

JUSTICE RUTH BADER GINSBURG

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After a lifelong battle with gender discrimination, Ruth Bader Ginsburg became more than a role model for American women, she became the second woman to preside as a United States Supreme Court Justice.¹ In this brief article, the Seton Hall Constitutional Law Journal celebrates Ruth Bader Ginsburg's accession to the U.S. Supreme Court by presenting a short biography of her life and career.

Born and raised in Brooklyn, New York, Ruth Bader attended Cornell University, where she graduated a member of *Phi Beta Kappa*.² At Cornell,³ Bader met Martin Ginsburg, a fellow student and her soon-to-be husband.⁴ Following their college graduation, the two married and, a year later, the couple's first child, Jane Carol, was born.⁵ When Jane Carol was one year old, Ginsburg enrolled at Harvard Law School, where her husband

¹ David Kaplan and Bob Cohn, *A Frankfurter, Not a Hot Dog: Ruth Ginsburg Has a Record of Judicial Restraint*, NEWSWEEK, June 28, 1993, at 29.

² Guy Gugliotta and Eleanor Randolph, *Judge Ginsburg's Journey Up: Feminist Activism Propelled Her to a High Court Nomination*, WASH. POST NAT'L WKLY. ED., June 21-27, 1993, at 6. Ruth Bader was born in the Flatbush section of Brooklyn, New York on March 15, 1933. *Id.* She attended Brooklyn's James Madison High School where she spent her free time as a baton twirler for the school's football team and as a features editor for the school newspaper. *Id.* Although no longer a resident, Ginsburg maintains ties to the New York area, as both she and her husband, Professor Martin Ginsburg, consider themselves New York "natives." Claudia MacLachlan, *Mr. Ginsburg's Campaign for Nominee: Well-Connected Tax Bar Colleagues Went to Bat for Old Friends*, NAT'L L.J., June 28, 1993, at 33.

³ *Id.* While attending Cornell, Ginsburg majored in government and belonged to both the Women's Self Governance Organization, a campus-based association, and a sorority. *Id.*

⁴ *Id.* Martin Ginsburg has been referred by colleagues as, "one of the best tax lawyers in the country." *Id.* (quoting U.S. Tax Court Senior Judge Theodore Tannenwald, Jr.). Currently a full-time professor at Georgetown University Law Center, he also manages cases for the Washington D.C. branch of Fried, Frank, Harris, Shriver & Jacobson on a part-time basis. *Id.*

⁵ Gugliotta and Randolph, *supra* note 2, at 6. Jane Carol Ginsburg was born July 21, 1955. MacLachlan, *supra* note 2, at 3. She is currently a professor at Columbia University School of Law and specializes in copyright law. *Id.* The Ginsburgs' second child, James Steven Ginsburg, was born on September 8, 1965. *Id.*

was, by that time, a second year law student.⁶

It was at Harvard where Ginsburg first felt the pressures of trying to succeed in a man's world. As one of only eight women in a class of 400, Ginsburg once recalled being questioned by the Dean at Harvard Law as to why she chose to occupy a space which was intended for a man.⁷ With such pressures before her, Ginsburg spent the next two years of her law school career trying to dispel the prevalent notion that women were inferior to men in the study and practice of law.⁸ Prior to her third year of law school Ginsburg transferred to Columbia Law School⁹ to be near her husband who, upon his graduation, had accepted employment in New York City.¹⁰

When Ginsburg graduated one year later, she did not fare as well as her husband, recalling once in an interview, "[n]ot a single law firm in the entire city of New York bid for my employment."¹¹ She explained further in a different interview, "[m]any law firms were just beginning to hire Jews and to be a woman, a Jew and mother to boot was an impediment . . . [but] motherhood was the major impediment. The fear was I would not be able to devote my full mind and time to a law job."¹² Even Supreme Court Justice Felix Frankfurter denied her employment on the basis of gender.¹³ Fortunately not all employers adhered to this practice of discrimination, Ginsburg eventually accepted a clerkship with the Honorable Edmund L. Palmieri of the United State District Court for the Southern District of New York.¹⁴

⁶ Gugliotta and Randolph, *supra* note 2, at 6.

⁷ *Id.*; Marcia Coyle, *Nominee's Mettle Will Be Tested Soon*, NAT'L L.J., June 28, 1993, at 32.

⁸ While at Harvard, Bader Ginsburg wrote for the Harvard Law Review. Coyle, *supra* note 7, at 32.

⁹ Attending Columbia Law School for only one year, Ginsburg both wrote for the Columbia Law Review and tied for first in her graduating class. *Id.*

¹⁰ *Id.* Upon law school graduation, Martin Ginsburg joined the law firm of Weil, Gotshal & Manages, where he eventually achieved partnership status. MacLachlan, *supra* note 2, at 33. However, seeking a career in education, Martin Ginsburg abandoned his partnership status to become a professor at Columbia University Law School. *Id.*

¹¹ Margaret Carlson, *The Law According to Ruth*, TIME, June 28, 1993, at 38.

¹² Gugliotta and Randolph, *supra* note 2, at 6 (quoting Ruth Bader Ginsburg).

¹³ Kaplan and Cohn, *supra* note 1, at 29.

¹⁴ Daniel Wise, *Lawyers Hail Ginsburg Nomination: Called 'Founding Mother' of Women's Rights Movement*, N.Y.L.J., June 15, 1993, at 2. Ginsburg served as a law secretary to the Honorable Edmund L. Palmieri from 1959 to 1961. *Id.*

After her clerkship ended, Ginsburg accepted a teaching position at Rutgers University Law School.¹⁵ Ginsburg earned tenure in 1969, but left two years later to teach part-time at Harvard, where she taught a course on women and the law.¹⁶ Harvard did not extend a tenure offer to Ginsburg, so she quietly left.¹⁷ Her talents did not go unused for very long, however, and in 1972 Ginsburg became the first female faculty member to be tenured at Columbia Law School.¹⁸

When she was not teaching, Ginsburg gained litigation experience as an attorney for the American Civil Liberties Union.¹⁹ In 1973, she served as general counsel and later, as a director on the ACLU's National Board for seven years.²⁰ It is her role as general counsel for the ACLU in gender discrimination cases that has led many to regard her as the "founding mother of the women's rights movement."²¹

Ginsburg's effort to achieve equal status and rights for women mirrors the approach used by the late Thurgood Marshall in his struggle to achieve equality under the law for African-Americans — gaining a small victory in one case that established precedent for the next.²² In her first

¹⁵ Carlson, *supra* note 11, at 38.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Hereinafter ACLU.

²⁰ Wise, *supra* note 14, at 1. Her active involvement in the ACLU soon prompted her to found the American Civil Liberties Union's Women's Rights Law Project in 1972. *Id.*

²¹ Wise, *supra* note 14, at 1. Some of the most celebrated women's rights cases which Ginsburg successfully argued include: *Orr v. Orr*, 440 U.S. 268 (1979) (holding that an Alabama statute which awarded alimony only against men was unconstitutional); *Duren v. Missouri*, 439 U.S. 357 (1979) (holding female jurors were not to be dismissed from service simply because they were mothers and needed at home); *Craig v. Boren*, 429 U.S. 190 (1976) (plurality opinion) (holding that an Oklahoma statute prohibiting the sale of 3.2% beer to males under age 21 and to women under 18 was unconstitutional); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) (holding that the Social Security policy under which only women could collect their spouse's social security benefits was unconstitutional); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (invalidating United States Air Force policy of only granting housing and insurance benefits to the spouses of married male officers and not to spouses of female officers); *Reed v. Reed*, 404 U.S. 71 (1971) (holding that an Idaho statute which preferred men over women as administrators of testate estates was unconstitutional).

²² "Judge Ginsburg basically put together the project and the strategy . . . which was much like the so-called Houston Plan implemented by the late Thurgood Marshall in the litigation assault on school segregation. 'It was a building-block approach . . .'" Isabelle Katz Pinzler, *quoted in* Coyle, *supra* note 7, at 32.

gender-discrimination case that reached the Supreme Court, *Reed v. Reed*,²³ Ginsburg successfully argued that state statutes preferring one sex over the other required a stricter standard than "mere rationality" standard, which the Court employed in prior gender discrimination cases.²⁴ After *Reed*, Ginsburg contested the validity of a United States Air Force policy which granted housing and insurance benefits to wives of the male officers, but did not provide such assistance to the husbands of the female officers, in *Frontiero v. Richardson*.²⁵ In *Frontiero*, Ginsburg's efforts to combat gender discrimination proved successful; the Court not only aligned its decision to strike down the discriminatory Air Force policy, but more importantly, rejected once and for all the "rational-basis" standard as a permissible means of evaluating cases of gender discrimination.²⁶

Ginsburg's work on behalf of the American Civil Liberties Union gained her national acclaim and presidential notice.²⁷ In 1980, President

²³ 404 U.S. 71 (1971).

²⁴ In *Reed*, the Court invalidated an Idaho statute that preferred men over women as administrators of testate estates. The state contended that the statute was a "rational means" to reduce the workloads of probate courts by eliminating excess probate hearings. *Id.* at 74 (citation omitted). The Court rejected this justification, stating that the statute was not based upon a rational, non-arbitrary, and cognizable difference between the abilities of men and women. *Id.* at 75-76 (citation omitted). Although the Court employed the term "rational," the other elements of the Court's analysis, "non-arbitrary" and "cognizable difference" implied that the Equal Protection Clause required greater protection for women than a mere "rational-basis" analysis.

²⁵ 411 U.S. 677 (1973) (plurality opinion). In *Frontiero*, the Court invalidated a congressional statute that authorized augmented salary and benefits for male military personnel with dependents, but denied the increased benefits to female military personnel with dependents. *Id.* at 678-79 (plurality opinion). Justice Brennan, writing for a plurality, determined that gender-based legal distinctions are subject to the most exacting standard of Constitutional review. *Id.* at 685-88 (plurality opinion).

²⁶ *Id.* (stating that "classifications based upon sex, like classifications based on race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."). The Court eventually retreated from the "strict-scrutiny" standard of review in *Craig v. Boren*, 429 U.S. 190 (1976) (plurality opinion), and *Califano v. Goldfarb*, 430 U.S. 199 (1977) (plurality opinion), and subsequently fashioned an "intermediate tier" of review. *Craig*, 429 U.S. at 212 (Stevens, J., concurring); *Goldfarb*, 430 U.S. at 206-07 (plurality opinion).

²⁷ Carlson, *supra* note 11, at 40. Ginsburg gained attention for her novel approach to combatting gender discrimination under the Equal Protection Clause of the Fourteenth Amendment. *Id.* Ginsburg developed this innovative approach using the mentality that gender discrimination is not a single-gender issue, but rather, one that affects both men and women. *Id.*

Jimmy Carter appointed Ruth Bader Ginsburg to the United States Court of Appeals for the District of Columbia Circuit.²⁸

During her thirteen-year tenure on the D.C. Circuit, Ginsburg gained a reputation as the "Thurgood Marshall of gender discrimination law," but nonetheless left the bench with a remarkably conservative record.²⁹ In an attempt to reconcile her reputation with her record, one commentator explained that the then Judge Ginsburg often felt obligated to adhere to precedent, but noted that such constraints need not be considered by her as a Supreme Court Justice.³⁰ Other commentators simply assert that her record while on the D.C. bench lends to the prediction that as a Supreme Court Justice, Ginsburg will most likely belong to the center.

Ginsburg's record on the court of appeals suggests that she will gravitate toward the political center of the Court. On one hand, as a judge on the D.C. Circuit Court, Ginsburg refused to include the right to engage in homosexual activity within the constitutionally protected right to privacy,³¹ preferred a strict separation of church and state³², and weakened

²⁸ Gugliotta and Randolph, *supra* note 2, at 6.

²⁹ Kaplan and Cohn, *supra* note 1, at 29. A "conservative," in the judicial context, has the belief that issues "are in the domain of the legislators" and should not be decided by the courts. Joan Biskupic, *The Peripheral Court*, WASH. POST NAT'L WKLY. ED., July 19-25, 1993, at 8. A "liberal," by contrast, is less concerned with intruding into the "domain of the legislators," and will involve himself/herself in legislative issues. *Id.*

³⁰ Joan Biskupic, *Clinton's Choice Would Probably Strengthen the Court's Center*, WASH. POST NAT'L WKLY. ED., June 21-27, 1993, at 7. According to the Washington Post, Ruth Bader Ginsburg's record of "straddl[ing] the liberal-conservative divide of the Washington D.C. Court of Appeals for the past 13 years," lacking the dynamism of Justices Brennan or Scalia, and loosing the innovation she possessed as an attorney with the ACLU display that she will be part of the political center of the Court with Justices David Souter and Sandra Day O'Connor." *Id.*

³¹ In 1984, she voted to dismiss a case in which the military discharged a sailor for "engaging in homosexual conduct," thereby rejecting the sailor's argument that his constitutional right to privacy had been breached. *Dornenburg v. Vice Admiral Lando Zech*, 746 F.2d 1579 (D.C. Cir. 1984). Two years later, in a procedural ruling, she approved of the CIA's policy barring employment of homosexuals. *John Doe v. William Casey*, 796 F.2d 1508 (D.C. Cir. 1986). The procedural ruling allowed the CIA director to fire a homosexual undercover employee, but courts could choose to review the firing. *Id.*

³² "Ginsburg's opinions from her 13 years on the U.S. Court of Appeals for the District of Columbia suggest she would prefer greater separation between church and state." Joan Biskupic, *The Chief Shows Who's at the Helm: In the Final Days of the Term Rehnquist Demonstrates He Can Still Deliver a Conservative Majority*, WASH. POST NAT'L WKLY. ED., July 12-18, 1993, at 31.

the rights of criminal defendants.³³ On the other hand, in several speeches Ginsburg orated that abortion is a fundamental liberty right and implied that the Equal Protection Clause requires government to fund abortions desired by impoverished women.³⁴

Ginsburg's "centrist" perspective is further evinced in her recent address to the students of New York University School of Law.³⁵ Speaking as a critic of *Roe v. Wade*, Ginsburg chided the Court for its decision not to simply invalidate the anti-abortion law, but rather to create a set of rules that, she contended, left the validity of every state abortion law in a precarious position and virtually choked all legislative development in this area.³⁶ In her speech, Ginsburg posited that *Roe* might have been less controversial if the Court had invoked into its reasoning a gender-discrimination analysis, stating, "disadvantageous treatment of a woman because of her pregnancy and reproductive choice is a paradigm case of discrimination on the basis of

³³ Ruth Bader Ginsburg is viewed as conservative in the criminal law area. Coyle, *supra* note 7, at 33. See, e.g., *United States v. Tilmon D. Reese*, 933 F.2d 254 (D.C. Cir. 1993) (holding that a defendant whose flight prevents consolidation of his appeal with that of a co-defendant is not entitled to a belated appeal); *United States v. Thomas Dorsey*, 865 F.2d 1275 (D.C. Cir. 1989) (holding that a jury was not improperly coerced into reaching an unanimous verdict of guilt, where the jury had been instructed to continue deliberations when a jury poll indicated that the verdict was unanimous and a request by a juror to be excused was denied after she indicated that she did not believe evidence was sufficient to support a conviction).

³⁴ Mickey Kaus, *Moderate Threat*, NEW REPUBLIC, July 12, 1993, at 6. Ginsburg is concerned that anti-abortion laws may impede a woman's ability, "to participate equally in the economic and social life of the Nation." *Id.* (quoting Ruth Bader Ginsburg). In a speech given in North Carolina, Ginsburg insisted that poor women's abortions should be funded by the government, because the government has an affirmative duty to do so. Jeffrey Rosen, *The Book of Ruth: Judge Ginsburg's Feminist Challenge*, NEW REPUBLIC, Aug. 2, 1993, at 30.

³⁵ In a speech given at New York University, Ginsburg suggested that if *Roe* had been decided on a sexual equality basis instead of on a privacy foundation, the controversy provoked by *Roe* would have been avoided. Daniel Wise, *Lawyers Hail Ginsburg Nomination*, June 15, 1993, at 33. In *Roe v. Wade*, the United States Supreme Court held that a woman's right to an abortion is protected as a fundamental privacy right. *Roe v. Wade*, 410 U.S. 113 (1973). As a consequence, a state's right to regulate abortions is limited. *Id.* *Roe* offered states a scheme whereby pregnancy was divided into trimesters, and a state's rights to regulate within each trimester was specifically enumerated. *Id.* Since *Roe v. Wade* is the precedent for the legality of abortion, pro-choice groups worried that Ginsburg's criticism of the case would lead the *Roe* holding to be restricted or overturned. Daniel Wise, *Lawyers Hail Ginsburg Nomination*, June 15, 1993, at 33.

³⁶ Judge Ruth Bader Ginsburg, Address at New York University School of Law (March 1993), *reprinted in* N.Y.L.J., June 15, 1993, at 2.

sex.”³⁷ Ginsburg’s criticisms of *Roe* have left pro-choice leaders uneasy about her appointment, fearing that Ginsburg’s disdain of *Roe* may suggest a preference towards limiting abortion rights.³⁸

Despite the concerns of abortion-rights advocates, Ginsburg’s nomination to the United States Supreme Court was widely supported by Congress.³⁹ Justice Ginsburg’s nomination was confirmed by the Senate with a vote of 96 to 3.⁴⁰ The Senate confirmation simply reasserted what the nation had already recognized — a lifetime of accomplishments has proven Ruth Bader Ginsburg’s aptitude for the high court.

³⁷ *Id.*

³⁸ Kaplan and Cohn, *supra* note 1, at 29. Prior to her appointment to the U.S. Supreme Court, organizations such as the National Abortion Rights Action League demanded that she specify whether abortion is a fundamental right. *Id.* However, these fears abated when revisions to one of her upcoming lectures included criticisms of statutory limits upon a woman’s right to have an abortion. *Id.*

³⁹ Carlson, *supra* note 11, at 40.

⁴⁰ Biskupic, *Senate, 96-3, Approves Ginsburg As 107th Supreme Court Justice*, THE WASH. POST, Aug. 4, 1993, at A4. After being confirmed by such a large margin Justice Ginsburg said, “[i]t feels wonderful, . . . I’ll do the very best I can in the job.” *Id.* (quoting Justice Ginsburg).

The three senators who opposed her nomination were: Jesse Helms (R-NC); Robert C. Smith (R-NH); and Don Nickles (R-OK). *Id.* Overall, Justice Ginsburg received wide support, and was known as a “consensus” choice by both political parties. *Id.* The Senate Republican leader, Robert J. Dole (R-KS), praised the Justice and stated that, “[b]y any measure, she is qualified to become the Supreme Court’s ninth justice Some have criticized Judge Ginsburg for being more interested in the fine print rather than the big picture, and for being a legal technician rather than an interpretive philosopher — criticisms that Judge Ginsburg should wear as a badge of honor.” *Id.* (quoting Sen. Robert Dole).

