Justice Ginsburg's Republican Jurisprudence

*Daphna Renan**

Abstract

Justice Ginsburg's opinions challenge us to rethink the role of statutes in American constitutional democracy, and how to interpret the authority of the people to innovate on the lawmaking process itself. Her legacy includes a body of opinions that comprises a forceful rebuttal to the Court's current interpretive dogma. Justice Ginsburg's writing poses an alternative vision of American public law—a "republican" jurisprudence that puts the power to make law back in the hands of the people. This Symposium Essay elucidates three aspects of that jurisprudence: what work it understands legislation to do in the polity, how it understands the authority of Congress to make law, and how it interprets the authority of the people to innovate on the lawmaking process itself.

Table of Contents

Introduction

It is a great privilege to be here today to reflect on the legacy of Justice Ruth Bader Ginsburg—a giant in the law and a treasured former boss. Justice Ginsburg was a visionary in the fight for a more egalitarian polity. She was as careful in her drafting as she was powerful in her reasoning and bold in her argument. She was grace and grit combined, and she never lost sight of the human impact of the law and the grave responsibility of judges as participants in shaping it.

Justice Ginsburg's opinions challenge us to rethink the role of statutes in American constitutional democracy, and how to interpret the authority of the people to innovate on the lawmaking process itself. Her jurisprudence emphasizes the centrality of the people, work-

* Peter B. Munroe and Mary J. Munroe Professor of Law, Harvard Law School. For terrific research and editorial assistance, I thank Jessica Levy and Eric Xu.

ing through the institutions of lawmaking, to constitute the constitutional order that exists. "Most urgently needed," Justice Ginsburg pressed in her hearing for confirmation to the Supreme Court, "is clear recognition by all branches of government that in a representative democracy important policy questions should be confronted, debated, and resolved by elected officials."[1]

The animating principle of what I will call Justice Ginsburg's *republican* jurisprudence is a constitution in which "We the People" govern, and in which lawmaking is a central mechanism of the people's governance.[2] As an account of interpretation, this approach advances the republican principle of nondomination by ensuring that judicial construction (both constitutional and statutory) accommodates a state answerable to the people—that is, the people as currently constituted.[3] A republican jurisprudence thus anchors in the people

---

1 *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. 110 (1993).

2 *See, e.g.*, THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("In republican government, the legislative authority necessarily predominates."); THE FEDERALIST NO. 10, at 80–81 (James Madison) (Clinton Rossiter ed., 1961) (defining a "republic" as a "government in which the scheme of representation takes place," and the "republican principle" as that "which enables the majority to defeat [a minority faction's] views by regular vote."); *cf.* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J 1539, 1548 (1988) (describing James Madison's view of republicanism as government deriving its power from the people and describing all forms of republicanism as united by a commitment to collective self-determination). The term "republican" has been used to describe a variety of conflicting perspectives in the history of political thought. Among American constitutional theorists, the term emerged as part of a broader normative debate over whether the ideal relationship between the state and individuals was best characterized by a classical conception of civic virtue or by a liberal conception of personal autonomy. *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION (1992). More recently, the term has been used by proponents of a normative political theory premised on eliminating public and private forms of arbitrary domination. *See, e.g.*, PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (2012); Frank Lovett, *Domination and Distributive Justice*, 71 J. POL. 817 (2009); Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, *in* REPUBLICANISM AND POLITICAL THEORY 83 (Cécile Laborde & John Maynor eds., 2008); *see also* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007). It is this latter tradition of nondomination that this Essay builds upon here and in earlier work. *See generally* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022).

3 *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT ix (1997) (identifying nondomination as a central value of republican theory and arguing that "freedom as non-domination supports a conception of democracy under which contestability takes the place usually given to consent; what is of primary importance is not that government does what the people tells it but, on pain of arbitrariness, that people can always contest whatever it is that government does"); *see generally* Bowie & Renan, *supra* note 2 (discussing the Court's current "juristocratic" approach to the separation of powers and how it undermines the value of nondomination); *cf.* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L.

themselves the power both to safeguard democracy and to reimagine it.[4]

As Justice Ginsburg urged over her twenty-seven years on the Court, a republican approach to legal interpretation is incompatible with a cramped, overly literalistic approach to statutory and constitutional text.[5] Abandoning Justice Ginsburg's jurisprudential premises, however, a more fundamentalist approach to statutory and constitutional text became dominant during her time on the Court. Such an approach to legal interpretation, Justice Ginsburg cautioned, impedes the authority of the people to govern; it uses high textualism to gut republican self-rule.[6]

Justice Ginsburg's legacy includes a body of opinions that, in combination, comprise a forceful rebuttal to the Court's current interpretive dogma. Justice Ginsburg's writing poses an alternative vision of American public law—a republican jurisprudence that puts the power to make law back in the hands of the people.[7] This Essay eluci-

---

REV. 407, 476–77 (1989) (advancing a civic republicanist argument that courts should "generously construe statutes designed to protect traditionally disadvantaged groups and nonmarket values" and make interpretive decisions that strive to "further political equality").

4 As Justice Ginsburg noted in her 2019 Frank and Kula Kumpuris Distinguished Lecture:

> "Think about how things were in 1787. Who were 'We the people'? Certainly not people who were held in human bondage because the original Constitution preserves slavery. Certainly not women whatever their color and not even men who own no property. It was a rather elite group, 'We the people,' but I think the genius of our Constitution is what Justice Thurgood Marshall said. He said he doesn't celebrate the original Constitution but he does celebrate what the Constitution has become, now well over two centuries. That is the concept of 'We the people' has become ever more inclusive. People who were left out at the beginning – slaves, women, men without property, Native Americans – were not part of 'We the people.' Now all the once left out people are part of our political constituency. We are certainly a more perfect union as a result of that."

Ruth Bader Ginsburg, J., Frank and Kula Kumpuris Distinguished Lecture (Sept. 3, 2019).

5 *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., Inc, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting); *see also* Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 324 (1979).

6 *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 625 (2009) (Ginsburg, J., dissenting) (critiquing the majority for "show[ing] little attention to Congress' design" in Title VII and failing "to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose" (quoting Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 631–32 (1973))); *see also* Marc Spindelman, *Toward a Progressive Perspective on Justice Ginsburg's Constitution*, 70 OHIO ST. L.J. 1115, 1119 (2009) (noting how Justice Ginsburg's constitutional vision places emphasis on how "the political branches of government—and so, through them, in a sense, the American people—are to take up their rightful place in constitutional conversation").

7 *See* Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 127 HARV. L. REV. 437, 443 (2013) (describing Justice Ginsburg's work as "demosprudential" insofar as it "invited a wider audience into the conversation" and "linked public engagement with insti-

dates three aspects of that jurisprudence: what work it understands legislation to do in the polity, how it understands the authority of Congress to make law, and how it interprets the authority of the people to innovate on the lawmaking process itself. In closing, the Essay contrasts Justice Ginsburg's jurisprudential approach with the kabuki republic of *United States v. Arthrex*,[8] perhaps the first time in which the loss of Justice Ginsburg on the Court changed the outcome of a case.

I. The Role of Statutes

Statutory interpretation is often presented as a matter of how to read words.[9] But in the hard cases it requires a normative account of what role legislation can and should play in the polity.[10] Justice Ginsburg's republican jurisprudence sought to make good on the potential for the people, working through our representative institutions, to make legislation an engine of social change. She regarded statutes as a central means for the people to advance the value of political equality.[11]

Statutes are imperfect instruments promulgated in imperfect ways. But in a representative democracy, legislation is the best tool we have to translate hard-fought political changes to the substance of a multiracial democracy and the content of a more egalitarian polity into the nation's lived experience.[12] When lawyers and jurists turn statutory interpretation into a game of textualist gotcha, they render the state less answerable to the people.[13]

---

tutional legitimacy" and so emphasized how "the Constitution belongs to the people, not just to the Supreme Court").

8 141 S. Ct. 1970 (2021).

9 Justice Kagan famously remarked that "[w]e are all textualists now." Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube (Nov. 25, 2015), https://www.youtube.com/watch?v=DPEtszFT0Tg [https://perma.cc/RE4H-HLHE].

10 *Cf.* Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 Nw. L. Rev. 269, 303–04 (2019).

11 *See* Amanda L. Tyler, *Lessons Learned from Justice Ruth Bader Ginsburg*, 121 Colum. L. Rev. 741, 752 (2021) ("[T]he Justice did not believe that looking to the courts was the only way—or even always the best way—to achieve meaningful, progressive change. . . . [L]egislation was the preferred course for securing change.").

12 *Cf.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 545–46 (1947).

13 *Cf.* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rev. 593, 595 (1995) (theorizing ways judges can use discretion in statutory interpretation to preserve, reconstruct, complement, or discipline politics and thus "advanc[e] a larger democratic project").

Justice Ginsburg wrote against a kind of *work-to-rule textualism* that Justice Scalia and others brought into the heartland of statutory interpretation.[14] In the labor context, work to rule is a form of industrial action wherein workers, by employing an unrealistically literalistic interpretation of governing contracts or rules, actively seek to undermine workplace efficacy or otherwise incapacitate production.[15] There is an analogous type of textualism that has gained traction in the current Court: an unrealistically rigid and cramped view of text that is deliberately undermining or incapacitating.[16]

On this approach, textualism becomes a way for lawyers and jurists to actively impede the efficacy of statutes by making them unrealistically literalistic.[17] While work to rule in the labor context uses a kind of undermining literalism as a strategy to exercise collective power to improve conditions,[18] however, here undermining literalism serves nearly the opposite end: to take power away from the people through the stingy reading of statutes. Indeed, this form of textualism is often used to impede hard-fought legal changes to workplace conditions and other statutory advancements of political equality.[19] Work-to-rule textualism thus builds antirepublican power; it is a way for lawyers and jurists to actively undermine the authority of the people reflected in legislation.[20]

Justice Ginsburg's legacy includes a repudiation of this type of textualism as a threat to republican self-rule. To illustrate, consider Justice Ginsburg's dissent in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*[21] The case concerned the ability of Title VII to remediate pay

---

14 *Cf.* Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304–06 (2017) (tracing Justice Scalia's influence on statutory interpretation).

15 *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 90–91 (2009) ("[W]orkers bring an enterprise to a halt by refusing to cut the corners necessary for things to function smoothly.").

16 *Cf.* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 120–21 (2009).

17 *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 290 (1990) (critiquing "wooden literalism").

18 *See* Marc J. Bloch & Scott A. Moorman, *Working to Rule and Other Alternate Job Actions*, 9 LABOR L. 169, 177–78 (1993).

19 *See, e.g.*, Ruth Bader Ginsburg & Susan Deller Ross, *Pregnancy and Discrimination*, N.Y. TIMES (Jan. 25, 1977), https://www.nytimes.com/1977/01/25/archives/pregnancy-and-discrimination.html [https://perma.cc/GVM2-STMD] (arguing—as an advocate, prior to her appointment as a justice—that the court's narrow reading of the statute "leaves a gaping hole" in women's protection against pregnancy discrimination).

20 *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992).

21 550 U.S. 618 (2007).

discrimination in the workplace.[22] Title VII provides that a charge of discrimination "shall be filed within [180] days after the alleged unlawful employment practice occurred."[23] A majority of the Court held that any annual pay decision not contested within 180 days becomes, as Justice Ginsburg put it in dissent, "a *fait accompli*" beyond the reach of Title VII to repair.[24] Such an interpretation, Justice Ginsburg apprehended, guts the remedial statute in a context in which it is most sorely needed: to address discrimination that has quietly fed on itself over time.[25]

To give meaning to a statute designed to remediate workplace discrimination, Justice Ginsburg reasoned, a court must be attuned to how such discrimination in fact unfolds.[26] "The Court's insistence on immediate contest," Justice Ginsburg cautioned, "overlooks common characteristics" of discriminatory pay[27]:

> 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 . . . 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.[28]

This context is necessary for a judge to understand how discrimination stealthily grows in the workplace. And it makes possible a construction of Title VII that regards every paycheck as *itself* an act of discriminatory pay because it "delivers less to a woman than to a similarly situated man."[29] By contrast, the Court's "cramped interpretation" of the statute was not truer to Title VII's words.[30] It was simply more obtuse about the meaning that those words could have in the context of a remedial regime addressed to discrimination on the basis of sex.[31] The Court's cramped reading thus impeded Title VII's ability to effectively address discrimination in the workplace.

---

22 *See id.* at 643.

23 42 U.S.C. § 2000e-5(e)(1).

24 *Ledbetter*, 550 U.S. at 644 (Ginsburg, J., dissenting).

25 *See id.* at 645.

26 *See id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.* at 661.

31 *See* Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 6–7 (2010) ("The Court's ruling, I observed for the four dissenters, ignored real-world employment practices that Title VII was meant to govern . . . . [It] could not be what Congress intended when,

Justice Ginsburg's more contextualist account of statutes must not be confused with an inattention to detail. Justice Ginsburg was the most precise writer I have ever encountered. In her own writing, she pored over every word, often revisiting an important line to ensure that there was no more precise formulation. When we clerks would hand in a draft opinion, we could expect to get it back with big red circles—around ideas, around particular words, even around semicolons. Justice Ginsburg was scrupulous; she strove to make her written work concise, exact, and—at the level of each and every word—deliberate and compelling.[32]

But Justice Ginsburg did not scrutinize *statutory* language under the same grammarian magnifying glass.[33] For she understood—and her former law clerk Abbe Gluck has shown through painstaking research[34]—that this is simply not how a collective and complex institution like Congress actually drafts.[35] At least as important, Justice Ginsburg recognized that we cannot comprehend the social change a statute aims to effectuate by looking at words on the page alone.[36] If statutes are policy instruments, we have to understand the social problems and policy debates at stake.

Perhaps most fundamentally, Justice Ginsburg understood that Congress *needs* the courts to implement or enforce its legislation. This is what makes work-to-rule textualism so pernicious. By dogmatically hewing to literalistic meaning or the stingy interpretation of text, the Court in a case like *Ledbetter* is effectively refusing to put antidis-

---

in Title VII, it outlawed discrimination based on race, color, religion, sex, or national origin in our Nation's workplaces.").

32 Daphna Renan, *In Memorium: Justice Ginsburg*, 134 HARV. L. REV. 899, 900 (2021); *see also* Tyler, *supra* note 11 at 745 ("Justice Ginsburg was precise in everything she did . . . . [H]er law clerks will tell you that she taught us to go over *every single word* to ensure that it was accomplishing something in an opinion.").

33 *Cf.* W. Va. Univ. Hosps. Inc. v. Casey, 499 U.S. 83, 113 (1991) (Stevens, J. dissenting) (arguing that "when the Court has put on its thick grammarian's spectacles" it has adopted interpretations inconsistent with congressional intent).

34 *See generally* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pts. I & II), 65 STAN. L. REV. 901 (2013), 66 STAN. L. REV. 725 (2014); Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020).

35 *See* Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1421 (1987) ("Congress may intend to be precise, yet fail for want of a grammarian.").

36 *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1640 (2018) (Ginsburg, J., dissenting) ("[T]he Court ignores the reality that sparked the NLRA's passage . . . ."); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2400 (2020) (Ginsburg, J., dissenting) (arguing for statutory interpretation contextualized to the Affordable Care Act's protections of women's access to contraceptive care).

crimination legislation to work.[37] There is nothing neutral or minimalist about this form of interpretation. It is subversive: Work-to-rule textualism undermines the power and authority of Congress to create effective governance institutions like Title VII. It is a way to inhibit government from within the four corners of enacted law[38]—and to impose limits on government power beyond those that constitutional law makes available.[39] Used in this way, textualism becomes deeply antistatist.

To ignore context in the name of textualism is thus to impoverish crucial instruments of policy and governance in a democratic republic.[40] This is not about magical thinking about what was in the unitary mind of a composite body like Congress. It is about what normative role statutes can meaningfully play in society, and the role of courts in effectuating the will of the people reflected in legislation.[41] On Justice Ginsburg's account, statutes constitute the small-c constitution: they construct and revise the substance of our constitutional commitment to political equality.[42] Rather than protect legislative supremacy,

---

37 In her Stevens Lecture at the University of Colorado, Justice Ginsburg remarked:

> "My dissent [in *Ledbetter*] said basically, 'Congress, you wrote a law that says thou shalt not discriminate on the basis of sex in employment. Surely, you meant Lilly Ledbetter's case to be covered. My colleagues have given a parsimonious reading to this law.' My statement ended, 'The ball is now in Congress's court to correct what I see as a misperception by my colleagues of the will of Congress.'"

Ruth Bader Ginsburg, *A Conversation with Justice Ruth Bader Ginsburg*, 84 U. COLO. L. REV. 909, 926 (2013).

38 *Cf.* Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 842 (2015) (analyzing the phenomenon of "uncivil obedience" and arguing that it "manages to provoke through and within the law by exploiting gaps between the letter of legal directives and the customs or purposes associated with them").

39 Similar critiques have been made about substantive canons of statutory interpretation, such as federalism "clear statement" rules, which limit Congress's practical ability to govern in ways that constitutional law would not restrict. *See generally* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION & REGULATION: CASES AND MATERIALS 425–27 (4th ed. 2021).

40 *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 425–37, 453–61 (1988); *cf.* Note, *Textualism's Mistake*, 135 HARV. L. REV. 890, 910–11 (2022).

41 *Cf.* Julie C. Suk, *"A More Egalitarian Relationship at Home and at Work": Justice Ginsburg's Dissent in* Coleman v. Court of Appeals of Maryland, 127 HARV. L. REV. 473, 477 (2013) ("Justice Ginsburg's *Coleman* dissent . . . illustrates . . . her ongoing commitment to a comprehensive gender equality, which will arrive not only through the enforcement of rights by courts, but also through a democratic constitutionalism that can be supported, reframed, and encouraged by a wise judicial voice."); Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 127 HARV. L. REV. 437, 439 (2013) (discussing Ginsburg's *Ledbetter* dissent as a "democratizing form of judicial speech . . . [that] engage[d] an external audience in a conversation about our country's commitment to equal pay for equal work" and noting that Ginsburg herself described this dissent as "[s]peaking to Congress.").

42 *See* Goodwin Liu, *Reflections on RBG: Mentor, Friend, Hero*, 121 COLUM. L. REV. 609,

judges impede the normative potential of legislation when they embrace a cramped view of decontextualized text.

II. The Authority of Congress

The problem is not limited to how jurists read the statutes that Congress enacts. It is also about how jurists construe Congress's authority to construct a more egalitarian polity through legislation. Justice Ginsburg's jurisprudence emphasized that the people empowered Congress to construct a more equal citizenry through the Reconstruction Amendments. Her opinions locate in those Amendments, moreover, the constitutional authority *for Congress* to decide what a more egalitarian polity should look like. To collapse the nature of discrimination, and the scope of permissible state responses to it, into an exercise of judicial literalism, Justice Ginsburg cautioned, is to extinguish the constitutional imagination of "We the People" in the pursuit of equal citizenship.[43]

The power of the people to elaborate on the idea of equality through their representative institutions is at the crux of Justice Ginsburg's dissents in *Coleman v. Court of Appeals of Maryland*[44] and *Shelby County v. Holder*.[45] In *Coleman*, the Court considered the self-care provision of the Family and Medical Leave Act,[46] which entitles eligible employees to job-secured leave where the employee has a serious health condition that makes her unable to do her job.[47] A majority of the Court held that the self-care provision did not address sex discrimination and, as a result, that Congress lacked the authority to enact the provision under section five of the Fourteenth Amendment.[48]

But to understand the policy decision encapsulated in the self-care provision, Justice Ginsburg argued in dissent, requires under-

612–13 (2021) (describing how Justice Ginsburg conceived of statutes, especially those countering discrimination, as advancing a "vision of equal citizenship"); *see also* William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution 77 (2013) (arguing that the small-c constitution, anchored in legislation, is more capable than the U.S. Constitution alone of advancing the "nation's fundamental commitments").

43 *See* Annenberg Classroom, *A Conversation on the Constitution: The Fourteenth Amendment*, Youtube (Sept 13, 2018), https://www.youtube.com/watch?v=9m4E60pXFgs&t=117s [https://perma.cc/APF9-QB5C]; *see also* Guinier, *supra* note 7, at 443.

44 566 U.S. 30 (2012).

45 570 U.S. 529 (2013).

46 Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381–6387, 29 U.S.C. §§ 2601–2654.

47 *See Coleman*, 566 U.S. at 33.

48 *See id.* at 36–37.

standing the underlying policy debates, in particular, the disagreement between "equal treatment" and "special treatment" feminists about how to combat effectively gender discrimination in the workplace—lines of disagreement initially forged in the context of pregnancy discrimination.[49] In contrast with special-treatment feminists, equal-treatment feminists "believe[d] that viewing pregnancy as *sui generis* perpetuated widespread discrimination against women"; for this reason, equal-treatment feminists advanced the goal of gender-neutral leave protections.[50] In enacting the Family Medical Leave Act's self-care provision, Congress implemented equal-treatment feminists' policy vision.[51]

Drawing on evidence in the Senate Committee Report, Justice Ginsburg showed how the self-care provision "[a]dhere[d] to equal-treatment feminists' aim . . . [by] prescrib[ing] comprehensive leave for women disabled during pregnancy or while recuperating from childbirth—without singling out pregnancy or childbirth."[52] Once the policy disagreement between equal-treatment and special-treatment feminists is properly understood, Justice Ginsburg urged, "it is impossible to conclude that 'nothing in particular about self-care leave . . . connects it to gender discrimination.'"[53] Justice Ginsburg thus drew on the legislative history, not to pretend that Congress has a unitary mind but to show that Congress enacted the Family Medical Leave Act in the context of a particular policy debate—context relevant to an informed understanding of the gender-neutral language of the statute.[54]

By contrast, the *Coleman* plurality's decision to focus instead on the gender-neutral face of the statute "pa[id] scant attention" to a hard-fought political win: a statute reflecting the vision of equal-treat-

---

49 *See* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 325–27 (1984); *see also* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1221 (1986) (explaining and challenging this dichotomy). Justice Ginsburg was particularly attuned to the nature of these debates given her work prior to joining the bench as an advocate, *see* Tyler, *supra* note 11, at 752–54, and her contributions as a scholar, *see* Ruth Bader Ginsburg, *Some Thoughts on the 1980's Debate over Special Versus Equal Treatment for Women*, 4 L. & INEQ. 143, 144–45 (1986).

50 *Coleman*, 566 U.S. at 49 (Ginsburg, J., dissenting).

51 Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279, 279 (1998) (describing the debate and how "equal treatment forces mobilized to gain passage of the [Family and Medical Leave Act]").

52 *Coleman*, 566 U.S. at 49–51 (Ginsburg, J., dissenting).

53 *Id.* at 51 (Ginsburg, J., dissenting).

54 *See generally* Suk, *supra* note 41.

ment feminists about how to create a more equitable workplace.[55] It wiped that policy perspective off the table as a viable means to construct a more egalitarian polity.

A respect for statutes—or what Jeremy Waldron has called the "dignity of legislation"—entails instead the recognition that statutes achieve social change "*in* the circumstances of politics," including the circumstances of deep policy disagreement.[56] Legislation does not claim respect "as an intimation of what an ideal society would be like," but rather because it reflects the capacity to act collectively even in the face of genuine disagreement about what that ideal society *should* entail.[57] Recognizing the goals of equal-treatment feminists and how they informed the policy debate casts the legislation enacted in a different light; it enables the jurist to respect the legislative bargain rather than to rewrite it.

Coleman concerned Congress's authority to enforce, by appropriate legislation, the Fourteenth Amendment's commitment to equal protection. *Shelby County* addressed Congress's authority, under the Fifteenth Amendment, to safeguard the franchise from race discrimination through the Voting Rights Act.[58]

The question presented in *Shelby County*, as Justice Ginsburg pressed in dissent, "is who decides whether . . . § 5 [of the Voting Rights Act] remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments 'by appropriate legislation.'"[59] In enacting the Voting Rights Act, and creating—through its preclearance regime—an instrument to address discrimination in a more systematic fashion, Congress engaged in "one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history."[60] Congress chose to reauthorize the Voting Rights Act, first, to "facilitate completion of the impressive gains thus far made" and, second, to "guard against backsliding."[61] Congress's decision—reached with "great care and seriousness"[62]—warranted the Court's "unstinting approbation."[63]

---

55 *Coleman*, 566 U.S. at 65 (Ginsburg, J., dissenting).

56 JEREMY WALDRON, THE DIGNITY OF LEGISLATION 156–57 (1999) (emphasis added).

57 *Id.*

58 *See generally* James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote:* Shelby County v. Holder, 8 HARV. L. & POL'Y REV. 39 (2014).

59 Shelby Cnty. v. Holder, 570 U.S. 529, 559 (2013) (Ginsburg, J., dissenting).

60 *Id.* at 562.

61 *Id.* at 559–60.

62 *Id.* at 580.

But instead a majority of the Court chose to second-guess Congress's policy judgment and to put an end to the Voting Rights Act's more systematic protections. A republican jurisprudence, Justice Ginsburg urged, would "have left the matter where it belongs: in Congress' bailiwick."[64]

Jurisprudentially, her dissent is a powerful argument for *McCulloch* deference[65]—here, anchored in the Fifteenth Amendment[66] and sensitive to the ways in which the Amendment itself advances the logic of *McCulloch* in the context of Reconstruction's distinctive aims.[67] For Justice Ginsburg, the people, working through their representative institutions, can achieve grand aims. And the "grand aim" of the Voting Rights Act was "to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race."[68]

III. The Authority of The People To Innovate on Lawmaking

Justice Ginsburg's republican jurisprudence thus centered the authority of the people to speak through their representative institutions in the lawmaking process. But it also emphasized the authority of the people to innovate on the lawmaking process itself.

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[69] Justice Ginsburg—writing this time for a majority of the Court—rejected a "wooden interpretation" of the Elections Clause that would have prohibited redistricting by independent commission.[70] Rather, Justice Ginsburg emphasized that "the animating principle of our Constitution" is that "the people themselves are the originating source of all the powers of government."[71] Even if the initiative and the referendum "were not yet in our democracy's arsenal" when the Elections Clause was drafted, the Clause should not be read "to disarm States from adopting modes of legislation that place the lead rein in the people's hands."[72]

---

63 *Id.* at 560.

64 *Id.* at 590.

65 *See* John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 10–15 (2014) (describing the "*McCulloch* theory of structural constitutional law" and tracing the Court's uses of "*McCulloch* deference" over time).

66 *Shelby Cnty.*, 570 U.S. at 567–68.

67 *See id.* at 568; *cf.* Manning, *supra* note 65, at 10–15.

68 *Shelby Cnty.*, 570 U.S. at 592 (Ginsburg, J., dissenting).

69 576 U.S. 787 (2015).

70 *Id.* at 813.

71 *Id.*

72 *Id.* at 816.

The Elections Clause of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."[73] In 2000, Arizona voters adopted an initiative, Proposition 106, that amended the State constitution to remove redistricting authority from the State legislature and vest it instead in an independent commission.[74] The Arizona Legislature brought suit, arguing that the commission and its maps for congressional districts violated the federal Elections Clause.[75] In particular, the Arizona Legislature alleged that "[t]he word 'Legislature' in the Elections Clause means [specifically and only] the representative body which makes the laws of the people."[76]

Justice Ginsburg rejected this rigid textualism as an unjustified constraint on the constitutional meaning of lawmaking and its evolving forms. Underscoring the republican commitment at the crux of her approach, Justice Ginsburg elaborated:

> The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. As Madison put it: "The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted [sic] with it should be kept in dependence on the people."[77]

She continued:

> The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have "an habitual recollection of their dependence on the people." In so acting, Arizona voters sought to restore "the core principle of republican government," namely, "that the voters should choose their representatives, not the other way around."[78]

---

73 U.S. CONST. art. I, § 4, cl. 1.

74 *See Ariz. State Legis.*, 576 U.S. at 792.

75 *See id.*

76 *Id.* (quoting Compl., app. 21, ¶ 37) (alteration in original).

77 *Id.* at 819 (first alteration in original) (quoting THE FEDERALIST No. 37, 227 (James Madison)).

78 *Id.* at 824 (citation omitted) (first quoting THE FEDERALIST No. 57, 352 (James

Justice Ginsburg thus advanced a republican jurisprudence—a vision of a Court capable of enabling the political process to constitute, and, as importantly, to reform, the institutions of American democracy.[79] This deference to the people as lawmakers led Justice Ginsburg to reject the current Court's high textualism. It called for a more subtle appreciation of the normative role of lawmaking in a constitutional democracy, as an imperfect but crucial engine of social change. As importantly, it called for judges to defer to those who exercise the lawmaking power in the name of the people on the complex and deeply contested questions of state design.[80]

Coda: A Kabuki Republic

Arthrex is perhaps the first case in which Justice Ginsburg's absence from the Court was decisive for the outcome. And it offers a striking contrast to the republican principles at the crux of Justice Ginsburg's approach. The case concerned the question whether the statutorily prescribed appointment of Administrative Patent Judges by their agency head (the Secretary of Commerce) complied with the Appointments Clause of Article II.[81] That Clause explicitly authorizes "Congress . . . by [l]aw [to] vest the [a]ppointment of such inferior [o]fficers, *as they think proper*, . . . in the Heads of Departments."[82]

If the Court had applied Justice Ginsburg's republican approach, reflected in cases like *Shelby County* and *Coleman*,[83] it would have deferred to the more democratic judgment of the representative branches.[84] The decision to locate in the agency head the appointment of administrative patent judges would have been an especially easy case, for it accords with the discretion constitutionally allocated to Congress in Article II to structure a working government.[85]

Madison); then quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005)).

79 *Cf.* Michelman, *supra* note 2.

80 *See generally* Bowie & Renan, *supra* note 2.

81 United States v. Arthrex, Inc., 141 S. Ct. 1970, 1976 (2021).

82 U.S. Const. art. II, § 2 (emphasis added).

83 *Cf.* Bank Markazi v. Peterson, 578 U.S. 212, 236 (2016) ("By altering the law governing the attachment of particular property belonging to Iran, Congress acted comfortably within the political branches' authority over foreign sovereign immunity and foreign-state assets.").

84 Justice Breyer in dissent suggested such an approach: "The words 'by Law . . . as they think proper' strongly suggest that Congress has considerable freedom to determine the nature of an inferior officer's job, and that courts ought to respect that judgment." *Arthrex*, 141 S. Ct. at 1988 (Breyer, J., concurring in judgment in part and dissenting in part) (citing Lucia v. SEC, 138 S. Ct. 2004, 2062 (2018) (Breyer, J., concurring in judgment in part and dissenting in part)) (alteration in original).

85 U.S. Const. art. II, § 2, cl. 2 ("Congress may by Law vest the Appointment of such

Instead, a majority of the Court overruled that more democratic judgment articulated in legislation—all in the name of democratic accountability. "Today, thousands of officers wield executive power on behalf of the President in the name of the United States," wrote Chief Justice Roberts; "That power acquires its legitimacy and accountability to the public [only] through 'a clear and effective chain of command' down from the President, on whom all the people vote."[86]

This kabuki republic was too much for Justice Thomas, who wrote for four Justices in dissent: "For the very first time, this Court holds that Congress violated the Constitution by vesting the appointment of a federal officer in the head of a department."[87] Yet "[t]he Executive Branch is large, and the hierarchical path from President to administrative patent judge is long."[88] A proper understanding of the judicial role should have resulted in the "Court deferring to Congress' choice of which constitutional appointment process works best."[89] If Justice Ginsburg were still on the Court, this more deferential approach to the judgment of the political branches almost certainly would have garnered a majority.[90]

What makes *Arthrex* all the more stunning is that, even as it struck down an institutional arrangement reached through the democratic process of lawmaking, the Court itself was unable to arrive at a majority position on what the separation of powers requires. Justice Gorsuch, who joined the Chief Justice's plurality to strike down the statute as unconstitutional, believed that the Court's chosen remedy *itself* created a different separation of powers problem.[91] The plurality ruled that the statute "cannot constitutionally be enforced to the extent that its requirements prevent the Director [of the Patent Trial and Appeal Board] from reviewing final decisions rendered by APJs" because, in the Court's view, this was inconsistent with the constitutional

---

inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

86 *Arthrex*, 141 S. Ct. at 1979 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 498 (2010)).

87 *Id.* at 1997–98 (Thomas, J., dissenting).

88 *Id.* at 1998.

89 *Id.* at 1999.

90 *Cf.* James Brudney, *The Supreme Court as Interstitial Actor: Justice Ginsburg's Eclectic Approach to Statutory Interpretation*, 70 OHIO STATE L.J. 889, 924–25 (2009) (arguing Justice Ginsburg's approach to statutory interpretation reflects a commitment to "fostering institutional dialogue and interbranch sensitivity").

91 *See Arthrex*, 141 S. Ct. at 1988, 1990–92 (Gorsuch, J., concurring in part and dissenting in part).

appointment process for APJs.[92] For Justice Gorsuch, however, this remedy was *also* a separation of powers violation because it amounted to the judicial seizure of legislative power.[93]

Even as the Court failed itself to reach a majority position on what the separation of powers should tolerate, it nonetheless overrode the majority view of the political branches on the same question. Put differently, the Court ruled that the separation of powers was sufficiently rigid and precise to reject the administrative structure chosen by the representative institutions of American democracy, even as the Court itself could not even get to a majority view on what such a rigid and precise separation of powers would legally entail.

Such a ruling is anathema to Justice Ginsburg's republican jurisprudence. In the name of democratic accountability and political legitimacy, it impedes the ability of the people, working through the representative branches, to design a democratically legitimate government.[94]

92 *Id.* at 1987.

93 *See id.* at 1988, 1990–92 (Gorsuch, J., concurring in part and dissenting in part).

94 *See generally* Bowie & Renan, *supra* note 2.