Note

Re-viewing History: The Use of the Past as Negative Precedent in *United States v. Virginia*

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"Our Nation has had a long and unfortunate history of sex discrimination."¹ Twenty-five years ago, a plurality of the Supreme Court admitted a truth long known to many. Modern Americans must still struggle with this history of discrimination. Its effects continue to be felt, less obvious but ongoing. What role, then, does history play for the modern world? What role can it play in the ongoing effort to move towards a deeper realization of equality? There is, of course, no single answer.²

One way to approach these questions is to recognize that many of the standards used in equal protection jurisprudence—in race as well as sex discrimination cases—are designed in reference to a past that is now almost universally recognized to be "wrong." State actors may not depend on "overbroad" generalizations to make "judgments about people that are likely to . . . perpetuate historical patterns of discrimination."³ Qualified individuals may not be excluded from activities based on "fixed notions

1. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

2. For a recent interdisciplinary collection of articles on the use of history in law, see *Symposium on the Critical Use of History*, 49 STAN. L. REV. 1023-1221 (1997). See also Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303 (summarizing approaches that feminist legal scholars have taken towards history and tradition); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (summarizing and critiquing the traditional vision of "law-in-history that has tended to . . . dominate liberal legal scholarship" and introducing approaches taken by Critical Legal Scholars); John Philip Reid, *Law and History*, 27 LOY. L.A. L. REV. 1707 (1996) (using traditional concepts of historical scholarship to criticize lawyers' use of history); Symposium, *Moments of Change: Transformation in American Constitutionalism*, 108 YALE L.J. (forthcoming June 1999) (discussing the use of history in legal interpretation).

3. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994).

concerning the roles and abilities of males and females.”⁴ And, once such tests have determined that a given exclusion is unconstitutional, a proper remedy strives to “eliminate the discriminatory effects of the past” and to “bar like discrimination in the future.”⁵

But such self-consciously revolutionary equal protection standards function within a legal system premised on precedent. There is a tension inherent in a jurisprudence that defines itself in counter-distinction to the past, yet works within a structure that embraces a conservative adherence to past decisions as precedent. In *United States v. Virginia*,⁶ a case challenging the Virginia Military Institute’s (VMI) all-male admissions policy, the school defended its exclusionary practice as a necessary and legitimate expression of its long-celebrated traditions. Writing for a six-justice majority, Justice Ginsburg used historical analogies to turn the school’s arguments upside down and thus discredit its claims as antiquated and anachronistic. This Note develops a theory of “negative precedent” that rationalizes the role history played in the *VMI* case and, more generally, the constructive role that history can, and does, play in areas of the law where the past no longer merits emulation.

Part I begins by diagramming the logical structure of an argument from precedent and summarizing standard rationales put forward as justifications for adherence to precedent. Negative precedent inverts familiar legal reasoning. Abandoned past practices can be used to argue, through a process of negative inference, against analogous modern practices. Equally important, negative precedent acknowledges the injuries caused by past practices that now seem unacceptable.

A close reading of the *VMI* decision fleshes out this theory. Part II gives background on the case and then shows how Justice Ginsburg’s treatment of the standard of scrutiny—defining intermediate scrutiny as requiring an “exceedingly persuasive” justification—shifts the tenor of the Court’s analysis by positing a “biased” observer who views examples of sex-based classifications as presumptively invalid. Such skeptical scrutiny ensures that the reader will recognize unqualified examples of historical discrimination as negative precedent.

Parts III and IV illustrate uses of negative precedent. VMI claimed that women could not be allowed to participate in the school’s famous adversative training method because the changes that would be required to include them would destroy the effectiveness of the program. In other words, the school asserted that it faced a catch-22. Part III shows how Justice Ginsburg drew historical analogies to similar past assertions, now

4. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

5. *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

6. 518 U.S. 515 (1996).

disproved, to defuse the school's arguments. Part IV demonstrates that by emphasizing the changing legal standard, negative precedent also allowed Justice Ginsburg to recognize the injury done to women by institutional discrimination that would now be judged unconstitutional.

Since history does not come with labels attached, a reference to the past may sound positive to some and negative to others. Part V discusses the risks that history's contestability poses for the use of negative precedent and confronts the possibility that an appeal to tradition may actually advocate for change. It concludes by suggesting that a richer view of tradition as *both* positive and negative allows progress to be grounded in history. Finally, a brief epilogue in Part VI suggests that negative precedent can also serve as a model for reform. Recognizing the central role that negative precedent played in this important decision deepens an understanding of the present value of the past.

I. THEORY AND JUSTIFICATIONS FOR PRECEDENT

The theory of negative precedent proposed in this Note builds on scholarly treatments of the standard use of precedent. Section A presents fairness, predictability, and efficiency rationales typically advanced as justifications for adherence to the past, as well as a separate tradition-based rationale developed by Anthony Kronman.⁷ So long as the societal consensus remains unchanged, a reference to a past decision simultaneously serves all of these rationales. But in areas of the law such as equal protection jurisprudence, sometimes judges are willing to sacrifice predictability and efficiency to satisfy changing understandings of equality and fairness. In such cases, predictability and efficiency are best served by ignoring the no-longer-controlling precedent. The traditionalist justification and a different conception of fairness, by contrast, mandate that the past not be forgotten. Section B constructs a theory of "negative precedent" that provides an analytic framework for rationalizing the ongoing use of such past precedents.

A. (Positive) Precedent

The bare bones of an argument from precedent are both familiar and easily stated: Because *X* was treated a given way, a similar case, *X'*, should be decided the same way.⁸ The first step of an argument from precedent is

7. See Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

8. The schematic description of the mechanics and traditional justifications for precedent that follows is adapted from Frederick Schauer's comprehensive treatment of the subject. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); see also *id.* at 571 n.3 (listing other

factual. Since the facts of the second situation will never match those of the first exactly, the argument begins by showing that cases are relevantly similar.⁹ That is necessarily a process of abstraction: Extraneous details of the two fact patterns are stripped away to reveal essential facts that define the universe of Xs. Once a judge determines that X' is "like" X, the case is decided. A pure rule of precedent dictates absolutely that the later case (and any and all other members of the universe of Xs) be resolved in the same way. The precedent controls simply because it is prior; the deference awarded the past decision is not premised on the merit of the given decision. It has force even if the result it requires is by some measure "wrong."

Thus, an argument from precedent can be distinguished from the more common (and often overlapping) argument from experience. In an argument from experience, the past is used as a means of making decisions in the present, but the past decision carries no weight beyond what it can teach about the present. In other words, "[t]he probability that the present [situation] will be like the past both determines and exhausts the value of the previous experience."¹⁰ If society thinks that the past decision was rightly decided, then an argument from experience will suggest the same result as an argument from precedent. But if the past decision now seems erroneous or if the result it requires for the current case is in some sense less than ideal, then the argument from experience leads to a different result than the argument from precedent.

What can justify adherence to a past decision if it is likely that following it results in a present mistake? Three claims are standard throughout the literature.¹¹ The first suggests that fairness dictates that like cases be treated alike regardless of when they occur. The second argument posits that consistent decisions benefit individuals by allowing them to plan their lives sensibly around a predictable set of rules. And the third recognizes that adhering to precedent promotes efficient decisionmaking and builds confidence in decisionmaking institutions. Following past decisions is functionally necessary because time only flows forward, but it

authors' standard treatments of precedent). Schauer's highly influential work has been used by numerous commentators as a starting point for discussions of the justifications for deferring to precedent. See, e.g., Clayton P. Gillette, *Rules and Reversibility*, 72 NOTRE DAME L. REV. 1415, 1415 (1997); Kronman, *supra* note 7, at 1037-39; Gerald J. Postema, *Integrity: Justice in Workclothes*, 82 IOWA L. REV. 821, 821 (1997); Mark Tushnet, *Self-Formalism, Precedent, and the Rule of Law*, 72 NOTRE DAME L. REV. 1583, 1583 n.a (1997).

9. See Schauer, *supra* note 8 at 576-88 (discussing how categories of relevance are established).

10. *Id.* at 575.

11. The following discussion is adapted from Schauer's article. For a full description, see *id.* at 595-602.

is not particularly significant that these cases are part of history.¹² Precedent achieves rational goals that are inherently ahistorical.

The fairness, predictability, and efficiency rationales use the past as a means to an end, rather than an end in itself. Therefore, they cannot explain (and in fact, as will be discussed below, they actually argue against) reference to past cases that are no longer considered controlling precedent. In other words, they do not explain the use of negative precedent. Anthony Kronman, however, presents a distinct claim for adherence to precedent that is explicitly premised on the *pastness* of the decision: tradition.¹³ Arguing that an ability to remember across generations is an essential and distinctive element of human nature, he concludes that humans are born into a contract of "interwoven obligations."¹⁴ Each generation has a duty to preserve the achievements of its ancestors: "The past is not something that we, as already constituted human beings, choose for one reason or another to respect; rather, it is such respect that establishes our humanity in the first place."¹⁵ If "respecting" the past is an integral part of living as humans in the present, what should we do with aspects of the past that no longer seem to merit respect?

B. *Negative Precedent*

Strict adherence to precedent is inherently conservative. If the societal consensus about the appropriateness of a given opinion is maintained, a reference to the decision simultaneously serves the fairness, predictability, efficiency, and traditionalist rationales. As society grows and changes, however, some past decisions come to seem "wrong." In some cases, legislative bodies explicitly change the status quo. For example, the Reconstruction amendments were designed to rectify inegalitarian practices that existed at the time and that in the absence of corrective measures would

12. See Kronman, *supra* note 7, at 1041 ("Since the past cannot be undone, the only way to treat later cases like (identical) earlier ones is to conform the later cases to them; this is a consequence of the rather obvious fact that time flows in one direction only."). Time only flows one way, but a similar "fairness" argument also can be used in the present with bearing on the future: Consider the common environmental plea that natural resources should be routinely conserved and pollution should be abated because it is "unfair" that future generations should suffer simply because they were born later. See generally, e.g., EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS (1989) (arguing that each generation has a duty to pass on the Earth in a condition at least as good as that in which it received it and a duty to repair any damage done by the failure of previous generations to do the same).

13. See *id.* at 1043-68. For other commentary on Kronman's argument, see Bartlett, *supra* note 2, at 306-08; and David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1040-60 (1991).

14. Kronman, *supra* note 7, at 1067.

15. *Id.* at 1066.

have been expected to endure.¹⁶ And occasionally, cases are explicitly overruled, thus obviously discrediting any precedential value they would otherwise have. More frequently, however, judge-made law grows past "wrong" decisions or expands the protection offered by a given legal rule through a process of distinguishing, one that functions without explicitly discrediting the past.¹⁷

The several rationales for precedent then pull in different directions. The predictability and efficiency justifications do not offer any reason for ongoing reference to the original rule. To the contrary, referring to a case decided in a manner different from the prevailing precedent undermines the illusion of stability on which these utilitarian rationales depend. Thus, precedent best serves its utilitarian objectives by presenting a single controlling rule as if it has always existed and will stretch out endlessly into the future. Outdated cases should be ignored. History, ironically, should be erased. But the traditionalist rationale for precedent combined with fairness considerations justify ongoing reference to no-longer-controlling case law. Such obsolete standards constitute "negative precedent."¹⁸

The formal structure of an argument from negative precedent simply inverts the familiar argument from precedent. The result reached in *X* is now considered "wrong." *X'*, a current situation, resembles *X*. Again, the first step is factual: The current situation must be shown to be relevantly similar to the past case. In an argument from precedent, proving the similarity mandated that the later case reach the same result as the earlier one. In an argument from negative precedent, this process is reversed: Since

16. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988).

17. This is a common practice. A current situation, *X'*, is similar to *X*. Assume that society now considers the original result "wrong." Since the first step in the decisionmaking process is factual, a different treatment of *X'* can be justified by showing that it is different from *X*. Distinguishing *X'* thus becomes a means to an end: establishing a new controlling precedent for the universe of *Xs*. *X'* then becomes a baseline; its scope is gradually expanded until it applies to the entire universe of *Xs* (and thus implicitly includes the original *X*). Arguments made back to the original case then would be futile. Distinguishing presents the possibility of a progressive, one-directional growth without any explicit denunciation of the rule of precedent. For a recent and well-known example of this, see the progression from *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which found a federal affirmative action program constitutional under intermediate scrutiny; to *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which held a municipal affirmative action program modeled on the one approved in *Fullilove* to be unconstitutional under strict scrutiny and distinguished *Fullilove* on the ground that Congress, but not Richmond, has an affirmative grant of power to enforce the Equal Protection Clause; to *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), which announced a policy of congruence that, expanding *Croson* and discounting *Fullilove*, required courts to evaluate federal affirmative action programs under strict scrutiny.

18. A related, but logically distinct, practice is citing a dissent from a now discredited decision to lend support for the opposite proposition. Judges, litigators, and commentators do this with some regularity; the dissents most commonly cited are probably Justice Harlan's in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), and Justice Holmes's in *Lochner v. New York*, 198 U.S. 45, 74 (1905).

the original case was wrongly decided, proving the similarity mandates that the current case yield the opposite—or at least a different—result. The “wrong” answer in the past requires the “right” answer now.¹⁹

While less familiar than positive precedent, negative precedent exists, and it serves (at least) two important objectives: (1) it offers a means of arguing by negative inference that can further progressive change; and (2) it recognizes a historic injury. The first use of negative precedent, argument by negative inference, is important because societal change is not monolithic. Increased access to institutions and greater equality are achieved only gradually. As courts and legislatures require progressive reform, some members of society—including many members of the institutions that are forced to adapt—fear that such change will destroy the unique qualities of these institutions. Even if they accept that some cases in the past were wrongly decided, they think that the current situation has nothing to do with the now discredited past. In other words, they think that *X* is not “relevantly similar” to *X*. Showing that the present situation is actually like the past requires that the present situation be changed.

The second justification for the use of negative precedent is backward-looking. Broadly speaking, traditionalism is a realization of humans’ unique ability to remember across generations. Kronman focuses on the “achievements” and “accomplishments” of the past,²⁰ but the past in this sense is not prescriptive. Remembering the achievements of our ancestors is important; remembering their mistakes is equally important. The “fairness” premise—that individuals at different times should be treated the same—underlines the significance of this assertion. If distinctions drawn today between the capabilities of men and women are generally considered illegitimate, then, since temporal differences are similarly immaterial, distinctions drawn in the past between men and women were similarly illegitimate. In other words, if men and women are equal today, they *should have been* equal in the past as well. And if the past really does matter—if

19. Note that if the original shift away from *X* was through a process of distinguishing rather than an explicit overruling, see *supra* note 17, arguing from past precedent in this manner is essentially “undistinguishing.”

20. See, e.g., Kronman, *supra* note 7, at 1051. David Luban, noting this tendency, suggests that Kronman’s reasoning is fatally flawed, in part by its failure to admit explicitly that some historical actions are not worth following. See Luban, *supra* note 13, at 1056-57. I think Luban is unfair in his criticism. Kronman does not suggest that we must slavishly adhere to all of the actions of the past. Nor does he ignore the possibility of intergenerational progress. Rather, Kronman circumscribes his conclusions: As humans, “we are bound, *within limits*, to respect [the past] for its own sake . . .” Kronman, *supra* note 7, at 1066 (emphasis added). See also *id.* at 1039 (“[T]he past deserves to be respected merely because it is the past—not, of course, uncritically or unconditionally, but for its own sake nonetheless.” (emphasis added)). Luban’s critique, however, is important in recognizing the limits of the traditionalist argument as described in Kronman’s article. But rather than discarding Kronman’s underlying premise, I suggest moving the lines to expand the scope.

the memory of the past is an essential expression of humanity—then recognizing past inequities is an important means of recognizing the justness of a past claim that was denied.

The two objectives of negative precedent correspond to the two aspects of a legal opinion: A written opinion both decides a specific factual dispute between litigants at a particular point in history *and* establishes a rule of law that will control similar factual disputes in the future. For the sake of convenience, I will refer to the former as the “historical” aspect of the opinion and the latter as the “legal” import of the opinion. A society’s intergenerational memory is best expressed by emphasizing the “history”: the particular circumstances of the case and the identifying characteristics of the individuals.²¹ The fairness, predictability, and efficiency objectives, by contrast, are concerned with the “law” of the opinion, and *stare decisis* canonizes the importance of adhering to the “law” established in earlier cases. Where explicitly discredited or clearly abandoned, however, case law loses this prescribed precedential weight. Instead the past case becomes “merely” a historical event. Nevertheless, a reference to a past decision continues to include both a “historical” and a “legal” component, in the sense that it refers both to the (wrong) resolution of the particular factual dispute and to the (wrong) rule of law established by the case. An argument from negative precedent operates along both these vectors. The use of a negative inference to discredit a current claim corresponds to the “legal” import of the decision; the backward-looking righting of a past wrong corresponds to the “historical” effect of the decision.

The distinction I have drawn between “law” and “history” is, of course, artificial. Speaking more generally, the “legal” aspect of precedent can be found acting in nonlegal institutions, and the “historic” aspect of precedent plays a role in legal decisions. In other words, even nonlegal institutions tend to abide by their own decisions as a means of achieving

21. Kronman introduces the traditionalist approach as an alternative explanation for a society’s reference to the past both “in the law and outside it.” *Id.* at 1047. Any reference to a past legal decision expresses a society’s intergenerational memory and, because law adheres to precedent (in part to achieve fairness, predictability, and efficiency), law serves such traditionalist impulses by its ongoing reference to past decisions. But the key to the traditionalist argument is not that the past event is a *legal* event; reference to a Renaissance play or the restoration of a crumbling cathedral serves tradition as well. *See id.* at 1053-55. In fact, a legal opinion is an imperfect means of expressing society’s intergenerational memory precisely because it also serves to promote fairness, predictability, and efficiency. Whereas the traditionalist rationale would emphasize the particular personalities involved, *see id.* at 1065, the utilitarian objectives of precedent require a process of abstraction that creates (at least the illusion of) a controlling precedent distinct from individual fact patterns. *See supra* text accompanying note 9. For an influential discussion of the significance of such depersonalization, see John Noonan’s analysis of the decisions in, and the legal commentary on, *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928), in JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 111-51 (1976).

fairness, efficiency, and predictability.²² Likewise, legal decisionmakers frequently look to nonlegal history as a means of making legal determinations.²³ Negative precedent also relies both on past cases and other historical events. A past legal decision, such as upholding a statute that prohibited women from bartending, may now seem "wrong." Similarly, a decision by a private institution, such as excluding women from attending law school, may also now seem "wrong." Either of these decisions can be cited as an example of a past mistake, and, as the discussion of the *VMI* case will make clear, either can serve as negative precedent.²⁴

II. THE *VMI* LITIGATION: PROVIDING A CONTEXT FOR THE USE OF NEGATIVE PRECEDENT

Negative precedent both argues against contemporary practices and acknowledges historic injuries. Part I presented these objectives as if they were logically distinct. They are not. Using a past example to advocate for a change in the present also implicitly revalues the past. But this phenomenon is hard to understand in the abstract. Justice Ginsburg's majority opinion in *United States v. Virginia*²⁵ demonstrates the use of negative precedent. This Part gives background on the litigation and the treatment of the standard of scrutiny. Parts III, IV, and V illustrate aspects of negative precedent in action.

A. *Litigation in the Lower Courts*

United States v. Virginia received extensive national media coverage and has already spawned a host of law review articles.²⁶ Therefore, I will

22. See, e.g., Schauer, *supra* note 8, at 572 (noting that such reasoning is familiar even in such nonlegal institutions as the family).

23. For example, due process protects "fundamental liberties" that are often defined as those "deeply rooted" in the country's traditions. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). For an influential discussion of the way in which the Equal Protection Clause positions itself against deep-seated traditions while the Due Process Clause is used to maintain such traditions, see Sunstein, *supra* note 16.

24. See *infra* Parts III and IV.

25. 518 U.S. 515 (1996).

26. For a comprehensive treatment of VMI's own history, see Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. CAL. REV. L. & WOMEN'S STUD. 189 (1996). Avery argues that the school created a largely artificial rhetoric of "unchanging" traditions as a strategic element of its defense, but that in fact the school—including its famed adversative method—has evolved greatly over time. For a different perspective on the narrative strategies employed in the case, see Valorie K. Vojdik, *At War: Narrative Tactics in the Citadel and VMI Litigation*, 19 HARV. WOMEN'S L.J. 1 (1996). Vojdik suggests that the school cast itself as a "single-gender" college rather than a traditional male military college to shift the focus away from the exclusion of women and argues

provide only a brief introduction. Founded in 1839, the Virginia Military Institute had never admitted women; when the litigation began, VMI was Virginia's only public single-sex institution of higher learning.²⁷ It had also traditionally been the only Virginia institution whose mission was creating "citizen soldiers."²⁸ To achieve this objective, it developed a unique "adversative method" that featured "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."²⁹

In addition to its adversative method, VMI offered a full selection of liberal arts, sciences, and engineering courses, comparable to—or better than—the curriculum offered at other public colleges and universities in Virginia. Many members of its faculty had Ph.D.s or other advanced degrees, and its library holdings were extensive. VMI graduates traditionally have gone on to achieve a high degree of success in both military and civilian life. Current graduates thus enjoyed access to a "network of business owners, corporations, VMI graduates and non-graduate employers . . . interested in hiring VMI graduates."³⁰ Alumni affection for the school was demonstrated by the generosity of their financial support; VMI boasted the largest per-pupil endowment in the nation.³¹

Between 1988 and 1990, VMI received 347 letters from women inquiring about the possibility of attending the school.³² In 1990, a female high school student who was summarily denied admission to VMI filed a

that that the absence of individual plaintiffs in the VMI litigation disadvantaged the United States because it was unable to harness narrative sympathies. See also Larry Catá Backer, *Reading Entrails: Romer, VMI and the Art of Divining Equal Protection*, 32 TULSA L.J. 361 (1997); Lucinda M. Finley, *Sex-Blind, Separate But Equal, or Anti-subordination? The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089 (1996). For fuller treatments of the history of the case itself and the particular implications that the decision will have for VMI, see, for example, Raymond F. Runyon, Note, *VMI and Virginia Lose Again: United States v. Virginia*, 32 TULSA L.J. 681, 702-05 (1997) (filling in the context for many of the concerns that Justice Scalia expresses in his dissent); Collin O'Connor Udell, Note, *Signaling a New Direction in Gender Classification Scrutiny: United States v. Virginia*, 29 CONN. L. REV. 521 (1996) (situating the decision within gender equal protection jurisprudence); and Shanon M. Gregor, Case Comment, *Constitutional Law—Equal Protection—Gender Discrimination: The Virginia Military Institute Is Given the Opportunity to Create "Citizen-Soldiers" out of Qualified Women*, 73 N.D. L. REV. 323 (1997) (giving a positive reading of the changes required by the decision and recounting the case's history).

27. See *United States v. Virginia*, 518 U.S. at 520. The following background is based on the material that Justice Ginsburg provided in her majority opinion. See *id.* at 520-30, 547-54. The decisions for the two waves of litigation can be found at *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991); 976 F.2d 890 (4th Cir. 1992); 852 F. Supp. 471 (W.D. Va. 1994); and 44 F.3d 1229 (4th Cir. 1995).

28. *United States v. Virginia*, 518 U.S. at 522.

29. *Id.*

30. *Id.* at 552 (quoting *United States v. Virginia*, 852 F. Supp. at 499).

31. See *id.*

32. See *id.* at 523.

complaint with the Attorney General, and the United States sued the Commonwealth of Virginia, VMI, and others responsible for the operation of VMI, alleging that the school's categorical exclusion of women violated the Equal Protection Clause.³³ The proceedings were bifurcated. In the first round of litigation on the liability question, the district court upheld the school's admissions policy,³⁴ but the Fourth Circuit found it unconstitutional. It remanded the case, suggesting that the state might be able to remedy the constitutional violation by establishing "parallel institutions."³⁵

Virginia therefore established the Virginia Women's Institute for Leadership (VWIL), a four-year, publicly funded undergraduate program housed at Mary Baldwin College, a private women's college. While VWIL purportedly shared VMI's mission of producing "citizen soldiers," it did so through a "cooperative method which reinforces self-esteem."³⁶ Mary Baldwin offered considerably fewer science classes, its faculty held significantly fewer degrees, and its endowment was substantially smaller than that of VMI. Justice Ginsburg provided a comparison of the schools' athletic facilities that reads like a parody:

For physical training, Mary Baldwin has "two multi-purpose fields" and "[o]ne gymnasium." VMI has "an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track."³⁷

Despite these differences, the district court and the Fourth Circuit both found that VWIL remedied Virginia's constitutional violation.³⁸

On appeal, there were two questions before the Supreme Court: Did VMI's exclusively male admissions policy violate the Equal Protection Clause? If so, did VWIL provide an adequate remedy?³⁹

33. *See id.*

34. *See United States v. Virginia*, 766 F. Supp. at 1415.

35. *United States v. Virginia*, 976 F.2d at 900.

36. *United States v. Virginia*, 852 F. Supp. at 476.

37. *United States v. Virginia*, 518 U.S. at 552 (internal citations omitted).

38. *See United States v. Virginia*, 852 F. Supp. at 484; 44 F.3d at 1241.

39. *See United States v. Virginia*, 518 U.S. at 530-31.

B. *Skeptical Scrutiny Posits a Presumption of Illegitimacy*

Justice Ginsburg, writing for a six-justice majority, announced the opinion of the Court. Chief Justice Rehnquist filed a brief concurrence, and Justice Scalia wrote a passionate dissent. Each discussed the standard of scrutiny. Justice Ginsburg articulated a “skeptical scrutiny” standard: The state must provide an “exceedingly persuasive justification” to sustain a gender-based classification against an equal protection challenge.⁴⁰ *VWIL*, she found, failed to provide an adequate remedy for the constitutional violation.⁴¹ The Chief Justice agreed with the outcome of the decision but disapproved of Justice Ginsburg’s shift from the traditional articulation of the intermediate scrutiny standard: Gender-based classifications “‘must serve important governmental objectives and must be substantially related to achievement of those objectives.’”⁴² Justice Scalia denounced the changed wording of the standard of scrutiny and argued that since intermediate scrutiny traditionally had required only a “substantial relation between end and means, not a perfect fit,”⁴³ *VMI*’s policy should have passed intermediate scrutiny.⁴⁴

Much has been—and will be—written about how much the skeptical scrutiny standard differs from the original formulation of intermediate scrutiny and what it means for future sex-discrimination claims.⁴⁵ Clearly, Justice Ginsburg intended to nudge the standard toward strict scrutiny.⁴⁶ For the purposes of this Part of the Note, however, it is important only to recognize that the rearticulated standard established a presumption of

40. *Id.* at 531 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-37 & n.6 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

41. *See id.* at 555-56.

42. *Id.* at 558 (Rehnquist, C.J., concurring) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

43. *Id.* at 573 (Scalia, J., dissenting).

44. *See id.* at 576-79. (Scalia, J., dissenting)

45. *See generally* Backer, *supra* note 26, at 365-70 (suggesting that since Justice Ginsburg’s opinion lays the groundwork for a move to strict scrutiny for gender classifications, “the intermediate courts may take the hint and make it increasingly impossible for the high court to contain the language of the opinion”); Christina Gleason, Comment, *United States v. Virginia: Skeptical Scrutiny and the Future of Gender Discrimination Law*, 70 ST. JOHN’S L. REV. 801 (1996) (reviewing the evolution of standards of scrutiny in challenges to gender classifications and suggesting that the Justices are very close to applying strict scrutiny); and Udell, *supra* note 26 (same).

46. *See United States v. Virginia*, 518 U.S. at 532 (“Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men).” (footnote omitted)). Justice Scalia accurately—though perhaps unnecessarily caustically—characterized her treatment of this distinction as potentially misleading: “[Such statements] suggest that we have not already categorically held strict scrutiny to be inapplicable to sex-based classifications.” *Id.* at 574 (Scalia, J., dissenting).

illegitimacy.⁴⁷ Without necessarily raising the standard, it changed the tenor of the analysis. The traditional intermediate scrutiny test posits an impartial observer who is able to weigh a proffered objective to determine whether it is “important” and then assess whether the gender-based classification is “substantially related” to achieving this objective. He strives to remain free of emotional entanglements. The evaluation is quasi-scientific and the law is a set of rules that is applied to a given situation.

The “exceedingly persuasive” test, in contrast, requires that the judge begin with a strong presumption that the gender-based classification is invalid. To persuade means to induce another to embrace a point of view *different from* that which the other originally held.⁴⁸ Thus, the judge must be “biased” against the classification such that only exceedingly convincing objectives can “persuade” him to change his mind. This does not mean that the judge may give free rein to his own emotions nor that he can object to what is in fact an “exceedingly persuasive” justification on the basis of his own personal opinion.⁴⁹ It does mean that he will look at a past example of prejudice and recognize it as wrong even if it is not explicitly discredited. To be effective, Justice Ginsburg’s use of negative precedent requires such a presumption of illegitimacy.

III. NEGATIVE PRECEDENT: UNRAVELING THE CATCH-22

Virginia claimed that the changes needed to include women in the adversative method would be so drastic that the method itself would cease to be effective.⁵⁰ In other words, as the appellate court put it, the situation

47. Justice Ginsburg’s discussion of the standard of scrutiny is also striking in the emphasis it places on the harm caused by the many years in which women were excluded from institutions throughout American history. See *infra* Part IV.

48. “Persuade” means “[t]o induce to undertake a cause of action or embrace a point of view by means of argument, reasoning, or entreaty.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1352 (3d ed. 1992). “Persuade” is distinguished from synonyms “induce,” “prevail,” and “convince” as meaning “to win someone over, as by reasons, advice, urging, or personal forcefulness.” *Id.* (emphasis added).

49. See generally MARTHA C. NUSSBAUM, POETIC JUSTICE, 53-78 (describing the role that “rational emotions” can play in judging).

50. Virginia also claimed that its exclusion of women was justified because single-sex education provides important educational benefits, see *Virginia*, 518 U.S. at 535 (quoting Brief for Cross-Petitioners at 20, *United States v. Virginia*, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107)), and thus the option of single-sex education at VMI was a valuable contribution to the state’s “diversity in educational approaches,” *id.* (quoting Brief for Cross-Petitioners, *supra*, at 25). This argument merged ends and means. That is, to the extent that the Court accepted that single-sex education provides considerable benefits, VMI’s policy obviously was substantially related to achieving this benefit. Justice Ginsburg did not reach the thorny question of the validity of the argument itself. Rather, she found that the argument failed because it was a *post hoc* rationalization. Thus, what would have been a normative evaluation of the “importance” of single-sex schools—and of considerable concern to the other few remaining public single-sex schools—became a straightforward factual inquiry into the genuineness of Virginia’s alleged

was a catch-22: “[W]omen are denied the opportunity [of benefiting from the adversative method] when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.”⁵¹ Women could not win. Rather than directly attack the premises of the catch-22, Justice Ginsburg used historical examples to argue against the legitimacy of the claims through a process of negative inference. Using a “wrong” rule of law from the past, negative precedent argues for the opposite conclusion today. This Part introduces the catch-22 and then engages in a close reading of the opinion to illustrate the use of negative precedent.

A. *The Catch-22*

The so-called catch-22 resulted from the confluence of two related, but logically distinct, sets of “findings” presented by the experts at the first trial.⁵² The first had to do with the appropriateness of the adversative method for women. Sociologists, physiologists, and professional educators who testified on “gender-based developmental differences” suggested that, in general, women would not do well in the adversative method because, while “[m]ales tend to need an atmosphere of adversativeness,” “[f]emales tend to thrive in a cooperative atmosphere.”⁵³ It was established, however, that “some women are capable of all the individual activities required of VMI cadets.”⁵⁴

commitment to providing single-sex options as part of its commitment to diversity among institutions.

Justice Ginsburg carefully qualified her statements about single-sex schools to leave open the possibility that some such schools might pass equal protection scrutiny. *See id.* at 535-36 & nn.7-8 (recognizing that “single-sex education affords pedagogical benefits to at least some students” and thus might fit within a state’s “prerogative evenhandedly to support diverse educational opportunities”). Chief Justice Rehnquist was much more definite about the possibility of single-sex schools. *See id.* at 565 (Rehnquist, C.J., concurring) (suggesting that a state could satisfy equal protection dictates by demonstrating that single-sex schools for men and women respectively offer “the same quality of education and were of the same overall calibre”).

Justice Ginsburg and Chief Justice Rehnquist both considered the relevant category for comparison to be public institutions of higher education, and they found that the historical record shows a clear trend towards dismantling single-sex schools. Since the only modern example of VMI’s purported interest in diversity was VMI itself, the Justices were unpersuaded by the state’s argument. *See id.* at 535-40 (majority opinion); *id.* at 560-64 (Rehnquist, C.J., concurring). Justice Scalia, by contrast, assumed that the relevant category was institutions—both public and private—in Virginia that receive public support. Noting that there were four private women’s colleges that receive some measure of state support, he argued that the state’s claim should pass muster. *See id.* at 576-79 (Scalia, J., dissenting).

51. *United States v. Virginia*, 976 F.2d 890, 897 (4th Cir. 1992) (footnote omitted).

52. *United States v. Virginia*, 518 U.S. at 541. The quotation marks qualifying “findings” are Justice Ginsburg’s.

53. *United States v. Virginia*, 766 F. Supp. 1407, 1434-35 (W.D.Va. 1991).

54. *Id.* at 1412.

The second set of “findings” was an assessment of the magnitude of the changes that VMI would have to make to include women. Administrators at VMI and the federal military academies testified that the school would have to modify the physical training requirements, the traditional absolute absence of privacy, and the adversative approach.⁵⁵ The Fourth Circuit (and Justice Scalia) concluded that these changes would be so grave as to make the program unworkable.⁵⁶ Moreover, the appellate court apparently feared that allowing women to participate in the adversative method would “destroy . . . any sense of decency that still permeates the relationship between the sexes.”⁵⁷ Again, however, some other portions of the stipulated facts suggested that the required changes would not be unduly drastic,⁵⁸ and VMI’s success with racial integration after making similar protests of impossibility showed that the adversative method might be more flexible than Virginia claimed.⁵⁹

The two sets of findings can be rearticulated more generally: (1) learning in this method would be harmful for women; and (2) admitting women would be harmful for the institution and for the relation between the sexes. It was impossible to assess the legitimacy of these claims in the course of the litigation. Until (and unless) women actually attended VMI, there was no way to know exactly how women would respond to VMI’s unique method, nor was there any way to know exactly how much any required changes to the method would affect the school’s ability to realize

55. *Id.* at 1437-42.

56. *See* *United States v. Virginia*, 976 F.2d at 896-97; 518 U.S. at 566 (Scalia, J., dissenting).

57. *United States v. Virginia*, 44 F.3d 1229, 1239 (4th Cir. 1995).

58. Following the Supreme Court’s decision requiring integration of a female-only nursing school in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), VMI commissioned a Mission Study to evaluate its own status. The district court’s Findings in Connection with the 1990 Mission Study included evidence from West Point suggesting that the changes might be handled without too much difficulty:

West Point provided generally favorable information concerning coeducation: (1) male and female cadet attrition occurs for the same reasons; (2) resentment of female cadets by male cadets has faded and “[a]cceptance is gained on the basis of individual achievement”; (3) VMI graduates will “probably be considered disadvantaged in the coed Army” because they do not come from a coed environment; (4) the introduction of women did not significantly change West Point; (5) women perform and compete as well as men in cadet basic training, cadet field training, and cadet advanced training, which are summer training programs; (6) training for men and women is comparable, but not identical, taking into account gender-based differences; (7) female cadets take the same physical education courses as men, except that they take self defense instead of boxing and wrestling; (8) the cost of educating a cadet did not rise significantly with the admission of women; (9) there had been “no changes in the curriculum, procedures, or facilities of the academic program because of the admission of women”; (10) female cadets have had no trouble with the West Point honor system. “Women are underrepresented in honor offenses,” and “[t]he system is applied equally to men and women”; and (11) gender integration has been successful, and “women’s accomplishments have excelled all anticipated levels.”

United States v. Virginia, 766 F. Supp. at 1428 (quoting U.S. Ex. 68).

59. *See* *United States v. Virginia*, 518 U.S. at 546 n.16.

its mission. As the trial made clear, experts could be marshaled on both sides of the debate.

Rather than basing her decision on the contradictory testimony provided by the experts, Justice Ginsburg took a different approach: She used negative precedent. Equal protection principles prohibit state actors from relying on “‘overbroad’” generalizations based on “‘fixed notions concerning the roles and abilities of males and females’” to make “‘judgments about people that are likely to . . . perpetuate historical patterns of discrimination.’”⁶⁰ Thus, showing that Virginia’s proffered justifications relied on historical patterns of discrimination bolstered the Government’s case that those justifications were illegitimate.

B. *The Adversative Method Is Not Appropriate for Women*

Justice Ginsburg began by addressing the first premise: Women should be protected from the adversative method.⁶¹ She noted that in 1839, when VMI was founded, higher education in general (including of course the adversative method) was “considered dangerous for women.”⁶² This was a purely descriptive statement; it expressed neither approval nor disapproval for the premise.

Justice Ginsburg supported the statement with a selection of quotations from nineteenth-century medical experts. First, she summarized the findings of the famous Dr. Edward Clarke:

Dr. Edward H. Clarke of Harvard Medical School, whose influential book, *Sex in Education*, went through 17 editions, was perhaps the most well-known speaker from the medical community opposing higher education for women. He maintained that the physiological effects of hard study and academic competition with boys would interfere with the development of girls’ reproductive organs.⁶³

And then she quoted directly from his book:

60. *Id.* at 541-42 (quoting *Mississippi Univ. for Women*, 458 U.S. at 725; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994)).

61. Justice Ginsburg actually reviewed the history of women’s education in reference to the state’s proffered diversity justification, *see supra* note 50, but her treatment of the issue also discredited Virginia’s catch-22 claims.

62. *Id.* at 536.

63. *Id.* at 536 n.9.

“[I]dentical education of the two sexes is a crime before God and humanity, that physiology protests against, and that experience weeps over.”⁶⁴

She went on to quote statements from two other contemporary experts, Dr. Maudsley:

“It is not that girls have not ambition, nor that they fail generally to run the intellectual race [in coeducational settings], but it is asserted that they do it at a cost to their strength and health which entails life-long suffering, and even incapacitates them for the adequate performance of the natural functions of their sex.”⁶⁵

and Dr. Meigs:

[A]fter five or six weeks of “mental and educational discipline,” a healthy woman would “lose . . . the habit of menstruation” and suffer numerous ills as a result of depriving her body for the sake of her mind.⁶⁶

Justice Ginsburg presented each of these assertions without qualification. They were simply statements made by experts about the ability of women to learn with men. Now consider a finding of fact based on the testimony offered by the school’s expert witnesses, Dr. Richardson and Dr. Riesman:

Given these developmental differences females and males characteristically learn differently. Males tend to need an atmosphere of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor. Females tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students.⁶⁷

In 1873, Dr. Clarke asserted that “academic competition with boys would interfere with the development of girls’ reproductive organs”; in 1874, Dr. Maudsley asserted that girls “run the intellectual race . . . at a cost to their strength and health”; and in 1991, Dr. Richardson and Dr. Riesman gave testimony suggesting that males need an “atmosphere of adversativeness” while females need a “cooperative atmosphere.” Although the modern

64. *Id.* (quoting EDWARD H. CLARKE, *SEX IN EDUCATION* 127 (Boston, James R. Osgood & Co. 2d ed. 1873)).

65. *Id.* (quoting HENRY MAUDSLEY, *SEX IN MIND AND IN EDUCATION* 17 (n.p. 1874)).

66. *Id.* (quoting CHARLES D. MEIGS, *FEMALES AND THEIR DISEASES* 350 (n.p. 1848)).

67. *United States v. Virginia*, 766 F. Supp. 1407, 1434 (W.D. Va. 1991) (predicating a factual finding in part on Riesman Dep. 63-65, 95, 106-07; and on Richardson’s testimony at Tr. 684-87, 692-93). Justice Ginsburg quoted from this portion of the District Court’s opinion. *See United States v. Virginia*, 518 U.S. at 541.

assertion is somewhat different in tone, its substance is strikingly similar to the nineteenth-century medical opinions.

Each of the nineteenth-century doctors was well-respected in his day, just as VMI's experts are respected by at least some sectors of the medical community today. Justice Ginsburg quoted from both sets of experts and emphasized the parallelism. She listed the credentials of the nineteenth-century Dr. Clarke purely descriptively: He was a Harvard Medical School professor and a well-known speaker who wrote an influential and widely-read book. These credentials would still qualify him as an "expert." In fact, Dr. Riesman's credentials echo those of his nineteenth-century counterpart: He, too, holds degrees from Harvard and has written several influential books.⁶⁸ Justice Ginsburg thus struck a blow at the legitimacy of the expert testimony on which the catch-22 was constructed. Her examples showed that degrees and books did not—and do not—guarantee truthful conclusions.

All these experts claimed that certain gender-based developmental differences made some modes of learning inappropriate for women. A century ago such statements were used to deny women access to almost all forms of higher education; VMI sought to use them in the same way today to deny access to the adversative method. But readers will recognize that the nineteenth-century experts were wrong. Allowing women to learn with men neither interferes with their reproductive functions nor endangers their health. More than one hundred years of coeducation have made this clear. Justice Ginsburg suggested that women who want to learn at VMI are members of the more general category of women who want to learn with men. Disallowing integrated learning because experts think it may be bad for the women is wrong now just as it was wrong in the past. The negative precedent discredits the present claims.

C. *The Adversative Method Would Be Destroyed by the Inclusion of Women*

Justice Ginsburg also used negative precedent to discredit the other half of the catch-22—VMI's claims that allowing women to attend the school would destroy the institution and the remaining sense of decency between

68. The District Court established Dr. Riesman as an expert:

Dr. David Riesman, a professor of sociology at Harvard University, testified as a VMI expert on education. He holds a bachelor's degree from Harvard College earned in 1931, and a law degree from Harvard Law School earned in 1934. . . . His publications include *The Lonely Crowd* (1950), *Constraint and Variety in American Education* (1956), *The Academic Revolution* (with Christopher Jencks, 1968), and *On Higher Education*.

United States v. Virginia, 766 F. Supp. at 1416-17.

the sexes. She began her treatment of the issue with a wry characterization of the problem:

The *notion* that *admission* of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment *hardly* proved, a prediction *hardly* different from other "self-fulfilling prophec[ies]" once routinely used to deny rights or opportunities.⁶⁹

The wording of this passage is rich with double-entendre and understated implications. "Notion" speaks to precedent, evoking the Court's self-given mandate to smoke out and invalidate gender classifications that are based on "fixed notions concerning the roles and abilities of males and females."⁷⁰ The word itself carries an aura of fancifulness and vagueness with a tinge of old fogeyism; it does not suggest a well-reasoned proposition.⁷¹ "Admission" is a similarly loaded term: It refers to the literal possibility that women will be allowed to enter the school, but it also suggests that VMI may have feared that the "admission"—in the sense of acknowledgment or concession—of women's abilities could downgrade the school by puncturing the carefully constructed myths of male superiority on which the system is founded.⁷² "Hardly" likewise plays two roles, and its significance is emphasized by the fact that it is repeated. On the one hand, it offers a normative assessment of the great difficulty—in the sense of "hard" going—of proving such an argument. At the same time, it makes Justice Ginsburg's own argument that VMI's protestations of impossibility

69. *United States v. Virginia*, 518 U.S. at 542-43 (emphasis added) (footnotes and citation omitted).

70. *See id.* at 541 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

71. "Notion" means a "thought or idea" but is distinguished from other synonyms for "idea" as one that is "vague, general, or even fanciful." *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 895 (3d ed. 1992). "Notion" has a secondary meaning of a "fanciful impulse; a whim." *Id.* at 1238.

72. Jack Balkin has persuasively argued that status groups—which in the context of the *VMI* litigation break down along gender lines according to the experts' statements that compare and contrast their learning ability—fiercely compete to keep an existing status hierarchy because status is a zero-sum game: A gain in the status of one group is a relative decrease in the status of those defined in reference to it. *See J.M. Balkin, The Constitution of Status*, 106 *YALE L.J.* 2313, 2328 (1997). For a less theoretical perspective, compare Justice Ginsburg's characterization of the school's protestations to a tongue-in-cheek passage from Virginia Woolf's *A Room of One's Own*:

Women have served all these centuries as looking-glasses possessing the magic and delicious power of reflecting the figure of man at twice its natural size. . . . That is why Napoleon and Mussolini both insist so emphatically upon the inferiority of women, for if they were not inferior, they would cease to enlarge. . . . How is [man] to go on giving judgement, civilising natives, making laws, writing books, dressing up and speechifying at banquets, unless he can see himself at breakfast and dinner at least twice the size he really is?

VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 53-54 (Hogarth Press 1929).

are like other self-fulfilling prophecies of doom—prophecies that turned out to be false.

The introductory sentence's form thus mirrors its function: It introduces negative precedent that works through a process of double entendre. Negative precedent stated (with unshakeable confidence) as "right" is understood as "wrong." Again, the negative precedent is presented without qualification or disclaimer. The following examples are privileged as lengthy block quotations in the text of the opinion:

On women entering law, 1876: Their child-rearing responsibilities "forbid[] that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice . . . is to any extent the outgrowth of . . . 'old fogeyism[.]' . . . [I]t arises rather from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to *grade up* the profession."⁷³

On women entering law school, 1925: Columbia Law School's faculty "never maintained that women could not master legal learning. . . . No, its argument has been . . . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!"⁷⁴

On women entering medical school, 1869: "'God forbid that I should ever see men and women aiding each other to display with the scalpel the secrets of the reproductive system.'"⁷⁵

These vintage examples fit within the same general category as the evidence given by Virginia's witnesses: They are statements by experts who acknowledge that women are capable of participating at some level in a given activity but who assert that this level of participation would have adverse effects on the profession and on the relation between the sexes. Throughout history, such statements have been used to keep women out of certain occupations and activities; VMI sought to use them in the same way. Eventually, however, each of these professions was successfully integrated and the naysayers' predictions of dire consequences were

73. *United States v. Virginia*, 518 U.S. at 543 (quoting *In re Dorsett*, SYLLABI, Oct. 21, 1876, at 5 (Minn. C.P. Hennepin County, 1876)).

74. *Id.* at 543-44 (quoting *NATION*, Feb. 18, 1925, at 173).

75. *Id.* at 544 (quoting MARY ROTH WALSH, *DOCTORS WANTED: NO WOMEN NEED APPLY*, 121-22 (1977) (quoting Edward H. Clarke, *Medical Education of Women*, 4 *BOSTON MED. & SURG. J.* 345, 346 (1869))).

discredited. VMI's claims about the detrimental effect that the admission of women would have on the adversative method were "hardly different" from such false prophecies. Thus, by analogy, Justice Ginsburg suggested that VMI's claims were illegitimate.⁷⁶

Even without qualification, each of the sex-based generalizations listed above can be immediately recognized as inaccurate. Women were able to enter law and medicine successfully, and the institution and practice of the professions remained unsullied. Thus, assessing the examples and recognizing their erroneousness demonstrates how to read such assertions with the "skeptical scrutiny" that Justice Ginsburg's formulation of the intermediate scrutiny test requires. The dated—and dramatically disproved—examples prepare the reader to evaluate with a similarly skeptical eye more recent forms of discrimination that are also purportedly justified by the requirements of the industry and the necessity of maintaining decency.

Justice Ginsburg then provided one modern example of such exclusion in the text of the opinion:

More recently, women seeking careers in policing encountered resistance based on fears that their presence would "undermine male solidarity," deprive male partners of adequate assistance, and lead to sexual misconduct. Field studies did not confirm these fears.⁷⁷

Warnings of the supposed dangers of admitting women into the federal service academies (the experiences that many would find most relevant to evaluating the legitimacy of VMI's claims) are relegated to a footnote.⁷⁸ Justice Ginsburg showed that like the doctors, lawyers, and policemen, the military officers predicted that admitting women to the academies would downgrade the profession: "It is my considered judgment that the

76. Justice Ginsburg made the connection between the historical assertions and the modern assertions explicit in a footnote that followed the introductory statement about self-fulfilling prophecies. In the note, she moved directly from quoting the state's expert witness David Riesman on the likelihood that the admission of women would eventually cause VMI to drop the adversative system all together, *see id.* at 542 n.12 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1413 (W.D. Va. 1994)), to a 19th-century Virginia state senator's depiction "in burning eloquence [of] the terrible consequences" that a law protecting married women's property rights would produce. *Id.* (quoting 10 EDUC. J. VA. 213 (1879)). A year after the bill passed, the bill's sponsor reported triumphantly "that 'not one of [the forecast 'terrible consequences'] has or ever will happen, even unto the sounding of Gabriel's trumpet.'" *Id.*

77. *Id.* at 544 (citations omitted) (quoting FRANCES HEIDENSOHN, *WOMEN IN CONTROL?* 201 (1992); and citing PETER B. BLOCH & DEBORAH ANDERSON, *POLICEWOMEN ON PATROL: FINAL REPORT* (1974); CATHERINE MILTON ET AL., *WOMEN IN POLICING* 32-33 (1974)).

78. *See id.* at 542 n.11.

introduction of female cadets will inevitably erode this vital atmosphere";⁷⁹ "[a]dmitting women to West Point would irrevocably change the Academy. . . . The Spartan atmosphere—which is so important to producing the final product—would surely be diluted, and would in all probability disappear."⁸⁰

The modern examples cannot stand on their own as negative precedent. There is not yet consensus about the rightness or wrongness of the predictions. (In fact, the district court and Justice Scalia both relied on the modern military testimony as grounds for continuing VMI's exclusionary practices.)⁸¹ Thus, Justice Ginsburg did not leave the officers' predictions of doom unqualified; rather, she carefully provided "proof" of their inaccuracy. Female cadets have graduated at the top of their class at each federal military academy;⁸² women have been raised to positions of responsibility;⁸³ and male cadets have become increasingly accepting of women and increasingly comfortably seeing them not as "women" but as "classmates."⁸⁴ These modern illustrations have neither the prominence in the opinion nor the rhetorical power of the past examples. Their strength comes from the analogy that Justice Ginsburg has already constructed: They fit within a universe of negative precedent that she has shown to be discredited.

Justice Ginsburg's final statement of the issue was understated:

Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded. The 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.⁸⁵

79. *Id.* (quoting *Hearings on H.R. 9832, H.R. 10705, and Related Bills Regarding Equal Admission to the Service Academies Before the Subcomm. No. 2 on Military Personnel of the House Comm. on Armed Servs.*, 93rd Cong. 137 (1975) (statement of Lt. Gen. Albert P. Clark, Superintendent of U.S. Air Force Academy)).

80. *Id.* (quoting *Hearings on H.R. 9832, H.R. 10705, and Related Bills Regarding Equal Admission to the Service Academies Before the Subcomm. No. 2 on Military Personnel of the House Comm. on Armed Servs.*, 93rd Cong. 165 (1975) (statement of Hon. Howard H. Callaway, Secretary of the Army)).

81. *See, e.g.*, *United States v. Virginia*, 766 F. Supp. at 1412; 518 U.S. at 589 n.5 (Scalia, J., dissenting).

82. *See United States v. Virginia*, 518 U.S. 515, 544 n.13 (1996).

83. *See id.* at 544 n.14.

84. *Id.* at 545 n.15 (quoting A. VITTERS, U.S. MILITARY ACADEMY, REPORT OF ADMISSION OF WOMEN 84 (1978)).

85. *Id.* at 544-45 (citations omitted).

As noted at the outset of this discussion, it was impossible in the course of the litigation to assess accurately the legitimacy of the catch-22. Justice Ginsburg did not (and could not) conclusively prove that the VMI administrators were wrong. Rather, her negative construction (“the fears may not be solidly grounded”) summed up the argument she made from negative precedent. She laid out examples showing that VMI’s claims that the admission of women would downgrade the school fit within a larger category of predictions of doom that have been disproved. The inference is clear. The negative precedent discredits the present claims.

IV. NEGATIVE PRECEDENT: RECASTING THE PAST

Part III described how the past can be used to argue, through a process of negative inference, against present claims. Part IV focuses on the backward-looking use of negative precedent. As discussed in Part I, precedent promotes fairness, predictability, and efficiency, while also expressing society’s intergenerational memory. In many cases, however, the fairness, predictability, and efficiency objectives have given way to other considerations—such as a changing understanding of equality—thereby rendering the past decisions no longer determinative. The standard of scrutiny applied to equal protection challenges to gender-based classifications obviously has evolved over the past century. Historical practices that once passed rational basis review might now be decided differently under intermediate or skeptical scrutiny. Does the history that occurred under the past legal regime still matter? Should it affect decisions made today?

If legal decisions are viewed purely as legal rules, there is no reason to refer to outdated decisions. Indeed, acknowledging that change has occurred in the past suggests the possibility of change in the future, thus undermining the illusion of stability that the rule of precedent promotes. In other words, precedent advances efficiency and predictability best by ignoring no-longer-controlling case law. But a legal decision also has a “historical” impact. Constructive amnesia thus has costs: It cuts off the present from the community of the past. Negative precedent provides an alternative approach that recognizes the effects of a decision that now seems wrong. A comparison Chief Justice Rehnquist’s concurrence in *United States v. Virginia* to Justice Ginsburg’s majority opinion illustrates these two approaches.

Chief Justice Rehnquist took the formalistic legal approach. He began his concurrence by emphasizing the period in which the standard of scrutiny had been (relatively) stable:

Two decades ago in *Craig v. Boren* we announced that “[t]o withstand constitutional challenge, . . . classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” We have adhered to that standard of scrutiny ever since.⁸⁶

This initial statement of the intermediate scrutiny standard suggests that it emerged out of thin air; it promotes the illusion of an unchanging rule. The Chief Justice then provided a solid column of citations, completely denuded of narrative, to subsequent cases in which this standard was used.⁸⁷ Again, there was no hint of the women affected by this standard; there was no hint of the “historical” impact of any given decision. This was purely a “legal” rule—no more, no less.

Of course, the institution of VMI predated intermediate scrutiny. Looking at history through a legal lens, however, Chief Justice Rehnquist concluded that the institution’s historical actions should be ignored. He began by observing, accurately, that VMI’s policies were not unconstitutional in 1839, when the “adoption of the Fourteenth Amendment, with its Equal Protection Clause, was nearly 30 years in the future” and when “[t]he interpretation of the Equal Protection Clause to require heightened scrutiny for gender discrimination was yet another century away.”⁸⁸ After briefly reviewing rational basis review, he noted that *Reed v. Reed*,⁸⁹ the first case to uphold a woman’s challenge to a gender classification under rational basis review, was a seminal case. But he asserted that since *Reed* had “nothing to do with admissions to any sort of educational institution,” officials at VMI were justified in assuming that the decision did not affect the constitutionality of the school’s single-sex status.⁹⁰ He concluded that the Court should not consider any evidence that predated the Court’s decision in *Mississippi University for Women v. Hogan*,⁹¹ reasoning that since this was the first case “actually involving a single-sex admissions policy in higher education” it was the first case that “place[d] Virginia on notice that VMI’s men-only admissions policy was open to serious question.”⁹²

Chief Justice Rehnquist’s concern with “notice” reflects the challenge posed by the evolution of legal rules. A system premised on precedent promises consistent decisions that allow institutions to plan around a predictable set of rules. To be “fair” to the institutions, actions that predate

86. *Id.* at 558 (Rehnquist, C.J., concurring) (citation omitted).

87. *See id.* at 558-59 (Rehnquist, C.J., concurring).

88. *Id.* (Rehnquist, C.J., concurring).

89. 404 U.S. 71 (1971).

90. *United States v. Virginia*, 518 U.S. at 560 (Rehnquist, C.J., concurring).

91. 458 U.S. 718 (1982).

92. *United States v. Virginia*, 518 U.S. at 561 (Rehnquist, C.J., concurring).

the legal standard should not be held against them. From a purely formal standpoint, the Chief Justice has a point.⁹³ Certainly, VMI could not be held legally accountable—in the sense of being assessed damages—for the historical actions it performed under the color of law. But the effects of an action are real, whether they are judged constitutional or unconstitutional. Today, exclusion on the basis of sex is seen as causing a harm; in the past, such exclusion, while legal, caused the same harm. Without imposing retroactive liability, negative precedent acknowledges past injuries caused by discrimination that now seems unacceptable.

Where Chief Justice Rehnquist implicitly relied on the fiction of a static rule of law, Justice Ginsburg presented heightened scrutiny as emerging out of rational basis review: “Today’s skeptical scrutiny of official action denying rights or opportunities based on sex *responds* to volumes of history,”⁹⁴ for, as she reminded us, “our Nation has had a long and unfortunate history of sex discrimination.”⁹⁵ She went on to spell out this history in a fair amount of detail, emphasizing the large part of this history during which women were excluded: “Through a century plus three decades and more of that history,” women were denied the vote.⁹⁶ The repeated conjunctions joining the discrete units of time rhetorically draws out the time: a century *plus* three decades *and* more sounds significantly longer than 133 years. She added that, for another half century, gender classifications that withheld opportunities from women were upheld so long as “any ‘basis in reason’ could be conceived.”⁹⁷ Again the wording she chose underscored her point that this standard was exceedingly low: Accepting “any ‘basis in reason’ [that] *could be conceived*” sounds much easier to satisfy than a “rational-basis review.”

Reaching the portion of the story where things began to change, Justice Ginsburg again stressed both that government bodies, under the color of law, denied women equal opportunities and that, finally, the Court played a role in striking such statutes down: “In 1971, for the first time in our Nation’s history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws.”⁹⁸ Justice Ginsburg gave examples of a few of the cases following *Reed* in which the

93. Although one could quibble with Chief Justice Rehnquist’s assertion that the starting date should be *Hogan* rather than *Reed* or, at the very least, *Craig*, which announced heightened scrutiny for all classifications on the basis of gender. Note that this is a question of the scope of a shift in the law; the question is how broadly the universe of Xs should be defined. See *supra* text accompanying notes 9, 19.

94. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (emphasis added).

95. *Id.* (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

96. *Id.*

97. *Id.* (citing *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)).

98. *Id.* at 532 (citing *Reed v. Reed*, 404 U.S. 71, 73 (1971)).

Court struck down gender classifications.⁹⁹ Whereas Chief Justice Rehnquist included an imposing column of bare case citations that emphasized the legal rule, Justice Ginsburg identified a few examples of intermediate scrutiny and included with each citation a relatively lengthy parenthetical providing the context of the case and the language the Court used to define the injury such discrimination caused.¹⁰⁰ Rather than subscribing to the myth of an unchanging rule, Justice Ginsburg underlined the long period during which the now controlling intermediate scrutiny standard was not in operation and the considerable effect that the change had for women in all aspects of society.

The contrast between Chief Justice Rehnquist's characterization of the traditional intermediate scrutiny standard as an authoritative "announcement" in a vacuum and Justice Ginsburg's characterization of the standard as a "response" to volumes of history probably stems in part from the emphasis Justice Ginsburg placed on the "exceedingly persuasive" language. The Chief Justice recognized that the skeptical scrutiny standard is—at least arguably—more stringent than the traditional intermediate scrutiny test, and he did not want the standard raised. He therefore wanted to stress the static nature of that rule. Justice Ginsburg, by contrast, seems to have advocated nudging the standard towards strict scrutiny. Spelling out the move from complete disregard for women to rational basis review to intermediate scrutiny built momentum and thus bolstered her suggestion that the Court may be close to employing strict scrutiny for gender-based classifications.¹⁰¹ But the contrast also reveals a deeper divide about the appropriate application of the legal rule when the legal standard has shifted. Chief Justice Rehnquist's approach emphasized the "legal" import of the past decisions; nothing that predated the current rule was relevant. Justice Ginsburg's approach emphasized the "historical" effect of the past decisions.

The key here is not just that rational basis review permitted decisions that would now be considered to have been based on unreasonable prejudice, but also that the courts themselves enforced societal discrimination. Justice Ginsburg illustrated this by citing *Goesaert v. Cleary*¹⁰² as an example of the now-rejected rational basis review.¹⁰³

99. See *id.* (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 462-63 (1981); *Stanton v. Stanton*, 421 U.S. 7, 95 (1975)).

100. This technique supplies narrative weight that otherwise would be entirely lacking in the Government's case because of the absence of individual plaintiffs. Cf. *Vojdik*, *supra* note 26, at 8-12 (arguing that the Government was disadvantaged because it was unable to use narrative to engender sympathy).

101. See *supra* note 46.

102. 335 U.S. 464 (1948).

103. See *United States v. Virginia*, 518 U.S. at 532. Chief Justice Rehnquist, responding to Justice Ginsburg's *Goesaert* reference, dismissed it as a "now abandoned view" that was not

See, e.g., Goesaert v. Cleary (rejecting challenge of female tavern owner and her daughter to Michigan law denying bartender licenses to females—except for wives and daughters of male tavern owners; Court would not ‘give ear’ to the contention that ‘an unchivalrous desire of male bartenders to . . . monopolize the calling’ prompted the legislation).¹⁰⁴

Her wording underlined that the Court played an active role in allowing sex discrimination to continue: “[The] Court *would not ‘give ear’* to the [women’s] contention.”¹⁰⁵ For Justice Ginsburg, *Goesaert* is negative precedent. Women who wanted to tend bar, like women who wanted to become doctors or lawyers, were denied an opportunity solely on the basis of their sex. Under intermediate scrutiny, a court would have found that this Michigan statute violated equal protection; under rational basis review, however, the Court found that it did not. The changing legal standard does not change the historical truth: The exclusion injured women. Chief Justice Rehnquist ignored a history of discrimination to promote formal legal fairness; Justice Ginsburg emphasized a history of discrimination to recognize real historic wrongs.

V. THE ABSOLUTE VALUE OF PRECEDENT

As discussed in Part IV, Justice Ginsburg’s opinion demonstrated that the country’s history of discrimination was explicitly sanctioned by the judicial and political institutions. Yet obviously there are other aspects of the country’s history that are worth preserving. By implicitly acknowledging that the dictates of the past need not be followed unquestioningly, negative precedent allows the possibility of a reference to history that both recognizes past achievements and acknowledges past mistakes. This Part begins by demonstrating that the past is neither inherently “positive” nor “negative” and that a single example may be

“mention[ed]” in—and implicitly therefore not connected to—*Reed’s* “brief opinion.” *Id.* at 560, 561 (Rehnquist, C.J., concurring). For him, *Goesaert* was irrelevant. *See also infra* text accompanying note 107 (arguing that inherent in an example presented as negative precedent is the danger that it could be read as positive precedent).

104. *United States v. Virginia*, 518 U.S. at 531 (citation omitted).

105. In the majority opinion for the *Hogan* case, Justice O’Connor similarly used *Goesaert* as negative precedent:

History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function. . . . [T]he Court in *Goesaert v. Cleary* upheld a legislature’s right to preclude women from bartending, except under limited circumstances, on the ground that the legislature could devise preventive measures against ‘moral and social problems’ that result when women, but apparently not men, tend bar.

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 n.10 (1982) (citation omitted).

traditional precedent to some and negative precedent to others. It then contrasts Justice Scalia's homily to tradition with Justice Ginsburg's story of state-sanctioned exclusion, concluding that a richer understanding of tradition as *both* positive and negative allows progress without requiring a radical disassociation from the past.¹⁰⁶

Since history's meaning is inherently contestable, the use of negative precedent can backfire. To be effective, negative precedent must establish both that a given past decision was wrong and that a current controversy is relevantly similar to the past decision. The argument can fail at either of these steps. First, an example presented as negative precedent could be read as positive precedent.¹⁰⁷ While this outcome may be particularly likely where there is not consensus about the "wrongness" of a given decision, standards of scrutiny should help control the valence of such examples. In other words, skeptical scrutiny posits a presumption of illegitimacy that should disqualify challenged classifications that are based on anachronistic assumptions about the capabilities of women or other protected classes. Second, a reader could recognize that the past decision was discredited but not accept that the current situation was relevantly similar. Ironically, this danger may be greatest where the past decision is most clearly rejected: A current contested practice may not look particularly "evil" when compared to past decisions that are now considered to have been egregious mistakes.¹⁰⁸ Either of these possible misreadings is potentially significant. Parts III and IV demonstrate, however, that an argument from negative precedent offers benefits that can outweigh the risks.

106. See generally Bartlett, *supra* note 2 (arguing that feminists should understand tradition and change as mutually embodied rather than as opposites).

107. For example, Justice Ginsburg used *Goeseart v. Cleary* in her discussion of the standard of scrutiny as a marker against which to measure change. See *United States v. Virginia*, 518 U.S. at 531; see also *supra* text accompanying notes 103-105 (analyzing Justice Ginsburg's use of *Goeseart*). Justice Scalia reacted to Justice Ginsburg's push to move the standard toward strict scrutiny by stating that if the standard were open to reconsideration, the "stronger argument" would be for returning to rational basis review because it was "routinely applied" through much of our history. *United States v. Virginia*, 518 U.S. at 575 (Scalia, J., dissenting). For Justice Ginsburg, *Goeseart* was negative; for Justice Scalia, it was positive. Since it is unlikely that rational basis review will be reinstated for gender-based classifications, Justice Ginsburg's use of *Goeseart* was rather safe.

108. In an article exploring the shifting rhetoric of status regulation, Reva Siegel argued that retrospective condemnation of past decisions (such as the Supreme Court's recent statement that "*Plessy* was wrong the day it was decided," *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992)) may exonerate current practices. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1111-13 (1997). This is properly understood as a failed argument from negative precedent, and Siegel's insight underlines the necessity of clearly establishing categories of relevance. Cf. Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 182-84 (1998) (arguing that depicting 19th-century racism as a pseudo-scientific phenomenon unrelated to modern racism unjustifiably allows modern society to distance itself from the past).

The reverse phenomenon may be true as well: A past example presented as a positive precedent may actually strike some as a negative precedent. Justice Scalia, convinced that the Court's decision marked the death of VMI,¹⁰⁹ ended his dissent with a eulogy. Speaking with yearning of the past as a time of "old-fashioned concepts" like "manly 'honor,'" he paid homage to "The Code of a Gentleman" found at the back of a booklet traditionally given to the first-year cadets:

"Without a strict observance of the fundamental Code of Honor, no man, no matter how 'polished,' can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader, he is the defender of the defenseless and the champion of justice . . . or he is not a Gentleman.

A Gentleman . . .

Does not speak more than casually about his girl friend.

Does not go to a lady's house if he is affected by alcohol.

....

Does not hail a lady from a club window.

A gentleman never discusses the merits and demerits of a lady.

....

Does not slap strangers on the back nor so much as lay a finger on a lady.

....

A Gentleman can become what he wills to be . . . [.]”¹¹⁰

Justice Scalia recognized that these sentiments are somewhat anachronistic, but he nevertheless mourned their passing:

I do not know whether the men of VMI lived by this Code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.¹¹¹

Justice Scalia included the Code in his opinion as a quasi-precedent, as a tradition from the past worth preserving. But he was overbroad in his endorsement. For many readers, men and women both, the Code itself *is* negative precedent—and the fact that VMI still purported to live by it

109. See *United States v. Virginia*, 518 U.S. at 566 (Scalia, J., dissenting) ("Today the Court shuts down an institution that has served the people of the Commonwealth with pride and distinction for over a century and a half.").

110. *Id.* at 602-03 (Scalia, J., dissenting). These quotations are selectively edited from the text of the Code of the Gentleman that Justice Scalia provided.

111. *Id.* at 603 (Scalia, J., dissenting).

strengthened the case against the school. Women do not need to be protected by the descendant of the knight, the crusader, the champion of justice. The world of the Code is a world of "‘romantic paternalism,’ which, in practical effect, put women, not on a pedestal, but in a cage."¹¹² Equal protection jurisprudence instructs judges to eradicate, rather than glorify, such vestiges of romantic paternalism.

At the same time, "honor" still merits respect. There are aspects of the Code—and, more generally, of the school and of the tradition out of which it came, that are worth preserving. Negative precedent allows reference to a past tradition without requiring conservative adherence to its dictates.¹¹³ Citing historical precedent both for male-only military schools and for single-sex education in general, Justice Scalia concluded: "The all-male *constitution* of VMI comes squarely within such a governing tradition," and thus he claimed that interpreting the Equal Protection Clause to require coeducation is "not the interpretation of the *Constitution*, but the creation of one."¹¹⁴ This was clearly meant as an insult, but his wording (perhaps unintentionally) serves as a reminder that an all-male "Constitution" also sits squarely within our "governing tradition." Justice Ginsburg offered a richer understanding of the country's "governing tradition," one that recognized that it is neither entirely positive nor entirely negative.

Justice Ginsburg began her analysis of the case by noting that for more than a century, "women did not count among voters composing 'We the People.'"¹¹⁵ Her first footnote in this section quoted Thomas Jefferson as stating "the view prevailing when the Constitution was new":

"Were our State a pure democracy . . . there would yet be excluded from their deliberations . . . women, who, to prevent depravation of morals and ambiguity of issue, should not mix promiscuously in the public meetings of men."¹¹⁶

Her final footnote mirrored the first. She quoted John Adams similarly describing the dangers of opening up the political process to women:

112. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). Such stereotypes also limit men's options. For example, *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the closest precedent for the VMI decision, was an effort by a man to gain access to an all-female nursing school.

113. Cf. *United States v. Virginia*, 518 U.S. at 568 (Scalia, J., dissenting) ("[I]n my view the function of this Court is to *preserve* our society's value regarding (among other things) equal protection, not to revise them.").

114. *Id.* at 569, 570 (Scalia, J., dissenting) (emphasis added).

115. *Id.* at 531.

116. *Id.* at 531 n.5 (quoting Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), in 10 WRITINGS OF THOMAS JEFFERSON 45-46, n.1 (New York, G.P. Putnam's Sons 1899)).

“[I]t is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise: women will demand a vote; . . . It tends to confound and destroy all distinctions, and prostrate all ranks to one common level.”¹¹⁷

She turned over the bedrocks of our national tradition—the founding fathers and the Constitution itself—to expose what are now familiar themes: Women must be protected from politics and politics must be protected from the debasement that women’s inclusion would cause. Politicians, like lawyers, doctors, and educators, relied on generalizations about women that have been since proven erroneous.

Justice Ginsburg did not entirely discredit history. Her use of negative precedent emphasized that even those who respect the achievements of past leaders should recognize that their actions excluded women. They caused a real and significant injury—both to the women who wanted to participate in government and to the nation that could have benefited from their contributions.¹¹⁸ Acknowledging discrimination in this sense is constructive. By recounting the country’s “long and unfortunate history of sex discrimination,”¹¹⁹ Justice Ginsburg “created”¹²⁰—or, more accurately, recognized—an alternative history of the women and men who broke down gender-based distinctions throughout society. As John Adams suggested, women who fought their way into the professions “tend[ed] to confound and destroy all distinctions.” But they did not “*prostrate* all ranks to one common level.”¹²¹ Rather they worked to *elevate* all ranks to one superior level. These women have already demonstrated their ability to succeed in an adversative environment. They too are part of a national history worth honoring.

VI. EPILOGUE: LOOKING BACKWARD TO MOVE FORWARD

It is always difficult to gauge the practical effect of a rhetorical tool such as negative precedent. The officials at VMI may have noticed no more about the opinion than that it required them to change their school—or they

117. *Id.* at 557 n.21 (citing RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781-1789*, at 191 (1987) (quoting Letter from John Adams to James Sullivan (May 26, 1776), in 9 *WORKS OF JOHN ADAMS* 378 (Boston, Little Brown 1854))).

118. *Cf. id.* at 532 (“[N]either federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—*equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.*” (emphasis added)).

119. *See supra* note 95 and accompanying text.

120. *See supra* note 114 and accompanying text.

121. *See supra* text accompanying note 117.

may have recognized that the negative precedent Justice Ginsburg provided could serve as a model for reform. Justice Ginsburg concluded her opinion by professing a belief that the school could be changed to include women:

VMI's story continued as our comprehension of We the People expanded.¹²² There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the "more Perfect Union."¹²³

Again, her peroration was phrased in the negative: "There is no reason to believe" The Court could impose, by judicial fiat, a standard of skeptical scrutiny that was sensitive to the anachronistic assumptions about women implicit in the school's objections to integration. It could force the school to admit women or relinquish public funding. But it could not, itself, change the minds of the men involved.

After losing in the Supreme Court, VMI's Board of Visitors considered refusing public funding so that the school could remain single-sex.¹²⁴ Instead, the Board voted nine to eight to accept women.¹²⁵ And, to their credit, the same school officials who had protested vigorously that coeducation was impossible did their best to lay the groundwork for successful integration. Virginia provided \$5.1 million, which was used to recruit women, hire staff, and make necessary physical changes, such as building separate bathrooms.¹²⁶ Noting that isolation and stress were among the factors cited by Shannon Faulkner as reasons for her much-publicized departure from the Citadel, VMI's superintendent, Josiah Bunting III, consciously tried to recruit enough women—in his words, a "critical mass"—to provide support for each other.¹²⁷ He also required the 1200 male cadets and 400 male employees already at the school to attend seminars on sexual harassment.¹²⁸

On August 18, 1997, thirty women joined the 430 men enrolling as cadets.¹²⁹ Officials expressed confidence that they were ready—that coeducation at VMI would succeed.¹³⁰ In a speech made to the crowd of

122. An omitted citation refers to a discussion of the school's successful integration of African Americans. See *United States v. Virginia*, 518 U.S. at 546 n.16.

123. *Id.* at 557-58 (citations omitted).

124. See Peter Finn, *Year of the Female Rat: 30 Women Enroll at VMI, All-Male Since 1839*, WASH. POST, Aug. 19, 1997, at D1.

125. See *First Female Cadets at V.M.I. Are in Class and in Uniform*, N.Y. TIMES, Aug. 19, 1997, at A17.

126. See *id.*

127. William H. Honan, *The Man with the Plan: "You Learn What To Avoid,"* N.Y. TIMES, Apr. 6, 1997, § 4A (Educ. Life Supplement), at 27.

128. See *Women To Join VMI Ranks*, NEWSDAY, Aug. 18, 1997, at A15.

129. See Finn, *supra* note 124.

130. See *id.*

incoming cadets and their nervous families, Major General Bunting added sex as a trait that the school was now ready to consider irrelevant in its radically egalitarian approach: “VMI does not care if you are poor or rich, if you are white or black, female or male, Taiwanese or Finn or Virginian We care only about your heart, your integrity and your determination.”¹³¹

The school seems to have risen to the challenge. In March of 1998, the traditional six months of intimidation and abuse ended for the first coed class of “rats.”¹³² And twenty-three of the thirty women, as well as 361 of the 430 men, who had enrolled in the fall claimed their place as full-fledged cadets.¹³³ Officials, students, and alumni classified the changes required to accommodate women—shades for windows in the dorms and a policy on jewelry included in the student handout—as “mostly cosmetic.”¹³⁴ As paraphrased in one account, Commandant of Cadets James Joyner said “the bar was not lowered, and women proved themselves equal to the school’s traditions.”¹³⁵

Negative precedent is ultimately about the possibility of change. An appropriate remedy for a constitutional violation strives to “eliminate [so far as possible] the discriminatory effects of the past” and to “bar like discrimination in the future.”¹³⁶ Neither endowments and gyms nor prestige and tradition could be manufactured on demand. There was no way that Virginia could create an institution that would eliminate the discriminatory effects of VMI’s past exclusions or bar similar discrimination in the future. Likewise, negative precedent cannot literally repair the past. But by recognizing a history of discrimination that has now been left behind, Justice Ginsburg’s opinion in the *VMI* case serves as a model for ongoing efforts to realize progress. The doctors, lawyers, and politicians stated, like the officials at VMI, that they thought change would be impossible. They were proven wrong. Their experiences showed the leaders of VMI that a “tradition” of excellence could be expanded to include women. By looking towards the past, negative precedent offers a vision of success for the future.

131. *Id.* Bunting was well aware that the school would be under intense media scrutiny. Other comments he made suggested his embrace of women and endorsement of tolerance was at least partially motivated by more pragmatic concerns: “Any activity that is seen to be nefarious or untoward will be on CNN in Sacramento five minutes after it happens in Lexington.” *Women to Join VMI Ranks*, *supra* note 128.

132. 23 *Women Endure VMI “Rat” Hazing*, L.A. TIMES, Mar. 18, 1998, at A10; *Women Reach End of VMI Rat Line*, NEWSDAY, Mar. 18, 1998, at A23.

133. See *Women Reach End of VMI Rat Line*, *supra* note 132, at A23.

134. *Id.*

135. *Id.*

136. *United States v. Virginia*, 518 U.S. at 548 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).