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RESPECTING DISSENT:
JUSTICE GINSBURG'S CRITIQUE OF THE
TROUBLING INVOCATION OF APPEARANCE

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Justice Ginsburg is alone on the Court in resisting the pro forma flourish of declaring respect for majority opinions that she carefully demolishes,¹ but she neither shrinks from voicing dissent² nor does so casually.³ It is the care with which she decides when to disagree, and the precision with which she expresses disagreement, that bespeaks the respect for her colleagues and the institution that others sometimes honor only in form. I focus here on Justice Ginsburg's dissents in two cases, *Baze v. Rees* and *Gonzales v. Carhart*, to show how she selects and frames her departures from majority judgments. My aim is to expose the way the majorities in this pair of cases too casually invoked *appearances* to justify their holdings—and the way Justice Ginsburg used her role as a dissenter to undermine the legitimacy of that reckless judicial methodology.

Baze, as Justice Ginsburg forcefully demonstrates, indefensibly cast aside the availability of alternative lethal injection monitoring procedures as a relevant factor in Eighth Amendment analysis.⁴ And *Carhart*, as she makes plain, departed without justification from the Court's previously consistent demand, rooted in "a woman's autonomy to determine her life's course," that a health exception be included in any abortion restriction.⁵ In both cases, a particularly troubling feature of the majority's conclusion was a much too casual willingness to sacrifice important rights for the sake of preserving appearances.

Regulation for the sake of appearances occupies a place of great complexity in constitutional discourse. So, for instance, the way government

labels some conduct as criminal might do constitutionally cognizable harm by stigmatizing some groups in society for no better reason than that it deems them less worthy than others.⁶ Or, the way government elevates some symbols for public celebration might offend constitutional principles by signaling its endorsement of certain religious beliefs.⁷ More rarely, otherwise problematic government actions might be *saved* by attention to how things appear—like insisting on a jury trial for a defendant whose unpopularity might have made a bench trial fairer,⁸ or restricting the role of money in politics to avoid the self-reinforcing impression that those who wield political power depend more on their funders than on their constituents.⁹

But such appearance-based defenses are uniquely difficult to corroborate and uniquely tempting to accept. Lest they become trumps too easily played in constitutional argument, courts must scrutinize their deployment with great care to ensure that they are not just post hoc rationalizations or excuses for deceiving the public¹⁰ and do not in fact serve to conceal serious constitutional violations.

Justice Ginsburg’s dissents in *Carhart* and *Baze* represent small—but important—steps in developing such scrutiny of appearance-based argument. In *Baze*, the Court had accepted the state’s defense of including a new drug in its lethal injection protocol despite the drug’s risk of inflicting immense pain unless properly administered, because the drug suppressed involuntary movements and, therefore, preserved the “dignity” of the procedure while ensuring that viewers would not erroneously mistake spasms for signs of pain.¹¹ But of course those spasms could instead *accurately* signal excruciating suffering,¹² and in any event, as Justice Ginsburg noted in her meticulous dissent, the appearance argument provided no excuse for failing to employ various safety checks to protect against mistakes if the drug was to be used at all.¹³

In *Carhart*, the Court rested in part on the degree to which the “partial birth” abortion procedure Congress outlawed resembled infanticide and might thus jeopardize public confidence in the medical community.¹⁴ Not only was this appearance argument hard to test empirically but, as

Justice Ginsburg noted in her dissent, not even *Congress* had treated it as weighty enough to justify overriding constitutional rights: other late-term methods of terminating pregnancy by delivering an intact fetus that appear no less brutal had been left untouched.¹⁵

Few will remember the Court's partial reliance upon appearance justifications in *Baze* and *Carhart* without recalling their gripping and precise refutation in Justice Ginsburg's dissenting opinions. By depriving defenses based on appearances of the cumulative weight of unexamined endorsement, Justice Ginsburg's opinions in this pair of life-and-death cases demonstrate the quiet power of cautious dissent.



ENDNOTES

- 1 *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 HARV. L. REV. 1305, 1324 (2011).
- 2 Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1194 (1992).
- 3 See Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142-44 (1990).
- 4 *Baze v. Rees*, 553 U.S. 35, 114 (2008).
- 5 *Gonzales v. Carhart*, 550 U.S. 124, 171-72 (2007).
- 6 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574-76, 578-79 (2003).
- 7 See, e.g., *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 626-27 (O'Connor, J., concurring) (1989).
- 8 See *Singer v. United States*, 380 U.S. 24, 35-36 (1965); see also *United States v. Sun Myung Moon*, 718 F.2d 1210, 1218 (2d Cir. 1983).
- 9 See generally LAWRENCE LESSIG, *REPUBLIC, LOST* (2011); see also Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61 (2012).
- 10 See FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* 275 ("The Grand Inquisitor") (Constance Garnett, trans., World Classics 2012) (1880).

- 11 *Baze*, 553 U.S. at 57-58.
- 12 *See id.* at 73 (Stevens, J., concurring in the judgment).
- 13 *Id.* at 121 (Ginsburg, J., dissenting).
- 14 *Carhart*, 550 U.S. at 158-59.
- 15 *Id.* at 182 (Ginsburg, J., dissenting).