University of Richmond Law Review

Volume 31 | Issue 2 Article 7

1997

The Supreme Court's "Exceedingly [Un]Persuasive" Application of Intermediate Scrutiny in United States v. Virginia

Jeffrey A. Barnes
University of Richmond

CASENOTES

THE SUPREME COURT'S "EXCEEDINGLY [UN]PERSUASIVE" APPLICATION OF INTERMEDIATE SCRUTINY IN *UNITED STATES V. VIRGINIA*

The Supreme Court's decision in the case of *United States v. Virginia*[1] in June of 1996 was a landmark decision that could change how future courts approach and resolve gender-based equal protection claims. The Supreme Court held that the Virginia Military Institute (VMI) could no longer continue its male-only admissions policy as a state-funded institution of higher education.[2] The Court's apparent heightening of the level of scrutiny applied to gender-based classifications from the previously used intermediate scrutiny to an ambiguous standard either somewhere between the traditional intermediate scrutiny and strict scrutiny, or, in effect, a standard equivalent to strict scrutiny, will further inhibit legislatures from classifying or treating individuals differently based upon their gender.[3] While many have praised the Court's specific holding, disallowing VMI's practice of preventing female applicants from enrolling in the school,[4] the Court's application of a new form of intermediate scrutiny may cause state and local governments to refrain from providing beneficial single-gender institutions or services.[5]

---

1. 116 S. Ct. 2264 (1996).

2. *See id.* at 2269.

3. *See id.*; Cass R. Sunstein, *Foreword: Leaving Things Undecided,* 110 HARV. L. REV. 4 (1996).

4. *See* Patricia Wald, *Glass Ceilings and Open Doors: A Reaction,* 65 FORDHAM L. REV. 603 (1996); Susan Reiger, *VMI and the Old/New Face of Sex Discrimination,* 43 FED. L. 22 (1996).

5. *See Virginia,* 116 S. Ct. at 2306 (Scalia, J., dissenting); Anita K. Blair, *The Equal Protection Clause and Single-Sex Public Education:* United States v. Virginia

However, because the Supreme Court never acknowledged that it was not applying the traditional intermediate scrutiny test, *United States v. Virginia's* precedential effect is questionable and needs more clarification before lower courts can uniformly apply a scrutiny test to gender-based equal protection claims.[6]

To understand the Supreme Court's decision in *United States v. Virginia,* it is first necessary to review and consider the facts and procedural history of the case. It is also necessary to review the history of intermediate scrutiny in order to put the Court's present application of the standard in perspective. It is sufficiently clear that over time the Supreme Court has added more bite to the intermediate scrutiny standard, and it is submitted that its decision in *United States v. Virginia* has brought the standard one step closer to strict scrutiny.[7] This casenote will discuss the Court's heightening of the standard of review for gender-based classifications and the effects that the decision

---

and Virginia Military Institute, 6 SETON HALL CONST. L.J. 999, 1000 (1996); Elizabeth Fox-Genovese, *Strict Scrutiny, VMI, and Women's Lives*, 6 SETON HALL CONST. L.J. 987, 989-90 (1996).

6. *See* Cohen v. Brown Univ., 101 F.3d 155, 190-91 (1st Cir. 1996) (Torruella, C.J., dissenting); Engineering Contractors Ass'n v. Metropolitan Dade County, 943 F. Supp. 1546, 1556 (S.D. Fla. 1996).

7. Courts generally apply three levels of scrutiny to legislative classifications in equal protection cases. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985). The general rule is that courts will apply the most deferential level of scrutiny, the rational basis test, unless the legislation's classification is based on a suspect or quasi-suspect class. *See id.* at 440. Under the rational basis test, a court will simply determine whether the classification "drawn by the statute is rationally related to a legitimate state interest." *Id.* Intermediate scrutiny, the mid-level scrutiny test, has been applied when a legislative classification is quasi-suspect, and has thus far only applied to classifications based on gender and illegitimacy. *See id* at 440-41; Clark v. Jeter, 486 U.S. 456, 461 (1988); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982); Craig v. Boren, 429 U.S. 190, 197-98 (1976); JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.14, 758 (5th ed. 1995). Intermediate scrutiny has required that a classification have "'an exceedingly persuasive justification' . . . met only by showing at least that the classification serves 'important governmental objectives and the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Hogan*, 458 U.S. at 730. The most intense level of scrutiny applied in the equal protection context is strict scrutiny. A court will apply strict scrutiny when a classification is based on a "suspect" or "proscribed" class, which has been identified as classifications based on race, ethnicity, national origin, and in some instances alienage. *See City of Cleburne*, 473 U.S. at 440; NOWACK & ROTUNDA, *supra* §§ 14.5, 14.12. Generally, under strict scrutiny, classification are constitutional "only if they are narrowly tailored measures that further compelling governmental interests." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995).

might have on the Equal Protection Clause of the Fourteenth Amendment.

Part I will discuss the recent history of gender-based Equal Protection Clause claims and the Court's application of intermediate scrutiny. Part II will review the facts and procedural history of *United States v. Virginia*. Part III will discuss and analyze Justice Ginsburg's majority opinion. Finally, Part IV will examine the implications of the case and its effects on gender-based equal protection claims.

I. THE HISTORY OF INTERMEDIATE SCRUTINY AND ITS APPLICATION TO GENDER-BASED EQUAL PROTECTION CLAIMS

"The Equal Protection Clause of the Fourteenth Amendment commands that . . . all persons similarly situated should be treated alike."[8] Although the Equal Protection Clause became part of the Constitution in 1868, it was not until 1971 that the Supreme Court, in *Reed v. Reed*,[9] ruled that a State had denied a woman, on the basis of her gender, the equal protection of the laws. The Court asserted that the standard of scrutiny to be applied to gender-based equal protection claims required that "[a] classification . . . be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."[10] In *Reed*, the Court did not suggest a requirement that the State's objective be important, it merely said that the State's apparent objective of "reducing the workload of probate courts . . . is not without some legitimacy."[11] Simply determining that an objective "is not without some legitimacy" is a far cry from the intense scrutiny invoked in more recent Supreme Court decisions.[12]

---

8. *City of Cleburne*, 473 U.S. at 440.

9. 404 U.S. 71 (1971).

10. *Id.* at 76.

11. *Id.* at 71, 76.

12. *See* United States v. Virginia, 116 S. Ct. 2264 (1996); *Hogan*, 458 U.S. at 727 (finding the State's proffered justification of compensating women for discrimination by offering "educational affirmative action" as unpersuasive); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) (asserting that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme").

In *Craig v. Boren*,[13] the Court strengthened the test used in *Reed* by asserting that gender classifications must "serve important governmental objectives."[14] This expansion of the test added to its bite as intermediate scrutiny continued to evolve. In 1979, in *Personnel Administrator v. Feeney*,[15] which was not a gender-based equal protection case, the Court summarized previous gender-based equal protection cases in dictum and noted that "those precedents dictate that any state law overtly or covertly designed to prefer males over females . . . would require an exceedingly persuasive justification to withstand constitutional challenge under the Equal Protection Clause."[16] Then a few years later, the Court decided in *Kirchberg v. Feenstra*[17] that a gender-based classification was invalid because the government failed to show an "exceedingly persuasive justification" for the classification, even though the government had not attempted to offer any justification for its discriminatory classification.[18] Despite its dubious origin in dictum, the Court was amenable to the "exceedingly persuasive justification" language and apparently adopted it as part of the test applied to gender-based classifications. In 1982, the Court assembled all of these precedents in *Mississippi University for Women v. Hogan*,[19] and applied the following intermediate scrutiny test, which has continued to be applied to gender-based equal protection claims (and is the test allegedly applied in *United States v. Virginia*):

> [T]he 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."[20]

---

13. 429 U.S. 190 (1976).
14. *Id.* at 197.
15. 442 U.S. 256 (1979).
16. *Id.* at 273.
17. 450 U.S. 455 (1981).
18. *Id.* at 461.
19. 458 U.S. 718 (1982).
20. *Id.* (citations omitted).

The Court also requires that a State's objective and its means to achieve that objective be "free of fixed notions concerning the roles and abilities of males and females."[21] These "fixed notions" should especially stay clear of "archaic and overbroad generalizations."[22] As will be discussed in the context of *United States v. Virginia,* when a court believes that a statute is based on any stereotypes or overbroad generalizations, a State has virtually no chance of convincing the Court that it has an exceedingly persuasive justification for its classification.

II. THE FACTS AND THE PROCEDURAL HISTORY OF *UNITED STATES V. VIRGINIA*

A. *The Virginia Military Institute*

The Virginia Military Institute (VMI) is a state-supported single-sex institution of higher education in the Commonwealth of Virginia.[23] Prior to the Court's decision, VMI was the only single-sex school remaining among Virginia's fifteen public colleges and universities.[24] It was established in 1839 as a four-year military college by the Virginia legislature.[25] The Commonwealth of Virginia created VMI with a "distinctive mission . . . to produce 'citizen soldiers,' . . . [who would be] prepared for leadership [positions] in civilian life and in military service."[26]

In order to accomplish this mission, VMI utilizes the "adversative model" of training as its method of education for cadets.[27] The adversative model is based upon what is called the "doubting model of education" and features "[p]hysical rigor, mental stress, absolute equality of treatment, absence of priva-

21. *Id.* at 724-25.
22. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).
23. *See* United States v. Virginia, 116 S. Ct. 2264, 2269 (1996).
24. *See id.*
25. *See* United States v. Virginia, 976 F.2d 890, 892 (4th Cir. 1992), *rev'd,* 116 S. Ct. 2264 (1996).
26. *Virginia,* 116 S. Ct. at 2269.
27. *See id.* at 2270.

cy, minute regulation of behavior, and indoctrination in desirable values."[28] The barracks at VMI are "stark and unattractive" and the cadets are under "constant scrutiny"—as cadets are afforded virtually no privacy at any time.[29] VMI cadets are required to wear uniforms, to eat together in the mess hall, and to regularly participate in drills.[30]

Another unique characteristic of VMI's adversative model of education is the treatment of entering freshman cadets.[31] First-year cadets are exposed to the "rat line," which is an "extreme form of the adversative model."[32] The "rats," as the new cadets are called, are tormented and punished by upperclass students during their first year at VMI.[33] This system is designed to bond the new cadets to their "fellow sufferers" and, when the year is over, to their "former tormentors."[34]

The adversative model's anticipated effect is to break down a young man's previous notions of himself and his ego, forcing him to overcome adversity; resulting in an improved man who has learned to trust his fellow cadets and to be a leader among his peers.[35] The reason that VMI and supporters of its strict adherence to the adversative method have sought to deny women admittance into the school is simply because the introduction of a female into the system would fundamentally alter the adversative method's application and results.[36] However, this is not to say women could not handle the system or flourish within it; but the application of the adversative model at VMI was designed to be a single-sex operation.[37] VMI supporters assert that the strict application of "equality of treatment, absence of privacy, [and the] minute regulation of behavior," cou-

---

28. United States v. Virginia, 766 F. Supp. 1407, 1421 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *rev'd*, 116 S. Ct. 2264 (1996).

29. *Id.* at 1424.

30. *See id.* at 1424, 1432.

31. *See id.* at 1422.

32. *Id.*

33. *See id.*

34. *Id.*

35. *See id.* at 1421-22.

36. *See id.* at 1435-36.

37. "The evidence and findings at trial demonstrate that VMI's adversative method would necessarily have to undergo drastic modification if VMI were to become coeducational." Brief for Cross-Petitioners, *Virginia*, 1995 WL 681099, Nos. 94-1941, 94-2107, at *59.

pled with the stringent physical rigors demanded of the cadets, could not occur in a coeducational environment.[38] The living conditions in the barracks are among VMI's most distinguishing characteristics: (1) cadets have windows on their dorm room doors; (2) there are no locks on the doors of cadet rooms; (3) the barracks are stark and unattractive; and (4) cadets must shower in large "gang bathroom" facilities.[39] Also, all the cadets are expected to meet the same physical fitness requirements.[40] These aspects, which may sound like odd or irrelevant details, are all important in an adversative environment.[41]

VMI supporters believe that introducing women into this environment would have the following effects: (1) privacy would be necessary and thereby cause a significant misapplication of the adversative method's requirement for the minute regulation of behavior;[42] (2) men and women would be less likely to treat the opposite sex harshly, thereby dulling the effects of the adversative method and the requirement of equality;[43] (3) competition among the cadets for the attention of the opposite sex would disrupt the cadet's bonding and the school's egalitarian goals;[44] and (4) the school would be forced to alter many of the physical requirements, again resulting in a misapplication of the concept that each cadet receive the same treatment and conform to the same standards.[45]

B. *Procedural Background*

In 1990, the United States, prompted by a complaint filed with the Attorney General, sued the Commonwealth of Virginia and VMI.[46] The complaint alleged that VMI's admissions policy violated the Equal Protection Clause of the Fourteenth Amend-

38. *Virginia*, 766 F. Supp. at 1421.
39. *See id.* at 1423-24.
40. *See id.* at 1438.
41. *See id.* at 1421-22.
42. *See id.* at 1412-13, 1438.
43. *See id.* at 1439-40.
44. *See id.*
45. *See id.* at 1413, 1438.
46. *See id.* at 1408.

ment.[47] After a six-day trial, including "an array of expert witnesses on each side," the District Court for the Western District of Virginia ruled in favor of Virginia and VMI.[48] The district court applied the means-end intermediate scrutiny test articulated by the Supreme Court in *Hogan*.[49]

Applying this test, the district court found there was a "substantial body of 'exceedingly persuasive' evidence support[ing] VMI's contention that some students, both male and female, benefit from attending a single-sex college."[50] Upon this conclusion, the district court found that Virginia's objective, offering diverse educational opportunities in higher education, was an important objective.[51] Therefore, since single-gender education can obviously only be accomplished by excluding one of the genders, the district court reasoned that Virginia's selected means was substantially related to the achievement of its important objective by offering single-sex education to qualified males who desire to endure the unique adversative method of education.[52]

The United States appealed this decision to the Court of Appeals for the Fourth Circuit.[53] The Fourth Circuit reversed the district court's decision, finding that Virginia's claimed objective of diversity lacked merit without a showing of why there were no publicly funded single-sex schools for women.[54] The Fourth Circuit remanded the case to the district court for a proper remedy in light of Virginia's violation of the Equal Protection Clause of the Fourteenth Amendment.[55] However, the court of appeals instructed the district court that there were at least three remedial options available to Virginia: (1) admit women to VMI, (2) force VMI to go private by abandoning state

47. *See id.*
48. *Virginia*, 116 S. Ct. at 2271.
49. *See id.*
50. *Virginia*, 766 F. Supp. at 1410-11.
51. *See id.* at 1413.
52. *See id.*
53. *See* United States v. Virginia, 976 F.2d 890 (4th Cir. 1992), *rev'd*, 116 S. Ct. 2264 (1996).
54. *See id.* at 899-900.
55. *See id.* at 900.

support, or (3) establish parallel institutions or parallel programs.[56]

Virginia chose the third option, to create a parallel institution for women as a part of Virginia's system of higher education.[57] The school, called the Virginia Women's Institute of Leadership (VWIL), was offered to the district court as remedial relief.[58] VWIL was designed as a four-year undergraduate program funded by Virginia and located at Mary Baldwin College, a private liberal arts school for women in western Virginia.[59] VWIL would "share VMI's mission—to produce 'citizen-soldiers.'"[60] However, the VWIL program would differ from VMI in its academic course offerings and its method of education.[61]

VWIL was conceived and designed by a task force of experts in educating women.[62] The task force focused on appropriate methods for "most women," and it determined that a military model using the adversative system was not appropriate for VWIL.[63] However, VWIL cadets would participate in ROTC programs and a "Virginia Corps of Cadets," but the "VWIL House would not have a military format, and VWIL would not require its students to eat meals together or wear uniforms during the school day."[64] VWIL cadets would, however, receive leadership training—including taking courses in leadership and completing an off-campus leadership externship. VWIL cadets would also participate in community service projects and assist in arranging a speaker series.[65]

The district court approved this remedial plan.[66] Applying the intermediate scrutiny standard, the district court found that Virginia was not required to provide a "mirror image VMI for

---

56. *See id.*

57. *See* United States v. Virginia, 852 F. Supp. 471, 473 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996).

58. *See id.*

59. *See Virginia*, 116 S. Ct. at 2272.

60. *Id.*

61. *See id.*

62. *See id.*

63. *Id.*

64. *Id.* at 2272-73.

65. *See id.* at 2273.

66. *See* United States v. Virginia, 852 F. Supp. 471, 473-74 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996).

women" in order for it to satisfy the Equal Protection Clause.[67] The district court further found, based upon undisputed matters of fact and the testimony of Virginia's experts, that VWIL's methodology was not inappropriate or ineffective for women and that "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping."[68]

The Court of Appeals for the Fourth Circuit affirmed the district court's judgment.[69] The Fourth Circuit applied a "heightened intermediate scrutiny test specially tailored to the circumstances" and imposed "specific performance criteria on the implementation of Virginia's proposal."[70] The court viewed VWIL's mission similar to that of VMI's and gave credence to the fact that the task force that designed VWIL tailored it for women and did not just blindly create another VMI.[71] Although the court observed that it would have been easier for the Commonwealth to merely copy VMI's program, it agreed that this option would have been ill-advised if done for the sake of litigation and possibly ineffective for most women.[72]

The Fourth Circuit scrutinized Virginia's selected means more closely than its proffered objective.[73] The court thought that the judiciary should be cautious when inquiring into the legitimacy of a governmental objective and should only refuse to approve a purpose that is found to be "pernicious."[74] It found that providing an option of single-gender education is a legitimate and important governmental objective, and that the means applied to achieve this (excluding the opposite sex), was the only possible way of accomplishing the end.[75] Upon reaching this decision, the Fourth Circuit added another step to the intermediate scrutiny test. It attempted to determine whether

67. *Id.* at 481.

68. *Id.*

69. *See* United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996).

70. *Id.* at 1232.

71. *See id.* at 1234-35. "VWIL would have its students pursue the same five goals as those pursued at VMI: education, military training, mental and physical discipline, character development, and leadership development." *Id.* at 1233.

72. *See id.* at 1234-35.

73. *See id.* at 1236.

74. *Id.* at 1239.

75. *See id.* at 1239.

the VWIL proposal was "substantively comparable" to VMI.[76] Although granting that it did not provide women with the VMI intangibles, like the VMI degree, the court determined that the two programs' missions and goals were the same, if only accomplished by different methods appropriately tailored by educational experts.[77]

Both the United States and the Commonwealth of Virginia appealed.[78] The United States appealed the Fourth Circuit's approval of Virginia's remedial plan, alleging that VWIL was not appropriate relief and that the relief required was the admittance of women into VMI.[79] Virginia, on the other hand, appealed the Fourth Circuit's initial decision that Virginia violated the Fourteenth Amendment by not admitting women to VMI or not providing a comparable single-sex school for women within its public system of higher education.[80]

III. THE SUPREME COURT'S DECISION IN *UNITED STATES V. VIRGINIA*

A. *The "Exceedingly Persuasive Justification" Requirement*

The Court recognized that the controlling precedents in this case were *J.E.B. v. Alabama ex rel. T.B.*[81] and *Hogan*,[82] both of which used intermediate scrutiny to evaluate gender-based equal protection claims. Recall that this test, applied by both the district court and the court of appeals, compels the state to show an "exceedingly persuasive justification" for its gender-based classification, and more specifically, that the classification advances important state objectives accomplished by means "substantially related to the achievement of those objectives."[83]

---

76. *Id.* at 1239-40.

77. *See id.* at 1241.

78. *See Virginia*, 116 S. Ct. at 2264.

79. *See id.*

80. *See id.* at 2276.

81. 511 U.S. 127 (1994) (holding that the Equal Protection Clause was violated by the State of Alabama's attorney who used all of his peremptory challenges to strike male jurors).

82. 458 U.S. 718 (1982) (holding that a state-supported university that limited its enrollment to women violated the Equal Protection Clause).

83. *Hogan*, 458 U.S. at 730. For a general discussion of intermediate scrutiny, see

Both lower courts applied this test and determined it to be satisfied.[84] However, for the first time, the Supreme Court added more bite to the words "exceedingly persuasive justification"[85] and the majority opinion made it clear that Virginia failed to provide this kind of justification.[86]

Writing for the majority, Justice Ginsburg detailed the history of gender-discrimination cases in the Supreme Court.[87] She admitted that equating gender classifications with classifications based on race or national origin is inappropriate.[88] This acknowledgment suggests that she has not, nor has the majority of the Court, yet determined that strict scrutiny applies to gender-based classifications.[89] However, Justice Ginsburg then focused her attention on the question of whether the proffered justification for Virginia's classification was "exceedingly persuasive."[90] Although *Hogan* asserted that the exceedingly persuasive justification burden can be satisfied by a showing that the objective is important and that its means are substantially related to it,[91] Justice Ginsburg separated the "exceedingly persuasive justification" language from the rest of the *Hogan* test, treating this language as if it were an additional barrier to be crossed.[92] Unfortunately, Justice Ginsburg provided no

---

supra note 7.

84. *See* United States v. Virginia, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996).

85. *Virginia*, 116 S. Ct. at 2274-75. Justice Scalia had this to say of the majority's use of the phrase "exceedingly persuasive justification":

> The Court's nine invocations of that phrase . . . and even its fanciful description of that imponderable as the "core instruction" of the Court's decisions in *J.E.B. v. Alabama ex rel T.B.* . . . and *Hogan* . . . would be unobjectionable if the Court acknowledged that *whether* a "justification" is "exceedingly persuasive" must be assessed by asking "[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." Instead, however, the Court proceeds to interpret "exceedingly persuasive justification" in a fashion that contradicts the reasoning of *Hogan* and our other precedents.

Id. at 2294 (Scalia, J., dissenting) (citations omitted).

86. *See id.* at 2274-75.

87. *See id.* at 2275-76.

88. *See id.* at 2275.

89. *See supra* note 7 and accompanying text.

90. *Virginia*, 116 S. Ct. at 2276.

91. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Blair, *supra* note 5, at 1001.

92. *Virginia*, 116 S. Ct. at 2276.

guidance as to what kind of evidence satisfies an exceedingly persuasive justification.[93] This lack of guidance will increase the level of uncertainty in gender-based equal protection cases by forcing every circuit to formulate its own test to determine whether a proffered justification is exceedingly persuasive.[94]

The Court was clearly not convinced that Virginia's justification was "genuine, not hypothesized . . . [nor relied] on overbroad generalizations about the different talents, capacities, or preferences of males and females."[95] The Court explained that the *Hogan* test cannot be satisfied if the state defending the gender-based classification relies on such overbroad generalizations or stereotypes.[96] Much of the evidence relied on by Virginia and the lower courts was statistical evidence supplied by experts detailing the abilities and preferences of men and women.[97] These statistics were used to demonstrate gender-based physiological and developmental differences.[98] However, in *J.E.B.* and now *United States v. Virginia,* the Court's decisions reveal that if the Court believes that a state used any gender stereotypes to demonstrate that its gender-classification furthers an important objective, the Court will not find that the evidence supports an exceedingly persuasive justification, even when the statistics strongly support the alleged stereotypes.[99] Therefore, under this interpretation of the *Hogan* test, a government may not defend its gender-based classification against the exceedingly persuasive justification requirement with statistical evidence to demonstrate differences between men and women. Unfortunately, the Court did not provide any guidance as to what kind of evidence could satisfy this requirement, but *J.E.B.* and *United States v. Virginia* make it clear that statistical evidence, no matter how persuasive or reliable the lower courts find it, is not sufficient.[100]

---

93. *See Virginia*, 116 S. Ct. at 2276.

94. *See, e.g.*, Cohen v. Brown Univ., 101 F.3d 155, 190-91 (1st Cir. 1996) (Torruella, C.J., dissenting); Engineering Contractors Ass'n v. Metropolitan Dade County, 943 F. Supp. 1546, 1556 (S.D. Fla. 1996).

95. *Virginia*, 116 S. Ct. at 2275 (citations omitted).

96. *See id.*

97. *See Virginia*, 766 F. Supp. at 1432-38.

98. *See id.*

99. *See Virginia*, 116 S. Ct. at 2280-82; *J.E.B.*, 114 S. Ct. at 1427 n.11.

100. *See Virginia*, 116 S. Ct. at 2280-81; *J.E.B.*, 114 S. Ct. at 1427 n.11.

The majority of the Court conceded, however, as it must, that physical differences between the sexes are "enduring" and that there are "[i]nherent differences between men and women."[101] But the Court asserted that these differences may not be used to denigrate the members of either sex or as "artificial constraints on an individual's opportunity."[102] While this is certainly true, Justice Ginsburg, in order to support her conclusion, never acknowledged that there are genuine psychological or cognitive development differences between the sexes, as this would contravene her analysis.[103] Instead, she set up her conclusion that the statistical evidence presented by Virginia's experts must have been based on stereotypes or overbroad generalizations, and thus did not satisfy the exceedingly persuasive justification requirement.

B. *The Court's "Uniqueness" Analysis*

In a very important footnote, the Court acknowledged that several amici urged that educational diversity of opportunities is a meaningful governmental objective and that "single-sex schools can contribute importantly to such diversity."[104] The Court asserted that it did not question a state's choice to evenhandedly support diverse educational opportunities.[105] However, the Court claimed that in the present case it was only addressing an educational opportunity recognized as unique, one available only at Virginia's "premier military institute."[106] The Court avowed that since VMI is unique, the Court was not faced with a question of the legality of "separate but equal" institutions.[107] As Justice Scalia pointed out in his dissent, however, a state-supported single-gender undergraduate program that is not unique would not only itself be unique, but

---

101. *Virginia*, 116 S. Ct. at 2276.

102. *Id.*

103. Justice Scalia had this to say about the majority's treatment of the expert testimony relied upon by the district court and the court of appeals: "It is not too much to say that this approach to the case has rendered the trial a sham. But treating the evidence as irrelevant is absolutely necessary for the Court to reach its conclusion." *Id.* at 2301 (Scalia, J., dissenting).

104. *Id.* at 2276 n.7.

105. *See id.*

106. *Id.*

107. *Id.*

realistically "nonexistent."[108] Therefore, it is illogical for the Court to suggest that under hypothetically "normal" circumstances, where a state's single-sex institution is not unique, the Court would relax its scrutiny of a state's proffered objective. It is submitted that any state-created single-sex institution, educational or otherwise, will not only have a virtually impossible time proving that it is not unique, but once it fails to so prove, the state can expect the Court to closely scrutinize the proffered objective under a test more identifiable with strict scrutiny, whether the objective is recognized as benign or not.[109]

C. *The Court's Intense Review of the Proffered Governmental Objective*

Virginia supplied two justifications in defense of VMI's exclusion of women.[110] The first was that "single-sex education provides important educational benefits" and "the option of single-sex education contributes to 'diversity in educational approaches.'"[111] Secondly, Virginia contended that VMI's unique method of "character development and leadership training . . . [referring to the adversative method] would have to be modified . . . to admit women."[112] The Court conceded that single-sex education does afford pedagogical benefits "to at least some students" and that it is undisputed that diversity in a state's "educational institutions can serve the public good."[113] However, the Court asserted that Virginia did not convince the Court that VMI was "established" or "has been maintained" as a program for diversifying educational opportunities while it is categorically excluding women from educational opportunities within Virginia.[114] The Court, in effect, considered Virginia's proffered objective of educational diverse opportunities a "post hoc

---

108. *Id.* at 2306 (Scalia, J., dissenting).

109. "And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. . . . Indeed, the Court indicates that if any program restricted to one sex is 'uniqu[e],' it must be opened to members of the opposite sex . . . ." *Id.* (Scalia, J., dissenting) (citations omitted).

110. *See Virginia*, 116 S. Ct. at 2276.

111. *Id.* (quoting Brief for Cross-Petitioners at 20, 25 (No. 94-1941)).

112. *Id.* (quoting Brief for Cross-Petitioners at 33-36 (No. 94-1941)).

113. *Id.* at 2276-77.

114. *Id.* at 2277.

rationalization."[115] The Court asserted that precedent required it to refuse to accept benign justifications offered by States in defense of exclusions when the justifications are not the State's actual objective, but instead "rationalizations for actions in fact differently grounded."[116]

For the Court to make this conclusion about Virginia's objective, however, it must have made certain assumptions. The Court claimed that "[n]either recent history nor distant history" aided the plausibility of Virginia's claimed goal of "diversity through single-sex educational options."[117] The Court is certainly correct when assuming that VMI was not originally created to promote educationally diverse opportunities. However, Justice Rehnquist, in his concurring opinion, noted that the Court should look only at Virginia's most recent actions, not drawing any negative inferences from the past, to determine whether VMI is serving the proffered state objective of providing educational diversity.[118] He asserted that VMI was put "on notice," by *Hogan*, a case that involved single-sex admissions to a state-supported undergraduate program.[119] Upon being put "on notice," Justice Rehnquist argued that Virginia should be allowed to explain and "reconsider its policy with respect to VMI, and to not have earlier justifications, or lack thereof, held against it."[120] This thoughtful conclusion would have allowed Virginia to offer only evidence post-dating 1982 to support its objective without having the mistakes and stereotypes of past generations affect its credibility.[121]

In his dissent, Justice Scalia argued that Virginia's diversity objective was not a pretext and discussed VMI's Mission Study Committee and the conclusions this committee made regarding the future of VMI.[122] This committee studied the future of VMI after the *Hogan* decision.[123] Justice Scalia claimed that the committee's findings, and the decision to stay single-sex,

115. *Id.*
116. *Id.*
117. *Id.* at 2277.
118. *See id.* at 2289-90 (Rehnquist, C.J., concurring).
119. *Id.* at 2289 (Rehnquist, C.J., concurring).
120. *Id.* at 2290 (Rehnquist, C.J., concurring).
121. *See id.* (Rehnquist, C.J., concurring).
122. *See id.* at 2298 (Scalia, J., dissenting).
123. *See id.* (Scalia, J., dissenting).

were made after a review of "newly coeducational institutions" like West Point and a review of "materials on education and on women in the military."[124] The committee's decisions were rooted in a plan for Virginia's future educational direction and its decision to keep VMI a single-sex institution was part of this plan.[125] Justice Scalia also cited one of the parties' stipulations asserting that the 1990 Report of the Virginia Commission on the University of the 21st Century to the Governor and General Assembly noted the "hallmarks of Virginia's educational policy are 'diversity and autonomy.'"[126] However, the majority focused on Virginia's distant history and some of Virginia's more recent history—when all of its state universities other than VMI, went coeducational beginning in the 1960s.[127] From this, the Court was willing to assume that VMI was still in existence for reasons other than those claimed by Virginia.[128]

Applying intermediate scrutiny certainly would involve making a determination upon this issue. However, the majority's complete lack of belief, or even mention of Virginia's objective as being remotely plausible, demonstrates that the Court's standard for reviewing a state's proffered governmental objective in gender-based equal protection cases is intense.[129] This intense review requires that a proffered objective for the classification pass a stringent "believability" test before the Court considers the well-known "means-ends" test to determine the objective's importance and the appropriateness of its means.[130]

---

124. *Id.* (Scalia, J., dissenting).

125. *See id.* (Scalia, J., dissenting).

126. *Id.* at 2299 (quoting Stipulations of Fact, at 37) (Scalia, J., dissenting).

127. Farmville Female Seminary, Mary Washington College, James Madison University, and Radford University had all been women's colleges, but "[b]y the mid-1970s, all four schools had become coeducational." *Id.* at 2277-78. In 1972, the University of Virginia became coeducational and "began to admit women on an equal basis with men." *Id.*

128. The Supreme Court asserted, "In sum, we find no persuasive evidence in this record that VMI's male-only admission policy 'is in furtherance of a state policy of 'diversity'.'" *Id.* at 2279 (quoting *Virginia*, 976 F.2d at 899).

129. *See supra* note 12 and accompanying text.

130. *See supra* note 12 and accompanying text.

D. *The Court's Non-Traditional "Perfect Fit" Requirement*

The Court dealt next with Virginia's argument that "VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women."[131] Virginia argued that the modifications necessary to accommodate women at VMI would be so "radical" and "drastic" as to no longer provide men the opportunity to learn under the adversative method, while depriving women the same opportunity because the program does not work in a mixed-gender environment.[132] Therefore, there would be a zero net-gain for women and a loss for men,[133] whereas permitting a separate school for both genders would allow the continuation of "adversative training" for men and leadership training for women. This argument, articulated in Part II of this case note, was not well received by the majority of the Court.[134]

The Court admitted that the admission of women "would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets."[135] However, the Court, relying on a statement by the district court, asserted, "[i]t is also undisputed, however, that 'the VMI methodology could be used to educate women. The District Court even allowed that some women may prefer it to the methodology a women's college might pursue."[136] In emphasizing these determinations, the majority of the Supreme Court is apparently, if unintentionally, heightening the "means" portion of the intermediate scrutiny standard. Only when courts are applying strict scrutiny do they require that a State's means for accomplishing its objectives be narrowly tailored to achieve a compelling interest.[137] This normally requires that the statute's important objective not be accomplished through an over- or under-inclusive classification (i.e., the classification should be a near-perfect fit, not improperly affecting many

131. *Virginia*, 116 S. Ct. at 2279.
132. *Id.*
133. *See Virginia*, 766 F. Supp. at 1413-14, 1435.
134. *See supra* Parts II.A.-B. *See also Virginia*, 116 S. Ct. 2264 (1996).
135. *Virginia*, 116 S. Ct. at 2279.
136. *Id.* (quoting *Virginia*, 852 F. Supp. at 481).
137. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995).

persons by exclusion or inclusion).[138] While in *Craig v. Boren*,[139] a gender-based equal protection case where the Court applied intermediate scrutiny, the Court found the State's classification grossly over- and under-inclusive, no such finding was made by the Supreme Court in *United States v. Virginia*.[140] Almost to the contrary, the Court merely relied on the district court's finding that *"some women may prefer* [the adversative method] to the methodology a women's college might pursue."[141] This is bordering very close, if not crossing the line, to the perfect-fit requirements of strict scrutiny. Intermediate scrutiny has never required a perfect fit, and the fact that a small and undetermined number of women in Virginia may prefer the "adversative method" does not make the classification grossly under-inclusive, or even remotely under-inclusive.[142]

E. *The Court's Threshold for "Stereotypes" and "Overbroad" Generalizations*

To this point the Court had found Virginia's "diversity of educational opportunities" objective a post hoc rationalization and had determined that Virginia's means for accomplishing this bogus objective were under-inclusive. To make matters worse for Virginia, the Court next found that the expert evidence Virginia and the two lower courts had relied on was based on stereotypes and overbroad generalizations about the "typically male or typically female 'tendencies.'"[143] In light of this finding, and in reviewing the brief submitted by the United States, it is clear the Court found the federal government attorneys' stereotype arguments very persuasive.[144]

---

138. *See Virginia*, 116 S. Ct. at 2295 (Scalia, J., dissenting).
139. 429 U.S. 190 (1976).
140. 116 S. Ct. 2264 (1996).
141. *Id.* at 2279 (quoting *Virginia*, 852 F. Supp. at 481) (emphasis added).
142. The reasoning in our other intermediate-scrutiny cases has similarly required only a substantial relation between end and means, not a perfect fit. . . . There is simply no support in our cases for the notion that a sex-based classification is invalid unless in relates to characteristics that hold true in every instance.

Id. at 2295 (Scalia, J., dissenting).
143. *Virginia*, 116 S. Ct. at 2279-81.
144. *See id.*; Brief for Cross-Respondents, *Virginia*, 1995 WL 745010, No. 94-2107.

The Court made it clear that, even when the lower courts determine that the expert testimonial evidence is credible and not based on stereotypes or overbroad generalizations, it is willing to overlook these findings and conduct its own strict analysis.[145] While never stating that the lower courts' findings were "clearly erroneous," the standard applied to findings of fact,[146] the majority merely noted that they have "cautioned reviewing courts to take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia."[147] Upon this assertion, the Court reviewed some of the evidence received by the district court and unfortunately compared it with evidence showing how well women have performed at the United State's military academies.[148] That women perform well at the academies is unarguably true, but Virginia never maintained that coeducation in a military environment was inappropriate.[149] Virginia and its experts were not saying that women cannot succeed or flourish in a military training environment. Instead, Virginia focused on the "adversative method," quite distinct from the military training environments of the United State's military academies. Virginia was asserting that the "adversative method" requires a single-gender environment, and the number of women who would want to attend and the number of women who would benefit from an "adversative method" program would not be sufficient to maintain a VMI-like institution.[150] Despite the lower courts' findings, however, the Supreme Court appeared to believe that classifications that do not

145. *See Virginia*, 116 S. Ct. at 2279-81.

146. *See* First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1926 (1995); Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993). Justice Scalia took offense to the majority's treatment of the district court's findings of fact and claimed that "[t]he Court simply dispenses with the evidence submitted at trial—it never says that a single finding of the District Court is clearly erroneous. . . . [T]his approach to the case has rendered the trial a sham. But treating the evidence as irrelevant is absolutely necessary for the Court to reach its conclusion." *Virginia*, 116 S. Ct. at 2301 (Scalia, J., dissenting).

147. *Virginia*, 116 S. Ct. at 2280.

148. *See id.* at 2280-81.

149. The military academies do not provide adversative training, thus a comparison between VMI and these institutions is not helpful. *See* United States v. Virginia, 766 F. Supp. 1407, 1440-41 (W.D. Va. 1991) (discussing how West Point changed its adversative system to a more "developmental style of training and emphasis on positive leadership" since co-education), *vacated*, 976 F.2d 890 (4th Cir. 1992), *rev'd*, 116 S. Ct. 2264 (1996).

150. *See Virginia*, 116 S. Ct. at 2264.

offer women the same benefits as men must be based on stereotypes and overbroad generalizations.

F. *The Remedial Plan (VWIL)*

The Supreme Court noted that the Fourth Circuit "deferentially reviewed" Virginia's VWIL proposal and "decided that the two single-sex programs directly served Virginia's reasserted purposes: single-gender education, and 'achieving the results of an adversative method in a military environment.'"[151] However, the Court's precedents require that, "a remedial decree . . . closely fit the constitutional violation" and be designed to place the affected persons in "the position they would have occupied in the absence of [discrimination]."[152] In light of these requirements, the majority of the Supreme Court found that VWIL did not afford women an opportunity "to experience the rigorous military training for which VMI is famed."[153] Upon comparing VMI and VWIL, the Court found that VWIL's program, facilities, faculty, and degree are not comparable to VMI's.[154]

Virginia maintained that many of the methodological differences are justified pedagogically and that the mission of producing "citizen-soldiers" through the use of "education, military training, mental and physical discipline, character . . . and leadership development" made the institutions sufficiently parallel.[155] The Court rejected this, along with the Fourth Circuit's deference and application of the previously mentioned "substantive comparability" test.[156] The Court agreed with Justice Phillips, the lone dissenter in the Fourth Circuit, who called VWIL a "pale shadow" of VMI.[157] The Supreme Court also admonished the Fourth Circuit for not inquiring whether VWIL would place women who are denied the opportunity to

151. *Id.* at 2282 (quoting *Virginia*, 44 F.3d at 1236, 1239).
152. *Id.* (referring to Milliken v. Bradley, 433 U.S. 267, 280 (1977)).
153. *Id.* at 2283.
154. *See id.* at 2283-88.
155. *Id.* at 2283 (quoting Brief for Respondents at 24 (Nos. 94-1941, 94-2107)).
156. *Id.* at 2286.
157. *Id.* at 2285 (quoting *Virginia*, 44 F.3d at 1250 (Phillips, J., dissenting)). (1996)).

attend VMI "in the position they would have occupied in the absence of [discrimination]."[158]

The Court found that the Fourth Circuit's attempt to compare the facilities in a separate but equal fashion was inappropriate in determining remedial relief.[159] VMI and the Fourth Circuit's decision to defer to Virginia's legislature by applying a "substantive comparability" test was doomed as soon as the Supreme Court labeled VMI as "unique."[160] One has to wonder how the majority of the Supreme Court would have attempted to determine whether VWIL was adequate remedial relief had it not found VMI to be "unique." It goes without saying that one cannot copy something that is unique. Therefore, it is submitted that if (1) there does exist a situation where a court does not find a single-gender institution unique; (2) this non-unique institution has a pedagogically justified objective for existence; and (3) the state does not provide an exact replica institution for the opposite gender; then a reviewing Court must attempt some kind of "comparability" test to determine whether the proffered parallel institution is appropriate remedial relief for a violation of the Fourteenth Amendment.

G. *The Court's Conclusion*

The Supreme Court concluded that VWIL was not sufficient remedial relief for Virginia's violation of the Equal Protection Clause of the Fourteenth Amendment.[161] In so doing, the Supreme Court affirmed the Fourth Circuit's initial judgment holding that Virginia was in violation of the Fourteenth Amendment and reversed the Fourth Circuit's judgment that VWIL was appropriate remedial relief in light of Virginia's violation.[162]

158. *Id.* at 2286 (quoting Milliken v. Bradley, 433 U.S. 267, 280 (1977)).
159. *See id.*
160. *Id.* at 2276 n.7.
161. *See id.* at 2287.
162. *See id.*

IV. THE IMPLICATIONS OF THE SUPREME COURT'S DECISION IN *UNITED STATES V. VIRGINIA*

The Court has apparently made four changes to intermediate scrutiny that arguably heighten the scrutiny applied to gender-based equal protection claims: (1) The Court intensely scrutinized Virginia's proffered governmental objective by finding that it was a post hoc rationalization, which forces state governments to enact statutes in a fashion similar to regulations under the Administrative Procedure Act where state governments list the purposes and objectives behind every classification-based statute;[163] (2) The Court focused on the "exceedingly persuasive justification" language and apparently separated this requirement from the ends-means scrutiny, thereby altering previous precedents that deemed a classification "exceedingly persuasive" upon passing the "important governmental objective achieved by substantially related means" portion of the test;[164] (3) The Court held that since there were some women in Virginia that might prefer the adversative method, Virginia's classification was not a perfect fit and therefore impermissibly under-inclusive, again altering previous precedent that only found gender classifications which were grossly over- or under-inclusive in violation of the Fourteenth Amendment;[165] and (4) The Court completely disregarded the district court's factual determination that Virginia's expert testimony defending VMI as "pedagogically justifiable" was valid and not based on stereotypes or overbroad generalizations, thereby increasing the level of scientific accuracy needed to convince the Court that there really might be some differences between the sexes.[166]

The future effect that *United States v. Virginia* will have on equal protection claims could be enormous. While the majority

---

163. Justice Scalia accused the majority of requiring this when he wrote "[t]he Constitution is not some giant Administrative Procedure Act, which imposes upon the States the obligation to set forth a 'statement of basis and purposes' for their sovereign acts." *Virginia*, 116 S. Ct. at 2298 (Scalia, J., dissenting).

164. *Id.* at 2274-75; Cohen v. Brown Univ., 101 F.3d 155, 190 (1st Cir. 1996) (Torruella, C.J., dissenting). *But see Cohen*, 101 F.3d at 183 n.22.

165. *See Virginia*, 116 S. Ct. at 2279; *see also id.* at 2296 (Scalia, J., dissenting); Rostker v. Goldberg, 453 U.S. 57 (1981) (holding that the selective-service registration could exclude women even though some women could be drafted for noncombat roles).

166. *Virginia*, 116 S. Ct. at 2279-82.

of the Supreme Court pretended to be applying the same intermediate scrutiny applied in *Hogan,* this simply does not seem to be the case.[167] Justice Scalia was concerned in his critical dissent that the future of all state-supported institutions, whether they be schools or rape-crisis centers, are in jeopardy because they will have difficulty proving to the Court that they are not "unique" and do not violate the Equal Protection Clause of the Fourteenth Amendment.[168] Justice Rehnquist, who wrote a concurring opinion, was also concerned with the majority's application of intermediate scrutiny.[169] Justice Rehnquist asserted that "the Court . . . introduces an element of uncertainty respecting the appropriate test."[170] This is stating the point rather mildly.

Since all three courts in this case determined that single-gender education is indeed beneficial, it would be unfortunate if the Court's decision causes state and local governments to discontinue or refrain from attempting to provide such programs. Now that VMI and the Citadel, South Carolina's state-supported military college, have been forced to admit women, other educational planners will certainly be reluctant to try single-sex education.[171] In his dissent, Justice Scalia cited a case in 1991, where a school district in Detroit attempted to offer three public schools for boys, citing "high homicide, unemployment, and drop-out rates" for inner-city boys and young men as the rationale.[172] The school board's plan, however, was halted by a

---

167. *See Cohen,* 101 F.3d at 190-91 (Torruella, C.J., dissenting); Engineering Contractors Ass'n v. Metropolitan Dade County, 943 F. Supp. 1546, 1556 (S.D. Fla. 1996).

168. Scalia claimed that "[u]nder the constitutional principles announced and applied today, single-sex public education is unconstitutional." 116 S. Ct. at 2305 (Scalia, J., dissenting).

169. *See id.* at 2288-91 (Rehnquist, C.J., concurring).

170. *Id.* at 2288 (Rehnquist, C.J., concurring).

171. In *Faulkner v. Jones,* 51 F.3d 440 (1995), the Fourth Circuit found that South Carolina had violated Shannon Faulkner's equal protection rights under the Fourteenth Amendment by denying her admission to the Citadel on the basis of her gender. This case was markedly different from *United States v. Virginia* because South Carolina had not attempted to offer a parallel program to women. Instead, South Carolina merely argued that there was not enough interest within the State to necessitate providing a women's military academy. This argument was clearly insufficient and the Citadel was required to admit Ms. Faulkner the following term.

172. *See* Garrett v. Board of Educ., 775 F. Supp. 1004, 1007 (E.D. Mich. 1991) (finding the School Board's objective compelling, but holding that excluding girls was not substantially related to the objective).

preliminary injunction after the parent of a young girl complained.[173] The school board ultimately gave up the plan.[174]

More recently, in 1996, a public junior high called the "Young Women's Leadership School" was opened for girls in Harlem.[175] Supporters of the school claim that "young women lose their assertiveness—along with skill in math and science—as they reach adolescence" as reasons for the separate school for young girls.[176] But before the school ever opened, the New York Civil Liberties Union, the New York City Rights Coalition, and the National Organization for Women all filed suit claiming the school violated federal civil rights laws.[177] The New York City Board of Education is apparently considering opening similar schools for boys as a defensive measure to the law suit.[178] In light of the Supreme Court's decision in *United States v. Virginia,* it will be interesting to see how the courts resolve this dispute.

The Supreme Court's application of this new intermediate scrutiny standard has already caused a few courts to disagree about the level of scrutiny to apply in gender-based equal protection cases.[179] In *Cohen v. Brown University,*[180] Chief Justice Torruella of the Court of Appeals for the First Circuit dissented, claiming that, "the Supreme Court appears to have elevated the test applicable to sex discrimination cases to require an 'exceedingly persuasive justification.'"[181] Justice Torruella claimed that this requirement, as noted above in this

---

173. *See id.* 775 at 1004.

174. *See Detroit Plan to Aid Blacks With All-Boys Schools Abandoned,* L.A. TIMES, Nov. 8, 1991, at A4.

175. *See All-Girls School: Give it a Try,* NEWSDAY, Aug. 25, 1996, at A33.

176. *Id.*

177. *See* Sheryl McCarthy, *If Kids Thrive at Same-Sex School, So Be It,* NEWSDAY, Dec. 12, 1996, at A58.

178. *See id.*

179. *See* Cohen v. Brown Univ., 101 F.3d 155, 190-91 (1st Cir. 1996) (Torruella, C.J., dissenting); Engineering Contractors Ass'n v. Metropolitan Dade County, 943 F. Supp. 1546, 1556 (S.D. Fla. 1996).

180. 101 F.3d 155 (1st Cir. 1996) (determining that the court would review constitutionality of district court's order requiring university to comply with Title IX by accommodating athletic interests and abilities of female students under "intermediate scrutiny test" and that "intermediate scrutiny" was not altered by *United States v. Virginia*).

181. *Id.* at 191 (Torruella, C.J., dissenting).

section and Part III, is no longer sufficiently fulfilled by having substantially related "ends" achieve "important government objectives."[182] Partly because of the new standard announced in *United States v. Virginia,* Justice Torruella voted to reverse a lower court decision "because it applie[d] a lenient [previous] version of intermediate scrutiny."[183]

In September of 1996, the United States District Court for the Southern District of Florida, in *Engineering Contractors Ass'n v. Metropolitan Dade County,*[184] was admittedly confused by the Supreme Court's decision and declared, "[t]his Court cannot say for certain whether the Supreme Court intended the VMI decision to signal a heightening in scrutiny of gender-based classifications."[185] Fortunately for the court, it found that the classification in question failed the "traditional intermediate scrutiny" test, thus finding it "unnecessary to decide whether the VMI decision requires . . . an even more difficult burden of proof."[186] This certainly will not be the last court to struggle with the Supreme Court's analysis in *United States v. Virginia.*

Jeffrey A. Barnes[*]

182. *Id.*

183. *Id.*

184. 943 F. Supp. 1546 (S.D. Fla. 1996) (holding that the county failed to demonstrate it had previously discriminated against minority and women-owned businesses and thus the affirmative action program was unconstitutional).

185. *Id.* at 1556.

186. *Id.*

* I would like to acknowledge Gary C. Leedes, Professor of Constitutional Law at the University of Richmond for his advice, boundless enthusiasm, and assistance.