

## Our Aspirational Constitution

The project of constituting a nation, at least in the American experience, involved adopting a Constitution. Our Constitution followed our Declaration of Independence, which underscored that the American project was conceived as a just endeavor, stating that everyone was created equally, committing to protect life, liberty, and the pursuit of happiness, and declaring that government derives its powers from the consent of the governed.<sup>1</sup> In our Constitution, the Preamble echoes this call to justice, promising to form a “more perfect union” and “establish Justice.”<sup>2</sup> In my talk today, I want to reflect on this project and how it is relevant to us today.

For all of us, we have a stake in defending our constitutional commitments and what is best about America. It is not an accident that Martin Luther King invoked American ideals—our “sweet land of liberty”<sup>3</sup>—when calling for an America that had yet to come into being. Nor is it an accident that Ruth Bader Ginsburg envisioned and worked to create a more inclusive “We The People.”<sup>4</sup> As President Bill Clinton famously put it, “there is nothing that’s wrong with America that cannot be fixed with what is right about America.”<sup>5</sup>

I will begin my talk by explaining what I mean by our aspirational Constitution. Then, I will discuss how our Constitution provides space for dialogue and listening that allows us to achieve our ideals.

### I. The Aspirational Constitution

One way to conceive of American history is as a dialogue about what is called for by our basic founding vision. For Abraham Lincoln, that vision called him to improve our constitutional order and address a manifestly unjust part of the Constitution, its acceptance of slavery. In the *Dred Scott* decision, the Supreme Court refused to take an aspirational view of the Constitution.<sup>6</sup> Instead, it took a descriptive one, suggesting that the presence of slavery as accepted by the original Constitution meant that African Americans in slavery were mere property.<sup>7</sup> Lincoln, by contrast, condemned this decision, invoking the Declaration of Independence’s statement that everyone was created as equal and suggesting that this commitment should function as an interpretive guide.<sup>8</sup>

For those who study American history, our past sins—including, to name a few, slavery, a massacre in Tulsa, internment of Japanese Americans, the Tuskegee experiments, and the murder of George Floyd—all are cause for pain and even despair. We must study this history. And we must read the *Dred Scott* decision as well as that of *Plessy v. Ferguson*, which condoned

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<sup>1</sup> The Declaration of Independence, para. 1 (U.S. 1776).

<sup>2</sup> U.S. Const. pmb1.

<sup>3</sup> Samuel Francis Smith, *My Country 'Tis of Thee* (1831).

<sup>4</sup> U.S. Const. pmb1.

<sup>5</sup> William Jefferson Clinton, President of the United States, First Inaugural Address (Jan. 20, 1993) (transcript available [https://avalon.law.yale.edu/20th\\_century/clinton1.asp](https://avalon.law.yale.edu/20th_century/clinton1.asp)).

<sup>6</sup> See *Scott v. Sandford*, 60 U.S. 393, 394 (1857).

<sup>7</sup> *Id.*

<sup>8</sup> Abraham Lincoln, President of the United States, Speech on the Dred Scott Decision (June 26, 1857) (transcript available

<https://quod.lib.umich.edu/l/lincoln/lincoln2/1:438?rgn=div1:singlegenre=All;sort=occur;subview=detail:type=simple;view=fulltext;q1=june+26+1857>).

segregation.<sup>9</sup> As we do so, however, we also should also read Lincoln’s Gettysburg Address, his Second Inaugural Address, the dissent in the Korematsu decision (which upheld the internment of Japanese Americans), and Martin Luther King’s “I Have a Dream” speech. Our past sins can both humble and shame us. And our past virtues can give us hope. Together, our past sins and virtues provide guidance and inspiration for us to work towards a more perfect union.

The project of constitutionalism can be misused in service of decisions like *Dred Scott*. Or it can be used appropriately in service of decisions like *Brown v. Board of Education*.<sup>10</sup> Often, those who argue that our Constitution should be interpreted based on “original intent” dodge the question about how broadly phrased principles like “equal protection of the laws” should be interpreted. On a strictly originalist view, one might view the equal protection clause as tolerating segregated schooling. Or as allowing only men to serve on juries. After all, in the District of Columbia overseen by the Congress that adopted this amendment, Black and White children attended separate schools. And, historically speaking, women were historically treated unequal to men vis a vis jury service.<sup>11</sup> Consequently, if understood narrowly based on the specific conception of equality held by the framers of the Fourteenth Amendment, we would hold to a standard of equal protection quite different than the one held to by our current Supreme Court.

Professor Ronald Dworkin provided a compelling answer to the puzzle of how to interpret the Fourteenth Amendment. He argued that our Constitution and its Framers should be viewed as adopting principles at a general conceptual level, not at the level of a specific conception they might have held.<sup>12</sup> In this sense, our constitutional interpreters, including Presidents like Lincoln, leaders like King, and Justices like Ginsburg, are free to advance the cause of justice as we engage in a discussion over what constitutes equal protection of the laws.

In the *United States v. Virginia* decision, Justice Ginsburg authored an opinion for the Supreme Court that set forth a robust vision of gender equality.<sup>13</sup> Writing for the Court, she explained that equal protection did not tolerate a denial of admission to women interested in attending the Virginia Military Institute.<sup>14</sup> She explained that any such denial would need to rest on “an exceedingly persuasive justification” and that the State of Virginia had failed to provide one.<sup>15</sup>

In advancing her view of equal protection, Justice Ginsburg suggested that those who wrote our Declaration of Independence and our Constitution would be pleased with today’s jurisprudence if they could time travel to see how we are interpreting the Constitution today.<sup>16</sup> This view both echoes Dworkin’s theory of constitutional interpretation and calls for a romantic view of those who framed our Constitution. It is indeed controversial from both a rhetorical and a historical point

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<sup>9</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>10</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>11</sup> *Hoyt v. Florida*, 368 U.S. 57, 60–62 (1961).

<sup>12</sup> RONALD DWORKIN, *LAW’S EMPIRE* at 47–55; 70–72 (1986).

<sup>13</sup> *United States v. Virginia*, 518 U.S. 515, 520–58 (1996).

<sup>14</sup> *Id.* at 534.

<sup>15</sup> *Id.* at 531, 534.

<sup>16</sup> *Id.* at 557.

of view as to whether one should give the principles adopted by earlier generations such a generous interpretation.

Justice Ginsburg believed it was appropriate to attribute to the Framers a more robust vision of equality than they specifically held at the time. Others may suggest those individuals don't merit such a generous interpretation. That approach, however, assumes that those individuals did not aspire for their principles to be interpreted with the benefit of future lived experience. Put differently, with our Constitution's aspiration of working towards a more perfect union, Justice Ginsburg has a compelling argument for her vision of constitutional interpretation.

When discussing whether it is appropriate to take a more generous or even a romantic view of our Constitution's Framers, I think of Justice Brandeis' famous words in his *Whitney v. California* concurrence.<sup>17</sup> In that opinion, he celebrates our Framers' view of free speech. Brandeis must have known, of course, that this was a selective use of history. After all, some of the authors of the First Amendment, which he viewed as a basis for robust dialogue and free speech, adopted the Alien and Sedition Acts, which criminalized political speech—and is anathema to today's vision of the First Amendment.<sup>18</sup> In defending a romantic view of history, the late Professor Robert Cover explained, as recounted by former student, now Professor Tanina Rostain, that:

If your view of history isn't romantic, then there is no reason for history to have any instructive power whatsoever . . . Why in the world would you then use history as authority? If you have a critical view of history . . . . Beard's view [that] the Founding Fathers were a bunch of money-grubbing people out for their own self-interest—why in the world would we then care what the Founding Fathers wanted? Why in the world should we then emulate them or in any way . . . view their acts as authoritative? We view the acts of history as authoritative precisely because we read into that history that part of the past which we choose to make authoritative, which we wish to emulate.<sup>19</sup>

Stated differently, Cover believed that because we needed to look at history, we had to choose which elements to elevate and which ones to recall as a cautionary tale. The Alien and Sedition Acts, on his approach, are a cautionary tale that does not take away from the broader commitment to a First Amendment dedicated to the free exchange of ideas. On Cover's view, the very purpose of constitutional law—and law more generally—is to act as “a bridge, the normative space between reality and the world we imagine we can build.”<sup>20</sup> The concept of law as a bridge means that constitutionalism is a part of advancing justice and working towards a more perfect union.

## II. A Constitution of Dialogue

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<sup>17</sup> *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

<sup>18</sup> Act of July 14, 1798, ch. 74, 1 § 596 (amended 1918) (Sedition Act); Act of July 6, 1798, ch. 66, 1 § 577 (Alien Act).

<sup>19</sup> Tanina Rostain, Note, *Tributes to Robert M. Cover*, 96 YALE L. REV. 1699, 1715 (1987), <https://core.ac.uk/download/pdf/160249437.pdf>.

<sup>20</sup> *Id.* at 1713.

A second principle of constitutional interpretation—in addition to viewing our Constitution as an aspirational document—is that the project of constitutionalism involves a commitment to dialogue. Such a dialogue begins from the premise that there are multiple plausible interpretations of constitutional principles, all of which can be held by those operating in good faith. In an age of polarization and demonization, this can be hard to do. To do so, we must renew and rebuild institutions that connect us to one another and foster empathy.<sup>21</sup>

As Jonathan Rauch has explained, “institutions are enemies of tribalism, at least in the context of a liberal society. By definition, they bring people together for joint effort on common projects, which builds community.”<sup>22</sup> This echoes what de Tocqueville observed long ago: “The only way opinions and ideas can be renewed, hearts enlarged, and human minds developed is through the reciprocal influence of men upon each other.”<sup>23</sup> This reciprocal influence and engagement in dialogue is what happens when people work together to solve problems.

At its best, the Supreme Court operates with empathy for and awareness of the perspectives of the parties before it and leaves space for parties to be heard. This is another lesson from Professor Robert Cover. In his tour de force law review article, *Nomos and Narrative*, he explains how Supreme Court justices make a choice in how they describe and approach the winning and losing side in a case.<sup>24</sup> In so doing, Cover calls for a true dialogue and a recognition of competing moral claims, treating each with respect. That dialogue, he explains, is the essence of constitutionalism.<sup>25</sup>

The U.S. Supreme Court can also be a model of respectful dialogue, as exemplified by the relationship between Justices Ginsburg and Scalia.<sup>26</sup> Indeed, as Justice Ginsburg famously stated, about Justice Scalia’s VMI dissent, “he absolutely ruined my weekend, but my opinion is ever so much better because of his stinging dissent.”<sup>27</sup> An important element of the Ginsburg-Scalia relationship is that they had a genuine affection for one another despite their ideological differences. They could, in other words, disagree, but not be disagreeable to one another. We need more of that. After all, as a group of political scientists reported, for example, “people become less divided after observing politicians treating opposing partisans warmly, and nonpartisan statements

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<sup>21</sup> Philip J. Weiser, Att’y Gen., State of Colo., Address to Colorado Bar Association (Dec. 11, 2020) (transcript available <https://coag.gov/blog-post/prepared-remarks-attorney-general-phil-weiser-discusses-leading-with-empathy-with-the-colorado-bar-association-dec-11-2020/>).

<sup>22</sup> Jonathan Rauch, *Rethinking Polarization*, 41 NATIONAL AFFAIRS, Fall 2019, <https://www.nationalaffairs.com/publications/detail/rethinking-polarization> (last visited June 30, 2021).

<sup>23</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA: AND TWO ESSAYS ON AMERICA 598 (Isaac Kramnick ed., Gerald Bevan trans., Penguin Books 2003) (1835).

<sup>24</sup> Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, (1983–1984), [https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3690&context=fss\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3690&context=fss_papers)

<sup>25</sup> *Id.* at 68 (“just as constitutionalism is part of what may legitimize the state, so constitutionalism may legitimize, within a different framework, communities and movements”).

<sup>26</sup> Phil Weiser, *Ruth Bader Ginsburg Showed Us How to Find Common Ground, Even When We Disagree*, COLORADO SUN, Sept. 23, 2020, <https://coloradosun.com/2020/09/23/phil-weiser-ruth-bader-ginsburg-supreme-court-opinion> (last accessed July 1, 2021); Nikki Schwab, *A Scalia Dissent Once Ruined Ruth Bader Ginsburg’s Weekend*, U.S. NEWS AND WORLD REPORT, April 18, 2014, <https://www.usnews.com/news/blogs/washington-whispers/2014/04/18/a-scalia-dissent-once-ruined-ruth-bader-ginsburgs-weekend> (last accessed July 1, 2021).

<sup>27</sup> Jennifer Senior, *The Ginsburg-Scalia Act Was Not a Farce*, THE NEW YORK TIMES, Sept. 22, 2020, <https://www.nytimes.com/2020/09/22/opinion/ruth-bader-ginsburg-antonin-scalia.html> (last accessed July 1, 2021).

from leaders can reduce violence.”<sup>28</sup> That’s why, as the Chair of Attorney General Alliance, I am spearheading the Ginsburg-Scalia Initiative.<sup>29</sup>

After January 6, 2021, we know that violence is indeed a risk to our democratic republic and one that stems from polarization and demonization. Among other forces in our society, social media platforms can create an echo chamber and depict those with alternate viewpoints in extremely negative terms. As captured in the movie, *The Social Dilemma*, this dynamic can even lead those with different viewpoints to regard “the other as alien, immoral, a threat.”<sup>30</sup> Before her passing, Justice Ginsburg cited this trend as a threat to the rule of law, noting “a loss of the willingness to listen to people with views other than one’s own. And that is facilitated by easily accessible electronic means,” she explained, as one can associate (sometimes not even intentionally) with that person’s “home crowd” and “tune out other voices.”<sup>31</sup>

A politics and a commitment to the rule of law that embraces listening and dialogue is what our democratic republic sorely needs right now. Sensing this need, President Obama, in a graduation address at Howard University, called on young people to listen and engage in dialogue, stating: “If the other side has a point, learn from them. If they’re wrong, rebut them. Teach them. Beat them on the battlefield of ideas.”<sup>32</sup> Justice Brandeis could not have said it any better.

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We live in a very difficult time. It is a time that is testing our commitment to the rule of law and a constitutional framework committed to dialogue, collaborative problem solving, and collective work towards a more perfect union. But our nation has come through difficult times before. At such a time, President Lincoln explained in his First Inaugural Address: “We must not be enemies. Though passion may have strained, it must not break our bonds of affection.”<sup>33</sup>

For inspiration as we look forward, let me end with a great romantic about what American politics can look like—Fred Rogers. As reported by Tom Junod, here’s Fred Rogers’ vision for our politics:

Fred was a man with a vision, and his vision was of the public square, a place full of strangers, transformed by love and kindness into something like a neighborhood. That vision depended on civility, on strangers feeling *welcome* in the public square,

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<sup>28</sup> Eli J. Finkel et al., *Political Sectarianism in America*, 370 *SCIENCE* 533 at 536, Oct. 30, 2020, <https://pcl.stanford.edu/research/2020/finkel-science-political.pdf>.

<sup>29</sup> <https://coag.gov/press-releases/9-17-21/>; <https://coag.gov/blog-post/the-ginsburg-scalia-initiative-8-13-21/>.

<sup>30</sup> Nate Cohn, *Why Political Sectarianism is a Growing Threat to American Democracy*, *THE NEW YORK TIMES*, April 19, 2021, <https://www.nytimes.com/2021/04/19/us/democracy-gop-democrats-sectarianism.html> (last accessed July 7, 2021).

<sup>31</sup> Caroline Kelly, *Ruth Bader Ginsburg: Senate Exemplifies Trend of Sticking with ‘One’s Own Home Crowd’*, *CNN*, Feb. 7, 2020, <http://www.cnn.com/2020/02/07/politics/ruth-bader-ginsburg-senate-partisan-polarization/index.html> (last accessed July 1, 2021).

<sup>32</sup> Barack Obama, President of the United States, Remarks By the President at Howard University Commencement Ceremony (May 7, 2016), (transcript available <https://obamawhitehouse.archives.gov/the-press-office/2016/05/07/remarks-president-howard-university-commencement-ceremony>).

<sup>33</sup> Abraham Lincoln, President of the United States, First Inaugural Address (March 4, 1861), (transcript available [https://avalon.law.yale.edu/19th\\_century/lincoln1.asp](https://avalon.law.yale.edu/19th_century/lincoln1.asp)).

and so civility couldn't be debatable. It couldn't be subject to politics but rather had to be the very basis of politics, along with everything else worthwhile.<sup>34</sup>

This is a powerful vision of dialogue. And it's true to what Professor Rostain said about Robert Cover: "he engaged us through his passion for intellectual inquiry, for justice, and for a better world."<sup>35</sup> As we all work to follow that example, we can all be a part of repairing our world and working together towards a more perfect union.

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<sup>34</sup> Tom Junod, *My Friend Mister Rogers*, THE ATLANTIC, Dec. 2019, <https://www.theatlantic.com/magazine/archive/2019/12/what-would-mister-rogers-do/600772/>.

<sup>35</sup> Rostain, *supra* note 20, at 1713.