

“EQUAL CITIZENSHIP STATURE”: JUSTICE GINSBURG’S CONSTITUTIONAL VISION

NEIL S. SIEGEL*

Abstract: In this essay, Professor Siegel examines the nature and function of constitutional visions in the American constitutional order. He argues that Associate Justice Ruth Bader Ginsburg possesses such a vision and that her vision is defined by her oft-stated commitment to “full human stature,” to “equal citizenship stature.” He then defends Justice Ginsburg’s characteristically incremental and moderate approach to realizing her vision. He does so in part by establishing that President Barack Obama articulated a similar vision and approach in his Philadelphia speech on American race relations and illustrated its capacity to succeed during the 2008 presidential election.

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* Professor of Law and Political Science, Duke University School of Law. I am grateful to Kate Bartlett, Guy Charles, Erwin Chemerinsky, Cary Franklin, Mark Graber, Martin Ginsburg, Jamal Greene, Sanford Levinson, Robert Post, Jedediah Purdy, Chris Schroeder, Reva Siegel, and Lawrence Solum for illuminating suggestions in response to a previous draft or a related presentation at the 2010 Annual Meeting of the Association of American Law Schools. I thank Natalie Bedoya for extraordinary research assistance. Ed.: The author clerked for Justice Ginsburg during the October 2003 Term.

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INTRODUCTION

Associate Justice Ruth Bader Ginsburg has served on the Supreme Court of the United States for more than fifteen years. The passage of time provides good reason to take pause and reflect on her contributions to the development of the law. I commend the editors of the *New England Law Review* for marking this occasion with a symposium in her honor.

I shall train my attention on the progressive constitutional vision that I believe animates Justice Ginsburg’s understanding of our Constitution. In several areas of constitutional law, her overarching vision is concisely captured by a phrase to which she often returns, both on and off the bench. Our Constitution, in Justice Ginsburg’s view, guarantees “equal citizenship stature.”¹ Its majestic and open-ended language is best read aspirationally and expansively: Each generation of Americans advances the constitutional design by slowly but surely coming to comprehend such commitments as “the equal protection of the laws”² to include within their embrace groups who previously did not count in constituting “the People”³ for whom the Constitution purports to speak. Justice Ginsburg’s Constitution not only constitutes; it also reconstitutes. It empowers persons by including them in core activities associated with citizenship, and it includes persons by empowering them—and it accomplishes more of both over time. In so doing, our Constitution makes good on its declaration of intent “to form a more perfect Union.”⁴

In this essay, I pay tribute to Justice Ginsburg’s constitutional vision. I begin by examining the general role that constitutional visions play in the American constitutional order. I pursue this question both from the perspective of the judiciary and, more importantly, from the perspective of the American public. I suggest that successful visions partially integrate the domains of constitutional politics and constitutional law, thereby rendering the countermajoritarian difficulty less difficult in practice.

I next focus on Justice Ginsburg’s vision in particular. Drawing from her judicial opinions and other public pronouncements, I show that her vision lends coherence and depth to a potentially distinct set of

1. See *infra* Part II (detailing many instances in which Justice Ginsburg uses this or similar language).

2. U.S. CONST. amend. XIV, § 1.

3. U.S. CONST. pmbi.

4. *Id.*

constitutional commitments. Justice Ginsburg's approach provides an affirmative—indeed, heroic—answer to the question whether there is such a thing as a progressive constitutional vision.

Finally, I explore the politics of persuasion that must be reckoned with by Americans who seek to realize something like Justice Ginsburg's inclusive vision. In approaching this difficult subject, I focus on the example set by President Barack Obama during the 2008 presidential campaign. Analyzing his Philadelphia speech on race relations in America, I observe that our nation's forty-fourth President appears to espouse a constitutional vision that is similar to Justice Ginsburg's. I further note that President Obama seems to share Justice Ginsburg's general approach to realizing her constitutional vision—namely, a tendency to favor incrementalism and moderation. This tendency, I suggest, stems not from cowardice or indecision, but from a constitutional vision that relies on—and seeks to empower—ordinary Americans to realize constitutional change, and that views our Constitution as a work in progress and not as an already perfected document. I suggest that the substance, style, and electoral success of President Obama's aspirational politics may have much to offer Americans who share Justice Ginsburg's constitutional commitments and who work to make them a governing reality in our national politics and our constitutional law. I also suggest that President Obama's approach calls into question progressive criticism of Justice Ginsburg as an excessively cautious jurist.

DISCUSSION

I. The Function of Constitutional Visions

Before turning to Justice Ginsburg's constitutional vision in particular, I will begin with the general idea of a constitutional vision. Much progressive legal scholarship uses the term “constitutional vision” without defining it.⁵ This may be because it is a difficult concept to pin down. In this Part, I offer a rough account of the nature and function of a constitutional vision.

A striking aspect of the decision making of the early Roberts Court is the near-perfect extent to which the Justices can be grouped into the same ideological blocks in certain deeply divisive cases. Such cases are well described by Anthony Kronman's notion of “identity-defining” conflicts, so named because the choices they require “define the community that makes them in the same way that some personal choices define the

5. See, for example, many of the contributions in *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009).

individual who does.”⁶ For example, in constitutional litigation involving government regulation of abortion,⁷ race and equal protection,⁸ the meaning and scope of the Second Amendment,⁹ eligibility for the death penalty,¹⁰ the detention or trial of alleged enemy combatants,¹¹ campaign finance legislation,¹² federal laws aimed at protecting the environment,¹³ and the domestic judicial enforceability of international law,¹⁴ four Justices—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—almost always agree with one another. Likewise, four other Justices—Justices Stevens, Souter, Ginsburg, and Breyer—almost always agree with one another. And Justice Kennedy (who, it is relevant to note, was President Reagan’s third choice) proves decisive by agreeing with one side or the other. In cases implicating these profound questions of personal and collective identity, this 5-4 or 4-1-4 fracture best characterizes the Roberts

6. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 88-89 (1993) (“In the political sphere, as in the personal, there are some choices that have what I call identity-defining consequences.”); *id.* at 90 (“[T]hose controversies that happen at any moment to be the most lively and important ones in a community—those with the largest implications for its direction and destiny—often present conflicts among values that reflect incomparable visions of what is most worthy in the community’s current practices or future possibilities . . .”).

7. *See* *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007).

8. *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2741-43 (2007); *cf.* *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009) (dividing 5-4 over whether a city violated Title VII of the Civil Rights Act of 1964 by discarding the results of an exam used to identify firefighters best qualified to fill vacant lieutenant and captain positions when the results of the exam showed that white candidates had significantly outperformed minority candidates).

9. *See* *District of Columbia v. Heller*, 128 S. Ct. 2783, 2787-88 (2008).

10. *See* *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650-51 (2008).

11. *See* *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 572-73 (2006).

12. *See, e.g.,* *Davis v. Federal Election Comm’n*, 128 S. Ct. 2759 (2008); *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

13. *See, e.g.,* *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* was technically a statutory case, but the statutory analyses took place in the shadow of the Constitution. The plurality invoked federalism concerns and constitutional avoidance. *Id.* at 737-38. Moreover, Justice Kennedy wrote of the test he would use that “in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty.” *Id.* at 782 (Kennedy, J., concurring in judgment).

14. *See* *Medellín v. Texas*, 128 S. Ct. 1346, 1349 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337 (2006).

Court, which is why it is often called the Kennedy Court.¹⁵ It is not merely that the views of the Justices within each block are positively correlated across these issue areas. The Justices can, almost without exception,¹⁶ be counted on to agree with the other members of their voting block on all of these issues—and, in all likelihood, others as well.¹⁷ As Christopher Eisgruber recently noted with only modest overstatement, “If you tell me where a justice stands on abortion, I can tell you what that justice’s position is on affirmative action, gun control, criminal procedure, federalism and other privacy issues.”¹⁸

What best explains this degree of overlap in constitutional conclusions? One possibility is that these areas of constitutional litigation constitute distinct issues—a series of jurisprudential “silos”—so that the overlap is merely or mostly a coincidental consequence of the current composition of a court with only nine members. A more likely possibility is that identifiable forces are producing these results. For example, it might be the case that the Justices’ views in these areas of law are informed by distinct constitutional visions.¹⁹

15. See, e.g., Erwin Chemerinsky, *When It Matters Most, It Is Still the Kennedy Court*, 11 GREEN BAG 2D 427 (2008). I do not discuss the voting behavior of Justice Sotomayor in this essay because she joined the Court only recently.

16. *Medellin* and *Sanchez-Llamas* are partial exceptions. In *Medellin*, Justice Stevens concurred in the judgment, expressing great sympathy for the dissenting views of Justices Souter, Ginsburg, and Breyer but voting on the same side as the other group of four. *Medellin*, 128 S. Ct. at 1372. In *Sanchez-Llamas*, Justice Ginsburg concurred in the judgment, joining only part of Justice Breyer’s dissenting opinion, which Justices Stevens and Souter joined in full. *Sanchez-Llamas*, 548 U.S. at 360, 365.

17. Controversies falling under the general heading of gay rights or church/state separation should also be included on any list of identity-defining conflicts. The Roberts Court has yet to render a decision concerning the extent to which the Constitution protects homosexuals from discrimination. Likewise, the Roberts Court has yet to render any Establishment Clause decisions. *But cf.* *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2567-68 (2007) (holding 5-4—along predictable ideological lines—that taxpayers do not have standing to assert an Establishment Clause claim against Executive Branch actions funded by general appropriations, as opposed to a specific congressional grant).

18. Adam Liptak, *To Nudge, Shift, or Shove the Court Left*, N.Y. TIMES, Feb. 1, 2009, at WK4. Professor Eisgruber also noted the “surprising amount of ideological coherence on the court over the last 30 years.” *Id.*

19. It would be difficult to account for these voting blocs in terms of theories of constitutional interpretation. Seven Justices do not purport to possess a theory of interpretation, and the two that do (Justices Scalia and Thomas) do not always follow them. For example, it is not clear how the original public meaning of the First, Fifth, or Fourteenth Amendments compels (or even supports) the views of Justices Scalia and Thomas in racial equality, campaign finance, or commercial speech cases. See, e.g., Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 92 (2009) (The basis for Scalia’s and Thomas’s colorblindness “assertions was and is mysterious—at least for an announced (and

The significant underdeterminacy of our Constitution's open-ended provisions²⁰ establishes a contestable "realm of meaning" or "nomos."²¹ A constitutional vision, in the general way that I use the term here, identifies these open-ended provisions with a set of values to which the national political community should aspire. A vision does so by providing a substantive account of how government power should be exercised and how individual rights should be protected in the American constitutional order. Such a vision provides a basic understanding of our Constitution—its meaning and the purposes it is charged with accomplishing—that animates and integrates responses to a range of constitutional questions.²²

Constitutional visions can thus be thought of as an answer to the problem of issue bundling in law and politics. A vision identifies a set of values to which the adherent is presumptively committed. When the adherent perceives that these values are implicated in various contexts, he or she is moved consistently to hold certain views about how best to resolve questions arising in these contexts. Like a theory of constitutional interpretation, therefore, a constitutional vision can be deeply principled.

A constitutional vision, however, is distinct from a theory of constitutional interpretation. While some jurists and commentators portray theories of constitutional interpretation as constraining judicial discretion,²³

proselytizing) Originalist. Not only does the constitutional text say no such thing . . . , but the best evidence of the original intentions is that the framers did not intend to constitutionalize a principle of strict colorblindness." (footnotes omitted)); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 718-19 (2007) (discussing the non-originalist character of their views in race cases); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 52-53 (2007) (discussing the non-originalist character of their views in First Amendment cases). Nor is Justice Scalia's majority opinion in *Heller* as originalist as it purports to be. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 193 (2008) ("It is, to say the least, striking that an *originalist* interpretation of the Second Amendment would treat civic republican understandings of the amendment as antiquated, and refuse to protect the arms a militia needs to defend against tyranny.").

20. For a discussion, see generally, for example, Siegel, *supra* note 19.

21. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 28 (1983).

22. Cf., e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2836 (2007) (Breyer, J., dissenting) (referencing "different good-faith visions of our country and our Constitution").

23. Thus, for example, Keith Whittington observes of originalists writing in the 1970s and 1980s:

[O]riginalism was thought to limit the discretion of the judge. . . . By rooting judges in the firm ground of text, history, well-accepted historical traditions, and the like, originalists hoped to discipline them.

constitutional visions are not meant to constrain discretion, let alone yield logically determinate results in particular controversies. On the contrary, constitutional visions are meant to provide affirmative accounts of how power should (or should not) be utilized in order to achieve a set of normative ends that are asserted to be both central concerns of the Constitution and central concerns in the lives of citizens. Constitutional visions relate the one set of concerns to the other.

Constitutional visions reflect the pervasive reality that the authority of the Constitution flows in part from its expression of enduring and evolving social values—from its status as the repository of our “fundamental nature as a people,” which “is sacred and demands our respectful acknowledgement.”²⁴ Thus, Woodrow Wilson insisted that “the Constitution of the United States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age.”²⁵ Likewise, Franklin Roosevelt invoked the “original broad concept of the Constitution as a layman’s instrument of government.”²⁶ By such statements, these Presidents meant that the Constitution must be understood as an expression of the deepest cultural values of our nation.²⁷ Presidents may articulate constitutional visions,²⁸ and the Justices they appoint may (explicitly or implicitly) possess constitutional visions as well. Indeed, the degree of

The ‘political seduction of the law’ was a constant threat in a system that armed judges with the powerful weapon of judicial review, and the best response to that threat was to lash judges to the solid mast of history.

Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 602 (2004).

24. Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167, 169 (1987).

25. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 69 (Transaction Publishers 2002) (1908).

26. Franklin Delano Roosevelt, Address in Washington, D.C.: The Constitution of the United States Was a Layman’s Document, Not a Lawyer’s Contract (Sept. 17, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 363 (Samuel I. Rosenman ed., 1941).

27. See Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473, 1501 (2007).

28. For an insightful discussion of constitutional visions that focuses on the pathmarking politics of certain transformative presidents, see KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 53-58 (2007).

overlap between basic visions may be a principal reason that a particular President seeks to put a particular individual on the Supreme Court of the United States.²⁹

Of course, this is not to suggest that Presidents and Justices may appropriately do the same things with a constitutional vision. Presidents and Justices occupy different institutional roles that serve distinct, if partially overlapping, sets of social functions.³⁰ Moreover, they typically confront different kinds of issues, and even when they consider the same questions, they do so at different points in time while operating under different constraints.³¹ For example, a President need not concern him- or herself with securing the social “goods of consistency, stability, predictability, and transparency that are essential to the rule of law”³² to nearly the same extent as a Supreme Court Justice.³³ Presidents and Justices who possess similar constitutional visions remain different actors in critically important ways.

Accordingly, to suggest that both Presidents and Justices may possess constitutional visions is not to obliterate distinctions between judicial role and political role or to insist that the same considerations are relevant to the legitimation of each. But it is to suggest that “ragged and blurred boundaries”³⁴ often separate the realm of constitutional law from the domain of constitutional politics. It seems right to affirm both that legal reasoning is characteristically distinguishable from the practice of electoral politics, and that legal reasoning can be partially defined by the logic of an integrating constitutional conception that I call a constitutional vision—a

29. Presidents often refer to a judicial nominee’s “judicial philosophy,” which might be thought to refer to an interpretive methodology. But I suspect that most often this term refers, at least implicitly, to a constitutional vision.

30. I have elsewhere discussed various purposes of the institution of law, some of which are more central to law and others of which are also regarded as core purposes of politics. Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 969-79 (2008).

31. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (1962) (“Their insulation and the marvelous mystery of time give courts the capacity to appeal to men’s better natures, to call forth their aspirations, which may have been forgotten in the moment’s hue and cry.”).

32. Post & Siegel, *supra* note 27, at 1477.

33. For a discussion of rule-of-law values and the particular importance that our constitutional community places on their vindication by courts, see JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* 210-26 (1979); Siegel, *supra* note 30, at 965, 970-71; Post & Siegel, *supra* note 27, at 1476-77; Neil S. Siegel, *A Theory In Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2015-16 (2005).

34. Post & Siegel, *supra* note 27, at 1474. For further discussions, see generally Siegel, *supra* note 19; Siegel, *supra* note 30.

logic that is shared by a certain register of political language and vision. Both Presidents and Justices may appropriately be constitutionalists in the cultural sense.

Indeed, constitutional visions do not merely inform both politics and jurisprudence. Persuasive visions partially integrate the two domains. The vision of a President may end up having a profound long-term impact on constitutional law.³⁵ And sometimes the principled judicial imagination synthesizes subject matters in a way that both maintains judicial legitimacy and proves instructive for a broader political effort to articulate a normative vision with the power to move people.

To understand the integrative function that constitutional visions perform, it is useful to consider the problem that has preoccupied constitutional theory for much of the past century, the “counter-majoritarian difficulty.”³⁶ A constitutional vision provides a potentially persuasive response to the question of what business nine unelected (and highly opinionated) judges have telling popular majorities that they cannot govern in whatever way they want. The persuasiveness of this response does not derive simply from associating a particular normative vision with “the law” and then insisting upon the autonomy of “the law” from “mere” politics, portraying the Justices as duty-bound to “interpret” and “apply” the law.³⁷ No doubt there are certain rhetorical advantages associated with

35. Cf. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 490 (2006) [hereinafter Balkin & Levinson, *Change*]; Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *VA. L. REV.* 1045, 1067 (2001) [hereinafter Balkin & Levinson, *Revolution*].

36. BICKEL, *supra* note 31, at 16 (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”).

37. *Id.* at 74 (“Judges and lawyers recurrently come to feel that they find law rather than make it. Many otherwise painful problems seem to solve themselves with ease when this feeling envelops people.”). Of course, this way of talking about constitutional law has been with us from the beginning. *See, e.g.*, *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824) (“Courts are the mere instruments of the law . . .”).

autonomy rhetoric.³⁸ But it contemplates a sharp distinction between constitutional politics and constitutional law when the two must share a dialectical relation if constitutional law is to retain its legitimacy.³⁹

Moreover, the rhetorical advantages of this approach are easily overstated. As I have written about Chief Justice Roberts' use of the "umpire analogy" during his Supreme Court confirmation hearing,⁴⁰ if Americans think they want judicial umpires, they also want umpires who call the game their way, at least on the issues they care about most.⁴¹ This is why engaged citizens worry about who in particular sits on the Supreme Court and why the future of the Court is often an issue in presidential elections. It is also why no Democratic President would have nominated John Roberts or Samuel Alito for a seat on the Court, and why no Republican President would have nominated Sonia Sotomayor. These observations might seem too obvious to be worth recording, yet autonomy rhetoric cannot make any sense of them.

A better approach begins with the recognition that the constitutional law pronounced by courts is not self-legitimizing—that in discharging their responsibilities, the Justices must attend to the conditions of the legitimation of the law that they craft. Elsewhere, I have identified this

38. See, e.g., Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 601 (1963) ("The distinction between what the Court says to the public about what it is doing and what scholars say to one another about what it is doing must be held firmly in mind It would be fantastic indeed if the Supreme Court in the name of sound scholarship were to publicly disavow the myth upon which its power rests."); Siegel, *supra* note 19.

39. See Post & Siegel, *supra* note 27; Siegel, *supra* note 30. For a discussion, see generally Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

40. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/55-56.pdf>. ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire."). During her Supreme Court confirmation hearing, Judge Sotomayor made similar statements. See, e.g., *Sotomayor Pledges "Fidelity to the Law,"* CNNPOLITICS.COM, available at <http://www.cnn.com/2009/POLITICS/07/13/sotomayor.hearing/index.html?iref=hpmostpop> (visited Nov. 23, 2009) ("In the past month, many senators have asked me about my judicial philosophy. It is simple: fidelity to the law. The task of a judge is not to make the law—it is to apply the law. And it is clear, I believe, that my record in two courts reflects my rigorous commitment to interpreting the Constitution according to its terms").

41. See Siegel, *supra* note 19, at 731. Full disclosure: I served on the Judiciary Committee Staff of then-Senator Joseph Biden during the hearing.

component of judicial role as the virtue of judicial statesmanship.⁴² “The Court is a leader of opinion, not a mere register of it,” Alexander Bickel instructed, “but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed.”⁴³ Constitutional visions ameliorate the countermajoritarian difficulty to the extent that the Justices who possess them succeed over the long haul in securing the assent—or, at least, the acceptance—of the very people whose conduct the Court purports to govern in the name of the Constitution.⁴⁴

It may not be necessary for the Court to persuade a majority of Americans of the correctness of its rulings. But it must at least succeed in persuading a good number of Americans to abide by its decisions. With apologies to Justice Jackson,⁴⁵ the Court is not truly final:

The southern leaders [who opposed *Brown*] understood and acted upon an essential truth, which we do not often have occasion to observe and which dawned on the southerners themselves somewhat late; hence the contrast between initial reactions and what followed. The Supreme Court's law, the southern leaders realized, could not in our system prevail—not merely in the very long run, but within the decade—if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country. This, in the end, is how and why judicial review is consistent with the theory and practice of political democracy. This is why the Supreme Court is a court of last resort presumptively only.⁴⁶

More regularly, the confirmation process ensures that the current Court is not final,⁴⁷ as does the frequent practice of norm contestation through presidential rhetoric and constitutional litigation.⁴⁸ Moreover, in rare but important circumstances, the threat or reality of constitutional amendment can give the Court pause.

42. See generally Siegel, *supra* note 30.

43. BICKEL, *supra* note 31, at 239.

44. See Siegel, *supra* note 30, at 983-85. See generally Siegel, *supra* note 19, at 718-19.

45. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result) (“We are not final because we are infallible, but we are infallible only because we are final.”).

46. BICKEL, *supra* note 31, at 258.

47. See Balkin & Levinson, *Revolution*, *supra* note 35, at 1067-69.

48. See Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, *supra* note 5, at 28-29.

The foregoing explanation of why constitutional visions matter is judge-centered, and appropriately so: the countermajoritarian difficulty is a problem with which judges must contend, and a persuasive constitutional vision may help them competently to execute their responsibilities in crafting constitutional law. But it is at least as important—indeed, ultimately more important—to examine the bridging function of constitutional visions from the perspective of constitutional politics, not constitutional law. That is, it is critical to explore the problem not only from the perspective of a Court whose authority must be legitimated, but also from the perspective of participants in constitutional politics who possess a vision and who wish to see it embodied in constitutional law.

In her public interactions, Justice Ginsburg has herself emphasized this side of the dialectical interaction; she recognizes the primacy of engaged citizens, social movements, and legal advocates in determining the ultimate success of any constitutional vision. For example, in concluding a 1997 lecture that she delivered at the Hofstra Law School summer program in Nice, France, she did not emphasize her own majority opinion in the *VMI* case, *United States v. Virginia*.⁴⁹ Rather, she underscored the “[l]itigation pursued by lawyers in the public interest,” which “had helped to make it ever more possible for our daughters, as well as our sons, to aspire and achieve according to their individual talent and capacities.”⁵⁰

Similarly, during a 2004 question-and-answer session with students at the City University of New York (CUNY) School of Law, Justice Ginsburg was asked to name “one or two of the most important legal issues that . . . the United States Supreme Court faces today.”⁵¹ She sought “to amend the question slightly to say: ‘What are the most important issues the people of the United States are facing today?’”⁵² Stressing “the balance between liberty and security,” she insisted that “[i]f the people don’t care about preserving their liberty and are overwhelmed by security concerns, there is no court that can change that sad development.”⁵³ She noted that courts

49. 518 U.S. 515 (1996).

50. Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 271 (1997). As my able research assistant, Natalie Bedoya, pointed out to me, the title of this piece identifies constitutional litigation as the means and advancing equal citizenship stature as the end. Visions specify ends. See *infra* Part II (exploring Justice Ginsburg’s constitutional vision).

51. Ruth Bader Ginsburg, Remarks of Ruth Bader Ginsburg at CUNY School of Law (Mar. 11, 2004), in 7 N.Y. CITY L. REV. 221, 232 (2004).

52. *Id.*

53. *Id.*

“are reactive institutions. We don’t create the controversies that come to us, we respond to the problems that are emerging in the society the courts exist to serve.”⁵⁴

Later at the same event, she was asked whether the U.S. Supreme Court would invalidate the death penalty “in our lifetimes.”⁵⁵ Rather than talking about the composition of the Court, she responded that “[o]n a question like that, you are as competent to judge as I am,” and she reiterated that “[i]f people don’t care, it won’t happen. If people do care, and there are many lawyers who do, I hope their ranks will grow, change will become possible.”⁵⁶ Again, she elected to underscore not the Court’s power to enact or resist social change, but the ultimate authority of the American public.

From the standpoint of constitutional politics, the primary purpose of a constitutional vision is not necessarily to maintain the law/politics distinction. Quite the contrary, the main purpose may be to unsettle it—to enable citizens through political mobilization eventually to impact the future path of constitutional law. Throughout American history, the impact of political mobilization on constitutional law has been ubiquitous and profound. Among many other things, this seems the most sensible way to account for the evolution of the Court’s racial equality jurisprudence,⁵⁷ its sex discrimination jurisprudence,⁵⁸ its abortion jurisprudence,⁵⁹ and now, its Second Amendment jurisprudence. As Reva Siegel has shown,⁶⁰ social movement struggle helps to explain the contours of the Court’s recent

54. *Id.*

55. *Id.* at 236.

56. *Id.*

57. See generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).

58. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1324 (2006) (“The ERA was not ratified, but the amendment’s proposal and defeat played a crucial role in enabling and shaping the modern law of sex discrimination. Yet constitutional law [as typically conceived] lacks tools to explain constitutional change of this kind.”).

59. See, e.g., Siegel, *supra* note 30, at 1028-29 (discussing the doctrinal evolution from *Roe v. Wade*, 410 U.S. 113 (1973), to *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

60. Professor Siegel offers an account of the social movement conflict that ultimately shaped Justice Scalia’s majority opinion in *Heller*. Siegel, *supra* note 19, at 191, 192-93 (showing how *Heller* respects claims and compromises forged in social movement conflict over the right to bear arms in the decades after *Brown*).

declaration—for the first time in American history—that the Constitution protects an individual right to possess a handgun in the home for purposes of self-defense.⁶¹

It is precisely because constitutional law “is historically conditioned and politically shaped”⁶² that constitutional visions are potentially so consequential. Without a vision—not a series of discrete political positions on unrelated issues, but a vision—it may be impossible to persuade one’s fellow citizens to adopt one’s conception of American identity as their own. It takes a vision that ties particular constitutional understandings to the ideals and interests of large numbers of Americans consistently to elect Presidents who appoint judges who in turn embody that vision in constitutional law.⁶³ It does not happen overnight. Slowly but surely, however, politics becomes law, as it did in *Heller*,⁶⁴ or law returns to the realm of “mere” politics, as happened during the constitutional crisis of 1937.⁶⁵ Constitutional visions partially integrate constitutional politics and constitutional law. They are a powerful means through which citizens and the leaders they elect seek to shape the course of constitutional law.

61. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821-22 (2008) (holding that the Second Amendment protects an individual right to possess a firearm—including a handgun—unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home).

62. H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 6 (2002).

63. It is no coincidence that our most influential Presidents, particularly Franklin Roosevelt and Abraham Lincoln, possessed coherent constitutional visions. See WHITTINGTON, *supra* note 28, at 53-54, 56-58. “The ‘New Deal’ was more than a slogan for a particular list of policies. The New Deal was the realization of Roosevelt’s constitutional vision, an effort to achieve ‘greater freedom [and] greater security for the average man.’” *Id.* at 57 (quoting Roosevelt, *supra* note 26). As for Lincoln, “the promissory note of the Declaration of Independence’s egalitarianism had to be repaid and the temporary compromise with slavery had to be abandoned.” WHITTINGTON, *supra* note 28, at 58 n.120. More recently, President Reagan articulated a conservative constitutional vision, much of which has been implemented over the past few decades. See *infra* note 66 and accompanying text.

64. See generally Siegel, *supra* note 19.

65. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387 (2001) (“The proper lesson of *Lochner* instructs us that, even where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court’s decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate. There will be attacks on judges and, ultimately, on the institution of judicial review. Even in the face of established precedent, law itself will come to be seen as nothing but politics.”) (referencing *Lochner v. New York*, 198 U.S. 45 (1905)).

II. Justice Ginsburg's Inclusive Vision

It is well established that there currently exists a conservative constitutional vision on the U.S. Supreme Court.⁶⁶ Rather than offering my own account of the content of this vision, I will show that there also is a coherent progressive vision, one that Justice Ginsburg has been expressing since her days as a legal advocate on behalf of women's rights during the 1970s. I will identify the vision that informs and integrates Justice Ginsburg's responses to constitutional questions with identity-defining dimensions.⁶⁷

Those who (accurately) think of Justice Ginsburg as "a judge's judge" or "a lawyer's lawyer"⁶⁸ may object that it is inappropriate to associate her with something so seemingly grand as a constitutional vision. After all, she can become obsessed—her clerks might suggest "possessed"—by the most

66. If originalism is understood not as a theory of constitutional interpretation but as a conservative political movement advancing themes of traditional family, public religion, racial retrenchment, state sovereignty, and social control, then Chief Justice Roberts and Justices Scalia, Thomas, and Alito are well described as possessing much the same constitutional vision. See generally Post & Siegel, *supra* note 48; Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006); Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L. REV. 363, 408 (2003) ("President Reagan's efforts to transform constitutional meaning put him in a class with Franklin D. Roosevelt and a handful of other Presidents. Reagan developed and pursued a constitutional vision extraordinary in its breadth of issues, its detail of analysis, and its ambition for presidential power."). Chief Justice Roberts and Justices Scalia, Thomas, and Alito were chosen to advance this conservative vision, and each has done so. It is striking how much of the vision has been realized.

67. See *supra* note 6 and accompanying text (discussing the idea of identity-defining conflicts). I do not address here the extent to which Justices Stevens, Souter, and Breyer possess identifiable constitutional visions, nor do I explore the degree of overlap between their approaches and that of Justice Ginsburg. But judging from their voting patterns and the frequency with which they join (or cite) one another's opinions, it seems likely that the degree of overlap is substantial and that there are some differences. Relative to Justice Ginsburg, for example, Justice Breyer puts more emphasis on themes of deference to democratic decision making. See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005). I leave Justice Sotomayor aside because she just joined the Court.

68. See, e.g., Joyce A. Baugh, *Ruth Bader Ginsburg: A Judge's Judge and a Lawyer's Lawyer*, in *SUPREME COURT JUSTICES IN THE POST-BORK ERA: CONFIRMATION POLITICS AND JUDICIAL PERFORMANCE* 61-80 (2002); Judith Baer, *Advocate on the Court: Ruth Bader Ginsburg and the Limits of Formal Equality*, in *REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC* 216, 216 (Earl M. Maltz ed., 2003) (quoting Peter Huber & Richard Taranto, *Ruth Bader Ginsburg, A Judge's Judge*, WALL ST. J., June 15, 1993, at A18).

technical questions of civil procedure,⁶⁹ and she is better known for her cautious and careful approach to controversial questions than for theoretical ascents.⁷⁰ No doubt, she does not ascribe to a theory of constitutional interpretation. But she has long possessed a foundational understanding of the cultural ideals that our Constitution is charged with realizing over time.

During her Supreme Court confirmation hearing, then-Judge Ginsburg put the Senate and the public on notice of the core content of her constitutional vision. Senator Orrin Hatch asked whether she agreed that “[t]he only legitimate way for a judge to go about defining the law is by attempting to discern what those who made the law intended.”⁷¹ While she thought everyone could agree with this statement, she also cautioned against relying on the “immediate” [intentions of the Framers] “for their day” [in light of] “their larger expectation that the Constitution would govern, as Cardozo said, not for the passing hour, but for the expanding future.”⁷²

To illustrate her point, she tellingly turned to the author of the Declaration of Independence, Thomas Jefferson, who once opined that “[w]ere our state a pure democracy, there would still be excluded from our deliberations women who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.”⁷³ Noting that Jefferson’s “understanding of ‘all men are created equal’ . . . for his day, for his time” was that “the breasts of women were not made for political convulsion,” she stated that she saw “an immediate intent about how an ideal is going to be recognized at a given time and place, but also a

69. For a characteristic, if little known, example of Justice Ginsburg’s mastery of procedural questions, see generally her opinion for a unanimous Court in *Kontrick v. Ryan*, 540 U.S. 443 (2004).

70. See, e.g., Baer, *supra* note 68, at 221-22 (identifying John Marshall Harlan II as Justice Ginsburg’s judicial “hero” and arguing that she “has demonstrated a similar style of what might be called restrained activism or activist restraint”). Certain decisions of the Court’s recently reconstituted majority have caused Justice Ginsburg to move somewhat from being a cautious liberal to being, at times, an angry liberal. See *Gonzales v. Carhart*, 550 U.S. 124, 169-71 (2007) (Ginsburg, J., dissenting); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting). Justice Ginsburg read from the bench her dissents in both cases. It is rare for her to read a dissent from the bench once a Term, let alone twice. See Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES, May 31, 2007, at A1. For discussion of these cases, see *infra* notes 110-126, 208-209 and accompanying text.

71. *The Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 127 (1993) (statement of Sen. Hatch).

72. *Id.* (statement of J. Ginsburg).

73. *Id.*

larger aspiration as our society improves. I think the Framers were intending to create a more perfect union that would become ever more perfect over time.”⁷⁴

Justice Ginsburg thus underscored for the Senators who would be voting on her confirmation that she could be characterized as an originalist in a certain, limited sense, but not in the mold of Justice Scalia or Justice Thomas.⁷⁵ Rather than regarding a judge as constrained by the original understanding (or original expected application) of a constitutional provision, she expressed her belief that the meaning of the Constitution changes over time, as each generation of Americans seeks to perfect constitutional ideals that were originally articulated by the Founders.⁷⁶ They perfect these ideals in part by broadening the universe of beneficiaries—for example, by according women the respect and opportunities they are due as full-fledged members of the political community.

In a similar vein, Justice Ginsburg has noted approvingly that Justice Thurgood Marshall “celebrated how our fundamental instrument of government had evolved over the span of two centuries,” not “what the Constitution was in the beginning.”⁷⁷ Yet she has taken care to “appreciate, too, that the equal dignity of individuals is part of the constitutional legacy, shaped and bequeathed to us by the framers, in a most vital sense.”⁷⁸ The founders, she explained, “rebelled against the patriarchal power of kings and the idea that political authority may legitimately rest on birth status.”⁷⁹ Although their culture prevented them from fully understanding, let alone realizing, the constitutional ideals that they espoused, “they stated a commitment in the Declaration of Independence to equality and in the

74. *Id.*

75. *Cf.* Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 35-36, 38 (2004) (arguing that the originalism of Justice Ginsburg, unlike that of Justice Scalia, is concerned with “historically constrained evolution,” according to which “[s]he looks for the central purposes of the relevant constitutional provision and tries to apply it in a vastly different world”).

76. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 587 (2005) (Stevens, J., joined by Ginsburg, J., concurring) (“[T]hat our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text.”).

77. Ruth Bader Ginsburg, *Foreword* to SUPREME COURT DECISIONS AND WOMEN'S RIGHTS: MILESTONES IN EQUALITY xii (Clare Cushman ed., CQ Press 2001) (discussing Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987)) [hereinafter Ginsburg, *Foreword*].

78. *Id.*

79. *Id.*

Declaration and Bill of Rights to individual liberty. Those commitments had growth potential.”⁸⁰ She has often invoked historian Richard Morris for the proposition that

a prime portion of the history of the U.S. Constitution, and a cause for celebration, is the story of the extension (through amendment, judicial interpretation, and practice) of constitutional rights and protections to once ignored or excluded people: to humans who were once held in bondage, to men without property, to the original inhabitants of the land that became the United States, and to women.⁸¹

Affording “equal dignity”⁸² to all Americans, including historically marginalized groups, constitutes the central purpose of Justice Ginsburg’s constitutional vision. As I now show, this theme is powerfully present in her responses to numerous constitutional questions, beginning (but not ending) with equal protection doctrine.

A. Illustrations of Justice Ginsburg’s Vision

1. Equal Protection—General

Equal protection is the area of constitutional law that arguably has been of greatest concern to Justice Ginsburg in her roles as professor, advocate, and judge. In the aforementioned discussion with students at CUNY Law School, an audience member asked her what standard of review she would apply in equal protection cases in an ideal world. She rejected the notion that the Court mechanically relies on tiers of scrutiny, stating that “[t]he labels are often rationalizations for results reached on other grounds.”⁸³ She thought, however, that there was an underlying principle. She called it “the idea of essential human dignity, that we are all

80. *Id.* For a discussion of the import of Justice Ginsburg’s reference in the text to individual liberty, see *infra* notes 218-221 and accompanying text.

81. Ginsburg, *Foreword*, *supra* note 77, at xii (quoting RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781-1789*, at 193 (1987)); see Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1186-88 (1992) [hereinafter *Speaking in a Judicial Voice*] (recording similar views); Ginsburg, *supra* note 50, at 265-66 (same); see also *infra* note 95 (noting Justice Ginsburg’s invocation of Morris in *United States v. Virginia*, 518 U.S. 515, 557 (1996)).

82. See *supra* note 78 and accompanying text.

83. Ginsburg, *supra* note 51, at 238; accord Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 269 (1999) (“I continue to view with suspicion endeavors to bundle the U.S. Supreme Court’s equal protection decisions into neat packages under the headings ‘strict scrutiny,’ ‘intermediate’ inspection, relaxed or ‘rational relationship’ review.”).

people entitled to respect from our Government as persons of full human stature, and must not be treated as lesser creatures.”⁸⁴ “The notion of essential human dignity,” she insisted, “is the driving force behind what we place under the heading of equal protection.”⁸⁵ Time and again, her opinions reflect her embrace of this “underlying principle.”

2. Equal Protection—Gender

In her role as founder and general counsel of the ACLU Women’s Rights Project during the 1970s, Professor Ginsburg developed an effective litigation strategy to combat sex discrimination. She sought to expose the role of law in subordinating women by enforcing sex-role stereotypes of the separate-spheres tradition, according to which men were expected to perform as breadwinners and women were expected to perform as economically dependent caregivers.⁸⁶ But her legal advocacy on behalf of women’s rights arguably did not find its fullest expression in the law until the 1990s, when she was elevated to the Supreme Court.

In perhaps her most important majority opinion, Justice Ginsburg rejected the Virginia Military Institute’s exclusion of women on the ground that the Commonwealth of Virginia was constitutionally disabled from regarding them as second-class citizens. “Through a century plus three decades and more of [American] history,” she wrote for the Court, “women did not count among voters composing ‘We the People.’”⁸⁷ She noted that

84. Ginsburg, *supra* note 51, at 238.

85. *Id.* at 239.

86. See generally, e.g., AMY LEIGH CAMPBELL, *RAISING THE BAR: RUTH BADER GINSBURG AND THE ACLU WOMEN’S RIGHTS PROJECT* (2003); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. (forthcoming April 2010); Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789 (2008). For Professor Ginsburg’s academic treatments of the subject at the time, see generally, for example, Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978).

87. *United States v. Virginia (VMI)*, 518 U.S. 515, 531 (1996) (“Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.”). For an insightful analysis of Justice Ginsburg’s use of discredited history as “negative precedent” in *VMI*, see generally Deborah A. Widiss, Note, *Re-viewing History: The Use of the Past as Negative Precedent in United States v. Virginia*, 108 YALE L.J. 237 (1998).

since *Reed v. Reed*,⁸⁸ “the Court has repeatedly recognized that neither 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.”⁸⁹ While Virginia’s plan to afford a unique educational benefit only to males “serves the Commonwealth’s sons,” she wrote, “it makes no provision whatever for her daughters. That is not *equal* protection.”⁹⁰ In the view now of seven Justices, including Chief Justice Rehnquist,⁹¹ VMI’s mission to produce “citizen soldiers” certainly “is great

88. 404 U.S. 71 (1971). Ginsburg played a pivotal role in litigating *Reed*. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 209 (2005). As Ms. Greenhouse noted:

In one of the earliest cases, *Reed v. Reed*, the Court was asked to invalidate an Idaho law that gave automatic preference to men over women in being selected as administrators of estates. Ruth Bader Ginsburg, then a law professor and an attorney for the American Civil Liberties Union’s Women’s Rights Project, worked on the brief for the appellant, Sally Reed, although she did not argue the case.

Id.; see also Rebecca L. Barnhart & Deborah Zalesne, *Twin Pillars of Judicial Philosophy: The Impact of the Ginsburg Collegiality and Gender Discrimination Principles on Her Separate Opinions Involving Gender Discrimination*, 7 N.Y. CITY L. REV. 275, 280 (2004) (“Although the Court did not apply a higher level of scrutiny to sex-based classifications, Ginsburg had planted the seed, and the *Reed* brief would become known as the ‘Grandmother Brief’ because it contained the legal arguments for all subsequent gender discrimination cases.”).

89. *VMI*, 518 U.S. at 532.

90. *Id.* at 540.

91. For further evidence of Chief Justice Rehnquist’s movement over the decades in the area of sex discrimination, see *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736-40 (2003) (Rehnquist, C.J.) (upholding the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA) as a valid exercise of Congress’ power under Section Five of the Fourteenth Amendment to combat unconstitutional sex discrimination). Commentators have noted the magnitude of Chief Justice Rehnquist’s shift in position from his early days on the Court to *VMI* and then *Hibbs*. See, e.g., Linda Greenhouse, *Learning to Listen to Ruth Bader Ginsburg*, 7 N.Y. CITY L. REV. 213, 218-19 (2004); Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg’s Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39, 47 (2004); Reva B. Siegel, *You’ve Come A Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871-98 (2006). The evolution of the late Chief Justice’s views on sex discrimination is as striking as the development of his relationship with Justice Ginsburg is endearing. During my year in her chambers, I witnessed the respect and devotion with which she referred to him as “the Chief” or “my Chief.” See, e.g., Ginsburg, *supra* note 50, at 267-68 (discussing, *inter alia*, the change in Chief Justice Rehnquist’s views on sex discrimination and referring to him as “my now Chief”).

enough to accommodate women, who today count as citizens in our American democracy equal in stature to men.”⁹²

Turning from the question of liability to the issue of remedy, Justice Ginsburg deemed constitutionally inadequate Virginia's offer of a separate and unequal substitute that brought to mind the new Texas law school deemed insufficient in *Sweatt v. Painter*.⁹³ The very comparison to *Sweatt* underscored her view of the dominant social meaning of VMI's exclusion of women. While previous generations of Americans were untroubled by VMI's admissions policy,⁹⁴ this fact was not decisive. Invoking historian Richard Morris,⁹⁵ she wrote that “VMI's story continued as our comprehension of ‘We the People’ expanded.”⁹⁶ She perceived “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.’”⁹⁷ In her judgment, and in the judgment of the Court she helped to persuade, the Union becomes more perfect as our Constitution's comprehension of “We the People” broadens to include women.

Notably, Justice Ginsburg seemed to problematize the Court's use of tiers of scrutiny in equal protection cases: she required “an exceedingly persuasive justification”⁹⁸ for government action on the basis of gender, a standard that seemed closer to strict scrutiny than to intermediate

92. *VMI*, 518 U.S. at 545.

93. *Id.* at 553, 557 (citing *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950)) (comparing Virginia's proposed solution to the remedy proposed by Texas in *Sweatt*).

94. *See id.* at 566 (Scalia, J., dissenting) (“Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education.”).

95. *See supra* text accompanying note 81 (quoting Ginsburg's invocation of Morris).

96. *VMI*, 518 U.S. at 557 (footnote and citations omitted) (referencing MORRIS, *supra* note 81, at 193).

97. *Id.* at 558.

98. *Id.* at 531. *See id.* at 571 (Scalia, J., dissenting) (noting “[t]he Court's nine invocations of that phrase”).

scrutiny.⁹⁹ Yet she was careful to maintain the law's distinction between practices of exclusion and inclusion. "Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."¹⁰⁰ Justice Ginsburg explained that "[s]ex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,'¹⁰¹ to 'promot[e] equal employment opportunity,'¹⁰² to advance full development of the talent and capacities of our Nation's people."¹⁰³ But, she underscored, "such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."¹⁰⁴ As legal historian Serena Mayeri has written, "[p]romoting women's advancement and equal participation in the society, the polity, and the economy was, Ginsburg essentially declared, an 'exceedingly persuasive justification.'"¹⁰⁵

3. Abortion

The ideal of equal citizenship stature animates Justice Ginsburg's approach to the permissibility of government regulation of abortion. In her controversial critique of *Roe v. Wade*,¹⁰⁶ she wrote that "the shape of the law on gender-based classification and reproductive autonomy indicates and influences the opportunity women will have to participate as men's full

99. This language originated in earlier cases. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-37 & n.6 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). In *VMI*, however, Chief Justice Rehnquist insisted that these decisions used the language to describe the difficulty of meeting the standard of review, not the standard of review itself. See *VMI*, 518 U.S. at 559 (Rehnquist, C.J., concurring in judgment). Justice Scalia was substantially more harsh in his criticism. See, e.g., *id.* at 573 (Scalia, J., dissenting) ("Only the amorphous 'exceedingly persuasive justification' phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women . . . willing and able to undertake VMI's program.").

100. *VMI*, 518 U.S. at 533.

101. *Id.* (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977) (per curiam)).

102. *Id.* (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987)).

103. *Id.* at 533-34.

104. *Id.* at 534 (citing *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)).

105. Mayeri, *supra* note 86, at 1851. For a recent, forceful explication of Justice Ginsburg's views on sex discrimination, see *AT&T Corporation v. Hulteen*, 129 S.Ct. 1962, 1978-80 (2009) (Ginsburg, J., dissenting).

106. 410 U.S. 113 (1973).

partners in the nation's social, political, and economic life."¹⁰⁷ Similarly, she insisted that "[a]lso in the balance is a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen."¹⁰⁸ Her analysis of the abortion question thus focused primarily not on the right to privacy, but on the "woman's equality aspect" to reproductive rights, the "equal-regard values involved in cases on abortion."¹⁰⁹

Justice Ginsburg reaffirmed her approach to restrictive abortion regulations more than two decades later, in her dissent in *Gonzales v. Carhart*.¹¹⁰ The five-Justice majority rejected a facial challenge to the federal Partial-Birth Abortion Ban Act of 2003, even though the statute lacked the health exception that the Court in *Stenberg v. Carhart*¹¹¹ had held was required under *Planned Parenthood v. Casey*.¹¹² Dissenting, Justice Ginsburg wrote that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."¹¹³

Justice Ginsburg wrote with uncharacteristic anger. She insisted that the Court's treatment of the medical evidence was "in undisguised conflict with *Stenberg*,"¹¹⁴ and that the statute did not advance the government's interest in protecting fetal life because "[t]he law saves not a single fetus from destruction, for it targets only a *method* of performing abortion."¹¹⁵ She further insisted that it is "simply irrational" to regard the banned procedure as warranting state intervention to a greater extent than the most

107. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 375 (1985) [hereinafter Ginsburg, *Some Thoughts on Autonomy and Equality*]. See Ginsburg, *Speaking in a Judicial Voice*, *supra* note 81, at 1198-209 (further critiquing *Roe*).

108. Ginsburg, *Some Thoughts on Autonomy and Equality*, *supra* note 107, at 383.

109. *Id.* at 385.

110. 127 S. Ct. 1610 (2007). See Cass R. Sunstein, Editorial, *Ginsburg's Dissent May Yet Prevail*, L.A. TIMES, Apr. 20, 2007, at A31 (noting that in *Gonzales v. Carhart*, Justice Ginsburg "attempted to reconceive the foundations of the abortion right, basing it on well-established constitutional principles of equality").

111. 530 U.S. 914 (2000).

112. 505 U.S. 833 (1992).

113. *Gonzales*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting) (citing Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002-28 (1984)).

114. *Id.* at 1646.

115. *Id.* at 1647.

common method of second-trimester, previability abortion, and that the Court “dishonors our precedent” by allowing “moral concerns” to “overrid[e] fundamental rights.”¹¹⁶

Justice Ginsburg seemed most provoked by the Court’s invocation of “an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices.”¹¹⁷ She skewered the Court’s fear that doctors might withhold information about the nature of the banned procedure “[b]ecause of women’s fragile emotional state and because of the ‘bond of love the mother has for her child.’”¹¹⁸ She noted incredulously that “[t]he solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks,”¹¹⁹ but to “depriv[e] women of the right to make an autonomous choice, even at the expense of their safety.”¹²⁰ The Court’s “way of thinking,” she charged while explicitly invoking the Court’s equal protection precedents, “reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.”¹²¹ In effect, Justice Ginsburg concluded that banning an abortion procedure for the gender-paternalistic reasons offered by the majority violated the Equal Protection Clause.¹²²

Justice Ginsburg would have invalidated the statute on its face because “the absence of a health exception burdens *all* women for whom it is relevant—women who, in the judgment of their doctors, require [the banned procedure] because other procedures would place their health at risk.”¹²³ Concluding with extraordinary bluntness, she wrote that “the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations

116. *Id.* (citations omitted).

117. *Id.* at 1648.

118. *Id.* at 1634 (majority opinion).

119. *Gonzales*, 127 S.Ct. at 1648-49 (Ginsburg, J., dissenting).

120. *Id.* at 1649.

121. *Id.* Justice Ginsburg compared *Muller v. Oregon*, 208 U.S. 412, 422-23 (1908) and *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring), with *United States v. Virginia*, 518 U.S. 515, 533, 542, n.12 (1996), and *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977). *Gonzales*, 127 S. Ct. at 1649 (Ginsburg, J., dissenting).

122. For development of this argument, see Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007).

123. *Gonzales*, 127 S. Ct. at 1651 (Ginsburg, J., dissenting). Justice Ginsburg also asserted that the Court “offers no clue” regarding what an appropriate as-applied challenge “might look like.” *Id.*

of 'the rule of law' and the 'principles of *stare decisis*.'"¹²⁴ She thought "the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives."¹²⁵

In *Gonzales v. Carhart*, Justice Ginsburg viewed the statute under review as threatening the equal citizenship of American women. Indeed, she explicitly invoked the impediments to "women's progress toward full citizenship stature throughout our Nation's history" that she underscored on behalf of the Court in *United States v. Virginia*.¹²⁶ And from her perspective, what enabled this significant change in the constitutional law of abortion likely added insult to injury: Justice Alito's replacement of Justice O'Connor left her, at that time, as the lone remaining woman on the Court.

4. Equal Protection—Race

As suggested by her invocation of *Sweatt* in *VMI*, Justice Ginsburg's commitment to equal citizenship stature orients her equal protection jurisprudence in the area of racial equality. Indeed, in race cases she has urged the same distinction between keeping a door closed and opening it that she has drawn in gender cases. She also has viewed mechanical application of the tiers of scrutiny as impeding realization of the Constitution's equality command.

Justice Ginsburg has insisted that the Constitution properly accounts for the difference between the logic of racial subordination and the logic of race-conscious remedy. In implementing the "equality instruction" of the Equal Protection Clause, she urged in her dissent in *Gratz v. Bollinger*,¹²⁷ "government decisionmakers may properly distinguish between policies of exclusion and inclusion."¹²⁸ She asserted that "[a]ctions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated."¹²⁹

In line with this substantive understanding of equality, Justice Ginsburg reminded the Nation in *Gratz* that "we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned

124. *Id.* at 1652.

125. *Id.* at 1653.

126. *Id.* at 1649 (quoting *United States v. Virginia*, 518 U.S. 515, 542 n.12 (1996)).

127. 539 U.S. 244 (2003).

128. *Id.* at 301 (Ginsburg, J., dissenting).

129. *Id.*

inequality remain painfully evident in our communities and schools.”¹³⁰ She further noted that “[t]he racial and ethnic groups to which the College accords special consideration (African-Americans, Hispanics, and Native-Americans) historically have been relegated to inferior status by law and social practice,” and “their members continue to experience class-based discrimination to this day.”¹³¹ Similarly, she observed in her concurring opinion in *Grutter v. Bollinger*¹³² that “it was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery.”¹³³

In Justice Ginsburg’s view, the institution of affirmative action in higher education seeks to redress past (and present) racial discrimination and its manifold social consequences, thereby promoting equal citizenship stature.¹³⁴ She views similarly the practice of affirmative action in other settings, as she suggested in her dissenting opinion in *Adarand Constructors, Inc. v. Peña*.¹³⁵ And she places in the same category the post-*Brown* project of racially integrating America’s public schools, whether

130. *Id.* at 298.

131. *Id.* at 303.

132. 539 U.S. 306 (2003).

133. *Id.* at 345 (Ginsburg, J., concurring) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

134. Remedial logic also pervades the reasoning of Justices who expressly speak the language of “diversity” in affirmative action cases. *See, e.g.*, Post, *supra* note 39, at 63, 74; Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 790-800 (2006).

135. 515 U.S. 200 (1995). Justice Ginsburg wrote in this government contracting case:

Those effects [of past racial discrimination], reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race. White and African American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.

Id. at 273-74 (Ginsburg, J., dissenting) (footnotes and citations omitted).

through court order or through voluntary efforts by local communities.¹³⁶ For her, efforts to secure equal citizenship stature implicate precisely the opposite purposes, effects, and social meanings of the brutal practices of racial subordination that prevailed throughout most of American history.¹³⁷

Accordingly, Justice Ginsburg's approach to race cases, like her approach in *VMI*, may be understood as a measured effort to destabilize the doctrinal constraints imposed by the tiers of scrutiny. While in *VMI* she endeavored to ramp up the level of scrutiny because she confronted a classification that she deemed invidious,¹³⁸ in race cases she has tended to dial down the degree of judicial skepticism because she has tended to confront classifications that she deems benign.¹³⁹ In *Grutter*, she went out of her way to record that the case presented no occasion "to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review."¹⁴⁰ In *Gratz*, she insisted that race is not "inevitably an impermissible classification."¹⁴¹

So too in *Adarand*. In her dissent, Justice Ginsburg read the lead opinion as requiring a "fatal" brand of strict scrutiny "for classifications burdening groups that have suffered discrimination in our society," but as

136. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2836 (2007) (Breyer, J., joined by Stevens, Souter, & Ginsburg, J., dissenting) ("For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools.").

137. For a classic focus on the purposes, effects, and social meanings of a practice as determinative under equal protection analysis, see Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 426 (1960) ("Can a system which, in all that can be measured, has practiced the grossest inequality, actually have been 'equal' in intent, in total social meaning and impact? 'Thy speech maketh thee manifest . . .'; segregation, in all visible things, speaks only haltingly any dialect but that of inequality.").

138. In *VMI*, Justice Ginsburg seemed to regard elevation of the level of scrutiny applied to sex classifications that enforce traditional sex-role stereotypes as the doctrinal expression of women's own elevation in American society. See 518 U.S. at 531. What is more, she intimated more than once that the elevation of both was not yet complete. See *id.* at 532 & n.6 (summarizing "the Court's *current directions* for cases of official classification based on gender," and noting that "[t]he Court has *thus far* reserved most stringent judicial scrutiny for classifications based on race or national origin . . ." (emphases added)).

139. But see *Johnson v. California*, 543 U.S. 499, 516 (2005) (Ginsburg, J., concurring) (reaffirming her "conviction that the same standard of review ought not control judicial inspection of every official race classification," but agreeing that a state policy of racial segregation in prisons "warrants rigorous scrutiny").

140. 539 U.S. at 346 n.* (Ginsburg, J., concurring).

141. 539 U.S. at 301 (Ginsburg, J., dissenting) (quoting *Nowalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1968)).

rejecting the notion that strict scrutiny is “fatal in fact” for “a classification made to hasten the day when ‘we are just one race.’”¹⁴² Significantly, she referenced the “Court’s once-lax review of sex-based classifications” as justifying “searching” review even of the ostensibly virtuous variety of racial classifications, “in order to ferret out classifications in reality malign, but masquerading as benign.”¹⁴³ The link between her past work as a champion of women’s rights and her present work as a guarantor of racial equality was express in the *United States Reports*.¹⁴⁴

5. Equal Protection—Disability

Justice Ginsburg is guided by equal-citizenship concerns in considering questions of equal protection for disabled Americans. In this context, too, she focuses on ending historic practices of exclusion and taking relevant differences into account. Here as well, her work as a women’s rights advocate has had a profound influence on the approach she has taken.¹⁴⁵

Indeed, disability issues were not new to Justice Ginsburg when she encountered them as a judge: much of her early work as a legal advocate was concerned with pregnancy, which can interfere with the performance of certain job functions. From the beginning, and particularly in her undernoticed merits brief in *Struck v. Secretary of Defense*,¹⁴⁶ Justice Ginsburg has viewed discrimination against pregnant women as a core case

142. 515 U.S. at 275 (Ginsburg, J., dissenting) (citations omitted).

143. *Id.*

144. See Mayeri, *supra* note 86, at 1850-53.

145. See Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding “We the People”*: *The Disability Rights Cases*, 104 COLUM. L. REV. 49, 56 (2004) (“[T]he critique of paternalism that lies at the core of disability rights thinking has much in common with—and was surely influenced by—the women’s movement’s own attack on paternalistic practices that limited women’s opportunities, an attack exemplified by then-Professor Ginsburg’s litigation agenda throughout the 1970s.”).

146. See Brief for Petitioner at 7, *Struck v. Sec’y of Def.*, 409 U.S. 1071 (1972) (No. 72-178). This brief has been underappreciated in part because the Court declined to hear the merits of the case. It also has been “neglected,” Reva B. Siegel, *Comments*, in *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION 245* (Jack M. Balkin ed., 2005), because the Court subsequently rejected an equal protection challenge to a pregnancy discrimination claim. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding a California law that provided workers with comprehensive disability insurance for all temporarily disabling conditions that might prevent them from working, except pregnancy). For an attempt to recover the *Struck* brief, see generally Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination As Sex Discrimination*, 59 DUKE L.J. (forthcoming January 2010).

of sex discrimination.¹⁴⁷ In *Struck*, she represented an Air Force officer, Captain Susan Struck, whose pregnancy—and whose refusal on religious grounds to have an abortion—subjected her to automatic discharge from military service. In her brief, Professor Ginsburg insisted that a key barrier to women's full participation in American society was not pregnancy, but our society's historic response to it: "Discharge for pregnancy, attended by termination of income and fringe benefits, and denial of the right to return after childbirth, disables these women far more than their temporary physical condition."¹⁴⁸ This argument, and her submission in *Struck* that the status quo is not neutral—that certain "practices operate as 'built-in headwinds' that drastically curtail women's opportunities"¹⁴⁹—foreshadow fundamental arguments of the contemporary disability rights movement.

Justice Ginsburg's opinion for the Court in *Olmstead v. L.C.*,¹⁵⁰ which held that unnecessary institutionalization of people with disabilities often constitutes "discrimination" prohibited by Title II of the Americans with Disabilities Act of 1990,¹⁵¹ has been called the "*Brown v. Board of Education* of the disability rights movement" by disability rights activists.¹⁵² According to Sam Bagenstos, a former Ginsburg clerk, "the Justice's contributions to the legal acceptance of the disability rights movement promise to aid significantly in the achievement of equal citizenship for people with disabilities in this country."¹⁵³ Professor Bagenstos stresses Justice Ginsburg's endorsement of the view of disability rights activists that "disability was neither a personal tragedy nor a source of inspiration for the nondisabled; disability was a minority-group status imposed by a society that was not accessible to individuals with physical or mental impairments that deviated too far from 'the norm.'"¹⁵⁴ From this perspective, a sidewalk without curb cuts is not neutral, nor is a courthouse

147. Recounting "Capt. Susan Struck's story" during her Supreme Court confirmation hearing, then-Judge Ginsburg sought "to explain how my own thinking developed on this issue [of sex discrimination, and it came out of] a case involving a woman's choice for birth rather than the termination of her pregnancy." Hearings Before the Committee on the Judiciary: The Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States, 103d Cong. 205 (1993). She identified "the *Struck* brief" as "mark[ing] the time when I first thought long and hard about this question." *Id.* at 206.

148. Brief for Petitioner, *supra* note 146, at 37.

149. *Id.* at 35 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (footnote omitted)).

150. 527 U.S. 581 (1999).

151. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2000)); *see also Olmstead*, 527 U.S. at 587.

152. Bagenstos, *supra* note 145, at 49.

153. *Id.* at 50.

154. *Id.* at 51.

without an elevator. Moreover, people who use wheelchairs are not inherently disabled; rather, they are rendered disabled by their inaccessible environment.

During the October 2003 Term, Justice Ginsburg reaffirmed her commitment to viewing disability in this way. Concurring in the Court's decision to uphold congressional power to enact part of Title II of the Americans with Disabilities Act of 1990 (ADA) under Section 5 of the Fourteenth Amendment, she wrote in *Tennessee v. Lane* that the ADA "is a measure expected to advance equal-citizenship stature for persons with disabilities."¹⁵⁵ According to Ginsburg, "Congress understood in shaping the ADA" that "[i]ncluding individuals with disabilities among people who count in composing 'We the People' . . . would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation."¹⁵⁶ The *Lane* Court, she concluded, was "faithful to the Act's demand for reasonable accommodation to secure access and avoid exclusion."¹⁵⁷

6. Federalism

Justice Ginsburg's approach to federalism cases is informed by her inclusive constitutional vision. Specifically, she defends broad government power to secure equal citizenship for once-excluded or otherwise vulnerable Americans.¹⁵⁸ In *United States v. Morrison*,¹⁵⁹ for example, she had little difficulty concluding that Congress possessed ample authority under the Commerce Clause to enact part of the Violence Against Women Act of 1994 (VAWA),¹⁶⁰ which provided a federal civil remedy for the victims of gender-motivated violence.¹⁶¹

Similarly, her *Lane* concurrence addressed some of the federalism concerns underlying the Rehnquist Court's Section 5 jurisprudence. She wrote that "[l]egislation calling upon all government actors to respect the

155. 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) (citing Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 471 (2000)).

156. *Id.* at 536.

157. *Id.* at 537.

158. I shall not canvass Justice Ginsburg's views on federalism in every significant area of constitutional law. A comprehensive survey would include discussion of her approaches to the Commerce Clause, the Tenth Amendment, the Eleventh Amendment, the enforcement clauses of the Civil War Amendments, preemption, and the dormant Commerce Clause.

159. 529 U.S. 598 (2000).

160. 42 U.S.C. § 13981 (1994).

161. Justice Ginsburg joined Justice Souter's dissent in full and Justice Breyer's dissent in part. See *Morrison*, 529 U.S. at 628 (Souter, J., dissenting); *id.* at 655 (Breyer, J., dissenting).

dignity of individuals with disabilities is entirely compatible with our Constitution's commitment to federalism, properly conceived."¹⁶² This was so, she explained, because it is "not conducive to a harmonious federal system to require Congress, before it exercises authority under [Section] 5 of the Fourteenth Amendment, essentially to indict each State for disregarding the equal-citizenship stature of persons with disabilities."¹⁶³ Noting that "[m]embers of Congress are understandably reluctant to condemn their own States as constitutional violators, complicit in maintaining the isolated and unequal status of persons with disabilities[.]" she thought it inappropriate to "disarm a National Legislature for resisting an adversarial approach to lawmaking better suited to the courtroom."¹⁶⁴ She deemed the record of exclusion before Congress "sufficed to warrant the barrier-lowering, dignity-respecting national solution the People's representatives in Congress elected to order."¹⁶⁵

By contrast, Justice Ginsburg invoked federalism concerns of her own in her dissent in *Bush v. Gore*,¹⁶⁶ insisting in an extraordinary case upon the "ordinary principle" that federal courts defer to a state high court's interpretation of state law.¹⁶⁷ She rejected Chief Justice Rehnquist's implicit comparison of the Florida Supreme Court's conduct to the massive resistance of state supreme courts during the Civil Rights Movement. Whereas those courts sought to undermine the U.S. Supreme Court's insistence in *Brown v. Board of Education* upon the equal citizenship stature of African Americans,¹⁶⁸ "the Florida Supreme Court "concluded that counting every legal vote was the overriding concern of the Florida legislature when it enacted the State's Election Code. The court surely should not be bracketed with state high courts of the Jim Crow South."¹⁶⁹

These few cases hardly capture most, let alone all, of Justice Ginsburg's relevant views on constitutional federalism.¹⁷⁰ But they do suggest that her constitutional vision influences her approach to cases with

162. *Lane*, 541 U.S. at 537.

163. *Id.*

164. *Id.* at 537-38.

165. *Id.* at 538.

166. 531 U.S. 98 (2000).

167. *Id.* at 142 (Ginsburg, J., dissenting).

168. 347 U.S. 483 (1954).

169. *Bush*, 531 U.S. at 141.

170. For example, Justice Ginsburg is among the Justices least likely to conclude that federal law preempts state law. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008) (holding 8-1 that the Medical Device Act's preemption clause bars common-law claims challenging the safety or effectiveness of a medical device marketed in a form that received pre-market approval from the FDA). Justice Ginsburg was the sole dissenter.

federalism components. Her assessment of federalism-based objections to government action appears to be informed by the extent to which such action advances or impedes equal-citizenship concerns.

7. Additional Instances

The ideal of equal citizenship stature animates Justice Ginsburg's approach to central areas of constitutional law. This commitment accounts for the general views on constitutional change that she expressed during her confirmation hearing; her addendum to Justice Marshall's stated view of the original Constitution; her basic approach to the Equal Protection Clause that she noted in her conversation with students at CUNY Law School; her views on gender discrimination that culminated in her majority opinion in *VMI*; her resistance to burdensome regulations of abortion, which she viewed as a form of gender discrimination in criticizing the Court in *Roe* and *Gonzales v. Carhart*; her substantive understanding of the Constitution's commitment to racial equality in cases such as *Grutter*, *Gratz*, and *Adarand*; her conception of constitutional equality for disabled Americans in cases such as *Olmstead* and *Lane*; and the views on federalism that she expressed in the dissent she joined in *Morrison*, her concurring opinion in *Lane*, and her dissent in *Bush v. Gore*.

These examples are illustrative, not exhaustive. I will suggest a few additional illustrations without developing them. Justice Ginsburg understands discrimination against homosexuals to implicate basic questions of equal citizenship stature.¹⁷¹ Likewise, her defense of a strict wall of separation between church and state seems animated by equal-citizenship concerns. She has concluded that "the aim of the Establishment Clause is genuinely to uncouple government from church"¹⁷² According to this view of the Clause, a robustly separationist approach—

171. Justice Ginsburg was in the majority in both *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), and she dissented in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The majority opinion in *Lawrence* defended the dignity of intimate homosexual relationships and underscored the state's lack of authority to demean homosexuals. See 539 U.S. at 567, 575, 578; see also *infra* note 218 and accompanying text (quoting some of the language from *Lawrence* and noting Justice Ginsburg's subsequent invocation of this language).

172. *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 817-18 (1995) (Ginsburg, J., dissenting) (citing *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947)).

one that maintains a secular public space¹⁷³—disables government from threatening the equal social status of citizens who may not support the religious practices advanced, endorsed, or coerced by government.¹⁷⁴

The ideal of full human stature also helps to account for Justice Ginsburg's votes in cases implicating the potential tradeoff between liberty and security in the wake of the terrorist attacks of September 11, 2001.¹⁷⁵ A Justice whose basic approach to constitutional law is oriented around the ideal of essential human dignity, of full human stature, might be expected to respond skeptically to a President's assertion that there are, in effect, no judicially enforceable constitutional limits on his authority to declare someone an "enemy combatant" and to indefinitely detain the individual or try him before a military commission.¹⁷⁶ Such a Justice might also be expected to attend to evolving standards of decency in determining whether imposition of the death penalty in certain circumstances shows sufficient respect for human dignity.¹⁷⁷

To offer just one more example, Justice Ginsburg has herself tied her support for what she calls "a comparative perspective in constitutional adjudication" to her broader constitutional vision.¹⁷⁸ She has criticized the "notion that it is improper to look beyond the borders of the United States in grappling with hard questions" as "in line with the view of the U.S. Constitution as a document essentially frozen in time as of the date of its

173. In *Pinette*, Justice Ginsburg endorsed the argument in Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-214 (1992), that the "negative bar against establishment of religion implies affirmative establishment of secular public order." 515 U.S. at 817.

174. For a different perspective from another Democratic appointee on the Court, see *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment). "[T]o reach a contrary conclusion here, based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions." *Id.*

175. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

176. See *supra* notes 53-54 and accompanying text (quoting relevant public statements of Justice Ginsburg). In each of the cases listed in the previous note, Justice Ginsburg voted in favor of detainees who alleged that they were being held or tried illegally.

177. Justice Ginsburg was in the majority in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002).

178. Ruth Bader Ginsburg, Assoc. J., U.S. Supreme Court, Speech at the Constitutional Court of South Africa, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (Feb. 7, 2006) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html (last visited Feb. 14, 2009)).

ratification.”¹⁷⁹ In her view, “U.S. jurists honor the Framers’ intent ‘to create a more perfect Union,’ . . . if they read the Constitution as belonging to a global 21st century, not as fixed forever by 18th-century understandings.”¹⁸⁰ Just as the United States has had much to offer the world in broadening “a decent Respect to the Opinions of Mankind”¹⁸¹ to include respect for the opinions of “[Human]kind,”¹⁸² so Justice Ginsburg believes that other countries can help Americans to perfect the Union. They can do so, among other ways, by providing different perspectives on who ought to count (and how) in (re)constituting “We the People.” “We are the losers,” she maintains, “if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups.”¹⁸³ This is because “irrational prejudice and rank discrimination are infectious in our world,” and because “. . . the determination to counter it, we all share.”¹⁸⁴

This was apparently one of the lessons that Professor Ginsburg learned during her stay in Sweden in the early 1960s. It is widely known that she learned Swedish and co-authored a book on Swedish judicial procedure.¹⁸⁵ It is less commonly understood that she also was exposed to perspectives that would significantly influence her approach to the problem

179. *Id.*

180. *Id.*

181. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

182. Ginsburg, *supra* note 178.

183. Ginsburg & Merritt, *supra* note 83, at 282.

184. *Id.*; see also, e.g., Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL’Y REV. 329, 336 (2004) (noting that in her *Grutter* concurrence, 539 U.S. at 344, she discussed two United Nations Conventions that “distinguish between impermissible policies of oppression and exclusion, and permissible policies of inclusion”); *id.* at 337 (forecasting that the Court will continue to take a comparative perspective in constitutional litigation in part “in a spirit of humility” because, “in Justice O’Connor’s words: ‘Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit.’” (quoting Sandra Day O’Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT’L JUD. OBSERVER, June 1997, at 2)).

185. See, e.g., Rebecca Mae Salokar, *Ruth Bader Ginsburg*, in WOMEN IN LAW 78, 80 (Rebecca Mae Salokar & Mary L. Volcansek eds., 1996) (“Following her clerkship, Ginsburg was invited to participate as a research associate on a comparative legal studies project funded by the Carnegie Foundation through Columbia University. She seized the opportunity to travel to Sweden to study its legal and judicial system and there, by coincidence, she witnessed the beginnings of a feminist movement. But the young Mrs. Ginsburg was not yet attuned to the legal concerns of women. The comparative studies project resulted in two co-authored books on Swedish law, and to this day, Ginsburg maintains her academic interest in that country’s laws and judicial system.”).

of sex discrimination in America.¹⁸⁶ As Cary Franklin explains in an important forthcoming article, “Ginsburg derived the anti-stereotyping principle in part from the philosophy of John Stuart Mill and the law and politics of Sweden, which began in the early 1960s to wage an ambitious, decades-long campaign against sex-role enforcement.”¹⁸⁷

Specifically, the Swedish anti-stereotyping ideals that would powerfully impact Professor Ginsburg went far beyond insisting on formal equality between the sexes. “[*Jämställdhet*,” as this Swedish theory of gender equality was known, rested on the belief that “sex classifications were often necessary in order to break down traditional conceptions of men and women’s roles; their aim was not to eliminate formal sex classifications but to liberate both sexes from prescriptive sex stereotypes.”¹⁸⁸ According to Franklin, it was primarily for this reason, and not because of strategic considerations or a commitment to formal equality, that Professor Ginsburg represented male plaintiffs in several of the cases she litigated.¹⁸⁹ Justice Ginsburg’s internationalism and her sex discrimination jurisprudence are thus tied together in interesting ways—ways that are integrated by her inclusive constitutional vision.

B. Reflections on Justice Ginsburg’s Vision

The foregoing illustrations reveal that Justice Ginsburg uses the phrase “equal citizenship stature” in a variety of settings, suggesting that it captures ideas that are central to her understanding of the Constitution’s objectives. To be sure, she has invoked the phrase most frequently in equal protection cases, which may be unsurprising because this is an area of constitutional law in which she has been especially concerned to secure doctrinal change.¹⁹⁰ But as I have endeavored to show, her concern with equal citizenship transcends her engagement with the Equal Protection

186. See generally Franklin, *supra* note 86 (arguing that the sex equality revolution Ginsburg witnessed in Sweden in the 1960s strongly influenced her approach to sex discrimination law in the United States).

187. *Id.* at 4; see *id.* at 12 (“Ginsburg’s immersion in Swedish law and culture in the 1960s would have a profound impact on her subsequent career as a legal feminist and Supreme Court litigator.”).

188. *Id.* at 17.

189. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Moritz v. Comm’r of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972). For an illuminating (and characteristically humorous) account of how the Ginsburgs stumbled upon the *Moritz* case, see Martin D. Ginsburg, *A Uniquely Distinguished Service*, 10 GREEN BAG 2D 173 (2007).

190. Cf. Baer, *supra* note 68, at 222 (“She has actively promoted change, at least in equal protection doctrine . . .”).

Clause. She has been applying to several groups and areas of constitutional law the same vision that she initially developed in her work as an advocate on behalf of women's rights during the 1970s.¹⁹¹

The foregoing examples reveal something else that is important about Justice Ginsburg's constitutional vision. She often invokes the ideal of equal citizenship stature interchangeably with references to "equal dignity," "essential human dignity," and "full human stature." In her public utterances, these phrases appear to convey essentially the same meaning. This observation permits three further reflections about the content of Justice Ginsburg's constitutional vision.

First, Justice Ginsburg's concern with "stature," or social status, indicates that her vision is infused with antisubordination values.¹⁹² Her primary focus of constitutional concern is on historically marginalized groups; she insists that it is wrong for government to reinforce their inferior social status.¹⁹³ In accordance with this insistence, she has sharply distinguished between efforts to exclude such groups from institutions or opportunities in American society, and efforts to include them by overcoming the continuing effects of past (and present) societal discrimination and taking relevant differences into account. In equal protection cases, she has operationalized this distinction by applying vigorous judicial scrutiny only to exclusionary practices, thereby destabilizing the doctrinal division of the Equal Protection Clause into three tiers of scrutiny. In her view, rigid adherence to the tiers thwarts the vindication of antisubordination values, particularly "[t]he moral insistence that the low be raised up—that the forces of subordination be named, accused, disestablished, and dissolved."¹⁹⁴

191. See, e.g., Ginsburg, *supra* note 50, at 266 (noting that "in the 1970s," her "major work . . . was to help advance the vibrant idea of the equal stature and dignity of men and women as a matter of constitutional principle").

192. For discussions of the antisubordination understanding of equal protection, see CATHERINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 38 (1987); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 151 (1976); Siegel, *supra* note 57, at 1472-76; see also Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 769-79 (2002).

193. See Siegel, *supra* note 57, at 1472-73 (defining "the antisubordination principle" as "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups").

194. Balkin & Siegel, *supra* note 192, at 32.

While some feminist legal scholars have charged Justice Ginsburg with excessive formalism in the area of gender equality,¹⁹⁵ the foregoing analysis suggests that her constitutional vision is more substantive than formal, and always has been. Critically, her selection in 1972 of a *pregnant* plaintiff to advance the equal protection claims of *women* illustrates that she is no formalist.¹⁹⁶ In her merits brief in *Struck*, Ginsburg explained that she was challenging laws that reflect or enforce traditional sex-role stereotypes because such laws restrict individual opportunity *and* subordinate women: “presumably well-meaning exaltation of woman’s unique role in bearing children has, in effect, denied women equal opportunity to develop their individual talents and capacities and has impelled them to accept a dependent, subordinate status in society.”¹⁹⁷

195. See, e.g., Baer, *supra* note 68, at 216, 231 (“Fourteen of the [nineteen] cases decided since *Craig* were brought by men. Lower court cases exhibit a similar pattern. The women’s won-lost record is better than the men’s; moreover, victories by men do not necessarily harm women and may benefit them. But so far men have been the primary beneficiaries of the new sexual equality doctrine. Ruth Bader Ginsburg has given no indication that this outcome troubles her. She continues to regard sex equality not as requiring the elimination of male supremacy, but as a problem of *discrimination*, of basing decisions on a person’s sex.”); David Cole, *Strategies of Difference: Litigating for Women’s Rights in a Man’s World*, 2 L. & INEQUALITY 33, 55 (1984) (“Ginsburg chose to litigate issues that she could frame as hurting both men and women, rather than issues, like pregnancy discrimination, where the harm fell on women alone. She sought to deny women’s ‘difference;’ this strategy both limited her range and increased her chances for success. Ginsburg’s classic argument was to insist that women were like men. She sought to show that women were similarly situated, but that society had treated them differently because of stereotypical ‘old notions’ and ‘archaic assumptions’ about sex roles. . . . Nevertheless, Ginsburg’s assimilationist method could not address the entire range of women’s rights issues. Assimilation is most obviously an insufficient response to issues of reproductive freedom. In this area, women are biologically different, and therefore women must be treated differently to be treated equally.”). Justice Ginsburg has herself summarized much of this criticism. See Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 17 (1989) (Feminist legal scholars “have portrayed the 1970s litigation as assimilationist in outlook, insistent on formal equality, opening doors only to comfortably situated women willing to accept men’s rules and be treated like men, even a misguided effort that harmed more women than it helped.”). Cary Franklin documents (and refutes) this criticism at length. See *generally* Franklin, *supra* note 86.

196. See Siegel & Siegel, *supra* note 146 (arguing that “Ginsburg was able to perceive social subordination in the exclusion of a pregnant woman from military service, even though pregnancy had long been understood as the principal physical difference between the sexes, because she saw that government regulation was enforcing traditional sex stereotypes”).

197. Brief for the Petitioner, *Struck v. Sec’y of Def.*, *supra* note 146, at 38. See *id.* at 38-45 (discussing, *inter alia*, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873); *Muller v. Oregon*, 208 U.S. 412 (1908); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Hoyt v. Florida*, 368 U.S. 57 (1961)).

Captain Struck, Ginsburg explained, “was presumed unfit for service under a regulation that declares, without regard to fact, that she fits into the stereotyped vision of the ‘correct’ female response to pregnancy.”¹⁹⁸ Ginsburg’s concern about the law’s enforcement of traditional sex-role stereotypes encompasses a concern about wrongful interference with individual opportunity, but it is not a concern about any and all differentiation. Rather, she has focused on differentiation with respect to certain practices that have long been associated with the subordination of women.¹⁹⁹

Fundamentally, antisubordination concerns motivate Justice Ginsburg’s approach to the problem of sex discrimination. She thus wrote for the Court in the *VMI* case that sex classifications “may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women.”²⁰⁰ Justice Ginsburg regards the historic subordination of women in America as the principal reason to regard with suspicion laws enforcing traditional sex-role stereotypes that constrain their opportunities. On those occasions when she insists that men and women should be treated essentially the same for most purposes, as in the *VMI* case, it is for reasons that are primarily associated with an antisubordination perspective, not a commitment to formal equality.²⁰¹ The same is true of her willingness—indeed, eagerness—to view men as victims of sex discrimination in certain situations.²⁰²

Antisubordination values thus define what constitutional equality is for Justice Ginsburg. She does not regard an antisubordination approach as an alternative to equality analysis. Rather, she regards antisubordination as equality in the sense she celebrates when using the phrases “equal citizenship stature” or “equal dignity.” That is, she conceives equality as equal standing and respect, and this conception guides her assessment of

198. *Id.* at 50-51 (internal quotation marks and citation omitted).

199. For an argument that Americans have slowly been coming closer to embracing Justice Ginsburg’s view of the relationship between pregnancy discrimination and sex discrimination, see generally Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping, From Struck to Carhart*, 70 OHIO ST. L.J. (forthcoming November 2009). In this essay, Reva Siegel and I argue (among other things) that it is time to reexamine the ways we read *Geduldig*, see *supra* note 146, in light of both subsequent legal developments and what the opinion actually says about the circumstances in which pregnancy discrimination does not qualify as unconstitutional sex discrimination. *Id.*

200. *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (footnote omitted).

201. *Cf. generally* Franklin, *supra* note 86 (rejecting the formal-equality reading of Ginsburg’s approach to the problem of sex discrimination).

202. See *supra* notes 186-189 and accompanying text (discussing Cary Franklin’s work, which explains why Professor Ginsburg represented male plaintiffs in some of the sex discrimination cases that she litigated during the 1970s).

when equality values are implicated. Such guidance is critical in order to determine when differentiation implicates equality. This is a key theme of the aforementioned passage in her majority opinion in *VMI*:

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.²⁰³

Because Justice Ginsburg’s conception of equality is infused with antisubordination values, it can deal with “[i]nherent differences” between the sexes. As noted above, her substantive understanding of equality is powerful enough to indict exclusion on the basis of motherhood, including in cases of pregnancy, even though pregnancy had long been understood as the principal physical difference between the sexes. In contrast to discrimination against pregnant women, which Justice Ginsburg always has viewed as a paradigmatic form of sex discrimination,²⁰⁴ she likely did not devote her litigation efforts to opposing, say, sex-segregated bathrooms because separate restrooms for men and women do not implicate basic questions about the equal citizenship stature of women.²⁰⁵

Justice Ginsburg also uses an antisubordination approach to identify the perspective from which equality determinations should be made. That is, she determines whether equality values are implicated primarily from the standpoint of members of historically excluded groups, not principally from the perspective of members of included groups—which was the

203. 518 U.S. at 533-34 (citations and footnote omitted).

204. See *supra* notes 146-149, 196-198 and accompanying text (discussing Justice Ginsburg’s views on pregnancy discrimination).

205. I am referencing, of course, restroom privacy objections to the Equal Rights Amendment. See, e.g., Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21 (“Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy.”). What Ginsburg labeled the “potty issue,” *id.*, “did not die with the ERA. Scholars continued to raise the question of segregated bathrooms to highlight the difference between race discrimination and sex discrimination. And constitutional law casebooks continued to discuss the potty issue, canonizing it as a central question of sex discrimination law.” Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 957 n.26 (2002) (citation omitted).

approach taken by, among many others, the majority in *Plessy v. Ferguson*²⁰⁶ and *Bradwell v. Illinois*.²⁰⁷ For example, she approached a recent pay discrimination case from the perspective of the victim:

206. 163 U.S. 537, 551 (1896) (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

207. 83 U.S. (16 Wall.) 130 (1873) (upholding the exclusion of women from the practice of law). In a concurring opinion, Justice Bradley wrote:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband’s consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

83 U.S. (16 Wall.) at 141 (Bradley, J., concurring). “Although the method of communication between the Creator and the jurist is never disclosed,” Professor Ginsburg wrote in her *Struck* brief, “‘divine ordinance’ has been a dominant theme in decisions justifying laws establishing sex-based classifications.” Brief for the Petitioner, *Struck v. Sec’y of Def.*, *supra* note 146, at 39.

The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.²⁰⁸

Congress subsequently endorsed the perspective that Justice Ginsburg adopted in dissent. The Lilly Ledbetter Fair Pay Act of 2009 was the first bill that President Obama signed into law.²⁰⁹

In addition to revealing her commitment to combating subordination, Justice Ginsburg's references to "equal dignity," "essential human dignity," and "full human stature" are instructive in a second way: she uses the terms "citizenship" stature and "human" stature interchangeably. She does not mean to include within her vision only United States citizens.²¹⁰ Rather, she seems to invoke the language of citizenship to express the general idea of inclusion within the American political community. The difference between these two senses of citizenship obviously can have significant implications in several areas of American politics and law, including

208. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162, 2178-79 (2007) (Ginsburg, J., dissenting) (citation omitted). Justice Ginsburg further wrote:

Pay disparities are thus significantly different from adverse actions "such as termination, failure to promote, . . . or refusal to hire," all involving fully communicated discrete acts, "easy to identify" as discriminatory. It is only when the disparity becomes apparent and sizable, *e.g.*, through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain. Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.

Id. at 2179.

209. See Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 30, 2009, <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>.

210. For a forceful expression of concern that privileging citizenship would exclude many politically and economically vulnerable people, see Rachel F. Moran, *Terms of Belonging*, in *THE CONSTITUTION IN 2020*, *supra* note 5, at 136 ("As U.S. history shows, there are many types of exile from the American dream, whether through expulsion from our borders or relegation to second-class status with them. In light of these transgressions, progressives' enthusiasm for citizenship bewilders me.").

terrorism cases²¹¹ and immigration cases.²¹² It also may have significant implications should the Court elect to reinvigorate the Privileges Or Immunities Clause of Section One of the Fourteenth Amendment.²¹³ Noncitizens are hardly invisible to Justice Ginsburg's constitutional vision.²¹⁴

Third, Justice Ginsburg's vision encompasses both an equality and a liberty component. As explored above, Justice Ginsburg's frequent use of the term "equal" (and "full" as an apparent synonym for "equal"²¹⁵) captures her aspirational understanding of the Constitution that she embraced during her confirmation hearings: those who were previously excluded are now to be included within the constitutional conception of "We the People."²¹⁶ She understands the Civil War Amendments as designed to accomplish the great aim of making equal citizens of the descendents of slaves and other historically excluded groups.²¹⁷

At the same time, Justice Ginsburg's use of the phrase "essential human dignity" appears to imply a floor, an irreducible minimum of autonomy that government must accord each person regardless of how it

211. One issue in cases involving the indefinite detention or trial of alleged enemy combatants is whether the citizenship status of the detainee makes any difference to the constitutional analysis. *See supra* note 175 and accompanying text (citing recent terrorism decisions by the Court).

212. *See, e.g.,* *Nguyen v. I.N.S.*, 533 U.S. 53, 74-97 (2001) (O'Connor, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting); *Miller v. Albright*, 523 U.S. 420, 460-71 (1998) (Ginsburg, J., dissenting). Both decisions upheld provisions of immigration law that made it easier for children of single-citizen mothers to become citizens than children of single-citizen fathers.

213. *See* U.S. CONST. amend. XIV, § 1. A key question is whether this clause, unlike the Due Process and Equal Protection Clauses, protects only U.S. citizens. This issue was one of the subjects of discussion at a conference sponsored by the American Constitution Society during November 2008. *See* *The Second Founding and the Reconstruction Amendments: Toward a More Perfect Union*, <http://www.acslaw.org/secondfounding>.

214. *See, e.g.,* Ginsburg, *supra* note 184, at 335 (endorsing Professor Louis Henkin's use of the word "person" rather than "citizen" in discussing human rights because such usage "reflect[s] a commitment to respect the individual rights of all human beings") (discussing Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 32 (1985)).

215. *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 532 (1996) ("[T]he Court has repeatedly recognized that neither 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." (emphases added)).

216. *See supra* notes 71-82 and accompanying text (quoting Justice Ginsburg).

217. *See supra* note 136 (quoting the principal dissent in *Parents Involved*).

treats other persons—a zone of individual freedom into which government may not intrude.²¹⁸ To be sure, she tends to emphasize the ideal of human dignity as equality more often than the ideal of dignity as liberty, implying that the equality ideal occupies a favored position in her scheme of constitutional values. But appropriate focus on this key component of her constitutional vision does not imply that the liberty ideal plays an insignificant role.²¹⁹ I note again her observation that the Founders “stated a commitment” not only “to equality,” but also “to individual liberty.”²²⁰

More importantly, Justice Ginsburg registers that laws intervening in major life decisions and enforcing status roles may simultaneously implicate both equality and liberty—equal protection and due process. For example, restricting women’s liberty may be a means to the end of communicating inequality, and discriminating against women may be a means to the end of diminishing their opportunities to make their own

218. Justice Ginsburg thus joined (and subsequently invoked) the following language from Justice Kennedy’s majority opinion in *Lawrence*:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

539 U.S. at 578-79. See Ginsburg, *supra* note 184, at 336 (highlighting this portion of Justice Kennedy’s majority opinion).

219. For example, although Justice Ginsburg views the institution of affirmative action as primarily implicating values of constitutional equality, liberty concerns nonetheless inform her reasoning in this area of the law. See, e.g., *Adarand*, 515 U.S. at 276 (Ginsburg, J., dissenting) (“Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups.”).

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

meaning of their lives.²²¹ For Justice Ginsburg, it seems less important to disentangle these two clusters of constitutional commitments than it is to emphasize the ways in which they are connected.²²²

Justice Ginsburg's insistence on equal citizenship stature integrates her approaches to several important areas of constitutional law. Her votes in potentially distinct cases—those implicating gender discrimination, reproductive rights, racial equality, disability rights, federalism, discrimination on the basis of sexual orientation, church/state separation, terrorism, the death penalty, and international law—are not conceptually independent of one another. They are not merely a series of jurisprudential “silos.” There is significant depth and coherence to Justice Ginsburg's constitutional jurisprudence, a depth and coherence that is attributable to her progressive constitutional vision.²²³

221. For development of this insight, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1738-45, 1763-66 (2008). “Concern that restrictions on women's liberty can communicate meanings about women's social standing lies at the heart of the sex discrimination cases, especially those cases invalidating laws that deny women autonomy to make decisions about their family roles.” *Id.* at 1744-45.

222. Thus, in *Struck* Professor Ginsburg challenged pregnancy discrimination as violative of both equal protection and due process. *See supra* note 146 and accompanying text. *See, e.g.*, Brief for the Petitioner, *Struck v. Sec'y of Def.*, *supra* note 146, at 52 (“The discriminatory treatment required by the challenged regulation . . . reflects the discredited notion that a woman who becomes pregnant is not fit for duty, but should be confined at home to await childbirth and thereafter devote herself to child care. Imposition of this outmoded standard upon petitioner unconstitutionally encroaches upon her right to privacy in the conduct of her personal life.”) (footnote omitted).

223. One might object that it is possible to share Justice Ginsburg's concern with the historically (or currently) powerless and yet reject her conclusions in specific areas of the law. For example, opponents of abortion rights have long insisted on the full human status of the fetus. *Cf., e.g.*, *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007) (describing an “unborn child” as “a child assuming the human form”). I agree that people who are equally concerned about the politically disempowered may disagree about the abortion issue itself. But I would be loath to conclude that they share a common constitutional vision without knowing whether their concern for the vulnerable includes a commitment to the full equality of women. And to get at that question, I would want to know their views on, say, accommodation of motherhood and accessibility to contraception and sex education. If opponents of abortion hold views that compromise women's equality in these areas as well, and if they view coercing childbirth as the only or the primary way to protect the unborn, then I would be inclined to conclude that they do not share Justice Ginsburg's inclusive vision. It seems more likely that they possess a different vision and are attempting to appropriate feminist frames for distinct normative purposes. For an illustration of social movement struggle in this area where one group adopts a powerful frame of its agonist, see, for example, Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1677-79 (2008) (2007

I therefore do not share the concern of some legal academics about “the absence of anything like a heroic vision on the Court’s left.”²²⁴ For reasons I will soon offer, I agree that Justice Ginsburg is not a “visionary” in an aggressive sense.²²⁵ But as I have shown, Justice Ginsburg does possess a heroic constitutional vision. I shall now consider whether the aggression of a visionary is what is most required in order to realize her vision.

III. The Pursuit of Justice Ginsburg’s Vision

Champions of Justice Ginsburg’s constitutional vision are justifiably inspired by its clear-sighted series of insistences: that history did in fact happen and must be reckoned with in the present; that those who were long excluded from the constitutional community must now be included; that the ideal of human equality is substantive, not formal, and must be vindicated, not betrayed.

To be persuaded by a constitutional vision, however, is not to persuade others to adopt it. And without persuading a majority of one’s fellow citizens over a sustained period of time, proponents of a constitutional vision cannot prevail in our constitutional politics or our constitutional law. The stakes are often high. Right now, for example, supporters of President Barack Obama—many of whom presumably share much of Justice Ginsburg’s constitutional vision—might ask themselves what it will take to ensure that his presidency ends up being as consequential as they hope it will be—what is required to make the outcome of the 2008 presidential election more like President Roosevelt’s victory in 1932 and less like President Carter’s victory in 1976.

I do not presume that many of President Obama’s supporters share Justice Ginsburg’s constitutional vision merely because the two can be categorized as “liberals.” Nor do I assume a connection just because the very election of Barack Obama as our nation’s forty-fourth President

Brainerd Currie Lecture). For a sketch of how different American society would have to look for abortion-restrictive regulation not to rest in substantial part on traditional sex-role stereotypes about women, see Siegel, *supra* note 113, at 366-67.

224. Cass R. Sunstein, *Where Are the Liberal Visionaries on the Supreme Court?*, TNR Online, May 15, 2007. *Cf. infra* note 249 (quoting other legal academics).

225. I read Professor Sunstein as suggesting that “genuine visionaries” not only possess a constitutional vision, but also seek to realize the vision in a particular way—namely, through “sweeping opinions” that throw caution and compromise to the wind. *Id.* I agree that Justice Ginsburg is no visionary in this sense. *See infra* Part III (discussing Justice Ginsburg’s characteristically careful approach to achieving social change through constitutional adjudication).

partially embodies the power of realizing Justice Ginsburg's vision.²²⁶ Rather, Justice Ginsburg and President Obama tend to speak about American constitutional identity in strikingly similar ways, and they appear to have similar ideas about how best to persuade fellow Americans to adopt their conception. For example, then-Senator Obama titled his Philadelphia speech on American race relations "A More Perfect Union," and he began it by reciting the opening words of the Constitution.²²⁷ Justice Ginsburg could have uttered much of the aspirational language that followed.²²⁸

Senator Obama noted that the document produced by the Framers during the summer of 1787 "was eventually signed but ultimately unfinished," for "[i]t was stained by this nation's original sin of slavery" and left "any final resolution to future generations."²²⁹ This resolution, however, "was already embedded within our Constitution—a Constitution that had at its very core the ideal of equal citizenship under the law; a Constitution that promised its people liberty, and justice, and a union that could be and should be perfected over time."²³⁰ Yet fine words on paper did not suffice:

226. I obviously cannot prove such a statement. But I can suggest that it seems a promising way to account for the number of Americans who wept on Election Night and the following day, including Americans who are not characteristically prone to public displays of great emotion. Anyone who doubts the depth and power of Justice Ginsburg's constitutional vision might consider this moment in American history and how many Americans of diverse backgrounds experienced it—even some who voted for Senator John McCain.

227. Senator Barack Obama, Address at the National Constitution Center: A More Perfect Union (Mar. 18, 2008) (transcript available at <http://my.barackobama.com/page/content/hisownwords>) ("We the people, in order to form a more perfect union."). He omitted the phrase "of the United States." *See id.*

228. I do not do sufficient work in this piece to establish that Justice Ginsburg and President Obama share the same essential progressive vision of our Constitution. This Part, however, offers evidence that suggests substantial similarities in the basic constitutional outlooks of this Justice and this President. I recognize, however, that there are also likely to be important differences between them. For example, it is not clear how a commitment to equal citizenship stature explains some of the Obama Administration's positions on executive power.

229. Obama, *supra* note 227.

230. *Id.*

[W]ords on a parchment would not be enough to deliver slaves from bondage, or provide men and women of every color and creed their full rights and obligations as citizens of the United States. What would be needed were Americans in successive generations who were willing to do their part—through protests and struggle, on the streets and in the courts, through a civil war and civil disobedience and always at great risk—to narrow that gap between the promise of our ideals and the reality of their time.²³¹

President Obama's Constitution, like Justice Ginsburg's, is an intergenerational project of making good on the promises that "We the People" implicitly made to ourselves and to one another in the beginning—despite many of our practices—through the ideals we espoused and the inclusive language we used. "[T]he true genius of this nation," Obama insisted in Philadelphia, "is that America can change."²³² "What we have already achieved gives us hope—the audacity to hope—for what we can and must achieve tomorrow."²³³ Justice Ginsburg agrees with the President not only that "[the] union may never be perfect," but also that "generation after generation has shown that it can always be perfected."²³⁴ Like President Obama, moreover, she has elected to emphasize the latter point as much as the former, implying (among other things) that there is good reason genuinely to love this country and to be proud to be an American.

As inspiring as this constitutional vision is, it may encounter certain vulnerabilities that its proponents ignore at their peril. To be sure, I am in no position to make strong claims here, for transforming a constitutional vision into a governing reality requires the acumen of a skillful political

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

leader, particularly a President.²³⁵ But my sense that the vulnerabilities I perceive are real is strengthened by the fact that a politically astute President appears to have recognized and given voice to them.

A key vulnerability concerns the potential pitfalls of constitutionally privileging certain groups over others amidst the appearance and reality of scarce resources and opportunities. Advocates of an inclusive vision must decide which groups to privilege and why in particular settings, and how to negotiate conflicts among them.²³⁶ They must also be mindful of how a constitutional vision that stresses expanding the locus of constitutional concern—that emphasizes including and empowering historically marginalized groups—may be received by working-class white Americans who live with substantial economic anxiety and who do not feel advantaged on account of their race:

Most working- and middle-class white Americans don't feel that they have been particularly privileged by their race. Their experience is the immigrant experience—as far as they're concerned, no one's handed them anything, they've built it from scratch. They've worked hard all their lives, many times only to see their jobs shipped overseas or their pension dumped after a

235. Keith Whittington has underscored the central role of presidential leadership in the articulation of a constitutional vision:

The presidential office is unique in American politics, and it invites its occupant to make expansive claims to the authority to lead the nation. Moreover, part of the presidential agenda is likely to involve constitutional meaning. The Constitution is foundational in American politics, not only in the sense that it establishes the boundaries of legal action but also in the sense that it authorizes, invites, and structures political activity. An implicit or explicit constitutional discourse comes naturally to presidents, not because they are special caretakers of our constitutional tradition but because their visions of political leadership lead them to push the boundaries of that tradition. The president “tells us stories about ourselves, and in so doing he tells us what sort of people we are, how we are constituted as a community. We take from him not only our policies but our national self-identity.”

WHITTINGTON, *supra* note 28, at 19 (quoting MARY E. STUCKEY, *THE PRESIDENT AS INTERPRETER-IN-CHIEF* 1 (1991)).

236. The 2008 election cycle offered illuminating instances of potential fault lines. Identity politics bitterly divided some supporters of Barack Obama and Hillary Clinton, and African-Americans played a significant role in securing the passage of Proposition 8 in California. *See, e.g.*, Caitlin Flanagan & Benjamin Schwarz, Editorial, *Showdown in the Big Tent*, N.Y. TIMES, Dec. 7, 2008, at WK11 (“The struggle for equality—beginning with freedom from human bondage . . . —has been so central to African-American identity that many blacks find homosexual claims of a commensurate level of injustice frivolous, and even offensive.”).

lifetime of labor. They are anxious about their futures, and feel their dreams slipping away; in an era of stagnant wages and global competition, opportunity comes to be seen as a zero sum game, in which your dreams come at my expense. So when they are told to bus their children to a school across town; when they hear that an African American is getting an advantage in landing a good job or a spot in a good college because of an injustice that they themselves never committed; when they're told that their fears about crime in urban neighborhoods are somehow prejudiced, resentment builds over time.²³⁷

If then-Senator Obama had talked about race and inequality in a full-throated antisubordination register, speaking only on behalf of certain groups in American society, it seems far less likely that he would have been elected President of the United States. It is noteworthy in this regard that Justice Ginsburg has counted propertyless white males among the previously excluded groups who achieved inclusion within "We the People."²³⁸ It is also noteworthy that she always has emphasized what women and men *both* have to gain by ending the separate spheres tradition of subordinating women through sex-role stereotypes.²³⁹

Obama spoke about race from multiple points of view, and regarding each of them he carefully distinguished legitimate concerns from misplaced or counterproductive hostility and scapegoating.²⁴⁰ He spoke about racial

237. Obama, *supra* note 227.

238. See *supra* text accompanying note 81.

239. See, e.g., Ginsburg, *supra* note 50, at 270.

By enshrining and promoting the woman's "natural" role as selfless homemaker, and correspondingly emphasizing the man's role as provider, the state impeded both men and women from pursuit of the very opportunities and styles of life that could enable them to break away from traditional patterns and develop their full, human capacities.

Id.

240. See, e.g., Obama, *supra* note 227 ("[W]e do need to remind ourselves that so many of the disparities that exist in the African-American community today can be directly traced to inequalities passed on from an earlier generation that suffered under the brutal legacy of slavery and Jim Crow."); *id.* ("For the men and women of Reverend Wright's generation, the memories of humiliation and doubt and fear have not gone away; nor has the anger and the bitterness of those years.").

The fact that so many people are surprised to hear that anger in some of Reverend Wright's sermons simply reminds us of the old truism that the most segregated hour in American life occurs on Sunday morning. That anger is not always productive; indeed, all too often it distracts attention from solving real problems; it keeps us from squarely facing our own complicity in our condition, and prevents the African-American

dialogue and reconciliation as he unblinkingly appreciated “the complexities of race in this country that we’ve never really worked through—a part of our union that we have yet to perfect.”²⁴¹ And he spoke about interests, values, and identities that unite Americans despite their differences.²⁴²

Obama also spoke directly to African Americans, white Americans, and all Americans. To African Americans, he insisted that the path to a more perfect union means not only “continuing to insist on a full measure of justice in every aspect of American life,” but also “binding our particular grievances—for better health care, and better schools, and better jobs—to

community from forging the alliances it needs to bring about real change. But the anger is real; it is powerful; and to simply wish it away, to condemn it without understanding its roots, only serves to widen the chasm of misunderstanding that exists between the races.

Id.

Just as black anger often proved counterproductive, so have these white resentments distracted attention from the real culprits of the middle class squeeze—a corporate culture rife with inside dealing, questionable accounting practices, and short-term greed; a Washington dominated by lobbyists and special interests; economic policies that favor the few over the many. And yet, to wish away the resentments of white Americans, to label them as misguided or even racist, without recognizing they are grounded in legitimate concerns—this too widens the racial divide, and blocks the path to understanding.

Id.

241. *Id.*

242. *Id.*

I believe deeply that we cannot solve the challenges of our time unless we solve them together—unless we perfect our union by understanding that we may have different stories, but we hold common hopes; that we may not look the same and we may not have come from the same place, but we all want to move in the same direction—towards a better future for our children and our grandchildren.

Id. (“It’s a story that hasn’t made me the most conventional candidate. But it is a story that has seared into my genetic makeup the idea that this nation is more than the sum of its parts—that out of many, we are truly one.”); *id.* (“[W]orking together we can move beyond some of our old racial wounds, and . . . in fact we have no choice if we are to continue on the path of a more perfect union.”); *id.* (“Let us find the common stake we all have in one another, and let our politics reflect that spirit as well.”).

the larger aspirations of all Americans—the white woman struggling to break the glass ceiling, the white man whose been laid off, the immigrant trying to feed his family.”²⁴³ And to white Americans, he urged:

[T]he path to a more perfect union means acknowledging that what ails the African-American community does not just exist in the minds of black people; that the legacy of discrimination—and current incidents of discrimination, while less overt than in the past—are real and must be addressed. Not just with words, but with deeds—by investing in our schools and our communities; by enforcing our civil rights laws and ensuring fairness in our criminal justice system; by providing this generation with ladders of opportunity that were unavailable for previous generations.²⁴⁴

He suggested that the path to a more perfect union requires “all Americans to realize that your dreams do not have to come at the expense of my dreams; that investing in the health, welfare, and education of black and brown and white children will ultimately help all of America prosper.”²⁴⁵ For President Obama, as Cass Sunstein has written movingly, “reconciliation is change, and it is also what makes change possible.”²⁴⁶

For reasons of both principle and pragmatism, President Obama’s approach may have much to offer Americans who seek to realize something like Justice Ginsburg’s constitutional vision by making certain claims on the Constitution. Relatedly, the President’s approach is relevant to an assessment of the ways in which Justice Ginsburg has (and has not) gone about executing her judicial responsibilities.

As a matter of basic justice and human well-being, progressives are right to attend to the social dislocations attending past and present practices of subordination. Yet an antisubordination perspective is necessarily a group-based perspective, and reifying Americans into discrete groups

243. *Id.* Obama’s repeated references to health and health care in the speech help to explain his strong commitment to health care reform despite the substantial political risks that such legislation entails. Health care appears to be no mere piece of his policy agenda; rather, it seems to be a key component of a constitutional vision that stresses full and equal citizenship.

244. *Id.* Compare *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”). Professor Obama presumably had *Plessy* (among other things) in mind.

245. Obama, *supra* note 227.

246. Cass R. Sunstein, *The Visionary Minimalist*, THE NEW REPUBLIC, Jan. 30, 2008, at 15.

misses an important part of how many of them experience themselves and their country. Part of what is so powerful about Obama's message is his emphasis on the common national identity that Americans passionately share—even if some of their most profound disagreements are about the meaning of that very identity.²⁴⁷ A commitment to combating subordination is critically important in both constitutional politics and constitutional law, but it is not the only relevant commitment.

Pragmatically, Obama's approach suggests that effectiveness may at times require tying one's own demands to the demands of others. Persuasion may also require changing the subject, at least for a time, from areas of intractable disagreement to areas of potential agreement. And success may require a degree of moderation, accommodation, and compromise with Americans of diverse backgrounds who respond to identity-defining conflicts in different ways.²⁴⁸ It may at times be necessary to temper the present expression of a vision in order to facilitate its eventual (or partial) adoption—or to avoid its repudiation before it has an

247. As Professor Sunstein observes:

He is unifying, and therefore able to think ambitiously, because he insists that Americans are not different "types" who should see each other as adversaries engaged in some kind of culture war. Above all, Obama rejects identity politics. He participates in, and helps create, anti-identity politics. He does so by emphasizing that most people have diverse roles, loyalties, positions, and concerns, and that the familiar divisions are hopelessly inadequate ways of capturing people's self-understandings, or their hopes for their nation.

Id.

248. *See id.* ("Obama believes that real change usually requires consensus, learning, and accommodation."). Professor Bickel made a related point:

No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden. But it is not true in our society that we are generally governed wholly by principle in some matters and indulge a rule of expediency exclusively in others. There is no such neat dividing line Most often, . . . and as often as not in matters of the widest and deepest concern, such as the racial problem, both requirements exist most imperatively side by side: guiding principle and expedient compromise. The role of principle, when it cannot be the immutable governing rule, is to affect the tendency of policies of expediency. And it is a potent role.

BICKEL, *supra* note 31, at 64.

adequate opportunity to succeed. Progressive criticism of Justice Ginsburg as too moderate and too cautious a jurist may, at times, fail to register these concerns.²⁴⁹

It is for good reason that Justice Ginsburg, during her time as an advocate and then a judge, took a slow, measured, and fundamentally dialogic approach to accomplishing social change through constitutional litigation. Looking at the matter years later from the perspective of the judiciary, she explained that courts are least likely to succeed in bringing about major social changes when acting on their own. Rather, she insisted that courts are in the best position to succeed when they maintain a dialogue with more democratic institutions of government—namely, federal and state legislatures and executives, as well as the People themselves.²⁵⁰ This was a principal theme of her March 1993 James Madison Lecture on Constitutional Law at New York University.²⁵¹

249. *Cf., e.g.*, Liptak, *supra* note 18, at WK4 (“These days, Professor [Geoffrey] Stone said: ‘The right side is very bold and very conservative. The liberal side is not bold. They are incrementalists. They don’t set the agenda.’”); *id.* (“The old-school liberal justices were simply more ambitious than Justices Breyer and Ginsburg, Professor Eisgruber said.”); Sunstein, *supra* notes 224-225 and accompanying text (recording similar views).

250. *See, e.g.*, Ginsburg, *supra* note 50, at 270 (“The Supreme Court, since the 1970s, has effectively carried on in the gender discrimination cases a dialogue with the political branches of the government. The Court wrote modestly, it put forth no grand philosophy.”); *see also* Bagenstos, *supra* note 145, at 50, 56-59 (arguing that Justice Ginsburg’s majority opinion in *Olmstead* “is both a perfect example of this kind of dialogic judicial action and evidence for its effectiveness in achieving the goals of social-change-oriented litigators”).

251. *See* Ginsburg, *Speaking in a Judicial Voice*, *supra* note 81, at 1198.

[J]udges play an interdependent part in our democracy. They do not alone shape legal doctrine but, as I suggested at the outset, they participate in a dialogue with other organs of government, and with the people as well. “[J]udges do and must legislate,” Justice Holmes “recognize[d] without hesitation,” but “they can do so,” he cautioned, “only interstitially; they are confined from molar to molecular motions.” Measured motions seem to me right, in the main, for constitutional as well as common law adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable.

Id. at 1204 (footnotes omitted).

What Justice Ginsburg has stressed about the efficacy of courts is relevant as well to participants in constitutional politics. To underscore again, proponents of a constitutional vision can succeed only to the extent that they persuade a sufficient number of fellow citizens to embrace their vision. And in a large, diverse nation, simply insisting without qualification, accommodation, or patience on the fundamental rightness of the vision may not be the most effective way to proceed.

How much and in what contexts proponents of a constitutional vision should be prepared to bend their substantive commitments for the sake of political persuasiveness, broader appeal, and social solidarity cannot be answered at a theoretical level. It is a matter of judgment, timing, and tact (among other things), which is to say that it is a matter of statesmanship.²⁵² Matters of statesmanship are necessarily contestable, and so there will at times be cause to question the judgment of a President whom one generally supports regarding specific issues.²⁵³ But the problem of implementing a constitutional vision cannot safely be disregarded by Americans who seek to win national elections and (re)elect leaders who must govern a heterogeneous nation.

To be clear, I am not gently implying that Justice Ginsburg's vision should be watered down to relative insignificance because the unvarnished version has little chance of prevailing in America. Such a "solution" surely would be worse than the potential vulnerabilities I have discussed. But I am suggesting that those who seek to advance Justice Ginsburg's constitutional vision should articulate it in ways that will prove persuasive over the long run to Americans whose support the vision requires in order to accomplish its purposes. Political progressives should be loath to disregard this suggestion, just as they should be loath to embrace the view, sometimes

In . . . cases . . . dealing with social insurance benefits for a worker's spouse or family, the decisions did not utterly condemn the legislature's product. Instead, the Court, in effect, opened a dialogue with the political branches of government. In essence, the Court instructed Congress and state legislatures: rethink ancient positions on these questions. Should you determine that special treatment for women is warranted . . . we have left you a corridor in which to move. But your classifications must be refined, adopted for remedial reasons, and not rooted in prejudice about "the way women (or men) are."

Id. (footnotes and citation omitted).

252. See generally Siegel, *supra* note 30 (analyzing statesmanship in the context of judging).

253. For example, political progressives have articulated forceful criticisms of the Obama Administration's positions on judicial appointments, executive power, equal citizenship for gay Americans, and the advisability of investigating alleged wrongdoing by the previous administration.

expressed in progressive circles, that Justice Ginsburg has been a disappointment because she has not tried to move the law to a much greater extent (and at a faster pace) than she has. Few progressive constitutionalists have accomplished so much.²⁵⁴

I tender this suggestion in part because President Obama seemed to proceed from a similar understanding during the 2008 election cycle and demonstrated his capacity to succeed at winning national elections, just as Justice Ginsburg before him demonstrated her capacity to alter significantly the way that men view women—and themselves. At first glance, this President and this Justice may seem like a strange pairing. But they share a genuine commitment to the continued emancipation of the historically excluded, and they share a quietly cool temperament—a professionalism, a deliberativeness—that serves them well in their efforts to realize their common commitment. Both are pioneers in a critically important sense, and they carry their constitutional vision in their distinct institutional roles with the same mindfulness that they must make community with Americans who do not share their views. In their typically understated but inspiring and often effective ways, President Obama and Justice Ginsburg work to earn the trust of these Americans and to win them over.

254. Using language that may prove to be his most quoted legacy, Justice Souter offered these words of wisdom just before leaving the Court:

Changes in societal understanding of the fundamental reasonableness of government actions work out in much the same way that individuals reconsider issues of fundamental belief. We can change our own inherited views just so fast, and a person is not labeled a stick-in-the-mud for refusing to endorse a new moral claim without having some time to work through it intellectually and emotionally. Just as attachment to the familiar and the limits of experience affect the capacity of an individual to see the potential legitimacy of a moral position, the broader society needs the chance to take part in the dialectic of public and political back and forth about a new liberty claim before it makes sense to declare unsympathetic state or national laws arbitrary to the point of being unconstitutional. The time required is a matter for judgment depending on the issue involved, but the need for some time to pass before a court entertains a substantive due process claim on the subject is not merely the requirement of judicial restraint as a general approach, but a doctrinal demand to be satisfied before an allegedly lagging legal regime can be held to lie beyond the discretion of reasonable political judgment.

District Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2341 (2009) (Souter, J., dissenting).

APPRECIATION

It is not possible for me to discharge my personal debt to Justice Ginsburg in the pages of a law review. I shall note here only a few facets of the content of her character that have inspired me and that I have endeavored to emulate in my own life. Among the qualities that come to mind is Justice Ginsburg's uncommon seriousness of purpose: her insistence that the work of the Court comes before everything else, including her own ego or those of her clerks.²⁵⁵ Other qualities include her capacity to register the basic constitutional values at stake in a case; her careful use of language; her focus on the factual record; her practice of proceeding with slowness and precision even in the most pressure-filled circumstances; her ability to sustain enduring friendships across ideological divides; and, above all else, her tremendous inner strength and courage.²⁵⁶

I also am inspired by—and thankful for—the way that Justice Ginsburg has engaged the central constitutional struggle of her career, the fight for gender equality. Her approach has informed not only her scholarship, advocacy, and opinion writing, but also her relationships with people. During the year that I was fortunate to spend in her chambers, she never once made me feel that I did not or could not understand the nature of the problem of sex discrimination because I am a man. She assumed that I wanted to understand and that I could if I actually took the time to listen carefully.

Sex discrimination obviously has harmed women throughout American history much more than it has harmed men—even to record such an observation is to risk trivializing the experience of women. But Justice Ginsburg has made clear through her words and deeds that the problem

255. "RBG" is not one to expend energy on sparing her clerks' feelings in correcting their errors of law or fact. But at the same time, she responds with gratitude, not defensiveness, on those rare occasions when her clerks save her from error. For her, it is all about the work.

256. The Justice's physical appearance can deceive those who do not know her. True strength and courage cannot be measured in pounds. She is one of the toughest people I have ever encountered.

affects all of us and must be addressed by all of us.²⁵⁷ When an adoring female visitor to chambers once remarked to Justice Ginsburg that her “feminist” girlfriends just loved the Justice for what she had done for American women, the Justice replied to the effect that she hoped the visitor’s male friends loved her as well. I often think of this episode in moments when I am mindful of how fulfilling it is to be a present father.

I am thankful to Associate Justice Ruth Bader Ginsburg for many things. But most of all, I am grateful that my two young daughters will inhabit a Union that has been perfected in part by the work she has done.

257. See, e.g., Ginsburg, *supra* note 77, at xii (endorsing “Susan B. Anthony’s ultimate vision: ‘man and woman working together to make the world the better for their having lived’”) (quoting LYNN SHERR, FAILURE IS IMPOSSIBLE: SUSAN B. ANTHONY IN HER OWN WORDS 305 (1995)); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (declaring unconstitutional a provision of the Social Security Act that allowed a woman whose husband died to receive benefits based on his earnings but did not allow a man whose wife died to receive benefits based on her earnings). Justice Ginsburg has described *Wiesenfeld* as “a case near and dear to my heart.” Ruth Bader Ginsburg, *quoted in* CAMPBELL, *supra* note 86, at 93. This is perhaps because her client was a man who was ready, willing, and able to raise his child in a society that considered him perverse for wanting to do what had long been deemed “women’s work.”