

Note

CRACKING THE CODE OF *UNITED STATES V. VIRGINIA*

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Mutability [of language] is so inescapable that it even holds true for artificial languages: Whoever creates a language controls it only so long as it is not in circulation; from the moment when it fulfils [sic] its mission and becomes the property of everyone, control is lost.¹

INTRODUCTION

In setting forth tests and standards for constitutionality, the Supreme Court frequently creates its own artificial language that derives its meaning primarily through repeated application. Indeed, in *United States v. Virginia*,² Chief Justice William Rehnquist acknowledged the mutable nature of the Court's language when he remarked that even the most familiar tests and standards adopted by the Court "are hardly models of precision."³ Given language's mutability, the words of these tests and standards should be used consistently in order to prevent them from being misinterpreted, as has happened to the language in *United States v. Virginia*.

In *United States v. Virginia*, the Court struck down the admissions policy of the Virginia Military Institute (VMI), a state school that admitted only men, because it violated the Equal Protection Clause of the Fourteenth Amendment.⁴ In considering the constitutionality of VMI's admissions policy, the Court applied

† I am grateful to H. Jefferson Powell for his comments on early drafts of this Note. I would like to dedicate this Note to my grandfather, Willis J. Meriwether, Jr., VMI '33.

1. Ferdinand de Saussure, *Nature of the Linguistic Sign* (Wade Baskin trans., 1916), in DAN LATIMER, *CONTEMPORARY CRITICAL THEORY* 3, 12 (1989).

2. 518 U.S. 515 (1996).

3. *Id.* at 559 (Rehnquist, C.J., concurring).

4. *See id.* at 519.

intermediate scrutiny to the gender⁵ classification,⁶ just as it had in similar cases for more than twenty years.⁷ “Intermediate scrutiny” is so named because it lies between the two other levels of equal protection scrutiny: rational basis scrutiny, which presumes laws to be valid and requires only that they be rationally related to some legitimate governmental interests,⁸ and strict scrutiny, which requires that laws be “narrowly tailored measures that further compelling governmental interests.”⁹ In general, racial and religious classifications are subject to strict scrutiny,¹⁰ gender classifications are subject to intermediate scrutiny,¹¹ and all other classifications are subject to rational basis scrutiny.¹²

The language used by the Court in *United States v. Virginia* differed from the language normally used in gender-based equal protection cases. Instead of examining VMI’s admissions policy in terms of its “substantial relationship to important governmental objectives,”¹³ the Court placed new emphasis on the presence or absence of an “exceedingly persuasive justification” for the policy and introduced the phrase “skeptical scrutiny” to refer to its inquiry.¹⁴

Of the six federal Courts of Appeals that have considered whether *United States v. Virginia* heightened the standard of scrutiny,

5. I use the word “gender” instead of the word “sex” for a reason identified by Justice Ginsburg: the word “sex” conjures up images of bordellos while the word “gender” has a more harmless connotation. See Catharine Crocker, *Ginsburg Explains Origin of Sex, Gender*, L.A. TIMES, Nov. 21, 1993, at A28.

6. See *infra* Part II.C.

7. See *infra* Part I.

8. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (“The general rule [in the context of the Equal Protection Clause] is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (“In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures.”).

9. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

10. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

11. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Discriminatory classifications based on illegitimacy are also subject to intermediate scrutiny. See *Mills v. Habluetzel*, 456 U.S. 91, 98-99 (1982).

12. See *City of Cleburne*, 473 U.S. at 440.

13. *Personnel Adm’r v. Feeney*, 442 U.S. 256, 273 (1979).

14. See *infra* notes 137-47 and accompanying text.

five have concluded that it did not.¹⁵ Many scholars and some judges, however, including the three who sat on a Sixth Circuit panel, have reached the opposite conclusion. They have interpreted the use of such phrases to mean that gender classifications are now subject to a level of scrutiny more strict than intermediate scrutiny,¹⁶ although they disagree about exactly how strict the examination would be.¹⁷ Several of these scholars have also focused on the very active role that Justice Ginsburg, the author of the majority opinion, played in the women's rights struggle of the 1970s.¹⁸

15. See *infra* note 172.

16. See *infra* Part II.C.1.

17. See, e.g., *Montgomery v. Carr*, 101 F.3d 1117, 1123 (6th Cir. 1996) (finding that *United States v. Virginia* "appear[ed] to create a new standard of review for gender-based classifications, requiring an 'exceedingly persuasive justification' on the part of the governmental actor"); Candace S. Kovacic-Fleischer, *United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 869-70 (1997) (speculating that the Court's use of the phrase "at least" in formulating its intermediate scrutiny standard is evidence of a heightened level of review); Carrie Corcoran, Comment, *Single-Sex Education After VMI: Equal Protection and East Harlem's Young Women's Leadership School*, 145 U. PA. L. REV. 987, 1010 (1997) (arguing that the Court's use of "exceedingly persuasive justification" suggested "that the Court might have applied a heightened form of intermediate scrutiny or, perhaps, even strict scrutiny"); Karen L. Kupetz, Note, *Equal Benefits, Equal Burdens: "Skeptical Scrutiny" for Gender Classifications After United States v. Virginia*, 30 LOY. L.A. L. REV. 1333, 1334 (1997) (interpreting the Court's single use of the phrase "skeptical scrutiny" to herald the application of a new level of constitutional scrutiny); Collin O. Udell, Note, *Signaling a New Direction in Gender Classification Scrutiny: United States v. Virginia*, 29 CONN. L. REV. 521, 553 (1996) (interpreting the Court's use of the phrase "exceedingly persuasive justification" in *United States v. Virginia* as signaling the application of "the more rigorous formulation of the intermediate scrutiny test . . . , the 'exceedingly persuasive justification' formulation"); see also *Engineering Contractors Ass'n of S. Fla., Inc. v. Metropolitan Dade County*, 943 F. Supp. 1546, 1556 (S.D. Fla. 1996) (admitting confusion over the state of gender-based equal protection law after *United States v. Virginia*); Barbara A. Lee, *Discrimination Against Students in Higher Education: A Review of the 1996 Judicial Decisions*, 24 J.C. & U.L. 619, 622 (1998) ("Also left unanswered is whether Justice Ginsburg's 'exceedingly persuasive justification' standard is closer to strict scrutiny than to intermediate scrutiny, and whether it will be used by federal courts in future challenges to sex-based classifications."). But see, e.g., Larry Cata Backer, *Reading Entrails: Romer, VMI and the Art of Divining Equal Protection*, 32 TULSA L.J. 361, 369 (1997) (arguing that the *United States v. Virginia* Court did not heighten the level of scrutiny applied to gender classifications); Tod C. Gurney, Comment, *The Aftermath of the Virginia Military Institute Decision: Will Single-Gender Education Survive?*, 38 SANTA CLARA L. REV. 1183, 1205 (1998) (arguing that intermediate scrutiny was applied in *United States v. Virginia*).

18. See, e.g., Kupetz, *supra* note 17, at 1338 (explaining Ginsburg's influence on the initial application of intermediate scrutiny to gender discrimination cases in 1976); Udell, *supra* note 17, at 525 (describing Ginsburg's dedication to "guid[ing] the evolution of equal protection gender jurisprudence" through her work with the ACLU in the 1970s).

The judges and scholars who think that the *United States v. Virginia* Court heightened the standard of scrutiny applied to gender classifications are mistaken. Although the language used in the majority opinion in *United States v. Virginia* is different from that used in earlier gender-based equal protection opinions, the differences are relatively minor and do not represent a change from the Court's gender-based equal protection jurisprudence of the previous twenty years.¹⁹

This Note demonstrates that, while the *United States v. Virginia* Court did not heighten the standard of scrutiny applied to gender classifications, the Court did use language that is needlessly confusing.²⁰ In order to examine both the language and the meaning of the Court's gender-based equal protection jurisprudence, this Note employs a model of communication developed by the linguist Roman Jakobson. Jakobson used this model to explain how the differing elements of communication—language (CODE), surrounding circumstances (CONTEXT), and meaning (MESSAGE)—are understood:

The ADDRESSER sends a MESSAGE to the ADDRESSEE. To be operative the message requires a CONTEXT referred to ("referent" in another, somewhat ambiguous, nomenclature), seizable by the addressee, and either verbal or capable of being verbalized; a CODE fully, or at least partially, common to the addresser and addressee (or in other words, to the encoder and decoder of the message); and finally, a CONTACT, a physical channel and psychological connection between the addresser and the addressee, enabling both of them to enter and stay in communication.²¹

Thus, if language is mutable, then a CODE may change while the MESSAGE stays the same.²² Of course, changing a CODE for no reason²³ while retaining the same MESSAGE will do little but confuse the ADDRESSEE.

19. See *infra* Part I.

20. Other commentators have noted the confusing nature of the *United States v. Virginia* Court's language. See, e.g., Gurney, *supra* note 17, at 1207.

21. Roman Jakobson, *Closing Statement: Linguistics and Poetics*, in *STYLE IN LANGUAGE* 350, 353 (Thomas A. Sebeok ed., 1960).

22. For example, the airport serving Washington, D.C., long known as Washington National Airport, is now officially called Ronald Reagan Washington National Airport. See Pub. L. No. 105-154, § 1575, 112 Stat. 3 (1998). It is the same airport, but Congress dictated a new CODE to represent that MESSAGE.

23. There are obviously good reasons to change some CODES, such as to avoid using

Part I of this Note explores the state of gender-based equal protection law before *United States v. Virginia* and shows that, for the most part, both the MESSAGE and the CODE of intermediate scrutiny for gender-based equal protection issues remained constant for the twenty-five years preceding the opinion. Part II analyzes the CODE, CONTEXT, and MESSAGE of *United States v. Virginia* and considers both the correct and incorrect interpretations of the MESSAGE. This Note concludes by reviewing the implications of unnecessarily changing the CODE used to convey a MESSAGE.

I. GENDER-BASED EQUAL PROTECTION BEFORE *UNITED STATES V. VIRGINIA*

The Supreme Court did not recognize the application of the Equal Protection Clause of the Fourteenth Amendment to governmental distinctions between men and women until the latter part of the twentieth century. In 1971, the Supreme Court first struck down a gender classification for denying equal protection of the laws to women.²⁴ Since then, the MESSAGE of the Court's gender-based equal protection cases has been consistent:²⁵ gender classifications are subject to intermediate scrutiny. The CODE used to convey this MESSAGE has also been consistent. Since 1976, the CODE "substantial relation to an important objective" has been used to convey the MESSAGE of intermediate scrutiny,²⁶ and, since 1981, the CODE "exceedingly persuasive justification" has been used interchangeably with the more familiar CODE "substantial relation to an important objective."²⁷ This consistency of MESSAGE and CODE reveals the settled nature of the Court's gender-based equal protection jurisprudence at the time *United States v. Virginia* was decided.

offensive language.

24. See *Reed v. Reed*, 404 U.S. 71, 77 (1971).

25. By advocating the application of strict scrutiny to gender classifications, the plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), represents the closest the Court has come to deviating from its MESSAGE of intermediate scrutiny for gender classifications. See *infra* notes 43-53 and accompanying text.

26. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (initiating the use of the CODE "substantial relation to an important objective").

27. See *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (equating the CODE "exceedingly persuasive justification" with the CODE "substantial relation to an important objective").

A. *Gender-Based Equal Protection Before the Articulation of Intermediate Scrutiny*

Congress clearly intended to address discrimination between people of different races through the Fourteenth Amendment's Equal Protection Clause,²⁸ which declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."²⁹ There is, however, no evidence that Congress intended to address discrimination between people of different genders through the Equal Protection Clause. Thus, it is not surprising that more than 100 years passed after the ratification of the Fourteenth Amendment before the Supreme Court recognized that gender classifications discriminating between men and women could deny equal protection of the laws to women.³⁰

When challenged under the Equal Protection Clause, most government action need only survive rational basis scrutiny, which merely requires that a statute be rationally related to a legitimate governmental interest.³¹ Indeed, rational basis scrutiny was applied in equal protection cases involving gender classifications until late in the twentieth century. An example of such an application is *Goesaert v. Cleary*,³² decided in 1948. In *Goesaert*, the Court found a violation of the Equal Protection Clause in a Michigan statute that prohibited all women from tending bar except the daughters and wives of male bar owners.³³ Considering the CONTEXT of *Goesaert*—men returning to their jobs from the battlefields of World War II and forcing women from their war jobs back into the kitchen—it is not surprising that the Court held that discriminating between men and women was not problematic, but that discriminating between women was. The Court stated that "[w]hile Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women

28. See CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (stating specifically that the principal drafter of the Fourteenth Amendment, Rep. John Bingham of New York, aimed his proposal's equal protection language at laws like the provision of the Oregon Constitution that denied blacks access to the courts to enforce their rights).

29. U.S. CONST. amend. XIV, § 1.

30. See *Reed v. Reed*, 404 U.S. 71, 74 (1971) (holding that a provision of the Idaho probate code giving preference to men over women in appointments of estate administrators violated the Equal Protection Clause). The Court has also recognized that gender classifications could deny equal protection to men as well. See *infra* notes 43-53 and accompanying text.

31. See *supra* note 8.

32. 335 U.S. 464 (1948).

33. See *id.* at 465, 467.

without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law.”³⁴ The Court thus interpreted gender discrimination to cover discrimination within a single gender instead of between the two genders.

The Supreme Court eventually confronted the issue of discrimination between men and women in *Reed v. Reed*.³⁵ In *Reed*, the appellant challenged an Idaho law that provided that, in choosing between people equally entitled to administer the estate of one who dies intestate, men must be preferred over women.³⁶ The Supreme Court unanimously stated that the “mandatory preference” of the Idaho law violated the Equal Protection Clause under rational basis scrutiny:

A classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the statute].³⁷

34. *Id.* at 466.

35. 404 U.S. 71 (1971).

36. *See id.* at 73 (discussing IDAHO CODE § 15-312 (1948)). The appellant was dissatisfied with this law because it forced her to accept her estranged husband as the administrator of their son’s estate. *See id.* at 71-73.

37. *Id.* at 76 (citation omitted) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). The primary argument of the Appellant’s Brief in *Reed*, written in part by Ginsburg, was that the Court should make gender a suspect classification, *see* Brief for Appellant at 5 (“The sex line drawn by [the Idaho statute], mandating subordination of women to men without regard to individual capacity, creates a ‘suspect classification’ requiring close judicial scrutiny.”), and apply strict scrutiny, *see id.* at 7 (“Idaho’s interest in administrative convenience, served by excluding women who would compete with men for appointment as an administrator, falls far short of a compelling state interest when appraised in light of the interest of the class against which the statute discriminates . . .”), which the Idaho statute certainly could not pass. Only as a secondary argument did the Appellant’s Brief contend that the Idaho statute could not pass even rational basis scrutiny like that imposed in *Goesaert*. *See id.* at 60.

This language—the CODE—is roughly the same as that used in *Goesaert*,³⁸ but the analysis actually applied in *Reed*—the MESSAGE—is very different from that applied in *Goesaert*.³⁹

Writing for the *Reed* Court, Chief Justice Burger acknowledged that the law was justifiable: he found that it was rationally related to the legitimate governmental interest of “reducing the workload on probate courts by eliminating one class of contests.”⁴⁰ The Court held that the Equal Protection Clause violation arose only in “the arbitrary preference [the statute] established in favor of males.”⁴¹ Despite the overwhelming similarity of *Goesaert*’s CODE to *Reed*’s, the fact that the same kind of preference had been declared permissible under rational basis scrutiny in *Goesaert*⁴² suggests that the MESSAGE of *Reed* is that gender classifications would be subjected to something stricter than rational basis scrutiny.

Two years later, in *Frontiero v. Richardson*,⁴³ a plurality of the Court recognized the MESSAGE of *Reed*—that gender classifications would be subject to a level of scrutiny that is stricter than mere rational basis.⁴⁴ In *Frontiero*, the appellant challenged the Air Force’s differing definitions of “dependent” for male and female spouses of officers.⁴⁵ While eight Justices voted to overturn the district court’s ruling,⁴⁶ there was no majority opinion in *Frontiero*. Although the Court’s lack of a majority opinion in *Frontiero* makes analysis of its

38. See *Goesaert*, 335 U.S. at 466 (“The Constitution . . . precludes irrational discrimination as between persons or groups of persons in the incidence of a law.”); see also *supra* text accompanying notes 32-34 (discussing the facts and CONTEXT of *Goesaert*).

39. While the CONTEXT of *Reed*—the civil rights movement of the 1960s and the pending passage of the Equal Rights Amendment by Congress—made the change in the Court’s MESSAGE foreseeable, even women’s rights advocates were not necessarily expecting the change to occur in *Reed*. See Deborah L. Markowitz, *In Pursuit of Equality: One Woman’s Work to Change the Law*, 14 WOMEN’S RTS. L. REP. 335, 342 (1992).

40. *Reed*, 404 U.S. at 76.

41. *Id.* at 74.

42. See *supra* note 34 and accompanying text.

43. 411 U.S. 677 (1973).

44. See *id.* at 684.

45. See *id.* at 679-80. In determining who was qualified to receive certain benefits, the Air Force assumed the wife of a male officer to be a “dependent” while the husband of a female officer had to rely on his wife for more than half of his support in order to be considered a “dependent.” See *id.*

46. The three-judge Alabama district court held that the statutes did not unconstitutionally discriminate against servicewomen. See *Frontiero v. Laird*, 341 F. Supp. 201, 209 (M.D. Ala. 1972). Justices Brennan, Douglas, White, Marshall, Stewart, Powell, and Blackmun and Chief Justice Burger voted to overturn while only Justice Rehnquist voted to affirm. See *Frontiero*, 411 U.S. at 678, 691.

MESSAGE and CODE difficult, the different opinions help reveal the different lines of thought that existed in the Court at the time. The four Justices who joined the plurality opinion, written by Justice Brennan,⁴⁷ accepted in *Frontiero* what the Court had not in *Reed*—that gender classifications should be “suspect” and that they should be subjected to strict scrutiny:

At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in *Reed v. Reed*.⁴⁸

These four could not, however, persuade the other Justices to accept this application of strict scrutiny to gender classifications. In fact, two Justices failed even to discuss the giant step up to strict scrutiny advocated by Justice Brennan’s plurality opinion. Justice Stewart stated his reasons for concurring in the judgment, though not the opinion, of the plurality in a terse, one sentence statement: “Mr. Justice STEWART concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution.”⁴⁹ Justice Stewart’s silence on the matter of the plurality’s elevation of gender to a suspect classification indicates his disapproval of the idea. Justice Rehnquist wrote an equally terse dissent in which he disclosed his agreement with the district court (and disagreement with the majority) while refraining from expressly criticizing the plurality’s action.⁵⁰

The three separately concurring Justices, however, gave voice to their dissatisfaction with the plurality opinion. Writing for himself, Chief Justice Burger, and Justice Blackmun, Justice Powell stated:

I cannot join the opinion of Mr. Justice BRENNAN, which would hold that all classifications based upon sex, ‘like classifications based

47. See *Frontiero*, 411 U.S. at 678. Joining Justice Brennan’s opinion were Justices Douglas, White, and Marshall. See *id.*

48. *Id.* at 682 (footnotes omitted). The “implicit support” in Justice Brennan’s plurality opinion may refer to the arguments for the application of strict scrutiny to gender-based equal protection issues made by the Appellant’s Brief in *Reed*. See *supra* note 37.

49. *Frontiero*, 411 U.S. at 691 (citing *Reed*). Given Justice Stewart’s citation to *Reed*, one must assume he did not find the same implicit support in *Reed* for the application of strict scrutiny to gender classifications that the plurality did.

50. See *id.* at 691 (“Mr. Justice REHNQUIST dissents for the reasons stated by Judge Rives in his opinion for the District Court.”).

upon race, alienage, and national origin,' are 'inherently suspect and must therefore be subjected to close judicial scrutiny.' It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. . . . In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.⁵¹

This concurrence thus advocated judicial restraint: the concurring Justices would have decided the case on the basis of *Reed* rather than through an application of strict scrutiny.

While Justice Powell's concurrence argued for deciding *Frontiero* on the basis of the Court's decision in *Reed*, it did not foreclose the possibility that strict scrutiny would be applied to gender classifications at some point in the future. The CONTEXT of this possibility must be understood, though. By the time *Frontiero* was decided, Congress had passed the Equal Rights Amendment, which would have made gender a suspect classification, and had sent it to the states for ratification.⁵² Justice Powell expressed the opinion that declaring gender a suspect classification was properly a political process and that the Constitution actually required no more than the application of *Reed* rational basis scrutiny.⁵³ Thus, the MESSAGE of *Frontiero* seems to be that the appropriate level of scrutiny for gender classifications lies somewhere between rational basis scrutiny and strict scrutiny.

51. *Id.* at 691-92 (citation omitted). Indeed, *Reed* provided the Court with precedent for overturning the district court's decision due to the fact that the differing definitions of "dependent" drew an unnecessary and arbitrary distinction between men and women and, thus, violated the Equal Protection Clause. *See supra* notes 37-42 and accompanying text. Following the logic of *Reed*, legitimate reasons for the differing definitions could include the decrease in inquiries regarding who was really a dependent and the savings in money spent on spousal benefits. These reasons may have even been important, as required under intermediate scrutiny, but, if so, they do not seem substantially related to the different definitions.

52. *See Frontiero*, 411 U.S. at 692.

53. *See id.* ("It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes."). Of course, the Equal Rights Amendment was never ratified, *see* Alison Muscatine, *Is NOW Pulling the Chair Out from Under Feminism?*, WASH. POST, Oct. 7, 1984, at D1, and no member of the Court has ever again voted to subject gender classifications to strict scrutiny. *See infra* Parts I.B-C.

B. The Articulation of Intermediate Scrutiny

Although the MESSAGES of *Reed* and *Frontiero* had required the application of an intermediate level of scrutiny to gender classifications, the Court had neither put a label on this new level of constitutional scrutiny nor attempted to explain it. In *Craig v. Boren*,⁵⁴ the Court settled on a CODE and explained the CODE's MESSAGE. The appellants⁵⁵ in *Craig* challenged an Oklahoma statute that prohibited the sale of low alcohol content beer to women below the age of eighteen and to men below the age of twenty-one.⁵⁶ Based on the appellee's statistical evidence of young men's drunk-driving arrests and vehicular injuries, the district court concluded that the statute was substantially related to the achievement of greater safety on the highways of Oklahoma.⁵⁷ Although the district court correctly asserted that *Reed's* "fair and substantial relation to the object of the legislation"⁵⁸ test was controlling, it ignored the MESSAGE behind that CODE, as well as the MESSAGE in *Frontiero*, and upheld the statute.⁵⁹

The Supreme Court refused to find the challenged law to be substantially related to Oklahoma's highway safety. Writing for the Court, Justice Brennan matter-of-factly recited *Reed's* CODE with one significant addition—the word "important": "To withstand constitutional challenge, previous cases establish that classifications by gender must serve *important* governmental objectives and must be substantially related to achievement of those objectives."⁶⁰ These words became the CODE used to convey the MESSAGE of an intermediate level of scrutiny, somewhere between rational basis scrutiny and strict scrutiny—a MESSAGE the Court had been sending since *Reed*.⁶¹

While the Court had applied an intermediate level of scrutiny since *Reed*, it had theretofore officially acknowledged only two levels of scrutiny: rational basis scrutiny, to which the bulk of all legislation was subjected, and strict scrutiny, to which only racial and religious

54. 429 U.S. 190 (1976).

55. The appellants were a bartender and a man between eighteen and twenty-one years of age. *See id.* at 192.

56. *See id.*

57. *See id.* at 199.

58. *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

59. *See Craig*, 429 U.S. at 199.

60. *Id.* at 197 (emphasis added).

61. *See supra* Part I.A.

classifications were subjected.⁶² By failing to acknowledge the existence of the different standard of scrutiny applied in *Reed* and *Frontiero* with a new CODE, the Court had also failed to fully explain this standard. Although *Craig's* CODE differed from *Reed's*⁶³ only in the addition of the word “important,” the Court used this difference as an opportunity to recognize and explain this intermediate level of scrutiny. The Court explained what its intent was in using the word “important” by pointing out that the “[d]ecisions following *Reed* . . . have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications.”⁶⁴ The Court also took the opportunity to further clarify *Craig's* MESSAGE by explaining what it meant by “substantial relation”:

“[A]rchaic and overbroad” generalizations concerning the financial position of servicewomen and working women could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the “marketplace and world of ideas” were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.⁶⁵

The Court’s MESSAGE here is that intermediate scrutiny requires gender classifications to be substantially related to an important governmental interest. Indeed, even though Justice Rehnquist disagreed with the application of this intermediate level of scrutiny in *Craig* because the law challenged in that case seemed to discriminate against men and in favor of women, he did not disagree with the Court’s recognition of “an elevated or ‘intermediate’ level scrutiny . . . in cases dealing with discrimination against females.”⁶⁶

62. See *supra* Part I.A.

63. See *supra* note 37 and accompanying text.

64. *Craig*, 429 U.S. at 198.

65. *Id.* at 198-99 (citations omitted) (quoting, respectively, *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975); *Stanton v. Stanton*, 421 U.S. 7, 15 (1974)).

66. *Id.* at 218 (Rehnquist, J., dissenting).

Other Justices did not agree with the application of this intermediate level of scrutiny. Though silent on the majority's articulation of the intermediate scrutiny standard, Chief Justice Burger lodged his objection by simply stating in his dissent that he could find no "independent constitutional basis supporting the right asserted [by the appellants] or disfavoring the classification adopted" by Oklahoma.⁶⁷ Justices Powell and Stevens, on the other hand, directly addressed the Court's recognition of a new level of scrutiny. Although he joined the opinion of the Court, Justice Powell asserted that the Court's "decision today will be viewed by some as a 'middle-tier' approach" and refused to "endorse that characterization."⁶⁸ He did, however, admit that "candor compels the recognition" that gender classifications were being subjected to a higher standard of review than the rational basis scrutiny that was normally applied.⁶⁹ In his concurrence, Justice Stevens expressed his disagreement with the majority's new CODE—or with any CODE that recognized different levels of scrutiny—more strongly, declaring:

There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.⁷⁰

Although Justice Stevens objected to the CODE that the majority used to explain the Court's gender-based equal protection jurisprudence, he weakened the force of his objection by not proposing an alternate CODE to explain what he saw as a single standard.

Despite the objections of three members of the *Craig* Court, intermediate scrutiny has since proven to be very workable. The

67. *Id.* at 217 (Burger, C.J., dissenting).

68. *Id.* at 211 n.* (Powell, J., concurring).

69. *Id.*

70. *Id.* at 211-12 (Stevens, J., concurring).

Court has repeatedly applied the standard expressed in *Craig* without any further changes to the MESSAGE.⁷¹

C. *The Birth of “Exceedingly Persuasive Justification” and Its Incorporation into the CODE of Intermediate Scrutiny*

Although the Court did not change its MESSAGE of intermediate scrutiny after its decision in *Craig*, it did subsequently add to the CODE it used in *Craig*. The Court continued to use the CODE “substantial relation to an important governmental objective” to refer to the MESSAGE of intermediate scrutiny, but the Court also began to use the CODE “exceedingly persuasive justification” interchangeably with the CODE “substantial relation to an important governmental objective.”

The link between the CODE “exceedingly persuasive justification” and the MESSAGE of intermediate scrutiny took time to develop, though. When first used by the Court in *Personnel Administrator v. Feeney*,⁷² the phrase was used simply to point out the difficulty that a gender classification faced in surviving intermediate scrutiny.⁷³ If the Court had intended its use of “exceedingly persuasive justification” in *Feeney* to signal a shift in its CODE or MESSAGE, then such a shift should have been reflected ten months later when the Court decided the gender-based equal protection case *Wengler v. Druggists Mutual Insurance Co.*⁷⁴ No such shift occurred in *Wengler* as the Court simply recited the already solidly established “substantial relation to an important governmental interest” CODE

71. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980); *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Califano v. Webster*, 430 U.S. 313, 316-17 (1977); see also *infra* Part I.C (discussing cases after *Craig*).

72. 442 U.S. 256 (1979).

73. The majority opinion states:

This Court's recent cases teach that such [gender] classifications must bear a close and substantial relationship to important governmental objectives, and are in many settings unconstitutional. Although public employment is not a constitutional right . . . these precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an *exceedingly persuasive justification* to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.

Id. at 273 (emphasis added) (citations omitted). The Court did not actually apply intermediate scrutiny in *Feeney*, however, because it found no overt or covert gender classifications. See *id.* at 274-76 (noting no gender classification and proceeding with an invidious intent inquiry).

74. 446 U.S. 142 (1980). *Wengler* dealt with a workers' compensation law that paid benefits to all widows but only to those widowers who could demonstrate need. See *id.* at 149.

for intermediate scrutiny and did not mention “exceedingly persuasive justification.”⁷⁵

The majority opinion in *Kirchberg v. Feenstra*⁷⁶ gave the CODE “exceedingly persuasive justification” its first bit of real meaning by equating it with intermediate scrutiny. In an opinion written by Justice Marshall, the Court stated that the answer to the “critical question” of “[w]hether [the gender classification] substantially furthers an important government interest”⁷⁷ could be gleaned by asking whether the “party seeking to uphold a statute that expressly discriminates on the basis of sex” had borne “the burden [of] advanc[ing] an ‘exceedingly persuasive justification’ for the challenged classification.”⁷⁸ In other words, the two differently CODED questions have the same MESSAGE, and the CODE “advanc[ing] an ‘exceedingly persuasive justification’” is just shorthand for the longer CODE “substantially further[ing] an important governmental interest.”⁷⁹ The Court further reinforced these CODES’ interchangeability by discussing the statute’s failure to pass intermediate scrutiny in terms of both.⁸⁰

Although the Court did use a new CODE to convey the MESSAGE of intermediate scrutiny in *Kirchberg*, the Court did not change that MESSAGE. The *Kirchberg* Court was the first to explicitly recognize that gender classifications are presumptively invalid,⁸¹ but this presumption had been an implicit part of the MESSAGE of

75. See *id.* at 150 (recognizing that “our precedents require that gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of those objectives”). Indeed, the *Wengler* Court’s rejection of Missouri’s administrative convenience justification demonstrated complete adherence to the MESSAGE of *Reed* and *Craig*, which also recognized that administrative convenience is not a governmental objective sufficiently important to justify discrimination between men and women. See *id.* at 151-52; *Craig*, 429 U.S. at 198; *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

76. 450 U.S. 455 (1981). At issue in *Kirchberg* was a Louisiana statute that gave husbands, but not wives, the unilateral right to dispose of property owned jointly by the couple on the theory that husbands were the “head and master” of such property. *Id.* at 456.

77. *Id.* at 461.

78. *Id.* (quoting *Feeney*, 442 U.S. at 273).

79. *Id.*

80. See *id.* at 460 (holding that “appellant *Kirchberg* does not claim that the provision [of the statute] serves any such interest,” meaning an important governmental interest); *id.* at 461 (holding that “appellant has failed to offer such a justification,” meaning an “exceedingly persuasive justification”).

81. See *id.* at 461 (“[T]he burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an ‘exceedingly persuasive justification’ for the challenged classification.”).

intermediate scrutiny at least since *Craig*. While rational basis scrutiny presumes laws to be valid,⁸² the Court ceased applying rational basis scrutiny to gender classifications in *Reed*.⁸³ In *Craig*, the Court actually shifted the burden of proof to the state, without explicitly recognizing the shift, by not assessing the adequacy of the appellant's arguments and, instead, focusing on the inadequacy of the state's.⁸⁴ Thus, although the *Kirchberg* Court was the first to explicitly recognize this shift, the shift itself had probably occurred several years earlier.

Justice O'Connor's majority opinion in *Mississippi University for Women v. Hogan*⁸⁵ confirmed the interchangeability of the more familiar CODE used to express intermediate scrutiny, "substantial relation to an important governmental objective," and the newer CODE, "exceedingly persuasive justification." Finding that a man could not be denied admission to a state-supported nursing school because of his gender, Justice O'Connor explained the Court's test as follows:

Our decisions also establish that 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."⁸⁶

But for the "at least," which had been implicit in intermediate scrutiny, the CODE used in *Hogan* is identical to that used in *Kirchberg*.⁸⁷

82. See *supra* note 8.

83. See *supra* notes 40-42 and accompanying text.

84. See *Craig v. Boren*, 429 U.S. 190, 199-204 (1976).

85. 458 U.S. 718 (1982).

86. *Id.* at 724 (emphasis added) (citations omitted) (quoting, respectively, *Kirchberg*, 450 U.S. at 461; *Personnel Adm'r v. Feeney*, 442 U.S. 256, 273 (1979); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

87. Compare *id.*, with *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (holding that the "critical question" of "[w]hether [the gender classification] substantially furthers an important government interest" could be gleaned by asking whether the "party seeking to uphold a statute that expressly discriminates on the basis of sex" had borne "the burden [of] advanc[ing] an 'exceedingly persuasive justification' for the challenged classification"). This confirmation of the CODES' interchangeability may be called into question, however, by a footnote following the quotation above. Harkening back to Justice Brennan's plurality opinion in *Frontiero*, the

As applied in *Hogan*, the MESSAGE of the CODE “exceedingly persuasive justification” does not differ from the MESSAGE of the CODE “substantial relation to an important governmental objective” as applied in *Kirchberg* and *Craig*. In considering whether “compensat[ion] for discrimination against women and, therefore, . . . educational affirmative action” justified the state university’s discriminatory admissions policy,⁸⁸ the *Hogan* Court concluded that “although the State recited a ‘benign, compensatory purpose,’ it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.”⁸⁹ This statement was nothing more than a recognition that Mississippi had not satisfied its burden under the intermediate scrutiny standard, just as the appellant had failed to do in *Kirchberg*.⁹⁰ The Court further held that Mississippi University for Women’s admissions policy was invalid because it was not “substantially . . . related to its proposed compensatory objective,”⁹¹ again echoing the traditional CODE of intermediate scrutiny. Thus, the MESSAGE of intermediate scrutiny remained consistent in *Hogan*.

The Court took a less clear stance in *J.E.B. v. Alabama ex rel. T.B.*,⁹² the next case in which the Court used the CODE “exceedingly persuasive justification.”⁹³ Although it set forth the intermediate scrutiny standard using both CODES,⁹⁴ the *J.E.B.* Court discussed

Court stated that “we need not decide whether classifications based upon gender are inherently suspect.” *Hogan*, 458 U.S. at 724 n.9; *see also supra* notes 43-53 and accompanying text. This statement can be interpreted in two ways: either the Court felt it was well-settled by that time that gender was not a suspect classification requiring the application of strict scrutiny or the Court was willing to consider applying strict scrutiny to gender at some point in the future. *Hogan*’s MESSAGE suggests that the former interpretation is correct.

88. *Hogan*, 458 U.S. at 727.

89. *Id.* at 730.

90. *See supra* note 80 and accompanying text.

91. *Hogan*, 458 U.S. at 730.

92. 511 U.S. 127 (1994).

93. The Court held that the Equal Protection Clause was violated by the Alabama prosecutor’s purposeful use of peremptory strikes to exclude women from a jury solely on the basis of their gender. *See J.E.B.*, 511 U.S. at 130-31.

94. *See id.* at 136-37 (“Under our equal protection jurisprudence, gender-based classifications require ‘an exceedingly persuasive justification’ in order to survive constitutional scrutiny. Thus, the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State’s legitimate interest in achieving a fair and impartial trial.” (citing *Personnel Adm’r v. Feeney*, 442 U.S. 256, 273 (1979); *Hogan*, 458 U.S. at 724; *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981))); *see also supra* notes 86-87 and accompanying text (analyzing the original quotations from the *Hogan* and *Kirchberg* rulings). While the Court does use the word “legitimate” to describe Alabama’s interest in “achieving a fair and

whether Alabama's actions passed that scrutiny only in terms of Alabama's "exceedingly persuasive justification" (or the lack thereof).⁹⁵ Thus, while previous opinions had always explained the failure of gender classifications to pass intermediate scrutiny in terms of the CODE "substantial relation to an important governmental objective," the majority opinion in *J.E.B.* was the first to use only the CODE "exceedingly persuasive justification" to explain this failure.

Although the *J.E.B.* Court may have shifted its emphasis from the CODE "substantial relation to an important governmental objective" to the CODE "exceedingly persuasive justification," the *J.E.B.* Court did not change the MESSAGE of intermediate scrutiny. In considering Alabama's arguments, the Court stated: "We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'"⁹⁶ The similarity of this statement to the *Craig* Court's earlier rejection of "'archaic and overbroad' generalizations concerning the financial position of servicewomen and working women" and "outdated misconceptions concerning the role of females"⁹⁷ suggests that the MESSAGE of intermediate scrutiny had remained consistent, though no firm conclusion can be drawn given the relative lack of explanation of the Court's equal protection analysis in this case.⁹⁸

impartial trial," *J.E.B.*, 511 U.S. at 136-37, it probably did not intend to weaken the intermediate scrutiny standard by requiring only legitimate instead of important governmental interests.

95. See *J.E.B.*, 511 U.S. at 137 (holding that Alabama's arguments that women on juries might be more sympathetic to female complainants fell "[f]ar from proffering an exceptionally persuasive justification for its gender-based peremptory challenges"). Presumably by mistake, the Court used the word "exceptionally" instead of "exceedingly." It is unclear why the Court made this and other simple linguistic mistakes. See also *supra* note 94 (discussing the Court's use of the word "legitimate" instead of the word "important").

96. *J.E.B.*, 511 U.S. at 138 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

97. *Craig v. Boren*, 429 U.S. 190, 198-99 (1976) (citations omitted) (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

98. It was, perhaps, because the majority opinion lacked a clear definition of "exceedingly persuasive justification" that Justice Scalia, joined in dissent by Chief Justice Rehnquist and Justice Thomas, did not object to that phrase as the correct expression of "the 'heightened scrutiny' mode of equal protection analysis used for sex-based discrimination." *J.E.B.*, 511 U.S. at 160-61 (Scalia, J., dissenting). He focused, instead, on the differences between peremptory strikes based on race, which he viewed as impermissible, and peremptory strikes based on gender, which he considered permissible. See *id.* at 159-60 (Scalia, J., dissenting). It was not until *United States v. Virginia* that Scalia or any of the other *J.E.B.* dissenters challenged the use of the CODE "exceedingly persuasive justification." See *United States v. Virginia*, 518 U.S. 515, 570-76 (1996) (Scalia, J., dissenting).

II. “EXCEEDINGLY PERSUASIVE JUSTIFICATION,” “SKEPTICAL SCRUTINY,” AND INTERMEDIATE SCRUTINY IN *UNITED STATES V. VIRGINIA*

In 1996, the Supreme Court decided *United States v. Virginia*, holding that VMI’s exclusion of women violated the Equal Protection Clause.⁹⁹ This decision spawned new questions about the level of scrutiny to be applied to gender classifications.¹⁰⁰ As explained in Part I, the MESSAGE of the Court’s previous gender-based equal protection cases had been clear: gender classifications are subject to intermediate scrutiny. The *United States v. Virginia* Court seemed to call this MESSAGE into question by emphasizing the CODE “exceedingly persuasive justification” instead of the CODE “substantial relation to an important governmental objective” and by introducing the new CODE “skeptical scrutiny” as a description of its analysis.

The case originated when the United States sued Virginia alleging that Virginia’s use of state funds to support VMI, a public military college that only admitted men, violated the Equal Protection Clause of the Fourteenth Amendment.¹⁰¹ The original judgment of the district court in favor of VMI’s admissions policy¹⁰² was vacated on appeal.¹⁰³ On remand to the district court, Virginia asked for and received the court’s approval of continued use of state funds at VMI in exchange for creating and funding a separate but similar institution for women, the Virginia Women’s Institute for Leadership (VWIL).¹⁰⁴ The creation of VWIL was, at best, a poor attempt to remedy VMI’s discriminatory admissions policy: VWIL lacked VMI’s high level of funding, VMI’s strong alumni network, VMI’s distinctive adversative environment,¹⁰⁵ and VMI’s

99. See *United States v. Virginia*, 518 U.S. at 534.

100. See *supra* note 17 and accompanying text (discussing scholars and judges who saw the majority opinion in *United States v. Virginia* as calling into question intermediate scrutiny’s application to gender classifications).

101. See *United States v. Virginia*, 766 F. Supp. 1407, 1408 (W.D. Va. 1991).

102. See *id.*

103. See *United States v. Virginia*, 976 F.2d 890, 892 (4th Cir. 1992).

104. See *United States v. Virginia*, 852 F. Supp. 471, 484-85 (W.D. Va. 1994). VWIL would have been located at nearby Mary Baldwin College, a private women’s liberal arts college. See *id.*

105. VMI’s adversative method of leadership training involved grueling physical and mental testing. See VIRGINIA MILITARY INSTITUTE: THE SPIRIT 61 (Virginia Military Institute Sesquicentennial Committee ed., 1989) (quoting Lieutenant General Edward West Nichols’ description of the cadets’ psychology and experience). The goal of the adversative method is to

independence.¹⁰⁶ In considering this remedial plan on appeal, the Fourth Circuit applied what it called a “special intermediate scrutiny test.”¹⁰⁷ The test determined:

(1) whether the state’s objective of providing single-gender education to its citizens may be considered a legitimate and important governmental objective; (2) whether the gender classification adopted is directly and substantially related to that purpose; and (3) whether the resulting mutual exclusion of women and men from each other’s institutions leaves open opportunities for those excluded to obtain substantively comparable benefits at their institution or through other means offered by the state.¹⁰⁸

Despite VWIL’s obvious inferiority to VMI, the Fourth Circuit held that Virginia’s remedial plan passed the “special intermediate scrutiny test”¹⁰⁹ and affirmed the second judgment of the district court.¹¹⁰ Judge Phillips dissented vigorously, arguing that the majority had improperly abandoned the appropriate level of scrutiny for gender classifications, by applying a more deferential level of scrutiny than the intermediate scrutiny expressed in *Craig and Hogan*.¹¹¹ After the Fourth Circuit denied a rehearing *en banc*,¹¹² the United States appealed, and the Supreme Court granted certiorari.¹¹³

Justice Ginsburg authored the Supreme Court’s majority opinion, which was joined by Justices Stevens, O’Connor, Kennedy, Souter, and Breyer. Chief Justice Rehnquist concurred in the judgment of the Court but wrote separately, and Justice Scalia filed a dissent. Justice Thomas did not take part in the consideration or

break all cadets down to an equal level in order to build them back together as a unit, creating camaraderie and team spirit through adversity. *See id.* at 45 (“It matters not under what adventitious circumstances you may have come here—of wealth, or family, or association—every prop is now wrested from you but that which supports your own merits—your personal, individual action and desert . . .” (quoting Francis H. Smith, *The Inner Life of the VMI Cadet, Address to the Corps* (September 10, 1866))). This adversative method understandably inspired both love and loathing: life at VMI “is a life characterized by former cadets as one they would not take a million dollars for having lived, and wouldn’t take a million dollars to go through again.” *Id.* at 46 (internal quotation marks omitted) (quoting HENRY A. WISE, *DRAWING OUT THE MAN: THE VMI STORY* (1978)).

106. *See United States v. Virginia*, 518 U.S. 515, 551-54 (1996).

107. *United States v. Virginia*, 44 F.3d 1229, 1237 (4th Cir. 1995).

108. *Id.*

109. *Id.*

110. *See id.* at 1241-42.

111. *See id.* at 1244 (Phillips, J., dissenting).

112. *See United States v. Virginia*, 52 F.3d 90 (4th Cir. 1995).

113. *See United States v. Virginia*, 518 U.S. 515, 515 (1996).

decision of the case.¹¹⁴ Before moving to the heart of its equal protection analysis, the Court criticized the Fourth Circuit's inquiry for being too deferential.¹¹⁵ The Court also praised Judge Phillips's dissent from the Fourth Circuit's decision as well as Judge Motz's dissent from the Fourth Circuit's denial of rehearing en banc, both of which used the CODE "exceedingly persuasive justification" to express the MESSAGE of intermediate scrutiny.¹¹⁶

A. *The CONTEXT of the Majority Opinion*

Many elements of the majority opinion's CONTEXT influence the understanding of *United States v. Virginia*'s MESSAGE. Those scholars who have misinterpreted the majority opinion's MESSAGE and who have considered the CONTEXT of the majority opinion have focused on the status of the majority opinion's author as a well-known women's rights advocate.¹¹⁷ They consider this element of the opinion's CONTEXT to indicate that Justice Ginsburg's agenda includes changing the Court's MESSAGE of intermediate scrutiny for gender classifications.¹¹⁸

Before being appointed to the D.C. Circuit in 1980,¹¹⁹ Ginsburg was one of the most influential participants in the fight for women's equal protection under the law.¹²⁰ In fact, when the American Civil Liberties Union (ACLU) agreed to represent the appellant in *Reed*,

114. The reason Justice Thomas did not participate in *United States v. Virginia* was, presumably, because his son was a recent graduate of VMI. See Donald P. Baker, *By One Vote, VMI Decides to Go Coed; Nation's Last All-Male Military School to Enroll Women Starting in '97*, WASH. POST, Sept. 22, 1996, at A1.

115. See *United States v. Virginia*, 518 U.S. at 528.

116. See *id.* at 529-30 (noting that Judge Phillips felt that "[t]he court . . . had not held Virginia to the burden of showing an "exceedingly persuasive [justification]" for the Commonwealth's action" and that "Judge Motz agreed with Judge Phillips that Virginia had not shown an "exceedingly persuasive justification" for the disparate opportunities the Commonwealth supported" (second alteration in original) (quoting respectively *United States v. Virginia*, 44 F.3d at 1247 (Phillips, J., dissenting) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) and *United States v. Virginia*, 52 F.3d at 92 (Motz, J., dissenting) (quoting *Hogan*, 458 U.S. at 724)).

117. See, e.g., Kupetz, *supra* note 17, at 1333-34 (pointing to Justice Ginsburg's majority opinion in *United States v. Virginia* as a significant moment in feminist jurisprudence because it articulates a more stringent equal protection test for gender classifications); Udell, *supra* note 17, at 550-56 (characterizing Justice Ginsburg's majority opinion as a positive step in her strategic plan to push gender classifications into the realm of strict scrutiny).

118. See Kupetz, *supra* note 17, at 1334; Udell, *supra* note 17, at 550-56.

119. See Joyce Ann Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 4 (1994).

120. See Markowitz, *supra* note 39, at 335.

she collaborated with the ACLU lawyers on the appellant's brief.¹²¹ After the unanimous decision in *Reed*, the ACLU formed its Women's Rights Project and named Ginsburg its first director.¹²²

As director, Ginsburg wrote and filed amici briefs for several of the landmark gender-based equal protection cases. In *Frontiero*, for example, it was the Ginsburg-authored amicus brief, not the appellant's brief, that pressed the strict scrutiny arguments ultimately adopted by Justice Brennan's plurality.¹²³ Ginsburg also wrote an amicus brief in *Craig*,¹²⁴ and she corresponded extensively with the *Craig* appellants' local attorney.¹²⁵ In fact, it was Ginsburg who actually made the suggestion that, given the Court's rejection of strict scrutiny in *Frontiero* only three years earlier, the *Craig* appellants should abandon their arguments for strict scrutiny and focus, instead, on a form of nonstrict, but still heightened scrutiny.¹²⁶

In focusing on the CONTEXT of Justice Ginsburg's work as an advocate, those who have misinterpreted the majority opinion's MESSAGE have ignored the CONTEXT of her work as a judge, which does not suggest that Justice Ginsburg desires to heighten the standard of scrutiny applied to gender classifications. As a judge on the D.C. Circuit, Judge Ginsburg did not behave like an activist.¹²⁷ The opinions she authored "did not indicate that she presented a crusading liberal lawyer's views."¹²⁸ Quite to the contrary, commentators saw her as a swing vote, siding with Republican-appointed judges (presumably more conservative) as often as, if not

121. See Brief for Appellant at 68, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

122. See Markowitz, *supra* note 39, at 337.

123. See *id.* at 344-46.

124. See Brief Amicus Curiae for ACLU at 34, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628).

125. See Markowitz, *supra* note 39, at 355.

126. See *id.*

127. Taking Justice Ginsburg's actions on the D.C. Circuit as a reflection of her true feelings about gender-based equal protection might be a mistake, though. First, she did not hear many cases involving gender discrimination and heard none involving gender-based equal protection issues. See, e.g., *Valentino v. United States Postal Serv.*, 674 F.2d 56 (1982) (settling an allegation of a Title VII sex discrimination suit without mentioning the Court's gender-based equal protection jurisprudence). Second, one might speculate that as an intermediate court, a federal court of appeals is not an appropriate or advisable forum for the advancement of an agenda. Judge Ginsburg may have felt that any heightening of scrutiny on her part would weaken her credibility with her colleagues on the D.C. Circuit and force the Supreme Court into explicitly rejecting strict scrutiny for gender classifications once again. As the highest constitutional authority, though, the U.S. Supreme Court is actually a forum from which an agenda can be advanced, although the appropriateness of doing so is questionable.

128. Baugh et al., *supra* note 119, at 4.

more often than, with Democrat-appointed judges (presumably more liberal).¹²⁹ Indeed, the only real indication in Ginsburg's opinions that she might have been open to reformulating the Court's three-tiered equal protection analysis came in *Federal Election Commission v. International Funding Institute, Inc.*¹³⁰ In her concurrence, Judge Ginsburg referred with approval to Justice Stevens' comment in *Cleburne v. Cleburne Living Center, Inc.*¹³¹ that the "Court's equal protection decisions 'reflect a continuum of judgmental responses to differing classifications' rather than three discrete 'tiers' of scrutiny."¹³² Other than this reference, though, Judge Ginsburg's opinions do not suggest that she disagreed with the Court's gender-based equal protection jurisprudence.¹³³

Once she was appointed to the Supreme Court, Justice Ginsburg gave only one hint of dissatisfaction with intermediate scrutiny being applied to gender classifications. In *Harris v. Forklift Systems, Inc.*,¹³⁴ a Title VII case, Justice Ginsburg remarked in a footnote that "[i]ndeed, even under the Court's equal protection jurisprudence, which requires 'an exceedingly persuasive justification' for a gender-based classification, it remains an open question whether 'classifications based upon gender are inherently suspect.'"¹³⁵ As one commentator remarked, Justice Ginsburg "used a single footnote to raise what may be a more significant point for future constitutional cases and for Ginsburg's role on the Court."¹³⁶ In *United States v. Virginia*, however, Justice Ginsburg did not address this issue at all.

In interpreting the MESSAGE of *United States v. Virginia*, considering the CONTEXT of Justice Ginsburg's authorship of the majority opinion is warranted. Considering only one part of this

129. See, e.g., Joan Biskupic, *Clinton's Choice Would Probably Strengthen the Court's Center*, WASH. POST NAT'L WKLY. EDITION, June 21-27, 1993, at 7.

130. 969 F.2d 1110 (D.C. Cir. 1992).

131. 473 U.S. 432 (1985).

132. *International Funding Inst.*, 969 F.2d at 1118 (quoting *Cleburne Living Ctr.*, 473 U.S. at 451-52 (Stevens, J., concurring)).

133. At that time, the relevant jurisprudence entailed the application of intermediate scrutiny to gender classifications, as seen in the previous discussions of *Wengler v. Druggists Mutual Insurance Co.*, *Kirchberg v. Feenstra*, *Mississippi University for Women v. Hogan*, and *J.E.B. v. Alabama ex rel. T.B.* See *supra* Part I.C.

134. 510 U.S. 17 (1993).

135. *Id.* at 26 n.* (Ginsburg, J., concurring) (citations omitted) (quoting respectively *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982)).

136. Baugh et al., *supra* note 119, at 28.

CONTEXT, however, is unwarranted. Justice Ginsburg's work as an advocate suggests that she may still have a desire to further heighten the standard of scrutiny applied to gender classifications. Justice Ginsburg's work as a judge, however, suggests that she has abandoned any former desire to heighten the standard of scrutiny applied to gender classifications. Taking into account both Justice Ginsburg's work as an advocate and her work as a judge, the CONTEXT of her authoring the majority opinion is inconclusive and does not shed any significant light on the true MESSAGE of *United States v. Virginia*.

B. The CODE of the Majority Opinion

Before reviewing the state of its gender-based equal protection analysis, the *United States v. Virginia* Court referred to the inquiry it was about to undertake as "skeptical scrutiny."¹³⁷ This CODE had never been used before and was part of the reason for the subsequent confusion as to the MESSAGE of *United States v. Virginia*.¹³⁸ Because the Equal Protection Clause has been interpreted to require different levels of constitutional "scrutiny" to be applied to different kinds of government action—rational basis scrutiny, intermediate scrutiny, and strict scrutiny—the Court's use of the CODE "skeptical scrutiny" has been interpreted as creating a new level of constitutional scrutiny.¹³⁹

Although the CODE "skeptical scrutiny" had not appeared in a Supreme Court opinion previously, the manner in which that CODE was used in *United States v. Virginia* suggests that it was meant merely to describe intermediate scrutiny. First, the CODE was used only one time, not repeatedly. Second, the CODE was used to refer to the inquiry actually undertaken by the Court in *United States v. Virginia*,¹⁴⁰ an inquiry that, while "skeptical," was nothing more than intermediate scrutiny. For the twenty years that preceded this case, the Supreme Court had been skeptical of gender classifications.¹⁴¹ Indeed, the Court had fully acknowledged that skepticism fifteen

137. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

138. *See, e.g.*, Kupetz, *supra* note 17, at 1334 (discussing the "new" equal protection standard of "skeptical scrutiny" for gender classifications articulated by Justice Ginsburg in the majority opinion).

139. *See id.*

140. *See United States v. Virginia*, 518 U.S. at 531 ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.").

141. *See supra* notes 82-84 and accompanying text.

years before *United States v. Virginia* by expressly shifting to the state the burden of proving the validity of a gender classification.¹⁴² The CODE “skeptical scrutiny” should not be interpreted as anything but a new way of describing intermediate scrutiny.

After referring to “skeptical scrutiny,” the Court defined the level of scrutiny appropriate for gender-based equal protection using familiar CODES, albeit with a different emphasis. The Court noted “the core instructions of this Court’s pathmarking decisions in *J.E.B. v. Alabama ex rel. T.B.* and *Mississippi University for Women*: Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”¹⁴³ At only two points does the majority opinion contain the CODE “substantial relation to an important governmental objective.”¹⁴⁴ For the remainder of the opinion, VMI’s admissions policy is considered in terms of the CODE “exceedingly persuasive justification.”¹⁴⁵ For example, the Court found that “[t]he State’s justification for excluding all women from ‘citizen-soldier’ training for which some are qualified, in any event, cannot rank as ‘exceedingly persuasive,’ as we have explained and applied that standard.”¹⁴⁶ The Court went on to hold that “Virginia, in sum, ‘has fallen far short of establishing the exceedingly persuasive justification’ that must be the solid base for any gender-defined classification.”¹⁴⁷

Several scholars, and even some judges, have interpreted the Court’s emphasis on the CODE “exceedingly persuasive justification” to indicate a heightening of the level of scrutiny applied to gender classifications.¹⁴⁸ This interpretation, however, ignores the Court’s own definition of the CODE “exceedingly persuasive justification.” The Court explained the requirements of demonstrating such a justification:

Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is “exceedingly persuasive.” The burden

142. See *supra* notes 81-84 and accompanying text.

143. *United States v. Virginia*, 518 U.S. at 531 (citations omitted).

144. See *id.* at 524, 533.

145. See *id.* at 571 (Scalia, J., dissenting) (noting nine invocations of the CODE “exceedingly persuasive justification” by the majority).

146. *Id.* at 545.

147. *Id.* at 546 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982)).

148. See *infra* Part II.C.1.

of justification is demanding and rests entirely on the State. The State must show “at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”¹⁴⁹

Each part of the *United States v. Virginia* Court’s definition of “exceedingly persuasive justification” is based directly on fourteen years or more of Supreme Court doctrine. In describing its task as “determin[ing] whether the proffered justification is ‘exceedingly persuasive,’”¹⁵⁰ the Court was simply repeating what it had said earlier in *Hogan*¹⁵¹ and in *J.E.B.*¹⁵² By recognizing the “skeptical” nature of intermediate scrutiny and pointing out that “[t]he burden of justification is demanding and it rests entirely on the State,”¹⁵³ the *United States v. Virginia* Court thus reiterated what the *Kirchberg* Court had acknowledged¹⁵⁴ and what had been part of the Supreme Court’s MESSAGE of intermediate scrutiny at least since *Craig*.¹⁵⁵ Moreover, the Court’s practice of supplying an “exceedingly persuasive justification” for a gender classification along with proof that the “classification serves important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives”¹⁵⁶ had been implicit since *Kirchberg*¹⁵⁷ and explicit since *Hogan*.¹⁵⁸ While language is mutable and old CODES can be used to convey new MESSAGES, the absolute consistency of the *United States v. Virginia* Court’s definition of “exceedingly persuasive justification” with intermediate scrutiny does not suggest a change in the Court’s MESSAGE of intermediate scrutiny for gender classifications.

149. *United States v. Virginia*, 518 U.S. at 532-33 (quoting *Hogan*, 458 U.S. at 724).

150. *Id.* at 533.

151. *See Hogan*, 458 U.S. at 724.

152. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-37 (1994); *see also supra* notes 94-97 and accompanying text.

153. *United States v. Virginia*, 518 U.S. at 533.

154. *See Kirchberg v. Feenstra*, 450 U.S. 455, 460-61 (1981); *see also supra* note 81 and accompanying text.

155. *See supra* notes 82-84 and accompanying text.

156. *United States v. Virginia*, 518 U.S. at 533 (quoting *Hogan*, 458 U.S. at 724) (internal quotation marks omitted).

157. *See Kirchberg*, 450 U.S. at 460-61; *see also supra* notes 76-80 and accompanying text.

158. *See Hogan*, 458 U.S. at 724; *see also supra* notes 85-86 and accompanying text.

C. *The MESSAGE of the Majority Opinion*

1. *The Incorrect MESSAGE.* Many of the scholars and some of the judges to consider the issue have either misinterpreted or expressed confusion as to the actual MESSAGE of *United States v. Virginia*. Misinterpretation has come, for the most part, from the scholars. Some scholars have argued that the MESSAGE of *United States v. Virginia* is that gender classifications may be subject to strict scrutiny.¹⁵⁹ Other scholars have suggested that the majority opinion in *United States v. Virginia* reveals the Court's intention to create a new level of scrutiny somewhere between intermediate scrutiny and strict scrutiny.¹⁶⁰

More troubling than misinterpretation of *United States v. Virginia*'s MESSAGE by scholars, however, is its misinterpretation by judges. In reviewing the current state of the law in *Montgomery v. Carr*,¹⁶¹ the Sixth Circuit described *United States v. Virginia* as "appearing to create a new standard of review for gender-based classifications, requiring an 'exceedingly persuasive justification' on the part of the governmental actor."¹⁶² Luckily, this statement is nothing more than dicta since the Sixth Circuit did not have to apply this new standard in *Montgomery*.¹⁶³ The fact that the Sixth Circuit handed down this decision so soon (six months) after the Court's decision in *United States v. Virginia* suggests that the CODE and CONTEXT of *United States v. Virginia*, rather than the scholarly confusion associated with it, were responsible for the Sixth Circuit's misinterpretation.

159. See, e.g., Corcoran, *supra* note 17, at 1010 (noting that the majority's use of the phrase "exceedingly persuasive justification" indicates "that the Court might have applied a heightened form of intermediate scrutiny or, perhaps, even strict scrutiny").

160. See, e.g., Kovacic-Fleischer, *supra* note 17, at 870; Corcoran, *supra* note 17, at 1010; Kupetz, *supra* note 17, at 1334; Udell, *supra* note 17, at 553. Whether or not such a standard is consistent with the Court's gender-based equal protection jurisprudence, it would probably not prove articulable. Although changing the CODE used to express the MESSAGE of intermediate scrutiny is all too easily done, creating a new standard of scrutiny between intermediate scrutiny and strict scrutiny would be difficult. To meet this hypothetical standard, a gender classification would have to serve governmental interests that were more than important but less than compelling, and the classification would have to be more than substantially related to those governmental interests but less than narrowly tailored to them. Distinguishing between the MESSAGES of the three tiers of the Court's current equal protection jurisprudence is difficult enough, but adding the MESSAGE of a fourth might blur the lines between each tier to the point that application was impossible.

161. 101 F.3d 1117 (6th Cir. 1996).

162. *Id.* at 1123.

163. See *id.* at 1129-30 (applying rational basis scrutiny instead).

Other scholars¹⁶⁴ and judges have merely admitted confusion over the majority opinion's intended MESSAGE. In *Engineering Contractors Ass'n v. Metropolitan Dade County*,¹⁶⁵ United States District Judge Ryskamp examined the Supreme Court's recent decision in *United States v. Virginia* and expressed his uncertainty as to the Court's MESSAGE:

This Court cannot say for certain whether the Supreme Court intended that the *VMI* decision signal a heightening in scrutiny of gender-based classifications. That issue is not dispositive of the instant case. Because the Court finds that the WBE [Women Business Enterprise] program fails even intermediate scrutiny, it is unnecessary to decide whether the *VMI* decision requires the County to meet an even more difficult burden of proof.¹⁶⁶

In this opinion, handed down only three months after the Court released *United States v. Virginia*, Judge Ryskamp's relief at not having to discern and apply the real MESSAGE of *United States v. Virginia* is almost palpable.¹⁶⁷

Scholarly confusion may have played a more significant role in United States District Judge Glasser's opinion in *North Shore Concrete & Associates, Inc. v. City of New York*,¹⁶⁸ decided in April 1998, after many scholars had commented on *United States v. Virginia*.¹⁶⁹ Mirroring Judge Ryskamp's conclusion in *Engineering Contractors*, Judge Glasser also professed confusion as to the MESSAGE of *United States v. Virginia*:

164. See, e.g., Raffi S. Baroutjian, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis*, in with Romer v. Evans, 30 LOY. L.A. L. REV. 1277, 1324 (1997) (arguing that the Court "blurred the parameters of the intermediate standard of equal protection review in *United States v. Virginia*"); John Dayton & Anne P. Dupre, *Equal Protection of the Laws: Recent Judicial Decisions and Their Implications for Public Educational Institutions*, 114 EDUC. L. REP. 1, 14-15 (1997) (noting the destabilizing effect of *United States v. Virginia* on the Court's gender-based equal protection jurisprudence); Lee, *supra* note 17, at 622.

165. 943 F. Supp. 1546, 1551 (S.D. Fla. 1996) (striking down an affirmative action program used to give construction contracts to women- and minority-owned businesses).

166. *Id.* at 1556.

167. The Eleventh Circuit later clarified the state of the law when it reviewed this case. See *infra* note 172.

168. No. 94 CV.4017, 1998 WL 273027, at *1 (E.D.N.Y. Apr. 12, 1998) (considering a summary judgment motion in a constitutional challenge to New York City's practice of awarding contracts based on an affirmative action program).

169. See, e.g., Kovacic-Fleischer, *supra* note 17; Kupetz, *supra* note 17; Udell, *supra*, note 17.

[T]he recent Supreme Court case, *United States v. Virginia*, has called the use of intermediate scrutiny for gender-based distinctions into question by using an “exceedingly persuasive justification” standard in invalidating the Virginia Military Institute program. Regardless, since this court finds that the City’s M/WBE [minority- and women-owned business enterprise] program withstands strict scrutiny, at least on this motion for summary judgment, the gender-based component will not be addressed separately.¹⁷⁰

Thus, Judge Glasser appeared to blame his uncertainty on the Court’s overuse of the CODE “exceedingly persuasive justification.” Given Judge Glasser’s uncertainty as to the appropriate level of scrutiny for gender classifications, it was fortuitous that he did not have to address “the gender-based component . . . separately.”¹⁷¹

2. *The Correct MESSAGE.* Taking into account the settled nature of the Supreme Court’s gender-based equal protection jurisprudence before *United States v. Virginia*, the full CONTEXT of Justice Ginsburg’s authorship of the opinion, the particular CODES used in the majority opinion, the manner in which the Court examined VMI’s admissions policy, and the political realities facing the Court, the MESSAGE of *United States v. Virginia* is no different from that of the Court’s earlier gender-based equal protection cases: gender classifications are subject to intermediate scrutiny. Indeed, five of the six federal Courts of Appeals to consider *United States v. Virginia*’s MESSAGE have come to this conclusion.¹⁷²

170. *North Shore Concrete & Assoc., Inc.*, 1998 WL 273027, at *3 (citations omitted).

171. *Id.*

172. The First, Second, Eighth, Ninth, and Eleventh Circuits have all concluded that the MESSAGE of *United States v. Virginia* is that gender classifications are subject to intermediate scrutiny. In deciding the landmark Title IX case *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996), the First Circuit commented on its reading of the MESSAGE of *United States v. Virginia*:

We point out that *Virginia* adds nothing to the analysis of equal protection challenges to gender-based classifications that has not been part of that analysis since 1979 While the *Virginia* Court made liberal use of the phrase “exceedingly persuasive justification,” and sparse use of the formulation “substantially related to an important governmental objective,” the Court nevertheless struck down the gender-based admissions policy at issue in that case under intermediate scrutiny, the standard applied to gender-based classifications since 1976, when it was first announced in *Craig v. Boren* The phrase “exceedingly persuasive justification” has been employed routinely by the Supreme Court in applying intermediate scrutiny to gender discrimination claims and is, in effect, a short-hand expression of the well-established test.

Id. at 183 n.22 (citations omitted). In *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir. 1998), the Second Circuit evinced its belief that the MESSAGE of *United States v. Virginia* is that

This Note has already considered the Supreme Court's gender-based equal protection jurisprudence before *United States v. Virginia*,¹⁷³ the CONTEXT of Justice Ginsburg's authorship of the majority opinion,¹⁷⁴ and the majority opinion's CODE,¹⁷⁵ all of which suggest that the MESSAGE of *United States v. Virginia* is that intermediate scrutiny should be applied to gender classifications. The manner in which the Court examined VMI's admissions policy also lends support to that interpretation of *United States v. Virginia*'s MESSAGE. Although the Court acknowledged the importance of Virginia's interest in educational "diversity through single-sex educational options,"¹⁷⁶ the Court held that VMI's admissions policy was not, in fact, "in furtherance of a state policy of [educational] 'diversity.'" ¹⁷⁷ This rejection of Virginia's first argument was clearly part of an intermediate scrutiny analysis, even though the Court phrased the rejection in terms of the "furtherance of a state policy"¹⁷⁸ and not in terms of the "substantial relation to a governmental interest."

gender classifications are subject to intermediate scrutiny by quoting the Court's description of the current state of its gender-based equal protection jurisprudence and then applying intermediate scrutiny. *See id.* at 141-42. In *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996), the Eighth Circuit stated that "[a] facially gender-based classification is subject to heightened scrutiny and violates the Equal Protection Clause if the classification is not substantially related to the achievement of important governmental objectives." *Id.* at 650 (citing *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 273 (1979)). In *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997), widely known as the California Proposition 209 case, the Ninth Circuit cited *United States v. Virginia* and held that, in order successfully to defend a gender classification, the government "must demonstrate that the classification is substantially related to an important governmental interest, requiring an 'exceedingly persuasive' justification." *Id.* at 1440 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985)). Clarifying the law for a confused district judge, *see supra* notes 165-67 and accompanying text, the Eleventh Circuit came to the same conclusion in *Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997). The court stated that "although the phrase 'exceedingly persuasive justification' has more linguistic verve than conventional descriptions of intermediate scrutiny, it does not necessarily follow that a new constitutional standard for judging gender preferences is embodied in that phrase," *id.* at 907-08, and concluded that "intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective," *id.* at 908.

173. *See supra* Part I.

174. *See supra* Part II.A.

175. *See supra* Part II.B.

176. *United States v. Virginia*, 518 U.S. 515, 536 (1996).

177. *Id.* at 539 (quoting *United States v. Virginia*, 976 F.2d 890, 899 (4th Cir. 1992)).

178. *Id.*

The Court's rejection of Virginia's second argument in support of VMI's admissions policy is also consistent with the application of intermediate scrutiny. Virginia argued that VMI provided excellent leadership training for students through the school's unique adversative method and that the participation of women would mean the end of the adversative method.¹⁷⁹ The Court rejected Virginia's argument and found that the adversative method could survive the participation of women,¹⁸⁰ with increased privacy for cadets being the only significant change in the VMI experience.¹⁸¹ Here, as in earlier gender-based discrimination cases,¹⁸² the Court simply did not believe that the state's purported objective was the actual reason for the classification.¹⁸³

A single footnote contains the only suggestion that the *United States v. Virginia* Court might even have considered applying something more than intermediate scrutiny to gender classifications. In footnote six, the Court stated that it "has thus far reserved most stringent judicial scrutiny for classifications based on race."¹⁸⁴ This statement can be interpreted either as a simple recitation of fact—that the Court has only applied strict scrutiny to racial (and religious) classifications—or as an indication that this history might not have been operating as a limit on the Court in *United States v. Virginia*. Regardless of how one interprets the footnote, though, it is difficult to argue that the *United States v. Virginia* Court was prepared to heighten the scrutiny applied to gender classifications.

179. See *id.* at 540. For an explanation of VMI's adversative method of leadership training, see *supra* note 105.

180. See *United States v. Virginia*, 518 U.S. at 542-46.

181. See *id.* at 550-51 n.19 (noting that women would require increased privacy and, perhaps, different physical training standards, but that these changes had been effectively dealt with at the service academies).

182. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 (1982) (rejecting Mississippi's purported compensatory purpose of combating discrimination against women for Mississippi University for Women's admissions policy and finding that, in fact, the admissions policy violated the Equal Protection Clause by "perpetuat[ing] the stereotyped view of nursing as an exclusively woman's job"); see also *Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979) (recognizing that the Equal Protection Clause sometimes requires an inquiry into the possibility that the legislature was motivated by an invidious intent to discriminate against women); *supra* note 73 and accompanying text (discussing use of the CODE "exceedingly persuasive justification" in *Feeney*).

183. See *United States v. Virginia*, 518 U.S. at 536.

184. *Id.* at 532 n.6.

Had Justice Ginsburg wanted to apply strict scrutiny in *United States v. Virginia*,¹⁸⁵ she probably could not have marshaled a majority to do so. Absent sharp departures from their current stances, there are not five Justices on the current Court who would subject gender classifications to strict scrutiny.

Chief Justice Rehnquist would certainly object to any heightening of scrutiny. He wrote a separate concurrence in *United States v. Virginia* in order to express both his conviction that intermediate scrutiny is the proper standard of scrutiny for gender classifications¹⁸⁶ and his concern that the majority would be misinterpreted as applying a stricter standard:

That phrase [“exceedingly persuasive justification”] is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself. To avoid introducing potential confusion, I would have adhered more closely to our traditional, “firmly established,” standard that a gender-based classification “must bear a close and substantial relationship to important governmental objectives.”¹⁸⁷

This language serves no other function than to avoid any implication that the *United States v. Virginia* Court was predisposed to heightening the level of scrutiny applied to gender classifications.

Justice Scalia would also be unlikely to vote for the application of strict scrutiny, given the subject of his dissent in *United States v. Virginia*.¹⁸⁸ In his dissent, Justice Scalia noted that “[i]t is well settled” that gender classifications are subject to intermediate scrutiny, but that he believes that intermediate scrutiny ought to be much less

185. See *supra* Part II.B (discussing the Court’s use of the CODE “skeptical scrutiny” in *United States v. Virginia*). While the confusion over the MESSAGE of *United States v. Virginia* would have existed whether Justice Ginsburg intended it or not, one must remember that it is pure conjecture that Justice Ginsburg would want to change the current state of the law. Her ACLU work in the 1970s revealed a patient, long-term strategy for effecting change, but it seems far-fetched that she would suppress her radical leanings for the twelve years that she sat on the D.C. Circuit, hoping that she would someday be appointed to the Supreme Court where she could once again indulge her desire to see gender classifications subjected to strict scrutiny. Nonetheless, the Court should have realized the confusion that would be created by the CONTEXT of her authoring the opinion, the emphasis on the CODE “exceedingly persuasive justification,” and the introduction of the CODE “skeptical scrutiny.”

186. See *United States v. Virginia*, 518 U.S. at 558-59 (Rehnquist, C.J., concurring).

187. *Id.* at 559 (Rehnquist, C.J., concurring) (citation omitted) (quoting respectively Heckler v. Mathews, 465 U.S. 728, 744 (1984); *Hogan*, 458 U.S. at 723; *Feeney*, 442 U.S. at 273).

188. See *id.* at 556 (Scalia, J., dissenting).

strict than the current state of the law would indicate.¹⁸⁹ According to Justice Scalia, placing the burden of proof on Virginia was a misapplication of intermediate scrutiny¹⁹⁰ despite the clear requirement since *Kirchberg* that the state bear the burden of proving a gender classification's constitutionality.¹⁹¹ Clearly, if Justice Scalia did not agree that states should bear this burden, then he certainly would not agree that states should face the even heavier burden that strict scrutiny would entail.

Given Justice Thomas's dissenting vote in *J.E.B.*¹⁹² and his well-recognized tendency to vote with Chief Justice Rehnquist and Justice Scalia,¹⁹³ Justice Thomas would probably not have voted to subject gender classifications to strict scrutiny. The final two votes against subjecting gender classifications to strict scrutiny would likely have come from Justices O'Connor and Kennedy, as their recent votes in *City of Richmond v. J.A. Croson Co.*¹⁹⁴ indicate.

The *Croson* Court struck down a municipal affirmative action plan that awarded a percentage of construction contracts to businesses based on the race of the owners.¹⁹⁵ In a concurring opinion joined by Chief Justice Rehnquist and Justice Kennedy, Justice O'Connor declared that strict scrutiny required that racial classifications be "strictly reserved for remedial settings, [or] they [the racial classifications] may in fact promote notions of racial inferiority and lead to a politics of racial hostility."¹⁹⁶ From this statement, one may deduce that Justices O'Connor and Kennedy believe that strict scrutiny permits discriminatory classifications to be used only as remedial measures and not as preventative measures. This understanding is very important given the *United States v. Virginia* Court's discussion of the preventative possibilities of VWIL, the women-only analog to VMI.

189. *Id.* at 570 (Scalia, J., dissenting).

190. Justice Scalia argued that the correct application of intermediate scrutiny required consideration of Virginia's "important state interest in providing effective college education for its citizens," an interest that the Court had ignored because Virginia had failed to argue that it was an interest served by VMI's admissions policy. *Id.* at 576 (Scalia, J., dissenting).

191. *See supra* notes 81-84 and accompanying text.

192. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 156 (1994) (Scalia, J., dissenting); *see also supra* note 98 (discussing the dissent Justice Thomas joined in *J.E.B.*).

193. *See* Richard Wilkins et al., *Supreme Court Voting Behavior: 1995 Term*, 24 HAST. CONST. L.Q. 1, 14 (1996).

194. 488 U.S. 469, 476 (1989).

195. *See id.* at 507-08.

196. *Id.* at 493.

As did the concurring opinion in *Croson*, the majority opinion in *United States v. Virginia* first examines the remedial nature of the state's proposal. The *United States v. Virginia* Court concluded, however, that VWIL "could not 'eliminate the discriminatory effects of the past.'"¹⁹⁷ Unlike Justice O'Connor's *Croson* concurrence, however, the majority opinion in *United States v. Virginia* goes on to consider whether VWIL's single-sex admissions policy might have some value as a preventative measure, asking whether VWIL "could . . . at least bar [gender] discrimination in the future."¹⁹⁸ If Justices O'Connor and Kennedy view strict scrutiny to prohibit the preventative use of racial classifications but these Justices were willing to consider the preventative effects of VWIL's gender classifications, then logic compels the conclusion that they could not have been applying strict scrutiny in *United States v. Virginia*. Thus, by joining an opinion that considers the preventative effects of the discriminatory classifications used by VWIL, Justices O'Connor and Kennedy implicitly acknowledged that strict scrutiny was not applied in *United States v. Virginia*. Assuming that Justices O'Connor and Kennedy vote with the conservative bloc of Chief Justice Rehnquist and Justices Scalia and Thomas, the possibility of a majority of the Court permitting strict scrutiny to be applied to gender classifications virtually ceases to exist.

CONCLUSION

The MESSAGE of *United States v. Virginia* emerges clearly. While the emphasis placed on the CODE "exceedingly persuasive justification" and the use of the CODE "skeptical scrutiny" were new to *United States v. Virginia*, the manner in which those CODES were used suggests that the Court applied intermediate scrutiny to VMI's admissions policy. The CONTEXT of Justice Ginsburg's advocacy of women's rights is at best inconclusive. Moreover, even if she had wanted the Court to apply strict scrutiny to gender classifications, she probably could not have convinced four other Justices to join her. Thus, the MESSAGE of *United States v. Virginia* is the same as the MESSAGES of the Court's earlier gender-based equal protection cases: gender classifications are subject to intermediate scrutiny.

197. *United States v. Virginia*, 518 U.S. 515, 548 (1996) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

198. *Id.* (internal quotation marks omitted).

The CODE and CONTEXT of the majority opinion, however, have confused many of the scholars and some of the judges who have tried to ascertain the Court's MESSAGE. Given this reaction, the Supreme Court should be aware of how confusing a change in CODE can be and should avoid making such changes lest confusion result. Because even the most familiar tests and standards set out by the Supreme Court "are hardly models of precision"¹⁹⁹ and depend on maintaining as much consistency of CODE as possible to convey the same MESSAGE, great care must be taken by the Court to ensure that such confusion does not lead the lower courts to make a move that the Court itself was unwilling to make.

199. *Id.* at 559 (Rehnquist, C.J., concurring).