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### Ruth Bader Ginsburg, Wise Legal Giant

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## RUTH BADER GINSBURG, WISE LEGAL GIANT

*Thomas A. Schweitzer\**

### APPOINTMENT TO THE SUPREME COURT

On July 20, 1993, Judge Ruth Bader Ginsburg of the United States Court of Appeals for the District of Columbia Circuit appeared before the Senate Judiciary Committee and its chairman, Senator Joseph R. Biden of Delaware, for hearings on her nomination by President William J. Clinton to the Supreme Court of the United States.<sup>1</sup> This was the first Supreme Court nomination by a Democratic president since Lyndon Johnson appointed Thurgood Marshall in 1967. It was to replace retiring Justice Byron White, and Clinton told aides he wanted to hit a “home run.”<sup>2</sup> Ginsburg’s nomination came at an awkward moment for President Clinton, who had made three unsuccessful nominations of women to Justice Department posts during his first year in office.<sup>3</sup>

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<sup>1</sup> JANE SHERRON DE HART, *RUTH BADER GINSBURG: A LIFE* 319 (Vintage Books ed. 2020) (2018). This remarkably comprehensive, legally sophisticated and readable work will no doubt rank as the definitive biography of the justice for the foreseeable future. The author, a professor emerita of history at the University of California, Santa Barbara, devoted over fifteen years to researching and writing it and was granted numerous interviews by Ginsburg and many of her friends and family members.

<sup>2</sup> *Id.* at 302.

<sup>3</sup> The abortive nominations were of Lani Guinier as Assistant Attorney-General and Kimba Wood and Zoe Baird as Attorneys-General. Jill Lepore, *Ruth Bader Ginsburg’s Unlikely Path to the Supreme Court*, NEW YORKER (Oct. 8, 2018), <https://www.newyorker.com/magazine/2018/10/08/ruth-bader-ginsburgs-unlikely-path-to-the-supreme-court>. Clinton finally succeeded with his nomination of Attorney General Janet Reno, who urged him to appoint a woman to the Supreme Court. DE HART, *supra* note 1, at 316.

Justice White was known to be thinking of retirement at the time of Clinton's election, but this Kennedy nominee presumably wanted his successor to be appointed by a Democratic president.<sup>4</sup> After Clinton's election, White tendered his resignation on March 19, 1993.<sup>5</sup> Clinton considered appointing a woman as White's successor but initially demurred when Ginsburg was proposed to him because he had been told "The women are against her."<sup>6</sup> The women's groups' lack of enthusiasm for her was due in part to the critique of *Roe v. Wade*<sup>7</sup> that she had articulated in her 1993 Madison Lecture.<sup>8</sup>

On the fractious D.C. Circuit Court, Ginsburg had taken a middle-of-the-road stance.<sup>9</sup> In November 1991, *The American Lawyer* named her one of the nation's leading centrist judges. As her friend Professor Jeffrey Rosen subsequently described her, she was considered "a paragon of judicial restraint."<sup>10</sup> When her candidacy was suggested, White House staffer Joel Klein distilled exhaustive research on Ginsburg into a nine-page single-spaced personal and legal profile. The Klein memo concluded that Ginsburg was "an accomplished advocate, respected scholar and eminent jurist, highly esteemed for her forceful mind and dedication to the law."<sup>11</sup> He added that her court challenges in the 1970s "left a lasting imprint on legal doctrine and American society. It may be a reflection of how far we have come that these triumphs seem taken for granted today."<sup>12</sup> Klein's memo said she was not a judicial activist and said

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<sup>4</sup> DE HART, *supra* note 1, at 309.

<sup>5</sup> *Id.* at 303.

<sup>6</sup> Lepore, *supra* note 3.

<sup>7</sup> 410 U.S. 113 (1973).

<sup>8</sup> DE HART, *supra* note 1, at 305-06; *see infra* p. 552 on the Madison Lecture.

<sup>9</sup> Ginsburg "position[ed] herself to the right of Wald, Mikva, and Edwards." DE HART, *supra* note 1, at 297. Her friendship with Antonin Scalia, despite their diametrically opposed legal views, was legendary. Perhaps even more surprising to her liberal clerks was that she became very friendly with Judge Robert Bork; the campaign led by Senator Ted Kennedy to derail Reagan's nomination of Bork because of his extremist views was the first major partisan battle in the Senate on Supreme Court nominations. Moreover, liberals were disappointed when she voted with Bork, Scalia, and other conservatives against navy petty officer James Dronenburg's challenge to his dismissal by the Navy without back pay because his consensual homosexual conduct was deemed not to be protected by the right to privacy. *Id.* at 297.

<sup>10</sup> DE HART, *supra* note 1, at 307 (citing Jeffrey Rosen, Ruth Bader Ginsburg: *The New Look of Liberalism on the Court*, N. Y. TIMES, October 5, 1997, at SM 60).

<sup>11</sup> *Id.* at 305.

<sup>12</sup> *Id.* at 305-06.

that her approach to cases was “fundamentally pragmatic, displaying little enthusiasm for rigid, abstract rules as theories.”<sup>13</sup> DeHart explains that this approach means “someone who tended to resolve cases on narrow procedural grounds, preferring small incremental steps to bold assertions of judicial power in order to preserve the legitimacy of the outcome.”<sup>14</sup> DeHart adds:

Judicial minimalism, Clinton knew, was then considered to be the best defensive strategy at the time for putting a brake on the conservative activists on the Court who were vigorously striking down progressive legislation. Further, minimalism encouraged justices to focus on the particularities of the case at hand rather than make sweeping announcements that get too far ahead of elected branches of government and the public in making law.<sup>15</sup>

Ginsburg was sixty years old, not the ideal nominee’s age for partisan liberals who wanted to nominate a justice who would be expected to stay on the Court for three or more decades. Conservative Republican Senator Orrin Hatch, who was friendly with a law partner of Martin Ginsburg (Ruth’s husband), stated that Ginsburg would be an acceptable nominee. However, Clinton, who had been elected with only 43% of the vote, appreciated the importance of appealing to Republicans. White House staffer Joel Klein said Ginsburg would be a consensus builder and “would be perceived in many quarters as a departure from the use of ideology as a primary consideration in Supreme Court nominees.”<sup>16</sup> Her candidacy was given a strong endorsement by her former Harvard professor and former Solicitor General Erwin Griswold, who eight years earlier, in a speech to the NAACP, had identified her, Charles Houston, and Thurgood Marshall as three major advocates who had contributed to changing civil rights law.<sup>17</sup> Columbia University President Michael Sovern also strongly endorsed her candidacy; his note to Senator Moynihan said “Pat, she’s the real thing.”<sup>18</sup>

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<sup>13</sup> *Id.* at 305.

<sup>14</sup> *Id.* at 307.

<sup>15</sup> *Id.* at 307-08.

<sup>16</sup> *Id.* at 306.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

Duly impressed by these enthusiastic accolades by prominent jurists and his own staffer, Yale Law School graduate Bill Clinton summoned Ginsburg to meet with him on June 12. While she lacked time to prepare and was chagrined to appear in casual clothing after this sudden request, Ginsburg made a superb impression on Clinton when he interviewed her. Clinton declared that he was “tremendously impressed” by her life story and legal expertise, as someone who viewed government in terms of the way it impacted people’s lives.<sup>19</sup> According to her biographer, Clinton concluded that she was a principled individual with sterling credentials, a brilliant mind and empathy for ordinary folk. He decided to nominate her on the spot, and most women’s groups rallied to her support.<sup>20</sup>

Ginsburg’s husband, prominent tax lawyer Martin Ginsburg, had actively promoted her nomination, and New York Senator Daniel Patrick Moynihan had enthusiastically lobbied for her among his Senate colleagues.<sup>21</sup> She had received the highest possible rating from the American Bar Association, and there appeared to be no organized public opposition to her nomination.<sup>22</sup>

At the Senate Judiciary Committee Hearing, Committee Chairman Biden was effusively cordial to Ginsburg. According to historian Jill Lepore, this was because he was “[k]een to do penance for the debacle of the Clarence Thomas hearings, just two years before – the year before the Year of the Woman – when an all-male committee, chaired by Biden, failed to credit what Anita Hill had to say about George H. W. Bush’s Supreme Court nominee.”<sup>23</sup>

Ginsburg was well-prepared for the July 20<sup>th</sup> Hearing; she had studied the entire history of Supreme Court nominations and was determined not to reveal any views she might hold on legal issues that might come before the Court. She emphasized at the outset that

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<sup>19</sup> *Id.* at 307.

<sup>20</sup> *Id.*

<sup>21</sup> White House staffers Ron Klain and Joel Klein lobbied for her on the “Hill,” and Judiciary Committee Counsel Elena Kagan carefully monitored the proceedings. *Id.* at 318, 321.

<sup>22</sup> *Id.* at 290. Many prominent law professors and attorneys wrote letters in support of Ginsburg’s nomination, including Janet Benshoof, the founding director of the Center for Reproductive Law and Policy, who was a Mac Arthur fellow and one of The National Law Journal’s “100 Most Influential Lawyers in America.” *Id.* at 315.

<sup>23</sup> Lepore, *supra* note 3.

she was there “to be judged as a judge, not as an advocate.”<sup>24</sup> Biden asked her how she could reconcile two positions she had taken on women’s rights issues. On the one hand, in her path-breaking litigation in the 1970s, she had pressed the Supreme Court to make gender a suspect classification subject to strict scrutiny under the Fourteenth Amendment equal protection clause. In contrast, at the New York University Madison Lecture several months before the committee hearing, she had taken a more moderate stance.<sup>25</sup> In her NYU address, she stated that judges should be “moderate and restrained” concerning rights not listed in the Constitution and should not get ahead of “the political process.”<sup>26</sup>

Judge Ginsburg resisted responding to this question by Biden. When he pressed her, however, she gave a good rationale for her reticence:

We cherish living in a democracy, and we also know that this Constitution did not create a tricameral system. Judges must be mindful of what their place is in this system and must always remember that we live in a democracy that can be destroyed if judges take it upon themselves to rule as Platonic guardians.<sup>27</sup>

When Biden pressed her further, Ginsburg clammed up and repeatedly refused to answer questions “that may well be before the

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<sup>24</sup> DE HART, *supra* note 1, at 319-20. She promised to follow the guidance of Justice Oliver Wendell Holmes, who counseled that “[O]ne of the most sacred duties of a judge is not to read [her] convictions into [the Constitution].” *Id.* at 320.

<sup>25</sup> Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992). This article is an adaptation for publication of the initial Madison Lecture on Constitutional Law which Judge Ginsburg delivered at N.Y.U. on March 9, 1993. The article’s preface referred to the *Roe v. Wade* decision as follows: “she contrasts the Supreme Court’s sweeping opinion in *Roe v. Wade* with the Court’s more restrained approach in contemporaneous cases involving explicitly gender-based discrimination . . .” *Id.* at 1185. See also Ian Shapiro, *Still Speaking in a Judicial Voice: Ruth Bader Ginsburg Two Decades Later*, 122 YALE L.J. ONLINE 257, 258 (2013).

<sup>26</sup> Lepore, *supra* note 3.

<sup>27</sup> *Id.* Here, she invoked the traditional principle that since the Supreme Court is neither a third house of Congress with power to legislate nor the body of powerful elders who Plato in *The Republic* contemplated would rule society, justices should limit themselves to adjudicating cases and should avoid trying to read their personal opinions into laws.

Court again . . .”<sup>28</sup> Eventually, Senator William Cohen of Maine exclaimed in frustration: “there is some suspicion in some circles . . . that you are basically a political activist who’s been hiding in the restrictive robes of an appellate judge, and that those restrictions will be cast aside when you don a much larger garment.”<sup>29</sup>

Despite these pressures, Ginsburg stuck to her guns. She won the unanimous support of the Judiciary Committee. Shortly afterward, with Senator Moynihan’s “diligent and vigorous sponsorship,”<sup>30</sup> the Senate endorsed her candidacy by a vote of ninety-six to three.

Ginsburg’s appointment would make history since she would be the second female justice, and she had an outstanding record of achievement in women’s rights law. Moreover, her overwhelming vote in the Senate seems hard to believe by twenty-first century standards. Nevertheless, Judge Ginsburg’s Supreme Court candidacy was not greeted with unanimous acclaim by all proponents of women’s rights when her nomination was first suggested. This was largely due to her position on *Roe v. Wade*, which struck down prohibitions of abortion in forty-six states. As noted above, despite her strong support for abortion rights, Ginsburg did not concur with the legal basis of that opinion, a stance which she never repudiated. Her legal record on this matter, and the philosophy which it embodies, is the subject of this note.<sup>31</sup>

### EARLY BIOGRAPHY

Justice Ruth Bader Ginsburg, a tiny bird-like creature barely five feet tall, was universally and justly regarded as a legal giant when she died on September 18, 2020. She was the unusual justice who made her greatest impact as an attorney before becoming a federal judge. She earned this reputation by her successful advocacy

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<sup>28</sup> DE HART, *supra* note 1, at 321.

<sup>29</sup> *Id.* Elena Kagan, who served as counsel to the Judiciary Committee, was impressed by Ginsburg’s “preternaturally controlled testimony”: when she chose to sidestep a question, she would say that the question might come before the Court again, and “it would be inappropriate for me to say anything more.” *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> The fiftieth anniversary of the Supreme Court decisions in *Roe v. Wade* and *Doe v. Bolton* will occur in January 2023, and it will be interesting to see if any law schools observe the anniversary with symposia. See *Doe v. Bolton*, 410 U.S. 179 (1973).

in support of women's rights and in opposition to entrenched gender stereotypes in the law during the 1970s. Since the adoption of the Fourteenth Amendment in 1868, not a single Supreme Court decision had held that the equal protection clause was violated by discrimination against women. Her four landmark cases permanently changed this.<sup>32</sup> As a result, it was often noted that her cases leading to the advancement of women's legal rights resembled Thurgood Marshall's litigation success in advancing the civil rights of African Americans (Thurgood Marshall was the first African American Justice). Former Solicitor General Erwin Griswold may have been the first person to acknowledge this when he dubbed her "the Thurgood Marshall of gender equality law."<sup>33</sup>

Justice Ginsburg's life and career coincided with the great expansion of women's presence and accomplishment in law, medicine, and other professions. Female students comprise more than half of law school enrollments at present, an astonishing figure when it is contrasted with their near-total absence when the future justice began her career more than six decades ago. For instance, Ginsburg was one of nine female students in a Harvard Law School entering class of five hundred fifty-two.<sup>34</sup> Ginsburg's mother Celia, a very intelligent, strong woman, had had to subordinate her own ambitions in life to the interests of her brother Sol. Conforming to the expectations of her working-class parents, Celia had gone to work to support herself and to help enable Sol to attend Cornell University.<sup>35</sup>

Ruth Bader, who was born in Brooklyn in 1933, faced and overcame major challenges in life. Her sister Marilyn died of spinal

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<sup>32</sup> *Reed v. Reed*, 404 U.S. 71 (1971); *Moritz v. Comm'r*, 469 F.2d 466 (10th Cir. 1972); *Frontiero v. Richardson*, 411 U.S. 677 (1973); and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

<sup>33</sup> Lepore, *supra* note 3.

<sup>34</sup> DE HART, *supra* note 1, at 54. Harvard Dean Erwin Griswold often embarrassed entering female students by asking why they should take a place that belonged to a male who would be expected to support a family. Some professors held a "ladies' day" once a semester, the only time female students were called upon.

<sup>35</sup> "At that time, Jewish families commonly sacrificed the futures of their daughters to ensure that a son might attend a prestigious school and enter a high-status profession as his birthright in the New World, benefitting other members of the family with his upward mobility." *Id.* at 8. Celia also saved a large sum of money for Ruth's education which she ultimately did not need because she received scholarships. Ruth gave most of the money to help her father, a struggling businessman. *Id.* at 28.



meningitis at age six when Ruth was two, and her parents' deep grief overshadowed her childhood.<sup>36</sup> Her mother died when she was seventeen, causing her to miss her high school graduation two days later. Early in their marriage, her husband Martin contracted testicular cancer as a Harvard law student, and she had to care for him and their young daughter. Ginsburg's husband eventually died of cancer, and she herself contracted colon cancer and pancreatic cancer.<sup>37</sup>

Ruth met "Marty," her future husband, as a young freshman at Cornell College. They fell in love and married after her graduation at the age of twenty-one; their daughter Jane was born in 1955, a year later. Then Marty was drafted, and they moved to Fort Sill, Oklahoma for two years. Marty later described this unusually placid period as a stroke of good fortune, where they could get to know one another far from school and career pressure. By all accounts, he was a wonderful spouse, and his prosperous parents fully supported Ruth and encouraged her to pursue law school despite having an infant daughter.

The young couple then returned to Harvard, where Marty began law school and she followed him a year later. In 1957, another tragedy struck: Marty contracted a life-threatening case of cancer. Fortunately, after two draconian operations and daily radiation treatments, he survived and recovered. During this time, Ruth went to class herself, collected notes from Marty's classes, and typed his papers, while caring for three-year-old Jane after the babysitter left at 4 p.m. Her workload and responsibilities were so overwhelming that she often stayed up all night during this period.<sup>38</sup>

Upon graduating, Marty got a good law job as an associate with Weil Gotshal & Manges in New York. Because of Marty's precarious health, Ruth did not want to risk living apart, so she moved with him and Jane to New York and transferred to Columbia Law School. She was designated a Kent Scholar and was offered a place on the *Columbia Law Review*, where she excelled.<sup>39</sup> She

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<sup>36</sup> *Id.* at 5.

<sup>37</sup> *Id.* at 349, 373, 402, 416.

<sup>38</sup> *Id.* at 70-73.

<sup>39</sup> Ginsburg had the perhaps unique distinction of becoming a member of two law reviews at prestigious law schools, and it is remarkable that as a transfer student, she was honored as a Kent Scholar. In 1978, in a historic first, her daughter Jane Ginsburg was also elected to the *Harvard Law Review*, making them the first mother-daughter team in Harvard history. *Id.* at 278.

graduated first in her class and had lined up a summer clerkship at a premier law firm. As her biographer accurately notes:

A job offer should have been a foregone conclusion for a student tied for first place in the graduating class at Columbia Law School. Serving on the law reviews of both Harvard and Columbia and clerking successfully at a premier New York law firm were just icing on the cake. Such superb credentials typically guaranteed offers from top Wall Street firms or a coveted clerkship with a judge on a federal appeals court.<sup>40</sup>

Ginsburg, however, was disappointed. While she knew she had performed well in her summer clerkship, Paul Weiss did not make her an offer; it had hired an African American woman, Pauli Murray, as an associate and apparently thought that was sufficient to show its commitment to diversity. She was interviewed by a dozen law firms but received only two second interviews and no offer.<sup>41</sup>

The other coveted option was a federal court clerkship. Her professors at Columbia recommended her enthusiastically, but as she ruefully noted, she had three strikes against her: she was a woman, a Jew, and a mother of a young child.<sup>42</sup> Columbia Law Professor Gerald Gunther,<sup>43</sup> who admired her ability, went from office to office of the Second Circuit judges in Foley Square lobbying to get her a

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<sup>40</sup> *Id.* at 78. The law firm was Paul Weiss.

<sup>41</sup> *Id.* at 78-79.

<sup>42</sup> *Id.* at 79.

<sup>43</sup> Gerald Gunther, who was only six years older than Ginsburg, was a remarkable man who became her lifelong counselor. He was born in 1927 in a small German town where his family had lived for centuries. The family fled Germany for New York in 1938 after the synagogue in their town was burned. He graduated from Brooklyn College in 1949 with an A.B. in History, earned an M.A. in Public Law and Government from Columbia in 1950, and was awarded an L.L.B. Magna Cum Laude by Harvard Law School in 1963. He served as a law clerk to Second Circuit Judge Learned Hand in 1953-54 and subsequently for Chief Justice Earl Warren of the Supreme Court. Warren credited him with a major role in writing the opinion in *Brown v. Board of Education*. After a year in private practice, he was hired by Columbia Law School where he was in charge of selecting the limited number of superior graduates who were recommended for court clerkships. He later served on the Stanford Law School faculty for many years. While he was only six years older than Ginsburg, she valued him as a counselor for the rest of his life. Gunther's constitutional law case book was the most widely used lawbook in the American law schools.

clerkship, but all the judges refused.<sup>44</sup> Then he contacted every Southern District federal judge but again was unsuccessful. Finally, he went after District Judge Edmund L. Palmieri, a Columbia alumnus, and threatened to never send him another Columbia law clerk if he refused to hire Ginsburg. Palmieri agreed, and she quickly won him over with her brilliance and hard work.<sup>45</sup>

After the end of her clerkship with Judge Palmieri, Ginsburg would have welcomed an opportunity for an appellate or Supreme Court clerkship, but she was offered none. Thus, she welcomed an offer by Columbia Professor Hans Smit, the founding director of Columbia Law School's Project on International Procedure, to research and prepare a chapter on Sweden's new code of civil procedure as part of a comparative analysis of foreign legal systems' procedural codes. She agreed, traveled to Sweden, learned Swedish, and co-authored the study with Anders Bruzelius, a Swedish judge.<sup>46</sup>

After returning from Europe, in 1960 Ginsburg accepted a full-time teaching position at Rutgers Law School, where she taught until 1973.<sup>47</sup> She was eager, however, to obtain a position at a first-tier law school. Harvard, where she had begun legal studies in 1954, offered her a visiting position, but she declined because commuting from New York would have been arduous. She became pregnant again and gave birth to her son James in 1965. In 1969, she was promoted to full professor, and James entered nursery school. In 1972, she got her chance to teach at her alma mater, Columbia; she was hired as its first female full professor in 1972 and taught one of the first courses in Women's Law.<sup>48</sup>

### PIONEERING LITIGATION FOR WOMEN'S RIGHTS

While teaching law, Ginsburg also worked for years on women's rights litigation for the American Civil Liberties Union, and she was a founder of the Women's Rights Project, which she later headed. At Rutgers, Ginsburg was paid less than a comparable male

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<sup>44</sup> Her first choice, Learned Hand, would not even consider a female clerk. DE HART, *supra* note 1, at 80.

<sup>45</sup> *Id.* at 80-84.

<sup>46</sup> *Id.* at 85-89. Berzelius's daughter had been a Kent Scholar at Columbia Law School. *Id.* at 85.

<sup>47</sup> *Id.* at 90-99.

<sup>48</sup> The *New York Times* headline in January 1972 read "Columbia Law Snares a Prize in its Quest for Women Professors." *Id.* at 139.

professor who had a family to support. Dean Willard Heckel rationalized that practice because Ruth's husband earned a good salary.<sup>49</sup> As a Rutgers professor, Ginsburg became active in litigating cases brought by the American Civil Liberties Union (ACLU). At the ACLU she relied upon three other pioneer crusaders for women's rights. Dorothy Kenyon had combated discrimination against women as a member of the ACLU national executive board and chair of the Women's Rights Committee since the 1930s.<sup>50</sup> Kenyon favored utilizing the equal protection clause to combat laws and practices which discriminated against women, however benevolent their ostensible purposes were. She had worked in the ACLU for decades on this project and was joined in 1965 on the executive board by Pauli Murray.<sup>51</sup> According to De Hart, Kenyon and Murray "intensely ... wanted to bring an equal protection case before the Court."<sup>52</sup> The third woman was Harriet Pilpel.<sup>53</sup>

Ginsburg built on the pioneering efforts and legal analysis of these women in using the equal protection clause to advance women's rights. During the first eight decades following passage of the Fourteenth Amendment, which was enacted in 1868 to protect the rights of freed slaves, its application had been limited to racial discrimination: The Supreme Court had never upheld a claim that the equal protection clause prohibited gender discrimination. Inspired by the legal work of Murray and Kenyon, Ginsburg was a lead attorney in several major court cases in the 1970s which pioneered this area of litigation. Her victories in the Supreme Court changed this field of law forever. As two law professors conclude:

Between 1970 and 1980, social movement advocacy  
and brilliant litigation by Ruth Bader Ginsburg and

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<sup>49</sup> IRIN CARMON & SHANA KNIZHNIK, *THE NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG* 46-47 (2015).

<sup>50</sup> DE HART, *supra* note 1, at 129-30.

<sup>51</sup> Murray, a remarkable woman of color, had graduated from Howard Law School in 1944; she was awarded a Rosenthal Fellowship for graduate study at Harvard Law School but was rejected because of her sex. She earned a Master of Law degree from Boalt Hall (Berkley) Law School and was the first Black woman to earn a J.S.D. (a doctorate in jurisprudence) from Yale, which honored her by naming a new undergraduate residence hall for her in 2017. *Id.* at 130-33. *See also supra* note 41.

<sup>52</sup> *Id.* at 148. *Reed v. Reed* was to present that opportunity.

<sup>53</sup> Pilpel had crusaded for birth control and the right to use contraception since the 1930s and was counsel for Planned Parenthood. DE HART, *supra* note 1, at 180.

others changed our Constitutional law. Cases beginning with *Reed v. Reed* demonstrated that in important respects, sex was like race: familiar justifications for excluding women rested on stereotypes that denied individuals the opportunity to compete and relegated women to secondary status in American Society.<sup>54</sup>

American law and cultural tradition had presumed that law and other professions were the domain of men, while women's proper place was in the home, rearing children and managing the household. The Supreme Court in 1869 rejected the claim that the Illinois Supreme Court was violating the Equal Protection Clause of the new Fourteenth Amendment when it denied a woman a license to practice law.<sup>55</sup> With minor exceptions, every state denied women the right to vote until passage of the Twentieth Amendment in 1920.

Ginsburg was a tireless legal researcher and thinker. She and her husband Marty, who although he was a tax lawyer sometimes litigated with her, watched the news attentively for accounts of persons who felt that they had suffered discrimination because of gender. If the facts and circumstances presented a promising case, they sometimes reached out on behalf of the Women's Rights Project to offer the person legal services and financial support. Ruth shrewdly brought a couple of cases on behalf of male plaintiffs who had suffered discrimination because of gender stereotypes embedded in the law; she recognized that male judges might empathize more with them than with female plaintiffs.<sup>56</sup>

*Reed v. Reed*<sup>57</sup> the first case, involved a contest between the adoptive parents of a young man who committed suicide at his father's house. The parents were divorced. Both parents applied to administer their son's modest estate, but Idaho law provided that "males must be preferred to females" in such cases, and the trial court rejected Sally Reed's application to be the administrator.<sup>58</sup>

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<sup>54</sup> Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 Ohio St. L.J. 1095 (2009) (footnote omitted).

<sup>55</sup> *Bradwell v. Illinois*, 83 U.S. 130, 139 (1873). Bradwell's failure was not permanent; Illinois later changed the law, and she was admitted to the Illinois Bar near the end of her life.

<sup>56</sup> *Weinberger*, 420 U.S. 636 (1973); *Moritz*, 469 F.2d 466 (10th Cir. 1972).

<sup>57</sup> 404 U.S. 71 (1971).

<sup>58</sup> *Id.* at 73 (citing IDAHO CONST. art. 1, § 1).

Ginsburg's appeal on behalf of Sally Reed was victorious in the Idaho District Court, but its decision was reversed by the Idaho Supreme Court.<sup>59</sup> The United States Supreme Court unanimously reversed the Idaho decision, holding for the first time that such discrimination on the basis of gender violated the Equal Protection Clause of the Fourteenth Amendment.<sup>60</sup>

The first case that Ginsburg herself argued in the United States Supreme Court was *Frontiero v. Richardson*.<sup>61</sup> Sharon Frontiero, a physical therapist at Maxwell Air Force Base Hospital in Montgomery, Alabama, was denied a housing allowance supplement to her paycheck which would have been given to similarly situated males. Her husband Joseph, a navy veteran, was a full-time college student who also needed medical and dental benefits. Joseph received a modest monthly veteran's payment and earned \$30.00 a month working as a night watchman. In order to receive a housing allowance supplement, married female members of the armed services had to meet a higher financial support level for their spouse than was required of married male members. Ginsburg challenged the constitutionality of a statute which allowed a male serviceman to claim his spouse as a dependent but denied that right to servicewomen.<sup>62</sup> The case ended in a major victory for the ACLU, as the Supreme Court agreed with Ginsburg that the statute endorsed stereotypical views of husbands as providers, unlike wives, and thus evinced "romantic paternalism" which violated equal protection.<sup>63</sup>

In another landmark case, *Weinberger v. Wiesenfeld*,<sup>64</sup> the ACLU represented a man whose deceased wife died in childbirth after having paid Social Security taxes. It successfully challenged the denial of survivors benefits to the widower, who had been denied benefits that were given to widows of husbands who had contributed to Social Security. The deceased wife had been the primary breadwinner for the family, and the Supreme Court held unanimously that the statute violated equal protection when it denied survivors benefits to the widower and his infant son.<sup>65</sup> Ginsburg argued the

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<sup>59</sup> *Id.* at 74.

<sup>60</sup> DE HART, *supra* note 1, at 181-82.

<sup>61</sup> 411 U.S. 677 (1971).

<sup>62</sup> DE HART, *supra* note 1, at 197.

<sup>63</sup> The Supreme Court decided the case on May 14, 1973. *Id.* at 214.

<sup>64</sup> 420 U.S. 636 (1973).

<sup>65</sup> DE HART, *supra* note 1, at 241-45. A three-judge court ruled in his favor in December 1973.

case before the Supreme Court in January 1975, and she then rushed back to New York to teach her 2:00 p.m. class. On March 19, the Supreme Court unanimously affirmed her trial court victory.<sup>66</sup>

Professor Ginsburg was the lead ACLU litigator in these cases, working with Legal Director Melvin Wulf and Executive Director Aryeh Neier. Her husband Marty worked with her on *Moritz v. Commissioner of Internal Revenue*,<sup>67</sup> representing a man whose mother required fulltime medical care.<sup>68</sup> IRS regulations provided that single women could get a tax reduction for the considerable costs of such care, whereas this was denied to a single man like Moritz. The Ginsburgs, who persuaded Moritz to let them take his case, argued in *Moritz* that the differential treatment of Moritz and similarly situated women was unlawful since it was based on stereotypical gender role expectations, but the United States Tax Court nevertheless upheld the regulation. On appeal, however, the Tenth Circuit reversed and ruled in favor of plaintiff Moritz.<sup>69</sup>

By the end of the 1970s, Ginsburg had litigated six cases in the Supreme Court and had won five. She was recognized as the leading authority on women and the law. Another case which might have made history, however, was never decided by the Supreme Court: *Struck v. Secretary of Defense*.<sup>70</sup> Susan Struck was an unmarried captain in the Air Force who became pregnant in December 1970 while serving in Vietnam. She was shipped back to McChord Air Force Base in Washington state and immediately received discharge orders: An Air Force regulation provided for prompt dismissal of an officer who got pregnant, although the Air Force would not dismiss her if she terminated the pregnancy.

Struck, a Roman Catholic who was opposed to abortion, wanted to carry her pregnancy to term, surrender the baby for adoption and then resume her military career. However, another Air Force regulation provided that a commissioned officer would be promptly terminated if she gave birth to a living child.<sup>71</sup> She turned to ACLU lawyers in Washington State, who brought an action

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<sup>66</sup> *Id.* at 247-51.

<sup>67</sup> 469 F.2d 466 (10th Cir. 1972).

<sup>68</sup> DE HART, *supra* note 1, at 126-29, 133-34.

<sup>69</sup> *Id.* at 11.

<sup>70</sup> *Id.* at 179-96 ("The Case That Got Away"); *Struck v. Sec'y of Def.*, 460 F.2d 1372 (9th Cir. 1971), *vacated*, 409 U.S. 1071 (1972).

<sup>71</sup> *Id.* at 179.

challenging the constitutionality of her discharge in the federal district court for the Western District of Washington and applied for a stay of her discharge until her case could be heard. In the meantime, she gave birth to a daughter on December 3, 1970, and surrendered the child to the adoptive parents.

Her attorneys argued that the regulation was unconstitutional since it violated both her First Amendment free exercise rights and her Fifth Amendment right to due process, and they sought a permanent injunction against her dismissal from the service. Two months after she gave birth, the court dismissed her case, holding the air force regulation constitutional. In November 1971, a divided Ninth Circuit court affirmed the lower court's decision, and Robert Creisler, her attorney, turned to Ginsburg, who agreed to represent Struck.

The Supreme Court granted certiorari, and Ginsburg filed the appellate brief in her capacity as General Counsel for the ACLU Women's Rights Project.<sup>72</sup> She had long believed that discrimination against pregnant women was a core case of sex discrimination. Men were encouraged to procreate and suffered no damage to their military careers but instead received salary raises. In the normal case, moreover, women were able to return to full duties shortly after giving birth. Courts had traditionally exalted pregnancy and motherhood as a separate track for women warranting different treatment; while this ostensibly had a benign purpose, Ginsburg argued that its effect was to restrain women from developing their individual talents and capacities.<sup>73</sup> The result, she contended, was to reinforce traditional sex stereotypes and to deny women equal protection of the laws, rather than making individualized assessments of women who were fully able to serve.

If the case had been decided by the Supreme Court, Ginsburg's Supreme Court brief in Struck might have changed history and presaged a different course in women's rights litigation. Instead, the Air Force changed its regulation and Solicitor General Erwin Griswold applied to have the Struck appeal dismissed as

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<sup>72</sup> The sagacious arguments that Ginsburg used in her brief in *Struck* to challenge laws treating people differently by gender on equal protection grounds are outlined in Siegel & Siegel, *supra* note 54.

<sup>73</sup> *Id.*



moot.<sup>74</sup> Struck's mandatory dismissal from military service was reversed, and her career was restored. Ginsburg agreed that this outcome was a just result which her client Struck welcomed; however, it meant the end of an opportunity for her to make a perhaps historic Supreme Court argument. Ginsburg had not anticipated the Solicitor General's bold stroke. Her biographer comments:

Ginsburg was thus deprived of her first chance for a Supreme Court victory in the 1972-73 term, in what was to have been a pairing of cases. Most importantly, she had lost her opening wedge in an effort to get the Court to understand pregnancy discrimination as sex discrimination. Gone too was any hope of using Struck to nudge the justices closer to a view of reproductive freedom as an issue of liberty and equality. The clock had run out.<sup>75</sup>

Meanwhile, separate challenges to statutes outlawing abortion were moving through the federal courts.<sup>76</sup> Sarah R. Weddington, counsel for a pregnant woman who wanted an abortion, challenged the Texas statute as a violation of her client's marital right of privacy under the Ninth Amendment, which had been recognized by the Court in *Griswold v. Connecticut*.<sup>77</sup> A three-judge federal district court held in her favor, and the Supreme Court granted certiorari. Another three-judge federal district court in Georgia had struck down parts of the Georgia abortion statute.<sup>78</sup> Certiorari was also granted in the

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<sup>74</sup> In the interests of resolving important legal issues despite the fact that the individual plaintiff's stake in litigation has inevitably been rendered moot by the passage of time, as in a case concerning a pregnancy, the Supreme Court has sometimes permitted an otherwise moot case to be pursued to conclusion on the ground that it raised an issue "capable of repetition, yet evading review." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018). Despite her disappointment that Struck's case had been rendered moot, Ginsburg evidently did not seek to prevent its dismissal on these grounds.

<sup>75</sup> DE HART, *supra* note 1, at 188. Before it was dismissed as moot, the Struck case had been calendared for consideration together with *Roe v. Wade* and *Doe v. Bolton*.

<sup>76</sup> *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Texas 1970); *Doe v. Bolton*, 379 F. Supp. 1048 (N.D. Ga. 1970). The Texas statute proscribed all abortions except where it was necessary to save the life of the mother.

<sup>77</sup> 381 U.S. 479 (1965).

<sup>78</sup> *Doe*, 319 F. Supp. 1048 (N.D. Ga. 1970). Georgia had adopted the model statute drafted by the American Law Institute, which replaced an 1876 statute similar to

Georgia case, which was consolidated for argument with *Roe v. Wade*.

While Sarah Weddington in the Texas case apparently did not consult the ACLU's Women's Rights Project, Margie Hames, a member of the ACLU's national board who led the Atlanta team that successfully challenged the Georgia statute did so. ACLU Legal Director Melvin Wulf received the *Doe v. Bolton* brief and referred it to Ginsburg for her assessment. After reviewing the brief, she concluded that the writing was not up to ACLU standards, and she believed that a stronger, explicit right to abortion based on the Constitution was required, rather than the weaker implied right.<sup>79</sup>

Arguments on *Roe* and *Doe* originally took place on December 13, 1971,<sup>80</sup> but there was little agreement among the justices when the Court met in conference to discuss the two cases. Thus, it was agreed to schedule re-argument of the two cases for October 11, 1972, which would allow newly appointed Justices Powell and Rehnquist to take part. Struck was originally placed on the calendar for the same day before it was dismissed as moot.<sup>81</sup>

Following the second argument on October 11, 1972, the Court held by seven to two on January 22, 1973, in *Roe v. Wade* that the Texas abortion statute was unconstitutional because it violated Roe's implied right of privacy.<sup>82</sup> On the same day, the Court in *Doe v. Bolton* invalidated Georgia's law limiting abortion, which was based on the American Law Institute's Model Penal Code.

New York and three other states had legalized abortion by statute, but the Supreme Court's decision evidently struck down the other forty-six states' abortion laws. Many champions of abortion law repeal greeted the decision with jubilation. Harriet Pilpel, chair of the National Abortion Rights Action League, said that the *Roe* decision, when combined with *Doe*, was "far broader in scope than anyone expected . . . It scaled the whole mountain. . . We expected to get there, but not on the first trip . . ." <sup>83</sup> Many legal scholars,

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the Texas statute challenged in *Roe v. Wade*. The ALI statute increased the legal grounds for seeking abortions.

<sup>79</sup> DE HART, *supra* note 1, at 18; *Doe*, 410 U.S. 179 (1973).

<sup>80</sup> DE HART, *supra* note 1, at 185.

<sup>81</sup> *Id.* at 184-86.

<sup>82</sup> *Roe*, 410 U.S. at 154.

<sup>83</sup> DE HART, *supra* note 1, at 190.

including Ginsburg, were less ecstatic and found the opinion “woefully short on law.”<sup>84</sup> Yale Law Professor John Hart Ely, who favored the right to abortion as a policy, criticized the Supreme Court opinion as not even law.<sup>85</sup>

Ginsburg and numerous other prominent legal scholars were disappointed that equal protection was missing from the Court’s holding.<sup>86</sup> Among this group, all of whom favored a woman’s right to an abortion, were Catherine MacKinnon, Rhonda Copelon, Reva Siegel, Robin West, Cass Sunstein, Kenneth Karst, and Laurence Tribe.<sup>87</sup>

### THE D.C. CIRCUIT

Over the years as a law professor and successful litigator in the Women’s Rights Project, Ginsburg had reflected on what she could accomplish as a federal judge. The election of Democrat Jimmy Carter as president in 1976, after the Nixon and Ford presidencies, and the enactment of the Omnibus Judgeship Act in 1978 presented an opportunity for liberal judicial candidates. The statute created thirty-five circuit judgeships, and President Carter had made a commitment to remedy the tiny number of women judges.<sup>88</sup>

As a former clerk to Southern District of New York Judge Palmieri with New York ties, Ginsburg desired a seat on the Second Circuit Court of Appeals. She enjoyed the loyal support of her husband Marty, and many letter writers also testified to her superior qualifications. In January 1979, she submitted her responses to the questionnaire for the Second Circuit and another one for the D.C. Circuit. Unfortunately, an all-male panel comprised of business lawyers discerned that she was unfamiliar with securities laws and disapproved her Second Circuit application.<sup>89</sup>

She fared better with respect to the D.C. Circuit. While she might not otherwise have considered that option, she received a direct invitation to apply from Senator Joseph Tydings of Maryland, who

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (citing John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 947 (1973)).

<sup>86</sup> *Id.* at 193.

<sup>87</sup> *Id.* at 184.

<sup>88</sup> There were only eleven female judges out of five hundred and five federal judge positions. *Id.* at 277.

<sup>89</sup> *Id.* at 281.

chaired the selection committee. Her candidacy was supported by scores of letters from her Columbia colleagues and other prominent lawyers.<sup>90</sup> The National Organization of Women's Legal Defense Fund, The Women's Equity Action League and the National Women's Political Caucus all endorsed her appointment, as did Erwin Griswold, District Judge Palmieri, Gerald Gunther, Columbia Executive Vice President and Former Columbia Law School Dean Michael Sovern and his successor Dean Albert J. Rosenthal.<sup>91</sup>

Her name was on the list of eight nominees sent to the White House, but she was not one of the two selected.<sup>92</sup> After D.C. Circuit Judge Harold Leventhal died, however, her prospects improved, although some liberals questioned the support of Carter and Attorney General Benjamin Civiletti for her in light of her strong women's law background. After months of anxious waiting, Ginsburg was informed on April 8, 1980, that Carter had signed her nomination.<sup>93</sup> On June 17, the Senate Judiciary Committee voted eight to one to recommend her, and full Senate ratification swiftly followed. In late June, Ginsburg was sworn in by Judge Skelly Wright as the newest judge of the D.C. Circuit.<sup>94</sup>

Her diligent and thorough preparation and keen legal mind quickly won her acclaim among the bar and the respect of her colleagues. Her companionship with arch-conservative Judge Antonin Scalia, despite near total disagreement on legal issues, became legendary. They enjoyed dinner engagements and listening to opera together. Ginsburg's legal reputation grew during the ensuing twelve years of the Reagan and George H.W. Bush administrations.

By the time Jimmy Carter was elected in 1976, she was on the top of a list of "leading centrists" in a survey of prospective Democratic appointees to the United States Supreme Court.<sup>95</sup> Since no one retired or died during his administration, however, Carter was the only president in recent history who had no opportunity to appoint a Supreme Court justice.

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<sup>90</sup> *Id.* at 281-82.

<sup>91</sup> *Id.* at 282.

<sup>92</sup> *Id.*

<sup>93</sup> Ginsburg received the highest rating for judicial candidates from the American Bar Association. *Id.* at 290.

<sup>94</sup> *Id.* at 291-92.

<sup>95</sup> *Id.* at 298-99.

The election of Bill Clinton in 1992 gave Democrats the first opportunity to appoint a Supreme Court Justice since Lyndon Johnson had appointed Thurgood Marshall in 1967.<sup>96</sup> Ginsburg's outstanding judicial reputation was universally admired, but there was one possible reservation among liberal Democrats: her view of *Roe v. Wade*. As noted above, her analysis about the best litigation strategy to secure advancement of abortion rights in the Supreme Court was based on the equal protection clause rather than on the right to privacy. Moreover, since she had litigated the Struck case all the way to the Supreme Court before it became moot in 1972, she had not changed her approach twenty years later.

### THE MADISON LECTURE

Ginsburg had accepted an invitation to present the annual Madison Lecture on Constitutional Law at New York University Law School on March 9, 1993. When she gave her speech, Justice White's resignation was believed to be imminent. When he did resign on March 19<sup>th</sup>, there was widespread public support for her as his successor. However, the *Roe v. Wade* decision, which she had criticized, had been regarded by pro-choice Democrats for twenty years as a great liberal landmark. Thus, she might have enhanced her likelihood of being nominated if she had tailored her remarks to show deference and respect for the decision, but she did not do so; instead, she remained faithful to the views she had held when she litigated the Struck case.

Ginsburg began the Madison Lecture by stating that she had two main themes: human rights and the administration of justice, particularly in the federal courts. She noted that her views had been shaped by her years as a "law teacher" in the 1960s and 70s who had helped to launch the ACLU's Women's Rights Project and her time as a judge on the United States Court of Appeals for the District of Columbia Circuit since 1980.<sup>97</sup>

The first half of Ginsburg's speech compared American appellate courts with European courts and indicated that, in her view, appellate judges should behave with moderation and in creating law

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<sup>96</sup> According to De Hart, "By 1991, Ginsburg had jumped to the top in a survey of "leading centrists" likely to be considered for the Supreme Court." *Id.* at 298-99.

<sup>97</sup> Ginsburg, *supra* note 25, at 1185. Justice Sandra Day O'Connor had presented the NYU Madison Lecture one year earlier. *See id.* at 1202.

should generally limit themselves to making “interstitial” decisions. She cited with approval Justice Brennan’s statement defending appellate judges’ exercise of their prerogative to dissent from majority opinions but noted that legal scholar Roscoe Pound decades earlier had decried “intemperate denunciations of . . . colleagues, violent invective, attributi[on]s of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice or obtuseness of [other judges].”<sup>98</sup> She then quoted examples of excessively intemperate remarks in dissents by her friend Justice Scalia and D.C. Circuit colleague Judge Abner Mikva.<sup>99</sup>

The second part of Ginsburg’s address was captioned “MEASURED MOTIONS IN THIRD BRANCH DECISION MAKING.”<sup>100</sup> Ginsburg stated that:

Moving from the style to the substance of third branch decision-making, I will stress in the remainder of these remarks that judges play an interdependent part in our democracy. They do not alone shape legal doctrine but, as I suggested at the outset, they participate in a dialogue with other organs of government and with the people as well.<sup>101</sup>

She noted that Justice Holmes had “recognize[d] without hesitation” that judges “do and must legislate,” but “they can do so . . . only interstitially . . . .”<sup>102</sup> She suggested: “Measured motions seem to me right, in the main, for constitutional as well as common law adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable. The most prominent example in recent decades is *Roe v. Wade*.”<sup>103</sup>

To “illustrate” her point, she “[h]ad contrasted that breathtaking 1973 decision with the Court’s more cautious dispositions, contemporaneous with *Roe*, in cases involving explicitly sex-based classifications . . .” and “[would] further develop that comparison here.”<sup>104</sup> She noted that the *Roe* decision had struck

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<sup>98</sup> *Id.* at 1194 (citing Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953)).

<sup>99</sup> *Id.* at 1194-95.

<sup>100</sup> *Id.* at 1198.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1198 (footnotes omitted).

<sup>104</sup> *Id.*

down on Fourteenth Amendment due process grounds “a Texas criminal abortion statute that intolerably shackled a woman’s autonomy”; the only exception was when abortion was necessary to save the woman’s life. She continued:

Suppose the Court had stopped there, rightly declaring unconstitutional the most extreme brand of law in the nation, and had not gone on, as the Court did in *Roe*, to fashion a law blanketing the subject, a set of rules that displaced virtually every state law then in force. Would there have been the twenty-year controversy we have witnessed, reflected most recently in the Supreme Court’s splintered decision in *Planned Parenthood v. Casey*? A less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day, I believe and will summarize why, might have served to reduce rather than to fuel controversy.<sup>105</sup>

She further suggested that *Roe v. Wade* might have been “less of a storm center had it . . . homed in more precisely on the women’s equality dimension of the issue and, correspondingly, attempted nothing more bold than the mode of decision making the Court employed in the 1970s gender classification cases.”<sup>106</sup> Ginsburg went on to describe the *Struck* case, that could have usefully linked “reproductive choice” to “disadvantageous treatment of women on the basis of their sex.”<sup>107</sup>

Ginsburg noted that originally “the Air Force regime differentiated invidiously by allowing men who became fathers, but not women who became mothers, to remain in service” and by allowing women who underwent abortions but not women who gave birth to continue their military careers.<sup>108</sup> She noted that the Air Force had abandoned its regulation and had thereby given *Struck* a total victory on the merits, which warranted the case’s dismissal because of mootness. Moreover, while the Supreme Court majority had not voted to make sex-based classifications a suspect category for equal protection purposes, it had adopted her “fallback” suggestion of

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<sup>105</sup> *Id.* at 1199.

<sup>106</sup> *Id.* at 1200.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1201.

an elevated, “intermediate” level of scrutiny for such classifications that was more stringent than the “rational relationship” test for most legislation.<sup>109</sup> Thus, the Supreme Court could have continued the “dialogue” that its earlier 1970s decisions had opened with the political branches of government, to ensure that laws and regulations “would catch up with a changed world.”<sup>110</sup> While, as she noted, abortion law “was in a state of change across the nation” toward “liberalization” of the laws,<sup>111</sup> “*Roe v. Wade* invited no dialogue with legislators.”<sup>112</sup>

Nevertheless, *Roe* was not “measured,” since it “left virtually no state with laws fully conforming to the Court’s delineation of abortion still permissible.”<sup>113</sup> Around that extraordinary decision, a well-organized and vocal right-to-life movement rallied and succeeded, for a considerable time, in turning the legislative tide to the opposite direction.”<sup>114</sup> In a similar vein, former Yale Law Professor Geoffrey Hazard observed: “By making such an extensive change, the court [in *Roe*] foreclosed the usual opportunities for assimilation [and] feedback . . . that are afforded in a decisional process involving shorter and more cautious doctrinal steps.”<sup>115</sup>

Ginsburg emphasized that “Constitutional review by courts is an institution that has been for some two centuries our nation’s hallmark and pride.”<sup>116</sup> But she believed that two “extreme modes of court intervention in social change processes” in the twentieth century had placed stress on the process: “At one extreme, the Supreme Court steps boldly in front of the political process, as some believe it did in *Roe*,”<sup>117</sup> at the other extreme the Court, in the early part of the century, “thrust” itself into “the rearguard opposing change, striking down, as unconstitutional, laws embodying a new

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<sup>109</sup> *Id.* at 1202.

<sup>110</sup> *Id.* at 1204-05.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at n. 129 (quoting Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. Pa. L. Rev. 153, 166 (1986)).

<sup>116</sup> *Id.* at 1205.

<sup>117</sup> *Id.* at 1206.



philosophy of economic regulation at odds with the nineteenth century's laissez-faire approach."<sup>118</sup>

Ginsburg compared the development of civil rights law following *Brown v. Board of Education*<sup>119</sup> to the 1970s development of women's equal rights cases. The Court's decisions broadening women's rights in the 1970s had helped to educate society on women's subordination and had made possible a gradual expansion of those rights. In contrast, Blacks "were confined in a separate sector" of society and prospects were bleak for renouncing the "separate but equal" doctrine and "apartheid" that it embodied,<sup>120</sup> so that justified the Supreme Court's stepping ahead of the political branches "in pursuit of a constitutional precept" as in *Brown v. Board of Education*.<sup>121</sup>

Ginsburg suggested that while the Supreme Court Justices "...generally follow, they do not lead, changes taking place elsewhere in society..." sometimes they can effectively "signal a green light for a social change."<sup>122</sup> "Roe, on the other hand, halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue."<sup>123</sup> Maybe in consequence of that error, she suggested, the most recent (at that time) abortion decision, *Planned Parenthood v. Casey*,<sup>124</sup> had retreated from *Roe* and lessened women's rights.<sup>125</sup>

Ginsburg concluded by recalling the wise counsel that her "teacher and friend," Professor Gerald Gunther, had offered when she was installed as a judge in 1980:

The *good* judge . . . is open-minded and detached . . .  
 heedful of limitations stemming from the judge's own  
 competence and, above all, from the presuppositions  
 of our constitutional scheme; th[at] judge . . .

<sup>118</sup> *Id.* The reference is obviously to the substantive due process jurisprudence typified by *Lochner v. New York*, 198 U.S. 45 (1905). *Id.* at n. 132.

<sup>119</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>120</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>121</sup> *Id.*; see also *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (the famous footnote 4 about "discrete and insular minorities").

<sup>122</sup> Ginsburg, *supra* note 25, at 1208.

<sup>123</sup> *Id.* at 1206. At present, continued divisiveness in America about abortion is still strong nearly fifty years after the *Roe* decision in 1973.

<sup>124</sup> 505 U.S. 995 (2003).

<sup>125</sup> 505 U.S. 833 (1992).

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.”<sup>126</sup>

Ginsburg explained that “Professor Gunther had in mind a great jurist, Judge Learned Hand,” whose biography he was completing at that time.<sup>127</sup>

The modest, measured tone of Gunther’s description of “the good judge” is striking. Gunther passed up the opportunity to shower his protégé with praise (Ginsburg knew how greatly he respected and indeed admired her). Instead, I think he was holding up the model of the good common law judge, and his model was Hand, for whom he had clerked.<sup>128</sup>

Two weeks before the invasion of Normandy on “D Day,” whose success spelled doom for the Third Reich tyranny, the great judge Learned Hand had addressed almost one and a half million people in New York’s Central Park at the annual “I am an American” day. His speech on May 21, 1944 contained the following famous words:

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<sup>126</sup> Ginsburg, *supra* note 25, at 1209.

<sup>127</sup> Gunther had clerked for Judge Learned Hand (1872-1961) on the Second Circuit in 1953-54 after he graduated from Columbia Law School. His biography of Hand, which totaled eight hundred pages and clearly constituted a labor of love, was published in 1994; a second edition with a preface by Ginsburg was published in 2011. GERALD GUNTHER, *LEARNED HAND, THE MAN AND THE JUDGE* (1994). Ginsburg was too gracious to mention that Hand had been her first choice for a clerkship when she received her Columbia law degree in 1959, a position for which he would not consider a woman.

<sup>128</sup> Learned Hand majored in philosophy at Harvard College, graduating Phi Beta Kappa with highest honors, was awarded an *Artium Magister* degree as well as an *Artium Baccalaureus* degree, and was chosen by his classmates to deliver the Class Day oration. He also graduated with an LL.B. from Harvard Law School in 1896. Following an unsuccessful stint as a practicing lawyer, he was appointed a federal district judge for the Southern District of New York at the young age of thirty-seven in 1909 and was appointed to the Second Circuit in 1924. His distinguished law school professors included James Bradley Thayer, Christopher Columbus Langdell, Samuel Williston, John Chipman Gray, and James Barr Ames. GUNTHER, *supra* note 127 at 32; KATHRYN GRIFFITH, *JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY* 4 (1973).

What then is the spirit of Liberty? I cannot define it; I can only tell you my own faith. The Spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men; the spirit of liberty is the spirit which weighs their interests alongside its own without bias . . .<sup>129</sup>

The hesitancy to be certain that he was right influenced Learned Hand throughout his long federal judicial career. He was a strong supporter of civil rights and freedom of speech, often opposing public opinion. One of his most famous decisions as district judge was *Masses Publishing Co. v. Patten*,<sup>130</sup> in which he ruled in favor of a radical magazine which was charged with violation of the Sedition Act when it urged men to resist the draft during World War I. While the decision was widely unpopular and was reversed by the Second Circuit, it helped influence Justices Homes and Brandeis, whose jurisprudence later evolved towards greater defense of the right to advocate unpopular political causes that did not pose a serious threat to the peace.<sup>131</sup> Nevertheless, because of his scrupulous determination to reach just results and his gift for eloquence, he was the federal judge whose opinions were the most widely cited by other courts during his lifetime.<sup>132</sup>

I think that Learned Hand, a universally admired judge, served as a role model for Ginsburg during her tenure on both the D.C. Circuit and the Supreme Court. As noted, above, he was her first choice as the judge to clerk for after graduating from law school. I believe that while she regretted his bias in declining to even consider a female clerk, she was nevertheless willing to recognize his greatness as a judge.

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<sup>129</sup> GUNTHER, *supra* note 127, at 549.

<sup>130</sup> 244 F. 535 (S.D.N.Y. 1917), rev'd, 216 F. 254 (2d Cir. 1919).

<sup>131</sup> As noted above, he was Ginsburg's first choice as the judge to clerk for, but he never considered hiring a female clerk. He happened, however, to be free of a prejudice that was common among members of the Establishment: antisemitism. In 1922, he privately objected to a proposed limit on the number of Jewish students admitted to Harvard College. "If we are to have in this country racial divisions like those in Europe," he wrote, "let us close up shop now." GRIFFITH, *supra* note 128, at 362-68 (1973).

<sup>132</sup> Richard A. Posner, *The Hand Biography and The Question of Judicial Greatness* (reviewing Gerald Gunther, *Learned Hand: The Man and the Judge* (1994)), 104 Yale Law Journal 511 (1994).

To sum up Ginsburg's Madison Address, while her criticism of the *Roe* decision was somewhat oblique, her disagreement was unmistakable. She felt it was “sweeping,” “breathtaking,” and not “measured.” In a 1985 address at the University of North Carolina Law School, she observed that the Supreme Court’s cases applying equal protection analysis to gender-based classifications which had advanced women’s rights had not provoked much controversy. In contrast, the Court in *Roe v. Wade* “ha[d] treated reproductive autonomy under a substantive due process/personal autonomy headline, . . .” and the case became a “storm center,” sparking public opposition and academic criticism, “in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action.”<sup>133</sup>

Since the Court had fashioned “a law blanketing the subject, a set of rules that displaced virtually every state law then in force,” it had missed the opportunity to initiate a dialogue with the Texas Legislature on the issues as it could have by merely striking down the draconian Texas statute and then waiting for Texas to respond. She noted that Professor Archibald Cox had described *Roe*’s trimester approach as “read[ing] like a set of hospital rules and regulations,”<sup>134</sup> and that Justice Sandra Day O’Connor also opposed the trimester approach.<sup>135</sup> Like many critics of *Roe*, Ginsburg was in favor of abortion rights, although she noted that she “was not at that time or any other time thereafter personally engaged in reproductive autonomy litigation.”<sup>136</sup>

#### LAW PROFESSORS CRITIQUE *ROE V. WADE*

The majority of law professors nationwide probably supported the right to an abortion, albeit many found the Supreme Court opinion in *Roe v. Wade* disappointing. This gave Professor

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<sup>133</sup> Ruth Bader Ginsburg, *Essay, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375 (1985).

<sup>134</sup> *Id.* at 381.

<sup>135</sup> The Court later abandoned the trimester approach, replacing it with an “undue burden” standard. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>136</sup> Ginsburg, *supra* note 133, at 381. This was likely because in 1971, the Ford Foundation, whose financial support the ACLU began to accept, had a strict policy that not a penny of its funds could be spent on abortion-related litigation. DE HART, *supra* note 1, at 161.

Jack Balkin of Yale Law School, thirty years later, the idea of consulting legal experts on how they would have decided *Roe* and its companion case *Doe v. Bolton*<sup>137</sup> if they had been Supreme Court justices in 1973. Eleven law school professors accepted his invitation and made presentations at a symposium in New Haven on how they would have decided the case; these were subsequently published.<sup>138</sup> While only three professors opposed the legalization of abortion (Michael Stokes Paulsen, Teresa Collett, and Jeffrey Rosen), none of the other eight fully approved the reasoning of the 1973 decision, and none adopted Justice Blackmun's original trimester framework. Moreover, their pro-abortion rights decisions varied widely. Given the fact that the *Roe* holding was based on a posited right of privacy not anchored in an explicit constitutional provision, this was no doubt inevitable.

Balkin's own opinion held that abortion statutes violated both women's liberty and equality because they forced women to become mothers in a society where they still bear most of the responsibility for childcare. However, state legislatures could set a statutory deadline for exercising the right to an abortion, after which they could restrict or even completely prohibit abortions.<sup>139</sup> Instead, he would permit states to experiment with various deadlines for women to exercise the abortion right.<sup>140</sup> Significantly, in light of his strong conviction about the wrongfulness of abortion prohibition statutes, Balkin acknowledged how difficult it was to articulate a constitutional basis for holding thus:

Moreover, the question of abortion rights is legally difficult and morally complex, bringing together issues of life and death, humanity, equality, and liberty. The problems the Justices faced in *Roe* were as trying in their own way as any set of questions that come before the courts. Given the legal and moral

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<sup>137</sup> 413 U.S. 179 (1973).

<sup>138</sup> JACK M. BALKIN, *WHAT ROE V. WADE SHOULD HAVE SAID* (2005). The professors were instructed not to include consideration of any post-1973 decisions or developments. Professor Balkin included a brief history of *Roe v. Wade* and the controversy it caused at the beginning of *What Roe v. Wade Should Have Said*. *Id.* at 3.

<sup>139</sup> *Id.* at 17-18. His opinion "reject[ed] the rigid trimester system in *Roe* . . ." *Id.* at 19.

<sup>140</sup> *Id.* at 19.

difficulty of the issues and the inevitable need to make compromises, it was perhaps too much to expect that the Court would get it right the first time, under almost anyone's standards of what 'getting it right' might mean . . .<sup>141</sup>

Instead, he suggested, the Court "might have developed its ideas more fully over a course of decisions, perhaps in tandem with its sex-equality jurisprudence;" and while that probably would not have made abortion uncontroversial, "it might have produced a fairer, more flexible, and more democratically acceptable set of legal doctrines."<sup>142</sup>

In addition, Balkin said that the Justices should have recognized that their decision was bound to cause "a significant upheaval in American politics" and should have tried harder to win public support and assuage criticism . . .<sup>143</sup> He commended Chief Justice Warren's decision in *Brown v. Board of Education*,<sup>144</sup> another extremely controversial decision that effected historic change, as "a model of eloquence and understatement, brief and statesmanlike, fully aware of its political context and deliberately designed to avoid confrontation and to conserve the Court's legitimacy . . ."<sup>145</sup> In contrast, Blackmun's decisions in *Roe* and *Doe*, while full of scholarship and medical history, were "long-winded" and "devote[d] a very significant amount of space to technical legal issues."<sup>146</sup> Indeed, "Blackmun's opinion in *Roe* was so complicated that Blackmun himself at one point contemplated writing an addendum explaining its meaning."<sup>147</sup>

Echoing Justice Ginsburg's approach in her Madison Address, Balkin concluded that "[p]erhaps *Roe*'s most important shortcoming was not its failure to 'get it right' but its relative inattention to the interactions between courts and politics "and to how courts, whether they like it or not, always work in conversation with the political branches in developing constitutional norms."<sup>148</sup> And while courts

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<sup>141</sup> *Id.* at 22-24.

<sup>142</sup> *Id.* at 23.

<sup>143</sup> *Id.*

<sup>144</sup> 347 U.S. 483 (1954)

<sup>145</sup> BALKIN, *supra* note 138, at 23.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

often have to protect rights from political interference, “those rights . . . also arise out of politics, they are tested by politics, and they are modified by courts as a result of politics.”<sup>149</sup> Balkin concluded:

Despite the attention that has been paid to Roe, the constitutional right to abortion, as it exists today, is not solely the work of the federal judiciary. Like all important constitutional ideas, it is the work of a dialectical process that engages all the major institutions of American lawmaking, and it has been fashioned through controversy and strife, through trial and error – and with many mistakes and hesitations along the way – out of the raw materials of American politics.<sup>150</sup>

Among the other law professors’ model opinions, Reva Siegel argued that the proper basis of the abortion right is women’s equality and that abortion is a constitutional right necessary to secure women’s equal citizenship.<sup>151</sup> Mark Tushnet believed that the all-male Supreme Court justices of 1973 did not understand the connection between abortion rights and the Equal Protection Clause. He based his opinion on Justice Douglas’s concurrence in *Doe v. Bolton*, which Justice Brennan had joined.<sup>152</sup>

Four other participants, Anita Allen, Robin West, Jed Rubenfeld and Cass Sunstein, concurred in the judgment that both the Texas and Georgia statutes were unconstitutional, but for different reasons. Anita Allen grounded her opinion on women’s procreative liberty protected by the Due Process Clause.<sup>153</sup> Jed Rubenfeld argued that the constitutional right to privacy is part of a “general prohibition against totalitarian policies that take over people’s private lives” and “conscript women, forcing them ‘to carry out a specific, sustained, long-term, life-altering and life-occupying course of conduct.’”<sup>154</sup> Robin West argued that restrictions on abortion violated both women’s liberty and their equality, imposing on them duties of “good samaritanship” that states do not impose on any other persons. She

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<sup>149</sup> *Id.* at 23-24.

<sup>150</sup> *Id.* at 24.

<sup>151</sup> *Id.* at 19.

<sup>152</sup> *Id.* at 21.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

thought that Congress is the best body to enact laws that would protect women's equality and would secure their equal citizenship.<sup>155</sup>

Cass Sunstein believes in a theory he calls judicial minimalism, in which courts should ordinarily decide cases on narrow grounds and leave many things undecided and thereby act as catalysts for democratic deliberation. He supported the results in *Roe* and *Doe* on the grounds that abortion statutes were overbroad since they abridged too much constitutionally protected liberty.<sup>156</sup>

Jeffrey Rosen dissented from both *Roe* and *Doe* because he believed that the right of privacy has no basis in the Constitution and that the Supreme Court should have left the issue of abortion rights to legislatures. He agreed with many of the arguments made by John Hart Ely against *Roe v. Wade* and believed that the hasty and ill-considered decision in *Roe* simply exacerbated political division and might have undermined the trend towards protection of abortion rights before the 1973 decision.<sup>157</sup>

Akhil Amar had an interesting position: He concluded that the Texas abortion statute in *Roe* was unconstitutional since it was enacted in the 1850s, while women only obtained the right to vote with passage of the Nineteenth Amendment in 1920. In contrast, he believed that the Court should have abstained from adjudicating the Georgia statute, passed in 1968, which was challenged in *Doe v. Bolton*, and left its interpretation to the Georgia courts.

Michael Stokes Paulsen believes that abortion is deeply immoral and that the Supreme Court has severely damaged its authority by declaring it to be a fundamental right and thereby becoming complicit in the destruction of so many innocent human lives.<sup>158</sup> He states that “[p]lainly, abortion kills a living being,” and

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<sup>155</sup> *Id.* at 20-21.

<sup>156</sup> *Id.* at 20.

<sup>157</sup> *Id.* Rosen met Ginsburg in an elevator when he was clerking for another judge on the D.C. Circuit in 1991. He wanted to make her acquaintance, so he asked her if she had seen any good operas recently. She responded with enthusiasm. She loved operas, and this led to a strong friendship. In 1993, he wrote an unsolicited assessment of potential nominees to the Supreme Court and ranked her “as the top candidate with the strongest support from both liberals and conservatives.” DE HART, *supra* note 1, at 317. Given his close friendship with Ginsburg, it is significant that he opposed both *Roe* and *Doe* and thought the abortion issue should be left to legislatures. Rosen published *Conversations with RBG: Ruth Bader Ginsburg on Life, Love, Liberty, and Law* (2019).

<sup>158</sup> BALKIN, *supra* note 138, at 22.



“[i]t is equally plain that the living being killed by an abortion is a human living being” and “[t]he act of abortion thus ends a human life.”<sup>159</sup> He argued that “[i]t is somewhat amusing (but also somewhat pathetic and dispiriting) to observe the other members of the Court flailing around, so desperately and so very creatively—and so inconsistently with one another!—and with such evident desire to reach a predetermined preferred result, trying to torture an argument out of the Constitution’s text in support of a ‘right’ of some kind . . . to kill human beings gestating in their mothers’ wombs.”<sup>160</sup>

Teresa Collett argued that *Roe* is the product of a misguided radical individualism that undermines women’s liberty and equality. She contends that making abortion freely available allows men to escape responsibility for sex and parenthood and treats women’s bodies as something unnatural and something to be altered to conform to the male model.<sup>161</sup>

#### JUDGE WILKINSON’S CRITIQUE OF *ROE V. WADE*

A detailed and rather devastating critique of *Roe v. Wade* was written by United States Court of Appeals Fourth Circuit Judge J. Harvie Wilkinson, who was equally caustic about *District of Columbia v. Heller*,<sup>162</sup> the radical decision in which the Supreme Court held for the first time since the ratification of the Second Amendment that there was an individual constitutional right to own guns at least in the District of Columbia, which is a federal entity.<sup>163</sup>

Wilkinson criticized both cases for “fashioning novel substantive rights,” “descending into the political thicket,” “ignoring the Legislature’s strengths” and “disregarding federalism’s virtues.”<sup>164</sup> According to Wilkinson:

Both decisions share four major shortcomings: an absence of a commitment to textualism; a willingness

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<sup>159</sup> *Id.* at 196.

<sup>160</sup> *Id.*; see also Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995 (2003). Paulsen’s title refers to *Planned Parenthood v. Casey*, 505 U.S. 995 (2003), which reaffirmed and purported to permanently entrench the right to abortion created by *Roe v. Wade*.

<sup>161</sup> BALKIN, *supra* note 138, at 22.

<sup>162</sup> 554 U.S. 570 (2008).

<sup>163</sup> J. Harvie Wilkinson III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 Va. L. Rev. 253 (2009). The article is 68 pages long and contains 325 footnotes.

<sup>164</sup> *Id.*

to embark on a complex endeavor that will require fine tuning over many years of litigation; a failure to respect legislative judgments; and a rejection of the principles of federalism. These failings have two things in common. First, each represents a rejection of neutral principles that counseled restraint and deference to others regardless of the issues involved. Second, each represents an act of judicial aggrandizement; a transfer of power to judges from political branches of government – and thus, ultimately, from the people themselves.<sup>165</sup>

Wilkinson charged the Court with creating a “newly discovered right to abortion” without any relationship to the text or structure of the Constitution,” something they should never have done.<sup>166</sup> He also gave examples of leading authorities’ criticisms of *Roe*. Gerald Gunther was unable “to find a satisfying rationale to justify *Roe* . . . on the basis of modes of constitutional interpretation I consider legitimate.”<sup>167</sup> Alexander Bickel asserted that the Court “refused the discipline to which its function is properly subject; it simply asserted the result it reached. This is all the Court could do because moral philosophy, logic, reason, or other materials of law” could not resolve the question of whether abortion should be permitted.”<sup>168</sup> Wilkinson concluded that the *Roe* decision gave rise to the modern conservative movement because it violated neutral principles of “textualism, structuralism, federalism, historicism and plain old modesty and restraint.”<sup>169</sup> Richard Epstein flatly labeled the decision “comprehensive legislation” which the seven justices had “enacted” in the name of the due process clause of the Fourteenth Amendment.<sup>170</sup>

The Court in *Roe* had imposed on itself an enormous future burden: by 2009, thirty-six years after the 1973 decision, it had decided more than twenty-five abortion cases, and lower courts had

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<sup>165</sup> *Id.* at 254.

<sup>166</sup> *Id.* at 258.

<sup>167</sup> *Id.* at 262.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 264.

<sup>170</sup> *Id.* at 262.

decided hundreds more.<sup>171</sup> Moreover, Wilkinson argued, legislative bodies accustomed to compromise and able to study fraught political issues over time were better suited to decide them than courts deciding individual cases. As Justice Scalia charged, the Supreme Court with its set of detailed regulations ended up creating what could accurately be called an “Abortion Code,” i.e., it was in effect exercising legislative power which it had no business doing.<sup>172</sup> Justice Rehnquist had labeled the *Roe* decision “judicial legislation” in his original 1973 dissent.<sup>173</sup>

Wilkinson proceeded to make a case that it was unwise for the Court in *Roe* to enter the “thicket” of such a controversial and politically fraught issue as the right to an abortion, especially when there is no clear “constitutional guidance” to assist in resolving controversies about the permissible scope of such a right. For instance, numerous states have enacted laws requiring parental consent for young girls to receive an abortion but permitting a “judicial bypass” if parents unreasonably refuse their consent. He noted that as of 2009, the Supreme Court had considered parental consent requirements and judicial bypass procedures eight times in sixteen years.<sup>174</sup>

Yale Law Professor John Hart Ely had published one of the major articles criticizing *Roe v. Wade* less than a year after the decision.<sup>175</sup> Abortion rights supporters are outraged by the unavailability of abortion facilities in large areas of the country, especially in the South, and they do not see why the exercise of a constitutional right proclaimed by the Supreme Court half a century ago should be nearly impossible in such areas.<sup>176</sup> However, Professor Ely, while he favored statutory abortion rights, believed that the

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<sup>171</sup> The 1992 case of *Planned Parenthood v. Casey* had eliminated the trimester system at the heart of *Roe* and had dealt with a startling number of technical issues; Wilkinson claimed that the case’s analysis “was detailed, debatable, and inescapably arbitrary.” *Id.* at 277.

<sup>172</sup> *Id.* at 261.

<sup>173</sup> *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

<sup>174</sup> Wilkinson, *supra* note 163, at 277. It seems excessive for such a detailed issue to require such frequent judicial review.

<sup>175</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973).

<sup>176</sup> Such regional inconsistencies were of course the norm in the United States under the police power prior to the Court’s 1973 decision, and such a pattern might resurface if the even more conservative Court with Ginsburg’s successor, new Justice Amy Coney Barrett, strikes down *Roe v. Wade*.

Court should not “second guess legislative balances” and disregard the lessons of community experience which influence compromises resulting from the political process.<sup>177</sup> In his dissent in *Roe*, Justice Rehnquist had emphasized the superior ability of legislatures studying conflicting claims and complicated medical and scientific issues at length, “unconstrained by judicial rules on standing and evidence.”<sup>178</sup> Others had criticized *Roe* for ignoring what Justice Brandeis had referred to as the “happy incident” of our federal system, which permitted the states to serve as natural laboratories for experimentation and innovation.<sup>179</sup>

Justice Scalia argued that while Americans were deeply and rather evenly split on the morality of abortion as a nation, the different regions were not representative of the whole, that is, states on the coasts tended to be predominantly pro-choice, while rural and deep Southern areas were more pro-life. Thus, leaving the issue to its traditional status as part of states’ police power would respect the views of the largest number of Americans. Wilkinson observed that legislative bodies were far better suited to dealing through compromise with such fraught issues, which they could study over long periods, without having to reach a decision in the case. In contrast, courts which are compelled to decide cases had no such flexibility, and they have to issue decisions within reasonable time frames.<sup>180</sup>

#### “THE GOOD JUDGE”

I wish to return now to the thought-provoking message which Gerald Gunther delivered when Ginsburg was sworn in as an appellate judge in December 1980:

The good judge . . . is open minded and detached . . . heedful of limitations stemming from the judge’s own competence and, above all, from the presuppositions of our constitutional scheme; and [th]at judge . . . recognizes that a felt need to act only interstitially

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<sup>177</sup> Ely, *supra* note 175, at 923.

<sup>178</sup> *Id.* at 935, n. 104 (citing Lynn D. Wardle, *Rethinking Roe v. Wade*, 1985 BYU L. Rev. 231, 238 & n.41).

<sup>179</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>180</sup> Wilkinson, *supra* note 163, at 307-08.

does not mean relegation of judges to a trivial or mechanical role, but rather affords the most responsible room for creative, important judicial contributions.<sup>181</sup>

I think that Gerald Gunther, when he spoke these words, was holding up the model of a good common law judge, and Ginsburg obviously agreed with him. Imbued with the scrupulous and cautious spirit of his mentor, Judge Learned Hand, Gunther felt that a judge should act with restraint. Despite his brilliant academic success at Harvard, Hand was full of insecurity and self-doubt all his life.<sup>182</sup> When writing opinions, he would often agonize over the merits, and he sometimes would go through numerous drafts of an opinion before it became final.

Alexander Hamilton in the *Federalist* described the judiciary as “the least dangerous branch” of government because it “had no influence over either the sword or the purse . . . It may truly be said to have neither FORCE nor WILL, but merely judgment.”<sup>183</sup> As we have seen, *Roe v. Wade* and *Doe v. Bolton* are open to the charge that the Supreme Court was in effect legislating when it issued the decisions.<sup>184</sup> Ginsburg appreciated how the law involved a dialogue between courts, legislative bodies and the general public, and she noted that courts generally follow, rather than leading, changes taking place elsewhere in society.<sup>185</sup> For this reason, she appreciated the

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<sup>181</sup> Ginsburg, *supra* note 25, at 1209; *supra* note 126

<sup>182</sup> He was keenly disappointed that he was not selected by any of the Harvard social clubs, and he was unsuccessful in the Glee Club and football team. He later acknowledged: “I was never any good as a lawyer. I didn’t have any success, any at all.” GUNTHER, *supra* note 127, at 107. When he accepted the Progressive nomination for Chief Judge of the Court of Appeals, New York’s highest court, in 1913, he refused to campaign since he could not bear “harassing the electorate.” He received only 13% of the vote and later decided that it was a mistake to have run: “I ought to have lain off, as I now view it; I was a judge and a judge has no business to mess into such things.” *Id.* at 237.

<sup>183</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>184</sup> Experience has shown, I believe, that Hamilton might have under-estimated the power and dangerous potential of the judiciary. In any event, jurisprudential commentary is replete with warnings that the Supreme Court should not act as a “superlegislature”; as Ginsburg said, we do not have a “tricameral” national federal government.

<sup>185</sup> See Ginsburg, *supra* note 25, at 1208, 1204-05.

value of an incremental, interstitial approach to judicial progress,<sup>186</sup> and this has always been how the common law evolved.

The common law system was the basic original framework of Anglo-American law. For centuries during the Middle Ages, the common law developed incrementally, when the king's judges traveled around the realm and had to adjudicate disputes between the king's subjects. The most common civil forms of action were torts and contracts. Over the years, the courts built up a body of judge-made law which honored precedent. When an instant case raised essentially the same question of law as one from the year before, *stare decisis* dictated that the judge should follow precedent rather than reaching a new and different conclusion in the new case. If a case could be narrowly decided, based on a limited legal issue, then the judge was supposed to decide it thus and avoid stating a broad principle that might lead to results in a future case that the judge did not intend. The courts were to proceed incrementally, by baby steps, since if a court made a mistake, it would require a smaller repair job to fix it.

While it is customary to distinguish common law from constitutional law, they actually have much in common. Their major difference is that constitutional law is anchored in a permanent legal text, which can only be altered through the arduous and demanding process of amendment; in contrast, statutes can be altered or repealed by a mere majority vote. Yet the brevity and generality of constitutional provisions necessitates that courts explain, elaborate and expand on their meaning. In doing so they are continuing to create a body of constitutional common law.<sup>187</sup>

With respect to *Roe v. Wade*, Ginsburg was concerned about "the fragile textual backing for privacy upon which *Roe* rested, deriving as it did from what many legal scholars had regarded as sloppy jurisprudence in the earlier *Griswold* decision."<sup>188</sup> She firmly believed that basing a woman's right to an abortion on the equal protection clause would make it less vulnerable to legal challenge. She imagined that if the Court had merely struck down the extreme Texas prohibition of abortion without more, that could have opened a dialogue between state legislatures, their citizens and the courts, and

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<sup>186</sup> See *id.* at 1209 (regarding Gunther's remarks at her D.C. Circuit installation).

<sup>187</sup> See, e.g., Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975).

<sup>188</sup> DE HART, *supra* note 1, at 192.

“[l]aws that proved too restrictive could then have been challenged so that the Court might proceed incrementally, giving the public more time to adjust.”<sup>189</sup> She feared that the “backlash” that greeted *Roe* might intensify and threaten “the institutional legitimacy and authority” of the Supreme Court itself.<sup>190</sup>

The Supreme Court majority of seven to two in *Roe v. Wade* may have believed that it was timely and appropriate to issue a uniform national rule on abortion in what Justice Ginsburg called “that breathtaking 1973 decision.”<sup>191</sup> They may have thought that they were achieving judicial economy by thus speeding up the process to conclusion. However, in 1993, Justice Ginsburg questioned whether this result was “worth it,” since “a well-organized and vocal right-to-life movement rallied and succeeded, for a considerable time, in turning the legislative tide in the opposite direction.”<sup>192</sup> Ginsburg further stated that “*Roe* . . . halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue.”<sup>193</sup>

#### “BURKEAN MINIMALISM” AND “THE GOOD JUDGE”

I believe that a legal philosophy which has been called “Burkean minimalism” accurately describes the judicial philosophy that Ginsburg received from Gerald Gunther’s description of how a “good judge” decides cases.<sup>194</sup> Professor Cass Sunstein has elaborated this jurisprudential approach in his writing. The label of course refers to Edmund Burke,<sup>195</sup> the great Irish statesman and conservative political philosopher who published his famous work only a year after the French Revolution.<sup>196</sup> Sunstein comments: “Burke opposes theories and abstractions, developed by individual

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 192-93.

<sup>191</sup> Ginsburg, *supra* note 25, at 1198.

<sup>192</sup> *Id.* at 1205.

<sup>193</sup> *Id.* at 1208.

<sup>194</sup> Cass Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353 (2006).

<sup>195</sup> EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Barnes & Noble 2010). Burke was born in 1729 and died in 1797. Camil Ungureanu, *Introduction to EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE*, at vii-ix.

<sup>196</sup> Edmund Burke, *Reflections on the Revolution in France*, in THE PORTABLE EDMUND BURKE 416, 451 (Isaac Kramnick ed., 1999).

minds, to traditions built up by many minds over long periods,”<sup>197</sup> including the common law. Burke wrote in the following famous passage:

We wished at the period of the Revolution, and we do now wish, to derive all we possess as an inheritance from our forefathers . . . The science of government being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he maybe, it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree, for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.<sup>198</sup>

Sunstein’s calls his interpretation of the Constitution “Burkean minimalism” and defines it as follows:

Burkean minimalists believe that constitutional principles must be built incrementally and by analogy, with close reference to long-standing practices. Like all minimalists, Burkeans insist on incrementalism but they also emphasize the need for judges to pay careful heed to established traditions and to avoid independent moral and political arguments of any kind.<sup>199</sup>

Sunstein cites Justices Felix Frankfurter and Sandra Day O’Connor as “the most prominent practitioners of Burkean minimalism, in the sense that they have tended to favor small steps and close attention to both experience and tradition.”<sup>200</sup> He distinguishes Burkean minimalists, from “originalists” and “conservative perfectionists,” but notes that “all three disapprove of those forms of liberal thought that culminated in the work of the Warren Court and on occasion its successors.”<sup>201</sup> He further notes that “[a]ll three approaches are at least skeptical of *Roe v. Wade*” and

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<sup>197</sup> Sunstein, *supra* note 194, at 369.

<sup>198</sup> EDMUND BURKE, *THE PORTABLE EDMUND BURKE* 451 (1999).

<sup>199</sup> Sunstein, *supra* note 194, at 356.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 358.



“the effort to remove religion from the public sphere . . . .”<sup>202</sup> Burkeans value narrow, incompletely theorized rulings and thus reject both width and depth.”<sup>203</sup>

One important feature of Burkean minimalism is “narrowness;” Burkean minimalists favor “narrow” rulings, “which do not venture far beyond the problem at hand, and attempt to focus on the particulars of the dispute before the Court.”<sup>204</sup> “Wide” rulings are the opposite of “narrow” ones, and “[m]inimalists fear that wide rulings will produce errors that are at once serious and difficult to reverse – a particular problem when the stakes are high.”<sup>205</sup>

Secondly, Burkean minimalists favor “rulings that are shallow rather than deep. Shallow rulings attempt to produce rationales and outcomes on which diverse people can agree, notwithstanding their disagreement on or uncertainty about the most fundamental issues.”<sup>206</sup>

Sunstein suggests that “shallow” rulings may prevent errors and “promote social peace,” because the meanings of the same general terms may be interpreted differently by people who can nevertheless agree on the terms used.<sup>207</sup>

As far as “tradition” is concerned, Burke thought that “reasonable citizens, aware of their own limitations, will effectively delegate authority to their own traditions,” which embody “the judgments of many people operating over time.”<sup>208</sup> This has particular relevance to the common law:

Burke sees his claims as a reason to value rather than to repudiate the common law, which he goes so far as to call the ‘pride of the human intellect.’ Burke contends that ‘with all its defects, redundancies, and errors,’ jurisprudence counts as ‘the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns.’<sup>209</sup>

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<sup>202</sup> *Id.* at 358.

<sup>203</sup> *Id.* at 358.

<sup>204</sup> *Id.* at 362.

<sup>205</sup> *Id.* at 363.

<sup>206</sup> *Id.* at 364.

<sup>207</sup> *Id.* at 365.

<sup>208</sup> *Id.* at 371.

<sup>209</sup> *Id.* at 371-72.

A final problem that Sunstein addresses is “the Burkean dilemma.” “Burkean minimalists respect the demands of stare decisis, believing as they do that entrenched decisions may well embody wisdom and that new departures are likely to have unanticipated consequences, especially if existing law is embodied in social practices as well as judicial doctrines.”<sup>210</sup> But if Burkean minimalists disagreed on the premises of the original decision, then how should they deal with it when it has been entrenched for years? This “dilemma” has no easy answer. One option is to narrow considerably the entrenched decision without overruling it, and moreover,

[i]t is easy to see how Burkeans might be drawn to this way of dealing with *Roe v. Wade*. But it would not be out of bounds for Burkeans to conclude that the most indefensible departures from their preferred method must be sharply cabined or even overruled, at least if it is possible to do so without disrupting reasonable expectations or undoing a great deal of the fabric of existing law. Committed Burkeans might well take this approach to *Roe* . . .<sup>211</sup>

“No Burkean is likely to believe that *Roe* was correct in the first instance,”<sup>212</sup> but some might conclude that it has become so embedded in social practices that overruling it might create “a kind of social upheaval.”<sup>213</sup> Thus, “reasonable Burkeans” could disagree about whether to overrule *Roe v. Wade*.

Sunstein summarizes his article as follows:

Burkeans value narrow, incompletely theorized rulings and thus reject both width and depth. What Burkeans add is an emphasis on the need to develop law with close reference to established practices and traditions and a corresponding distrust of judicial judgments that are not firmly rooted in long-standing experience...<sup>214</sup>

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<sup>210</sup> *Id.* at 402.

<sup>211</sup> *Id.* at 403.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 408.

Sunstein presented his minimalist judicial philosophy more fully in a 1999 book.<sup>215</sup> At that time, the Supreme Court addressed the question of whether there was a constitutional right to physician-assisted suicide. A majority of five justices merely said that there is no general right to suicide, assisted or otherwise, but it left open the possibility that under special circumstances, people might have a right to assisted suicide after all.<sup>216</sup> He commented:

In other words, the Court left the most fundamental questions undecided. Far from being odd or anomalous, this is the current Court's usual approach. In this way, the Court is part of a long historical tradition. Anglo-American courts often take small rather than large steps, bracketing the hardest and most divisive issues.

My goal in this book is to identify and to defend a distinctive form of judicial decision-making, which I call "minimalism."<sup>217</sup>

He further explains:

Procedure first: A minimalist court settles the case before it, but it leaves many things undecided. It is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions. Alert to the problem of unanticipated consequences, it sees itself as part of a system of democratic deliberation; it attempts to promote the democratic ideals of participation, deliberation and responsiveness . . . To the extent that it can, it seeks to provide rulings that can attract support from people with diverse theoretical commitments.<sup>218</sup>

Minimalism is not a form of judicial "activism." On the contrary,

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<sup>215</sup> CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

<sup>216</sup> *Id.* at ix.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at x.

Minimalists are protective of their own precedents and cautious about imposing their own views on the rest of society. Certainly, they disfavor broad rules that would draw a wide range of democratically enacted legislation into question . . . They prefer to leave fundamental issues undecided. This is their most distinctive characteristic . . .<sup>219</sup>

Sunstein discusses *Brown v. Board of Education* and *Roe v. Wade* at length. With regard to *Roe*, he states that “[p]erhaps the *Roe* outcome was correct as a matter of substantive constitutional theory . . . But at least it seems reasonable to think that the democratic process would have done much better with the abortion issue if the Court had proceeded more cautiously and in a humble and more interactive way.”<sup>220</sup>

Minimalists clearly have great respect for Alexander Bickel, the great Yale Law School professor who wrote *The Least Dangerous Branch*.<sup>221</sup> Bickel championed “the passive virtues,” which are exercised when a court refuses to assume jurisdiction.<sup>222</sup> This is not necessarily because the case is unimportant, but because it is untimely to do so. This is inevitable in many cases where the Supreme Court denies a petition for certiorari because its vast potential docket makes it impossible to grant much more than 1% of such petitions. As Sunstein further observes, the passive virtues are also served by the principle of justiciability: “The basic principles of justiciability are designed to limit the occasions for judicial interference with political processes.”

Sunstein further realizes that:

[t]hose who favor passive virtues, narrow decisions, incompletely theorized agreements tend to be humble about their own capacities. They are not by any means skeptics; but with respect to questions of both substance and method, they are not too sure that they

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 37.

<sup>221</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS Branch* (Yale Univ. Press, 2nd ed. 1986) (1962).

<sup>222</sup> SUNSTEIN, *supra* note 215, at 39.

are right. They know that their own attempts at theory may fail . . .<sup>223</sup>

A minimalist approach is also appropriate “where facts and values are in flux:”

Minimalists refuse to freeze existing ideals and conceptions; in this way they retain a good deal of room for future deliberation and choice. This is especially important for judges who are not too sure that they are right.<sup>224</sup>

Since there is a natural desire among most people for clarity and certainty, it might seem odd to impute merit to a system that valorizes “incompletely theorized rulings” that are both “narrow” and “shallow.” However, there is scarcely too much agreement and harmony in our contemporary, hostilely partisan world. Even if the terms of certain rulings mean slightly different things to different people, “shallowness” might make it easier for them to agree with one another. I think that Cass Sunstein’s Burkean minimalism plainly shows its derivation from the philosophy and wisdom of Learned Hand through Gerald Gunther to Ruth Bader Ginsburg, and if it is followed by the courts, it might herald an era of greater comity in our nation.

#### **VALEDICTORY: A LIFE WELL LIVED**

In looking back on the remarkable life and career of Justice Ruth Bader Ginsburg, one cannot fail to be impressed by her wisdom and accomplishments. She was brilliant, diligent and remarkably well-disciplined. Her appointment to the Supreme Court at the relatively old age of sixty was a merit appointment, as her ninety-six to three confirmation vote suggests. It is a tribute to her sagacity, strategic skills and sense of timing that she was the litigator most responsible for making lasting changes in women’s legal rights during the 1970s. Unlike other revolutionary changes in the law in

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<sup>223</sup> *Id.* at 40.

<sup>224</sup> *Id.* at 259. The evocation of Learned Hand’s May 1944 speech in Central Park and Gerald Gunther’s remarks at Ginsburg’s swearing in as a D.C. Circuit judge are unmistakable. Incidentally, Sunstein identifies Ginsburg as a somewhat liberal minimalist. *Id.* at 62.

the twentieth century, the changes in the law that she helped bring about have won universal acceptance. I think that this is due in part to her commitment to interstitial development of the law, influenced by her knowledge of common law and its history. She understood and appreciated historical processes and how law evolves through the interaction of legislatures, courts and the beliefs and culture of the American people.

No stranger to tragedy, poverty, and setbacks, Ruth Bader Ginsburg led a trailblazing life within a traditional framework. As a young woman, she married the love of her life and had children. She supported her husband when he fell ill in law school while she continued her own studies and took care of their daughter. She was lively, beautiful, and well-liked. The male legal community denied her jobs that went to males, so she became a teacher. While she was a law professor, she became an active litigator in the 1970s and won landmark cases to further the civil rights of women. Along the way, she was supported by men in her personal life who helped her to achieve her goals. She remained true to her jurisprudential philosophy and took advantage of every opportunity to help bring about permanent improvements in women's rights. Her brilliance, her work ethic, and her strength of character eventually won for her a position of power, acclaim and influence. She was a woman of her time who became a legend. Tikkun olam. May her memory be a blessing for all Americans!