

Some Thoughts on Autonomy and Equality in Relation to Ruth Bader Ginsburg

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Twenty-five years ago, then-Judge Ruth Bader Ginsburg delivered a thought-provoking lecture entitled *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*.¹ One of her central points was that *Roe v. Wade* “sparked public opposition and academic criticism” partly because the Court “presented an incomplete justification for its action.”² The Court’s decision located a woman’s right to terminate her pregnancy solely in “a concept of personal autonomy derived from the due process guarantee”³ of the Fourteenth Amendment, rather than also in the then-emerging sex-equality jurisprudence of the Amendment’s Equal Protection Clause. By doing so, the Court both set itself up for academic criticism of the type that has generally accompanied substantive due process decisions—namely, that the Court has simply imposed its own value preferences—and framed the right in negative-liberty terms that contributed to its restrictive view in later cases involving such issues as access to abortion for poor women. But at the same time that Justice Ginsburg criticized the Court in *Roe* for not going far enough—by failing to ground the right to terminate a pregnancy in both the autonomy and equality prongs of the Fourteenth Amendment—she also suggested that the Court “ventured too far in the change it ordered.”⁴ In going beyond simply striking down the Texas statute to create a framework for state regulation that focused on the stages of pregnancy, *Roe* implemented a “kind of legislative

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¹ The lecture, which was delivered on April 6, 1984, was later published as Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

² *Id.* at 376.

³ *Id.* at 381.

⁴ *Id.*

code” that mistakenly narrowed the constitutionally permissible choices available to the states.⁵

In my contribution to this Symposium, I do not propose to revisit Justice Ginsburg’s argument with respect to *Roe v. Wade* and abortion rights. I am fully convinced of her primary point: women can attain full equality only if they can control their fertility, and access to abortion remains a critical element of that control. Indeed, the Court itself has articulated that view. In *Thornburgh v. American College of Obstetricians and Gynecologists*,⁶ for example, Justice Blackmun’s opinion for the Court stated that the Constitution’s “promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . extends to women as well as to men.”⁷ And in *Planned Parenthood v. Casey*,⁸ the joint opinion of Justices O’Connor, Kennedy, and Souter pointed to the fact that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives”⁹ and that “[a]n entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society” as a reason to reaffirm its central holding.¹⁰ Only by implicitly abandoning that view of women as fully equal, and equally capable, citizens could the Court decide *Gonzales v. Carhart*¹¹ as it did: treating women as somehow too fragile to make difficult choices regarding second-trimester abortions and reinstating the gilded cage that Justice Ginsburg as a litigator did so much to dismantle.¹²

This Essay focuses instead on the broader points *Some Thoughts on Autonomy* makes about judicial method. First, I suggest that Justice Ginsburg’s performance on the Supreme Court reflects the principles she identified in *Some Thoughts on Autonomy*. Justice Ginsburg has continued to resist the temptation to use substantive due process as an occasion for

⁵ *Id.* at 382 (quoting Paul Freund, *Storms over the Supreme Court*, 69 A.B.A. J. 1474, 1480 (1983)).

⁶ 476 U.S. 747 (1986).

⁷ *Id.* at 772.

⁸ 505 U.S. 833 (1992).

⁹ *Id.* at 856.

¹⁰ *Id.* at 860.

¹¹ 550 U.S. 124 (2007).

¹² For a thorough and thoughtful discussion of the Court’s deployment of the woman-protective rationale for limiting access to particular abortion techniques, see generally Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991; Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).

“specify[ing] by a kind of legislative code the one alternative pattern that will satisfy the Constitution.”¹³ And she has continued to see the “intimat[e] . . . practical” relationship between autonomy and equality in adjudicating Fourteenth Amendment claims.¹⁴ Second, I suggest some limits to Justice Ginsburg’s hypothesis that a “stereoscopic” view of the Fourteenth Amendment can do much to dampen popular backlash against Supreme Court decisions.

I. PUNITIVE DAMAGES AND JUSTICE GINSBURG’S RESISTANCE TO THE NEW SUBSTANTIVE DUE PROCESS

Substantive due process has become so identified with *Roe v. Wade* and other cases involving intimate decisionmaking and autonomy that most constitutional law scholars have hardly noticed that the most significant innovation in substantive due process during the Rehnquist and Roberts Court years has involved a very different sort of decisionmaking altogether: namely, the imposition of punitive damages by juries in tort cases. In *Pacific Mutual Life Insurance Co. v. Haslip*,¹⁵ the Supreme Court, after several years of searching for a doctrinal handle, held that the Due Process Clause imposes a substantive limit on the size of punitive damages awards.¹⁶ The Court subsequently clarified that “grossly excessive” or disproportionate punitive damages awards violate the Fourteenth Amendment.¹⁷

Initially, a majority of the Justices rejected the idea of an objective test for unconstitutional disproportionality.¹⁸ And yet, within a few years, the Court ended up adopting precisely such an approach. In *B.M.W. of North*

¹³ Ginsburg, *supra* note 1, at 382 (quoting Paul Freund, *Storms over the Supreme Court*, 69 A.B.A. J. 1474, 1480 (1983)).

¹⁴ *Id.* at 375.

¹⁵ 499 U.S. 1 (1991).

¹⁶ *See id.* at 17–18 (stating that, although the common-law method of imposing punitive damages is not “*per se* unconstitutional,” a particular award can be reviewed for reasonableness under the Due Process Clause).

¹⁷ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993) (opinion of Stevens, J.).

¹⁸ *See id.* at 457–58 (opinion of Stevens, J., joined by the Chief Justice and Blackmun, J.) (rejecting the idea that objective factors could be combined into an objective “test”); *id.* at 466–67 (Kennedy, J., concurring in the judgment) (rejecting the idea of a constitutional inquiry that focuses on the amount of the award in favor of one that looked at the jury’s reasoning); *id.* at 470–72 (Scalia, J., joined by Thomas, J., concurring in the judgment) (rejecting the entire enterprise of constitutional proportionality review).

America v. Gore,¹⁹ the Court identified a set of “guideposts” for assessing whether a punitive damages award is unconstitutionally high.²⁰ The second of these guideposts was what the Court called “ratio”²¹—the mathematical relationship between the amount of compensatory damages the jury had awarded and the amount of punitive damages it had imposed.²² “The principle that exemplary damages must bear a ‘reasonable relationship’ to compensatory damages”²³ suggested that a “breathtaking” ratio between the two should “surely ‘raise a suspicious judicial eyebrow.’”²⁴ In *Gore*, the Court declined to identify a precise point at which judicial brows and lungs would seize up.²⁵ But in *State Farm Mutual Insurance Co. v. Campbell*,²⁶ although the Court repeated its “reluctan[ce] to identify concrete constitutional limits on the ratio,” it offered something only a little less rigid than concrete: “[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”²⁷ And last Term, in *Exxon Shipping Co. v. Baker*,²⁸ an admiralty case in which the Court deployed federal common law rather than constitutional law to review a punitive damages award, the Court declared its skepticism of “verbal formulations,”²⁹ rejected “the notion that judges cannot use numbers,”³⁰ and declared that a 1:1 ratio between punitive and compensatory damages formed “a fair upper limit” in (some) admiralty cases.³¹

Justice Ginsburg is the only Justice to have dissented in all three of the ratio cases. And her grounds for dissenting echo her critique of *Roe*’s

¹⁹ 517 U.S. 559 (1996).

²⁰ *Id.* at 574–75.

²¹ *Id.* at 580.

²² *Id.* at 581.

²³ *Id.* at 580.

²⁴ *Id.* at 583 (quoting *TXO*, 509 U.S. at 481 (O’Connor, J. dissenting)).

²⁵ *See Gore*, 517 U.S. at 582.

²⁶ 538 U.S. 408 (2003).

²⁷ *Id.* at 424–25.

²⁸ 128 S. Ct. 2605 (2008).

²⁹ *Id.* at 2628.

³⁰ *Id.* at 2630. Oddly, the Court pointed to the twenty-one-year period in the rule against perpetuities as an example of judges using numbers; the way of calculating that period is notoriously complex. *See Lucas v. Hamm*, 364 P.2d 685, 690 (Cal. 1961) (internal quotation marks omitted) (holding, because the rule against perpetuities is such a “technicality-ridden legal nightmare” and so “fraught with . . . confusion,” that a lawyer who made a mistake in drafting a will could not be held liable for malpractice).

³¹ *Exxon*, 128 S. Ct. at 2633.

“codification” of abortion rights.³² In *BMW v. Gore*, her dissent, joined by Chief Justice Rehnquist, began by noting that the Court had embarked on the process of nationalizing and constitutionalizing limits on punitive damages “in the face of reform measures recently adopted or currently under consideration in legislative arenas.”³³ And she ended with an appendix containing an account of the variety of controls on punitive damages “enacted or under consideration in the States,” including “(1) caps on awards; (2) provisions for payment of sums to state agencies rather than to plaintiffs; and (3) mandatory bifurcated trials with separate proceedings for punitive damages determinations.”³⁴ Her point was straightforward. In response either to their own perceptions of a problem or to the Court’s more tentative forays into controlling punitive damages in *Haslip* and *TXO*, states had adopted or were considering an array of different responses. It would therefore be a mistake for the Supreme Court to short-circuit this process and announce a single “pattern that will satisfy the Constitution.”³⁵

Compare that discussion in *BMW v. Gore* with Justice Ginsburg’s description of the legal landscape at the time of *Roe*: the “political process was moving” and “majoritarian institutions were listening and acting.”³⁶ A “distinct trend in the states”³⁷ towards reform was preempted by “[h]eavy-handed judicial intervention.”³⁸ The critiques are of a piece with one another.

In *State Farm*, where the Court announced a presumptive upper limit of 10:1 on punitive damages, Justice Ginsburg’s dissent was equally straightforward in condemning the legislative character of the Court’s constitutional holding:

In a legislative scheme or a state high court’s design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court under the banner of substantive due process, the numerical controls today’s decision installs seem to me boldly out of order.³⁹

Ultimately, even in the common-law context of federal admiralty at issue

³² See Ginsburg, *supra* note 1, at 382.

³³ *Gore*, 517 U.S. at 607 (Ginsburg, J., dissenting).

³⁴ *Id.* at 614.

³⁵ Ginsburg, *supra* note 1, at 382 (quoting Paul Freund, *Storms over the Supreme Court*, 69 A.B.A. J. 1474, 1480 (1983)).

³⁶ *Id.* at 385.

³⁷ *Id.* at 379.

³⁸ *Id.* at 385.

³⁹ *State Farm*, 538 U.S. at 438 (Ginsburg, J., dissenting).

in *Exxon Shipping Co. v. Baker*,⁴⁰ Justice Ginsburg *did* question the Court's handiwork in adopting a 1:1 ratio. She expressed skepticism as to "whether there [was] an urgent need in maritime law to break away from the 'traditional common-law approach,'" under which punitive damages awards were reviewed individually, in order to adopt an essentially legislative solution.⁴¹ One needn't go anywhere near as far as Robert Bork once notoriously did in asserting that "the respective claims to pleasure" of couples seeking to use contraceptives and corporations seeking to void pollution ordinances "are identical"⁴² to see that, having recognized the virtues of judicial forbearance even in the area of substantive due process and reproductive rights, it is hardly surprising that Justice Ginsburg insists on that approach when it comes to substantive due process and purely economic issues.

II. EQUAL AUTONOMY: JUSTICE GINSBURG AND THE STEREOSCOPIC FOURTEENTH AMENDMENT

This year marks not only Justice Ginsburg's seventeenth year on the Supreme Court, but also the sixtieth anniversary of the Court's opinion in *Railway Express Agency v. New York*.⁴³ The case itself is little more than a textbook example of just how far the Court will stretch to hypothesize a permissible purpose in a rationality review case. What makes the case really memorable, however, is Justice Jackson's concurrence, which advances a powerful vision of the relationship between due process and equal protection:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.⁴⁴

⁴⁰ 128 S. Ct. 2605 (2008).

⁴¹ *See id.* at 2639 (Ginsburg, J., concurring in part and dissenting in part).

⁴² Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 9 (1971).

⁴³ 336 U.S. 106 (1949).

⁴⁴ *Id.* at 112–13 (Jackson, J., concurring).

I have written extensively elsewhere about the desirability of reading the Fourteenth Amendment “stereoscopically”—that is, of understanding the ways that principles of liberty and equality inform one another.⁴⁵ Perhaps none of Justice Ginsburg’s opinions more clearly illustrates this technique than *M.L.B. v. S.L.J.*⁴⁶

M.L.B. concerned Mississippi’s termination of a mother’s parental rights. After the state trial court ruled against her, *M.L.B.* filed a timely appeal. State law, however, conditioned her right to appeal on prepayment of record preparation fees of about \$2400. Her application to proceed in forma pauperis was denied, and her appeal was dismissed.⁴⁷

The Supreme Court reversed.⁴⁸ Justice Ginsburg’s opinion for the Court recognized the case’s location at the intersection of equal protection and due process values:

The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action. A precise rationale has not been composed, because cases of this order cannot be resolved by resort to easy slogans or pigeonhole analysis.⁴⁹

Justice Ginsburg also recognized that the Court’s earlier litigation-access cases had shoehorned the issue into an equal protection claim, but she clearly inflected that doctrinal pigeonhole with autonomy-based considerations.⁵⁰ The reason for requiring states to waive access fees in parental termination cases (as opposed to, paradoxically enough, bankruptcy cases, where the government can restrict access to litigants able to pay a filing fee⁵¹) is that a fundamental interest is at stake:

Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the

⁴⁵ See Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002); Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. 1447 (2004).

⁴⁶ 519 U.S. 102 (1996).

⁴⁷ See *id.* at 106–09 (recounting the facts and procedural history of the case).

⁴⁸ *Id.* at 128.

⁴⁹ *M.L.B.*, 519 U.S. at 120 (internal citations and quotation marks omitted).

⁵⁰ *Id.* at 124–25.

⁵¹ See *United States v. Kras*, 409 U.S. 434, 445–49 (1973) (bankruptcy filing fees pass rationality review under the Equal Protection Clause).

State's unwarranted usurpation, disregard, or disrespect. M.L.B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake.⁵²

Justice Ginsburg's opinion for the Court in *M.L.B.* does more than simply carry forward into another area of law her connection of autonomy and equality. Rather, *M.L.B.* echoes a related aspect of Justice Ginsburg's analysis in *Some Thoughts on Autonomy*: the problematic character of negative constitutional rights, particularly when it comes to the interests of indigent women, and the need for equality-based reasoning to fill the gaps in autonomy-based analyses.⁵³ Toward the end of *Some Thoughts on Autonomy*, Justice Ginsburg pointed out that a purely autonomy-based abortion right "places restraints, not affirmative obligations, on government."⁵⁴ At the same time, she recognized the problem with straightforward equal protection arguments based on poverty: "Generally, constitutional claims to government benefits on behalf of the poor have prevailed only when tied to another bark."⁵⁵ In the context of abortion, Justice Ginsburg identified that associated concept as the prohibition on gender-based discrimination.⁵⁶ In *M.L.B.*, by contrast, protection against gender-based discrimination cannot carry that load. Even though there will be many cases where mothers find themselves economically disadvantaged relative to fathers—as M.L.B. herself did in the battle with S.L.J. to retain ties to their child—fundamental parental liberty interests, and not gender equality, provided the stronger basis for protecting M.L.B.'s access to the courts. In short, the government's affirmative "duty to govern impartially"⁵⁷ can come from a fundamental liberty interest's inflection of equal protection, just as it can come from an equality-based inflection of a fundamental liberty interest.

There is one aspect of *Some Thoughts on Autonomy* with which I want to express some reservations, doing so, to quote Justice Ginsburg's characterization in the essay itself, "tentatively and with trepidation."⁵⁸ Precisely *because* Justice Ginsburg's analytic argument is so convincing, it is clear that abortion implicates more than private choice. Supporters of traditional gender roles were right to see abortion as a threat to maintaining

⁵² *M.L.B.*, 519 U.S. at 116–17 (internal citations and quotation marks omitted).

⁵³ Ginsburg, *supra* note 1, at 384–85.

⁵⁴ *Id.* at 384.

⁵⁵ *Id.* at 384–85.

⁵⁶ *Id.* at 385.

⁵⁷ *Id.* (quoting *Harris v. McRae*, 448 U.S. 297, 357 (1980) (Stevens, J., dissenting)).

⁵⁸ *Id.*

the subordinated position of women. Traditionalists would, I think, hardly have been neutralized—in 1973 or today—by a judicial opinion that relied explicitly on the importance of reproductive control to women’s equality.⁵⁹ In other words, appeals to equality, rather than quieting the waters stirred up by demands for autonomy, may actually roil them further, as they clarify the connection between the exercise of particular rights and broader claims for full personhood.

At the same time, as the current debate over the rights of gay people shows, there paradoxically often seems to be more support for equality in the workplace and political spheres—where members of different groups are actually in direct competition with one another—than in the sphere of private autonomy, which one might initially have thought of as involving non-rivalrous goods. In this light, compare two of Justice Ginsburg’s most forceful dissents, both written during the 2006 Term. In *Gonzales v. Carhart*,⁶⁰ her dissent from a decision upholding a federal abortion statute excoriated the majority for disrespecting a “woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature”⁶¹—reinforcing her connection of autonomy and equality values—but it has had little effect in changing the terms of the debate. By contrast, her equally vigorous dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*⁶² condemning her colleagues’ “cramped interpretation” of federal fair employment law and urging Congress “to correct this Court’s parsimonious reading of Title VII”⁶³ bore almost immediate fruit, culminating in the first major legislation signed by President Obama.⁶⁴

III. CONCLUSION

In her service on the Supreme Court, Justice Ginsburg has had the opportunity to apply the principles she identified in *Some Thoughts on Autonomy* to a broad range of issues. Her opinions show that although the essay’s immediate focus was reproductive rights and women’s autonomy, its

⁵⁹ Justice Ginsburg herself implicitly recognizes this point when she writes that “I do not pretend that, if the Court had added a distinct sex discrimination theme to its medically oriented opinion, the storm *Roe* generated would have been less furious.” *Id.* at 383.

⁶⁰ 550 U.S. 124 (2007).

⁶¹ *Id.* at 172 (Ginsburg, J., dissenting).

⁶² 550 U.S. 618 (2007).

⁶³ *Id.* at 661 (Ginsburg, J., dissenting).

⁶⁴ See Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 539–44 (2009) (discussing the role of Justice Ginsburg’s dissent in galvanizing political support for the Lilly Ledbetter Fair Pay Act of 2009).

skepticism of free-ranging substantive due process claims and its embrace of a stereoscopic approach to the Fourteenth Amendment have played out in a consistent approach to some of the most controversial issues before the Court.