JUDICIAL SELECTION MONITORING PROJECT

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THE CONTINUING SEARCH FOR MODERATION

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

Pundits and politicians rushed to label Ruth Bader Ginsburg a "moderate" without knowing virtually anything about her record. This reaction had more to do with who she is not–Bruce Babbitt, Jon Newman, Mario Cuomo, Laurence Tribe–than who she is.

The record shows that Judge Ginsburg is no moderate. The Judicial Selection Monitoring Project's first report, *A Step in the Left Direction*, documented how her scholarly writings reveal a strikingly activist judicial philosophy and an arguably moderate judicial style. On issues that really matter, however, her record belies any moderation at all. Her politics drive her jurisprudence.

This second report, *The Continuing Search for Moderation*, summarizes these findings and goes on to examine Judge Ginsburg's record on the U.S. Court of Appeals, with an eye toward whether she tempers her judicial activism in practice. The "moderate" label so quickly and confidently placed on Judge Ginsburg would predict such a pattern. In addition, mid-level appellate courts have built-in factors that can temper judicial activism–Supreme Court precedent, circuit precedent, etc. Judge Ginsburg herself has written about such factors that "tug" judges on those courts toward moderation.

The jurisdiction of the judicial circuit on which Judge Ginsburg serves makes the task of assessing her judicial philosophy particularly difficult. This circuit's docket includes a heavy dose of administrative law and includes, for example, only a narrow range of criminal cases. Even so, Judge Ginsburg's record provides many examples of how she breaks her own rules of moderation by writing separately about issues not before the court and giving dissertations on the law outside of the case at hand. In key areas–e.g., separation of powers, standing, civil rights–her opinions reveal a pattern of picking and choosing approaches and selective application of doctrines to create a striking parallel with the liberal political agenda. *A Step in the Left Direction* showed how, in her scholarly writings, Judge Ginsburg's politics drive her jurisprudence. Likewise, *The Continuing Search for Moderation* reveals how this same activism is apparent in her judicial record.

Judge Ginsburg believes that courts and legislatures are interchangeable players in the search for sound public policy; that courts should be restrained only when legislatures are activist; that courts should change interpretation of the Constitution in light of social and political developments; that courts can move beyond reviewing legislation to actually "repairing" it. She has shown that even the inherent constraints of a mid-level appellate court have not seriously tempered this activism. She has written that the factors tugging judges toward moderation on such a court do not exist on the court to which she has been nominated.

The record belies the pundits. Judge Ginsburg is no moderate. She has a strikingly activist judicial philosophy and has shown her willingness to abandon even her nominally moderate judicial style in the service of politically correct results.

THE CONTINUING SEARCH FOR MODERATION

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

On June 14, 1993, after more than 12 weeks of consideration, President Bill Clinton nominated U.S. Circuit Judge Ruth Bader Ginsburg to replace retiring U.S. Supreme Court Associate Justice Byron White. The Judicial Selection Monitoring Project published its first report on the Ginsburg nomination, *A Step in the Left Direction*, on June 24. That report focused on Judge Ginsburg's scholarly writings. This second report includes discussion of her judicial opinions and assembles more clues about Judge Ginsburg's judicial philosophy. Both reports are intended to provide information as the Senate seeks to fulfill its constitutional role of advice and consent and in considering the Ginsburg nomination.

I. INTRODUCTION

Analysts, reporters, and politicians quickly rushed to label Judge Ginsburg a "moderate" within minutes of her nomination. None of them, of course, even attempted to define that term. Determining how a former general counsel of the American Civil Liberties Union and a pioneering women's rights activist could be labeled "moderate" led to publication of *A Step in the Left Direction*. Defining, and distinguishing between, judicial philosophy and judicial style, the report concluded that the "moderate" label applies only to the latter and only for the moment.

More serious study of Judge Ginsburg's record has produced doubts about this "moderate" label. For example, noting that Ruth Bader Ginsburg prompted the ACLU to adopt a radical position on the issue of sex between adults and children while she was its general counsel, *Human Events* asked: "How `Moderate' Is Ruth Ginsburg?"[2] Writing in the *New Republic*, Mickey Kaus described thinking that the label "moderate" sounded legitimate until he read her writings. "Now," he writes, "I'm not so sure."[3]

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[2] "How `Moderate' Is Ruth Ginsburg?," *Human Events*, June 26, 1993, at 1.

[3] Kaus, "Moderate Threat," *The New Republic*, June 12, 1993, at 6.

When evaluating Republican nominees, Senate Democrats and their allies in the academy and interest groups strongly argued for the relevance of extra-judicial writings, the focus of *A Step in the Left Direction*. Testifying in 1987 against the Supreme Court nomination of U.S. Circuit Judge Robert Bork, law professor Paul Gewirtz countered those who argued against considering the nominee's academic writings by stating that "virtually all academics write to express what they believe to be the truth. We may try out ideas that we later conclude are wrong, but...law professors try to say what they really believe. Thus, what we write is always revealing."[4] Senator Howard Metzenbaum (D-OH), a member of the Judiciary Committee, declared at the hearing on Judge Ginsburg's former judicial colleague Clarence Thomas' nomination to the Supreme Court that "[t]he pre-judicial record and positions of a nominee are usually a good indicator of what kind of judge that nominee will be."[5]

Significantly, these liberal activists demanded consideration of Republican nominees' academic writings that entirely pre-dated any service in the judiciary and never attempted to explain their relevance to a nominee's judicial philosophy. Rather, they simply highlighted political results. Most of Ruth Bader Ginsburg's scholarship, on the other hand, was published after she joined the U.S. Court of Appeals, making it even more relevant than even the Democratic standard suggests. The reports on the Ginsburg nomination from the Judicial Selection Monitoring Project are careful to focus attention on the nominee's judicial philosophy rather than political results.

A Step in the Left Direction distinguished between Judge Ginsburg's activist judicial philosophy and her moderate judicial style and suggested that the latter might just give way should she join the Supreme Court. Mickey Kaus' analysis followed a strikingly similar line. He wrote: "When it comes to judging, there are many species of moderation. One variety reflects a disciplined interpretation of the Constitution. Another reflects mere caution."[6] He concluded that "Ginsburg's cautious, case-by-case approach...appears less like congenital `moderation' than the option-preserving tactics of a shrewd litigator....By being `moderate' today, she frees herself to be immoderate tomorrow."[7]

Summarizing the findings from *A Step in the Left Direction* provides a useful backdrop for this analysis of Judge Ginsburg's judicial decisions.

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[4] *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, Hearings Before the Committee on the Judiciary, United States Senate, 100th Cong., First Sess., Serial No.J-100-64, Part 2 (1987), at 2561.

[5] Transcript of Proceedings, United States Senate, Committee on the Judiciary, *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court*, Sept. 16, 1991 (Part 1), at 31.

[6] *Id.*

[7] *Id.*

A. Activist Judicial Philosophy

Judge Ginsburg has a clearly activist judicial philosophy. She blurs the line between the judicial and political branches of government, between judges and policymakers, and between law and politics. Her writings evidence this activist philosophy in several ways.

First, Judge Ginsburg believes that the Supreme Court can, and sometimes should, change its interpretation of the Constitution based on "a growing comprehension by jurists of a pervasive change in society at large."[8] She has written approvingly of how "[p]ervasive social changes" undermine the reasoning of undesirable Supreme Court precedents.[9]

Second, she approves of the Supreme Court "creatively interpret[ing]" constitutional provisions to implement "a modern vision" of society.[10] She supports "[b]oldly dynamic interpretation, departing radically from the original understanding" to achieve desirable political results.[11]

Third, Judge Ginsburg believes that courts and legislatures are interchangeable players in the effort to achieve good public policy. She writes that courts should achieve desirable political results when legislatures do not "shoulder[] their full responsibility for activist decisionmaking."[12] Judicial restraint is only appropriate when legislatures are activist.

Fourth, Judge Ginsburg's politics drive her jurisprudence. Some examples:

* When campaigning for adoption of the so-called equal right amendment to the U.S. Constitution, she says the equal protection clause of the Fourteenth Amendment does not protect women.[13]

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[8] Ginsburg, "Remarks on Women Becoming Part of the Constitution," 6 *Law & Inequality* 17,20 (1988).

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

[10] *Id.* at 1673.

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

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

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

* When championing the feminist cause in court, she argues quite successfully that the equal protection clause of the Fourteenth Amendment does indeed protect women.[14]

* When promoting the equal rights amendment, she calls the claim that the measure would support abortion rights "an inflammatory, but not an accurate charge."[15]

* When criticizing the Supreme Court's abortion doctrine, she insists that an equal protection theory, rather than a due process theory, should provide the basis for abortion rights.[16]

Anyone who confuses the political and judicial branches of government as much as Judge Ginsburg does has a fundamentally activist judicial philosophy. The term "moderate" does not fairly describe these views. Then why have so many given Judge Ginsburg this label?

B. Moderate Judicial Style

While judicial philosophy refers to one's views of the role of a judge, "judicial style" refers to practical considerations guiding the functioning of a judge. Only with respect to these prudential factors can Judge Ginsburg be called a moderate.

First, Judge Ginsburg has discouraged what she calls "individualist judging,"[17] the practice of frequently writing separate opinions. Judge Ginsburg opts "to acquiesce" rather than "to go it alone."[18] She wrote 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."[19]

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[14] See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

[15] Ginsburg, "Ratification of the Equal Rights Amendment: A Question of Time," 57 *Texas Law Review* 919,937 (1979).

[16] See *infra* notes 39-40 and accompanying text; *A Step in the Left Direction* at 22-23.

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

[18] Ginsburg, "Remarks on Writing Separately," 65 *Washington Law Review* 133,141 (1990).

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

Second, Judge Ginsburg has written that, when a judge does write for a court's majority rather than separately, he or she "should take the low ground, and resist personal commentary."[20]

Third, Judge Ginsburg has criticized the Supreme Court's decision in *Roe v. Wade*,[21] which not only struck down the very restrictive Texas statute before the Court but announced a complicated set of rules that effectively rendered all other abortion laws invalid, as having "ventured too far in the change it ordered."[22] She believes the Court should have "written smaller and shorter."[23]

In 1991, commentator Stuart Taylor called Judge Ginsburg a "careful judge not given to crusading activism."[24] Roger Pilon wrote that she "establishes herself as a `judicial activist,' although one limited to `interstitial' activism."[25] One reporter concluded that Judge Ginsburg feels "the court should merely nudge social trends."[26] She is an activist; Taylor says she is not a "crusading" one and Pilon says she is merely an "interstitial" one. She believes courts should move social trends; some say she would merely "nudge" them.

Judge Ginsburg is even arguably "moderate" only with respect to this practical measure of judicial style although, as the next section of this report will demonstrate, she violates in practice the very rules of moderation she has expressed in scholarship. Even this moderate judicial style may be merely a product of Judge Ginsburg's service on a mid-level appellate court, restrained by her own court's precedents and the decisions of the Supreme Court. Judge Ginsburg has written that on such a court, "[u]nlike the Supreme Court" which

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

[21] 410 U.S. 113 (1973).

[22] Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63 *North Carolina Law Review* 373,381 (1985).

[23] Ginsburg, "On Muteness, Confidence, and Collegiality: A Response to Professor Nagel," 61 *University of Colorado Law Review* 715,719 (1990).

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

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

[26] Murray, "Despite Writings, President Insists Ginsburg is Pro-Choice," *Washington Times*, June 16, 1993, at A3.

faces "grand constitutional questions," various factors combine to "tug judges strongly toward the middle, toward moderation and away from startlingly creative or excessively rigid positions."[27] If confirmed, Judge Ginsburg will no longer serve on such a court and will be free of that tug toward moderation.

C. Turning Judicial Review Into Judicial Repair

Judge Ginsburg believes that courts should go beyond invalidating statutes they find to violate the Constitution and should actually "repair" them. In *Weinberger v. Wiesenfeld*,[28] for example, the Supreme Court reviewed a provision of the Social Security Act that awarded benefits to the surviving widow of a deceased male wage earner but not to the surviving widower of a deceased female wage earner. The Court determined that this gender-based classification violated the Fifth Amendment, but then went beyond invalidating the provision. The Court actually ordered Social Security payments to widowers in the absence of any legislative provision to accomplish that result. As Judge Ginsburg put it, "the Court wrote into the statute [those] Congress had left out."[29]

Such "judicial extension of underinclusive statutes"[30] or "judicial repair work"[31] is appropriate, Judge Ginsburg writes, when "the class benefited by the judicial repair...[is] limited, and the legislative will [is] minimally touched."[32] She writes approvingly of courts acting to "repair" an invalidated statute based on "[t]he probable will of the legislature."[33]

This is a shockingly activist view of the proper role of unelected courts in a system of representative government with co-equal branches. Judge Ginsburg has no problem with courts explicitly legislating--literally writing statutes that did not otherwise exist--so long as they do so modestly. She writes quite plainly that "appreciating that the court is legislating

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

[28] 420 U.S. 636 (1975).

[29] Ginsburg, "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation," 28 *Cleveland State Law Review* 301,302 (1979).

[30] *Id.* at 304.

[31] *Id.* at 305.

[32] *Id.*

[33] *Id.* at 316.

seems to me the key to proper analysis of the issue."[34] Determining the actual will of the legislature is often a daunting task; courts inventing the probable will of the legislature is license for independent legislation by the judicial branch. And even then, whether acting on the basis of the actual or probable will of the legislature, courts have no authority to do anything but invalidate a legislative enactment that violates the Constitution. Courts do not have authority to write new legislation.

Just as Judge Ginsburg thinks courts and legislatures are interchangeable players in developing desirable public policy, so she also equates judicial review with judicial repair. Judge Ginsburg writes that, without the power of "judicial repair," unconstitutional statutes would be "immunize[d] from judicial review"[35] and legislating would be left "to the political branches without judicial oversight."[36] This is patently absurd. Legislatures have the power to legislate. Courts have the power to review that legislation and determine whether it contravenes the Constitution. When it does, such legislation is void. This dramatic power literally to invalidate the actions of the elected branches is the essence, not the absence, of judicial review. Indeed, "judicial oversight" is perhaps too modest a label for this power.

D. A "Moderate" Theory of Abortion Rights?

In *Roe v. Wade*, the Supreme Court found that the "liberty" protected by the due process clause of the Fourteenth Amendment[37] includes "a woman's decision whether or not to terminate her pregnancy."[38] That theory has been applied in the years since 1973 to strike down virtually any restriction on abortion.

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[34] *Id.* at 324.

[35] *Id.* at 303.

[36] *Id.* at 317.

[37] 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."

[38] *Roe v. Wade*, 410 U.S. 113,153 (1973).

Judge Ginsburg has criticized the Court for basing its abortion doctrine on the due process clause rather than the equal protection clause.[39] In a 1992 article, Judge Ginsburg wrote that "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."[40]

1. an immoderate theory

The combination of Judge Ginsburg's criticism of *Roe* as "venturing too far" and her criticism of the decision's doctrinal foundation suggests that her preferred equal protection theory for abortion rights would be more moderate. At least two aspects of this theory, however, demonstrate otherwise.

First, applying the equal protection theory to abortion rights really means ignoring any discussion of "equality" as between similarly situated men and women and focusing instead solely on women. This, in turn, results in defining any abortion restriction as impermissible sex discrimination.

"The Constitution requires that [government] treat similarly situated persons similarly."[41] Yet men and women cannot be similarly situated with respect to either pregnancy or its termination. Claiming that abortion restrictions constitute discrimination against women on the basis of gender requires reference to the treatment of similarly situated persons of a different gender, namely, men. Anyone can see the conceptual difficulty this immediately creates. James Bopp concludes: "Logically, if pregnant women are not similarly situated with respect to nonpregnant persons, a law prohibiting abortion would not be a denial of equal protection to all women as a class and, therefore, not gender discrimination."[42]

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[39] 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).

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

[41] *Rostker v. Goldberg*, 453 U.S. 57,79 (1981). See also *Cleburne v. Cleburne Living Center*, 473 U.S. 432,439-40 (1985).

[42] Bopp, "Is Equal Protection a Shelter for the Right to Abortion?," in J. Butler & D. Walbert (eds.), *Abortion, Medicine, and the Law* (4th ed. 1992), at 167.

Since men cannot become pregnant and, therefore, cannot be situated similarly with women regarding pregnancy or its termination, the argument must necessarily take a different form and focus exclusively on women. Doing so actually requires ignoring the "equal" protection clause which, again, guarantees that similarly situated individuals be treated similarly. Even though an exclusive focus on women necessarily negates the entire equal protection argument, Judge Ginsburg wants just such a focus. She has written that *Roe* would be less subject to criticism "had the Court placed the woman alone...at the center of its attention."[43]

Focusing exclusively on women, as Judge Ginsburg insists, not only requires ignoring the very constitutional provision on which her theory supposedly rests, but it further complicates the argument. Restricting abortion means restricting a course of action that only women can pursue. As such, the theory must contend, restricting abortion is sex discrimination and a denial of equal protection by definition. One of Judge Ginsburg's former law clerks summarized this view: "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."[44] Roger Pilon counters:

> Disadvantageous treatment of a woman because of her pregnancy is treatment based, as the proposition states, on her pregnancy, nor 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.[45]

It is hardly a moderate position to assert that restricting a course of action that only women can pursue is, by definition, discrimination on the basis of sex. While Judge Ginsburg apparently feels that the Court did too much at one time in *Roe v. Wade*, over the long term her theory would mandate more radical results than the theory announced in *Roe*.

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[43] Ginsburg, *supra* note 22, at 382.

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

[45] Pilon, *supra* note 25.

Judge Ginsburg's preferred theory for abortion rights is far from moderate for a second reason. She has insisted that the case for constitutional protection of abortion rights is less about "state versus private control of a woman's body for a span of nine months"[46] than it is about "a woman's autonomous charge of her full life's course [or] her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen."[47] For this reason she has recently suggested support[48] for the Supreme Court's decision in *Planned Parenthood v. Casey*,[49] which also stated that the "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."[50]

This is a concrete example of one facet of Judge Ginsburg's activist judicial philosophy. She believes that judges can, and sometimes should, drive social trends, as well as respond to favorable social and political developments, through "creative" or "dynamic" changes in constitutional interpretation. In the context of abortion rights, Judge Ginsburg believes that federal courts have the authority simply to choose a particular social or political development of which they approve, or a preferred social theory, and then to change interpretation of the Constitution itself in order to accommodate those developments or theories.

This is truly a radical theory. Whatever a judge feels would help women "participate in the economic and social life of the Nation" could be constitutionally mandated through the equal protection clause. Mickey Kaus writes:

> It could be used to argue that abortion must be *subsidized* by the state as well as permitted....It could justify affirmative discrimination designed to compensate women for the extra burden of childrearing. It could even be used to strike down laws that are non-discriminatory on their face but that don't make allowances for women's reproductive disadvantage. (Is the forty-hour week unconstitutional?)[51]

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[46] Ginsburg, *supra* note 22, at 383.

[47] *Id.*

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

[49] 112 S.Ct. 2791 (1992).

[50] *Id.* at 2809.

[51] Kaus, *supra* note 3.

In *Roe v. Wade*, the Supreme Court held that elected representatives of the people may not choose one theory of life, namely, that it begins at conception, on which to base its regulation of abortion.[52] Yet Judge Ginsburg apparently believes that unelected federal judges are perfectly free to choose one theory of social and political relations on which to base their interpretation of the Constitution. By thus putting the Constitution in the service of politics, Judge Ginsburg provides a clear example of a shockingly activist judicial philosophy.

2. immoderate results

Judge Ginsburg's criticism of the due process basis for the Supreme Court's abortion doctrine is merely a function of political expediency. As noted above, she stressed the due process theory when trying to blunt criticism of the equal rights amendment. When she says that the decision in *Roe* "ventured too far in the change it ordered,"[53] "seemed entirely to remove the ball from the legislators' court,"[54] and "called into question the criminal abortion statutes in every state, even those with the least restrictive provisions,"[55] she is not criticizing the Court's failure to properly settle the constitutional issue. Rather, she is criticizing the Court's interruption of what she saw as progress toward a "stable settlement"[56] of the political issue. As she criticizes the Court for supposedly overreaching, in the same scholarly breath Judge Ginsburg laments that *Roe* "halted a political process that was moving in a reform direction."[57] She wants the job of broadening access to abortion accomplished and thinks that legislative liberalization rather than judicial fiat might be the best method at the moment.

Any suggestion that Judge Ginsburg, by simultaneously criticizing *Roe*'s doctrinal foundation and seemingly excessive political impact, would achieve more modest political results with her preferred equal protection theory is belied by her own writings. The Supreme Court has, in fact, applied the equal protection theory to abortion restrictions. In doing so, it has consistently held that the government is not constitutionally required to pay

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[52] *Roe*, 410 U.S. at 162.

[53] Ginsburg, *supra* note 22, at 381.

[54] Verbatim, *supra* note 48, at 11.

[55] Ginsburg, *supra* note 22, at 381.

[56] Verbatim, *supra* note 48.

[57] *Id.* See also Ginsburg, *supra* note 23, 718-19; Ginsburg, *supra* note 22, at 382; Ginsburg, *supra* note 40.

for abortions under any circumstances.[58] Judge Ginsburg has criticized these decisions as "incongruous"[59] and the "[m]ost unsettling of the losses" for woman's rights.[60] This is just one example of how Judge Ginsburg's application of the equal protection theory would invalidate restrictions that the Supreme Court has upheld under *Roe*. Mickey Kaus writes that "Ginsburg strongly implies that she *would* require government funding of abortions--hardly the `moderate' position."[61]

The bottom line is that Judge Ginsburg supports widely available legal abortion and chooses her social, political, and constitutional theories--as well as offers her praise and criticism--accordingly. Her politics drive her jurisprudence. It would be difficult to find a clearer example of judicial activism.

II. FROM ONE SIDE OF THE BENCH TO THE OTHER

Many analysts and activists continue to evaluate judges on the basis of the winners and losers in legal cases. In a recent column, for example, law professor David Cole described what he believes is Judge Ginsburg's "vision of justice" by a checklist of those with whom Judge Ginsburg "has sided" in her judicial decisions.[62] She has, he claims, "sided with conservatives"[63] on issues such as gay rights, racial discrimination, and criminal law. On the other hand, Cole observes, "she has authored opinions favorable to" liberal interests in other categories of cases.[64] He hopes she will be "a justice who is sympathetic to the claims of the politically weak."[65] In other words, she will be a good justice if she produces politically correct results.

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[58] See, e.g., *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977).

[59] Ginsburg, *supra* note 22, at 386.

[60] Ginsburg, "Gender in the Supreme Court: The 1976 Term," in B. Justice & R. Pore (eds.), *Constitutional Government in America* (1980), at 224.

[61] Kaus, *supra* note 3.

[62] Cole, "A Justice of Passion? We'll See.," *National Law Journal*, July 5, 1993, at 15.

[63] *Id.*

[64] *Id.* at 16.

[65] *Id.*

This is the wrong way to evaluate judges and Judge Ginsburg herself has suggested that she may not subscribe to this blatantly political approach to justice, criticizing those who blast the judiciary when their own "ox is being gored" rather than on a more principled basis.[66] This analysis, too, will attempt to evaluate Judge Ginsburg's record while on the U.S. Court of Appeals by what it reveals of her judicial philosophy rather than merely by a tally of winners and losers. It highlights 37 cases out of the hundreds in which Judge Ginsburg wrote majority or separate opinions.

A. A Judicial Record in Perspective

With the analysis of Judge Ginsburg's scholarly writings offered in *A Step in the Left Direction* and summarized above as a backdrop, this report moves on to survey the nominee's judicial record on the U.S. Court of Appeals for the District of Columbia Circuit to discover more clues about her judicial philosophy. For several reasons, this record is less reflective than it might be. First, the jurisdiction of the D.C. Circuit is dominated by regulatory and administrative law issues. These cases require the court merely to decide whether an agency adequately evaluated the basis for and alternatives to action it seeks to take.[67] At the same time, the court's docket is light on cases involving substantive constitutional issues or other elements that are more reflective of an individual's judicial philosophy.

Second, the Supreme Court is a fundamentally different court than the U.S. Court of Appeals. Judge Ginsburg herself has distinguished the two, writing that on mid-level appellate courts, "[u]nlike the Supreme Court," which do not face "grand constitutional questions," certain factors serve to "tug judges strongly toward the middle, toward moderation."[68] If confirmed, she will no longer be on a court where those factors tug judges toward moderation, but will be on the Supreme Court, facing grand constitutional questions, where judges' own predilections have freer rein.

Significantly, those riding on Judge Ginsburg's welcome wagon seem to forget the dogged insistence by Senate Democrats and liberal activists about this very point, albeit directed at Republican nominees. Law professor Laurence Tribe, testifying against the

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[66] Ginsburg, "Interpretations of the Equal Protection Clause," 9 *Harvard Journal of Law & Public Policy* 41,44 (1986).

[67] See, e.g., *Tongass Conservation Society v. Cheney*, 924 F.2d 1137 (D.C.Cir. 1991) (Judge Ginsburg concluded for the court--joined by Judges Patricia Wald and Clarence Thomas--that the Navy had adequately evaluated alternatives to its planned submarine testing range in Alaska and adequately evaluated its impact on the local tourist industry).

[68] Ginsburg, *supra* note 17, at 200.

Supreme Court nomination of Robert Bork in 1987, described the "fundamental difference between being on a court of appeals where one is operating within the bounds of precedent and being on the Supreme Court where one is making precedent."[69] He stressed the need to examine a nominee's extra-judicial writings and speeches "as a guide to what [a nominee] might do upon [the Supreme] Court."[70]

Similarly, law professor Paul Gewirtz testified at the same hearing:

> A Court of Appeals judge is obliged by his position in the judicial hierarchy to carry out Supreme Court precedent, and knows that if that obligation is ignored there is a higher court to reverse him. A Supreme Court Justice has much greater power because of the importance of the cases that come to the Court and because a Justice has the leeway to overrule prior Court decisions. In exercising the more extensive leeway that typically exists in cases before the Supreme Court, a Justice is likely to draw more extensively upon his or her deep-seated convictions about what the Constitution means and what a Justice's role is.[71]

Third, not only is a mid-level appellate judge bound by the Supreme Court, she is also bound by her own circuit's precedents. Changing the law is significantly easier on the Supreme Court than on the U.S. Court of Appeals. Three-judge appellate panels cannot change the law of a circuit by overruling another panel's decision on a particular point of law. There must be a motion for the entire circuit to re-hear a panel's decision and only the entire circuit can change the law of that circuit, something it is very reluctant to do. The entire Supreme Court, in contrast, considers each case and can change its own precedents without any similar intervening step.

B. Breaking Her Own Rules of Moderation

Judge Ginsburg's scholarly writings, as presented in *A Step in the Left Direction* and summarized above, demonstrate a strikingly activist judicial philosophy. The next question is whether she has similarly demonstrated her activism while on the bench. Those who have rushed to label Judge Ginsburg a moderate seem to assume that she has not. Again, analysis of the actual record belies the quick assertions of the pundits.

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[69] *Nomination of Robert H. Bork, supra* note 4, Part 2, at 1314.

[70] *Id.*

[71] *Id.* at 2561.

1. straying from the issues at hand

Judge Ginsburg has criticized "individualist judging,"[72] the practice of writing separate opinions, as well as judges who address issues not necessary for deciding the case in front of them. Yet in *Federal Election Commission v. International Funding Institute*,[73] she violated both of her own rules. In that case, the court, sitting en banc, upheld a Federal Election Commission rule forbidding the use of campaign fundraising lists by other political organizations. Judge Ginsburg wrote a separate statement to give a dissertation on how "taxing and spending decisions...*can* seriously interfere with the exercise of constitutional freedoms."[74] She specifically cited one of the Supreme Court's abortion funding decisions to assert that a "substantial constitutional question" would arise if the government withheld all Medicaid funding from women seeking abortions.[75]

This gratuitous statement not only had nothing to do with the case before the court, belying a moderate judicial style, but it was a wrong statement of the law. Judge Ginsburg cited the 1980 decision in *Harris v. McRae*,[76] yet failed to cite several other funding cases, including the 1989 decision in *Webster v. Reproductive Health Services*.[77] The Court has never held that denial of Medicaid benefits for abortion by either the state or federal government violates the Constitution under any circumstances. Judge Ginsburg has long insisted that these cases were wrongly decided, but they are the law nonetheless. Her gratuitous misstatement of the law in such an area that she cares particularly about raises doubts about her "moderation" and adherence to precedent when freed from any constraints on the Supreme Court.

In *Dronenberg v. Zech*,[78] Judge Ginsburg had criticized Judge Robert Bork for including in his opinion "a commentarial exposition of the opinion writer's viewpoint."[79] Yet that is exactly what Judge Ginsburg offered about a topic--abortion funding--that she

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[72] Ginsburg, *supra* note 17, at 200.

[73] 969 F.2d 1110 (D.C.Cir. 1992).

[74] *Id.* at 1118 (emphasis in original).

[75] *Id.* at 1119.

[76] 448 U.S. 297 (1980).

[77] 492 U.S. 490 (1989).

[78] 746 F.2d 1579 (D.C.Cir. 1984).

[79] *Id.* at 1582.

has written extensively about in the past. The relevance of abortion funding to a case involving Federal Election Commission regulations is not self-evident. She apparently breaks her own rules when it suits her.

2. straying from the law at hand

As noted above, mid-level appellate courts are bound by both their own precedents and the decisions of the Supreme Court. In her own opinions, Judge Ginsburg often emphasizes this fact, repeatedly claiming--whether accurately or not[80]--that Supreme Court decisions compel her conclusions. Judge Ginsburg has, however, again broken her own rules about writing separately to gratuitously address policy issues.

In *Federal Labor Relations Authority v. U.S. Department of the Treasury*,[81] for example, the court ruled that an FLRA order requiring disclosure by federal agencies of their employees' names to a federal employees' union violated the Privacy Act. Judge Ginsburg wrote separately to state that she "reluctantly"[82] agreed with the result because the Supreme Court's interpretation of the relevant statutes required it. She wrote that the Supreme Court should reconsider the issue and expressed her clear preference for the "public interest in the [collective] bargaining representative's ready access to unit employees" over the employees' "modest privacy interests."[83]

In *Government Employees Local 1843 v. Federal Labor Relations Authority*,[84] the court upheld as reasonable a decision by the FLRA that an agency had not committed an unfair labor practice by failing to withhold union dues from a reinstated employee's back pay award. Judge Ginsburg wrote separately to state that, if she were a member of the FLRA, she would have ruled otherwise,[85] a statement hardly necessary to decide the case before the court.

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[80] See the discussion of abortion funding cases, *supra* notes 76-77 and accompanying text.

[81] 884 F.2d 1446 (D.C.Cir. 1989).

[82] *Id.* at 1457.

[83] *Id.* at 1457-58.

[84] 843 F.2d 550 (D.C.Cir. 1988).

[85] *Id.* at 556 (Ginsburg, J., concurring).

C. Constitutional Interpretation

1. equal protection cases

Judges cannot pick their subject matter the way professors can. While the bulk of Judge Ginsburg's academic scholarship addressed the equal protection clause and gender discrimination, she has rarely addressed these issues as a judge.

In *Quiban v. Veterans Administration*,[86] Philippine World War II veterans and a deceased veteran's surviving spouse challenged federal statutes that excluded them from eligibility for veterans' benefit programs. They claimed this exclusion violated the Fifth Amendment's guarantee of equal protection. The court of appeals reversed the district court's grant of summary judgment for the plaintiffs.

This case raised two basic questions: the proper standard of review, and the result when applying that standard of review. Judge Ginsburg was careful to base her answer to both questions explicitly on Supreme Court precedent. She first concluded that, "[u]nder binding Supreme Court precedent,"[87] the lenient "rational basis test" rather than the "strict scrutiny test" should apply. She then found that "[t]he classifications in question, controlling authority instructs, have the requisite rationality."[88] She stressed this point again at the close of her opinion: "This case is controlled by [Supreme Court precedent], both as to the standard of review and as to the merits of the constitutional challenge. Under the lenient [Supreme Court] standard, we must conclude that section 107--while hardly generous to veterans of the Philippine Army and the New Philippine Scouts--is constitutional."[89]

Judge Ginsburg's response to one argument is noteworthy, albeit also based squarely on Supreme Court precedent. Counsel for an *amicus* argued that the plaintiffs were being discriminated against "based on an 'immutable' condition, a status they cannot change, *i.e.*, their status as World War II veterans of the Philippine armed forces."[90] Judge Ginsburg

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[86] 928 F.2d 1154 (D.C. Cir. 1991). Judges Douglas H. Ginsburg and Karen LeCraft Henderson joined Judge Ginsburg's opinion.

[87] *Id.* at 1156.

[88] *Id.*

[89] *Id.* at 1163.

[90] *Id.* at 1160 n.13.

responded that "the 'immutable characteristic' notion, as it appears in Supreme Court decisions, is tightly-cabined. It does not mean, broadly, something done that cannot be undone. Instead, it is a trait 'determined *solely* by accident of birth.'"[91]

This decision might be consistent with a restrained judicial philosophy, one not given to creating new rights or turning wants into entitlements. Yet it begs the question whether Judge Ginsburg herself holds these views, or would have decided these issues the same way in the absence of controlling Supreme Court precedent.

2. first amendment religion cases

a. free exercise clause

The First Amendment guarantees that "Congress shall make no law...prohibiting the free exercise [of religion]."[92] In *Goldman v. Secretary of Defense*,[93] a Jewish physician who had served in the military for 14 years faced court-martial for insisting on wearing a yarmulke in addition to his military uniform. A panel of the U.S. Court of Appeals upheld the action against Goldman, who made a motion for the entire court to re-hear the case. Judge Ginsburg, joined by then-Judge Antonin Scalia, dissented from the majority's decision not to re-hear the case. She stated her belief that the military's action "suggests 'callous indifference' to Dr. Goldman's religious faith, and it runs counter to 'the best of our traditions' to 'accommodate[] the public service to the[] spiritual needs [of our people].'"[94]

Judge Ginsburg expressed agreement with the opinion of Judge Kenneth Starr, also dissenting from the denial of re-hearing, who likewise cited "the spirit of accommodation which the Constitution, as interpreted by the Supreme Court, requires."[95]

This short statement by Judge Ginsburg is frequently mentioned in the media, though only with reference to the outcome it urges--upholding an individual's right to exercise his religion. Yet it reveals little by itself about Judge Ginsburg's own agreement or disagreement with the Supreme Court's emphasis on accommodation or the principles she

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[91] *Id.* (citations omitted).

[92] The Supreme Court has applied the free exercise clause to the states as well. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[93] 739 F.2d 657 (D.C.Cir. 1984).

[94] *Id.* at 660 (citation omitted).

[95] *Id.* at 659.

feels are important in interpreting constitutional provisions such as the free exercise clause. Does she believe that some kind of subjective "callous indifference" standard should be applied? Would she look to the meaning of "free exercise" intended by those who framed that constitutional language? Her brief statement in *Goldman* certainly does not answer these questions, though their answer would seem essential to a proper evaluation of Judge Ginsburg's nomination to the Supreme Court, which has the power to shape free exercise jurisprudence.

In *Leahy v. District of Columbia*,[96] an individual raised a religious objection against the District of Columbia's regulation that each applicant for a driver's license provide his Social Security number. The district court denied the plaintiff's motion for summary judgment and dismissed the case. Judge Ginsburg, for the court of appeals,[97] concluded that the district court had misread a relevant Supreme Court precedent and applied a test that only a minority of the Court had approved. Judge Ginsburg stated the correct test and applied it to conclude that the government had not met its burden. She then remanded the case to the district court to determine the sincerity of the plaintiff's religious belief.

In *Olsen v. Drug Enforcement Administration*,[98] an individual claimed to be a priest in the Ethiopian Zion Coptic Church. Claiming that the church's sacrament was marijuana, he sought a religious-use exemption from federal law prohibiting use of the drug. Acknowledging that the government has a compelling interest in preventing marijuana use, Judge Ginsburg concluded that the pivotal issue "is whether marijuana usage by [members of the church] can be accommodated without undue interference with the government's interest in controlling the drug."[99] Following the lead of the U.S. Courts of Appeals for the First, Eighth, and Eleventh Circuits, she decided that "[w]e have no reason to doubt that these courts have accurately gauged the Highest Court's pathmarks in this area"[100] and affirmed the district court's denial of an exemption.

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[96] 833 F.2d 1046 (D.C.Cir. 1987).

[97] U.S. Circuit Judge Kenneth Starr and U.S. District Judge Gerhard Gesell, sitting by designation, joined in the opinion.

[98] 878 F.2d 1458 (D.C.Cir. 11989). Judge Laurence Silberman joined Judge Ginsburg's opinion. Judge James Buckley filed a dissenting opinion.

[99] *Id.* at 1462.

[100] *Id.*

b. establishment clause

In *Murray v. Buchanan*,[101] taxpayers challenged payment of salaries and expenses for chaplains serving the U.S. House of Representatives and the U.S. Senate. The district court dismissed the complaint. The court of appeals held that, under Supreme Court precedent,[102] payment of such salaries and expenses did not violate the establishment clause of the First Amendment.[103] Judge Ginsburg, joined by Senior Judge David Bazelon, concurred in a separate statement. She declined to give her own discussion of the constitutional issue, resting instead on the "unambiguous[]"[104] instruction from the Supreme Court on how the case should be decided on the merits.

3. first amendment free speech cases

In *American Postal Workers Union v. United States Postal Service*,[105] a postal employee was fired for claiming, in an article promoting universal unionization in his union newsletter, to have read the mail he had been handling. He challenged his discharge as violating the First Amendment's guarantee of free speech. The district court ruled for the employee. The court of appeals, in an opinion by Chief Judge Patricia Wald joined by Judge Ginsburg, affirmed. The employee, however, was not discharged for having written an article or for expressing a particular opinion about unionization. Rather, the employee was discharged for having read the mail he was handling, albeit a fact revealed in a newsletter article. This distinction can easily be demonstrated by observing that he could have expressed his views about unionization without admitting to the unlawful behavior. Unable to distinguish between a subject of public concern (unionization) and an admission of unlawful behavior, the court held that the first effectively sanctified the second. It appears that a subjective appraisal of the results in this case prevented the court from observing this necessary distinction.

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[101] 720 F.2d 689 (D.C.Cir. 1983).

[102] See *Marsh v. Chambers*, 463 U.S. 783 (1983).

[103] The establishment clause of the First Amendment reads: "Congress shall make no law respecting an establishment of religion."

[104] *Murray*, 720 F.2d at 699 (statement of Ginsburg, J.).

[105] 830 F.2d 294 (D.C.Cir. 1987). Judge Robert Bork dissented.

Community for Creative Non-Violence v. Watt[106] provides an example of Judge Ginsburg's politics driving her jurisprudence. In this case, the National Park Service issued a permit to the Community for Creative Non-Violence (CCNV) to conduct a round-the-clock demonstration on the Mall and in Lafayette Park to draw attention to the plight of the homeless but denied the participants a permit to sleep in those locations because sleeping would violate the Park Service's anti-camping regulations. Claiming that sleeping is an exercise of free speech, CCNV brought suit to invalidate the permit's limitation on sleeping. The district court ruled for the Park Service. The court of appeals, sitting en banc, reversed. Judge Ginsburg agreed with the result, though she found the case "close and difficult."[107] She rejected then-Judge Antonin Scalia's position that the First Amendment only protected spoken and written thought as an "arbitrary, less-than-fully baked" theory.[108] She also hesitated to accept the more liberal position that "the on-site sleep of a round-the-clock demonstrator" is indistinguishable from leaflet distribution, speeches, or flag displays.[109]

Instead, Judge Ginsburg insisted that "sleeping in symbolic tents" has a "personal, non-communicative aspect" that bears a "close, functional relationship" to standing or sitting in such tents, that is, it guarantees that a demonstrator is physically present to sustain the round-the-clock demonstration.[110] This "linkage...suffices to require a genuine effort to balance the demonstrators' interests against [the government's] concern."[111] She insists that "the non-communicative component of the mix reflected in CCNV's request for permission to sleep...facilitates expression."[112] It remains a mystery, one that Judge Ginsburg made no attempt to solve, why her division of sleeping into communicative and non-communicative components is any less arbitrary or any more baked than Judge Scalia's theory.

What are the limits of Judge Ginsburg's theory? Would she give formal First Amendment protection to any "non-communicative component of the mix" in a particular case that "facilitates expression"? If so, then her theory would sweep far beyond even the liberal position taken by the majority in this case--a position she would not join. Where would she look for guidance about how to answer these questions? Is this a case in which she would apply an emphasis from her scholarly writings, namely, that courts should change

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[106] 703 F.2d 586 (D.C.Cir. 1983).

[107] *Id.* at 605 (Ginsburg, J., concurring in the judgment).

[108] *Id.* at 605.

[109] *Id.* at 606.

[110] *Id.* at 607.

[111] *Id.*

[112] *Id.* at 608.

their interpretation of the Constitution to accommodate a desirable vision of a just and equitable society? Again, the answers to these questions are critical to a proper evaluation of Judge Ginsburg's nomination to the Supreme Court.

In *Action for Children's Television v. Federal Communications Commission*,[113] the court reviewed an FCC regulation limiting broadcast of indecent programming to the period from midnight to 6:00 a.m. Judge Ginsburg held that the Supreme Court's decision in *FCC v. Pacifica Foundation*[114] shielded the FCC's definition of "indecent" programming from challenge but decided that the FCC had not adequately justified the time restriction for such programming. She emphasized that the FCC's role was to assist parents rather than to replace parents in making viewing decisions for children.[115]

4. fifth amendment takings cases

Judge Ginsburg has demonstrated serious effort to keep her opinions involving the Fifth Amendment's takings clause[116] limited. In *Hohri v. United States*,[117] the plaintiffs sought money damages and a declaratory judgment stemming from the internment of Japanese-Americans during World War II. The district court dismissed all claims. The court of appeals affirmed, except with respect to the claim that the internment constituted an uncompensated taking of their property in violation of the Fifth Amendment. Judge Ginsburg joined a statement accompanying denial by the full court of appeals to re-hear the panel decision. That statement criticized Judge Robert Bork's dissent from the denial of re-hearing as full of "rhetorical excess"[118] and evidence that he had "succumbed to the

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[113] 852 F.2d 1332 (D.C.Cir. 1988). Judges Spottswood Robinson and David Sentelle joined her opinion.

[114] 438 U.S. 726 (1978).

[115] *Id.* at 1334 ("the Commission's avowed objective is not to establish itself as censor but to *assist parents* in controlling the material young children will hear") (emphasis in original); *id.* at 1343-44 ("the government does not propose to act *in loco parentis* to deny children's access *contrary to* parents' wishes....[T]he government's role is to facilitate parental supervision of children's listening") (emphasis in original).

[116] The Fifth Amendment states that "nor shall private property be taken for public use without just compensation."

[117] 793 F.2d 304 (D.C.Cir. 1986).

[118] *Id.* at 314.

temptation to overstate and overwrite."[119] She claimed the panel opinion--which she joined-- turned "on what we find to be the situation-specific holding" of relevant Supreme Court precedents.[120]

In *Boston and Maine Corp. v. Interstate Commerce Commission*,[121] the court reviewed an ICC decision approving a request by Amtrak to condemn miles of railroad track and convey them to another railroad. Judge Ginsburg agreed with granting the petition for review and remanding the case to the ICC, but stressed that "I rely on the inadequacy of the Commission's assessment *in this case*, not on the precedent-setting construction of the statute decreed by the majority opinion."[122]

5. fifth amendment due process cases

In *Robinson v. Palmer*,[123] prison officials suspended visits by an inmate's wife for one year after she was found smuggling marijuana to him. The Department of Corrections subsequently changed its policy to require permanent suspension of visiting privileges for anyone attempting to bring in contraband. The inmate's wife challenged application of the new policy to her and the district court held that her suspension could not be permanently extended without notice and an opportunity for her to be heard. Judge Ginsburg, for the court of appeals, reversed and held, under existing Supreme Court precedent, that a felon's expectation of privacy is too insubstantial to invoke the full procedural protections of the due process clause.[124]

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[119] *Id.* at 315.

[120] *Id.* at 313 (statement of Judges Wright and Ginsburg).

[121] 911 F.2d 743 (D.C.Cir. 1990). Judge James Buckley wrote the opinion for the court.

[122] *Id.* at 753 (Ginsburg, J., concurring) (emphasis in original).

[123] 841 F.2d 1151 (D.C.Cir. 1988). Judge James Buckley and Senior Judge Thomas Fairchild, sitting by designation, joined the opinion.

[124] *Id.* at 1155.

D. Separation of Powers

Judge Ginsburg has criticized the judicial practice of writing separate opinions[125] and has emphasized that, on mid-level appellate courts, factors operate to tug judges toward moderation.[126] This may be true in cases devoid of significant issues of constitutional import. In cases raising such issues, however, Judge Ginsburg does indeed write separately and indicates what she might do on a court where factors tugging judges toward moderation no longer exist.

In *In re Sealed Case*,[127] former government officials challenged the authority of independent counsels appointed under the Ethics in Government Act to issue subpoenas compelling their testimony before a grand jury. The district court ruled against them. The court of appeals reversed. Writing in dissent, Judge Ginsburg provided another example of how her politics drive her jurisprudence[128] in a case involving a "grand constitutional controversy."[129]

In her scholarship, Judge Ginsburg has approved of the courts changing their interpretation of the Constitution in light of social and political developments.[130] In this case, we see that this kind of overt activism similarly infects her judicial writings. The asserted policy goal of the Ethics in Government Act--curbing "abuses of executive branch power"[131]--justifies for Judge Ginsburg turning the structural imperative of separated powers mandated by the Constitution into a subjective test barring only what judges feel is "undue displacement of executive branch prerogatives."[132] When the Supreme Court eventually reversed the court of appeals, Justice Antonin Scalia characterized Judge Ginsburg's position, which the majority had adopted, this way: "The Court has...replaced the clear constitutional prescription what the executive power belongs to the President with a

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[125] See *supra* notes 17-19 and accompanying text.

[126] See *supra* note 27 and accompanying text.

[127] 838 F.2d 476 (D.C.Cir. 1984). Judge Laurence Silberman, joined by Judge Stephen Williams, wrote the opinion for the court.

[128] See *supra* notes 13-16 and accompanying text.

[129] *In re Sealed Cases*, 838 F.2d at 531 (Ginsburg, J., dissenting).

[130] See *supra* notes 8-11 and accompanying text.

[131] *In re Sealed Cases*, 838 F.2d at 518 (Ginsburg, J., dissenting).

[132] *Id.* at 518 (emphasis added).

'balancing test.'...Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis."[133]

Quite in contrast to Judge Ginsburg's subjective, functional approach to the separation of powers in *In re Sealed Case*, in *National Federation of Federal Employees v. Brown*[134] she took a decidedly more rigid approach. In this case, unions challenged imposition by the executive branch of a cap on pay increases under a statute authorizing adjustment of pay rates consistent with the public interest. Emphasizing the "structure of government--the separation of powers--established by the Constitution,"[135] Judge Ginsburg held in this 2-1 decision that the President may not cap pay increases without relying on congressionally established standards.

In *Walker v. Jones*,[136] a former congressional employee claimed she had been discharged because of her gender. The district court dismissed the action and the court of appeals, Judge Ginsburg writing, reversed. The Constitution gives each house of Congress authority to determine its own rules of internal governance. As Judge MacKinnon pointed out in dissent, "subject only to clear constitutional limitations, that power is 'absolute and beyond the challenge of any other body or tribunal.' What this means is that the House has virtually unquestionable authority to decide what activities constitute internal legislative matters, and to regulate, manage, or oversee those matters as it sees fit."[137] Even so, Judge Ginsburg, in what the dissent called a "sharp departure from existing law,"[138] created her own categories of activities over which Congress had unfettered control and those which the courts could regulate.

In *Doe v. Casey*,[139] a former CIA employee claimed he was improperly dismissed because he had revealed his homosexuality. The National Security Act allows the CIA director "in his discretion" to "terminate the employment of any employee...whenever he shall deem such termination necessary or advisable in the interest of the United States." Judge Ginsburg joined the decision for the plaintiff. The majority created a rule that, quite

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[133] *Morrison v. Olson*, 487 U.S. 654,711-12 (1988) (Scalia, J., dissenting).

[134] 645 F.2d 1017 (1981). Judge Harry Edwards joined the opinion.

[135] *Id.* at 1024.

[136] 733 F.2d 923 (D.C.Cir. 1984). Judge Malcolm Wilkey joined the opinion.

[137] *Id.* at 939 (MacKinnon, J., dissenting in part), quoting *United States v. Ballin*, 144 U.S. 1,5 (1892).

[138] *Id.* at 938.

[139] 796 F.2d 1508 (D.C.Cir. 1986). Judge Harry Edwards wrote the opinion for the court. Judge James Buckley dissented.

contrary to the plain language of the National Security Act, any dismissal must actually be in the national interest--as measured by the judiciary, of course--rather than that the CIA director's exercise of discretion be reasonable. As Judge James Buckley pointed out in dissent: "The majority[] misreads [the National Security Act] to require that the discharge...actually be in the national interest. All that the statute prescribes is that the Director deem it to be. The majority fails to draw the necessary distinction between judicial confirmation of the Director's purpose...and that determination's correctness. While a court may satisfy itself of the former, it may not inquire into the latter."[140]

Judge Ginsburg invoked a rigid concept of structural separation of power to rule in favor of a labor union, adopted a subjective concept of undue displacement to rule in favor of investigating the executive branch, delved into matters of internal legislative administration to preserve a claim of gender discrimination, and misread a federal statute to keep alive a claim of discrimination on the basis of sexual orientation. It appears she changes jurisprudential stripes in the pursuit of politically correct results.

E. Standing

In *Wright v. Regan*,[141] parents of black children attending public schools in Memphis, Tennessee, claimed the Internal Revenue Service failed "on a nationwide basis"[142] to confine tax exempt status to private schools that do not discriminate.[143] The district court dismissed the action because the plaintiffs lacked standing to bring the lawsuit. Plaintiffs are required to demonstrate a real injury upon their own legal rights in order to

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[140] *Id.* at 1528 (Buckley, J., dissenting) (emphasis in original).

[141] 656 F.2d 829 (D.C.Cir. 1981). Judge J. Skelly Wright joined the opinion. Judge Tamm dissented.

[142] *Id.* at 825.

[143] Under 501(c)(3) of the Internal Revenue Code, schools are exempt from federal income, Social Security, and unemployment taxes. Contributions to such organizations are tax-deductible. In *Green v. Connally*, 330 F.Supp. 1150 (D.D.C. 1971), a three-judge district court held that the Internal Revenue Code requires "denial and elimination of Federal tax exemption for racially discriminatory private schools and of Federal income tax deductions for contributions to such schools." *Id.* at 1156. The Supreme Court summarily affirmed this decision. *Coit v. Green*, 404 U.S. 997 (1971). The IRS subsequently adopted guidelines to determine whether schools nationwide requesting or holding tax exempt status are discriminatory.

properly invoke a court's jurisdiction. In an opinion by Judge Ginsburg, and over a dissent describing her opinion as "boldly creating new law on the jurisdiction of federal courts"[144] and an opinion "to be deplored as a statement of jurisprudential principle,"[145] reversed.

The plaintiffs in this case challenged the granting of tax exempt status to private schools, yet did not and had no intention of sending their own children to private schools. As Judge Ginsburg described their position: "The sole injury they claim is the denigration they suffer as black parents and schoolchildren when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth....The very act by the IRS of according tax exemption to a school that discriminates in their vicinity causes immediate injury to them, plaintiffs maintain, and that is the only injury for which they seek redress."[146] That is, they challenged government policy and action in the abstract, absent an application of that action or policy to them or any deprivation of any legal rights.

Judge Ginsburg claimed that "as an intermediate court of review, we select from two divergent lines of Supreme Court decision the one we believe best fits the case before us."[147] When the Supreme Court voted 6-2 to reverse Judge Ginsburg,[148] it became clear that she made the wrong choice. The Supreme Court held that a general claim to have the government act according to the law is not an injury in fact to the cognizable legal rights of the plaintiffs. Similarly, the Court held that a general claim of stigmatizing injury because of the presence somewhere of discriminatory government action, without proof that individuals had been personally discriminated against, is clearly insufficient to establish standing and, therefore, the court's jurisdiction.

As the Supreme Court explained, the doctrine of standing is an essential element of "the idea of separation of powers on which the Federal Government is founded."[149] As with the separation of powers cases summarized above, this is another example of how Judge Ginsburg makes her jurisprudence fit her politics.

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[144] *Id.* at 838 (Tamm, J., dissenting).

[145] *Id.* at 839 n.1.

[146] *Id.* at 827.

[147] *Id.* at 828.

[148] *Allen v. Wright*, 468 U.S. 737 (1984). Justice Thurgood Marshall did not participate.

[149] *Id.* at 750.

In *Women's Equity Action League v. Cavazos*,[150] Judge Ginsburg found that the Women's Equity Action league had standing to sue the Department of Education for failing to properly enforce Title VI of the 1964 Civil Rights Act, which conditions receipt of federal education funds on the absence of race discrimination. The court of appeals previously remanded this matter to the district court to decide the standing question in light of the Supreme Court's decision in *Allen v. Wright* which reversed Judge Ginsburg's decision in *Wright v. Regan*, discussed above. The plaintiffs in *Wright* had no connection with an educational institution allegedly engaged in prohibited discrimination; they merely had an interest in the problem. "The fact that the *Allen* plaintiffs neither attended nor sought to attend the private schools in question proved fatal to their claim."[151] In contrast, the plaintiffs in *Women's Equity Action League*, or those they represented, were actually enrolled or employed in the educational institutions allegedly engaged in prohibited discrimination.

In *Kurtz v. Baker*,[152] an atheist philosophy professor requested permission to offer remarks during the period at the opening of each daily session of Congress reserved for prayer. The chaplains of the House and Senate denied the request and Dr. Kurtz brought suit. The district court ruled that he had standing to sue, and the court of appeals reversed. The court found that Kurtz had established sufficient "injury in fact" by alleging that he had "been prevented from addressing each house of Congress."[153] But the court next decided that this injury could not be said to have been caused by the chaplains' rejection of Kurtz's requests because there was no allegation, or any proof, that the chaplains had the authority to grant those requests. There is, therefore, no "'substantial probability'"[154] that Kurtz would be allowed to speak but for the chaplains' denial of his request.

Judge Ginsburg dissented on this point, but went out of her way to avoid the conclusion that Dr. Kurtz lacked standing to raise his claim. She twisted Kurtz's claim into something that helped her reach her own conclusion, but also into something that his complaint did not allege. She insisted that "Kurtz's claim...is inevitably an attack on Congress' customary, opening-with-prayer observance."[155] She thus confused the underlying issue of whether a chaplain-led prayer is constitutional with the real issue of standing, that is, whether Dr. Kurtz could properly raise the issue. Since the Supreme Court

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[150] 879 F.2d 880 (D.C.Cir. 1989). Judge David Sentelle and Chief Judge Edward Re of the Court of International Trade, sitting by designation, joined in the opinion.

[151] *Id.* at 885.

[152] 829 F.2d 1133 (D.C.Cir. 1987). Judge James Buckley, joined by Judge Douglas Ginsburg, wrote the opinion for the court.

[153] *Id.* at 1142.

[154] *Id.*, quoting *Warth v. Seldin*, 422 U.S. 490,504 (1975).

[155] *Id.* at 1147.

has held that the practice does not violate the Constitution,[156] she wrote that "I would so hold directly and would not avoid the question by a circuitous determination that Kurtz lacks standing to seek its settlement."[157]

To the extent that Judge Ginsburg hereby shows a preference for deciding cases on the merits rather than for first addressing questions--like standing--affecting the court's jurisdiction, she herself completely refutes any claim of moderation made for her by her apologists and shows a more aggressive activism than those apologists are willing to admit. To the extent that she confuses the issues of merits and jurisdictions, she evidences an disturbing lack of ability.

Another example of how Judge Ginsburg stretches the limits of the standing doctrine to accommodate a political interest with which she has sympathy is *Spann v. Colonial Village, Inc.*.[158] Individual and organizational plaintiffs brought suit against the manager of a condominium development which, they claimed, ran discriminatory advertisements in the *Washington Post* in violation of the Fair Housing Act. The plaintiffs claimed that advertisements utilizing white models "indicate a preference based race" prohibited by the Fair Housing Act that "impelled the [plaintiffs] to devote resources to checking or neutralizing the ads' adverse impact."[159] Such "concrete drains on their time and resources"[160] constitute an injury sufficient, they said, to confer standing to sue.

In this case, an organization made a subjective judgment about the message being sent by an advertisement. That organization made another subjective judgment about the need for it to respond to the message it deemed was sent by the advertisement. The organization made yet another subjective judgment about the form its response should take. It is by no means clear that the conclusion reached through such a series of judgments constitutes the kind of "actual or threatened injury in fact that is fairly traceable to the

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[156] See *Marsh v. Chambers*, 463 U.S. 783 (1983).

[157] *Kurtz*, 829 F.2d at 1147-48.

[158] 899 F.2d 24 (D.C.Cir. 1990).

[159] *Id.* at 27.

[160] *Id.* at 29.

alleged illegal action"[161] required by the Supreme Court for standing to exist. It seems closer to the "abstract concern with a subject"[162] or an "organization's abstract social interests"[163] that remains insufficient to confer standing.

Similarly, in *Action Alliance of Senior Citizens v. Heckler*,[164] several organizations seeking to improve the lives of the elderly through information, counseling, and service referral brought suit challenging implementation of the Age Discrimination Act by the Department of Health and Human Services. These organizations challenged the content of specific regulations and the Department's supposed failure to act on regulations proposed by other agencies. A federal magistrate concluded that the organizations thereby lacked standing to bring suit. The court of appeals reversed on this point. Judge Ginsburg wrote that there were "concrete organizational interests detrimentally affected"[165] that justified standing in this case. Because two of the challenged regulations--which reduced the level of compliance reports and eliminated the need for certain types of evaluations--restricted the flow of information available to organizations that, like the plaintiffs in this case, work to counsel individuals and otherwise refer them for provision of services, these organizations' "programmatic concerns" rather than "ideological interests" were affected.[166]

The plaintiff organizations were not the subject of the regulations. The regulations did not operate to affect these organizations in any direct way whatsoever. Rather, regulations that decrease the amount of bureaucratic activity necessary for service delivery are said to "inhibit[]...the[] daily operations"[167] of organizations that simply deal in information about the bureaucracy. This creates a completely unwarranted incentive to constantly expand government bureaucracy through initiation of lawsuits by organizations which, while not subject to government regulations, nevertheless deal in information about those government regulations.

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[161] *Valley Forge Christian College v. American United for Separation of Church and State*, 454 U.S. 464,472 (1982).

[162] *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26,40 (1976).

[163] *Havens Realty Corp. v. Coleman*, 455 U.S. 363,379 (1982).

[164] 789 F.2d 931 (D.C.Cir. 1986). Judge Harry Edwards and Senior Judge Thomas Fairchild of the U.S. Court of Appeals for the Seventh Circuit, sitting by designation, joined the opinion.

[165] *Id.* at 937.

[166] *Id.*

[167] *Id.*

In *Public Citizen v. National Highway Traffic Safety Administration*,[168] environmental and consumer organizations challenged a rule issued by the NHTSA setting mandatory fuel economy standards for automobiles. They claimed that their members wished to purchase more fuel-efficient automobiles and the NHTSA standards were too low. That is, organizations claimed that the agency should have done something more to their liking and the court granted them standing on this ground. This is a striking expansion of the standing doctrine which opens up the floodgates to litigation by persons whose only interests that are injured are their policy preferences.

It does not require more examples to establish the point. In case after case where public interest organizations bring lawsuits, Judge Ginsburg massages and stretches the standing doctrine to advance politically correct claims--e.g., discrimination and environmental--to go forward. Perhaps it is merely coincidence that the causes championed by these groups parallel the liberal political agenda. On the other hand, perhaps Judge Ginsburg's politics drives her jurisprudence.

F. Civil Rights Cases

Judge Ginsburg's application of the standing doctrine produces results in curiously close parallel to the liberal political agenda. Several decisions addressing jurisdictional issues in civil rights cases produce the same parallel--denying a race discrimination claim to whites, while allowing another employment discrimination claim as well as environmental interests to proceed with their suits.

In *Dougherty v. Barry*,[169] eight white firefighters claimed race discrimination in the promotion of black firefighters to the position of deputy fire chief. The district court ruled for the plaintiffs and ordered back pay and retirement benefits as if each of the eight plaintiffs had been promoted. The court of appeals vacated that decision, ordering the complaint dismissed because it was filed more than 90 days after the plaintiffs received the requisite letter from the Equal Employment Opportunity Commission notifying them of their right to sue. It made no difference that the EEOC later issued a second right to sue letter that the plaintiffs thought brought with it another 90-day period in which to sue.

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[168] 848 F.2d 256 (D.C.Cir. 1988). Judge Abner Mikva joined the opinion. Judge Laurence Silberman dissented.

[169] 869 F.2d 605 (D.C.Cir. 1989). Judges Kenneth Starr and David Sentelle were on the panel although Judge Starr, who had been nominated to be Solicitor General, did not participate in the decision.

While construing this time limit rigidly, Judge Ginsburg took a more flexible approach in *Bayer v. U.S. Department of the Treasury,*[170] in which the plaintiff alleged discrimination based on religion. The plaintiff failed to contact the Equal Employment Opportunity Commission within 30 days of the alleged discrimination as required by federal regulations. The district court dismissed the complaint. The court of appeals reversed, this time holding that the plaintiff may have been unaware of the 30-day time limit, thus making summary judgment for the government inappropriate.

In *Center for Nuclear Responsibility v. U.S. Nuclear Regulatory Commission,*[171] A public interest organization challenged a ruling of the Nuclear Regulatory Commission that proposed amendments to a nuclear power plant's operating license presented no significant hazards and could be immediately effective without a pre-determination hearing. The district court dismissed the complaint. The plaintiff organization waited more than three months to file an appeal, outside the 60 days required by the Federal Rules of Appellate Procedure. The court of appeals affirmed. Judge Ginsburg dissented, claiming that the plaintiff was confused about the proper appellate forum. She rejected the majority's application of the time limit as a "mechanical analysis" that should not prevent the plaintiff's "long-sought day in court."[172]

Mosrie v. Barry[173] gave Judge Ginsburg the opportunity to apply Supreme Court precedent with which she clearly disagreed. In this case, a police officer claimed that his lateral transfer and public criticism of his performance by supervisors deprived him of a liberty interest and entitled him to additional procedural protections that had not been afforded him. The district court ruled for the government. The court of appeals affirmed because the loss suffered by the plaintiff did not rise to the level required by the Supreme Court in *Paul v. Davis.*[174] Judge Ginsburg concurred, but wrote separately to harshly criticize the Supreme Court's decision in *Paul.* She wrote: "Until the Court revisits the question whether a person's good name is a liberty interest, protected by the Constitution against arbitrary government deprivation, we are obliged to follow *Paul v. Davis,* and its

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[170] 956 F.2d 330 (D.C.Cir. 1992). Chief Judge Abner Mikva and Judge Ray Randolph joined the opinion.

[171] 781 F.2d 935 (D.C.Cir. 1986). Judge J. Skelly Wright, joined by Judge Patricia Wald, wrote the opinion for the court.

[172] *Id.* at 946 (Ginsburg, J., dissenting).

[173] 718 F.2d 1151 (D.C.Cir. 1983). Judge Robert Bork, joined by Chief Judge Spottswood Robinson, wrote the opinion for the court.

[174] 424 U.S. 693 (1976).

strained reading of earlier decisions. Based on the accurate rendition of *Paul v. Davis*' reasoning in Judge Bork's opinion, but emphasizing penetrating criticism of the High Court's opinion, I concur."[175]

In *Mosrie*, Judge Ginsburg wrote an opinion separate from Judge Robert Bork's majority to offer her own critical commentary about a Supreme Court decision. Just one year later, Judge Ginsburg wrote an opinion separate from Judge Bork's majority to criticize him for offering "a commentarial exposition of the opinion writer's viewpoint"[176] about certain Supreme Court decisions. Judge Ginsburg apparently departs from her own rules about moderation when it suits her political fancy.

G. Criminal Cases

Liberal activists and most in the media establishment focus on a tally of winners and losers and conclude that a judge who rules for the government is bad while a judge who rules for criminal defendants is good. Under this standard, Judge Ginsburg has a decidedly mixed record.

In *United States v. Eccleston*,[177] a jury convicted Trevor Eccleston of narcotics and firearms offenses. The court of appeals reversed, holding that the circumstantial evidence in the case was "just barely sufficient to sustain the verdict."[178] She was convinced that improper admission of hearsay testimony by a police officer prejudiced that testimony and the district court should have ordered a mistrial.

In *United States v. Russell*,[179] Charles Russell was convicted of narcotics and firearms charges. The court of appeals affirmed, upholding warrantless searches where plain view or the shape or feel of objects justified it and disapproving of a warrantless search of a grocery bag where no such factors were present.

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[175] *Mosrie*, 718 F.2d at 1163 (Ginsburg, J., concurring).

[176] *Dronenberg v. Zech*, 746 F.2d 1579 (D.C.Cir. 1984).

[177] 961 F.2d 955 (D.C.Cir. 1992). Judges James Buckley and Douglas Ginsburg joined the opinion.

[178] *Id.* at 955.

[179] 655 F.2d 1261 (D.C.Cir. 1981). Judges Spottswood Robinson and Malcolm Wilkey joined the opinion.

In *United States v. Harrington*,[180] the judge sentencing Kelvin Harrington for narcotics offenses departed from the federal sentencing guidelines, giving him a more lenient sentence because Harrington's potential for rehabilitation was a mitigating factor inadequately considered in the guidelines. The court of appeals vacated the decision and remanded the case for resentencing, disagreeing with the district court's analysis but finding a niche in the existing guidelines--acceptance of personal responsibility for one's criminal conduct--for what the court deemed to be Harrington's post-offense rehabilitative conduct. As the dissenting judge observed: "A defendant's participation in a drug treatment program does not evince his acceptance of responsibility for the crime he committed, even where--as here--that crime was distributing illegal drugs. Rather, it demonstrates only the defendant's desire to improve himself...and perhaps to obtain a lighter sentence."[181]

In *United States v. Chin*,[182] a jury convicted Andrew Chin of narcotics charges and of using a juvenile to avoid detection for a drug offense. The court of appeals affirmed, holding that the police officer had probable cause to arrest Chin and upholding admission of expert drug testimony. Observing that the federal statute prohibiting the use of juveniles to avoid detection "is not a model of meticulous drafting,"[183] Judge Ginsburg followed the lead of three other courts of appeals to conclude that actual knowledge of the juvenile's age is not an element of the crime.

In *United States v. Gibson*,[184] a jury convicted Bernard Gibson of narcotics charges. The court of appeals affirmed the conviction, upholding the search of a purse found in a car and into which a police officer had observed money and a packet of white substance being placed under both the automobile exception to the warrant requirement and the plain view doctrine.

In *United States v. Watley*,[185] a jury convicted Andre Watley of using a firearm during a drug offense and other narcotics charges. The district court denied a pre-sentence motion to withdraw the guilty plea. The court of appeals vacated the district court's decision and remanded, holding that erroneous information about the possible sentence the defendant would face made his guilty plea involuntary.

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[180] 947 F.2d 956 (D.C.Cir. 1991). Judge Harry Edwards filed a concurring opinion and Judge Laurence Silberman filed a dissenting opinion.

[181] *Id.* at 970-71.

[182] 981 F.2d 1275 (D.C.Cir. 1992). Judges Harry Edwards and Stephen Williams joined the opinion.

[183] *Id.* at 1279.

[184] 636 F.2d 761 (D.C.Cir. 1981). Judges Spottswood Robinson and Malcolm Wilkey joined the opinion.

[185] 987 F.2d 841 (D.C.Cir. 1993). Judges Patricia Wald and Laurence Silberman joined the opinion.

In *United States v. Foster*,[186] a jury convicted Cornell Foster of narcotics charges. The court of appeals reversed, holding that the trial court erred in limiting defense counsel's cross-examination of a police officer about the fact that Foster carried, at the time of his arrest, significantly less cash than would be expected of someone selling drugs. The court also held it was improper for the prosecutor to insinuate he had knowledge of prior instances of drug dealing by Foster absent evidence in the record to support the insinuation.

The reasons discussed above[187] why Judge Ginsburg's judicial record is less revealing than it might be are apparent in this criminal context. The criminal jurisdiction of the D.C. Circuit is decidedly limited. As the examples above demonstrate, the criminal docket is dominated by cases involving violation of federal drug laws. Few, if any, of these cases raise significant issues.

III. CONCLUSION

Judge Ruth Bader Ginsburg has a strikingly activist judicial philosophy. While her scholarly writings and the inherent constraints imposed on a mid-level appellate court may suggest a more moderate judicial style, her record while on the U.S. Court of Appeals demonstrates that she abandons even this moderation when it suits her political agenda. In key categories of cases--e.g., cases involving the separation of powers, abortion, standing, or discrimination--her politics drives her jurisprudence.

Considering her own acknowledgement that the factors present on other courts that tug judges toward moderation are not present on the Supreme Court, this comprehensive review of Judge Ginsburg's record completely refutes the "moderate" label that so many journalists, politicians, and activists have rushed to place on her. Her liberal politics and judicial activism may well dominate her tenure on the Supreme Court to a degree that no one anticipates, or is willing to admit publicly, today.

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[186] 982 F.2d 551 (D.C.Cir. 1993). Judges Laurence Silberman and Stephen Williams joined the opinion.

[187] See *supra* section II.A.