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REVISITING EQUALITY: FEMINIST THOUGHT ABOUT INTERMEDIATE SCRUTINY

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This panel's evaluation of *Craig v. Boren*¹ in light of *United States v. Virginia*² (*VMI*), and its discussion of the development of the law of equal protection for women has revealed several important aspects of the relationship between feminist legal theory and feminist legal practice during the last twenty years of the contemporary feminist movement.³ We can see how, at the beginning of this period, the early women's rights activists' concern with achieving formal legal equality for women animated many of the legal strategies designed to combat discrimination and subordination.⁴ Through the cases they chose to bring to court, these activists placed emphasis upon securing for women conditions that were the same as those for men. In the area of constitutional doctrine, they believed in the need to establish a high burden for the state to meet to justify any differential treatment of men and women. They rooted their commitment to achieving this rigorous scrutiny in two related concerns—first, in their judgment that strict scrutiny enhanced the effectiveness of challenges to discriminatory state action and, second, in the symbolism of according sex discrimination the highest level of scrutiny available in the area of equal protection analysis.

Awaiting a decision in *VMI*, all the panelists continued to support the application of strict scrutiny to claims of sex discrimination. For them, *VMI* represented an opportunity, albeit an unsuccessful one, to convince the Supreme Court to adopt strict scrutiny in the context of sex discrimination. Along with the panelists' continuing concern for

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1. 429 U.S. 190 (1976).

2. 116 S. Ct. 2264 (1996) [hereinafter "*VMI*"].

3. See *Centennial Panel: Two Decades of Intermediate Scrutiny*, 6 AM. U. J. GENDER & L. 1-30 (1997) [hereinafter "*Centennial Panel*"].

4. *Id.*

realizing the original goal of formal equality, however, they identified many other strands of feminist analysis that have emerged and flourished during the intervening period. These strands complicate and enhance both the analysis of *VMI* and our evaluation of the level of legal scrutiny applied by a court in evaluating a state's actions. How critical is the level of scrutiny to the outcome of *VMI* and to other cases? What is the relationship of assumptions about gender to the formal legal standards applied to a situation? What is the symbolic meaning of the level of scrutiny in our present conditions? As we have come to understand how categories of race and gender are problematic, do we need to modify our views of the legal rules and principles that are applied to those categories? How do the paradigms of equality that underlie equal protection based on race and gender affect gays and lesbians or other groups subjected to discriminatory treatment?

While reaffirming the continuing symbolic and political importance of strict scrutiny, Donna Lenhoff and Liz Schneider addressed the complexity of evaluating the practical importance of the degree of judicial scrutiny in securing equality for women.⁵ Donna placed the effectiveness of the constitutional standard in the context of the implementation of significant statutory protections for women, such as Title VII⁶ and Title IX,⁷ as well as the partial effectiveness over the years of intermediate scrutiny in securing constitutional protection for women. Women's rights strategists in *VMI* felt confident that Virginia's attempt to create a separate institution for women would not withstand intermediate scrutiny at the level of the Supreme Court. Although strict scrutiny may be limited in its practical implications, Debbie Brake stressed the need to think about the impact of constitutional doctrine, not just in the Supreme Court, but at the level of the lower federal courts, where most litigants and their lawyers confront it. Although advocates might be reasonably confident about victory in *VMI* under intermediate scrutiny at the Supreme Court level, vindication came only after a long struggle in the District Court and Fourth Circuit. Debbie stressed the role that the watered-down standard played in creating greater room for the operation of gender stereotypes.

Liz deepened the analysis further by considering the factors other than the level of scrutiny affecting courts' decisions about sex dis-

5. *Id.* at pp. 3-13 and pp. 21-26.

6. Title VII of the Civil Rights Act of 1964, § 701(b) 42 U.S.C. §2000e-2 (1988).

7. Title IX of the Education Amendments of 1972, §§ 901-909, *as amended*, 20 U.S.C. §§ 1681-1688 (1996).

crimination. Deeply rooted assumptions about gender, as well as legal standards, operate to produce results. Because stereotypical thinking about men and women would also affect decision-making under a strict scrutiny regime, advocates need to be constantly aware of the interaction between legal doctrine and the understanding of gender. Strict scrutiny might be more important for the political message it communicates than for the role it could play in limiting the impact of gender stereotypes in judicial decisions. Liz and Donna also noted how the “difference” strand of feminist thought has raised questions about when and why differential treatment of men and women might be of value to women, and has challenged and enriched our thinking about the meaning of equality. This “difference” strand of feminist thought, however, has also been misused to undermine challenges to practices that disadvantage women. In addition, both Liz and Sharon Rush identified how feminist thought continues to grapple with the problematic character of the categories of race and gender. A black woman subjected to discriminatory treatment is divided against herself when a court comes to decide upon a level of scrutiny to apply to that treatment.

These various factors—the symbolic and practical implications of the level of constitutional scrutiny, the effect of stereotypical thinking, and the porous and shifting character of the categories by which people are classified—also influence Sharon Rush’s thinking about obtaining meaningful constitutional scrutiny of discrimination against gay men and lesbians. As in the struggle for women’s equality, heightened constitutional scrutiny matters both symbolically and practically in the movement for gay and lesbian rights. Furthermore, cultural constructs of homosexuality not only shape a court’s approach to discriminatory treatment of gays and lesbians, but they have also impeded the application of any heightened level of scrutiny to differential treatment of homosexuals and heterosexuals. In addition to these concerns, Sharon added questions about the very process of analogical thinking that occurs as we work to build a constitutional vision of equality.

Twenty years ago, the Supreme Court in *Craig v. Boren*⁸ enunciated intermediate scrutiny as the standard for reviewing state discrimination based on sex. This case was only a partial victory in women’s rights advocates’ campaign for equality. With a continuing commitment to achieving strict scrutiny as the constitutional standard for evaluating claims of sex discrimination, this panel has identified for us not only the abiding importance of the struggle for full equality,

8. 429 U.S. at 190.

but also a more nuanced vision of equality that now, twenty years later, informs the ongoing struggle.