JUDICIAL SELECTION MONITORING PROJECT

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A STEP IN THE LEFT DIRECTION

An analysis of
President Bill Clinton's nomination of

RUTH BADER GINSBURG

to be an Associate Justice of the U.S. Supreme Court

by
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EXECUTIVE SUMMARY
(excerpted from section V, Conclusion)

Judicial philosophy and judicial style are two very different facets of a judicial nominee. Judicial philosophy encompasses a nominee's fundamental views about the role of courts and the difference between law and politics, between judges and policymakers. Judge Ginsburg has an activist judicial philosophy.

- She believes that the Supreme Court can, and sometimes should, change its interpretation of the Constitution because of social changes.[1]
- She believes that the Supreme Court can, and sometimes should, creatively interpret constitutional provisions in order to accommodate a modern vision of society.[2]
- She believes in the need for "interventionist" judicial decisions when legislatures do not or will not act.[3]
- She believes that "boldly dynamic interpretation" that departs "radically from the original understanding" is sometimes necessary to reach certain results.[4]
- She believes the Constitution can survive only if supported by judicial interpretations that are neither too "mushy" or too "rigid."[5] She believes that a jurisprudence of original understanding is too rigid.[6]

Judicial style is a combination of practical factors that describe the functioning, rather than the role, of a judge. Judge Ginsburg has a moderate judicial style. It is only in this sense that she can be called a "moderate," the label that so many are so quick to place on her.

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[1] See *infra* section II.B.

[2] See *infra* section II.C.

[3] See *infra* section II.D.

[4] See *infra* section II.F.

[5] See *id.*

[6] See *id.*

- She opposes frequently writing separate opinions.[7]

- She believes that judges should write no more than necessary to decide a particular case and should "take the low ground, and resist personal commentary" when writing for the court.[8]

Judge Ginsburg's views on abortion and *Roe v. Wade* are driven by her politics. Consistent with her activist judicial philosophy, she believes the Supreme Court quite properly involved itself in the abortion controversy, and should have done so by striking down the restrictive law at issue in *Roe* on equal protection, rather than on due process, grounds. This way, the Court could have encouraged a liberalizing political trend that, in Judge Ginsburg's view, recognizes the independence of women in our society.

Consistent with her moderate judicial style, Judge Ginsburg has criticized the Supreme Court for going beyond invalidating the Texas law and announcing a set of complicated rules that effectively struck down all other abortion restrictions--tough as well as lenient--existing in 1973, and most of those enacted since.

Judge Ginsburg's preferred equal protection theory, however, has serious conceptual problems. Most important, men and women cannot be similarly situated with respect to either pregnancy or its termination and, as such, it is impossible to discuss whether women are being treated "equally" because of their gender. Since women are the sole focus of this view, applying an equal protection theory to abortion rights necessarily means defining any restriction on abortion--a course of action that only women can take--as impermissible sex discrimination. As such, this theory would go beyond the policy established by *Roe v. Wade*. Judge Ginsburg objects to the Supreme Court's decisions that the state is not constitutionally required to pay for abortions, even though the Court applied her preferred equal protection theory in those cases.

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[7] See *infra* section III.C.

[8] See *infra* section II.B.

A STEP IN THE LEFT DIRECTION

by
Thomas L. Jipping, M.A.,J.D.[1]

On June 14, 1993, President Bill Clinton exercised his power under Article II, Section 2 of the United States Constitution[2] and nominated U.S. Circuit Judge Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court. This analysis is provided by the Judicial Selection Monitoring Project[3] to assist the U.S. Senate in fulfilling its constitutional role of "advice and consent" and in considering Judge Ginsburg's nomination.

Ruth Bader Ginsburg was born on March 15, 1933, in Brooklyn, New York. She received a B.A. with high honors in government and distinction in all subjects from Cornell University in 1954, graduating Phi Beta Kappa. She attended Harvard Law School from 1956 to 1958, serving on the *Harvard Law Review*, and received her LL.B. and J.D. degrees in 1959 from Columbia Law School, where she served on the *Columbia Law Review* and was named a Kent Scholar. After serving as a law clerk to U.S. District Judge Edmund Palmieri, she joined the faculty at Rutgers University School of Law and, from 1972 to 1980, was a professor of law at Columbia. During her tenure there, she served as general counsel to the American Civil Liberties Union and founded its Women's Rights Project. As counsel to the Women's Rights Project, she successfully litigated several landmark sex discrimination cases in the Supreme Court. She was appointed to the U.S. Court of Appeals for the District of Columbia Circuit by President Jimmy Carter on June 18, 1980.

Judge Ginsburg is the author of numerous law journal articles and has continued writing articles and delivering speeches since joining the federal judiciary. She has received honorary academic degrees from nearly one dozen universities, as well as awards including

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[1] Director, Judicial Selection Monitoring Project, Center for Law & Democracy, Free Congress Foundation. B.A. with honors, Calvin College (1983); J.D. cum laude, State University of New York at Buffalo (1987); M.A., SUNY-Buffalo (1989). Law clerk, U.S. Court of Appeals, Third Circuit (1988-89). Many thanks to Marianne E. Lombardi, Esq., Deputy Director of the Judicial Selection Monitoring Project, and to Joseph R. Cincotta, Gregory A. Gold, Jennifer M. Barnes, and Michael W. Fanning, Research Associates with the Free Congress Foundation.

[2] Article II, Section 2 states in part that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint...Judges of the supreme Court."

[3] A project of the Free Congress Foundation's Center for Law & Democracy, the Judicial Selection Monitoring Project is supported by more than 50 national and state organizations. It was launched in August 1992 to expand the Foundation's ability to participate in the debate over nominations to judicial and Department of Justice posts.

the Society of American Law Teachers Outstanding Teacher Award in 1979 and the Woman of Achievement Award from Barnard College in 1980. Examples of her service to the legal profession, drawn from the 1993 *Judicial Staff Directory*, include:

- American Bar Association
  - Standing Committee on Federal Judicial Improvements, 1992-present
  - Amicus Curiae Committee, 1979-80
  - Individual Rights and Responsibilities Section Council, 1975-80
  - *American Bar Association Journal*, Board of Editors, 1972-78
  - International Law Section
    - Committee on Comparative Procedure and Practice, 1970-73
    - European Law Committee, 1967-72
- American Bar Foundation
  - Executive Committee and Board of Directors, 1979-89
- Association of the Bar of the City of New York
  - Executive Committee, 1974-78
  - Civil Rights Committee, 1979-80
  - Sex and Law Committee, 1978-79
  - Post Admission Legal Education Committee, 1970-74
  - Foreign Law Committee, 1966-69
- American Law Institute Council
  - Adviser, *Restatement (2d) of Judgments*, 1972-82
  - Adviser, Project on Complex Litigation, 1987-present
- Federal Bar Council
  - Vice President, 1978-80
- American Foreign Law Association
  - Vice President, 1973-76
  - Director, 1970-77
- Association of American Law Schools
  - Executive Committee, 1972
  - Nominating Committee, 1979
- Society of American Law Teachers
  - Vice President 1978-80
  - Board of Governors, Executive Committee, 1975-77
- Judicial Conference of the Second Circuit
  - Planning and Program Committee, 1976-80
  - Advisory Committee on Planning for District Courts, 1979-80

Judge Ginsburg has served on the editorial board of various publications including the *Guide to American Law* and *American Journal of Comparative Law*. Her service on advisory boards includes Columbia University's Center for the Study of Human Rights and Center for the Study of Social Change, and the Women's Equity Action League. She served as a director of the Women's Law Fund from 1972 to 1980. She is a member of the Council on Foreign Relations and a Fellow of the American Academy of Arts and Sciences.

I. INTRODUCTION

A. The Rush to Judgment

President Clinton withdrew his nomination of University of Pennsylvania law professor Lani Guinier to be Assistant Attorney General for Civil Rights after admitting he had read none of her writings. Attorney General Janet Reno lauded Guinier as a "superb" nominee without having read any of her writings. This embarrassing experience should have made plain the need for thoroughly examining a nominee's record before making judgments or attaching labels such as "superb" or "moderate."

Several additional factors point to the same conclusion, whether or not taking the time required impacts on a convenient legislative schedule. First, Judge Ginsburg's 30-year "paper trail," which includes hundreds of judicial opinions and dozens of legal briefs and scholarly articles, is far longer than any Supreme Court nominee in recent memory.

Second, even after thinking about it for more than 12 weeks, President Clinton nominated someone he met for the first time just 24 hours before. Especially after the Guinier episode, this unusual set of events puts a greater premium on post-nomination evaluation.

Third, the initial and critical evaluation, screening, and "vetting" of candidates was conducted by a team of anonymous private lawyers.[4] Their identities, hidden agendas, conflicts of interest, and personal stakes remain completely unknown to the public. This administration has a habit of allowing such anonymous and unaccountable people to make significant personnel and policy decisions. For which judicial positions will this team of lawyers screen candidates? Do any of these lawyers practice before the Supreme Court or any other court for which they will recommend nominees? Who are these lawyers and what are their credentials for serving this critical gate-keeping and screening function? Many people concerned about the integrity of the Clinton administration have raised new doubts based on this mysterious group having such enormous influence.[5]

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[4] See, e.g., Devroy & Marcus, "After 87 Days, Tortuous Selection Process Came Down to Karma," *Washington Post*, June 15, 1993, at A11; Murray, "Despite Writings, President Insists Ginsburg is Pro-Choice," *Washington Times*, June 16, 1993, at A3.

[5] See Klaidman, "Who Are Clinton's Vetters, and Why the Big Secret?," *Legal Times*, June 21, 1993, at 1.

Fourth, Republican Senate leaders apparently have agreed to a July 20 hearing date, just five weeks after the nomination was announced. This "unusual expedited process"[6] will take less than the minimum of six weeks that Judiciary Committee Chairman Joseph Biden (D-DE) once said would be necessary, much less than the average over the last 13 years of nine weeks between nomination and hearing, and less than half the time President Clinton took to think about his choice. There is talk that an expedited process is being granted in return for President Clinton's choice of a less-than-radical nominee, meaning that the timetable is being dictated by who was not chosen rather than by who was. Focusing instead on this nominee and the length of her paper trail counsels for more time.

B. What's in a Label?

Analysts, reporters, and politicians rushed to label Judge Ginsburg within minutes of her nomination. President Clinton, who had met her for the first time just a day earlier, said when he announced her nomination that she "cannot be called a liberal or a conservative."[7] One reporter called her "a self-described centrist" and a "cautious" judge.[8] The *Wall Street Journal*,[9] *Washington Post*,[10] and *Washington Times*[11] all immediately labeled her a "moderate," while the *New York Times* labeled her "moderate to liberal."[12] One columnist said she "represents an extreme of moderation."[13] Senator Charles Grassley (R-IA) called her "a Democrat nominee that even conservatives can like and respect."[14]

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[6] Biskupic, "Quick Confirmation of Ginsburg Sought," *Washington Post*, June 16, 1993, at A1.

[7] Quoted in Murray, "D.C. Appeals Judge Beats Out Two Men," *Washington Times*, June 15, 1993, at A1.

[8] Roman, "Process May Lead to Court in Center," *Washington Times*, June 16, 1993, at A3.

[9] Barrett & Birnbaum, "Clinton Picks Ginsburg for the Supreme Court After Tortuous Search," *Wall Street Journal*, June 15, 1993, at A1.

[10] Biskupic, "Quick Confirmation of Ginsburg Sought," *Washington Post*, June 16, 1993, at A16.

[11] Roman, "Analyst Links Nomination to a Weak White House," *Washington Times*, June 20, 1993, at A6.

[12] Editorial, "Mr. Clinton Picks a Justice," *New York Times*, June 15, 1993, at A26.

[13] Greenberg, "The Unveiling of a New Justice," *Washington Times*, June 17, 1993, at G4.

[14] Quoted in Seper, "Ginsburg Nomination Prompts General Praise," *Washington Times*, June 15, 1993, at A7.

In 1991, one commentator offered a list of what he called "first-rate centrists" which included Judge Ginsburg. His evaluation of Judge Ginsburg is as follows:

> [Judge Ginsburg is] the least liberal of four Carter appointees to U.S. Court of Appeals for D.C. Circuit...stellar record as law professor, pioneering and prolific scholar on women's rights and civil procedure...was general counsel of the American Civil Liberties Union and its Women's Rights Project...was leading litigator for women's rights...pro-choice on abortion but with nuanced views on the constitutional issue posed by *Roe v. Wade*...a political liberal who would be anathema to far-right screamers but is widely respected by conservative and liberal experts and litigators alike as a highly intelligent, careful judge not given to crusading activism.[15]

Advocates of judicial restraint--something quite different from conservative activism, albeit a distinction lost to many liberal interest groups and members of the media establishment--resist evaluating judges or judicial nominees on the basis of winners and losers. Merely observing, for example, how often a judge has ruled for the prosecution in criminal cases or for plaintiffs in civil rights cases says absolutely nothing about that judge or about his or her judicial philosophy. Nevertheless, the media inevitably tabulates winners and losers and publishes articles about whether a judge is "pro" this interest or "anti" that one, rules for this or that group how often, or sides with "conservatives" or "liberals" on a particular court. By itself, without providing anything more meaningful to give such statistical observations context, this is a fundamentally misleading approach to evaluating a judicial nominee such as Judge Ginsburg.

For example, Judge Ginsburg has joined in numerous rulings in favor of labor unions.[16] Yet one news report stated that "union lawyers have expressed concern about two labor rulings in which Ginsburg voted against unions."[17] One reporter thinks that

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[15] Taylor, "What's Really Wrong With the Way We Choose Supreme Court Justices," *The American Lawyer*, November 1991, at 76.

[16] See, e.g., *North Bay Development Disabilities Services, Inc.* v. NLRB, 905 F.2d 476 (D.C.Cir. 1990), *cert. denied*, 111 S.Ct. 952 (1991); *LeBoutillier v. Air Line Pilots*, 778 F.2d 883 (D.C.Cir. 1985); *Kolinske v. Lubbers*, 712 F.2d 471 (D.C.Cir. 1983).

[17] Marcus, "Clinton's Unexpected Choice is Women's Rights Pioneer," *Washington Post*, June 15, 1993, at A14.

"Judge Ginsburg...would have dissented"[18] in *Roe v. Wade*,[19] the Supreme Court decision creating the right to choose abortion, while analyst Bruce Fein writes that she would have "concurred in the *Roe* result."[20] These result-oriented assessments are rarely either accurate or revealing of anything meaningful.

Judges, unlike lawyers, do not advocate for clients. Judges, unlike politicians, do not represent constituents. As such, it is troubling to hear President Clinton emphasize that Judge Ginsburg "has repeatedly stood for the individual, the person less well-off, the outsider in society" when discussing her particular fitness to serve on the Supreme Court.[21] Unless Judge Ginsburg is able successfully to put this advocacy role behind her, she will be neither moderate nor centrist, but a judicial activist who ought not sit on the highest court in the land. As a judge, she must stand for the law and its equal application to all, regardless of race, gender, or social class.

C. Marks of a Meaningful Evaluation

Any meaningful evaluation of this nomination, then, must do two things. First, it must fairly review and report on the substance of Judge Ginsburg's record. During the 1980s, opponents of Supreme Court nominees intentionally and seriously misrepresented the substance of those nominees' records. Judge Ginsburg herself has, for example, criticized a particularly "egregious" example of the Planned Parenthood Federation's attacks on Judge Robert Bork, nominated to the Supreme Court in 1987.[22] She condemned such attacks as "emotionally charged, badly distorted, calculated to alarm."[23]

This approach is an attempt to manipulate and commandeer, rather than assist and inform, the judicial selection process. There can no doubt exist differences of opinion about, and alternative conclusions drawn from, an accurately presented body of information. No useful result can, however, flow from the kind of distortion that often masqueraded as "analysis" by liberal interest groups against Supreme Court nominees in the last decade.

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[18] Murray, *supra* note 4.

[19] 410 U.S. 113 (1973).

[20] Fein, "Status Quo Selection," *Washington Times*, June 16, 1993, at G1.

[21] Marcus, *supra* note 17, at A1.

[22] Ginsburg, "Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate," 1988 *University of Illinois Law Review* 101,115.

[23] *Id.* at 116.

Second, a meaningful evaluation must put information about Judge Ginsburg's record in some perspective for present purposes, that is, her nomination to the Supreme Court. While her objective credentials form only part of the material needed to evaluate her nomination, the remaining pieces of the puzzle must be chosen and explained with care.

Judge Ginsburg has, after all, not been nominated to head an executive branch department or regulatory agency. As such, her policy views--her political ideology--are not important for their own sake. Neither has she been nominated to serve on the U.S. Court of Appeals. As such, her views, for example, about adherence to the rulings of higher or collateral courts may be less relevant. Ruth Bader Ginsburg has been nominated to serve on the Supreme Court of the United States, the very court that once served as a restraint and supplied much of the applicable law for her on the U.S. Court of Appeals.

In 1990, Democratic members of the Senate Judiciary Committee, including Chairman Joseph R. Biden and Edward M. Kennedy, told then-Court of Appeals nominee Clarence Thomas that while they might support him for his appellate position, they said, it would be a very different ball game should he ever be nominated to the highest court in the land. And indeed it was. Similarly, the Senate would shirk its duty simply if it simply rubber-stamped Judge Ginsburg's nomination merely by observing that she has spoken or acted with relative restraint while a U.S. Circuit Judge. The more important inquiry is whether she is fundamentally committed to judicial restraint or exercised restraint merely because she occupied the middle tier of the federal judiciary.

A meaningful evaluation requires more than noting Judge Ginsburg's statement at the press conference announcing her nomination that "a judge is bound to decide each case fairly in a court with the relevant facts and the applicable law even when the decision is not, as [Chief Justice William Rehnquist] put it, what the home crowd wants."[24] This may have been the maxim she remembered while on the U.S. Court of Appeals; it begs the question of what her maxim will be while on the U.S. Supreme Court. It is the duty of the Senate, in fulfilling its constitutional "advice and consent" function, to find out.

A meaningful evaluation also requires more than the insistence by worshipful former clerks that her opinions "are scrupulously free of ideology" or that she "has faithfully reconciled personal conviction with a judge's duty to apply the law."[25] On the Court of Appeals, she may have had little choice. On the Supreme Court, she will have a choice.

This report will examine Judge Ginsburg's scholarly record and will strive to organize the pieces of that record into some coherent fashion. It will provide clues about Judge Ginsburg's judicial philosophy and her judicial style--two fundamentally different factors--and

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[24] Quoted in "Ginsburg 'Has Stood for the Individual'," *Washington Times*, June 15, 1993, at A4.

[25] Huber & Taranto, "Ruth Bader Ginsburg, a Judge's Judge," *Wall Street Journal*, June 15, 1993, at A18.

determine whether she is, in fact, a "moderate." This report will also examine Judge Ginsburg's views on abortion and *Roe v. Wade*. Finally, this report throughout will suggest questions that Senators should ask as they seek to evaluate this nomination and fulfill their constitutional role of advice and consent.

II. JUDICIAL PHILOSOPHY

During the 1980s, liberal interest groups and some Democratic Senators sought to change the constitutional balance of power in the judicial selection process in order to frustrate the appointment of judicially restrained judges to the federal courts. In doing so, they sought to collapse "political ideology" into "judicial philosophy" and claim that nominees were against all the relevant politically correct results. Using the attacks on Supreme Court nominee Robert Bork as an example, Judge Ginsburg observed that "[t]he distinction between judicial philosophy and votes in particular cases, however, blurred."[26]

This tactic, to be sure, made for useful sound-bites, direct-mail fundraising appeals, and hysterical sloganeering. Judge Ginsburg described the tactic as "campaigns against judges that spread misinformation, turn complex issues into slogans, and play on our fears."[27] As it perverted the judicial selection process and harmed good people, however, this tactic also blurred the necessary distinction between law and politics and between the judicial and political branches of government. It is no wonder that leaders of this attack on judicial independence, such as Nan Aron of the Alliance for Justice, already have said that they want "a political justice" to fill the next vacancy on the Supreme Court.[28]

"Judicial philosophy" encompasses an individual's views about the proper place of courts in our system of co-equal branches of government, as well as the proper role of an unelected judge. Should the courts involve themselves in social or political developments, whether by prompting them or responding to them with changing interpretations of the Constitution? Does the Constitution necessarily speak to every social problem or division and is, therefore, a judge some mix of national physician, counselor, philosopher/king, and handyperson? Must a judge necessarily do what other co-equal branches do not, or cannot? Is it the judge's job to "do justice" in the abstract or to settle legal disputes?

How should a judge approach the task of construing a statute or interpreting the Constitution? This is a fundamentally different question from asking what an individual's particular construction or interpretation might be. Confusing the two is precisely what

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[26] Ginsburg, *supra* note 22, at 114.

[27] *Id.* at 117.

[28] Quoted in Roman, *supra* note 8.

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liberal interest groups and their Democratic Senate allies introduced into the mix during the 1980s. As liberals collapsed the judicial into the political, they treated judges like politicians and judicial nominees like congressional candidates. They were only interested in how a nominee would rule on issues they cared about. Rather, a proper inquiry into a nominee's judicial philosophy asks about the goal of interpretation and the tools that a judge should employ in that task.

The terms "activism" and "restraint" remain useful when properly defined. An activist judge believes his or her job is generally to "do justice" in the abstract. An activist believes that the actual meaning of legal documents themselves (particularly statutes and the Constitution) changes over time. An activist believes that judges and courts exist to heal the divisions and address the problems of society. An activist believes that courts can, and sometimes should, be involved in social change or prompt political developments and that they should pinch-hit for legislatures that do not do the right thing.

A restrained judge believes his or her job is to settle legal disputes properly brought before the court. A restrained judge believes that the actual meaning of legal documents does not change--that meaning remains what the document's framers (Congress, the Founding Fathers, etc.) intended it to mean--but, instead, must be applied to changing circumstances. A restrained judge has a more modest view of the judiciary's role, believing that many other institutions (governmental and private) exist to handle divisions and tensions in society and that they should be left alone to do their part when the courts have done theirs. As a judicial colleague of Judge Ginsburg's once put it, "'[j]udicial restraint' is shorthand for the philosophy that courts ought not to invade the domain the Constitution marks out for democratic rather than judicial governance."[29]

Judge Ginsburg has provided some clues, including a particular formulation which she has repeated over the years, about her judicial philosophy, at least while on a mid-level appellate court. At the hearing on her nomination to the U.S. Court of Appeals, she said:

> And I believe that a judge is bound to decide fairly--based solely on the relevant facts--the record made in the case the and applicable law; a judge is bound to do that even then the decision is, as Justice Rehnquist recently put it, not the one the home crowd wants.[30]

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[29] *Dronenburg v. Zech*, 746 F.2d 1579,1583 (D.C. Cir. 1984) (statement by Judge Bork).

[30] *Selection and Confirmation of Federal Judges*, Hearings Before the Committee on the Judiciary, United States Senate, 96th Cong., Second Sess., Serial No.96-21, Part 7 (1981), at 350.

A. Nudging Social Trends

One facet of a nominee's judicial philosophy is whether the courts should be involved in social or political developments. Court cases, of course, result from such developments and court decisions can contribute to them, and the view that judges should resist such involvement in no way argues with this fact. But the important point here is whether a judicial nominee is self-consciously committed to resisting this involvement, to deciding cases on the basis of what the law requires rather than on the winds of political or social change.

Judge Ginsburg has criticized the Supreme Court's decision in *Roe v. Wade*, which created the right to choose abortion. The nature and implications of this criticism for her judicial philosophy are explored in another section of this report, and it is enough here to note that she has criticized the Court for stepping "boldly in front of the political process."[31] One reporter observed that Judge Ginsburg feels "the court should merely nudge social trends."[32]

Judge Ginsburg clearly approves of judicial involvement in social or political change; she merely believes such involvement should be gradual rather than sudden. She did not criticize the Court for "stepping in front of the political process" but for "stepping boldly." Judge Ginsburg believes in "nudging" social trends rather than shoving them. This clearly identifies her as a judicial activist.

Judge Ginsburg is not fundamentally committed to judicial restraint, a principled and self-conscious attitude that, all other things being equal, will guide her away from acting politically rather than judicially. Her many statements cautioning against "venturing too far" or shaping doctrinal limbs "too swiftly," to be sure, suggest that her activism has limits, but she is nevertheless an activist. Judges acting politically have an activist judicial **philosophy**; judges acting politically slowly or carefully may have a moderate judicial **style**. Only in this latter sense can Judge Ginsburg be called a moderate. As Roger Pilon concludes: "Thus she establishes herself as a 'judicial activist,' although one limited to 'interstitial' activism."[33] Stuart Taylor, quoted above, concluded that she was not given to "crusading" activism.

In one article, commenting on "the role the Supreme Court plays in the process of social change,"[34] Judge Ginsburg stated that, at least with respect to gender equality, "the

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[31] Verbatim, "Ginsburg Laments *Roe*'s Lack of Restraint," *Legal Times*, April 5, 1993, at 11.

[32] Murray, *supra* note 4.

[33] Pilon, "Ginsburg's Troubling Constitution," *Wall Street Journal*, June 17, 1993, at A10.

[34] Ginsburg, "Remarks on Women Becoming Part of the Constitution," 6 *Law & Inequality* 17,24 (1988).

Court was neither in front of, nor did it hold back, social change."[35] Rather, its involvement was to foster "interplay among the people, the political branches, and the courts."[36] In this view, courts and judges are not the bulwarks of our liberties but the facilitators of progressive social development. Roger Pilon again puts it well when he says that "the image is closer to 'good government' than to the separation of powers."[37]

In one article, Judge Ginsburg cited comments by law professor Gerald Gunther, spoken at her investiture as a judge, which she considers "a model" of "the good judge":

> [The good judge] is genuinely open-minded and detached,...heedful of limitations stemming from the judge's own competence and, above all, from the pre-suppositions of our constitutional scheme; th[at] judge...recognizes that a felt need to act only interstitially does not mean relegation of judges to a trivial or mechanical role, but rather affords the most responsible room for creative, important judicial contributions.[38]

The Judiciary Committee should explore Judge Ginsburg's views about these "creative, important judicial contributions."

B. Responding to Social Trends

Elsewhere, Judge Ginsburg has written approvingly of changes in constitutional interpretation brought about by "a growing comprehension by jurists of a pervasive change in society at large."[39] She made this observation particularly to describe how the Supreme Court came to apply the Fourteenth Amendment's equal protection clause to women and thereby to scrutinize sex-based legislative classifications. She described how the Court turned "in a new direction" after understanding how legislation "apparently designed to benefit or protect women could often, perversely, have the opposite effect."[40] Elsewhere

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[35] *Id.*

[36] *Id.* at 25.

[37] Pilon, *supra* note 33.

[38] Ginsburg, "The Obligation to Reason Why," 37 *University of Florida Law Review* 205,224 (1985).

[39] Ginsburg, *supra* note 34, at 20.

[40] *Id.*

she noted how "[p]ervasive social changes" undermined the reasoning in previous undesirable Supreme Court decisions in the area of gender equality.[41]

C. Should Judges Implement Their Vision for Society?

An important facet of a nominee's judicial philosophy is whether the courts are empowered to implement their particular vision of what society needs. Judge Ginsburg's writings suggest that she believes the courts should be such fully-engaged players. She has argued that an equal rights amendment is necessary to provide an explicit constitutional guarantee of equal protection for women. Nevertheless, she has written that the Fourteenth Amendment's equal protection clause is "growth-susceptible"[42] and elsewhere stated that it is "phrased broadly enough" to cover women.[43] In the absence of an equal rights amendment, she writes, the Supreme Court "has creatively interpreted clauses of the Constitution...to accommodate a modern vision of sexual equality....Such interpretation has limits, but sensibly approached, it is consistent with the grand design of the Constitution-makers to write a charter that would endure as the nation's fundamental instrument of government."[44] Anyone who believes that the Constitution can only endure if the Supreme Court creatively interprets its clauses to accommodate modern social visions has a fundamentally activist judicial philosophy.

D. Should Courts Fill In for Legislatures?

Another facet of a nominee's judicial philosophy is whether courts should serve as a societal pinch-hitter, filling in the gaps or stepping up to the plate when legislatures do not or will not address particular issues or problems. In a 1981 article on judicial activism, Judge Ginsburg discussed "legislative activism" in the aid of judicial restraint and stated that "the need for interventionist [judicial] decisions...would be reduced significantly if elected officials shouldered their full responsibility for activist decisionmaking."[45] This is a

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[41] Ginsburg, "Sex Discrimination," in L. Levy, K. Karst & D. Mahoney (eds.), *Encyclopedia of the American Constitution* (1986), at 1667.

[42] Ginsburg, *supra* note 34, at 18.

[43] *Selection and Confirmation of Federal Judges*, *supra* note 30, at 348.

[44] Ginsburg, *supra* note 41, at 1673.

[45] Ginsburg, "Inviting Judicial Activism: A 'Liberal' or 'Conservative' Technique?," 15 *Georgia Law Review* 539,550 (1981).

scholarly way of saying that someone has to do it and the judiciary will fill in if the legislature fails. This is also a clear example of an activist judicial philosophy.

Judge Ginsburg, to be sure, has expressed a preference for "activist decisionmaking" by legislatures rather than by courts. This may suggest a moderate judicial style, but it is an activist judicial philosophy nonetheless. In another article, she stressed that legislatures ought to "install a system of legislative review and revision under which Congress would take a second look at a law once a court opinion or two highlighted the measure's infirmities."[46] Yet she clearly believes that courts should do the job if legislatures fail.

E. Judicial Dialogue

1. Between judges on the same court

Judge Ginsburg has discussed three different forms of dialogue in which judges participate. The first, and narrowest, occurs among the judges on a single court. This report, in its discussion of Judge Ginsburg's judicial style below, describes her emphasis on writing narrowly and not separately. Nonetheless, she acknowledges that separate opinions constitute a kind of dialogue among judges on a collegial court that "may provoke clarifications, refinements, modifications in the court's opinion."[47]

2. Between different courts

A second, and broader, dialogue occurs between judges at different levels in the federal court system. Both separate opinions and opinions of the court participate in this dialogue. "Separate opinions in intermediate appellate courts serve an alert function. If appeal from the court's judgment is a matter of right, the separate opinion may assist the court of next resort by charting alternative grounds of decision. If further review is discretionary, as in the U.S. Supreme Court, a separate opinion may signal to the Court that the case is troubling and perhaps worthy of a place on its calendar."[48]

In addition to separate opinions, the majority opinions of one court may participate in a dialogue with superior courts. Judge Ginsburg voted against the full U.S. Court of Appeals re-hearing a panel decision upholding the Navy's discharge of a sailor for engaging

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[46] Ginsburg, "A Plea for Legislative Review," *Southern California Law Review* 995,996 (1987).

[47] Ginsburg, "Remarks on Writing Separately," 65 *Washington Law Review* 133,143 (1990).

[48] *Id.* at 143-44.

in homosexual activity.[49] She supported the narrower grounds for the panel's decision and considered its broader constitutional discussion to be the individual viewpoint of Judge Robert Bork, the opinion writer, rather than the views of the court.[50] The judges arguing for re-hearing criticized the panel opinion for ignoring judicial restraint and questioning the coherence, if not the substance, of Supreme Court decisions. Judge Ginsburg responded:

> The dissenting opinion bends 'judicial restraint' out of shape in suggesting that it is improper for lower federal courts ever to propose 'spring cleaning' in the Supreme Court. In my view, lower court judges are not obliged to cede to the law reviews exclusive responsibility for indicating a need for, and proposing the direction of, further enlightenment from Higher Authority.'...It is a view on which I have several times acted.[51]

In a panel discussion at Rutgers University School of Law the next year, she nonetheless defended that panel's broader discussion of constitutional issues against strong criticism by law professor Ronald Dworkin. She said: "If Judge Bork showed a lack of judicial restraint or respect in questioning High Court precedent he regarded as doubtful, then I suppose I did so also many times."[52] She clearly sees the utility of a dialogue between individual judges and courts occupying different tiers of the federal judiciary.

3. Between different branches of government

Judge Ginsburg has suggested that she does not view courts as the solver of all societal problems, but one of many players. She said during a 1985 roundtable discussion at Rutgers University Law School:

> But it is not sensible, for example, for civil rights advocates to press today in federal court litigation for lowered standing barriers, or broader views of state action, constitutionally-guarded privacy, or the range of expressive conduct protected by the first amendment. Instead, concentration should be on state legislatures, administrative agencies--both federal and

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[49] *Dronenberg v. Zech*, 741 F.2d 1388 (D.C.Cir. 1984).

[50] *Dronenberg v. Zech*, 746 F.2d 1579,1581-82 (D.C.Cir. 1984) (statement of Judge Ginsburg).

[51] *Id.* at 1581 n.1.

[52] Ginsburg, "Second Decennial Conference on the Civil Rights Act of 1964," 37 *Rutgers Law Review* (1985), at 1108.

> state--and, most of all, public education, as election returns and shifting student attitudes on many undergraduate campuses indicate. The effort will require more patience, planning, and persistence than campaigns aimed at sweeping victories in court, but success, to the extent it is achieved, may be more secure.[53]

What is unclear is whether this reflects her understanding about the role of the courts generally or a recommendation for proceeding "today," that is, during a time of domination by Republican-appointed judges committed to judicial restraint.

Dialogue among judges on the same court or between judges on different tiers of the federal judiciary is unobjectionable. Dialogue between the judicial and political branches of government, however, can either be judicial activism--if the judges decide to do the legislature's job--or judicial restraint--if the judges let the legislature do its own job. Judge Ginsburg's writings place her in the activist camp.

Judge Ginsburg is not opposed to judicial activism per se. Writing in the *Georgia Law Review*, she stated that "the need for interventionist [judicial] decisions...would be reduced significantly if elected officials shouldered their full responsibility for activist decisionmaking."[54] Judge Ginsburg does not oppose what she calls "interventionist" judicial decisions. Rather, she apparently believes that it is preferable for legislatures to make such decisions. She identifies "legislative activism" as an "aid of judicial restraint."[55] The other side of this coin, however, is the belief that judicial activism is appropriate in the face of legislative restraint. Judges can, in her view, act where "Congress is too busy or too divided politically to speak with precision."[56] Thus she appears to roughly equate the judicial and legislative branches as interchangeable players; someone has to do it, and the courts should if the legislature does not. This is clearly the mark of a judicial activist.

F. What Does "Interpretation" Mean?

Judge Ginsburg has argued that the Fourteenth Amendment's equal protection clause was not intended to cover women. She has stressed this view when arguing in favor of adding an equal rights amendment to the Constitution. At the same time, however, Judge Ginsburg has led a long-term litigation campaign to successfully urge the Supreme Court to

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[53] *Id.*

[54] Ginsburg, *supra* note 45, at 550.

[55] *Id.* at 547.

[56] *Id.* at 548.

more strictly scrutinize legislative classifications based on sex, with the goal being invalidation of such classifications under the equal protection clause.

For purposes of politics, Judge Ginsburg argues that the Fourteenth Amendment does not protect women. For purposes of litigation, she argues that it does. What are her true views? Her apologists might argue that, as a lawyer, she must employ any legitimate argument in the service of her client. Perhaps. This pattern nonetheless suggests that she has often placed constitutional interpretation in the service of present political purposes.

This pattern also suggests that she has little, if any, firm foundation in a coherent constitutional or interpretive philosophy. This discussion has already noted the observations by some that she is more a technician than an interpretive philosopher. Harvard law professor Alan Dershowitz says that she emphasizes the "fine print" rather than the "big picture."[57] Her selective references and manipulative use of originalism supports this view.

Judge Ginsburg insists that respecting what she insists is the intent of the Fourteenth Amendment's framers would constitute "a too strict 'jurisprudence of the framers' original intent'."[58] Rather, she writes approvingly of "[b]oldly dynamic interpretation, departing radically from the original understanding...to tie to the fourteenth amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities."[59] She also writes that the Constitution can "serve through changing times if supported by judicial interpretations that are neither 'mushy' nor too 'rigid'."[60] And, as already noted, she approves of "creatively interpreted clauses" as a way of making the Constitution accommodate modern social visions.

The Senate Judiciary Committee should explore with Judge Ginsburg just what she means by "interpretation" in these contexts. Only an activist could urge "boldly dynamic interpretation," "creative interpreted clauses," and the "creative, important judicial contributions" of which Professor Gunther spoke. She criticizes the Supreme Court for "stepping boldly in front of the political process" in *Roe v. Wade* yet encourages the Court to interpret boldly in sex discrimination cases. She wants the Court to interpret boldly, dynamically, and creatively in that area, but insists that the Constitution will endure only if the Court's interpretations are neither mushy nor rigid. These pieces do not suggest any coherent judicial or interpretive philosophy.

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[57] Dershowitz, "Nomination by Default," *Washington Times*, June 16, 1993, at G1.

[58] Ginsburg, *supra* note 34, at 17.

[59] Ginsburg, "Sexual Equality Under the Fourteenth and Equal Rights Amendments," 1979 *Washington University Law Quarterly* 161,161.

[60] Ginsburg, "On Amending the Constitution: A Plea for Patience," 12 *University of Arkansas at Little Rock Law Journal* 677,692-93 (1989-90).

Judge Ginsburg has suggested that on a court like the U.S. Court of Appeals, and "[u]nlike the Supreme Court,"[61] which faces few "grand constitutional questions," various factors combine to "tug judges strongly toward the middle, toward moderation and away from startlingly creative or excessively rigid positions."[62] Will she be free of the tug once she joins the Supreme Court and begins facing grand constitutional questions or favor the "[b]oldly dynamic interpretation"[63] of the Constitution she has called for in the past?

III. JUDICIAL STYLE

"Judicial style" is different from judicial philosophy. It includes commitment to prudential rules of institutional restraint rather than broader, more substantive, views about interpretation or the overall role of the courts. While judicial philosophy involves one's view of the proper role of a judge, judicial style involves one's view of the proper functioning of a judge. One can have an activist judicial philosophy but a moderate judicial style.

A. Compromise, Consensus, and Collegiality

When President Clinton nominated Judge Ginsburg, he outlined three reasons for choosing her. One was that she would be "a force for consensus-building on the Court." Judge Ginsburg is self-conscious about this role. She put it this way during a roundtable discussion in 1985:

> I don't see myself in the role of a great dissenter and I would much rather carry another mind even if it entails certain compromises. Of course there is a question of bedrock principle where I won't compromise but I have a very low dissent record on my court and I have learned a lot about other minds paying attention to people's personalities in this job. I take that into account much more than just the ideas that I was dealing with in what I did before I came to the bench.[64]

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[61] Ginsburg, "Styles of Collegial Judging: One Judge's Perspective," *Federal Bar News and Journal*, March/April 1992, at 200.

[62] *Id.*

[63] Ginsburg, *supra* note 59, at 161.

[64] *Judicature*, October-November 1985, at 145.

B. Writing No More Than Necessary

Judge Ginsburg later, in her roundtable discussion at Rutgers University, said that "a judge who speaks for a court with a wide range of views, rather than in a concurring or dissenting opinion, should take the low ground, and resist personal commentary."[65] This was in direct reference to criticism of Judge Robert Bork's decision in *Dronenberg v. Zech*,[66] in which the court upheld the Navy's policy of discharging sailors who engaged in homosexual conduct.

Judge Ginsburg was not a member of the panel but did express her views when addressing a motion for the entire court to review the panel decision. She voted not to rehear the case.[67] She agreed with the panel's first conclusion, that the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*[68] was binding but felt that in its remaining discussion, "the panel opinion airs a good deal more than disposition of the appeal required."[69] She considered those "extended remarks on constitutional interpretation as a commentarial exposition of the opinion writer's viewpoint, a personal statement that does not carry or purport to carry the approbation of 'the court'."[70] Her clear preference, in her statement in *Dronenberg* as well as in her remarks at Rutgers University a year later, is for the judge writing for the court to avoid addressing matters not directly necessary to the case before the court.

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[65] Ginsburg, *supra* note 52, at 1108.

[66] 741 F.2d 1388 (D.C.Cir. 1984).

[67] Unfortunately, the media routinely misreported Judge Ginsburg's action. One report stated that "she voted to dismiss a sailor's challenge to his dismissal for homosexual conduct." Marcus, "Clinton's Unexpected Choice is Women's Rights Pioneer," *Washington Post*, June 15, 1993, at A14. Another reporter for the same newspaper stated that "she voted to dismiss a case involving a sailor discharged from the military for engaging in homosexual activity." Biskupic, "Nominee's Philosophy Seen Strengthening the Center," *Washington Post*, June 15, 1993, at A12. Another reporter stated that "she ruled against a homosexual sailor who challenged his discharge from the Navy." Roman, "Ginsburg Seen Joining Court's 'Mushy Middle'," *Washington Times*, June 15, 1993, at A7. She did none of these things.

[68] 425 U.S. 901 (1976), *summarily aff'g* 403 F.Supp. 1199 (E.D.Va. 1975).

[69] *Dronenberg v. Zech*, 746 F.2d 11579,1581 (D.C.Cir,. 1984) (statement of Judge Ginsburg).

[70] *Id.* at 1582.

C. Writing Separately Only When Necessary

Judge Ginsburg, as quoted above, has pointed out that she has "a very low dissent record" on the U.S. Court of Appeals.[71] Delivering the Jurisprudential Lecture at the University of Washington School of Law in May 1989, Judge Ginsburg discussed "the competing tugs of collegiality and individuality" and said that "[w]hen to acquiesce and when to go it alone is a question our system allows each judge to resolve for herself."[72] Clearly opting for the former over the latter, Judge Ginsburg cited time constraints, the "danger of crying wolf," and "[c]oncern for the well-being of the court on which one serves, for the authority and respect its pronouncements command" as deterrents to writing separately.[73]

While, as noted above, Judge Ginsburg sees some utility in writing separately, her general view is that "[o]verindulgence in individualist judging...is counterproductive....Most vitally, the 'rule of law' virtues are slighted when a court fails to function as a collegial body. Those virtues are consistency, predictability, clarity, and stability."[74]

There appears to be some agreement that Judge Ginsburg is, in the words of one analyst, more "a legal technician" than "an interpretive philosopher."[75] Another report concluded that she has "a sometimes pedantic concern about details and procedure" and "her opinions reveal no broad constitutional philosophy."[76] Professor Dershowitz says more critically that her opinions as a judge "have been characterized by a rigid proceduralism."[77] One former clerk described her approach as "restrained, taking small steps instead of big steps--adhering closely to the precedents and not pushing the envelope."[78] One reporter concluded that Judge Ginsburg is one of those "cautious judges who are reluctant to overturn precedent."[79]

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[71] *Judicature*, *supra* note 64, at 145.

[72] Ginsburg, *supra* note 47, at 141.

[73] *Id.* at 142.

[74] Ginsburg, *supra* note 61, at 200.

[75] Fein, *supra* note 20.

[76] Barrett & Birnbaum, *supra* note 9, at A1.

[77] Dershowitz, *supra* note 57.

[78] Quoted in Associated Press, "Law Clerks Paint Picture of a Painstaking Jurist," *Washington Times*, June 20, 1993, at A6.

[79] Roman, *supra* note 8.

Even as they rush to confirm Judge Ginsburg before their August legislative recess, Senators should explore whether this attention to procedural and jurisdictional concerns is part of Judge Ginsburg's fundamental commitment to a moderate-to-conservative judicial style or whether it is merely a function of her serving on a mid-level appellate court. That is, once the restraint of Supreme Court precedent is removed, what principles will guide Justice Ginsburg and are those the same that once guided Judge Ginsburg?

This discussion of Judge Ginsburg's judicial style can conclude with two of her own expressions. At the 1980 hearing on her nomination to the U.S. Court of Appeals, she said:

> And I believe that a judge is bound to decide fairly--based solely on the relevant facts--the record made in the case and the applicable law; a judge is bound to do that even when the decision is, as Justice Rehnquist recently put it, not the one the home crowd wants.[80]

Concluding an article on judicial activism, Judge Ginsburg wrote that the greatest members of the federal judiciary "have been independent-thinking individuals with open but not empty minds, individuals willing to listen and to learn. They have been skeptical of party lines and they have exhibited a readiness to reexamine their own premises, liberal or conservative, as thoroughly as those of others."[81]

The *Washington Post* expressed its editorial view this way:

> She herself has expressed a reference for 'measured motions' by the judiciary, warning that 'doctrinal limbs too swiftly shaped...may prove unstable.' She reaffirmed yesterday her determination to view each case on the facts and the law presented, no matter what her own personal views and the urging of 'the home crowd' might suggest. To do anything less, to go to the high court with a political agenda or a mind closed to the unorthodox or the challenging, would be a betrayal of judicial responsibility.[82]

Judge Ginsburg has moderate practical instincts as a judge. She has a moderate judicial style. She is an interstitial activist. Yet her activist judicial philosophy is of far greater concern to those who seek to protect an independent judiciary. A philosophy of

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[80] *Selection and Confirmation of Federal Judges*, *supra* note 30, at 350.

[81] Ginsburg, *supra* note 45, at 558.

[82] Editorial, "Judge Ginsburg's Nomination," *Washington Post*, June 15, 1993, at A20.

judicial restraint can keep judicial style in check. Practical instincts, a moderate judicial style, are no match for an activist judicial philosophy, especially when the shackles of institutional constraint are removed by appointment to the highest court in the land.

IV. ABORTION AND *ROE v. WADE*

Judge Ginsburg founded the ACLU's Women's Rights Project and served as the ACLU's general counsel from 1974 to 1980. Anyone who thinks she does not support constitutional protection for the right to choose abortion does not know what those four letters represent. Noting her criticism of *Roe v. Wade*,[83] the Supreme Court's decision creating the right to abortion, one analyst concluded that her objection did not extend to "the ultimate goal of a right to abortion fully anchored in the Constitution and secure against political undermining."[84]

President Clinton, however, promised during the presidential campaign to choose someone as his first Supreme Court appointee who is a "strong supporter of *Roe* [*v. Wade*]." At least since the late 1970s, Judge Ginsburg has criticized the constitutional basis and practical political impact of that decision. This slight departure from the politically correct text immediately raised questions about whether Bill Clinton correctly applied his abortion litmus test. Indeed, even he has backed off, insisting now only that Judge Ginsburg "is clearly pro-choice" on abortion.[85] Kathleen Quinn brands Judge Ginsburg's views "alarming" and "stunning."[86]

A. Constitutional Foundation

1. The Supreme Court's decision

Judge Ginsburg has devoted nearly all of her professional life to crafting and implementing a unified approach to issues of concern to women based on the Constitution's requirement of "equal protection of the laws." During the 1970s, she argued and won

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[83] 410 U.S. 113 (1973).

[84] Greenhouse, "On Privacy and Equality," *New York Times*, June 16, 1993, at A1.

[85] Murray, *supra* note 4.

[86] Quinn, "Treat Judge Ginsburg Like a Man," *New York Times*, June 20, 1993, at 17.

landmark cases in the Supreme Court requiring courts to constitutionally scrutinize laws that treat men and women differently. The nature of her criticism of *Roe*'s constitutional foundation, then, may not seem surprising.

On January 22, 1973, by a 7-2 vote, the Supreme Court handed down its decision in *Roe v. Wade* striking down a century-old Texas statute that prohibited all abortions except those necessary to save the life of the mother. The Court decided, for the first time, that the Fourteenth Amendment's due process clause[87] protects a woman's decision whether to terminate her pregnancy by abortion. The Court went past striking down that law--the most restrictive in the nation--and crafted a scheme of rules for balancing the woman's right and the state's interests in maternal health and fetal life during different stages of pregnancy.

2. Judge Ginsburg's views

Judge Ginsburg has criticized the decision for basing the right to choose abortion on the due process clause rather than the equal protection clause.[88] For example, while still a law professor, she wrote in a review of the Supreme Court's 1976-77 Term:

> Significantly, the opinions in *Roe v. Wade* and *Doe v. Bolton* barely mention "women's rights." They are not tied to any equal protection or equal rights theory. Rather, the Court anchored stringent review of abortion prohibitions to concepts of bodily integrity, personal privacy or autonomy, derived from the due process guarantee.[89]

When Professor Ginsburg became Judge Ginsburg, she continued raising the same question. Delivering the Joyner Lecture on Constitutional Law at the University of North

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[87] The Fourteenth Amendment's due process clause reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

[88] The Fourteenth Amendment's equal protection clause reads: "[nor shall any State...] deny to any person within its jurisdiction the equal protection of the laws." While the Fifth Amendment, which applies to the federal government, does not contain a similar clause, the Supreme Court has decided that its due process clause has an equal protection component and has thereby imposed the same restrictions on the federal government that the Fourteenth Amendment imposes on state governments. See *Weinberger v. Wiesenfeld*, 420 U.S. 636,638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497 (1954). Ruth Bader Ginsburg successfully *Weinberger* before the Supreme Court.

[89] Ginsburg, "Gender in the Supreme Court: The 1976 Term," in B. Justice & R. Pore (eds.), *Constitutional Government in America* (1980), at 223.

Carolina School of Law in April 1984, she observed: "The High Court has analyzed classification by gender under an equal protection/sex discrimination rubric; it has treated reproductive autonomy under a substantive due process/personal autonomy headline not expressly linked to discrimination against women."[90]

Judge Ginsburg repeated the same observation in a 1992 article: "But the Supreme Court did not rest its *Roe v. Wade* decision on an equal stature for women or sex discrimination rationale. Instead, the Court ruled on a personal privacy or autonomy analysis that had few precedents."[91]

Unfortunately, Judge Ginsburg has never described just how, based on the equal protection clause, an opinion striking down the restrictive Texas statute might have been written. In fact, she has never explicitly stated that *Roe v. Wade* was itself wrongly decided or that it should be overruled. She has simply observed that the Court based its opinion on the due process clause rather than on the equal protection clause. Most of her writings on this subject are descriptive rather than analytical.

3. Analysis

Judge Ginsburg is not alone in asserting that laws prohibiting or restricting abortion constitute sex discrimination in violation of the equal protection clause. In *Webster v. Reproductive Health Services*,[92] for example, the parties challenging abortion restrictions asked that, should the Court abandon *Roe*'s due process theory for abortion rights, the Court "remand th[e] case for consideration of what other Constitutional principles can support the right recognized in *Roe*." They offered an equal protection theory as an alternative.

Harvard law professor Laurence Tribe has observed that "[t]he plaintiffs in *Roe v. Wade* and *Doe v. Bolton* did not challenge the abortion restrictions as a form of sex discrimination....The national ACLU's Reproductive Freedom Project has long pursued a policy of discouraging sex discrimination claims in abortion cases."[93] This may be the result of fundamental conceptual problems with the theory itself.

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[90] Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63 *North Carolina Law Review* 373,373-74 (1985).

[91] Ginsburg, "A Moderate View on Roe," *Constitution*, Spring-Summer 1992, at 17.

[92] 492 U.S. 490 (1989).

[93] L. Tribe, *American Constitutional Law* (2nd ed. 1988), at 1353 n.109.

Judge Ginsburg refers to an "equal protection or equal rights theory"[94] or an "equal protection/sex discrimination rubric"[95] as a better way of approaching cases challenging abortion restrictions. The equal protection clause ensures that similarly situated individuals are treated similarly.[96] Applying this concept to the question of abortion rights creates some difficulty. If women and men could both become pregnant, a law prohibiting only women from obtaining abortions would violated the equal protection clause. This law would treat women differently **because of their sex.**

Men, of course, cannot become pregnant and, therefore, women and men cannot be similarly situated with respect to either pregnancy or its termination. Denying to women a course of action that only they can take--in this case, a particular method of pregnancy termination--cannot be said to discriminate against them because of their gender; all persons able to take that course of action are of the same gender.

Perhaps the best way to make this point is to use examples from the very sex discrimination cases that Ruth Bader Ginsburg participated in litigating on behalf of the American Civil Liberties Union's Women's Rights Project. Each of these cases involved women being treated differently than similarly situated men because of their gender.

- *Reed v. Reed*[97] challenged an Idaho law requiring that men be preferred over equally qualified women to be estate administrators.

- *Frontiero v. Richardson*[98] challenged two statutes providing military servicemen with automatic dependency benefits for housing or medical care for their spouses but providing such benefits for military servicewomen only if her spouse depended on her for more than half his support.

- *Kahn v. Shevin*[99] challenged a tax break for widows that was unavailable for widowers.

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[94] Ginsburg, *supra* note 89, at 223.

[95] Ginsburg, *supra* note 90, at 373.

[96] See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432,439-40 (1985).

[97] 404 U.S. 71 (1971).

[98] 411 U.S. 677 (1973).

[99] 416 U.S. 351 (1974).

- *Weinberger v. Wiesenfeld*[100] and *Califano v. Goldfarb*[101] challenged Social Security benefits available to women but not to men.

- *Craig v. Boren*[102] challenged an Oklahoma law setting the age for purchasing beer at 18 for women and 21 for men.

One of her former clerks summarized Judge Ginsburg's views on this point: "The disadvantageous treatment of a woman because of pregnancy or reproductive choice, Judge Ginsburg has written, is a paradigm case of discrimination on the basis of sex."[103] Roger Pilon counters:

> Disadvantageous treatment of a woman because of her pregnancy is treatment based, as the proposition states, on her pregnancy, not her sex. Otherwise every woman would be so treated, which not even Judge Ginsburg asserts. It is true, of course, that only women become pregnant. But from that fact it no more follows that pregnancy discrimination is sex discrimination than that punishment for having committed a crime is punishment for being a person--it being a fact also that only people commit crimes.[104]

Exclusive focus on women, therefore, necessarily negates the equal protection argument because individuals in the resulting class share the same gender. Yet an exclusive focus on women is exactly what Judge Ginsburg advocates. *Roe*, she writes, would be less subject to criticism "had the Court placed the woman alone...at the center of its attention."[105] Doing so, however, cannot be accomplished through the equal protection clause since determining whether a woman has been treated "equally" with respect to her gender requires reference to the treatment of similarly situated individuals of a different gender, namely, men.

Remember how her former clerk put it: "The disadvantageous treatment of a woman because of her pregnancy or reproductive choice...is a paradigm case of discrimination on

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[100] 420 U.S. 636 (1975).

[101] 430 U.S. 199 (1977).

[102] 429 U.S. 190 (1976).

[103] Huber & Taranto, *supra* note 25.

[104] Pilon, *supra* note 33.

[105] Ginsburg, *supra* note 90, at 382.

the basis of sex." Only women can become pregnant and, therefore, only women can obtain abortions. Therefore, any abortion restriction is a "disadvantageous treatment of a woman because of her pregnancy or reproductive choice" because no abortion restriction, no matter how slight, can be applied against a man. To apply an equal protection theory to abortion rights, then, requires arguing that any abortion restriction violates the equal protection clause by definition.

The Supreme Court has already rejected this idea. In *Geduldig v. Aiello*,[105] the Court upheld against an equal protection challenge a state program that excluded from insurance coverage disabilities accompanying pregnancy. The Court held:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition--pregnancy--from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification.[107]

Judge Ginsburg believes that "[t]he disadvantageous treatment of a woman because of pregnancy...is a paradigm case of discrimination on the basis os sex." The Supreme Court has rejected the notion that "every legislative classification concerning pregnancy is a sex-based classification." No wonder the ACLU's Reproductive Freedom Project counsels against making sex discrimination claims in abortion cases.

B. Practical Political Impact

1. The Supreme Court's decision

During the 19th century, every state passed laws prohibiting all abortions except those necessary to save the life of the mother.[108] Between 1965 and 1972, every state considered

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[106] 417 U.S. 484 (1974).

[107] *Id.* at 496 n.29.

[108] See Quay, "Justifiable Abortion--Medical and Legal Foundations," 49 *Georgetown Law Journal* 395,447-520 (1961).

proposals to liberalize these statutes and many chose to do so.[109] A study by the Planned Parenthood Federation found that approximately half the states adopted proposals to reform or repeal their abortion statutes.[110]

In 1973, when the Supreme Court decided *Roe*, three types of statutes existed. Thirty-one states retained the traditional restrictive statute.[111] Another 15 states had adopted statutes permitting abortions in specific circumstances.[112] The final four states allowed abortions for any reason but only during early pregnancy.[113]

The Texas statute reviewed in *Roe* was of the first type and *Roe* obviously rendered it unconstitutional. In a case decided the same day as *Roe*, the Court made clear that its decision also rendered the second, more liberal, type of statute invalid.[114] There is almost universal agreement among scholars, analysts, and commentators that *Roe* effectively struck down all existing abortion laws.[115] None was liberal enough to survive the new scheme of rules constructed by the Court in *Roe*. Its rigid framework has been applied since 1973 to invalidate nearly every abortion restriction including, for example, parental and spousal consent,[116] standard of care in post-viability abortions,[117] second physician requirement

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[109] See Comment, "A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems," 1972 *University of Illinois Law Forum* 177.

[110] "Abortion in the U.S.: Two Centuries of Experience," in *Constitutional Amendments Relating to Abortion: Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 357 (1981).

[111] See *Roe*, 410 U.S. at 118 n.2.

[112] *Id.* at 140 n.37. These circumstances typically included a threat to the mother's life or health, likely fetal deformity, rape, or incest. This type of statute was modeled on the American Law Institute's Model Penal Code section on abortion.

[113] *Id.*

[114] *Doe v. Bolton*, 410 U.S. 179 (1973).

[115] See, e.g., Sarvis & Rodman, *The Abortion Controversy* (New York: Columbia University Press, 1973), at 57 (Court's decision in *Roe* "renders all original and reform laws unconstitutional").

[116] See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

[117] See, e.g., *Colautti v. Franklin*, 439 U.S. 379 (1979).

for post-viability abortions,[118] informed consent requirements,[119] or two-parent notification.[120]

2. Judge Ginsburg's views

Judge Ginsburg clearly views this sudden and universal trumping of the legislative process, and the wiping out of all existing abortion laws--restrictive and lenient--in a negative light.

On March 9, 1993, Judge Ginsburg delivered the Madison Lecture at New York University School of Law and observed that *Roe v. Wade* "halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue."[121] She noted that the Court "seemed entirely to remove the ball from the legislators' court."[122]

Judge Ginsburg had previously observed in 1992 that "[t]he *Roe* decision, by stopping a political process that was moving in a reform direction, may have prolonged divisiveness and deferred stable settlement of the abortion controversy."[123]

Judge Ginsburg wrote in a 1990 article: "There was at the time [of *Roe*], as Justice Blackmun noted in his opinion, a distinct trend in the states 'toward liberalization of abortion statutes.' Had the Court written smaller and shorter, the legislative trend might have continued in the direction in which is was clearly headed in the early 1970s."[124]

She wrote in 1985 that, in *Roe*, the Court "called into question the criminal abortion statutes of every state, even those with the least restrictive provisions."[125] In doing so, the

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[118] See, e.g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

[119] See, e.g., *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

[120] See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

[121] Verbatim, *supra* note 31, at 11.

[122] *Id.*

[123] Ginsburg, *supra* note 91.

[124] Ginsburg, "On Muteness, Confidence, and Collegiality: A Response to Professor Nagel," 61 *University of Colorado Law Review* 715,718-19 (1990).

[125] Ginsburg, *supra* note 90, at 381.

decision "ventured too far in the change it ordered."[126] Judge Ginsburg agreed with the assessment of Professor Paul Freund, namely, that the Court "properly invalidated the Texas proscription" but should have "left off at that point" so that "the legislative trend might have continued in the direction in which it was headed in the early 1970s."[127] Professor Freund had written in 1983 that the detailed trimester framework in *Roe* "illustrated a troublesome tendency of the modern Supreme Court...'to specify by a kind of legislative code the one alternative pattern that will satisfy the Constitution'."[128]

3. Analysis

Not everyone agrees with Judge Ginsburg's reading of history. The *New York Times* editorialized that she "was too hard on Roe and probably misread history."[129] Author David Garrow writes that her criticisms of *Roe* "manifest a surprising ignorance of abortion law developments in the five years preceding the January 1973 decision."[130]

When Judge Ginsburg, on the one hand, argues that the Court in *Roe* "ventured too far"[131] and should have "written smaller and shorter"[132] and, on the other hand, challenges *Roe*'s doctrinal foundation, she suggests that her preferred equal protection theory would be less expansive than the due process theory the Court adopted. In fact, however, her recommended alternative has no limitation whatsoever.

Judge Ginsburg has offered no reason, and none is apparent, why a law prohibiting abortion for a particular reason--even sex selection--or during a particular stage of pregnancy--even the ninth month--would not amount to sex discrimination just as readily as would a law prohibiting all abortions. If restricting a course of action that only women can take is prohibited sex discrimination, then it is so throughout pregnancy. Restriction on sex selection abortions or on late-term abortions only affect women.

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[126] *Id.*

[127] *Id.* at 382.

[128] *Id.*, quoting Freund, "Storms Over the Supreme Court" 69 *A.B.A. Journal* 1474,1480 (1980)

[129] Editorial, *New York Times*, June 15, 1993, at A26.

[130] Garrow, "History Lesson for the Judge," *Washington Post*, June 20, 1993, at C3.

[131] *Id.* at 381.

[132] Ginsburg, *supra* note 124, at 719.

Judge Ginsburg has, on the one hand, criticized the Supreme Court's *Roe v. Wade* decision for going too far in striking down an abortion restriction while, on the other hand, criticizing the Supreme Court for going too far in upholding restrictions on public funding of abortions. The Court has consistently held that the Constitution does not require the state to pay for abortions under any circumstances. Judge Ginsburg has criticized these decisions as "incongruous"[133] and the "[m]ost unsettling of the losses" for women's rights.[134] She wrote in 1985: "If the Court had acknowledged a woman's equality aspect, not simply a patient-physician autonomy constitutional dimension to the abortion issue, a majority perhaps might have" ruled differently.[135]

One would think from Judge Ginsburg's criticism of both the due process theory of abortion rights and the Court's abortion funding cases that the Court had decided the funding cases on a due process rationale. Not so. It applied the equal protection clause.

- In *Maher v. Roe*,[136] the Court held that the equal protection clause does not require a state to pay expenses for elective abortions when it chooses to pay expenses for childbirth.

- In *Poelker v. Doe*,[137] the Court held that the equal protection clause does not require a city to provide publicly financed hospital facilities for abortions when it provides such facilities for childbirth.

- In *Harris v. McRae*,[138] the Court held that the so-called Hyde Amendment, which restricts the use of funds in the federal Medicaid program to pay for abortions, does not violate the equal protection clause.

- In *Williams v. Zbaraz*,[139] the Court held that a funding restriction similar to the Hyde Amendment in a state statute does not violate the equal protection component of the Fifth Amendment.

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[133] Ginsburg, *supra* note 90, at 386.

[134] Ginsburg, *supra* note 89, at 224.

[135] Ginsburg, *supra* note 90, at 385.

[136] 432 U.S. 464 (1977).

[137] 432 U.S. 519 (1977).

[138] 448 U.S. 297 (1980).

[139] 448 U.S. 358 (1980).

* In *Webster v. Reproductive Health Services*,[140] the Court held that a statutory restriction on the use of public employees or facilities for abortions does not violate the equal protection clause.

One can only conclude that Judge Ginsburg simply thinks that the government is obligated to pay for abortions, regardless of how the equal protection clause applies. It appears, at least in this area, that Judge Ginsburg is willing to have "the Supreme Court step boldly in front of the political process,"[141] exactly what she criticized the Court for doing in *Roe*.

On the one hand, Judge Ginsburg writes that "the legislative trend"[142] of the 1960s and early 1970s should have been allowed to continue "in the reform direction."[143] On the other hand, she writes: "Nor can the political process be relied upon to respond to the plight of the indigent woman."[144] It appears she only opts for allowing the legislative process to operate in the abortion area as long as it is heading in a "reform direction" toward results she approves.

Is Judge Ginsburg's preferred theory--equal protection--more modest or more expansive than the Supreme Court's preferred theory--due process--has been? Does Judge Ginsburg think that the legislative process should be allowed to move toward a "stable settlement of the abortion controversy"[145] or doesn't she? She apparently equates "stable settlement" with widely available legal abortion.

Judge Ginsburg writes that "the *Roe v. Wade* decision is not fairly described as 'moderate'"[146] and elsewhere described that decision as "no measured motion."[147] Yet it is not at all clear that her preferred theory makes any more sense or is any more moderate. Judge Ginsburg has made it clear that her theory could be used to require public financing of abortions and a cursory look suggests that her theory could be used to eliminate restrictions that *Roe v. Wade* would allow.

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[140] 492 U.S. 490 (1989).

[141] Ginsburg, *supra* note 31, at 11.

[142] Ginsburg, *supra* note 124, at 719.

[143] Ginsburg, *supra* note 91.

[144] Ginsburg, *supra* note 89, at 224.

[145] Ginsburg, *supra* note 91.

[146] *Id.*

[147] Ginsburg, *supra* note 31, at 11.

V. CONCLUSION

Judicial philosophy and judicial style are two very different facets of a judicial nominee. Judicial philosophy encompasses a nominee's fundamental views about the role of courts and the difference between law and politics, between judges and policy makers. Judge Ginsburg has an activist judicial philosophy.

- She believes that the Supreme Court can, and sometimes should, change its interpretation of the Constitution because of social changes.[148]
- She believes that the Supreme Court can, and sometimes should, creatively interpret constitutional provisions in order to accommodate a modern vision of society.[149]
- She believes in the need for "interventionist" judicial decisions when legislatures do not or will not act.[150]
- She believes that "boldly dynamic interpretation" that departs "radically from the original understanding" is sometimes necessary to reach certain results.[151]
- She believes the Constitution can survive only if supported by judicial interpretations that are neither too "mushy" or too "rigid."[152] She believes that a jurisprudence of original understanding is too rigid.[153]

Judicial style is a combination of practical factors that describe the functioning, rather than the role, of a judge. Judge Ginsburg has a moderate judicial style. It is only in this sense that she can be called a "moderate," the label that so many are so quick to place on her.

- She opposes frequently writing separate opinions.[154]

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[148] See *supra* notes 39-41 and accompanying text.

[149] See *supra* notes 42-44 and accompanying text.

[150] See *supra* notes 45-46 and accompanying text.

[151] See *supra* note 59 and accompanying text.

[152] See *supra* note 60 and accompanying text.

[153] See *supra* note 58 and accompanying text.

[154] See *supra* note 74 and accompanying text.

- She believes that judges should write no more than necessary to decide a particular case and should "take the low ground, and resist personal commentary" when writing for the court.[155]

Judge Ginsburg's views on abortion and *Roe v. Wade* are driven by her politics. Consistent with her activist judicial philosophy, she believes the Supreme Court quite properly involved itself in the abortion controversy, and should have done so by striking down the restrictive law at issue in *Roe* on equal protection, rather than on due process, grounds. This way, the Court could have encouraged a liberalizing political trend that, in Judge Ginsburg's view, recognizes the independence of women in our society.

Consistent with her moderate judicial style, Judge Ginsburg has criticized the Supreme Court for going beyond invalidating the Texas law and announcing a set of complicated rules that effectively struck down all other abortion restrictions--tough as well as lenient--existing in 1973, and most of those enacted since.

Judge Ginsburg's preferred equal protection theory, however, has serious conceptual problems. Most important, men and women cannot be similarly situated with respect to either pregnancy or its termination and, as such, it is impossible to discuss whether women are being treated "equally" because of their gender. Since women are the sole focus of this view, applying an equal protection theory to abortion rights necessarily means defining any restriction on abortion--a course of action that only women can take--as impermissible sex discrimination. As such, this theory would go beyond the policy established by *Roe v. Wade*. Judge Ginsburg objects to the Supreme Court's decisions that the state is not constitutionally required to pay for abortions, even though the Court applied her preferred equal protection theory in those cases.

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[155] See *supra* note 65 and accompanying text.