

Toward a Progressive Perspective on Justice Ginsburg's Constitution

MARC SPINDELMAN*

A good deal of what has already been said on the occasion that occasioned these pages—Justice Ruth Bader Ginsburg's fifteenth anniversary on the U.S. Supreme Court—has been animated by a certain liberal ideal. A great Justice, it is thought, is to be known by the law she has made from the Bench. Nowhere perhaps does this idea have more appeal, or at least more traction, than in the context of constitutional law, and more particularly, on the field of individual and civil rights, where the general paradigm works like this: The more law a Justice makes, the more freedom she is believed to deliver, hence the more deserving she is of our enduring praise. Liberal judicial activism may be long gone as a regular judicial practice, but the dream of it lives on.

Conservative criticisms of this dream—and the doctrinal realities it yields—are well known.¹ Less familiar are challenges to it from the political left. But there are political progressives who believe that a Justice's willingness to govern us by constitutional rule is not the best measure of judicial success. A better metric, they think, is found in judicial modesty and even judicial inaction, especially when they are keyed to leaving politics open to progressive law reform. Viewed in this light, the light of progressive constitutionalism, a new perspective on Justice Ginsburg's constitutional jurisprudence takes form.

But first a few words about progressive constitutionalism itself. Many flavored, the version I have in mind, borrowing significantly from Robin West,² maintains that progressive politics—and the freedoms towards which

* Copyright © 2009 by Marc Spindelman. All rights reserved. Professor of Law at The Ohio State University's Moritz College of Law, and also the Faculty Advisor for the Ginsburg Symposium. Brookes Hammock gave helpful research assistance.

¹ See generally RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1975); ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (2003); Lino A. Graglia, *Judicial Review: Wrong in Principle, A Disaster in Practice*, 21 MISS. C. L. REV. 243 (2002); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

² See generally ROBIN L. WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994) (hereinafter WEST, PROGRESSIVE CONSTITUTIONALISM); Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127 (2006); Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 230 (2006). Additional works in these directions, which inform the approach articulated here, include LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004), LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN

they aim—would stand a better chance of success than they presently do if the Supreme Court were to stand back and give the political processes their head. As the Court pulled back, political deliberations would need to become more thoroughly informed than they currently are by an active sense of constitutional fidelity, duty, and purpose. Were politics to be ennobled this way, at least on a range of important topics, the Constitution might become what in judicial hands it never has been: a Charter of affirmative, as well as negative, obligations towards those whose lives it governs.

Needless to say, this view of progressive constitutionalism takes a critical position on the role of courts in our constitutional system, which puts it in some tension with liberal orthodoxy. Liberal convention teaches that courts are needed to protect us, especially our individual and equality rights, *from* politics and law. Without them, it is said, our rights would be left to dangle, needlessly and unjustly imperiled, in the political winds.³ The historical accuracy of this teaching aside,⁴ progressive constitutionalism notices that judicial superintendence of our Constitution, including our individual and equality rights, has a distinctly double-edged quality to it. Even where it has helped secure freedom, it has regularly, if not always, done so by creating potential impediments to further social progress and reform.

The Court's recent *Affirmative Action*⁵ and *School Integration*⁶ decisions usefully illustrate the general point. These cases involve politically progressive, race-conscious policies, adopted by local institutions in an attempt to improve educational opportunities for minorities—and the community at large. Seen in political terms, politics and law worked for minorities. They did not need to be saved from them. But as it turns out, these progressive programs did need to be saved. Not from politics, but the Supreme Court. Relying on liberal activist precedents affirming the need for educational equality to achieve racial justice, the High Court upheld one

CONSTITUTIONAL PRACTICE (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Goodwin Liu, *Education, Equality and National Citizenship*, 116 *YALE L.J.* 220 (2006); Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 *STAN. L. REV.* 203 (2008).

³ Justice Ginsburg beautifully captured the soaring logic of this idea during her interview with Wendy Williams and Deborah Merritt. See *Transcript of Interview of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg, April 10, 2009*, 70 *OHIO ST. L.J.* 805, 820 (2009) (describing the institution of judicial review as a necessary bulwark against political tyranny).

⁴ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991), and MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004), among others, challenge this conventional story about the role of the courts, and especially the U.S. Supreme Court, in recognizing and vindicating civil rights.

⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

⁶ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

policy (Michigan Law School's affirmative action program), though it curiously (and conspicuously) dubbed its decision doing so a "deviation from the norm of equal treatment,"⁷ while striking the others down. In the process, *Brown v. Board of Education*,⁸ arguably the greatest liberal activist decision of all time, was exposed as being both a shield against State-sponsored racism and a sword *against* race-equality progress, including of all things in education. And this is to say nothing about other politically progressive legislative successes, including at the federal level, that the Supreme Court has eliminated using other constitutional doctrines at its disposal.⁹

Hence progressive constitutionalism's bid: What if politics were not diminished in these ways? What if the Supreme Court did not wield a constitutional veto more powerful than the one the Constitution expressly entrusts to the President's hands?¹⁰ What if the Court's role in our system were downsized to give politics, and the possibilities of progressive reform, a fighting chance? Could progressive reforms come to be understood as more than constitutionally-permissible options? Could they come to be understood as constitutional commands?¹¹

Even without answers to these questions, enough has been said in this thumbnail sketch of progressive constitutionalism to be able to venture a few initial thoughts about what Justice Ginsburg's constitutional record on the Supreme Court looks like from within it.

First, and more generally, on the level of constitutional method, there is what animates Justice Ginsburg's approach to constitutional adjudication. It is the spirit of the common law judge, who makes law, if at all, interstitially,

⁷ *Grutter*, 539 U.S. at 342 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion)).

⁸ 347 U.S. 483 (1954).

⁹ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (sex discrimination); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (disability discrimination); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (age discrimination).

¹⁰ U.S. CONST. art. I, § 7, cl. 3.

¹¹ Practically, of course, political progressives would not always win these battles, but the political energies that Supreme Court victories have sometimes quelled, as Thayer warned they might—see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893) (observing how judicial review can sap legislative duty of its commitment to constitutionalism and what it requires)—might become vitally engaged, once again. Not that judicial review cannot and does not reconfigure politics (of course, it does), but only to say that the resulting political formations are contingent upon judicial review and have particular forms they otherwise might not. I deal with some of this in the context of sodomy laws in Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615 (2004), but a more direct example, in the context of abortion and reproductive rights more generally is in Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009) [hereinafter West, *Reproductive Justice*].

(in Holmes' phrase) "from molar to molecular motions,"¹² carefully attending to the legal details of cases and materials, not simply the grand principles they may involve.¹³ These tendencies in Justice Ginsburg's judicial work are, as Chris Slobogin observes, widely known.¹⁴ But progressive constitutionalism actively applauds them, rejecting the idea to which many liberals still cling, that judicial modesty is, at best, uninspiring, or at worst, a disappointment for the ways it can (and sometimes does) leave justice undelivered, undone.¹⁵ Progressive constitutionalism, by contrast, does not search for political inspiration—much less salvation—from the courts. Nor does it think of social justice as chiefly, much less exclusively, a judicial project. That's what politics, and constitutional politics outside of the courts, are for.¹⁶

Pressing deeper into the thought, it is not simply Justice Ginsburg's methodological tendencies that progressive constitutionalism finds appealing. Better yet, those tendencies jibe in some important ways with progressive constitutionalism's larger outlook. While it is true, as Neil Siegel has recently

¹² S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Interesting reflections are in Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19 (1995). Grey notes then-Judge Ginsburg's embrace of a Holmesian approach in her confirmation hearings. *Id.* at 19 n.1.

¹³ Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 270 (1997).

¹⁴ Christopher Slobogin, *Justice Ginsburg's Gradualism in Criminal Procedure*, 70 OHIO ST. L.J. 867, 867–70 (2009); see also, e.g., Toni J. Ellington, *Ruth Bader Ginsburg and John Marshall Harlan: A Justice and Her Hero*, 20 U. HAW. L. REV. 797, 801 (1998); Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 629–31, 634–36 (2003). For some comparisons to Justice Ginsburg's work as an advocate, see Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251 (2009).

¹⁵ A particularly vivid example of this point of view is in Fred Rodell, *Alexander Bickel and the Harvard-Frankfurter School of Judicial Inertia*, SCANLAN'S MONTHLY, May 1970, at 76 (reviewing ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970)):

Frankfurter's philosophy of constitutional law always favored judicial inertia, a deliberate ducking of the big issues on whatever excuse he could fish up, from the picking of some procedural nit to an arbitrary fiat (as in the reapportionment cases) that an issue was too "political," meaning too hot for the Court to handle. This pusillanimous policy of "judicial restraint," of deference to the legislature even if the Constitution thus be damned, was in direct conflict with the . . . drive for the righting by the Court of constitutional wrongs.

¹⁶ This point has been all but entirely missed in the recent "health care" debates, which have been notable, among other things, for the way reform proponents have pervasively failed to ground the State's claimed obligation to ensure basic health care for all Americans in the Constitution's guarantees.

pointed out, that Justice Ginsburg has a beautiful “constitutional vision”¹⁷ of—and for—equal citizenship and dignity, her jurisprudential method is noteworthy, as Siegel and others have observed, for its general rejection of a command-and-control model of judicial review in favor of a more dialogic approach.¹⁸ On this view, 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.¹⁹ Indeed, where the Court deems and declares that the political branches are constitutionally authorized to do so, they may even take—and stay in—the conversational lead.

To be sure, this constitutional dialogue has its limits. Though she has embraced it, Justice Ginsburg has never called into question, certainly she has never abandoned, the institution of judicial review.²⁰ She remains faithful to the view of *Marbury v. Madison*²¹ that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”²² But

¹⁷ Neil S. Siegel, “*Equal Citizenship Stature*”: *Justice Ginsburg’s Constitutional Vision in President Obama’s America*, 42 NEW ENG. L. REV. (forthcoming 2009) (manuscript at n.252, on file with the *Ohio State Law Journal*).

¹⁸ *Id.* (citing *Remarks of Ruth Bader Ginsburg, March 11 2004, CUNY School of Law*, 7 N.Y. CITY L. REV. 221, 270 (2004)). On the dialogic model outside of the constitutional context, see James J. Brudney, *The Supreme Court as Interstitial Actor: Justice Ginsburg’s Eclectic Approach to Statutory Interpretation*, 70 OHIO ST. L.J. 889 (2009). Of course, the most recent and well-known example of this approach in the realm of statutory interpretation is her opinion in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (Ginsburg, J., dissenting), discussed in Martha Chamallas, *Ledbetter, Gender Equity and Institutional Context*, 70 OHIO ST. L.J. 1037 (2009).

¹⁹ As Eugene Rostow put it many years ago: “The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.” Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952). To which Alexander Bickel added: “No other branch of the American government is nearly so well equipped to conduct one. And such a seminar can do a great deal to keep our society from becoming so riven that no court will be able to save it.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (1962). The unstated reference appears to be to Learned Hand: “[T]his much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.” LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 181 (Irving Dilliard ed., 1952).

²⁰ *Confirmation of Ruth Bader Ginsburg as Supreme Court Justice: Hearing of the S. Judiciary Comm.*, 103d Cong. 188 (1993) (statement of Ruth Bader Ginsburg) (“I believe *Marbury* against *Madison* was rightly decided.” “I prize the institution of judicial review for constitutionality.”).

²¹ 5 U.S. (1 Cranch) 137 (1803).

²² *Id.* at 177. See *infra* text accompanying notes 26–42.

while this has been understood to mean that the Court ultimately has the final say in any constitutional seminar it leads, subject to override only by constitutional amendment or its own reversal, this awesome power of the last word is to be exercised, in Justice Ginsburg's view, guardedly and with great care. As she has observed, the Supreme Court should generally "follow . . . not lead, changes taking place elsewhere in society."²³ Hence her now famous reservation that *Roe v. Wade*²⁴ was too much, too fast, coming from the Supreme Court and that it actually may have impeded—not advanced—progressive political reform in the reproductive rights arena.²⁵

Viewed in this light, Justice Ginsburg's constitutional work on the Supreme Court does not tow progressive constitutionalism's line in any systematic way. The reaction to it from within progressive constitutionalism is thus, not surprisingly, somewhat mixed.

At times, seen from within progressive constitutionalism, Justice Ginsburg's constitutional decisions may seem to drift too far toward a liberal constitutional model of activist success. Along these lines, one might count Justice Ginsburg's great liberal triumphs in *United States v. Virginia*,²⁶ siding with the federal government against a state university's policy barring women from admission, and like it, her stirring dissent in *Gonzalez v. Carhart*,²⁷ rejecting a federal abortion restriction containing no exception for a pregnant woman's health. The first case is the highpoint, to date, of judicial ownership of sex equality; the second can be taken as a standard-bearer for judicial superintendence of reproductive politics—in the name of individual rights. While liberals generally cheer these rulings, progressive constitutionalists view them, minimally, with a critical eye, asking—increasingly aloud²⁸—what possibilities of, and for, social justice may they shut down? What, for instance, might sex equality and procreative rights mean—what more affirmative, and ultimately, potentially more liberating dimensions, might they take on—if they were freed from judicial control?²⁹ Would the freedoms be more worth having, could they be worth more, even

²³ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992).

²⁴ 410 U.S. 113 (1973).

²⁵ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

²⁶ 518 U.S. 515 (1996).

²⁷ 550 U.S. 124 (2007) (Ginsburg, J., dissenting).

²⁸ West, *Reproductive Justice*, *supra* note 11. For earlier criticism of *Roe*, also from a progressive perspective, though not exactly this one, see CATHARINE A. MACKINNON, *Abortion: On Public and Private*, in TOWARD A FEMINIST THEORY OF THE STATE 184 (1989).

²⁹ West, *Reproductive Justice*, *supra* note 11, at 1431–32.

show greater respect for freedom itself, if they resulted from politics, rather than judicial noblesse?

To be clear, to pose these questions is not to suggest that progressive constitutionalism sees nothing of value in these decisions. On a purely political level, of course, progressive constitutionalism (like Justice Ginsburg herself) is fully committed to women's equal citizenship, and agrees that it is disparaged and improperly denied both by the admissions policy at issue in *United States v. Virginia*, and the abortion ban upheld by *Carhart*. The disagreement between them, such as it is, is about the remedy.

Speaking more jurisprudentially, progressive constitutionalism can find in Justice Ginsburg's decisions in these cases reasons for measured nods. Neither of them, after all, *expands* the reach of judicial control over the political processes. True, there were grumblings at the time *United States v. Virginia* was decided that that is what it was aiming to do by subtly ratcheting up the standard of review in sex discrimination cases from intermediate to strict scrutiny.³⁰ But by its own terms,³¹ and over time,³² it turns out that it, and like it Justice Ginsburg's *Carhart* dissent, merely held ground that earlier precedents had claimed and occupied. In this sense, these decisions demonstrate a principled commitment to judicial modesty that progressive constitutionalism can certainly sympathize with. That said, the question lingers: What if the commitment to judicial modesty were advanced, well, a little less modestly, and a little more actively—and in service of liberating progressive politics from judicial review? What good might come of that?

Turning from cases in which Justice Ginsburg has merely held the ground the Court previously claimed to cases that did—or might have—broken new ground, what is found? Again, the record is not unmixed.

Consider Justice Ginsburg's decision to join the majority opinion in *Lawrence v. Texas*.³³ *Lawrence* famously embraces a constitutional right to sexual intimacy between consenting adults.³⁴ Liberals have applauded the decision for promising that the State is to kept out of our bedrooms and our

³⁰ *United States v. Virginia*, 518 U.S. 515, 571 (1996) (Scalia, J., dissenting) (suggesting that the Court, without saying so, “effectively” accepted strict scrutiny for laws that discriminate based on sex); *id.* at 596 (describing the rationale of the majority's decision as “sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny”).

³¹ *Id.* at 523–24, 532–33 (invoking standard intermediate scrutiny language).

³² *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728–29 (2003) (affirming that heightened, intermediate scrutiny remains the standard of review for facial sex-based classifications).

³³ 539 U.S. 558 (2003). Justice Ginsburg did not join Justice O'Connor's separate concurrence in the case, disposing of it on equal protection grounds.

³⁴ *Id.* at 578.

intimate lives.³⁵ To deliver this promise, the *Lawrence* Court effectively claimed new constitutional authority to inspect laws that regulate sexual activity. Ultimately, it is now up to the Supreme Court to determine which side of the constitutional line any given law affecting sex falls on. Sodomy laws, we know, are out. Rape laws, the Court suggests, if it does not squarely hold, are not; they are fine.³⁶ Where this leaves laws against sexual harassment, which deal with unwanted, but sometimes consensual, sexual activity, is not entirely clear.³⁷ And the same holds true for public laws and education campaigns that aim to regulate consensual sex that transmits HIV.³⁸ Why should the Supreme Court be deciding what sexual justice requires?³⁹

Underscoring this question is what is sidelined in the approach to sexual regulation that *Lawrence* takes. As progressives increasingly recognize, sometimes regulating sex should, indeed, be seen as an unconstitutional burden that must be lifted off of an individual's back. But sometimes sexual regulation should also be understood as a constitutionally required form of protection needed to prevent and redress sexual injury, itself a form of private violence that the State exists to address and combat.⁴⁰ *Lawrence* captures as much of the progressive outlook as it can. But its ability to

³⁵See, e.g., Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

³⁶*Lawrence*, 539 U.S. at 578 (indicating that the constitutionality of laws against rape is not formally in question in the case). I explore the implications of this for men, including gay men, who are raped in Spindelman, *supra* note 11.

³⁷Spindelman, *supra* note 11, at 1650–67.

³⁸See, e.g., ALA. CODE § 22-11A-21(c) (2006) (criminalizing as a misdemeanor the knowing transmission, assumption of risk of transmission, or performance of act likely to transmit a sexually transmitted disease to another person); KAN. STAT. ANN. § 21-3435 (2008) (making it a felony for a person “infected with a life threatening communicable disease” who knowingly engages in sexual acts with the intent to expose a sexual partner to the “disease”); MD. CODE ANN., HEALTH-GEN. § 18-601.1 (LexisNexis 2009) (making a misdemeanor of the knowing “transfer” or attempt to transfer HIV); MONT. CODE ANN. § 50-18-112 (2008) (making a misdemeanor of the knowing “exposure” of another person to a sexually transmitted disease); WASH. REV. CODE ANN. § 9A.36.011 (West 2009) (making it a felony for a person to transmit or expose another to HIV).

³⁹Relevant to the question is Richard Posner's observation that:

Anyone in our society who wants to write about sex without being accused of prurient interest had better explain what the source of his interest in the subject is. In my case it is the belated discovery that judges know next to nothing about the subject beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary—especially the federal judiciary[.]

RICHARD A. POSNER, *SEX AND REASON* 1 (1992).

⁴⁰Robin West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385, 401–07 (2005).

capture the entire picture is limited—even blinkered—by constitutional ground norms that keep it from imagining a constitutional universe in which the State is obligated to provide victims of sexual harm *protections* of the law.⁴¹ The institution of judicial review, which entails judicial superintendence of a Negative Constitution, does not prime—and it may not even allow⁴²—the Court to imagine that what is needed to secure sexual freedom is not less law, but a different mix of legal regulation and deregulation, perhaps even in some respects, more law altogether.

If this truth about sexual freedom holds true, more generally, why should political progressives not contemplate a non-court-centered constitutionalism? Perhaps even better might be the prospect, which some progressive constitutionalists are willing to consider, that the Supreme Court, at least in matters of individual and equality rights, might have no say at all, or at least not the final say, because (borrowing Mark Tushnet's phrase) the Constitution might be taken away from the courts.⁴³

Suggesting that this would hardly be the disaster that many liberals fear—and sometimes claim—is the position Justice Ginsburg took in the Supreme Court's *Assisted Suicide Cases*,⁴⁴ a position that veers solidly in the direction of progressive constitutionalism.⁴⁵

Justice Ginsburg's separate opinion in these cases models both brevity and subtlety. It states that she “concur[s] in the Court's judgments . . . substantially for the reasons stated by Justice O'Connor in her concurring opinion.”⁴⁶ In itself, this is interesting, if also, from a conventional liberal perspective, somewhat deflating. Justice Stevens and Justice Souter both filed concurring opinions in the cases that arguably came closer than Justice O'Connor's did to the position that constitutional liberals

⁴¹ See WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 2, at 10–30 (offering a comprehensive argument, including from the text of the Fourteenth Amendment's Equal Protection Clause, that it presupposes not just equality but protection of the laws).

⁴² The trajectory of the logic of the Negative Constitution is famously traced in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and more recently updated by *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

⁴³ TUSHNET, *supra* note 2.

⁴⁴ *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Ginsburg, J., concurring in the judgments); *Vacco v. Quill*, 521 U.S. 793 (1997) (Ginsburg, J., concurring in the judgments).

⁴⁵ Another example might be the punitive damages cases discussed in Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Ruth Bader Ginsburg*, 70 OHIO ST. L.J. 1085, 1087–90 (2009).

⁴⁶ *Glucksberg*, 521 U.S. at 789 (Ginsburg, J., concurring in the judgments). The brief concurrence explains that this concurrence in the judgments applies both to *Glucksberg* and *Vacco*. *Id.* at n.*.

wanted the Court to adopt.⁴⁷ Stopping short, both Justices Stevens and Souter expressly raised and gestured toward the prospect that the Supreme Court might someday vindicate a constitutional right to physician-assisted suicide.⁴⁸ Justice O'Connor's concurrence resisted the pull of these arguments, suggesting that the political processes were working through the legal regulation of end-of-life decision-making, particularly assisted suicide, with a real sense of its fundamental importance to the individual and to society.⁴⁹ As a result, Justice O'Connor declined to recognize a new constitutional right to help in taking one's own life.⁵⁰

Progressive constitutionalism does not exactly lament this development. If anything, it embraces it. The Supreme Court's refusal to constitutionalize a generalized right to die is not in this case an abandonment of constitutional principle, but a recognition that it can animate and guide the undertakings of the political processes as much as it can judicial deliberations. Moreover, leaving assisted suicide in the political sphere preserves room for the enactment of a finely calibrated right to die that reflects what progressive constitutionalism understands the State's constitutional obligations to be: on the one hand, to ensure that the individual is entrusted with the final decision about what to do with his own life, while on the other, acting to ensure that private forces of social inequality, including economic inequality, do not drive individuals to end their lives when they would otherwise prefer to live.⁵¹ Within existing constitutional terms, a judicially-recognized right like this is unthinkable. It could not be articulated as such by the courts—no matter that it might be the best understanding of what the Constitution's great promise of liberty calls for.

⁴⁷ *Glucksburg*, 521 U.S. at 738 (Stevens, J., concurring); *id.* at 752 (Souter, J., concurring).

⁴⁸ *Id.* at 739 (Stevens, J., concurring) (contending that the Court's "holding . . . does not foreclose the possibility that some applications of the statute might well be invalid"); *id.* at 752 (noting the limitations in the Court's decisions and suggesting that other cases, with different, and more specific facts, might be decided differently); *id.* at 789 (Souter, J., concurring) ("While I do not decide for all time that the respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.").

⁴⁹ *Id.* at 736–37 (O'Connor, J., concurring).

⁵⁰ *Id.* at 736 ("I join the Court's opinions because I agree that there is no generalized right to 'commit suicide.' But respondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges to the New York and Washington laws at issue here.").

⁵¹ I explore these points in Marc Spindelman, *Death, Dying, and Domination*, 106 MICH. L. REV. 1641 (2008).

Progressive constitutionalism's reservations about Justice Ginsburg's decision to join the Court in *Lawrence* and its support for Justice Ginsburg's position in the *Assisted Suicide Cases* speak in different ways to a renewed hope for the possibilities of politics that many on the political left have—until quite recently—seemingly abandoned. And there is a certain timeliness to this renewal, living as we do in what appears to be shaping up as a new era of legislation—an era in which the great changes needed by society, both to survive and to flourish, cannot and will not be driven by the courts.⁵² It is too soon to tell, but we should not be surprised if it turns out that one of the most important challenges of our time is to try to figure out how to ensure that the courts do not use the Constitution to stand in the way of legislative progress, as the political branches, returning to life, begin to turn it out.⁵³

Many years ago, Jerome Frank warned against the dangers of transferring child-like dreams of an Infallible, Law-Giving Father onto our

⁵² For a contemporaneous view that moves in quite a different direction, see Ronald Dworkin, *Looking for Cass Sunstein*, 56 N.Y. REV. OF BOOKS, Apr. 30, 2009, at 32 (reviewing CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE* (2009)):

It is often said that ambitious judicial judgments are arrogant. Close to the opposite is true: it is arrogant for unelected officials to declare or deny fundamental rights with no or little attempt to state a warrant for their decision in broad constitutional principle. Minimalism would be a particularly dangerous strategy for liberal justices aiming in the future to correct the radical shrinking of constitutional rights that conservative justices have now achieved under a minimalist disguise. We need a renaissance of liberal principle in constitutional law. We need eloquent and bold opinions, in the tradition of the great justices of the past, opinions that can restate the fundamentals of a liberal constitutional jurisprudence.

Dworkin, with many other legal academics, seemed disappointed by the recent confirmation hearings of now-Justice Sonia Sotomayor. See Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. OF BOOKS, Sept. 24, 2009, at 37. Many of these reactions seem informed by a sense that the hearings were a missed opportunity for then-Judge Sotomayor to embrace and defend a more conventionally activist liberal form of judicial review.

⁵³ For one warning shot in these directions, see David B. Rivkin, Jr. & Lee A. Casey, *Illegal Health Reform*, WASH. POST, Aug. 22, 2009, at A15 (sketching contours of a constitutional case against federal health care legislation). But see Mark A. Hall, *Legal Solutions in Health Reform: The Constitutionality of Mandates to Purchase Health Insurance* (Apr. 27, 2009) (Georgetown Univ.: O'Neil Inst. for Nat'l and Global Health Law, Washington, D.C.) (on file with author) (describing the constitutional legitimacy of federal health care reforms); Memorandum from Walter Dellinger & H. Jefferson Powell to Attorney Gen. Janet Reno and Assoc. Attorney Gen. Webster L. Hubbell, *Constitutionality of Health Care Reform* (Oct. 29, 1993) (on file with author) (same, of Clinton-era health care reform).

Father-Judges.⁵⁴ Embracing and extending the warning, progressive constitutionalism holds that we should be on guard against wanting Supreme Court Justices to rule us, as our Fathers—or our Mothers. Happily, Justice Ginsburg's constitutional work on the Court demonstrates no real interest in this so-called honor of being worshipped for solving our problems for us. Her judicial modesty, tied to a dialogic vision of the role of courts in our constitutional system, demonstrates, much as anything else, an active faith—a faith more on the left should share—in the possibilities of politics and political deliberation, a faith in our institutions of government, and ultimately in the American people. Through this faith, Justice Ginsburg issues a challenge. It is we who ultimately must decide how to act to make our collective future—and our Constitution—for ourselves.

⁵⁴ JEROME FRANK, *Getting Rid of the Need for Father Authority*, in LAW AND THE MODERN MIND 243–52 (1930); see also Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in The Sweet Hereafter*, 34 L. & SOC'Y REV. 3, 3 (2000) (“Until we become thoroughly cognizant of, and cease to be controlled by, the image of the father hidden away in the authority of the law, we shall not reach that first step in the civilized administration of justice, the recognition that man is not made for the law, but that the law is made by and for men.”) (quoting FRANK, *supra*, at 252).