

Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg’s Equality Jurisprudence

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American equal protection jurisprudence reflects various competing conceptions of equality. This Article will compare Justice Ginsburg’s treatment of gender and racial classifications. When considering constitutional challenges to gender classifications, Justice Ginsburg has focused closely on individual merit and eliminating barriers that deny women equal opportunities and respect as citizens. Even in the context of preferences or affirmative action for women, Justice Ginsburg has applied searching scrutiny to overturn gender classifications based on stereotypes about men and women. Justice Ginsburg has focused on a view of equality that turns on individual merit, individual achievement, and eliminating barriers that treat women as women, rather than as individuals. By contrast, in the context of racial classifications, Justice Ginsburg has repeatedly voted to uphold affirmative action programs that treat individuals differently on the basis of race. Here she has emphasized group harms and subordination, a very different principle of equality that considers the relative position of racial groups in society, rather than the needs of particular individuals. Her decisions demonstrate less skepticism and greater tolerance for government policies that give preferences to racial minorities. Although gender and race are different types of personal characteristics, it is not immediately obvious why different equality principles should apply to racial minorities on the one hand and to women on the other.

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Most commentators have suggested that Justice Ginsburg's race and gender jurisprudence are cut from the same cloth.¹ I think, however, that her decisions pose a puzzle: why would the Equal Protection Clause require an individualistic conception of equality for women, but a group-based view of equality for racial minorities?

This Article examines two competing principles of equality and then turns to Justice Ginsburg's decisions about gender and racial equality to demonstrate the different principles of equality that she employs. There is little to explain why individual treatment and freedom from stereotypes should be the principle for women, but not for racial minorities. Justice Ginsburg provides many good reasons for why gender equality requires the government to refrain from enacting policies based on gender stereotypes about the roles, abilities, and interests of women and men. She emphasizes that formal equality or preventing discrimination against individuals best serves the interests of women, despite their historically disadvantaged position in society. These arguments should naturally, and perhaps even more urgently, apply to racial equality.

I. TWO CONCEPTS OF EQUALITY

The Fourteenth Amendment prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."² The Supreme Court has interpreted the Fifth Amendment's Due Process Clause to contain an equal protection component.³ As a legal and philosophical concept, however, equality has many different meanings. In interpreting constitutional equality guarantees, the Supreme Court must determine what equality requires in particular circumstances. The understanding of equality has been contested and has proceeded along two roughly different tracks, identified by Owen Fiss as principles of "antidiscrimination" and "antisubordination."⁴ These two principles reflect the debate between different approaches to the theory, scope, and implementation of the Equal Protection Clause. These distinctions, often discussed in the context of racial equality, mirror debates

¹ See, e.g., Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789, 1850–53 (2008) (explaining how Justice Ginsburg's jurisprudence represents a convergence or possibility of synthesis between doctrines of sex and race equality); Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39, 45–46 (2004) (explaining how Justice Ginsburg's approach to racial equality extends from her commitment to gender equality).

² U.S. CONST. amend. XIV, § 1.

³ See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁴ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (Winter 1976) [hereinafter Fiss, *Groups*].

in feminist theory between liberal feminists and radical feminists.⁵ Understanding these distinctions will help situate Justice Ginsburg's jurisprudence of equality with regard to both race and gender.

The principle of antidiscrimination relates to formal equality, to neutral principles that treat individuals the same, regardless of their race or gender.⁶ This principle focuses on fairness and considers whether government policy treats individuals equally, particularly in the allocation of scarce goods. The antidiscrimination principle focuses on individuals rather than groups. This has been the predominant, though not exclusive, understanding of equality in the Supreme Court's jurisprudence.⁷ Liberal feminists also follow an antidiscrimination principle and focus on individual rights and autonomy, not special rights or privileges for women.⁸ Justice Ginsburg's advocacy and jurisprudence is regularly associated with such liberal feminism because she successfully advocated formal gender equality, not special treatment for women.⁹

Fiss and others found this individualistic and formal conception of equality too narrow, and thus articulated another principle of equality—the antisubordination or “group-disadvantaging” principle of equality.¹⁰ As most

⁵ See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1288 (1991) (contrasting an “essentially assimilationist approach” to formal equality for women with approaches that focus on women's differences and pervasive male domination); Cynthia V. Ward, *The Radical Feminist Defense of Individualism*, 89 NW. U. L. REV. 871, 872–73 (1995) (discussing the liberal-radical divide in feminist theory); see also Owen M. Fiss, *What is Feminism?*, 26 ARIZ. ST. L.J. 413, 413 (1994) (examining feminist legal theory and explaining that it evolved from egalitarianism to more radical theories focused on subordination).

⁶ Fiss, *Groups*, *supra* note 4, at 108 (explaining that the antidiscrimination principle “reduce[s] the ideal of equality to the principle of equal treatment—similar things should be treated similarly.”).

⁷ See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1473 & n.10 (2004) (“Scholars debate what our constitutional understanding of equality ought to be, but most would agree that American equal protection law has expressed anticlassification, rather than antisubordination, commitments as it has developed over the past half-century.”).

⁸ See, e.g., Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Wendy W. Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99; see also MacKinnon, *supra* note 5, at 1286 (explaining how the women's movement initially focused on strict equality and “called for an end to legal classifications on the basis of sex”).

⁹ See, e.g., Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829–30 (1990) (explaining that liberal feminism is “viewed as the dominant theory” behind constitutional litigation brought by Ginsburg and others during the 1970s).

¹⁰ See Fiss, *Groups*, *supra* note 4, at 108; Owen Fiss, *Another Equality*, ISSUES IN LEGAL SCHOLARSHIP 1–4 (2004), <http://www.bepress.com/ils/iss2/art20> [hereinafter Fiss, *Another Equality*].

forms of legal and state-sponsored racial discrimination receded from our society, the idea was to set forth a principle of equality that could respond to the historical and structural discrimination that remained, particularly for blacks.¹¹ The antisubordination principle focuses on group harms, on disadvantages suffered by particular groups in society. The basic idea is that

certain social practices, including but not limited to discrimination, should be condemned not because of any unfairness in the transaction attributable to the poor fit between means and ends, but rather because such practices create or perpetuate the subordination of the group of which the individual excluded or rejected is a member.¹²

This principle forbids policies that disadvantage groups or that perpetuate or create subordination of the group. This is not just a theoretical construct, but a principle that courts should use “to govern interpretation of the Equal Protection Clause.”¹³

As a matter of implementation, Fiss explains that the antisubordination principle encourages affirmative action because it promotes individuals from disadvantaged groups to positions of power and prestige and therefore alters the relative position of the group.¹⁴ Moreover, such policies will improve the self-image of members of disadvantaged groups and will also change the attitudes of others, resulting in “racial dehierarchization.”¹⁵ Antisubordination theory focuses on outcomes, raising the status of disadvantaged groups such as racial minorities by seeking a more equal distribution of goods and benefits. It recognizes that racial preferences may produce unfairness to some individuals but this “can be justified as a sacrifice incurred in order to achieve a transcendent goal—accelerating the process by which caste and its cognates are eliminated.”¹⁶

Antisubordination theory has parallels with non-liberal (radical) feminist theory, which focuses not on individual equality, but rather on the systemic

¹¹ See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, ISSUES IN LEGAL SCHOLARSHIP 5–6 (2003), <http://www.bepress.com/ils/iss2/art11> (noting the high stakes over whether the Supreme Court chose an antidiscrimination or antisubordination principle in assessing programs such as affirmative action); Owen Fiss, *Another Equality*, *supra* note 10, at 5–6 (explaining the historical circumstances leading to articulation of the antisubordination principle).

¹² Fiss, *Another Equality*, *supra* note 10, at 3–4.

¹³ *Id.* at 5.

¹⁴ *Id.* at 6–7.

¹⁵ *Id.* at 7 (internal quotation marks omitted).

¹⁶ *Id.*

and structural causes of gender inequality.¹⁷ “Radical feminists believe that liberal ideas of individual rights and autonomy-based justice are not merely the wrong way to end sex inequality but help to perpetuate it, since they reflect inherently male ways of being.”¹⁸ These feminists focus on achieving substantive equality for women, not from a purportedly neutral point of view or from the existing “male” perspective, but rather from the perspective of women. As Catharine MacKinnon explains: “Equality understood substantively rather than abstractly, defined on women’s own terms and in terms of women’s concrete experience, is what women in society most need and most do not have. . . . Sex inequality is thus a social and political institution.”¹⁹ As with antistatutory theorists, radical feminists focus on the legal, social, and structural institutions that perpetuate inequality for women—they reject (or at least find inadequate) formal equality as a remedy to discrimination against women because of the existing subordinated status of women in society and the need for concrete, not abstract, equality for women.²⁰

While these two principles, antidiscrimination and antistatutory, reflect very different theoretical understandings of equality, they rarely present themselves in a pure form in Supreme Court decisions. The Supreme Court is not engaged in theorizing about equality, but rather must decide claims about equal protection and provide public justifications for their decisions. Legal arguments about racial and gender equality tend to intermingle these principles. For instance, a decision may emphasize formal equality and invalidate an affirmative action program, but seek to justify the result as beneficial for minority groups. Alternatively, a decision that emphasizes group harms may allow affirmative action and explain that such unequal treatment is required to achieve formal equality for individuals in the future. Nonetheless, many decisions can be seen as primarily adopting one of the two approaches, with important consequences for the eventual decision.

Practically speaking, in cases dealing with exclusionary discrimination against racial minorities and women, the antidiscrimination and

¹⁷ See Fiss, *What is Feminism?*, *supra* note 5, at 423 (arguing that most feminist thought is not liberal because it advocates state activism and that “[t]he intervention they call for is structural in nature, trying to alter basic social institutions like the family and the market, and is not predicated upon finding that the individual against whom state power is brought to bear has committed a discrete wrong”).

¹⁸ Ward, *supra* note 5, at 873.

¹⁹ CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 244 (1989).

²⁰ See MacKinnon, *supra* note 5, at 1324 (“Inequality . . . is first concrete, historical, present, and material, only derivatively generic, and never abstract The equality principle, in this approach, is properly comprised of the practical necessities for ending inequality in each of its real forms.”).

antisubordination principles point in the same direction—they prohibit such discrimination because it violates formal equality on the one hand, and burdens already disadvantaged groups on the other. It is in the context of relatively new debates over equality, such as programs of preferential treatment, that the two principles often conflict. The different theoretical underpinnings of the two approaches to equality come into focus particularly when assessing affirmative measures to help racial minorities or women. In the context of these so-called benign programs, antidiscrimination or liberal approaches focus on individual harms and fairness to all individuals—formal equality requires treating each person the same. Therefore it views “benign” preferences in much the same way as “invidious” discrimination. It does not matter who is receiving preferences, because it undermines equality to treat individuals as members of groups based on characteristics such as race and gender, rather than as individuals. In practice, formal equality is straightforward. It requires treating people the same and so does not allow distinctions to be drawn along lines of race or gender, except in the most limited circumstances.

By contrast, antisubordination focuses on group harms to ensure that certain groups do not remain a subclass in our society. This principle advances something distinct from formal equality and emphasizes reordering social relationships to eliminate systemic disadvantage or subordination of particular groups. Accordingly, in this view, affirmative action and other race-conscious policies may be necessary to remedy racial hierarchies. Treating individuals unequally may be tolerated and even encouraged to bring about greater substantive equality and also to produce the right attitudes about equality, both in the disadvantaged group and in the minds of others. Group-based equality is necessarily more complicated than formal equality because it depends on a view of the existing hierarchy and what policies would undermine rather than reinforce the hierarchy. The assessment of group disadvantage depends in part on beliefs and intuitions about social norms relating to who constitutes a subordinated group, and what policies and practices contribute to that subordination. Evaluating subordination requires a judge to determine which individuals are part of a disadvantaged group. This may prove to be a very difficult task for the judiciary.²¹ Moreover, even if a group can be identified, the court must evaluate what policies disadvantage the group. For example, people strongly differ about whether affirmative action reinforces or helps to eradicate racial

²¹ See Lawrence A. Alexander, *Equal Protection and the Irrelevance of ‘Groups’*, ISSUES IN LEGAL SCHOLARSHIP 6–8 (2004), <http://www.bepress.com/ils/iss2/art1> (discussing the practical problems encountered in trying to implement the antisubordination principle, such as difficulties in defining social groups, their relative status, and which laws worsen the status of such groups).

subordination. Similarly, feminists of different perspectives differ about whether bans against pornography and prostitution help to eradicate female subordination or instead constitute paternalistic regulation of women's autonomy. Identifying subordination will often be a contentious matter because of different social and political beliefs and commitments—these are disagreements about the social order that exists and/or the social order that should exist. Courts are ill-suited to sort through these difficult questions.²²

These different equality principles also reflect fundamentally different views of human dignity. Liberal antidiscrimination perspectives choose an individualistic account of human dignity—dignity inheres in each person equally and therefore we respect such dignity by treating each person as an individual, rather than as a member of a group based on characteristics such as race or gender.²³ Antisubordination, by contrast, espouses a dignity of recognition.²⁴ It focuses on the relationship between the individual and society, and considers that an individual's self-worth depends on the extent to which the society treats him or her in a certain way. It is concerned with attitudes of subordination and with the resulting facts of inequality. To remedy these attitudes may require affirmative measures directed at particular groups. This is not the dignity of the individual, but rather a socially defined dignity of belonging.

Justice Ginsburg's jurisprudence with regard to gender equality consistently and forcefully espouses an antidiscrimination principle. When faced with unequal treatment for women and men, Justice Ginsburg's decisions have focused on formal equality, on considering the fairness of treating men and women differently in particular contexts.²⁵ In most instances, she finds that such distinctions lack an appropriate means-end fit—that policy distinctions drawn on the lines of gender rarely serve any legitimate state purpose. Justice Ginsburg views even well-intentioned preferences for women with skeptical scrutiny. As the examples below will demonstrate, when faced with equal protection challenges to laws that distinguish on the basis of gender, Justice Ginsburg emphasizes individual interests, not harms suffered by men or women as a group.

By contrast, in cases dealing with racial equality, Justice Ginsburg speaks the language of antisubordination. In arguing to uphold a wide variety of affirmative action programs, Justice Ginsburg has focused on group

²² See Daniel Sabbagh, *Affirmative Action and the Group-Disadvantaging Principle*, ISSUES IN LEGAL SCHOLARSHIP 9–10 (2004), <http://www.bepress.com/ils/iss2/art14> (providing institutional reasons why the Supreme Court has implicitly rejected the antisubordination principle).

²³ See Neomi Rao, *Three Concepts of Dignity* (forthcoming).

²⁴ See *id.*

²⁵ See *infra* Part II.

harms, the remnants of a racial caste system, and the need to elevate the status of racial minorities.²⁶ Her decisions emphasize the persistent facts of racial disparities in income, health, and welfare, in order to demonstrate that racial minorities continue to be subordinated in our society. Based on these facts, she has argued that less searching scrutiny should apply to preferences for racial minorities because such programs benefit disadvantaged groups and therefore may be compatible with equal protection.

The principles of antidiscrimination and antisubordination express fundamentally different conceptions of equality, which lead to different results, particular in the context of affirmative action or preference programs. These principles can help identify and understand the different conceptions of equality Justice Ginsburg uses to evaluate claims of gender equality on the one hand and racial equality on the other.

II. GENDER AND INDIVIDUAL DIGNITY

In equal protection challenges to gender classifications, the Supreme Court applies heightened scrutiny to determine whether the classification serves important government objectives and whether the policy is substantially related to the achievement of those objectives.²⁷ In particular, Justice Ginsburg, as well as a majority of the Court, have focused on the harm of classifying people by gender because such classifications reinforce stereotypes about men and women.²⁸ The following examples demonstrate that Justice Ginsburg remains firmly committed to principles of antidiscrimination in the context of gender classifications. Justice Ginsburg's egalitarian and liberal viewpoint requires in most instances the same treatment for men and women.²⁹

²⁶ See *infra* Part III.

²⁷ See, e.g., *United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

²⁸ *Id.* at 550.

²⁹ Some scholars have suggested that these decisions can be seen as part of the antisubordination tradition to the extent that they express concern for women as a class of individuals. See, e.g., Denise C. Morgan, *Anti-Subordination Analysis after United States v. Virginia: Evaluating the Constitutionality of K–12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL. F. 381, 384 (identifying an antisubordination principle in the VMI decision and explaining that the language of the opinion “suggests that the goal of intermediate scrutiny is to identify and strike down rules that maintain the traditional hierarchy of men over women, rather than to determine which differences between the sexes can justify their disparate treatment”). The antisubordination principle, however, is not the primary concern of these decisions, which instead emphasize the individual and the harm that results from classifying an individual along gender lines. Most commentators, both critical and not, identify Justice Ginsburg's advocacy and jurisprudence with liberal individualism and egalitarianism. See, e.g., Rosalind Dixon, *Feminist Disagreement*

A. Supreme Court Decisions on Gender Equality

Justice Ginsburg's decisions considering equal protection challenges to gender classifications emphasize the equality of men and women and the imperative of removing legal classifications that stereotype women and men and thereby frustrate their equal participation in society. In these decisions, Justice Ginsburg focuses on the individual and emphasizes equality of opportunity, not equality of results. For example, in *United States v. Virginia* she wrote the opinion for the Court invalidating the Virginia Military Institute's (VMI) male-only admissions policy.³⁰ Justice Ginsburg explained that to defend the male-only program at VMI, Virginia would have to demonstrate an "exceedingly persuasive justification."³¹ Moreover, such justification "must be genuine . . . [a]nd it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."³² State action does not comport with equal protection "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."³³ While recognizing that single-sex education can have pedagogical benefits, she explained, "'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded."³⁴

Examining the history of higher education in Virginia, Justice Ginsburg concluded that there was no evidence that the male-only admissions policy at VMI furthered a state policy of diversity, but instead rested in part on the historic exclusion of women from higher education.³⁵ Moreover, Justice Ginsburg instructed that the Court must take a "'hard look' at generalizations or 'tendencies'" of the kind advanced by Virginia because qualified individuals cannot be excluded based on "fixed notions concerning the roles and abilities of males and females."³⁶ The rationale that admitting women would reduce VMI's stature and unique form of education, Justice Ginsburg

(Comparatively) *Recast*, 31 HARV. J.L. & GENDER 277, 280–81 (2008) (citing Justice Ginsburg's approach as a prime example of liberal feminism).

³⁰ See *United States v. Virginia*, 518 U.S. 515, 515 (1996).

³¹ *Id.* at 531.

³² *Id.* at 533.

³³ *Id.* at 532.

³⁴ *Id.* at 535–36.

³⁵ *Id.* at 539–40.

³⁶ *Virginia*, 518 U.S. at 541 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

found to be “a judgment hardly proved, a prediction hardly different from other ‘self-fulfilling prophecies.’”³⁷ Justice Ginsburg’s probing inquiry of Virginia’s justifications reflected a “skeptical scrutiny of official action denying rights or opportunities based on sex.”³⁸

Although Justice Ginsburg acknowledged that many women (and even men) would not be attracted to VMI’s particular form of education, still women could not be categorically excluded.³⁹ She stressed that generalizations about what most women would choose cannot be used to deny opportunities for women “whose talent and capacity place them outside the average description.”⁴⁰ She relied on findings that some women would be capable of the activities required by VMI cadets and that some women could meet the stringent physical standards. Therefore, “[i]t is on behalf of these women that the United States has instituted this suit, and it for them that a remedy must be crafted, a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit.”⁴¹ The extent of Justice Ginsburg’s commitment to liberal, individualist principles can be further appreciated by what she did not require or consider. She did not focus on whether a significant number of women would be admitted under a new policy, nor did she require a different admissions standard for women to promote substantive equality.⁴² Rather, the Court simply required that VMI allow women to try to meet the existing standards of the school and emphasized the importance of allowing women with appropriate credentials—the will, capacity, and fitness—the *opportunity* to apply and be admitted to the elite program.⁴³ “Women seeking and fit for a VMI-quality

³⁷ *Id.* at 542–43.

³⁸ *Id.* at 531.

³⁹ *Id.* at 542 (“It may be assumed, for purposes of this decision, that most women would not choose VMI’s adversative method [I]t is also probable that ‘many men would not want to be educated in such an environment.’”).

⁴⁰ *Id.* at 550.

⁴¹ *Id.*

⁴² *Virginia*, 518 U.S. at 540–41 (discussing how some women could use VMI’s existing standards and benefit from its current adversative approach to education). Justice Ginsburg’s liberal approach to gender equality has been criticized in other contexts. For example, David Cole has criticized Ginsburg’s advocacy and litigating strategy before she was on the Supreme Court because she rejected difference theory and embraced an “assimilationist method.” David Cole, *Strategies of Difference: Litigating for Women’s Rights in a Man’s World*, 2 L. & INEQ. 33, 55 (1984); see also Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 830–31 (1990) (discussing the radical feminist critique of Ginsburg’s liberal feminist advocacy).

⁴³ *Virginia*, 518 U.S. at 542 (“The issue, however, is not whether ‘women—or men—should be forced to attend VMI’; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.”).

education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection."⁴⁴

Justice Ginsburg emphasized that equal protection required treating women as individuals and allowing them to follow their talents and merits wherever they may lead.⁴⁵ Such a remedy was important even if it affected only a small number of women "outside the average description"⁴⁶ with the will and capacity to attend VMI. She emphasized that such equality of opportunity was necessary to maintaining equal citizenship in our society.⁴⁷ Accordingly, "State actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"⁴⁸ Such citizenship depends, in part, on individuals being judged according to their merit, not based on stereotypes about their capabilities or social roles. The VMI decision centers on equality of opportunity for individual women. Although Justice Ginsburg did not use the word, the decision celebrates the individual dignity of women—the dignity of autonomy to make choices about education and one's future and to open up the fullest range of choices to both men and women.

Similarly, in *Miller v. Albright*,⁴⁹ the Court considered a challenge to an immigration law that treated children born out of wedlock differently based on whether their mother or father was an American citizen. Under the law, a child born abroad to an unmarried citizen mother and alien father became an American citizen at birth, whereas an unmarried citizen father had to take additional steps before his child born abroad to an alien mother could become an American citizen.⁵⁰ The government explained that the special rule for unmarried citizen mothers was based, in part, on "an assumption that the citizen mother would probably have custody."⁵¹ The Court, in a 6–3 decision written by Justice Stevens, upheld the statute explaining that it did not rest on impermissible gender stereotypes, but rather that the "biological

⁴⁴ *Id.* at 557.

⁴⁵ *Id.* at 532.

⁴⁶ *Id.* at 550.

⁴⁷ *Id.* at 545–46 (explaining that women "today count as citizens in our American democracy equal in stature to men. Just as surely, the Commonwealth's great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier 'citizen-soldier' corps."); *see also id.* at 532.

⁴⁸ *Virginia*, 518 U.S. at 541 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. at 725).

⁴⁹ 523 U.S. 420 (1998).

⁵⁰ *Id.* at 429–31 (describing the statutory requirements).

⁵¹ *Id.* at 430 n.8. The government also cited the rule in most foreign countries that the nationality of an illegitimate child is that of the mother unless paternity has been established. *Id.*

differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands.”⁵² The gender classification at issue sought to assist women and, as Justice Stevens explained, appropriately recognized the different situations of unmarried mothers and fathers in part because of the essential biological role of women in childbirth.⁵³ He found that such “assumptions are firmly grounded and adequately explain why Congress found it unnecessary to impose [citizenship] requirements on the mother that were entirely appropriate for the father.”⁵⁴

In dissent, Justice Ginsburg explained that the law could have made custody or support the relevant criterion, but instead “treats mothers one way, fathers another, shaping Government policy to fit and reinforce the stereotype or historic pattern.”⁵⁵ She also emphasized that even if the stereotypes hold true for many, even most, individuals, still the government should not classify unnecessarily or overbroadly by gender.⁵⁶ Government policy cannot rest on “the generalization that mothers are significantly more likely than fathers to care for their children, or to develop caring relationships with their children.”⁵⁷ Justice Ginsburg agreed that the statute at issue in *Miller* was a sort of benign preference, “an affirmative action of sorts.”⁵⁸ Nonetheless, she explained the policy violated equal protection by using “sex as a criterion in delineating citizens’ rights.”⁵⁹ Accordingly, she argued that even if one accepts the government’s stated beneficial purposes, “it is surely based on generalizations (stereotypes) about the way women (or men) are. These generalizations pervade the opinion of Justice Stevens, which constantly relates and relies on what ‘typically,’ or ‘normally,’ or ‘probably,’ happens ‘often.’”⁶⁰ Justice Ginsburg emphasized that gender-based

⁵² *Id.* at 445.

⁵³ *Id.* at 444 (explaining that the statute does not assume that mothers of illegitimate children will have a closer relationship to their children than father, but “[i]t does assume that all of them will be present at the event that transmits their citizenship to the child”).

⁵⁴ *Miller*, 523 U.S. at 444.

⁵⁵ *Id.* at 460 (Ginsburg, J., dissenting).

⁵⁶ *Id.* (“Characteristic of sex-based classifications, the stereotypes underlying this legislation may hold true for many, even most, individuals. But in prior decisions the Court has rejected official actions that classify unnecessarily and overbroadly by gender when more accurate and impartial functional lines can be drawn.”).

⁵⁷ *Id.* at 482–83 (Breyer, J., dissenting).

⁵⁸ *Id.* at 460 (Ginsburg, J., dissenting).

⁵⁹ *Id.* at 461.

⁶⁰ *Id.* at 469.

classifications could not be used when more neutral categories would serve the legislature's purpose.⁶¹

At root in *Miller* was the assumption that mothers have primary responsibility for children, reinforcing and perpetuating stereotypes about gender and parenting. Justice Ginsburg's dissent reflected concerns of individual fairness, for the lack of a persuasive fit between the government's means and ends in enacting citizenship policy. She opposed the "preference" for women because she considered that such unequal treatment of mothers and fathers legally reinforced gender stereotypes. No doubt many (or even most) unmarried mothers have primary responsibility for their children. Nonetheless, Justice Ginsburg argued for equal treatment for the individual, who may be atypical or unusual, not for the individual as part of a socially defined group. Justice Ginsburg implicitly evaluated the harm of gender classifications to be greater than any benefit to be derived by giving women a preference when they have children out of wedlock—a choice for formal equality over substantive benefits. The *Miller* dissent embraces liberal principles of equality by espousing a principle for all individuals.

B. *Advocacy and Scholarship on Gender Equality*

Justice Ginsburg's work as an advocate for women's equality and also her scholarly work as a law professor emphasized ideals of equality of opportunity, of removing stereotypes that discriminated against women. At times, however, Ginsburg suggests that affirmative action or gender classifications may be necessary to correct for past discrimination or exclusion from opportunities. For example, she cites to *Califano v. Webster*⁶² as an example of an appropriate preference.⁶³ In *Webster*, the Court upheld a Social Security Act provision that allowed women to eliminate low-earning years from the calculation of their retirement benefits.⁶⁴ The Court explained that the classification was specifically designed to correct wage imbalance between men and women and was not based on "overbroad generalizations."⁶⁵ Ginsburg commented that *Webster* "looks toward a general rule of equal treatment while leaving a slim corridor open for

⁶¹ *Miller*, 523 U.S. at 469–70.

⁶² 430 U.S. 313 (1977).

⁶³ Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 471 (1978); see also Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 271 (1999).

⁶⁴ *Webster*, 430 U.S. at 314–16.

⁶⁵ *Id.* at 317.

genuinely compensatory classification.”⁶⁶ This seems a neat summary of the Ginsburg position with regard to benign gender classifications over the years—an emphasis on equal treatment with a slim possibility of preferences to compensate for past discrimination.

Justice Ginsburg, however, has repeatedly explained just how narrow the possibility remains for gender preferences, a position that reflects the “skeptical scrutiny”⁶⁷ she applies to distinctions based on gender. For example, in *Kahn v. Shevin*, a case challenging a small tax benefit given to widows but not widowers, then-Professor Ginsburg argued that the Supreme Court’s decisions in *Reed v. Reed*⁶⁸ and *Frontiero v. Richardson*⁶⁹ had a clear message:

[P]ersons similarly situated, whether male or female, must be accorded even-handed treatment by the law; lump treatment of men, on the one hand, and women on the other is constitutionally impermissible. Legislative classifications may legitimately take account of need or ability; they may not be premised on sex-role stereotypes or unalterable sex characteristics that bear no necessary relationship to an individual’s need, ability or life situation.⁷⁰

“[E]ven-handed treatment” by the law states an antidiscrimination principle based on formal equality for men and women. It does not usually require or tolerate special treatment for women because of longstanding economic and legal discrimination and it does not seek to reinforce the group identity of women by providing benefits tailored only to women. Importantly, Justice Ginsburg emphasized that the law must consider *individual* need and ability and thereby undermined the view that women as a *group* may systematically have need for special benefits.

In articles from the 1970s, Ginsburg argued that “the ultimate goal with respect to sex-based discrimination should be a system of genuine neutrality.”⁷¹ She supported affirmative action for women, but on very limited grounds, and with great skepticism about benign rationales offered

⁶⁶ Ginsburg, *supra* note 63; *see also* Ginsburg & Merritt, *supra* note 63 (explaining that in *Webster* the Court “endorsed a societal discrimination rationale” similar to the one it rejected in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)).

⁶⁷ *Virginia*, 518 U.S. at 531.

⁶⁸ 404 U.S. 71 (1971).

⁶⁹ 411 U.S. 677 (1973).

⁷⁰ Brief for Appellants at 11, *Kahn v. Shevin*, 416 U.S. 351 (1974) (No. 73-78). *See generally* *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

⁷¹ Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 28–29 (1975).

for “assisting” women. Although Ginsburg did not seek to avoid all gender-based affirmative action, her approach to it was restrained, as “designed not to confer favors but to assure that women with capacity to do the job are set on a par with men of similar capacity.”⁷² This conception is not one of preference or favoritism for women, but rather removing discriminatory obstacles so that women can compete with men.⁷³ Ginsburg’s description of appropriate affirmative action focused on individual ability and talent, not on preferences for women as part of a historically disadvantaged group.⁷⁴ Any deviations from the principle of neutrality must be closely related to a compensatory purpose and be limited in duration so that equality of opportunity remains the goal.

Moreover, in her writings as well as in some of her opinions, Justice Ginsburg has suggested that preferential treatment can lead to the subordination of women. As she explained, proponents of the Equal Rights Amendment (as she was) “perceive laws for ‘women only’ as ultimately harmful to the group they purport to protect, and favors as *characteristically* entailing an accompanying detriment.”⁷⁵ Thus, she argued that the lower status of women would be reinforced by preferences designed just for women. Put another way, affirmative action for women may perpetuate their subordination by continuing to classify them along gender lines. The “favors” entail an unavoidable detriment. This theme of classification and subordination is also expressed, for instance, by Justice Thomas, who has repeatedly argued that preferences for racial minorities reinforce perceptions of inferiority both in the broader society and in the minds of the beneficiaries.⁷⁶

⁷² *Id.* at 28.

⁷³ In other contexts, Justice Ginsburg has similarly upheld women’s equal responsibilities alongside men and denied special favoritism based on a woman’s role within the family. *See, e.g.*, *Bennis v. Michigan*, 516 U.S. 442, 457 (1996) (Ginsburg, J., concurring); *see also* Merritt & Lieberman, *supra* note 1, at 43–44 (explaining that in *Bennis*, Ginsburg “viewed Tina Bennis as an economic actor fully equal to her husband and other men”).

⁷⁴ In Ginsburg’s view, affirmative action requires first stopping discriminatory practices that favor males and whites over women and nonwhites. Second, it requires measures to correct the consequences of previous discrimination, such as “special efforts to seek out and recruit qualified members of groups once excluded . . . [and the] elimination of employment tests, standards and qualifications that are not reliable predictors of requisite performance; in-service training programs.” As a final resort, she would allow “goals and timetables or outright quotas for a transition period.” Ginsburg, *supra* note 71, at 28–30.

⁷⁵ Ginsburg, *supra* note 71, at 15 (emphasis added).

⁷⁶ *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part) (“The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This

Justice Ginsburg has repeatedly argued that preferences for women come with detriments. Such programs must be carefully evaluated to judge whether they stem from any perceived stereotype of women or whether they are genuinely designed to level the playing field. Ginsburg refuses to accept benign rationales for gender preferences because they often stem from exclusionary motives, and, even if well-intentioned, may reinforce stereotypes that limit the participation of women in society. Individual opportunity for women can be hampered by such classifications even if they have beneficent purposes.

Preferences for women express two distinct harms that are often conflated. The first is that the preference may in fact be a detriment—for example, so-called preferences for women that kept them from jury service, or tending bar, or taking the Bar. These are exclusions of women masquerading as benefits and are properly treated as outright gender discrimination and exclusion. Other preferences, however, may genuinely intend to help women by providing some type of tangible benefit. Examples of this may be seen in *Miller v. Albright*, providing a benefit for citizen mothers over fathers,⁷⁷ or in *Kahn v. Shevin*, affording a small tax benefit to widows, but not widowers.⁷⁸ Even the truly “benign” preferences, however, may cause harm, as Ginsburg has argued, because they reinforce existing social roles for women. The harm with such well-intentioned programs is one of discrimination against men, but also in Ginsburg’s view, a harm of subordination of women because such classifications assume that women must be primarily responsible for childrearing and homemaking and therefore cannot compete with men on an equal footing outside the home. Thus, for Justice Ginsburg, the group classification is itself the burden because it reinforces the gender hierarchy between women and men.

Some feminists have criticized Justice Ginsburg’s advocacy for its assimilationist approach.⁷⁹ These feminists question the validity of a gender-

problem of stigma does not depend on determinacy as to whether those stigmatized are actually the ‘beneficiaries’ of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma”); *Missouri v. Jenkins*, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) (recognizing a “fundamental[] truth that the government cannot discriminate among its citizens on the basis of race At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny”).

⁷⁷ 523 U.S. at 420; see *supra* note 58 & accompanying text.

⁷⁸ 416 U.S. at 351; see *supra* note 70 & accompanying text.

⁷⁹ See Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 214 (“[T]he problem with formal equality is not simply that it is incapable of

neutral approach and find formal equality inadequate.⁸⁰ Such feminists thus call for various changes to benefit women as a group and also to protect them from harms of violence and exploitation.⁸¹ They speak the language of antisubordination and often approve of preferences for women. Justice Ginsburg, however, has argued that such preferences perpetuate a gender hierarchy in which women do not have equal opportunities.⁸² She recognizes that even if programs provide some “help” to women, or reflect realities about existing social roles, nonetheless they violate equal protection by treating women and men differently based on stereotypes and generalizations that do not have any necessary connection to gender. In spite of any practical benefits to women, preferences that reinforce outdated stereotypes about women’s roles should not be tolerated. Justice Ginsburg has not heeded the calls of some feminists to treat women differently based on their gender or to allow state and federal legislatures to pursue such policies when they conflict with her liberal, individualistic view of equal protection.

Since *Reed v. Reed*,⁸³ the Supreme Court has repeatedly reaffirmed that gender classifications cannot rest on impermissible stereotypes about women. Even if the stereotype reflects, as stereotypes always do, some truth about the roles of men and women, stereotypes about gender characteristics usually remain an impermissible basis for government policy. The idea is for each person to be treated as an individual, based on his or her particular qualities. This position has been accepted by a substantial majority of the Supreme

radically changing society or of ensuring that similarly situated women and men are treated similarly. Formal equality has actually hurt many women . . . it is likely to hurt most mothers and wives who are not well-paid professionals.”); MacKinnon, *supra* note 5, at 1288–92 (criticizing the “essentially assimilationist approach” of early feminist advocacy as minimizing real differences between men and women and failing to improve conditions of inequality for most women); *see also* Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 17 (acknowledging criticism of 1970s litigation as “insistent on formal equality, opening doors only to comfortably situated women willing to accept men’s rules and be treated like men,” but rejecting such comments as unfair).

⁸⁰ *See, e.g.*, Becker, *supra* note 79, at 202 (explaining a consensus within the feminist community that “formal equality is inadequate” and arguing that no single abstract standard will solve women’s problems).

⁸¹ *See, e.g.*, MacKinnon, *supra* note 5, at 1296.

⁸² *See* Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251, 272 (2009) (discussing Ginsburg’s difficulty in persuading an all-male Supreme Court about the “double-edged” nature of legal benefits for women that perpetuated harmful stereotypes, the “most insidious of those stereotypes, Ginsburg believed, was that of male breadwinner and female homemaker”).

⁸³ 404 U.S. 71 (1971).

Court. For example, in *Nevada Department of Human Resources v. Hibbs*,⁸⁴ the Court upheld an award of money damages against States for violation of the Family and Medical Leave Act (FMLA). Chief Justice Rehnquist, writing for six members of the Court, explained how stereotypes could fuel discrimination against women:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.⁸⁵

In the context of gender classifications, Justice Ginsburg and a solid majority of the Court have embraced a liberal and highly individualistic view of equality. Government policies that rest on outmoded gender stereotypes will usually not survive scrutiny under the Equal Protection Clause.⁸⁶ Although this is only a brief survey, Justice Ginsburg's life work with regard to gender equality reflects a deep commitment to the individual, to ensuring that the law does not treat individuals according to typecasts, or averages, or stereotypes, but rather allows them to use their talents and capacities as they choose.

III. RACIAL CLASSIFICATIONS

When government policies classify individuals by race, they treat individuals differently based on the racial group to which they belong. In the past such classifications were used to exclude racial minorities from many political rights as well as social and economic benefits. In recent years, however, most racial classifications aim to benefit racial minorities by providing affirmative action or preferences for some scarce good, such as

⁸⁴ 538 U.S. 721 (2003).

⁸⁵ *Id.* at 736; see also Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1871 (2006).

⁸⁶ The Supreme Court's jurisprudence in this area has been termed a "de facto ERA." Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 985 (2002). Though failing to be ratified, scholars have argued that the ERA in fact succeeded in the Court's equal protection jurisprudence. See also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1323 (2006); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476-77 (2001) ("Today, it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted." (footnote omitted)).

admissions to elite schools or government contracts. When such programs are challenged on equal protection grounds, the Supreme Court has maintained (by a narrow majority) that all racial classifications must be evaluated under strict scrutiny.⁸⁷ This standard applies whether the classifications are “benign” or “invidious,” and so the Court evaluates preferences for racial minorities in the same manner as policies that seek to exclude members of racial minorities. The Supreme Court primarily has adopted an antidiscrimination view of equality that focuses on the harm to the individual from being classified on the basis of race. Although the decisions sometimes invoke antisubordination concerns (and these are frequently expressed in dissenting opinions), antisubordination has not been the primary principle in race cases.⁸⁸

Decisions about affirmative action have been decided by narrow 5–4 majorities.⁸⁹ While the majority has adhered to strict scrutiny and principles of formal equality, a minority of justices have held the view preferences for racial minorities must be treated differently from programs that exclude such minorities on the basis of race. When evaluating racial preferences, these justices have emphasized group-based principles of equality in which the harm to racial minorities is a distinctly group or class-based harm of persistent discrimination.⁹⁰ Equality is thus violated when certain racial groups remain a social underclass whether or not they are treated with formal equality. This expresses antisubordination themes by acknowledging the reality of racial stratification and “the injustice that arises when group identification is turned into a system of subjugation.”⁹¹ In theory, Fiss and others articulated the antisubordination principle in part to respond to and justify the growth of affirmative action measures that could not be reconciled with principles of formal equality.⁹² In practice, judges often justify the constitutionality of racial preferences by correlating group disadvantage and social inequality with racial groups.⁹³

⁸⁷ See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741–42 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243–47 (1995).

⁸⁸ See Siegel, *supra* note 7, at 1473.

⁸⁹ See *Grutter*, 539 U.S. at 306; *Gratz*, 539 U.S. at 244.

⁹⁰ See *Gratz*, 539 U.S. at 282 (Stevens, J., dissenting).

⁹¹ Fiss, *Another Equality*, *supra* note 10, at 20.

⁹² *Id.*

⁹³ Even those Justices who associate group-based harms with the Equal Protection Clause do not fully adopt all of the consequences of antisubordination theory. There are structural and institutional limitations, as well as practical considerations, that prevent this from occurring. See Sabbagh, *supra* note 22, at 9 (examining various institutional reasons why courts have not adopted the group-disadvantaging principle, including that it

Justice Ginsburg's decisions evaluating equal protection challenges to affirmative action programs reflect these themes of antistatutory subordination—she focuses on group harms and structural racial hierarchies that must be eradicated. This is not the equality for individuals or equal opportunity stressed in the context of gender discrimination. For example, in *Adarand Constructors, Inc. v. Peña*,⁹⁴ the Court considered a challenge to a federal program designed to give preferences to members of disadvantaged groups in government contracting. The program at issue gave a prime contractor “additional compensation if it hired subcontractors certified as small businesses controlled by ‘socially and economically disadvantaged individuals.’”⁹⁵ Pursuant to the contract, the contractor must presume that such individuals include “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.”⁹⁶ In a 5–4 decision, the Court reiterated that the program, like all racial classifications must be evaluated under the strict scrutiny standard.⁹⁷ The Court, in an opinion by Justice O'Connor, explained that “holding ‘benign’ state and federal racial classifications to [a] different standard[] does not square with” the essential principle that the equality guarantees of the Fifth and Fourteenth Amendments “protect *persons*, not *groups*.”⁹⁸

Justice Ginsburg disagreed and her dissent in *Adarand* emphasized the existing disadvantages of African-Americans and the long history of legal and social measures designed to maintain “White Supremacy.”⁹⁹ She reflected on the persistence of racial inequality: “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.”¹⁰⁰ Justice Ginsburg here argued that certain structural, racial hierarchies must be dismantled before minorities can enjoy true equality of opportunity.

Articulating these principles in greater detail, Justice Stevens, joined by Justice Ginsburg, wrote in dissent that the Court need not be “consistent” in its treatment of racial classifications: “There is no moral or constitutional equivalence between a policy that is designed to perpetuate a *caste system* and one that seeks to eradicate *racial subordination*. Invidious discrimination

cannot be universalized nor expressed as an abstract principle); Siegel, *supra* note 7, at 1473 n.10.

⁹⁴ 515 U.S. 200 (1995).

⁹⁵ *Id.* at 205.

⁹⁶ *Id.*

⁹⁷ *Id.* at 227.

⁹⁸ *Id.*

⁹⁹ *Id.* at 272–74 (Ginsburg, J., dissenting).

¹⁰⁰ *Adarand*, 515 U.S. at 274 (Ginsburg, J., dissenting) (footnote omitted).

is an engine of oppression Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.”¹⁰¹ Here caste and subordination provide explicit justifications for allowing racial preferences that aim to remedy social inequality. Justice Stevens emphasized that intentions matter and that the government’s decision to “impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority” may be “entirely consistent with the ideal of equality.”¹⁰² This conception of equality reflects the idea that individuals may be treated unequally in order to achieve a more equal allocation of goods between racial groups. So long as the government truly aims for equality of opportunity between racial groups, it may classify individuals on the basis of race to achieve that goal. Accordingly to Justice Stevens, “well-intentioned” racial policies get less judicial scrutiny than other more invidious racial classifications. This focus on equality across groups or class membership has an illiberal aspect, as it is willing to overlook individual and particular harms in favor of a broad-brush concern for racial groups. This suggests that the experience of race can trump that of the individuals, or at least that the federal government may design “beneficial” policies based on race, rather than individual need or circumstances.¹⁰³

In *Gratz v. Bollinger*,¹⁰⁴ the Court invalidated the University of Michigan’s undergraduate affirmative action program.¹⁰⁵ That program automatically awarded underrepresented minority applicants (African-Americans, Hispanics, and Native Americans) an additional 20 points out of a total of 150 points in the admissions process.¹⁰⁶ This award of points had the effect of making race “decisive for virtually every minimally qualified underrepresented minority applicant.”¹⁰⁷ As the Court explained, “The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court’s opinion in *Grutter* requires:

¹⁰¹ *Id.* at 243 (Stevens, J., dissenting) (emphasis added).

¹⁰² *Id.* at 247–48.

¹⁰³ *Id.* at 253 (arguing that Congress is entitled to greater deference when it enacts a program designed to foster equality than the deference due a state legislature); *id.* at 271 (Ginsburg, J., dissenting) (agreeing that “large deference is owed by the Judiciary to Congress’ institutional competence and constitutional authority to overcome historic racial subjugation” (internal quotation marks omitted)).

¹⁰⁴ 539 U.S. 244 (2003).

¹⁰⁵ *Id.* at 245.

¹⁰⁶ *Id.* at 255. The admissions index was divided into ranges: “100–150 (admit); 95–99 (admit or postpone); 90–94 (postpone or admit); 75–89 (delay or postpone); 74 (delay or reject).” *Id.*

¹⁰⁷ *Id.* at 272 (internal quotation marks omitted); *see also id.* at 277 (O’Connor, J., concurring) (“[T]his mechanized selection index score, by and large, automatically determines the admissions decision for each applicant.”).

consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body"¹⁰⁸ The Court emphasized "the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education."¹⁰⁹

In dissent, Justice Ginsburg argued that the program passed constitutional muster. In reaching this conclusion she did not argue that the program does in fact make individualized determinations for admissions of underrepresented minority students. Rather, Justice Ginsburg implicitly rejected such individualized determinations as the standard. Instead she explained that a different constitutional standard should apply to affirmative action programs than to programs of exclusionary discrimination.¹¹⁰ In ensuring equal protection, policymakers can "distinguish between policies of exclusion and inclusion."¹¹¹ Justice Ginsburg noted, "Actions 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 after effects have been extirpated."¹¹² Justice Ginsburg argued that similar treatment of inclusionary and exclusionary programs makes no sense so long as the vestiges of discrimination remain.¹¹³ She observed, "In the wake 'of a system of racial caste only recently ended,' large disparities endure."¹¹⁴ To support this point she identified racial disparities in employment, education, and access to health care, as well as economic racial discrimination in real estate markets and consumer transactions.¹¹⁵

The dissent failed to discuss racial stereotypes or individual harm. The analysis instead stretched across society—seeking to identify disadvantage and stratification along the group characteristic of race. As Justice Ginsburg explained, African-Americans, Hispanics and Native Americans "historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day."¹¹⁶ Similarly, she noted that "[t]he stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal

¹⁰⁸ *Gratz*, 539 U.S. at 277 (O'Connor, J., concurring) (citation omitted).

¹⁰⁹ *Id.* at 271 (majority opinion).

¹¹⁰ *Gratz*, 539 U.S. at 301 (Ginsburg, J., dissenting).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 298.

¹¹⁴ *Id.* at 299 (citation omitted).

¹¹⁵ *Id.* at 299–300 & nn.1–9.

¹¹⁶ *Gratz*, 539 U.S. at 303 (Ginsburg, J., dissenting).

remains vital.”¹¹⁷ Her dissent did not consider the individual members of underrepresented racial groups, but treated them as a group and focused on their “status” and the “racial oppression” that endures in our society.¹¹⁸ This group-based focus allowed Justice Ginsburg to conclude that the University of Michigan’s undergraduate program was constitutional, even though it did not make an individualized assessment of each applicant, but rather crudely assigned all individuals of certain identified racial groups a substantial and undifferentiated advantage in the admissions process. Comparing her opinion in *Gratz* to her opinions in *Miller* or the VMI case, there is a striking difference in focus—members of racial minority groups may be treated along racial lines for the benefit of their racial group (and perhaps society more generally), but preferences for women must be viewed skeptically lest they reinforce gender stereotypes and overlook individual qualities.

In the context of racial preferences, several justices have repeatedly argued that affirmative action should be treated differently from other forms of more “invidious” discrimination and that there is a different social meaning between a “No Trespassing” sign and a “welcome mat.”¹¹⁹ Justice Stevens has argued that because of our history we have an intuitive understanding of what is meant by “affirmative action” and how it differs from rank discrimination against racial minority groups.¹²⁰ This sentiment serves as justification for the presumably well-intentioned desire to assist racial minorities as members of racial groups. Nonetheless, the fact that affirmative action may have different intentions and purposes from previous forms of discrimination does not support different legal treatment. The idea that benign and malignant racial classifications should receive different levels of constitutional scrutiny depends on the tenuous assumption that judges are able to distinguish between benign and pernicious classifications. Even with good intentions, preferences for racial minorities may be pernicious and cause harm to those individuals they are designed to help. Judges who would apply a lower level of scrutiny to affirmative action programs assume that they can evaluate which government actions subordinate and which do not—that they know subordination when they see it.¹²¹ They argue that affirmative action alleviates the subordination of blacks

¹¹⁷ *Id.* at 304 (citation omitted).

¹¹⁸ *Id.*

¹¹⁹ *Adarand*, 515 U.S. at 245 (Stevens, J., dissenting).

¹²⁰ See Fiss, *Another Equality*, *supra* note 10, at 4 (explaining that this is why we call it affirmative action or positive discrimination—something different).

¹²¹ *Cf.* Ginsburg, *supra* note 71, at 15 (criticizing Justice Potter Stewart for his expressed confidence in knowing the difference between unreasonable gender discrimination and favors for women).

and other racial minorities, but others disagree and see affirmative action as reinforcing negative stereotypes about racial minorities.¹²²

One of the difficulties with the group-centered or antistatutory viewpoint is that it turns on many contingent and evolving factors. To determine whether a program helps to dismantle racial hierarchies, a judge must have a view about the existing hierarchy and what policies will undermine racial stratification rather than reinforce it. Yet, one can reasonably ask, what legal grounds can be used for determining whether a policy perpetuates racial hierarchy? Fiss does not give a specific answer to this question.¹²³ There is some vague sense of social, economic, and political progress, but it is not clear what guideposts the Court should use in measuring such progress, or how progress should change the Court's evaluation of racial caste.¹²⁴ One is left with the feeling that antistatutory simply requires us to fall back on prior political or moral

¹²² For example, empirical evidence “reasonably supports the view that using preferences tends to exacerbate subtle forms of intergroup bias in the evaluation of affirmative action beneficiaries.” Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1663 (1998) (analyzing the empirical evidence of how affirmative action generates or perpetuates negative stereotypes about racial minorities). Beneficiaries of affirmative action have also attested to the self-doubt that such programs generate. See, e.g., SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* 117 (1990) (“The effects of preferential treatment—the lowering of normal standards to increase black representation—puts blacks at war with an expanded realm of debilitating doubt, so that doubt itself becomes an unrecognized preoccupation that undermines their ability to perform.”); see also *supra* note 76 (discussing Justice Thomas's decisions regarding the stigma of racial preferences). See generally STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991).

¹²³ See Alexander, *supra* note, at 4 (“With respect to gauging a group's social status (subordinate or not), Fiss again said very little. One gets the impression that such social status is a function of socio-economic power (average? median? total?), political influence, and the duration of these conditions. Again, this is about as far from an algorithm as one is going to find in the annals of proposed legal principles.”). But see Fiss, *Another Equality*, *supra* note 10, at 17–18 (acknowledging the difficulties of implementing the antistatutory principle but maintaining that it is “fully within the competence of the judiciary”).

¹²⁴ Fiss's criteria for group disadvantage remain vague. See, e.g., Fiss, *Another Equality*, *supra* note 10, at 22; see also Peter H. Schuck, *Groups in a Diverse, Dynamic, Competitive, and Liberal Society: Comments on Owen Fiss's "Groups and the Equal Protection Clause,"* ISSUES IN LEGAL SCHOLARSHIP 7 (2004), <http://www.bepress.com/ils/iss2/art15> (“[T]he criteria necessary to apply Fiss's principle are not only breathtakingly vague; they also beg precisely the kinds of questions—about group identity and achievement, political efficacy, inter-group competition, the distinction between unfair practices and group-disadvantaging practices, and distributive justice—that judges have no business answering.”).

views of racial equality. There is no other legal or constitutional basis for evaluating which racial classifications burden minorities and which do not.

Implicit in this view is that perceptions of subordination are not fixed, but can change over time, as racial groups throw off disadvantage. Capturing such perceptions may be especially difficult for judges who must decide cases about racial classifications based on the perspectives expressed by individual litigants before the Court. In recent cases, primarily white litigants challenged affirmative action programs and asserted harm based on the fact that such programs discriminated against them by denying equal treatment. Such antidiscrimination claims have prevailed in numerous cases, but dissenting justices have noted the importance of preference programs in improving racial equality. Imagine if African-Americans regularly started litigating against affirmative action programs, arguing as Justice Ginsburg did as an advocate for gender equality, that such programs perpetuate negative stereotypes about African-Americans, fail to assess them on individual merit, and violate equal protection. The group-disadvantaging view of racial preferences seems to foreclose this possibility, or the legitimacy of such a perspective.¹²⁵ If affirmative action programs pass constitutional scrutiny because of persistent racial inequality, the claims of minority individuals do not fit into the analysis—individual voices, needs, and merits may be overlooked. Widespread racial inequality exists whether or not racial minorities believe that they benefit from racial preferences. On the other hand, if the understanding of race-based affirmative action gradually shifted in light of such litigation (much as the understanding of gender equality shifted through the advocacy of Justice Ginsburg and others), does the meaning of the Equal Protection Clause turn on the views of various groups? Does the constitutionality of a program depend on whether the beneficiaries like the program?

Indeed, Justice Ginsburg recognizes the danger of racial preferences when she explains that such programs must be limited in duration. Affirmative action must end at some point when racial minority groups achieve a greater measure of equality.¹²⁶ Implicit in this is the notion that such programs are less than desirable, and perhaps even unconstitutional, once greater equality has been achieved. Of course, this only raises the more difficult question of how can we know when sufficient progress has been made towards “genuinely equal opportunity [that] will make it safe to sunset

¹²⁵ See Sabbagh, *supra* note 22, at 9 (arguing that the group-disadvantaging principle is difficult to reconcile with the requirement that the law “transcend the contingent and heterogeneous character of social experience”).

¹²⁶ See *Grutter*, 539 U.S. at 344 (Ginsburg, J., concurring) (citing international agreements supporting the idea that affirmative action programs are temporary measures only until equality objectives are achieved).

affirmative action.”¹²⁷ Given widespread socio-economic disparities in our society that in part track racial groups, what would greater equality look like? For instance, women arguably still face discrimination and lower wages and yet these problems do not insulate most gender preferences for women in Justice Ginsburg’s view.

What appears to be missing from Justice Ginsburg’s discussion of these “benign” racial preferences is the skepticism she brings to bear on gender classifications, the scrutiny that even well-intentioned preferences may impermissibly reinforce stereotypes by treating individuals on the basis of gender stereotypes, rather than on individual need or merit. There is a significant degree of acceptance for race consciousness and categorizing by racial groups, and very little toleration for gender consciousness. What accounts for the difference?

Justice Ginsburg has offered some reasons for the different treatment of affirmative action in the context of race and gender. She has explained that there are important differences between historical and social causes of race and gender discrimination: “For women have not been impeded to the extent ghettoized minorities have been by the lingering effects of involuntary segregation in housing and community life. Females are found as frequently as males in every neighborhood. No buses are required to place boys and girls together in the same classroom.”¹²⁸

More recently, dissenting from the Court’s opinion in *Gratz*, Justice Ginsburg focused on the ongoing discrimination faced by racial minorities citing large disparities in unemployment, poverty, and access to health care, as well as unequal wages and job opportunities.¹²⁹ In her view, these facts support affirmative action for a time to promote greater socio-economic equality. Such disparities, however, also exist for women. For instance, Justice Ginsburg mentions the long history of gender discrimination in immigration policy against women in the *Miller* decision.¹³⁰ She just reaches different conclusions from the history of persistent discrimination. In *Grutter* the history of discrimination allows her to find the racial preference constitutional, whereas in *Miller* the history of gender discrimination supports a finding that a gender preference is unconstitutional.

¹²⁷ *Id.* at 346 (“From today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.” (footnote omitted)).

¹²⁸ Ginsburg, *supra* note 63, at 472–73.

¹²⁹ *Gratz*, 539 U.S. at 299–301 (Ginsburg, J., dissenting) (citing a variety of census and other data regarding persistent inequality between whites and non-whites).

¹³⁰ See *supra* notes 55–61 & accompanying text.

Justice Ginsburg notes “a laudable governmental purpose . . . should not immunize a race-conscious measure from careful judicial inspection.”¹³¹ Nonetheless, the actual inspection made by the dissenting justices in *Gratz* and other recent affirmative action cases does not focus on whether such programs result from overbroad generalizations or stereotypes, or whether they disserve individuals. Rather, the emphasis is on how racial minorities “continue to experience class-based discrimination to this day”¹³² Common experience confirms the truth of this statement, but it rests on generalizations about how individuals of racial minority groups are treated and affected by historic patterns of discrimination. These are, however, simply generalizations in a country that has elected its first African-American president, who in turn has appointed the first Latina woman to the Supreme Court. Discrimination may not be eradicated, but it affects individuals differently based on their varied life circumstances and personal characteristics.¹³³

Many affirmative action programs, such as the point system in *Gratz*,¹³⁴ do not treat racial minorities as individuals, but rather use stereotypes about the preparation and competitiveness of racial minorities. If a minority group is underrepresented, then all members of that group receive an undifferentiated and often decisive boost in the admissions process. By providing preferences, such programs reflect the idea that racial minorities cannot achieve equality in fact through equality of opportunity. Blanket racial preferences assume that racial minorities need different or special opportunities in order to get to equal outcomes. This assumption brands all racial minorities as needing a helping hand, when no doubt many individuals who are African-American or Hispanic or Native American could compete on their own merits. Yet when admitted into a program that practices affirmative action, these individuals will have the stereotype applied to them, just as will their less prepared or less fortunate colleagues. Justice Thomas understands the dignitary harm that can result from application of a racial label, from categorizing individuals by race.¹³⁵ This is the same type of harm that Justice Ginsburg perceives in dividing people up by gender—irrespective of motive, the *classification is the harm* because it reinforces divisions and stereotypes along characteristics that should be irrelevant to government action.

¹³¹ *Gratz*, 539 U.S. at 302 (Ginsburg, J., dissenting).

¹³² *Id.* at 303.

¹³³ The majority in *Gratz* is willing to permit elite institutions of higher learning to use *individualized* considerations of race in the admissions process. *See id.* at 268 (majority opinion).

¹³⁴ *See supra* note 106 & accompanying text.

¹³⁵ *See supra* note 76.

Choosing to put out a separate entrance for minorities, not just a welcome mat, overlooks or minimizes the dignitary harms to individuals, even if that entrance is in front and not at the back of the building. In cases dealing with gender classifications, Justice Ginsburg regularly rejected preferences that rested on the assumptions and stereotypes of women as homemakers—even when those programs sought to help women by minimizing the effects of the reality that many women *were* homemakers financially dependent upon their husbands.¹³⁶ Even where the laws sought to provide a benefit that would assist women, Justice Ginsburg argued that legal reinforcement of gender roles made such classifications pernicious and unconstitutional.¹³⁷ Accordingly, Justice Ginsburg would reject preferences for citizen mothers over citizen fathers, or tax exemptions for widows, but not widowers. This reasoning of individual and formal equality should be extended to racial minorities. Affirmative action responds to the difficulties faced by some racial minorities in gaining access to scarce goods, but the classification of racial minorities in this way simply reinforces and entrenches the assumptions and prejudices that have led to widespread inequality between racial groups.

IV. INDIVIDUAL DIGNITY FOR EVERYONE

Justice Ginsburg has recognized that at the heart of equal protection

is the idea of essential human dignity, that we are all people entitled to respect from our Government as persons of full human stature, and must not be treated as lesser creatures. The idea of respect for the dignity of each human is, I think, essentially what the Equal Protection Clause is about.¹³⁸

Justice Ginsburg has also written “the equal dignity of individuals is part of the constitutional legacy, shaped and bequeathed to us by the framers, in a most vital sense.”¹³⁹ It would be hard to disagree with a concept of essential human dignity. Dignity, like equality, however, is a value that can have many different meanings.¹⁴⁰ To give just a few examples, dignity may mean respect for individual autonomy, for the capacity of each person to choose

¹³⁶ See *supra* note 70 & accompanying text (discussing Ginsburg’s brief in *Kahn v. Shevin*).

¹³⁷ See *supra* notes 55–61 & accompanying text (discussing *Miller v. Albright*).

¹³⁸ *Remarks of Ruth Bader Ginsburg, March 11 2004, CUNY School of Law*, 7 N.Y. CITY L. REV. 221, 238–39 (2004) [hereinafter *Ginsburg Remarks*].

¹³⁹ Ruth Bader Ginsburg, *Foreword to SUPREME COURT DECISIONS AND WOMEN’S RIGHTS* xi–xii (Clare Cushman ed., 2001).

¹⁴⁰ See Rao, *supra* note 23.

how to live. Alternatively, dignity may require social recognition of one's lifestyle or group.

In her writings and jurisprudence on gender equality, Justice Ginsburg has favored the dignity and equality belonging to each individual. She speaks of essential human dignity as being treated as a person of "full human stature" and as "respect for the dignity of each human."¹⁴¹ Similarly, as discussed above, she rejects "myths or stereotypes inhibiting women's achievement of their full human potential."¹⁴² Realizing one's potential is a distinctively individual achievement—dignity here means removing barriers to the achievement of such potential. In the context of gender discrimination, Justice Ginsburg repeatedly emphasizes the themes of individual merit and achievement, of allowing all men and women to pursue their interests free of legal classifications based on stereotypes about the roles of men and women. As she explained in the VMI case, equal protection requires treating women as individuals, of accommodating and granting opportunity to those who belie generalizations: "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."¹⁴³ To the extent that she would recognize affirmative action for women, it is only on very narrow terms, and with great skepticism about the benefits of classifying on the basis of gender, even if for the intended benefit of women.

Justice Ginsburg, however, expresses a different conception of dignity in the context of racial discrimination.¹⁴⁴ When considering affirmative action programs, Justice Ginsburg focuses primarily on racial groups, the social harms and the effects of historic discrimination suffered by these groups, rather than denial of equal opportunity to individuals. She has repeatedly given less individual scrutiny to benign racial classifications because she focuses on group differences across society.

Alongside this advocacy, however, many feminists argued that biological differences between men and women make formal equality inappropriate and incongruous to sex equality,¹⁴⁵ but this position has not

¹⁴¹ *Ginsburg Remarks*, *supra* note 138, at 238–39.

¹⁴² *Ginsburg & Merritt*, *supra* note 63, at 269.

¹⁴³ *Virginia*, 518 U.S. at 550.

¹⁴⁴ *See supra* Part III.

¹⁴⁵ *See generally* CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); Becker, *supra* note 79 (discussing pregnancy and difference); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1136–50 (1986) (discussing pregnancy and maternity leave policies). More traditional legal scholars similarly rely upon biological differences between men and women to justify a lower standard of review for policies that distinguish along gender lines.

received significant recognition in judicial decisions. Formal equality for women, not differential treatment, remains the thrust of the Supreme Court's decisions.

What explains the greater trust and minimal skepticism for racial preferences? Perhaps there is an unacknowledged reason why the harms of affirmative action for racial minorities are often overlooked. There is no history of "benign" but exclusionary policies for racial minorities.¹⁴⁶ In the not-so-distant past women faced a number of exclusionary policies justified (whether sincerely or not) by seeking to protect women from political and professional life and its burdens.¹⁴⁷ But historically there were few or no "benign" preferences for racial minorities. "[R]omantic paternalism"¹⁴⁸ was not used to justify the segregation of blacks from whites or the exclusion of blacks from voting and jury service; rather, it was pure discrimination borne of ignorance, hatred, or whatever the ugly emotional, social, and historical causes of discrimination may be. Discriminatory policies for blacks did not hide behind tender justifications as they did for women.

Because this category of exclusionary "benign" preferences is largely a null set for racial minorities, it might be more difficult to see the harm of modern day well-intentioned preferences such as affirmative action. Racial minorities historically faced open and egregious discrimination and were rarely afforded any type of preference, benign or otherwise. Therefore, affirmative action policies, aimed at promoting substantive equality may seem like progress, an important break from the discriminatory past. Those who argue in favor of a lower standard for benign racial preferences may overlook, deliberately or not, the paternalism of such programs, just as in the past, politicians and judges were unable (or unwilling) to see the paternalism and inequality inherent in the "benign" preferences for women.

Yet this historical difference should not make a legal difference and does not justify less skepticism for racial preferences. Affirmative action and other similar programs, like the benign preferences for women, insinuate and

¹⁴⁶ See DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* (forthcoming Univ. of Chi. Press).

¹⁴⁷ Ginsburg & Merritt, *supra* note 63, at 269 ("Recall that traditional forms of sex discrimination, unlike obviously odious race-based classifications, were once regarded or rationalized as benignly favoring or protecting the second sex—laws that prohibited women from working at night, tending bar, carrying heavy weights, working overtime, for example."). Feminist advocates such as Ginsburg were concerned that affirmative action programs for women could not be distinguished from the exclusionary and paternalistic policies of the past. Mainstream feminist legal strategy remained suspicious of gender classifications in most circumstances.

¹⁴⁸ *Frontiero v. Richardson*, 411 U.S. 677, 684–86 (1973) (discussing the history of "benign" preferences for women and the accompanying legal, social, and economic disadvantage that accompanied such preferences).

perpetuate stereotypes about how racial minorities are different from whites. They assume, contrary to ample evidence, that all minorities need special consideration simply by virtue of being minorities. Affirmative action, by giving a special benefit to minorities, confirms and reinforces traditional and historical associations between race and disadvantage, just as preferences for women reinforced traditional and historic associations between gender and homemaking, and therefore exclusion or limitation from work and other opportunities outside the home. By purporting to ameliorate the effects of traditional divisions between men and women, policies for “women only” worked to entrench traditional male-female roles. Similarly, racial preferences that purport to ameliorate discrimination against minorities may simply reinforce and entrench the causes and attitudes of discrimination. If one subscribes to a group disadvantaging theory of equality, it should at least be an open question whether affirmative action burdens or benefits minorities as a group, particularly as greater racial equality is achieved.

Justice Ginsburg acutely perceives in the context of gender classifications that there is harm to the equality of women when they are treated differently from men, even when such difference is purportedly for the benefit of women. Different treatment undermines equality and harms the dignity of individual women. Moreover, it reaffirms patterns of subordination. Applying Justice Ginsburg’s principles on gender equality, one might conclude that affirmative action for racial minorities harms individual dignity by assuming that persons of a minority race cannot compete with others on an equal footing simply by virtue of their race. It is a discriminatory and troubling assumption that has no functional connection to a person’s background, experiences, or need. There is a dignitary harm that occurs when one is not counted as an individual, but rather treated simply as a member of a group. Such treatment undermines the concept of equal citizenship in the context of race, no less than in the context of gender.

It is hard to see how racial preferences satisfy Justice Ginsburg’s criteria under the Equal Protection Clause of treating racial minorities with respect, as persons of full human stature. These programs diminish the individual accomplishments of members of racial minority groups by lumping all such individuals together and placing them into a racial category. The programs do not use functional criteria—for example, to consider whether a person has suffered from economic disadvantage—and then allocate preferences along those lines. Rather, affirmative action programs usually sweep with a broad brush. They confer benefits along the lines of race and use race as a proxy for disadvantage and inability to compete on an equal footing. This then perversely reinforces the historic associations between race and disadvantage. In Justice Ginsburg’s jurisprudence, being a person of “full human stature” requires individual treatment for women, but group treatment for minorities. It assumes one theory of equality for women and another for

racial minorities, without providing a clear justification for the difference. Both women and minorities have suffered, and still sometimes suffer, political, legal, social and economic discrimination. Nonetheless, today racial minorities as well as women constitute heterogeneous groups, diverse along social, economic, and political markers. So why does equality require treating women as individuals, but allow treating racial minorities as members of groups?

A satisfactory answer to this puzzle remains to be provided. This divergence in treatment for women and racial minorities, two groups who have suffered historic disadvantage in social, economic, and political life, suggests some of the difficulties with antistatutory principles. Because this equality principle depends on social norms of belonging and recognition, it remains highly contingent and depends on changing social values. In Justice Ginsburg's jurisprudence, for women, equality and belonging mean largely equal treatment with men; but for racial minorities, equality and social belonging mean preferential treatment along group lines. The different treatment between the two groups demonstrates, at least, that this equality principle depends on highly contextual understanding of which individuals are a part of "groups" that matter for legal purposes. Evaluations of group disadvantage within the antistatutory principle are similarly highly contested. Some justices argue that affirmative action helps to eliminate racial castes in our society, whereas others argue just the opposite—that affirmative action reinforces such castes by continuing to divide up individuals on the basis of race. The antistatutory principle seems to offer no way to resolve this dispute, which may be one reason a majority of the Supreme Court has adhered to a primarily individualist principle of formal equality for both gender and racial classifications. This principle is not without its difficulties, but in most circumstances there are few disputes about what such equality requires.