

Those Appealing Indigents: Justice Ginsburg and the Claims of Equal Citizenship

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In 1996 and again in 2005, Justice Ruth Bader Ginsburg wrote for the Supreme Court in decisions recognizing the rights of indigents to public aid in perfecting their appeals to state appellate courts.¹ Each of the opinions argued in the familiar way, fitting the case before the Court into patterns laid down in precedent decisions. In each case, however, Justice Ginsburg's opinion was noteworthy for what it added, interpreting the precedents in ways that advanced rights of access to the courts. In both cases, Justice Clarence Thomas dissented, rejecting Justice Ginsburg's reading of the precedents. He also issued a radical call for the Court to overrule a robust line of decisions extending back to 1956. Here I discuss Justice Ginsburg's opinions in these cases from two interrelated standpoints: the forward-looking aspects of precedent and the substance of equal citizenship.

I. *M.L.B.*: PRECEDENT AND THE STOPPING-PLACE PROBLEM

Melissa Brooks, known to this generation's law students as *M.L.B.*, in 1994 was determined by a Mississippi judge to be an unfit mother and

*David G. Price and Dallas P. Price Professor of Law Emeritus, UCLA School of Law. I am delighted to be part of this Symposium, for many reasons. One is that I can join in honoring Justice Ginsburg, whom I have known since the days when we were both child law teacher. Another is that I was able to return to the building where I taught my very first course in Constitutional Law in 1958. I am grateful to Leslie Karst for her comments on a draft of this Article. My thanks, too, to a first-rate research librarian, Jenny Lentz, for her imaginative assistance.

¹ *Halbert v. Michigan*, 545 U.S. 605 (2005); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

stripped of her maternal rights.² In 1992, when she and her ex-husband had divorced, they agreed that he should have custody of their two children, then aged seven and nine. Three months later, the ex-husband remarried. The next year, he and his new wife petitioned in the state chancery court to terminate Melissa's parental rights and to substitute the new wife as adoptive mother. They contended that Melissa had not visited the children enough and was in arrears on child support. She claimed that she had tried to visit the children but had been refused access to them. The chancery court judge offered no discussion of her contention.³ He did not discuss the evidence at all but entered an abstract finding that recited, word for word, the language of the Mississippi statute: "there had been a 'substantial erosion'" of her maternal relationship "caused 'at least in part by [M.L.B.'s] serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children.'"⁴ The judge terminated Melissa's parental rights and granted adoption of the children by the new wife; he further ordered that the children's birth certificates be altered to show the new wife as their mother. Unlike a custody ruling, which can be modified, rulings like these normally are permanent.

Melissa filed her appeal but was told that she could not proceed unless she paid more than \$2,300 for a trial transcript and other documents—money she did not have. She sought leave to appeal in forma pauperis, but the Mississippi Supreme Court denied that motion. The U.S. Supreme Court granted certiorari and reversed, 6–3, holding that, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, "Mississippi may not deny M.L.B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent."⁵

Justice Ginsburg, for the Court, began at the doctrinal beginning, *Griffin v. Illinois*.⁶ In that criminal case, Illinois law would permit an appeal

² Except where I have specified another source, we learn all the facts in the first two paragraphs of the text from Justice Ginsburg's opinion. See *M.L.B.*, 519 U.S. at 106–09. As Deborah Jones Merritt has pointed out, the Justice "searches for the individual voices of litigants who appear before her." Deborah Jones Merritt, *Hearing the Voices of Individual Women and Men: Justice Ruth Bader Ginsburg*, 20 U. HAW. L. REV. 635, 637 (1998) [hereinafter Merritt, *Hearing*].

³ Petition for Writ of Certiorari at Appendix 9, *M.L.B.*, 519 U.S. 102 (No. 95-853).

⁴ *M.L.B.*, 519 U.S. at 108.

⁵ *Id.* at 107.

⁶ See *id.* at 110 (citing *Griffin v. Illinois*, 351 U.S. 12, 16 (1956) (5–4 decision)). Deborah Jones Merritt has suggested that other doctrinal starting points might have been more troublesome for Justice Ginsburg's argument. See Merritt, *Hearing*, *supra* note 2, at 641–42.

only when the appellant provided a transcript to the appellate court.⁷ Justice Black, for a plurality of four, concluded that denial of an appeal to an indigent who could not afford the cost of a transcript violated the Fourteenth Amendment. Although he spoke of the principle of “equal justice for poor and rich, weak and powerful alike,”⁸ he invoked not just the Equal Protection Clause but also the Due Process Clause in support of the decision.⁹ In *M.L.B.*, Justice Ginsburg did the same.

Justice Thomas, writing in dissent and joined by Chief Justice Rehnquist and Justice Scalia, objected to this doctrinal “ambiguity,”¹⁰ as he called it, and proceeded to consider the two clauses separately. Perhaps he began with a memory of the motto “divide and conquer,” but that turns out to be an unlikely slogan for a dissenting opinion. As for due process, he recited the *Griffin* plurality’s acknowledgment of a 19th-century opinion stating that due process does not require a state to provide any appeal at all.¹¹ As for equal protection, he argued that the *Griffin* principle had been sharply restricted in *Washington v. Davis*,¹² which had “rejected a disparate impact theory of the Equal Protection Clause altogether,”¹³ limiting the Clause’s application to cases of purposeful discrimination.¹⁴ In *M.L.B.*, joined by Justice Scalia—but

⁷ *Griffin*, 351 U.S. at 13–14 (plurality opinion). Illinois law did provide a free trial transcript in a capital case. 38 ILL. COMP. STAT. 769.1(a) (1955).

⁸ *Griffin*, 351 U.S. at 16 (plurality opinion).

⁹ *Id.* at 18–19. Justice Frankfurter, concurring, invoked the Equal Protection Clause. *Id.* at 23–24 (Frankfurter, J., concurring).

¹⁰ *M.L.B.*, 519 U.S. at 130 (Thomas, J., dissenting). I discuss the integration of the Due Process and Equal Protection Clauses in Section III.A. of this Article. See *infra* text accompanying notes 46–62. But I want to point out, here and now, that there is no ambiguity for those who understand that the Fourteenth Amendment’s unifying principle is equal citizenship.

¹¹ *M.L.B.*, 519 U.S. at 131 (Thomas, J., dissenting); see also *McKane v. Durston*, 153 U.S. 684 (1894). On the weakness of *McKane* as a governing precedent, see *infra* notes 47–49 and accompanying text.

¹² *M.L.B.*, 519 U.S. at 135 (Thomas, J., dissenting); see also *Washington v. Davis*, 426 U.S. 229 (1976).

¹³ *M.L.B.*, 519 U.S. at 135 (Thomas, J., dissenting). Here Justice Thomas was quoting his own concurring opinion, six months earlier, in *Lewis v. Casey*, 518 U.S. 343, 375 (1996) (Thomas, J., concurring). On that occasion he had offered a twenty-nine-page essay on the evil consequences of the Court’s decision in *Bounds v. Smith*, 430 U.S. 817, 828 (1977). *Bounds* relied on the Due Process Clause in requiring a state prison to provide inmates with a law library or some other legal assistance to assure their right of access to the courts. *Bounds*, 430 U.S. at 828. The language quoted here was part of Justice Thomas’s argument in *Lewis* that the *Bounds* Court had mistakenly invoked *Griffin* in support of its decision. *Lewis*, 518 U.S. at 368–78 (Thomas, J., concurring).

¹⁴ *M.L.B.*, 519 U.S. at 135 (Thomas, J., dissenting). Justice Ginsburg’s response to this invocation of *Washington v. Davis* included a reference to the Court’s contemporary

not by the Chief Justice¹⁵—he went on to suggest that the Court should overrule the precedent of *Griffin* itself.¹⁶

Respect for precedent means more than looking to the past for guidance. It also means imagining what the present decision will mean in the future. In other words, the Court not only follows precedents but sets them. It is always fair to ask the question: “Where will this decision lead us?” Students in courses on constitutional law need to be made aware of the constant necessity, when one is advocating an interpretation of the Constitution, to have an answer ready. This is a predictable question for any advocate, or any judge, who makes (or rejects) an equal protection claim or a due process claim, or, indeed, any claim of a constitutional right.¹⁷ A few years ago, Justice Ginsburg spoke to a large audience of students at the UCLA Law School. While she was responding to a question about a First Amendment case,¹⁸ she interjected these words: “As my...spouse says,¹⁹ and I agree, there

decision in *Williams v. Illinois*, 399 U.S. 235 (1970), invalidating a state law that kept an indigent offender in confinement beyond the statutory maximum if he or she was unable to satisfy the part of his or her sentence requiring a payment of money. *M.L.B.*, 519 U.S. at 105; see also *Williams v. Illinois*, 399 U.S. 235, 242 (1970). *Williams* antedated *Davis*, but more recently the Court had invoked *Williams* as a precedent in *Bearden v. Georgia*, 461 U.S. 660, 670–73 (1983). Justice White, who wrote the Court’s opinion in *Davis*, cited *Williams* with approval in his concurring opinion in *Bearden*. *Bearden*, 461 U.S. at 676 (White, J., concurring). Given Justice Thomas’s suggestion in the text immediately following, it comes as no surprise that he would give the *Davis* opinion a more severe limiting effect than its author did.

¹⁵ For the disclaimer of Chief Justice Rehnquist, dissenting, see *M.L.B.*, 519 U.S. at 129 (Rehnquist, C.J., dissenting).

¹⁶ *Id.* at 139. As of 2008, Justice Thomas had voted to overrule precedents at a yearly rate more than double Justice Ginsburg’s. MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 12–13 (2008).

¹⁷ Early in the October 2008 Term, the Supreme Court was considering the claim by Summum, a religious group, of a right to erect, in a city park, a monument to the group’s Seven Aphorisms, the monument to be of the same size and nature as the existing Ten Commandments monument. The Justices’ questions at oral argument explored the stopping-place problem, looking both forward and backward. Chief Justice Roberts asked Summum: “I mean, you have a Statue of Liberty; do we have to have a statue of despotism?” Transcript of Oral Argument at 35, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2008) (No. 07-655). Justice Stevens said to the United States, as amicus for the city: “Well, supposing the Government in the Vietnam Memorial decided not to put up the names of any homosexual soldiers. Would that be permissible?” *Id.* at 23. In *Summum*, the Court unanimously held for the city on the free-speech question; the case involved no claim under the Establishment Clause. *Summum*, 129 S. Ct. at 1129.

¹⁸ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

¹⁹ Martin Ginsburg, a professor of law at Georgetown and a prominent tax lawyer in Washington, was in the room, and he smiled.

are only two questions, in the end, in the law...[O]ne is ‘Who decides?’ and the other is ‘Where do you draw the line?’”²⁰

The stopping-place problem appeared prominently in *M.L.B.* In his dissent, Justice Thomas did his best to convince his colleagues that they were approaching a slope, to which he brought his own bucket of grease.²¹ He asked, rhetorically:

Will the Court, for example, now extend the right to a free transcript to an indigent seeking to appeal the outcome of a paternity suit? To those who wish to appeal custody determinations? How about persons against whom divorce decrees are entered? Civil suits that arise out of challenges to zoning ordinances with an impact on families? Why not foreclosure actions—or at least foreclosure actions seeking to oust persons from their homes of many years?²²

As a matter of public policy, you or I might answer yes to some of these questions, and we might choose not to answer others. But we do not pretend to speak with the authority of a court. Of course Justice Ginsburg might have similar inclinations, but she must offer answers that will satisfy a majority of the Justices. As to several of Justice Thomas’s speculations, her opinion answered directly, pointing out that the Court had previously distinguished parental status terminations from ordinary civil actions, even cases of “divorce, paternity, and child custody.”²³ Speaking more generally, she referred to “the tightly circumscribed category of parental status termination case.”²⁴ The opinion thus offered reassurance that *M.L.B.* was a modest extension of states’ duties. The Court was not throwing open a door to widely expanded claims for government assistance to those who seek all manner of forms of access to courts.

As for larger questions about constitutional duties of governments to provide funds for exercising fundamental rights, Justice Ginsburg took notice of some previous decisions rejecting such claims. For example, the Court had upheld Congress’s denial of food stamps for members of a striker’s family²⁵

²⁰ DVD: Justice Ruth Bader Ginsburg Address (UCLA School of Law 2006) (on file with author).

²¹ See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 361–62 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1051 (2003).

²² *M.L.B.*, 519 U.S. at 142–43 (citations omitted). In *Griffin*, Justice Harlan had raised the stopping-place problem in his own dissenting opinion, objecting to the majority’s implicit imposition on the state of an affirmative duty to finance the indigent’s appeal. *Griffin v. Illinois*, 351 U.S. 12, 34–36 (1956) (Harlan, J., dissenting).

²³ *M.L.B.*, 519 U.S. at 127.

²⁴ *Id.* at 122.

²⁵ *Lyng v. Int’l Union*, 485 U.S. 360, 369 (1988).

and the denial of Medicaid funding for poor women seeking abortions.²⁶ I think any experienced reader of the Court's opinions would conclude that, had Justice Ginsburg been on the Court when those cases were decided, she would have voted against the conclusions they announced. In *M.L.B.*, she did not laud those opinions; she merely reported them and distinguished them. The decisions, she said, had rejected the claims of indigents for state subsidies to help them pursue their own lawsuits or to avoid the effects of general economic disadvantage.²⁷ In this case, however, Ms. Brooks was seeking to defend against devastating invasive action by the state, comparable in severity with punishment for crime—"destruction of her family bonds" and "the brand associated with a parental unfitness adjudication."²⁸ All this modesty notwithstanding, the *M.L.B.* decision promptly made its way into law school casebooks—a good indication that the Court was not only following precedent but also setting precedent.²⁹

II. *HALBERT*: INFORMING DECISIONS OF THE FUTURE

Nine years later, with the Supreme Court's composition unchanged, the Court decided *Halbert v. Michigan*,³⁰ recognizing another consequence (more limited in scope) of the principle of *Griffin v. Illinois*.³¹ Not surprisingly, the vote was 6–3, with Justice Ginsburg writing for the majority and Justice Thomas writing for the same dissenters. Halbert had pleaded nolo contendere to a charge of sexual assault on his stepdaughter and another girl.³² Under Michigan law, one who has pleaded guilty or nolo can appeal

²⁶ *Harris v. McRae*, 448 U.S. 297, 326 (1980).

²⁷ *M.L.B.*, 519 U.S. at 125.

²⁸ *Id.*

²⁹ On remand, the trial judge made findings of fact and again ruled that Melissa Brooks's parental rights be terminated and that the children be adopted by their father's new wife. The state court of appeals reversed, concluding that the evidence did not support termination of her parental status. *M.L.B. v. S.L.J.*, No. 97-CA-00929-COA, 1999 Miss. App. LEXIS 299, at *40 (Miss. Ct. App. May 18, 1999). The Mississippi Supreme Court agreed that the chancery judge's decision was not supported by clear and convincing evidence. *M.L.B. v. S.L.J.*, 806 So. 2d 1023, 1029 (Miss. 2000). By this time, the parties agreed to talk with each other and with the children, who were old enough (fifteen and seventeen) to be consulted about their own preferences. E-mail from Danny Lampley, attorney representing Melissa Brooks, to Jenny Lentz, reference librarian, UCLA School of Law (Oct. 24, 2008). At the very least, Ms. Brooks can take satisfaction from what she properly sees as a vindication.

³⁰ 545 U.S. 605, 610 (2005).

³¹ 351 U.S. 12, 18–20 (1956).

³² *Halbert*, 545 U.S. at 624–25.

only at the discretion of the state court of appeals.³³ Halbert sought to appeal, not as to his conviction but as to his sentence.³⁴ The ground was that the trial court, after finding him guilty, had improperly “scored” the severity of his offense, erring toward harsher punishment. He sought state-appointed counsel to aid in this appeal, but the Michigan courts denied the motion.

The governing precedents were (1) *Douglas v. California*,³⁵ in which the Court relied on *Griffin* to require the state to provide counsel for an indigent’s appeal of a conviction, and (2) *Ross v. Moffitt*,³⁶ which denied a claim of right to state-appointed counsel for a discretionary appeal to a state supreme court, following a mandatory review in the intermediate appellate court. The *Ross* Court limited the reach of *Douglas* to the first review “as of right.” In *Halbert*, the Michigan courts had held that the right to state-provided counsel did not extend to the presentation of his petition for leave to appeal, because the court of appeals had discretion whether or not to grant the petition.³⁷ The Supreme Court reversed, applying the term “first-tier review” to the appeals court’s determination of whether to allow the appeal.³⁸ This label emphasized that Halbert’s application for leave to appeal was his first opportunity to get an appellate decision on the merits of his sentence.³⁹ Some of the discussion in *Halbert*—particularly in Justice Thomas’s dissent—went to the question of whether Halbert had waived any such claims by pleading nolo.⁴⁰ I leave that issue to others, limiting the discussion here to Justice Ginsburg’s opinion on the right of indigents to state-appointed counsel.

That opinion does, indeed, cite *M.L.B.*, but it gives more attention to another case decided just six months before *Halbert*. In *Kowalski v.*

³³ *Id.* at 616.

³⁴ This story is told in the *Halbert* opinion. *Id.* at 615.

³⁵ 372 U.S. 353, 355–57 (1963). *Douglas* was a companion case to *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), which recognized the right of a prosecuted indigent to state-appointed trial counsel.

³⁶ 417 U.S. 600, 617–18 (1974).

³⁷ *Halbert*, 545 U.S. at 613.

³⁸ *Id.* at 617.

³⁹ Obviously, Halbert’s claim that his offense was improperly scored could not have been made at the time of his nolo plea, nor could he appeal on this issue at any time before his application for leave to appeal to the court of appeals. On remand, appellate counsel was appointed; the court of appeals denied Halbert’s application for leave to appeal, and the Supreme Court of Michigan denied leave to appeal. The federal district court denied Halbert’s petition for a writ of habeas corpus. *Halbert v. Palmer*, No. 1:07-CV-449, 2007 WL 2302361, at *2–3 (W.D. Mich. Aug. 8, 2007).

⁴⁰ *Halbert*, 545 U.S. at 625 (Thomas, J., dissenting).

Tesmer,⁴¹ the Supreme Court had considered a similar attack (in federal court) on Michigan's denial of state-appointed appellate counsel to persons who had pleaded guilty. When *Kowalski* reached the Supreme Court, the challengers to the Michigan law who were convicted on guilty pleas had been dismissed from the case on abstention grounds; the remaining challengers to the law were two attorneys who customarily served as state-appointed counsel.⁴² The Court held in *Kowalski* that the lawyers lacked third-party standing,⁴³ but Justice Ginsburg, joined by Justice Souter, dissented. Concluding that the attorney-plaintiffs readily showed the requisite "injury in fact" (lost opportunity for fees) and their "close relation" to the third parties who were actually governed by the challenged law (the ones who pleaded guilty and initially sought review in the state court of appeals), Justice Ginsburg said that the attorneys needed only to satisfy the one remaining condition for third-party standing: a showing of "some hindrance to the third party's ability to protect his or her own interests."⁴⁴ Here, she discussed in detail the difficulties facing indigent appellants who must proceed without counsel.

Her opinion in *Halbert* tracks her *Kowalski* dissent, repeatedly quoting it. In *Halbert*, however, there is an important difference: now it is not just two dissenting Justices stating their views; now the discussion is the opinion of the Court. Although the precise setting of *Halbert* will not be repeated in Michigan,⁴⁵ this part of Justice Ginsburg's opinion will be a valuable resource in future cases whenever indigents seek the appointment of state-provided counsel on appeal. I summarize:⁴⁶

⁴¹ 543 U.S. 125, 127 (2004).

⁴² *Id.* at 127–28.

⁴³ *Id.* at 127, 134. That is, standing of a party to raise claims of a person who is not a party to the present case.

⁴⁴ *Id.* at 136 (Ginsburg, J., dissenting) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

⁴⁵ In 1999 (effective 2000) the Michigan legislature amended the law to require a trial judge, before accepting a plea of guilty or nolo, to instruct the defendant that such a plea will waive the right to state-provided counsel to assist with post-conviction remedies including an application for leave to appeal. MICH. COMP. LAWS ANN. § 770.3a (West 2000). In 2007, however, the legislature repealed the 1999 amendment. In 2009, the Michigan Court of Appeals, dealing with some cases tried between 2000 and 2007, ruled that the 1999 amendment was unconstitutional. The *Halbert* opinion, says the court, "unambiguously indicates that the United States Supreme Court would hold unconstitutional the practice of imposing a waiver of appointed appellate counsel as a plea condition." *People v. Billings*, 770 N.W.2d 893, 898 (Mich. Ct. App. 2009).

⁴⁶ All the points in the following subparagraph are made both in *Halbert v. Michigan*, 545 U.S. 605, 620–21 (2005), and in *Kowalski*, 543 U.S. at 140–41 (Ginsburg, J., dissenting).

- Some 70% of indigent defendants represented by state-appointed counsel plead guilty, and 70% of those convicted are incarcerated.
- 68% of state prisoners do not complete high school. Many lack basic literary skills: 70% of them fall in the two lowest (out of five) levels, lacking ability to write a brief letter explaining an error on a credit card bill, or to use a bus schedule, or to summarize in writing an argument made in a long newspaper article.⁴⁷ Some 16% of state prisoners are mentally ill; 10% receive psychotropic medication.
- Getting through the appellate process without a lawyer is difficult for any lay person, and especially hard for one with a poor education, or a learning disability, or a mental impairment—or, as in Halbert's case, all three.

Here Justice Ginsburg quoted the Michigan statute stating (in excruciating legalese) the grounds on which one who pleads guilty or nolo might appeal.⁴⁸ She also summarized the procedures for appealing in Michigan, including a required explanation of “how the law applies to the facts of your case.”⁴⁹ She aptly called the latter task “a tall order for a defendant of marginal literacy.”⁵⁰ Justice Thomas, dissenting, responded to this part of the Court's opinion with a fancy version of “so what?” He argued at length that the case resembled *Ross* more than it resembled *Douglas*.⁵¹ In this argument he said that the Court's showing of indigent appellants' need for professional counsel “lacks any stopping point.”⁵² Indeed, Americans who are concerned about the fairness of our criminal justice system may hope that *Halbert* will not be the end of the line. There seems little doubt that Justice Ginsburg, as she was writing the *Halbert* opinion, had her eyes on the future—in particular, the future of indigents' access to appellate courts.

III. THE CLAIMS OF EQUAL CITIZENSHIP

When Justice Ginsburg was a jurist in residence at Washington University's law school, she gave an address entitled “In Pursuit of the

⁴⁷ *Halbert*, 545 U.S. at 621; *Kowalski*, 543 U.S. at 140 (Ginsburg, J., dissenting).

⁴⁸ *Halbert*, 545 U.S. at 622.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 627–28 (Thomas, J., dissenting).

⁵² *Id.* at 635. This argument is based on Justice Thomas's assumption that the Court has weakened the distinction between *Douglas* and *Ross*. On the contrary, the *Halbert* majority reaffirms that distinction, but considers Halbert's application for review of the scoring of his sentence—a decision made well after his nolo plea—to be his first appeal as of right on the sentencing issue he raises. *See supra* note 38 and accompanying text.

Public Good: Access to Justice in the United States.”⁵³ Early in her address, she sounded her theme:

“Equal Justice Under Law” is etched about the U.S. Supreme Court’s grand entrance. It is an ideal that remains aspirational. Thanks in part to efforts by lawyers, race, gender, and other incidents of birth no longer bar access to justice as they once did. It remains true, however, that the poor, and even the middle class, encounter financial impediments to a day in court. They do not enjoy the secure access available to those with full purses or political muscle.⁵⁴

She went on to speak about some ways in which the less wealthy might be represented by attorneys in cases dealing with private claims: legal aid, indirect representation by lawyers for cause-oriented groups such as the NAACP, pro bono service by private lawyers, contingent fee contracts, and legal clinics—the latter sponsored both by private firms and by law faculties actively promoting such learning by doing.⁵⁵ By no means did she say that those institutions had closed the gap for indigents in America; alas, the gap remains wide even today.⁵⁶

In her address Justice Ginsburg did mention the Supreme Court’s early decisions requiring state-appointed trial lawyers for indigents accused of crimes,⁵⁷ but she did not go on to discuss the *Griffin* case or other rulings on indigents who were seeking to appeal from lower court decisions. Perhaps she was being circumspect—after all, those rights were a recurrent subject of controversy in the Court—or perhaps she just didn’t want to brag. My point here is that she has an abiding concern for the rights of poor people to get fair hearings in court.⁵⁸ This concern is just one expression of what Deborah

⁵³ Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J.L. & POL’Y 1, 2 (2001) [hereinafter Ginsburg, *In Pursuit*].

⁵⁴ *Id.*

⁵⁵ *Id.* at 12–13. I am happy to note that the UCLA law faculty was a pioneer in these efforts and that the Ohio State and UCLA faculties today have ambitious programs of clinical legal education. Both schools’ programs are described in detail online—and the descriptions make good reading. Information on UCLA’s clinical programs can be found at <http://www.law.ucla.edu/home/index.asp?page=1731>. For information on OSU’s program, see <http://moritzlaw.osu.edu/clinic/index.php>.

⁵⁶ See David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127 (2007).

⁵⁷ She mentioned *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Ginsburg, *In Pursuit*, *supra* note 53, at 3. Here, too, the recent overload of the public defender system is discouraging. See Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

⁵⁸ Her attention to the needs of the poor is an especially urgent example of her more general attitude favoring open access to courts. For an analysis of her opinions on this

Jones Merritt rightly called Justice Ginsburg's "jurisprudence of opportunity and equality."⁵⁹ The disagreements between Justices Ginsburg and Thomas in *M.L.B.* and *Halbert* are not limited to the details of rights of access to the courts. Those opinions represent a larger—and much more significant—disparity in attitude toward the substantive content of equal citizenship. It is the contrast between mindful concern and indifference.

A. *The Integration of Equal Protection and Due Process*

Justice Thomas insists on dividing analysis of Fourteenth Amendment issues into separate spheres for the Due Process Clause and the Equal Protection Clause. Ever since *Douglas v. California*,⁶⁰ some commentators have suggested what they call a logical paradox in the *Griffin* line of cases.⁶¹ As for due process, the Court has never overruled its long outmoded 1894 statement in *McKane v. Durston*⁶² that due process does not demand any appeal; yet, in logic, equal protection would go far beyond the limits of *Ross v. Moffitt*.⁶³ The supposed paradox disappears, however, when it is realized that the statement in *McKane* is no longer a precedent that deserves to be followed. In *M.L.B.*, Justice Ginsburg gave *McKane* the treatment it had universally received in opinions of the Court in the twentieth century. The constant pattern is to cite *McKane* and then say it has no application to the case at hand.⁶⁴ Today, a state law abolishing appeals in criminal cases is

subject, see Elijah Yip & Eric K. Yamamoto, *Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure*, 20 U. HAW. L. REV. 647, 650–55 (1998). Her related decisions in the D.C. Circuit are reviewed in J. Stratton Shartel, *Ginsburg's Opinions Reveal Willingness to Grant Access to Litigants*, 7 INSIDE LITIG., Aug. 1993, at 1, 23–28.

⁵⁹ Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39, 39 (2004).

⁶⁰ 372 U.S. 353 (1963).

⁶¹ E.g., *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 81, 105–08 (1963).

⁶² 153 U.S. 684, 687 (1894). In *McKane*, the Supreme Court's statement that due process did not require an appeal was part of the holding, but it teetered on the edge of dictum, for New York law did, indeed, allow appeals from criminal convictions. *Id.* at 687–88. The issue before the Court was whether the state could deny bail while *McKane's* appeal was pending. *Id.* at 686. The Court's answer: "Yes." *Id.* at 689.

⁶³ 417 U.S. 600, 617–18 (1974).

⁶⁴ In the twentieth century the Supreme Court never applied *McKane* to govern the result. A LexisNexis search of *Shepard's* turned up references to *McKane* in thirteen Supreme Court decisions in the twentieth century. Ten of these were in dissenting opinions, including Justice Thomas's in *M.L.B. v. S.L.J.*, 519 U.S. 102, 131 (1996) (Thomas, J., dissenting), and *Halbert v. Michigan*, 545 U.S. 605, 631 (2005) (Thomas, J., dissenting); one was in Justice Thomas's concurrence in *Lewis v. Casey*, 518 U.S. 343, 369 (1996) (Thomas, J., concurring). In another, *Evitts v. Lucey*, 469 U.S. 387, 409

unthinkable. If some state legislature were to break this pattern, the Supreme Court should hold the law unconstitutional under the Fourteenth Amendment's Due Process Clause. Access to the courts is one of the rights the Court has held to be "fundamental," in due process and equal protection analyses alike.⁶⁵ Today, this right includes access to appellate courts, as decisions in the *Griffin-Douglas* line have illustrated for more than four decades. *M.L.B.* and *Halbert* exemplify the continued strength of this principle and add their own reinforcement to the line of decisions.

Justice Thomas, ever patrolling the boundaries of doctrinal purity, repeatedly announces his exasperation with *Griffin's* blending of the two Clauses into a convergent ground for decision.⁶⁶ The application of the *Griffin* precedent to the civil action in *M.L.B.*, in his view, compounds the offense.⁶⁷ To the contrary, Justice Ginsburg takes seriously the *Griffin* plurality's invocation of both due process and equal protection in support of the principle of "equal justice for poor and rich,"⁶⁸ augmented by the emphasis on "equal justice" in Justice Frankfurter's concurrence.⁶⁹ The integration of appeals to equality and liberty makes good sense when we realize that the two Clauses—along with the Privileges or Immunities Clause⁷⁰—are expressions of the substantive core of the Fourteenth Amendment, which is a guarantee of equal citizenship.⁷¹

In 2002, Pamela Karlan captured the interaction of due process and equal protection in a striking metaphor: the stereoscopic Fourteenth Amendment.⁷²

(1985) (Rehnquist, J., dissenting), Justice Rehnquist relied on *McKane*; the majority opinion mentioned the case, but held it inapplicable and followed *Griffin* and *Douglas*. See also *Abney v. United States*, 431 U.S. 651, 656 (1977) in which the Court mentioned *McKane* and then proceeded to allow an appeal from a conviction in a federal court.

⁶⁵ See, e.g., Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 29–31 (1977).

⁶⁶ E.g., *Lewis*, 518 U.S. 366–78 (Thomas, J., concurring); *Halbert*, 545 U.S. at 627–35 (Thomas, J., dissenting); *M.L.B.*, 519 U.S. at 130–44 (Thomas, J., dissenting).

⁶⁷ *M.L.B.*, 519 U.S. at 139 (Thomas, J., dissenting).

⁶⁸ *Griffin*, 351 U.S. at 16.

⁶⁹ *Id.* at 23–24 (Frankfurter, J., concurring).

⁷⁰ See *Saenz v. Roe*, 526 U.S. 489, 501 (1999). On *Saenz* and equal citizenship, see Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 154 (1999). For elaboration of the argument that this clause establishes a right of access to courts in civil cases, see Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477 (2008).

⁷¹ I have been making this argument for a long time. See generally Karst, *Foreword*, *supra* note 65.

⁷² Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002). William Eskridge has

Two years later she pursued the theme when she introduced a symposium on *Lawrence v. Texas*,⁷³ which struck down the state's sodomy law.⁷⁴ She matched the *Lawrence* opinion's use of egalitarian language to justify a liberty-based opinion with the Warren Court's 1966 decision in *Loving v. Virginia*,⁷⁵ explicitly based on both clauses of the Fourteenth Amendment. The *Lawrence* opinion's references to the equality of groups in a decision grounded on substantive due process may have seemed new, but for a century the Supreme Court, in developing the law of due process, had given strong consideration to just such egalitarian concerns.⁷⁶ Two prominent examples are the Warren Court's "incorporation" of the criminal justice liberties of the Bill of Rights into the Fourteenth Amendment, undoubtedly influenced by concerns about racial equality,⁷⁷ and the rights of birth control ("woman's problem," said Margaret Sanger)⁷⁸ and abortion choice, now seen clearly as aspects of women's equality.⁷⁹

B. Justice Ginsburg on Equal Citizenship as Inclusion

Justice Ginsburg's *Halbert* opinion tells us not only about its subject but also about the Justice herself. She cares about the harmful effects of poverty in people's lives. Justice Thomas to the contrary notwithstanding, the point of the judicial enterprise is not to achieve conceptual symmetry, but to provide citizens with equal justice under law. I use the word "citizens" here

provided another illuminating analysis of the two clauses in counterpoint. William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1186 (2000).

⁷³ 539 U.S. 558, 578–79 (2003).

⁷⁴ Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1463 (2004); see also Nan D. Hunter, *Living With Lawrence*, 88 MINN. L. REV. 1103, 1134 (2004); Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Clauses*, 1999 U. ILL. L. REV. 1209, 1270–71.

⁷⁵ 388 U.S. 1, 12 (1967).

⁷⁶ See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 99 (2007).

⁷⁷ See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2073–77 (2002); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 53 (2000).

⁷⁸ Margaret Sanger, *Woman and the New Race* (1920), reprinted in VOICES OF DIVERSITY 100, 101 (Pat Andrews ed., 1995).

⁷⁹ There has been a deluge of articles making this point. On this occasion, the most appropriate citation is (then-Circuit Judge) Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985).

to emphasize that the Supreme Court's decisions in cases involving indigents' access to courts are important, not only in identifying the rights of citizens, but also in reminding us that indigents *are* citizens.⁸⁰ The Court has called some rights fundamental. Voting, of course, is a paradigm here—but for many years we have understood that access to court is properly called “a defining condition of citizenship.”⁸¹ In Frank Michelman's arresting summation of the analogy between voting and litigating, “You cannot, without confusion, call a person a citizen and at the same time sanction the exclusion of that person from that [the law-application] process.”⁸²

The theme of inclusion is also central in Justice Ginsburg's jurisprudence when she interprets equality-based acts of Congress. In another recent access-to-court opinion, she described the main purpose of the Americans with Disabilities Act (ADA) of 1990 as “[i]ncluding individuals with disabilities among people who count in composing ‘We the People.’”⁸³ Two cases before the Court involved access in the most literal, physical sense. Because a county courthouse lacked an elevator, George Lane, a paraplegic, had crawled up two flights of stairs to answer some criminal charges.⁸⁴ On the next occasion, when he refused to crawl again or to be carried by officers, he was arrested and jailed for failure to appear.⁸⁵ Beverly Jones, a court reporter and also a paraplegic, was unable to get work because of similar problems.⁸⁶ Lane and Jones sued for damages under the ADA.⁸⁷ The question before the Court ultimately was whether Section Five of the Fourteenth Amendment authorizes Congress to lift the state's immunity from damages for violation of the ADA.⁸⁸ By a 5–4 vote, the Court answered yes, in an opinion by Justice Stevens. Justice Ginsburg joined in that opinion and joined a concurring opinion by Justice Souter, but she also added her own

⁸⁰ On poverty and racial isolation, see Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1 (1988).

⁸¹ Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 550 (1967). In our context it is appropriate to add a citation to Bertram F. Willcox & Edward J. Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 16 (1957).

⁸² Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 527, 539–40; see also Gary S. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 266 (1970).

⁸³ *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).

⁸⁴ *Id.* at 513–14 (majority opinion).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 517.

concurrence. In addition to the language recorded above, she cited with approval Samuel Bagenstos's article on the ADA—in particular, his description of the Act as intended (in her words) “to advance equal-citizenship stature for persons with disabilities.”⁸⁹

These comments echoed the words of Justice Ginsburg's best-known opinion, which she wrote for the Court when it held unconstitutional the Virginia Military Institute's exclusion of women. She described the right of women to equal opportunity as an aspect of “full citizenship stature,”⁹⁰ and emphasized the language of inclusion.⁹¹ In cases dealing with race-based affirmative action, she has associated herself with the long-standing view of Justice Stevens that race is a legitimate consideration for governmental action when it is considered for purposes of inclusion rather than exclusion.⁹² The *leitmotif*⁹³ of inclusion is echoed in Justice Ginsburg's parallel concern for an inclusive community within the Court. In her dissent in the *Adarand* case,⁹⁴ she extended a hand toward Justice O'Connor's opinion, highlighting “a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects.”⁹⁵ This inclusive gesture seemed to be reciprocated some years later, when Justice O'Connor wrote for the Court in *Grutter v. Bollinger*,⁹⁶ upholding affirmative action in admissions to the University of Michigan's law school.⁹⁷

⁸⁹ *Lane*, 541 U.S. at 536 (Ginsburg, J., concurring) (citing Samuel Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 471 (2000)).

⁹⁰ *United States v. Virginia*, 518 U.S. 515, 532 (1996).

⁹¹ *Id.* at 557.

⁹² He first articulated this view in his dissent in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 316 (1986).

⁹³ In 1998, this term (Wagner's invention) sounded and resounded in an exchange of footnotes in *Minnesota v. Carter*, 525 U.S. 83 (1998). Compare *id.* at 98 n.3 (Scalia, J., concurring) with *id.* at 111 n.3 (Ginsburg, J., dissenting). The thrust and counterthrust of these two devotees of Wagner are recounted in Jay D. Wexler, *Justice Ginsburg's Footnotes*, 43 NEW ENG. L. REV. (forthcoming 2009). In *Carter*, of course, each of these Justices would claim to wield the sword that was reforged in *Siegfried*. Or, as Ira Gershwin almost had it in *Porgy and Bess*, each would sing, “I got plenty o' *Nothing*.”

⁹⁴ *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 271 (1995) (Ginsburg, J., dissenting).

⁹⁵ *Id.* at 273.

⁹⁶ 539 U.S. 306, 343–44 (2003).

⁹⁷ In the companion case, *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003), the Court struck down an affirmative action ingredient in UM's undergraduate admissions. Dissenting, Justice Ginsburg reiterated that “government decisionmakers may properly distinguish between policies of exclusion and inclusion.” *Id.* at 301.

The opinions of the Court in *M.L.B.* and in *Halbert* are part of a much larger body of jurisprudence. In the contexts I have listed—and in others, too—the Fourteenth Amendment’s central principle of equal citizenship continues to find support, day by day, in the work of Justice Ruth Bader Ginsburg. Fifteen years ago, she wrote that law is “the protector of the oppressed, the poor, the minority, the loner”⁹⁸ I am honored to participate in Ohio State’s celebration of her service to that grand ideal.

⁹⁸ Ruth Bader Ginsburg, *Introduction* to *THE JEWISH JUSTICES OF THE SUPREME COURT REVISITED: BRANDEIS TO FORTAS* 3, 4 (Jennifer M. Lowe ed., 1994).