how the Civil War and Reconstruction changed men's and women's roles and status in the North, South, and West.

### *Standards in Historical Thinking*

#### *Standard 2: Historical Comprehension*

- A. Identify the author or source of the historical document or narrative and assess its credibility.
- C. Identify the central question(s) the historical narrative addresses.
- D. Differentiate between historical facts and historical interpretations.

#### *Standard 3: Historical Analysis and Interpretation*

- A. Compare and contrast differing sets of ideas, values, etc.

- B. Consider multiple perspectives.
- E. Distinguish between unsupported expressions of opinion and informed hypotheses grounded in historical evidence.

*Standard 5: Historical Issues-Analysis and Decision-Making*

- A. Identify issues and problems in the past and analyze the interests, values, perspectives, and points of view of those involved in the situation.
- D. Evaluate alternative courses of action, keeping in mind the information available at the time, in terms of ethical considerations, the interests of those affected by the decision, and the long- and short-term consequences of each.
- F. Evaluate the implementation of a decision by analyzing the interests it served; estimating the position, power, and priority of each player involved; assessing the ethical dimensions of the decision; and evaluating its costs and benefits from a variety of perspectives.

UNITED STATES

v.

VIRGINIA et al.

Certiorari to the United States Court of Appeals for the Fourth Circuit.

No. 94-1941.

Argued January 17, 1996

Decided June 26, 1996

Syllabus

Virginia Military Institute (VMI) is the sole single-sex school among Virginia's public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. Using an "adversative method" of training not available elsewhere in Virginia, VMI endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. Reflecting the high value alumni place on their VMI training, VMI has the largest per-student endowment of all undergraduate institutions in the Nation. The United States sued Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Fourteenth Amendment's Equal Protection Clause. The District Court ruled in VMI's favor. The Fourth Circuit reversed and ordered Virginia to remedy the constitutional violation. In response, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL), located at Mary Baldwin College, a private liberal arts school for women. The District Court found that Virginia's proposal satisfied the Constitution's equal protection requirement, and the Fourth Circuit affirmed. The appeals court deferentially reviewed Virginia's plan and determined that provision of single-gender educational options was a legitimate objective. Maintenance of single-sex programs, the court concluded, was essential to that objective. The court recognized, however, that its analysis risked bypassing equal protection scrutiny, so it fashioned an additional test, asking whether VMI and VWIL students would receive "substantively comparable" benefits. Although the Court of Appeals acknowledged that the VWIL degree lacked the historical benefit and prestige of a VMI degree, the court nevertheless found the educational opportunities at the two schools sufficiently comparable.

Opinion of the Court [excerpts]

Justice Ginsburg delivered the opinion of the Court.

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree. [519]

The cross-petitions in this suit present two ultimate issues. First, does 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 of the individual activities required of VMI cadets,” 766 F. Supp., at 1412, the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's “unique” situation, *id.*, at 1413—as Virginia's sole single-sex public institution of higher education—offends the Constitution's equal protection principle, what is the remedial requirement? [530–31]

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. As Fourth Circuit Judge Motz observed, however, in her dissent from the Court of Appeals' denial of rehearing en banc, it is also probable that “many men would not want to be educated in such an environment.” 52 F. 3d, at 93. (On that point, even our dissenting colleague might agree.) Education, to be sure, is not a “one size fits all” business. The issue, however, is not whether “women—or men—should be forced to attend VMI”; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords. *Ibid.*

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 prophec[ies],” see *Mississippi Univ. for Women*, 458 U.S., at 730, once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. [542–43]

The VWIL student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the legions of VMI “graduates [who] have distinguished themselves” in military and civilian life. See 976 F. 2d, at 892–893. “[VMI] alumni are exceptionally close to the school,” and that closeness accounts, in part, for VMI's success in attracting applicants. See 766 F. Supp., at 1421. A VWIL graduate cannot assume that the “network of business owners, corporations, VMI graduates and non-graduate employers . . . interested in hiring VMI graduates,” 852 F. Supp., at 499, will be equally responsive to her search for employment, see 44 F. 3d, at 1250 (Phillips, J., dissenting) (“the powerful political and economic ties of the VMI alumni network cannot be expected to open” for graduates of the fledgling VWIL program).

Virginia, in sum, while maintaining VMI for men only, has failed to provide any “comparable single-gender women's institution.” *Id.*, at 1241. Instead, the

Commonwealth has created a VWIL program fairly appraised as a “pale shadow” of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. *See id.*, at 1250 (Phillips, J., dissenting).

Virginia’s VWIL solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court’s 1946 ruling that, given the equal protection guarantee, African Americans could not be denied a legal education at a state facility. *See Sweatt v. Painter*, 339 U.S. 629 (1950). Reluctant to admit African-Americans to its flagship University of Texas Law School, the State set up a separate school for Herman Sweatt and other black law students. *Id.*, at 632. As originally opened, the new school had no independent faculty or library, and it lacked accreditation. [552–53]

VMI, too, offers an educational opportunity no other Virginia institution provides, and the school’s “prestige”—associated with its success in developing “citizen-soldiers”—is unequalled. Virginia has closed this facility to its daughters and, instead, has devised for them a “parallel program,” with a faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization. *Cf. Sweatt*, 339 U.S., at 633. VMI, beyond question, “possesses to a far greater degree” than the VWIL program “those qualities which are incapable of objective measurement but which make for greatness in a . . . school,” including “position and influence of the alumni, standing in the community, traditions and prestige.” *Id.*, at 634. 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.

A prime part of the history of our Constitution, historian Richard Morris recounted, 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. *See supra*, at 29, n. 16. There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the “more perfect Union.”

For the reasons stated, the initial judgment of the Court of Appeals, 976 F. 2d 890 (CA4 1992), is affirmed, the final judgment of the Court of Appeals, 44 F. 3d 1229 (CA4 1995), is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered. [557–58]

[Document Source: 518 U.S. 515 (1996).]

*Worksheet*  
Comparing Cases

For purposes of this worksheet, SBA = *United States v. Susan B. Anthony*, and VMI = *United States v. Virginia*.

1. How long after the ratification of the Fourteenth Amendment was each case brought to trial?

SBA

VMI

2. Who were the principals in each case?

SBA

VMI

3. What clause in the Fourteenth Amendment was put forward in each case and by whom (the plaintiff or the defendant)?

SBA

VMI

4. What courts were involved in the case (list in order of involvement)?

SBA

VMI

5. How were state and federal jurisdiction in contention in each case?

SBA

VMI

6. How did the judges rule regarding the application of Fourteenth Amendment rights in each case?

SBA (Hunt)

VMI (Ginsburg)

7. How might the timing of each case have affected the outcome? What does the nature of the plaintiff in the VMI case suggest about changing perspectives on the scope of application of Fourteenth Amendment rights over time?