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THE AFTERMATH OF *UNITED STATES V. VIRGINIA*: WHY FIVE JUSTICES ARE PULLING IN THE REINS ON THE "EXCEEDINGLY PERSUASIVE JUSTIFICATION"

*Heather L. Stobaugh**

I. INTRODUCTION

FOLLOWING the landmark decision of *United States v. Virginia*,[1] it appeared the Supreme Court was moving toward using a stricter form of intermediate scrutiny in gender-based equal protection claims. Over the years, commentators[2] have argued that Justice Ginsburg's use of "skeptical scrutiny"[3] and her heavy reliance on the "exceedingly persuasive justification" language in the majority opinion of *Virginia* introduced a stricter test into cases involving gender-based classifications as opposed to the traditional level of intermediate scrutiny established in *Craig v. Boren*.[4] Considering Justice Ginsburg's legal background and her personal crusade against gender-based discrimination,[5] the *Virginia*

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1. 518 U.S. 515 (1996).
2. *See, e.g.*, Deborah L. Brake, *Reflections on the VMI decision*, 6 AM. U. J. GENDER SOC. POL'Y & L. 35, 36 (1997).
3. *Virginia*, 518 U.S. at 530.
4. 429 U.S. 190 (1976).
5. In 1956, Ruth Bader Ginsburg began law school at Harvard. *See* Carol Pressman, *The House that Ruth Built: Justice Ruth Bader Ginsburg, Gender and Justice*, 14 N.Y.L. SCH. J. HUM. RTS. 311, 313 (1997). At the time, her husband, Martin, was also in law school, and they had a one-year-old daughter. *Id.* at 312-13. When Martin graduated in 1959, the Ginsburgs moved to New York, so he could begin a new job. *Id.* at 314. Ginsburg transferred to Columbia Law School, where she graduated first in her class—though without any offers for employment. *Id.* at 311. Aided by one of her professors, Ginsburg finally secured a judicial clerkship in the U.S. District Court for the Southern District of New York. *Id.* Afterwards, she found her way into academia, teaching first at Rutgers University Law School, then Harvard Law School, and finally Columbia Law School, where she became a tenured professor. *See* Scott M. Smiler, *Justice Ruth Bader Ginsburg and The Virginia Military Institute: A Culmination of Strategic Success*, 4 CARDOZO WOMEN'S L.J. 541, 544 (1998).

While teaching at Rutgers, Ginsburg began her noteworthy involvement with the American Civil Liberties Union ("ACLU") and, on its behalf, participated in the first U.S. Supreme Court decision, *Reed v. Reed*, to hold that a statute discriminating on the basis of gender violates the Fourteenth Amendment. *Id.* at 547-51. Later, Ginsburg served as gen-

decision suggested that the predominantly male Supreme Court was finally seeing gender-based discrimination through the eyes of a woman and perhaps preparing to declare gender a suspect class.[6]

Despite such scholarly speculation about *Virginia's* positive impact on future gender-based equal protection claims, it now appears not enough weight was given to those Justices who had expressed a strong dislike for the "exceedingly persuasive justification" language and had disapproved of Justice Ginsburg's heavy reliance on it.[7] It is no secret that the current Supreme Court is split about whether gender is a suspect class.[8] Since Justice Brennan's plurality opinion in *Frontiero v. Richardson*,[9] no Justice has sought to explicitly declare gender—like race, national origin, or alienage—suspect, thereby necessitating the use of strict scrutiny.[10] It is also no secret that some Members of the Court believe Justice Ginsburg was using *Virginia* as the foundation upon which the Court could later justify a decision ruling gender a suspect class.[11] If the purpose of *Virginia* was to give the Court "the green," so to speak, then the purpose of the Court's decision in *Nguyen v. INS*[12] was to apply the brakes.

Nguyen, decided in the summer of 2001, represents a marked shift away from the Court's gender-based equal protection analysis set forth in *Virginia*. As one of the last facially discriminatory federal laws, the stat-

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eral counsel and founding director of the national ACLU's Women's Rights Project ("WRP"), whose purpose was to identify "gender discrimination cases appropriate for Supreme Court review and to prepare briefs and arguments accordingly." *Id.* at 544. While involved in the ACLU and WRP during the 1970s, Ginsburg wrote several amicus briefs and argued six gender-based discrimination claims before the Court, losing only one. *See* Pressman, *supra* note 5, at 314-15.

In 1980, President Carter appointed Ginsburg to the U.S. Court of Appeals, and in 1993, she became the second female Justice on the U.S. Supreme Court after being nominated by President Clinton. *Id.* at 315.

6. *See infra* note 85.

7. *See, e.g., Virgina*, 518 U.S. at 559, 568 (Rehnquist, C.J., concurring; Scalia, J., dissenting).

8. The Court has never unanimously ruled that gender, like race, is a suspect class falling within Justice Stone's famed footnote four in *United States v. Caroline Products Co.*, 304 U.S. 144 (1938).

9. 411 U.S. 677 (1973).

10. "The Supreme Court has made it clear that differing levels of scrutiny will be applied [to laws that are challenged as violating equal protection] depending on the type of discrimination." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 529 (Aspen Publishers, Inc. 1997). "Discrimination based on race or national origin [and alienage, generally,] is subjected to strict scrutiny. . . . Strict scrutiny is virtually always fatal to the challenged law." *Id.* The next highest level of scrutiny, intermediate, "is used for discrimination based on gender and for discrimination against non-marital children." *Id.* Finally, the Court subjects all other classifications, such as age, sexual orientation, mental retardation, and poverty, to a rational basis test. "Rational basis review is the minimum level of scrutiny that all laws challenged under equal protection must meet. . . . [R]arely have laws been declared unconstitutional for failing to meet this level of review." *Id.* at 529-30. On an interesting note, some commentators have identified at least five levels of scrutiny in the Court's equal protection analyses. In addition to the three enumerated levels, scholars have identified a "higher intermediate scrutiny" in cases like *Virginia* and "rational basis with bite" in decisions like *Romer v. Evans*, 517 U.S. 620 (1996). *Id.* at 536.

11. *See infra* § IV.

12. 121 S. Ct. 2053 (2001).

ute at issue in *Nguyen* seemed destined for invalidation, particularly in light of precedent. Five Justices, however, upheld the statute, leaving both the dissent and commentators baffled as to how the Court reached its decision. In an attempt to understand that decision, the dissenting Justices, on the one hand, have argued that the majority in *Nguyen* used rational basis review to uphold the statute rather than subjecting it to true intermediate scrutiny.[13] Commentators, on the other hand, have suggested that the plenary power doctrine may be one reasonable justification for the Court's holding and its use of deferential review.[14]

This article asserts that neither position fully explains what occurred in *Nguyen* and that, instead, five Justices united to pull in the reins on the use of the "exceedingly persuasive justification," which they believe imposes a higher level of scrutiny on gender-based classifications under Justice Ginsburg's *Virginia* opinion.[15] In other words, five Justices saw this area of the Court's jurisprudence moving in a direction they did not support—toward treating gender as a suspect class—and they used *Nguyen* to prevent that result. As such, scholars are now left speculating about the impact of *Nguyen* on future gender-based equal protection claims and left waiting to see if *Virginia's* "exceedingly persuasive justification" will prevail.

II. ARRIVING AT INTERMEDIATE SCRUTINY

The Supreme Court took over three years to decide what level of scrutiny applies to laws making distinctions on the basis of gender. In *Reed v. Reed*,[16] the Court held for the first time that a law discriminating on the basis of gender violates the Fourteenth Amendment's equal protection guarantee. The Idaho statute at issue in *Reed* established a preference for males over females as estate administrators.[17] In striking down the statute, the majority claimed to apply a rationality test; yet, the Court utilized the language from Ruth Bader Ginsburg's ACLU brief,[18] which stated that laws distinguishing on the basis of gender must "rest upon some ground of difference having a fair and substantial relationship"[19] to the governmental objective. As a pivotal decision, *Reed* established precedent on which the Court would later justify its use of intermediate scrutiny in gender-based equal protection claims.

Two years later in *Frontiero v. Richardson*,[20] the Court held that a federal statute giving preferential treatment to men in the uniformed services with dependent wives violated the Fifth Amendment's Due Process

13. *See infra* § VI, A.
14. *See infra* § VI, B.
15. *See infra* § VI, C.
16. 404 U.S. 71 (1971).
17. *Id.*
18. *See* Pressman, *supra* note 5, at 323-24.
19. *Id.* at 328.
20. 411 U.S. 677 (1973).

Clause.[21] That statute allowed men to automatically claim their wives as dependents, while requiring women in the uniformed services to actually show that their husbands were more than fifty percent dependent on them for support.[22] Though eight[23] Justices agreed that the statute was unconstitutional, they struggled to agree on the appropriate standard of review for gender-based claims. Justice Brennan, perhaps too eager to set the standard in this area, announced that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[24] Only four Justices agreed on this point,[25] and a majority of the Court has never declared gender a suspect class.

In 1976, the Court finally settled on the use of intermediate scrutiny for gender-based classifications. *Craig v. Boren*[26] involved a challenge to an Oklahoma statute that permitted women to purchase 3.2 percent beer at the age of eighteen yet denied men the same right until they turned twenty-one.[27] Writing for the majority, Justice Brennan enunciated a new standard for gender-based equal protection claims—intermediate scrutiny—and this time he was backed by a majority. Rather than declare gender a suspect class, the Court accepted Ruth Bader Ginsburg's intermediate scrutiny test[28] as proposed in her ACLU amicus brief.[29] Under intermediate scrutiny, the Court stated that laws making distinctions on the basis of gender must be "substantially related to an important governmental objective."[30] The intermediate standard established in *Craig* has endured and, despite the forecasts and arguments made by some commentators, remains the core focus of the Court's gender-based equal protection analysis today, as demonstrated by its latest decision in *Nguyen*.[31]

III. THE RISE OF AN EXCEEDINGLY PERSUASIVE JUSTIFICATION

Massachusetts v. Feeney[32] was the first case to use the "exceedingly per-

21. Since a federal statute was at issue, the Court's analysis focused on whether the law violated the Fifth Amendment. Though the Fifth Amendment does not contain an Equal Protection Clause, it is well-settled that, via an incorporation theory, the Fourteenth Amendment's Equal Protection Clause applies to the federal government by way of the Fifth Amendment's Due Process Clause. Bolling v. Sharpe, 347 U.S. 497 (1954).
22. *Fronterio*, 411 U.S. at 678.
23. Justice Rehnquist dissented.
24. *Fronterio*, 411 U.S. at 688.
25. *Id.* at 677.
26. 429 U.S. 190 (1976).
27. *Id.* at 191-92.
28. Although the term "intermediate scrutiny" was not coined by Ruth Bader Ginsburg, her brief set forth the language of this test. *See* Pressman, *supra* note 5, at 327-28.
29. *Id.*
30. *Craig*, 429 U.S. at 197. Though still a form of heightened scrutiny, the intermediate level is less demanding than strict scrutiny as applied in *Fronterio* and more rigorous than the rationality test utilized in *Reed*. *See* CHEMERINSKY, *supra* note 10.
31. *See infra* § V.
32. 442 U.S. 256 (1979).

suasive justification" language in the context of gender-based equal protection. In *Feeney*, the Court (7-2)[33] upheld the Massachusetts veterans' preference statute, which gave preferential treatment to veterans applying for civil service jobs.[34] Although roughly sixty percent of Massachusetts' public jobs fell into the civil service category[35] and approximately ninety-eight percent of the veterans in the state were male at the time the suit was filed,[36] the Court held that the statute did not purposefully discriminate against women.[37] Writing for the majority, Justice Stewart reiterated the intermediate standard from *Craig v. Boren* and further noted that any 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."[38]

Since the first case to use this language upheld, rather than nullified, the challenged law, this is strong evidence that the "exceedingly persuasive justification" standard was not intended to add a higher level of scrutiny to the intermediate test. Indeed, the Court, in all likelihood, did not intend for those words to carry as much force as they did in subsequent cases like *Virginia*.[39]

Two years later, the Court reiterated the "exceedingly persuasive justification" language in *Kirchberg v. Feenstra*.[40] In that case, Joan Feenstra challenged a Louisiana statute that allowed her husband to dispose of their community property without her consent.[41] Writing for the major-

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33. Justice Marshall, joined by Justice Brennan, dissented.
34. *Feeney*, 442 U.S. at 281.
35. *Id.* at 262.
36. *Id.* at 270.
37. *Id.* at 281.
38. *Id.* at 273 (emphasis added).
39. For example, the current Chief Justice, William Rehnquist, who now strongly opposes the use of that language as part of the intermediate scrutiny test, was one of the concurring Justices in *Feeney*.
40. 450 U.S. 455, 461 (1981).
41. *Id.* at 457. The facts of *Kirchberg* are as follows: In 1974, Joan Feenstra alleged that her husband, Harold Feenstra, molested their minor daughter. *Id.* Mr. Feenstra retained an attorney, Karl Kirchberg, to defend him. *Id.* In consideration for Mr. Kirchberg's legal services, Mr. Feenstra signed a $3000 promissory note, using their home as security. *Id.* Mrs. Feenstra was not aware of this arrangement. *Kirchberg*, 450 U.S. at 457. Eventually Mrs. Feenstra dropped the charges against her husband, and they became legally separated. *Id.* Mrs. Feenstra continued to reside in their home while Mr. Feenstra moved to another state. *Id.*

In 1976, Mrs. Feenstra became aware of the promissory note when Mr. Kirchberg threatened to foreclose on her home because her ex-husband had defaulted on the debt. *Id.* Mr. Kirchberg filed suit against Mrs. Feenstra, and she filed a counterclaim, asserting that the statute giving her husband the power to dispose of their home without her consent was in violation of the Equal Protection Clause. *Id.* at 457-58. Although Louisiana repealed the section of the statute at issue in 1980 while the case was pending before the Court of Appeals for the Fifth Circuit, the court reviewed whether the statute was unconstitutional at the time Mr. Feenstra mortgaged the home in 1974. *Kirchberg*, 450 U.S. at 458. The Court of Appeals determined that the statute was unconstitutional. *Id.* at 459.

On appeal to the Supreme Court, Mr. Kirchberg argued that the Fifth Circuit's judgment was not meant to work retroactively; therefore, he could still foreclose on Mrs. Feenstra's home. *Id.* The Supreme Court ruled that the statute violated the Fourteenth

ity, Justice Marshall affirmed the Court of Appeals' decision to overturn the statute.[42] In so doing, he stated that "the 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."[43] Using this language in conjunction with the intermediate scrutiny test, Justice Marshall explained that "[b]ecause appellant has failed to offer such a justification, *and* because the State . . . has apparently abandoned[44] any claim that an important government objective was served by the statute, we affirm the judgment."[45]

Interestingly, the manner in which Justice Marshall set out the above standard makes intermediate scrutiny look like a two-part test. In other words, it appears Mr. Kirchberg not only had to show an "exceedingly persuasive justification," but also an "important governmental objective."[46] Though seemingly trivial on the surface, this difference is significant since today's Court does not agree on whether the "exceedingly persuasive justification" language is an *addition to* or a *restatement of* the traditional intermediate scrutiny test. In fact, some Justices have written separate concurring opinions or dissents based on this point.[47] Moreover, if the "exceedingly persuasive" standard adds a second tooth to the intermediate test, a new burden is imposed on the party seeking to justify a statute. As this article later discusses, the Court's decision in *Nguyen* seems to suggest that a majority of Justices prefer the more limited application of the language—that the "exceedingly persuasive" language is merely a restatement of, and not an addition to, the intermediate test.[48]

Justice O'Connor's opinion in *Mississippi University for Women v. Hogan*[49] served as an important stepping stone in the Court's gender-based equal protection jurisprudence. In *Hogan*, a 5-4 majority ruled that the nursing school's no-male admissions policy at Mississippi University for Women ("MUW") violated the Fourteenth Amendment.[50] Although the policy discriminated against men rather than women, Justice O'Connor explained that intermediate scrutiny applies evenhandedly in all gender-based claims, despite the claimant's sex.[51]

Amendment and that the Court of Appeals' decision served to invalidate the agreement between Mr. Kirchberg and Mr. Feenstra, though the Court did not answer whether its decision would apply to other mortgages executed under the statute prior to its being repealed. *Id.* at 461-63.

42. *Id.* at 461.

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

44. The State of Louisiana did not challenge the Court of Appeals' decision.

45. *Kirchberg*, 450 U.S. at 461 (emphasis added).

46. Since the State of Louisiana did not join Mr. Kirchberg's appeal to the Supreme Court, one questions whether he could have prevailed in the absence of the State asserting that the statute had, at one time, advanced an important governmental interest.

47. *See, e.g., Virginia*, 518 U.S. at 559, 568 (Rehnquist, C.J., concurring; Scalia, J., dissenting).

48. *See infra* § V.

49. 458 U.S. 718 (1982).

50. *Id.* at 724.

51. *Id.*

Setting forth a comprehensive intermediate standard which had been developing from a decade of case law, Justice O'Connor stated:

> [T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. The burden is met only by showing *at least* that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."[52]

By expressly joining the two standards, Justice O'Connor's opinion in *Hogan* made the "exceedingly persuasive justification" an integral part of the intermediate scrutiny test. Moreover, since she used the traditional intermediate standard as a way to describe how to satisfy the "exceedingly persuasive justification" burden, a strong argument can be made that the primary focus of the test became whether a party proved an "exceedingly persuasive justification" rather than an "important governmental objective."

Justice O'Connor's use of the words "at least" has also been a point of controversy among scholars. Some commentators have argued that she used these words to make the intermediate standard more exacting.[53] For example, it is unclear in *Hogan* whether the government *only* had to show an "exceedingly persuasive justification" or whether it had to show *at least* that and perhaps something more. Whatever Justice O'Connor's intentions were by emphasizing the words "at least," the day the "exceedingly persuasive" language would dominate the Court's gender-based equal protection analysis was not too far around the corner.[54]

More than a decade after *Hogan*, the Court reaffirmed the "exceedingly persuasive" language in *J.E.B. v. Alabama*.[55] In *J.E.B.*, the Court examined whether gender could serve as a legitimate basis for a preemptory strike.[56] Like *Reed v. Reed*, *J.E.B.* involved alleged discrimination against men. The petitioner in *J.E.B.* argued that the State had used its preemptory strikes to remove male jurors from a paternity and child-support case.[57] As evidence of this, petitioner pointed to the fact that the final jury was comprised of all women.[58] Six Justices were persuaded by the petitioner's evidence and agreed that "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause . . ."[59]

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52. *Id.* (internal citations omitted) (emphasis added).

53. *See* Thomas C. Marks, Jr., *Three Ring Circus: The Adventure Continues into the Twenty-first Century*, 39 STETSON L. REV. 271, 314 (2000); *see also* Collin O'Connor Udell, *Signaling A New Direction In Gender Classification Scrutiny*: United States v. Virginia, 29 CONN. L. REV. 521, 530-31 (1996).

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

55. 511 U.S. 127 (1994).

56. *Id.* at 129.

57. *Id.*

58. *Id.*

59. *Id.* at 130-31.

Writing for the majority, Justice Blackmun echoed Justice O'Connor in *Hogan*: "Under our equal protection jurisprudence, gender-based classifications require 'an exceedingly persuasive justification' in order to survive constitutional scrutiny."[60] The Court found no such justification in this case.[61] Though *J.E.B.* has received less attention than other cases in this area of the Court's jurisprudence, this case made evident that the "exceedingly persuasive justification" was an essential part of the intermediate test. What was left to be seen, however, was whether that standard imposed a higher burden on the party trying to justify a statute than did intermediate scrutiny. Many believe Justice Ginsburg answered this question affirmatively in *United States v. Virginia*.[62]

IV. *UNITED STATES V. VIRGINIA*: THE COURT'S "CORE INSTRUCTION"

The crucial case in this area of the Court's jurisprudence is, of course, *United States v. Virginia*.[63] Justice Ginsburg's majority opinion (7-1)[64] explicitly focused on the "exceedingly persuasive justification" language rather than the traditional intermediate test. Applying that language, the Court held that the Virginia Military Institute's ("VMI") exclusion of women from the state-funded school deprived women of the Fourteenth Amendment's equal protection guarantee.[65] Moreover, the Court determined that the remedial women's school, the Virginia Women's Institute for Leadership ("VWIL"), established by VMI after the Fourth Circuit's ruling, did not legitimize VMI's discriminatory admissions policy.[66]

Virginia involved a challenge to one of the nation's oldest state-funded, single-sex military institutes.[67] According to the school's mission statement, VMI set out to produce "'citizen soldiers'" through an "'adversative'" teaching method, which established a pecking order among students in an atmosphere similar to Marine Corps boot camp.[68] The school believed this type of teaching method, which had been used at VMI since its inception in 1839, was inappropriate for females, who were therefore excluded from the school.[69]

In 1990, a female high-school student seeking admission to VMI filed a complaint with the Attorney General's office challenging VMI's all-male

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60. *J.E.B.*, 511 U.S. at 136.
61. Despite the Court's holding, some Justices attempted to limit the scope of the decision, recognizing preemptory challenges as an important litigator's tool and integral part of the jury selection process. Justice O'Connor, in particular, was careful to note that the Court's decision should only apply to the government's use of preemptory strikes, and not to private civil litigants or criminal defendants, since the Fourteenth Amendment only prohibits discrimination by state actors. *Id.* at 147, 150.
62. 518 U.S. 515 (1996).
63. *Id.*
64. Justice Scalia dissented. Justice Thomas did not participate in the decision.
65. *Virgina*, 518 U.S. at 534.
66. *Id.* at 555-56.
67. *Id.* at 520-21.
68. *Id.* at 522.
69. *Id.* at 523.

admissions policy.[70] The United States sued the school and the Commonwealth of Virginia, arguing that VMI's exclusion of women constituted gender-based discrimination in violation of the Equal Protection Clause.[71] Applying *Hogan*, the District Court held for the school, reasoning that single-sex education, which served to diversify the learning experience, advanced an important governmental objective.[72] Thus, the District Court reasoned that the "*only* means of achieving that objective" was "'to exclude women . . .'"[73] from VMI. In the eyes of the District Court, the admissions policy survived intermediate scrutiny.

The Court of Appeals for the Fourth Circuit rejected this reasoning, however, and vacated the District Court's holding.[74] The Fourth Circuit stated that "Virginia has not . . . advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women."[75] But the Fourth Circuit's holding was not a complete win for women in the arena of single-sex education because the court also determined that "three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by co-education."[76] As such, the Fourth Circuit remanded the case, instructing Virginia to devise a remedial plan, such as admitting women to VMI; establishing parallel institutions or programs; or abandoning state support, leaving VMI free to pursue its policies as a private institution.[77]

Complying with this instruction, Virginia proposed establishing VWIL, a parallel school for women only.[78] On remand, the District Court approved of VWIL, determining that the alternate school remedied the discrimination in compliance with the Fourteenth Amendment.[79] A divided Court of Appeals affirmed,[80] but the U.S. Supreme Court reversed.[81]

Writing for the majority, Justice Ginsburg examined whether VMI's all-male admissions policy denied women equal protection of the law and, if so, what remedial action must be taken to comply with the Fourteenth Amendment.[82] At the start of her opinion, Justice Ginsburg set forth the standard by which these questions would be measured: "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[83] Rather than labeling this traditional intermediate scrutiny, Justice Ginsburg coined a new term,

70. *Virginia*, 518 U.S. at 523.
71. *Id.*
72. United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991).
73. *Virginia*, 518 U.S. at 523.
74. United States v. Virginia, 976 F.2d 890 (4th Cir. 1992).
75. *Id.* at 892.
76. *Id.* at 896-97.
77. *Id.* at 900.
78. *Virginia*, 518 U.S. at 526.
79. United States v. Virginia, 852 F. Supp. 471, 473 (W.D. Va. 1994).
80. United States v. Virginia, 44 F.3d 1229 (4th Cir.1995).
81. *Virginia*, 518 U.S. 515 (1996).
82. *Id.* at 530-31.
83. *Id.* at 530 (internal citations omitted).

"skeptical scrutiny,"[84] which created a stir among scholars[85] and Members of the Court.[86] Moreover, she stated that the "core instruction"[87] of the Court's analysis would focus on the "exceedingly persuasive" standard rather than whether the State had asserted "an important governmental objective" that was "substantially related" to that end.

After tracing the long history of discrimination against women,[88] Justice Ginsburg defined the "exceedingly persuasive justification" standard. She stated that "[t]he burden of the justification is demanding and it rests entirely on the State. . . . And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. . . . 'Inherent differences between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.'"[89]

She then announced the Court's holding: "Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI."[90] The Court also ruled that VWIL was not an appropriate remedy for this discrimination: "Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection."[91]

Though seven of the eight participating Justices concurred in the judgment, only six of them appeared to sanction Justice Ginsburg's strong reliance on the "exceedingly persuasive" standard.[92] Chief Justice Rehnquist, for example, wrote separately to express his concern over the Court's application of this language and its effect on the intermediate scrutiny test. He opined that the "exceedingly persuasive justification" language should be used as it was in *Massachusetts v. Feeney*, only to restate the traditional intermediate test.[93] He strongly objected to the

84. *Id.*

85. Many scholars have argued that *Virginia* was Justice Ginsburg's attempt to apply strict scrutiny to gender-based claims and to finally label gender a suspect class. *See* Smiler, *supra* note 5, at 578-584; *see* Marks, *supra* note 53, at 324-33. *See generally*, Amy Walsh, *Ruth Bader Ginsburg: Extending the Constitution*, 32 J. MARSHALL L. REV. 197 (1998); *see generally* Deborah L. Brake, *Reflections of the VMI Decision*, 6 AM. U. J. GENDER SOC. POL'Y & L. 35 (1997).

86. *See Virginia*, 518 U.S. at 558-65 (Rehnquist, C.J., concurring) (arguing that the "exceedingly persuasive justification" should not be an integral part of the intermediate scrutiny test); *Id.* at 565-603 (Scalia, J., dissenting) (accusing the majority of using something other than intermediate scrutiny to arrive at its holding).

87. *Id.* at 531.

88. Part of the Court's traditional analysis in cases involving the application of strict scrutiny, like those based on racial discrimination, includes a discussion of the history of the discrimination against that particular class of people. One can argue that in this respect Justice Ginsburg's analysis does more closely resemble the Court's analysis in cases requiring strict scrutiny.

89. *Virginia*, 518 U.S. at 533.

90. *Id.* at 534.

91. *Id.* at 557.

92. *Id.* at 558, 566 (Rehnquist, C.J., concurring; Scalia, J., dissenting).

93. *Virginia*, 518 U.S. at 559; *see also infra* § VI, C.

Court using the "exceedingly persuasive" language to impose a higher burden on the party seeking to justify a statute. In retrospect, Chief Justice Rehnquist's concurring opinion in *Virginia* is best viewed as an admonition that he would fight to ensure that the "exceedingly persuasive justification" did not carry great force in the Court's later decisions.

As the sole dissenter, Justice Scalia wrote not only to assert his disapproval of the Court's analysis but also to express his view that VMI's all-male admissions policy did not offend the Constitution.[94] Disavowing the "exceedingly persuasive justification" standard as part of the intermediate test, Justice Scalia implied that the majority used this standard to apply strict scrutiny under the guise of an intermediate test.[95]

Though the Court's holding in *Virginia* seemed, on the surface, a cause for celebration in the fight against gender-based discrimination and though it appeared a majority of the Court may have been forming to finally declare gender a suspect class, it would soon become clear that this was not the case. Rather, the opinions of Chief Justice Rehnquist and Justice Scalia, which both opposed Justice Ginsburg's strong reliance on the "exceedingly persuasive" standard, would resonate just five years later in *Nguyen v. INS*.[96]

V. *NGUYEN V. INS*: PULLING IN THE REINS ON THE "EXCEEDINGLY PERSUASIVE JUSTIFICATION"

In *Nguyen v. INS*,[97] the Court upheld a federal statute requiring unmarried fathers to take more stringent steps than unmarried mothers in conferring U.S citizenship on their nonmarital children.[98] Tuan Nguyen was born in Vietnam in 1969 to a Vietnamese mother and a U.S. citizen father, who were not married.[99] After his parents' relationship ended, Nguyen lived with his father's girlfriend in Vietnam until he was five years old,[100] at which point he moved to Texas where he was raised by his father until he was an adult.[101] When Nguyen was twenty-two, he pleaded guilty to two counts of sexual assault on a child.[102] The Immigra-

94. *Virginia*, 518 U.S. at 566-603.

95. *Id.* at 568 ("I have no problem with a system of abstract tests . . . though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it.") (internal parentheses omitted).

96. 121 S. Ct. 2053 (2001).

97. *Id.*

98. Although *Nguyen* concerned discrimination against men (i.e., fathers), the dissent asserted that the statute actually served to reinforce stereotypes against women. As Justice O'Connor opined, "Section 1409 (a)(4) is the paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children. . . . The majority, . . . rather than confronting the stereotypical notion that mothers must care for these children and fathers may ignore them, quietly condones the 'very stereotype the law condemns.'" *Id.* at 2076.

99. *Id.* at 2057.

100. *Id.* Nguyen did not stay in contact with his mother and never lived with her after his parents' relationship ended. *Nguyen*, 121 S. Ct. at 2057.

101. *Id.*

102. *Id.*

tion and Naturalization Service ("INS") sought to deport him to Vietnam as a result of his criminal convictions.[103]

Initially, Nguyen testified that he was a Vietnamese citizen, so an Immigration Judge declared him deportable.[104] But Nguyen later claimed that he was a U.S. citizen like his father, and he appealed the Immigration Judge's decision.[105] During this time, Nguyen's father obtained an order of parentage based on a DNA test that revealed a 99.8% probability of his paternity.[106] Nevertheless, the Immigration Board rejected Nguyen's appeal because he and his father had failed to satisfy the requirements of 8 U.S.C. § 1409(a)(4) by establishing Nguyen's citizenship prior to his eighteenth birthday.[107]

Under 8 U.S.C. § 1409(a), the following requirements must be met for a nonmarital child to receive U.S. citizenship if the citizen parent is the father and the mother is an alien:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
> (2) the father had the nationality of the United States at the time of the person's birth,
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
> (4) while the person is under the age of 18 years—
> (A) the person is legitimated under the law of the person's residence or domicile,
> (B) the father acknowledges paternity of the person in writing under oath, or
> (C) the paternity of the person is established by adjudication of a competent court.[108]

By contrast, where a nonmarital child's mother is a U.S. citizen and the father an alien, § 1409(c) allows the child to automatically receive the mother's citizenship status at birth if she "had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year."[109]

Claiming that § 1409(a)(4) discriminated against fathers on the basis of gender in violation of the Fifth Amendment,[110] Nguyen and his father appealed the Immigration Board's decision to the Fifth Circuit, which upheld the statute.[111] In a 5-4 decision, the Supreme Court affirmed[112] the

103. *Id.*
104. *Id.*
105. *Nguyen*, 121 S. Ct. at 2057.
106. *Id.* at 2057, 2072.
107. *Id.* at 2057. *Cf.* Miller v. Albright, 523 U.S. 420 (1998) (the statute used to give the father until the child's twenty-first birthday to establish citizenship).
108. *Id.* at 2058.
109. *Id.* at 2058-59.
110. *See supra* note 21.
111. Nguyen v. INS, 208 F.3d 528 (5th Cir. 2000).
112. *Nguyen*, 121 S. Ct. 2053 (2001).

Fifth Circuit's ruling. Writing for the majority, Justice Kennedy claimed[113] to subject the statute to intermediate scrutiny, relying not on the "exceedingly persuasive justification" language, as was the case in *Virginia*, but instead on the traditional language set forth in *Craig v. Boren*. As he explained, "[f]or a gender-based classification to withstand equal protection scrutiny, it must be established 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."[114] Though not a complete departure from the Court's analysis in *Virginia*, this was quite different from Justice Ginsburg's use of the "exceedingly persuasive justification" as the Court's "core instruction" in that case.

Justice Kennedy's analysis found that § 1409(a)(4) served two important governmental interests. First, the government had an important interest in ensuring the existence of a biological parent-child relationship.[115] Second, the government had an interest in assuring that "the child and citizen parent have some demonstrated opportunity or potential to develop . . . a real, meaningful relationship."[116]

As for the first interest, the Court explained that the birthing process itself verifies the biological relationship between the mother and her child.[117] Moreover, in the mother's case, documentation, such as birth certificates, medical records, and witnesses at the birth, assist in this verification.[118] By contrast, the majority found that verifying the biological relationship between a father and his child is more difficult. For example, a father may not be present at the birth, and even if he is, his presence "is not incontrovertible proof of fatherhood."[119] Since mothers and fathers are not similarly situated in the birthing process, the Court rationalized that "a different set of rules" for determining the existence of a biological relationship is "neither surprising nor troubling from a constitutional perspective."[120]

As for the second important governmental interest, assuring that the citizen parent and child have "an *opportunity* to develop a meaningful relationship,"[121] the majority reasoned that this opportunity exists automatically for the mother since she must be present at her own child's birth.[122] The father, by contrast, may not even know of his child's exis-

113. Justice O'Connor's dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer, accused the majority of applying a lower level of scrutiny to the statute at issue. *Id.* at 2066-79.

114. *Id.* at 2059 (internal quotations omitted).

115. *Id.* at 2060-61.

116. *Id.*

117. *Nguyen*, 121 S. Ct. at 2060.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (emphasis added).

122. *Nguyen*, 121 S. Ct. at 2061.

tence, or the mother may not know the father's identity.[123] By this reasoning, § 1409(a)(4) arguably does for the father what giving birth does for the mother: assures initial contact between the father and child, so at least there is an opportunity for a meaningful relationship to develop.

Having established these two important objectives, the Court next turned to a means-end analysis and found that the statute was "substantially related" to important governmental objectives. Rejecting Nguyen's arguments that knowledge alone does not guarantee a parent-child relationship and that § 1409(a)(4) is based on the stereotype that mothers are more likely than fathers to develop caring relationships with their children,[124] the Court said, "[i]t is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that bond."[125] As both interests satisfied intermediate scrutiny, the Court declared that the fit between the statute and the government's objectives was "exceedingly persuasive."[126]

In sharp contrast to Justice Ginsburg's *Virginia* opinion, Justice Kennedy only referred to the "exceedingly persuasive justification" standard twice in his opinion.[127] Moreover, the language was not used as an integral part of the Court's analysis as it had been in the past. For example, the first time Justice Kennedy used the language was merely to assert that the "exceedingly persuasive" standard had been met. Although he stated that "[t]he fit between the means and the important end is 'exceedingly persuasive.' *See Virginia*, 518 U.S. at 533,"[128] Justice Kennedy did not explain how he reached that conclusion. Furthermore, the second time Justice Kennedy referred to the language in his opinion was simply to recite its meaning: "We have explained that an 'exceedingly persuasive justification' is established '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."' *Hogan, supra,* at 724 (citations omitted). Section 1409 meets this standard."[129]

Interestingly, Justice Kennedy relied on Justice O'Connor's definition of an "exceedingly persuasive justification," as asserted in *Hogan,* rather than Justice Ginsburg's fuller definition set forth in *Virginia.* This incites curiosity as one notes that Justice Kennedy referenced *Virginia* when declaring that the burden was met but cited *Hogan* when describing the

123. *Id.*
124. *Id.*
125. *Id.* at 2064. *But see id.* at 2073 (O'Connor, J., dissenting) ("bare assertion of what is allegedly 'almost axiomatic,' however, is no substitute for the 'demanding' burden of justification borne by the defender of the classification") (quoting *Virginia*, 518 U.S. at 533).
126. *Nguyen*, 121 S. Ct. at 2064.
127. *Id.*
128. *Id.*
129. *Id.*

standard.[130] Perhaps Justice Kennedy has now decided, after reflecting on *Virginia*, that he does not agree with Justice Ginsburg's use of the "exceedingly persuasive" language or her "skeptical scrutiny," and he and the other majority Justices saw *Nguyen* as an opportunity to make this point.

Even more interesting is that Justice Kennedy's opinion appears, at least on the surface, inconsistent with his previous decisions foreshadowing how he would rule on the statute at issue in *Nguyen*. For instance, just three years earlier in *Miller v. Albright*,[131] the Court examined the same statute but failed to reach a unanimous decision. In that case, petitioner Lorelyn Miller was born in the Phillippines to a Filipino mother and a U.S. citizen father, who were never married.[132] In 1992, one month after Miller's twenty-first birthday, her father, who lived in Texas, filed a petition to establish his paternity.[133] Upon the Texas court entering a decree of paternity, Miller, who was still living in the Phillippines, applied for U.S. citizenship.[134] Her application was denied since paternity was not established until after her twenty-first birthday.[135] Miller, like Nguyen, claimed that the statute at issue discriminated against fathers in violation of equal protection.[136] Though six[137] Justices affirmed the Court of Appeals' decision to uphold the statute, a majority did not do so by the same reasoning.

Justice Stevens, joined by Chief Justice Rehnquist, upheld the statute against equal protection challenge, finding that it was not based on impermissible stereotypes but rather on legitimate biological differences between mothers and fathers.[138] Justice Scalia, joined by Justice Thomas, wrote a concurring opinion stating that Congress' plenary powers[139] in the context of immigration and naturalization prevented the Court from granting the requested relief—conferring citizenship on Miller.[140]

Justices O'Connor and Kennedy did not reach the merits of the equal protection claim. In her concurring opinion, Justice O'Connor stated that Miller lacked standing in the absence of her father as a party to the lawsuit.[141] But if Miller's father had been a party to the suit, Justice O'Connor said, in dicta, that she would have invalidated the statute, as it

130. *Id.*

131. 523 U.S. 420 (1998).

132. *Id.* at 425.

133. *Id.*

134. *Id.* at 425-26.

135. *Id.* at 426. Since Miller was born prior to 1986, she fell within the "narrow age bracket whose Members may elect to have the preamendment law apply," which established that the requirements of the statute be met by the age of twenty-one as opposed to the age of eighteen, as in Nguyen's case. *Id.* at 426 n.3.

136. *Id.* at 426.

137. Justices Ginsburg, Souter, and Breyer dissented.

138. *Miller*, 523 U.S. at 442-45.

139. *See infra* § VI, B (discussing the plenary power doctrine).

140. *Miller*, 523 U.S. at 453-59.

141. *Id.* at 446. Initially, Miller's father was a party to the original lawsuit. *Id.*

failed intermediate scrutiny.[142] Justice Kennedy appeared to concur with Justice O'Connor on this point, yet he later wrote the majority opinion in *Nguyen*, upholding the same statute in stark contrast with Justice O'Connor's statements in *Miller*. Justice Kennedy's unexplained switch and the majority's lack of reliance on the "exceedingly persuasive" standard in *Nguyen* raise serious questions about the level of scrutiny the Court applied in that case and, even more unsettling, what standard the Court will use in future gender-based discrimination claims.

The *Nguyen* decision has thrown a distinct twist in what was beginning to look like an established area of constitutional law. Since that holding, we are left wondering which test dominates—the intermediate scrutiny as used in *Craig* or the "exceedingly persuasive justification" as used in *Virginia*, and if the former, how the latter fits in, if at all. To answer those questions, one must examine the possible justifications for the Court's decision in *Nguyen* as well as each majority Justice's motive for upholding the statute.

VI. RECONCILING *NGUYEN* WITH *VIRGINIA*

There is much speculation about how the majority Justices reached their decision in *Nguyen* considering the Supreme Court's precedents in this area. Both the dissenting Justices and commentators have accused the majority of using a lower standard of review, as neither appears to believe that the statute at issue actually survives intermediate scrutiny. The dissenting Justices have pointed the finger at the Court's misuse of rational basis review, while some scholars have searched for justification in the doctrine of plenary power. This article asserts that neither theory satisfactorily explains the Court's misfit decision in *Nguyen*. Instead, it appears that five Justices banded together to stop what they believed was a potential threat to the traditional level of intermediate scrutiny, the "exceedingly persuasive justification," as this language was setting the stage for the Court to declare gender a suspect class.

A. THE DISSENT'S JUSTIFICATION: RATIONAL BASIS REVIEW

The dissent in *Nguyen* bluntly accused the majority Justices of using a rational basis test, merely labeled as intermediate scrutiny, to uphold § 1409(a)(4). In her dissent, Justice O'Connor argued that, consistent with rational basis review, the Court hypothesized governmental interests and failed to show that those interests were actual purposes in enacting § 1409(a)(4).[143] Under intermediate scrutiny, the government has the burden of justifying its gender-based distinctions, and the Court "must determine whether the *proffered* justification is 'exceedingly persuasive.'"[144] Thus, the Court may not hypothesize interests that the govern-

142. *Id.* at 452.
143. *See Nguyen*, 121 S. Ct. at 2071.
144. *Id.* at 2067 (emphasis added).

ment itself has not offered, as it can when applying rational basis.[145] In defending the statute, the INS relied on two important interests: first, assuring that "children who are born abroad and out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States parent . . . and second, preventing such children from being stateless."[146] Conversely, the majority framed the government's interests in terms of ensuring the existence of a biological parent-child relationship and assuring that "the child and citizen parent have some demonstrated opportunity or potential to develop . . . a real, meaningful relationship."[147] The dissent noted that "this disparity between the majority's defense of the statute and the INS' proffered justifications is striking, to say the least."[148]

According to the dissent, the majority also failed to explore the importance of these supposed governmental objectives, counter to its analysis in previous gender-based equal protection claims. Justice O'Connor agreed that while it is important to validate the biological relationship between a parent and child where the potential for fraudulent citizenship exists, the Court did not discuss or explore that issue.[149] Moreover, Justice O'Connor rejected the Court's justification of the statute on the basis of assuring the opportunity for a meaningful relationship, stating that "it is questionable whether such an opportunity qualifies as an 'important' governmental interest apart from the existence of an actual relationship."[150] In other words, the dissent accepted the notion that the parent-child relationship itself was an important interest, but not merely the *opportunity* for such a relationship.

The majority opinion's greatest flaw, in the dissent's eyes, was its failure to adequately analyze the means-end and to insist on a tighter nexus between the two.[151] Rather than applying the "exceedingly persuasive justification" standard by closely examining the nexus between the means-end, the Court merely declared the statute's gender-based distinctions "exceedingly persuasive" and dismissed the availability of gender-neutral alternatives which it has, in the past, deemed "highly probative of the validity of the classification."[152] The dissent noted that the advanced governmental interests could have been achieved through a number of gender-neutral alternatives, such as requiring regular contact between the citizen parent and the child for a certain period of time; dismissing compliance with the formal requirements under the statute once the father-

145. *Id.* at 2068.
146. *Id.* at 2069.
147. *Id.* at 2060-61.
148. *Nguyen*, 121 S. Ct. at 2060-61.
149. *Id.* at 2069.
150. *Id.* at 2072.
151. *Id.* at 2069.
152. *Id.* at 2068. The majority stated, "to require Congress to speak without reference to gender of the parent with regard to its objective . . . would be to insist on a hollow neutrality." *Nguyen*, 121 S. Ct. at 2061. In contrast, the dissent noted that this is the "very neutrality that the law requires." *Id.* at 2071.

child relationship is established; or requiring both parents' acknowledgement of the birth.[153] For the dissent, the majority's failure to examine and insist on these gender-neutral alternatives pointed to the application of rational basis rather an intermediate review.

Though the dissent's accusations against the Court are, as demonstrated, well-founded and, in the author's view, correct, what the dissenting opinion fails to address is *why* the majority Justices utilized this lower standard of review. As mentioned, one possible justification finds its basis in the plenary power doctrine discussed below.

B. Scholarly Speculation: The Plenary Power Doctrine

The plenary power argument advanced by some commentators[154] is a plausible but, in the end, an unlikely justification for the result in *Nguyen*. Supporters of this argument assert that the Court used a lower standard of review (i.e., rational basis) because it was acting deferentially to Congress' broad powers to regulate matters concerning immigration and naturalization.[155] Generally, that doctrine dictates that Congress has plenary powers "to make policies and rules for exclusions of aliens,"[156] and the courts will use a deferential standard of review when examining cases involving congressional plenary authority.

The plenary power doctrine has deep historical roots in Supreme Court jurisprudence, dating back to 1889 in the *Chinese Exclusion Case*,[157] where the Court held that "the power of excluding aliens was a sovereign power delegated exclusively to Congress by the Constitution."[158] This exclusion power, however, is "not explicitly enumerated in the Constitution."[159]

The Court coined the phrase "plenary congressional power"[160] in the 1972 case of *Kleindienst v. Mandel*.[161] There, two doctrines were in conflict: Congress' plenary power and the First Amendment.[162] A majority of the Court essentially held that the plenary power doctrine trumps the First Amendment, and a deferential standard of review in the context of immigration and naturalization has dominated ever since.[163] Under this standard of review, the government must only show that it had "a facially legitimate and bona fide reason" for using its powers negatively.[164] Jus-

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153. *Id.* at 2074.
154. *See generally* Clay M. West, Nguyen v. INS: *Is Sex Really More Important Now?*, 19 Yale L. & Pol'y Rev. 525, 536-37 (2001).
155. *See generally* Collin O'Connor Udell, Miller v. Albright: *Plenary Power, Equal Protection, and the Rights of An Alien Love Child*, 12 Geo. Immigr. L.J. 621(1998).
156. Kiendienst v. Mandel, 408 U.S. 753, 769-70 (1972).
157. 130 U.S. 581 (1889).
158. *See* Udell, *supra* note 155, at 622.
159. *Id.* at 621-22.
160. *Id.* at 623.
161. 408 U.S. 753, 769-70 (1972)
162. *Id.* at 754.
163. *Id.* at 769-70.
164. *Id.* at 769.

tice Marshall, joined by Justice Brennan, dissented in *Kliendienst*, arguing that the Constitution—rather than a judicially created doctrine—should govern where the rights of American citizens are concerned.[165] In other words, the higher standard of review should apply when the enumerated constitutional rights of U.S. citizens are at stake.

Throughout the decades, the Court has been divided over the application of the plenary power doctrine and how much weight it should be given. Moreover, whether the doctrine trumps other constitutional principles, such as equal protection, when both are pitted against one other has not yet been fully resolved.[166] The question is an important one since in a case like *Nguyen*, for example, the Court may use a more deferential standard of review than intermediate scrutiny if it determines that the plenary power doctrine dominates. Though this doctrine serves as a plausible explanation for the Court's decision to uphold the facially discriminatory statute at issue in *Nguyen*, it seems highly unlikely for two reasons.

First, and most obvious, the Court explicitly stated that it was not relying on the plenary power doctrine in that case.[167] Justice Kennedy noted that "[t]he statutory scheme's satisfaction of the equal protection scrutiny we apply to gender-based classifications constitutes a sufficient basis for upholding it."[168] As such, the Court "need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power."[169] Based on these statements, the Court at least claims it did not use deferential review under the plenary power doctrine to reach its conclusion in *Nguyen*.

Second, Justice Scalia's plenary power analysis in *Miller v. Albright* was joined only by Justice Thomas.[170] As some commentators have noted, it would appear that only a minority of the Justices on the current Court believe that the plenary power doctrine trumps equal protection.[171] Moreover, other commentators believe that the strength of the plenary power doctrine has been eroding over the years.[172] When looking back to the *Kleindeinst* case, scholars tend to agree with Justice Marshall's dissent discussing the scope of Congress' exclusion powers, and they argue that the traditional three-tiered approach in equal protection cases should apply rather than deferential review.[173] On the surface, a current majority of the Court also appears to take this position, as evidenced by the *Miller* decision where only two Justices applied the doctrine. As one

165. *Id.* Justice Marshall distinguished the *Kliendeinst* case from the *Chinese Exclusion Case* in support of his argument. In the latter case, the rights of aliens were implicated, whereas in *Kleindeinst*, the First Amendment rights of American citizens were at stake. *Kleindeinst*, 408 U.S. at 781-83.

166. *See Nguyen*, 121 S. Ct. at 2059; *see generally* Udell, *supra* note 155.

167. *Nguyen*, 121 S. Ct. at 2059.

168. *Id.* at 2065.

169. *Id.*

170. *See Miller*, 523 U.S. at 453.

171. *Id.* at 452; *see also* Udell, *supra* note 155, at 650.

172. *See* Udell, *supra* note 155, at 655 (discussing Legomsky).

173. *Id.* at 653.

scholar has observed about the *Miller* decision, "[f]or the first time, Section 1409 (a) was portrayed by seven of the nine justices as falling outside the scope of traditional immigration jurisprudence (a view not shared by the Court of Appeals when it considered the case below)."[174] Thus, both scholarly support and past decisions in this area tend to support the argument that the plenary power doctrine does not justify the Court's holding in *Nguyen*.

It is crucial to note, however, that Justice Kennedy's majority opinion in *Nguyen* left open what effect the plenary power doctrine has on equal protection claims. At the close of his opinion, Justice Kennedy stated that if the Court had not determined that § 1409 (a)(4) survived intermediate scrutiny, Nguyen and his father "would face additional obstacles before they could prevail."[175] For example, "[t]here may well be 'potential problems with fashioning a remedy' were [the Court] to find the statute unconstitutional."[176] After discussing Justice Scalia's plenary power arguments advanced in *Miller*, Justice Kennedy explained that the Court "need not rely on this argument" in the *Nguyen* case and "need not assess the implications of statements in [the Court's] earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power."[177] In other words, he reserved the question of whether the plenary power doctrine trumps equal protection for another day, and currently there is justification and precedent[178] for the Court to rule either way.

Perhaps it is for this reason that the *Nguyen* decision raises even more cause for concern. If the Court had used the plenary power doctrine to justify its holding, then at least *Nguyen* could be distinguished from past decisions like *Virginia*. Instead, as it stands now, we are left searching for a justification and a way to reconcile these cases. One possible explanation, though perhaps less palatable, is offered in the following section.

C. The Majority: Five Justices Fight to Pull in the Reins

Rather than asking if the majority applied a lower level of scrutiny in *Nguyen*, the more interesting question is whether the Justices are even on

174. *Id.* at 655.
175. *Nguyen*, 121 S. Ct. at 2065.
176. *Id.*
177. *Id.*
178. *See* Fiallo v. Bell, 430 U.S. 787 (1977) (holding that the challenged laws distinguishing between mother and fathers of illegitimate children were not unconstitutional since Congress has broad powers over immigration and naturalization matters). *But see Nguyen*, 121 S. Ct. at 2078 (O'Connor, J., dissenting) (arguing that *Fiallo* is readily distinguishable from *Nguyen* as a case concerning the admission of aliens into the United States and not whether an individual is a U.S. citizen). Justice O'Connor's position is not without support. *See Fiallo*, 430 U.S. at 800 (Marshall, J., dissenting). Moreover, the majority in *Fiallo* recognized that "'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Id.* at 792 (internal citation omitted). Based on this language and Justices Marshall and O'Connor's dissents, it is highly credible that the Court would rule that the plenary power doctrine should not come into play when the constitutional rights of American citizens are at stake.

the same page when they use the term "intermediate scrutiny." Based on the Court's decisions over the last decade, it appears they are not. Moreover, they seem to realize they are not. With that in mind, perhaps *Nguyen* represents a judicial effort to clarify what a majority of the Justices believe is, or should be, intermediate scrutiny. Put differently, this article argues that the *Nguyen* decision is meant to contain Justice Ginsburg's majority opinion in *Virginia* and to limit the scope of the "exceedingly persuasive" standard. It is clear that some Justices feel that standard is the catalyst for a new level of "skeptical scrutiny," which has the potential of allowing the Court to declare gender a suspect class. *Nguyen*, in a nutshell, is five Justices' attempt to stop that result.

As previously discussed, Chief Justice Rehnquist has never supported using the "exceedingly persuasive justification" standard to impose a higher burden on the traditional intermediate test.[179] This comes as no surprise since he did not fully approve of intermediate scrutiny from the start. In *Craig v. Boren*, Chief Justice Rehnquist's dissent strongly opposed the introduction of intermediate scrutiny, at least where the alleged discrimination was against men. Rather than apply the intermediate standard evenhandedly to all gender-based claims, Chief Justice Rehnquist sought to limit its application to discrimination against women while using rational basis review in the context of male discrimination.[180] Thus, it is quite obvious that when Chief Justice Rehnquist joined Justice Stewart's majority opinion in *Massachusetts v. Feeney*, which first used the "exceedingly persuasive justification" language, he had no intention of imposing an even higher standard on the intermediate test, particularly in cases like *Nguyen* where the alleged discrimination was against males.

In *United States v. Virginia*, Chief Justice Rehnquist unequivocally stated his position regarding the proper use of the "exceedingly persuasive justification" language:

> While terms like "important governmental objective" and "substantially related" are hardly models of precision, they have more content and specificity than does the phrase "exceedingly persuasive justification." That phrase is best confined, as it was first used [in *Feeney*] as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself.[181]

Based on these statements, a plausible argument can be made that Chief Justice Rehnquist viewed the *Nguyen* case as an opportunity to put the "exceedingly persuasive" language in what he deems is its proper place—a mere description of the traditional intermediate test. And apparently he was not without support.

Justice Scalia, with whom Justice Thomas routinely concurs, has also been quite assertive about his distaste for this language. It was, in fact, a dominant reason for Justice Scalia's sole and scathing dissent in *Virginia*,

179. *See supra* note 86.
180. *See* Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting).
181. *Virginia*, 518 U.S. at 559.

a decision in which Justice Thomas did not participate. In all fairness to Justice Scalia, he has at least been forthright about his general dislike for the entire three-tiered approach used in the equal protection context. As he stated in *Virginia*:

> I shall devote most of my analysis to evaluating the Court's opinion on the basis of our current equal protection jurisprudence, which regards the Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will apply in each case.[182]

Despite this view, Justice Scalia has applied the various levels of scrutiny as precedent dictates, but he has apparently drawn the line at the "exceedingly persuasive justification" language, at least in the way it was utilized in *Virginia*. In that case, Justice Scalia took issue with the majority using this "amorphous"[183] language to hold VMI's single-sex admissions policy unconstitutional rather than applying traditional intermediate scrutiny, which he believed the admissions policy survived. His dissent reiterated that the intermediate scrutiny analysis should focus on the "substantially related to an important governmental objective" language and not the "exceedingly persuasive justification."[184] Justice Scalia could not have been more clear that he wanted to limit the Court's application of this phrase. For example, in *Virginia*, he stated:

> Although the Court in two places recites the [intermediate] test as stated in *Hogan* . . . the Court never answers the question presented in anything resembling that form. When it engages in analysis, the Court instead prefers the phrase "exceedingly persuasive justfication" from *Hogan*. The Court's nine invocations of that phrase, and even its fanciful description of that imponderable as "the core instruction" of the Court's [previous] decisions would be unobjectionable if the Court acknowledged that *whether* a "justification" is "exceedingly persuasive" must be assessed by asking "[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." Instead, however, the Court proceeds to interpret "exceedingly persuasive justification" in a fashion that contradicts the reasoning of *Hogan* and our other precedents.[185]

Considering his position in *Virginia*, it is not shocking that Justice Scalia upheld the statute at issue in *Nguyen*. It must be noted, however, that this time Justice Scalia joined the majority opinion even though he still believed the Court lacked the power to grant a remedy to Nguyen under the plenary power doctrine. Justice Scalia did write an additional

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182. *Id.* at 567.
183. *Id.* at 573.
184. *Id.* at 576.
185. *Id.* at 571-72 (internal citations omitted).

concurrence to assert his plenary power argument, but at the same time he and Justice Thomas prevented another plurality decision like *Miller* by joining the other three Justices.

Unlike Justice Stevens' concurrence in *Nguyen*, which was expected since he wrote the majority opinion in *Miller*, Justice Kennedy's opinion in *Nguyen* was surprising, particularly since he authored the majority opinion. Commentators and some Members of the Court believed that when the facts of *Miller* arose again without any issue as to standing, a majority of the Justices would strike down § 1409(a), "one of the last remaining sex-based classifications in the corpus of federal law."[186] In fact, in his *Miller* dissent, Justice Breyer seemed confident that "a majority of the Court [did] not share 'Justice Stevens' assessment that the provision withstands heightened scrutiny.'"[187] He went so far as to state that "'[i]t is unlikely' that 'gender classifications based on stereotypes can survive heightened [intermediate] scrutiny,' a view shared by *at least five Members* of this Court."[188] The Court itself appears to have been caught off-guard by Justice Kennedy's majority opinion in *Nguyen*. But the question still remains what caused his switch.

In retrospect, Justice Kennedy's silent concurrence in *Miller* is quite telling. There is little doubt that he concurred with Justice O'Connor on the lack of standing in that case, but it is now evident that he did not join her dicta describing § 1409(a) as failing intermediate scrutiny. In light of this, one questions why Justice Kennedy did not write a separate concurring opinion agreeing with the standing issue while disassociating himself from Justice O'Connor's statements regarding the statute's invalidity. Perhaps Justice Kennedy himself had not yet decided where he stood on the issue, or perhaps the other four Justices persuaded him of the need to rope-in the "exceedingly persuasive" language.

When examining Justice Kennedy's opinions both before and after *Virginia*, maybe his decision in *Nguyen* is not be so surprising. In *J.E.B. v. Alabama*, he did quote Justice Rehnquist's dissent from *Craig v. Boren*, saying that "the intermediate scrutiny standard may not provide a very clear standard in all instances."[189] Perhaps Justice Kennedy was hinting at what he believed was happening to that standard with the introduction of the "exceedingly persuasive justification" language. But at that point, Justice Kennedy did not appear willing to let the murkiness of this standard influence the "strong presumption that gender classifications are invalid."[190] So what, then, changed between his concurring opinion in *J.E.B.* and his majority opinion in *Nguyen*, which led to two very different results? The answer is almost too obvious: *United States v. Virginia* and Justice Ginsburg's heavy reliance on an "exceedingly persuasive justifica-

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186. The Harvard Law Review Association, 115 HARV. L. REV. 376, 377 (2001).

187. *Miller*, 523 U.S. at 476.

188. *Id.* (emphasis added). In addition to himself, Justice Breyer was referring to Justices O'Connor, Ginsburg, Souter, and Kennedy.

189. *J.E.B.*, 511 U.S. at 152.

190. *Id.*

tion." It appears that Justice Kennedy—like Chief Justice Rehnquist and Justices Scalia, Thomas, and Stevens—also disapproves of the Court's use of that language. Though he has never explicitly stated as much, his authoring of the *Nguyen* decision leaves little doubt about where Justice Kennedy now stands on this issue.

VII. THE IMPACT OF *NGUYEN* ON FUTURE GENDER-BASED EQUAL PROTECTION CLAIMS

With these five Justices forming a majority, the question remains whether they will continue their efforts to extinguish the "exceedingly persuasive" standard. For all those who reveled in the *Virginia* decision and what it meant for women—and men—both legally and socially, the *Nguyen* opinion stands as a symbol of regression, reminding us of one solemn fact: although thirty years have passed since Justice Brennan first tried to gather a majority in *Frontiero* to declare gender a suspect class, the Supreme Court is still not willing to make that determination.

Of course, no one can say with certainty how the Court will rule in future gender-based equal protection claims since much of that depends on the facts of a given case, who sits on the Supreme Court at that time, and how much societal attention a particular issue is given. But considering the Court as it sits now, one can make a strong argument that a majority of the Court is reverting back to a pre-*Virginia* application of intermediate scrutiny, i.e., that the challenged classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."[191] And unless one of these five Justices decides to switch sides (again), the "exceedingly persuasive justification" will most likely not serve as the Court's "core instruction" in the future—and that is assuming it remains part of its instruction at all.

Some scholars may not find this troublesome, as they perceive no real difference between the traditional intermediate level of scrutiny and the "exceedingly persuasive" standard. There are also those who share Justice Scalia's view that intermediate scrutiny was being invaded by a stricter and more "imponderable" test. But for those of us who believe a difference between the two standards does exist, the possibility that the Court will return to a pre-*Virginia* analysis of gender-based equal protection claims is disturbing since ultimately this means that more discriminatory laws, like the one at issue in *Nguyen*, will be upheld.

What we are left with, then, is hope that Justice O'Connor's final words in *Nguyen* will prove true:

> No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications. Today's decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened

191. *Id.* at 2059.

> scrutiny to such classifications to determine whether a constitutional violation has occurred. I trust that the depth and vitality of precedents will ensure that today's error remains an aberration.[192]

The concern, of course, is that the *Nguyen* decision will not "remain an aberration," as the dissent hopes. And until the Court renders its next decision in another gender-based equal protection claim, we are left to ponder, quite apprehensively, the significance and force of *Nguyen*.

VIII. CONCLUSION

It is one thing when the Members of the Court disagree amongst themselves about a particular decision; it is altogether something different when some of the Justices ask the public to disregard a majority decision as precedent, as did Justice O'Connor and her fellow *Nguyen* dissenters. Stepping back for a moment, both sides of the Court (Justices Ginsburg, O'Connor, Breyer, and Souter on the one side, and Chief Justice Rehnquist and Justices Scalia, Thomas, Stevens and Kennedy on the other) share equal fault in creating the current predicament.

Arguably, Justice Ginsburg's opinion in *Virginia* stretched precedent in much the same way Justice Kennedy's opinion in *Nguyen* narrowed it. One can argue that *Nguyen* is simply correcting a long line of decisions that *Virginia* sought to distort, and the five majority Justices in *Nguyen* are merely trying to restore the traditional intermediate standard. But these arguments ignore the fact that *Virginia* is on the books and that five Justices appear unwilling to follow it.

To prevent any further undermining of its decisions in this area, the Court must reach agreement on precisely what intermediate scrutiny means. Moreover, rather than obscuring their differences about the "exceedingly persuasive justification" in published opinions—which ends up agitating precedent—the Court should first determine how that language fits into the intermediate test, if at all, before issuing its next opinion. At the very least, the Justices should express their views about the "exceedingly persuasive" standard more directly, as some have done, so cases like *Nguyen* may be reconciled with and distinguished from precedent. Until then, commentators will continue to view decisions like *Nguyen* as unpredictable and precarious, and the Court will continue to lose its credibility.

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192. *Nguyen*, 121 S. Ct. at 2078-79.