NEW YORK LAW SCHOOL

NYLS Law Review

Volume 66
Issue 1 *RBG Tribute*

Article 4

January 2022

Justice Ginsburg's Legacy: Promoting All Fundamental Freedoms for All People Through Strategic Alliances and Incremental Reform

Nadine Strossen

VOLUME 66 | 2021/22

NADINE STROSSEN

Justice Ginsburg's Legacy

Promoting All Fundamental Freedoms for All People Through Strategic Alliances and Incremental Reform

66 N.Y.L. Sch. L. Rev. 47 (2021–2022)

ABOUT THE AUTHOR: John Marshall Harlan II Professor of Law, Emerita, New York Law School. J.D. *magna cum laude* Harvard Law School, 1975; A.B. Harvard College, 1972.

I. INTRODUCTION

The very fact that I had the supreme honor of conducting the February 6, 2018, public conversation with Justice Ruth Bader Ginsburg, the transcript of which is published earlier in this Issue, is itself a testament to two of her most inspiring qualities: her unceasing efforts to provide opportunities for women and her consistent promotion of dialogue and discussion. When New York Law School Dean Anthony Crowell invited Justice Ginsburg to deliver the prestigious Shainwald Lecture,[1] she responded that, rather than delivering a formal lecture, she would prefer to engage in an exchange with someone else, and she specifically recommended that I could serve as her discussion partner.

Justice Ginsburg's unparalleled efforts to promote opportunities for women, both individually and as a group, are well known and justly celebrated. In contrast, it is less well known than it should be that she also consistently promoted dialogue in all situations, ranging from conversations between individuals to resolve personal and collegial disagreements, to exchanges between different branches and units of government to resolve policy controversies. For example, in a 1992 law review article, then-Judge Ginsburg wrote: "[T]he effective judge . . . strives to persuade, and not to pontificate. She speaks in a 'moderate and restrained' voice, engaging in a dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even her own colleagues."[2]

Justice Ginsburg's recommendation that I should conduct "a dialogue with" her as an alternative to a formal lecture in which she would "pontificate," flowed from my longstanding collegial relationship with "Ruth," as she had long ago asked me to call her. Our relationship started when she sent me a gracious note, offering her congratulations and support upon my selection as the American Civil Liberties Union national president in January 1991, making me the first woman to fill the top leadership position in the organization's then-seventy-one-year history. Ginsburg's generous mentorship—which I know extended to countless others—has had an incalculable positive ripple effect because it has in turn encouraged her mentees to strive to emulate her mentoring efforts.

When people ask me, as they regularly do, what are the most important lessons I learned from my longstanding personal and professional interactions with Ginsburg, I often flag her innumerable acts of kindness and assistance to innumerable individuals, notwithstanding her exceptionally demanding work schedule. She was constantly supportive of my professional efforts, both as a civil liberties advocate and as a law professor and scholar. Moreover, she was constantly supportive of my students, graciously answering their individual letters and regularly accepting invitations to speak to them both at NYLS and at the Court. I cite myself and my

1. "Shainwald Lecture" refers to the Sidney Shainwald Public Interest Lecture Series, established in tribute to the late Sidney Shainwald by his wife, Sybil Shainwald, and exclusive to NYLS. *About the Public Interest Lecture Series*, Sybil Shainwald: Women's Health Law., http://sybilshainwald.com/About-the-Public-Interest-Lecture-Series.htm (last visited Apr. 3, 2022).

2. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1186 (1992) [hereinafter *Speaking in a Judicial Voice*] (citations omitted).

students by way of example; Ginsburg replicated these generous actions for countless others who were also fortunate enough to come within her generous orbit. Whenever I am tempted to defer answering a letter or to decline a request for some individual professional assistance, I always chide myself that if Ginsburg could make the time for such efforts, despite the incomparably important professional responsibilities she shouldered, then I certainly can too!

Beyond Ginsburg's stature as an inspiring role model of generous conduct toward others, including as a professional mentor and colleague, I will discuss in this piece four other interrelated lessons from her towering legacy that I consider especially important: her view of women's rights as an integral aspect of the overall human rights agenda, with fundamental rights to equality, liberty, and fairness being mutually reinforcing; her associated commitment to the ACLU, with its signature mission of defending all fundamental rights for all people; her incremental strategy for promoting women's rights, including abortion rights, which she considered an essential aspect of women's rights; and her reaching across ideological divides to forge both personal friendships and professional alliances.

The foregoing themes pervading Ginsburg's work are particularly salient for today's polarized political climate, with many influential voices advocating approaches antithetical to hers. Many current advocates of social justice, including for women, maintain that classic civil liberties such as free speech and due process are somehow inimical to their causes, and that these other causes should take precedence. Furthermore, many current social justice activists reject an incremental, reformist strategy, instead advocating sweeping, radical approaches. And too many such activists refuse to collaborate with people who disagree with them on particular issues, even if they also share important common goals and strategies.

II. THE INTEGRAL INTERRELATIONSHIPS AMONG CIVIL LIBERTIES AND HUMAN RIGHTS

Ruth Bader Ginsburg has explained that she deliberately chose the ACLU as the vehicle for her pathbreaking activism on behalf of women's rights, rather than an organization with a narrower agenda, in large part because she believed that the ACLU's broader civil liberties advocacy would enhance the credibility of the women's rights cause. In the same vein, Ginsburg has explained that she chose the ACLU because of the integral interconnection between civil liberties and civil rights, including women's rights: "I wanted to be a part of a general human rights agenda . . . [promoting] the equality of all people and the ability to be free."[3] During our interview for the Shainwald Lecture, I asked her to explain this decision, and she answered as follows:

3. *ACLU History: A Driving Force for Change: The ACLU Women's Rights Project*, ACLU, https://www.aclu.org/other/aclu-history-driving-force-change-aclu-womens-rights-project (last visited Apr. 5, 2022) (alteration in original); *see also Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU [hereinafter ACLU *Tribute*], https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff?redirect=womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff#pioneer (last visited Apr. 5, 2022).

> I thought about what group I might affiliate with, and I thought about the National Organization for Women (NOW) and the Women's Equity Action League (WEAL), and then it came to me that, if women's rights ought to be high on the human rights agenda, men had to be part of the operation too. And the ACLU, the foremost protector of civil liberties in the United States, seemed the right place to be.[4]

The ACLU's overall mission—championing freedom and equality for everyone—reflected Ginsburg's own principles. In addition to serving as the founding director of the ACLU Women's Rights Project (WRP), she was also a member of the ACLU Board of Directors and one of its national general counsel, thus serving as a key ACLU leader on the organization's entire broad civil liberties agenda.

For example, Ginsburg served in both general leadership capacities (on the Board and as counsel) while the ACLU handled probably its most controversial free speech case in its century-plus history, which many critics considered to be inconsistent with the kinds of equal rights causes that the ACLU—and Ginsburg individually—also advocated. I am referring to the ACLU's 1977–1978 defense of the free speech rights of neo-Nazis to demonstrate in Skokie, Illinois, a municipality with a large Jewish population, many of whom were Holocaust survivors.[5] Along with other ACLU leaders, including the ACLU's then executive director Aryeh Neier, who is himself a Holocaust survivor, Ginsburg recognized that members of traditionally oppressed groups, including Jews and women, were especially dependent on robust free speech guarantees and especially vulnerable to any censorship power.

In the same general time frame, when some feminists advocated censoring sexual expression that they labeled with the stigmatizing term "pornography," arguing that it fostered misogynistic discrimination and violence, Ginsburg expressed a critical perspective on this view: It resurrected paternalistic stereotypes about women's inherent vulnerability, which she had constantly sought to uproot.[6] Consistent with Ginsburg's commitment to eradicating gender stereotypes, in 1984, when the City of Indianapolis enacted a law that reflected the pro-censorship feminists' view,[7] the ACLU filed a brief that opposed the law as violating not only free speech but also gender equality.[8] Although Ginsburg by that point was serving as a federal judge, the ACLU's brief

4. Ruth Bader Ginsburg, *Transcending Ideological Divides to Advance All Rights for All People: A Conversation Between the Honorable Ruth Bader Ginsburg and Professor Nadine Strossen*, 66 N.Y.L. Sch. L. Rev. 12–13 (2021–2022) [hereinafter *A Conversation Between Justice Ginsburg and Professor Strossen*].

5. Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (per curiam).

6. Jeffrey Rosen, *The Book of Ruth: Judge Ginsburg's Feminist Challenge*, New Republic (Aug. 2, 1993), https://newrepublic.com/article/61837/the-book-ruth. "[T]he feminists of the 1980s sought to resurrect many of the special protections for women that Ginsburg had opposed, [including] sweeping bans on pornography . . . ." *Id.* "After hearing [Catharine] MacKinnon advocate broad restrictions on pornography at Columbia Law School in the late '70s, Ginsburg confided to a friend, 'That woman has bad karma.'" *Id.*

7. Many prominent feminists and feminist organizations strongly opposed censorship of sexual expression. *See generally* Nadine Strossen, Defending Pornography (1995).

8. Ind. Code § 16 (1984), *invalidated by* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (striking down the Indianapolis ordinance, also known as the Dworkin-MacKinnon Anti-Pornography Civil Rights Ordinance, as an unconstitutional regulation of speech), *aff'd*, 475 U.S. 1001 (1986).

reflected her signature rejection especially of gender-based stereotypes that treated women as inherently needing "protection." One powerful example is Ginsburg's brief for the ACLU WRP in the 1973 case of *Frontiero v. Richardson*.[9] It captured the dangers of this paternalistic approach in such memorable language that Justice William Brennan incorporated it into his groundbreaking opinion, in which he urged that gender classifications should be as presumptively unconstitutional as racial classifications.[10] Referring to "our Nation['s] . . . long and unfortunate history of sex discrimination," Justice Brennan dismissed the protectionist rationale for such discrimination, borrowing language from Ginsburg's brief: "Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[11]

The ACLU's brief in the Indianapolis case explained how the pornography censorship advocated by some feminists reflected the very same "romantic paternalism" toward women that Ginsburg's *Frontiero* brief had assailed, perpetuating the same kinds of negative stereotypes about both women and men that Ginsburg consistently challenged.

> The ordinance . . . presumes a natural and inevitable vulnerability of (weaker) women to the unbridled and voracious sexual appetites of (stronger) men and accordingly promises to "protect" all women. As in the past, the cost of "protection" is the perpetuation of gender-based stereotypes and the denial to women of sexually explicit material which may itself benefit women by providing information about sexuality, sexual functions, or reproduction. . . . While it is undoubtedly true that many women are victims of male violence . . . . the attempt to [justify] widespread censorship on the false stereotypical assumption that all women are unable to resist male domination . . . is precisely the type of sex-based protectionism that inhibits the evolution of genuine equality between the sexes.[12]

As the brief concluded: "A statute that formally equates women with children and men with satyrs is hardly a step toward sexual equality."[13]

On the bench, Ginsburg continued to strongly support free speech rights even for hateful and hated messages and speakers. Notably, she did so even when almost no other justices took such a strong speech-protective position, and even in the face of arguments that the speech at issue undermined the equality rights that she so forcefully championed. In the 2003 case of *Virginia v. Black*, for example, Ginsburg was one of only three justices to conclude that the entire Virginia statute outlawing

9. Brief of ACLU as Amici Curiae, Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694) [hereinafter ACLU Frontiero Brief].

10. 411 U.S. at 686–88.

11. *Id.* at 684 (citing ACLU Frontiero Brief, *supra* note 9, at 59 (quoting Sail'er Inn, Inc. v. Kirby, 485 P.2d 529 (Cal.1971))).

12. Brief of the ACLU and the Indiana Civil Liberties Union Amici Curiae at 28, Am. Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (D. Ind. 1984) (No. 84-791C), *aff'd*, 771 F.2d 323 (No. 84-3147), *aff'd*, 475 U.S. 1001 (No. 85-1090).

13. *Id.*

cross-burning was facially unconstitutional, on the ground that it facilitated the conviction even of cross-burners who solely intended to convey ideological messages but not to intimidate others.[14] Five years later, in the 2008 case of *United States v. Williams*, Ginsburg was one of only two justices who voted to strike down a law criminalizing proposals to buy or sell child pornography even when the material in question was not in fact constitutionally unprotected depictions of actual minors.[15] Even other justices and federal judges who are generally free speech stalwarts balked at applying neutral free speech principles to expression that resembles but is not child pornography (for example, by featuring young-looking adults or by using computer morphing techniques).[16] Therefore, Ginsburg's insistence on applying free speech principles even to this deeply reviled expression is especially noteworthy. To be sure, she did not consistently uphold free speech arguments in all cases,[17] but her votes in *Black* and *Williams* demonstrate that her reasons for rejecting certain free speech arguments do not stem from the unpopularity of the expression or from an elevation of equality concerns above free speech concerns.

Consistent with Ginsburg's commitment to general human rights and civil liberties principles, I wasn't surprised to read a 2018 interview, at the height of the #MeToo movement,[18] in which she strongly spoke up for the due process rights of men accused of sexual assault.[19] This interview was conducted by George Washington

14. 538 U.S. 343, 380–82, 384 (2003) (Souter, J., concurring in the judgment in part and dissenting in part). In contrast, the majority found only one provision in the statute violative of the First Amendment. *See id.* at 362–63 (majority opinion) .

15. 553 U.S. 285, 311, 327 (2008) (Souter, J., dissenting).

16. *See* Nadine Strossen, *Justice Anthony Kennedy's Free Speech Legacy*, 70 Hastings L.J. 1317, 1327–28 (2019). The Supreme Court sustained a First Amendment challenge to the federal Child Pornography Protection Act (CPPA), which criminalized material that "appeared to be"—but was not actually—child pornography. *Id.* at 1327 (referring to *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002)). But of the forty constitutional challenges to the CPPA prior to the Court's 2002 ruling, "[decisions in] thirty-seven of them found some rationale for rejecting those challenges." *Id.* at 1327–28 n.69 (citations omitted). "The judges who rejected the challenges included at least nine who had been appointed by Democratic presidents and several who had records and reputations" that were generally speech-protective. *Id.* at 1328. Likewise, even scholars who study and support robust free speech principles have eschewed doing so in the child pornography context; one notable exception is New York University Law Professor Amy Adler. *See* Amy Adler, *Inverting the First Amendment*, 149 U. Penn. L. Rev. 921, 926 (2001) ("We are so horrified by the crime of child pornography that, to combat it, we have inverted the First Amendment, disrupting established categories and assumptions. Child pornography law—an area of First Amendment jurisprudence that has been virtually ignored by scholars—has widespread implications for all of free speech.").

17. *See* David L. Hudson, Jr., *Justice Ruth Bader Ginsburg and the First Amendment*, Free Speech Ctr. (Sept. 30, 2020), https://mtsu.edu/first-amendment/post/987/justice-ruth-bader-ginsburg-and-the-first-amendment.

18. The #MeToo movement, which began in 2017 after news broke of sexual assault allegations against film producer Harvey Weinstein, is a social movement that focuses on helping survivors of sexual harassment and assault heal and consider how to challenge the systems that perpetuate sexual violence. Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. Ill. L. Rev. 45, 50–52.

19. Nat'l Const. Ctr., *A Conversation with Justice Ruth Bader Ginsburg*, YouTube (Feb. 12, 2018), https://www.youtube.com/watch?v=sN7rhjPBFts.

University Law Professor Jeffrey Rosen, who also heads the National Constitution Center.[20] Justice Ginsburg noted that campus sexual assault policies have been criticized for violating due process rights of the accused and said that she agreed with this criticism.[21] Rosen pressed her to elaborate: "I think people are hungry for your thoughts about how to balance the values of due process against the need for increased gender equality." Ginsburg answered: "It's not one or the other. It's both. We have a system of justice where people who are accused get due process, so it's just applying to this field [of sexual assault] what we have applied generally."[22]

III. GINSBURG'S CONTINUED LOYALTY TO THE ACLU'S SIGNATURE BROAD CIVIL LIBERTIES AND HUMAN RIGHTS AGENDA

As discussed above, Ginsburg's express support for the ACLU's broad mission of defending an across-the-board civil liberty and human rights agenda prompted her to select it as the organizational home for her pioneering women's rights work. Her ongoing support for this broad mission animated her continuing loyalty to the ACLU throughout the remainder of her career and life.

In June of 1974, Ginsburg was invited to address the ACLU Biennial Conference, a nationwide gathering of ACLU leaders and activists. In advance of that event, she corresponded with another towering ACLU leader who had even preceded Ginsburg herself in spearheading the ACLU's advocacy of women's rights: Pauli Murray.[23] At Murray's request, Ginsburg had drafted proposed language to be used in introducing her (Ginsburg) to the conference attendees. That proposed introduction underscored Ginsburg's conception of women's rights as an essential aspect of the ACLU's broad civil liberties and human rights work:

---

20. *Jeffrey Rosen*, Geo. Wash. L., https://www.law.gwu.edu/jeffrey-rosen (last visited Apr. 3, 2022).

21. Nat'l Const. Ctr., *supra* note 19. One commentator has argued that university policies need to better account for the due process concerns of those accused of sexual assault because, for example, investigations of sexual assault allegations by universities often lead to criminal investigations or prosecutions. J. Brad Reich, *When Is Due Process Due?: Title IX, "The State," and Public College and University Sexual Violence Procedures*, 11 Charleston L. Rev. 1, 19–22 (2017). Another author has written that accused students have interests "in their education and protecting their public image," as well as an interest in some form of representation, legal or otherwise, in navigating the school disciplinary process. Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 Fordham L. Rev. 2289, 2303–04 (2016).

22. Nat'l Const. Ctr., *supra* note 19.

23. Pauli Murray was a civil rights activist whose work "put gender equality on the ACLU's agenda." Women's Rights Project, ACLU, Annual Report 2005, at 6 (2005). For a recent documentary and an autobiography on Murray's monumental contributions to women's rights, see My Name Is Pauli Murray (Participant 2021) and Pauli Murray, Pauli Murray : The Autobiography of a Black Activist, Feminist, Lawyer, Priest, and Poet (1989), respectively. In 2017, Yale established two new residential colleges, one of which was the Pauli Murray College, named in her honor as a Yale Law School alumna and as a "vision for a better society." *Yale's New Residential Colleges*, YaleNews, https://news.yale.edu/in-focus/yales-new-residential-colleges (last visited Apr. 3, 2022); *About Pauli Murray, About Us*, Pauli Murray College, https://paulimurray.yalecollege.yale.edu/subpage-2 (last visited Apr. 3, 2022).

> Professor Ginsburg views the effort to achieve equal rights, responsibilities and opportunities for men and women as among contemporary society's more vital consumer movements for change. The central theme, spotlighted earlier by the civil rights movement, is that each person is entitled to develop his or her own individual potential, and should not encounter artificial barriers, or be steered toward an assigned place based on a birth characteristic that [bears] no necessary relationship to [the] ability to contribute to society. Advancement of this ideal inevitably assists ACLU in all of its work to achieve a more equal, just and open society.[24]

Underscoring even further her positive view of the ACLU's overall work, and of her association with it, Ginsburg added the following suggestion to Murray: "If you think it appropriate you might mention that I regard my affiliation with ACLU as the most rewarding association I have known."[25]

Even when Ginsburg moved on to become first a federal appellate judge and then a Supreme Court justice, she regularly accepted invitations to speak at ACLU events and continued to voice her strong support for the ACLU's mission and work. She stressed that position, for example, during my NYLS interview with her reproduced in this Issue.[26]

When President Bill Clinton nominated Ginsburg to the Supreme Court in 1993, only a short time had passed since the 1988 presidential campaign when then-Republican candidate George H.W. Bush attacked his Democratic rival, Michael Dukakis, for being "a card-carrying member of the ACLU."[27] The ACLU was demonized as a "liberal" organization at a time when that was widely viewed as a stigmatizing label, even among many Democrats. After Dukakis' ignominious defeat, President Clinton pushed the Democratic Party to the right, and in fact his administration often did battle with the ACLU on important policies, including on crime and drugs.[28] In that sense, it was surprising even that Clinton would nominate to the High Court someone so closely identified with the ACLU as Ginsburg was. Still more surprising was the fact that almost every single senator voted to confirm

---

24. Letter from Ruth Bader Ginsburg, Professor, Columbia Univ. Sch. of L., to Pauline Murray, Gen. Theological Seminary (June 5, 1974) (on file with author).

25. *Id.*

26. *A Conversation Between Justice Ginsburg and Professor Strossen*, *supra* note 4, at 30.

27. Richard Cohen, *Another 'Card-Carrying Member of the ACLU,' Opinion*, Wash. Post (Sept. 22, 1988), https://www.washingtonpost.com/archive/opinions/1988/09/22/another-card-carrying-member-of-the-aclu/53953b45-414a-4988-b3fc-6c49d8d45e0c/.

28. *See, e.g.*, Nadine Strossen, *The Current Assault on Constitutional Rights and Civil Liberties: Origins and Approaches*, 99 W. Va. L. Rev. 769, 772–73, 805–09 (1997) (chiding the Clinton administration for signing off on laws that, for example, criminalized certain internet speech and contributed to attacks on "pro-defendant" judges).

her appointment; only three conservative Republican senators voted against it,[29] while one Democratic senator was absent and did not vote.[30]

Perhaps most surprising of all, as Justice Ginsburg recounted during our NYLS interview, was the degree of questioning she faced about her ACLU affiliation during the four-day Senate Judiciary Committee hearing on her nomination.[31] Ginsburg and her advisors during the hearing preparation process shared the reasonable belief that she should be prepared to answer multiple questions about the many controversial positions the ACLU had advocated with her support and under her leadership. To assist with this preparation, ACLU staff unearthed and delivered to her mountains of pertinent archival material, including, for example, Board minutes and other material documenting all decisions that the Board had made while she was a member. Yet throughout the protracted hearings, the grand total of questions about her ACLU affiliation was . . . ZERO!

The U.S. Senate's virtually unanimous approval of Ginsburg's appointment notwithstanding her ACLU involvement was the subject of one of the writer Calvin Trillin's characteristically witty ditties for *The Nation* magazine. Entitled *On the Nomination of Ruth Bader Ginsburg*, it read:

> She's highly thought of in the trade.
> The taxes for her maid were paid.[32]
> And somehow all the White House vetters
> Remained unmoved by those four letters
> That spooked Dukakis through and through—
> The dread quartet, A.C.L.U.
> The paths in women's law she plowed
> Were plowed while working for this crowd.
> Republicans don't seem annoyed
> To hear the judge was thus employed.
> They cheer: She made some law impartial,
> And got compared to Thurgood Marshall.
> Dukakis, Bush said, had a card—
> With that alone poor Mike was tarred.
> If Bush's views remain unvarying,
> He wonders: Was the judge card-carrying?[33]

29. The three Republican senators who voted not to confirm Justice Ginsburg were Jesse Helms (R-NC); Don Nickles (R-OK); and Robert C. Smith (R-NH). Linda Greenhouse, *Senate, 96–3, Easily Affirms Judge Ginsburg as a Justice*, N.Y. Times, Aug. 4, 1993, at B8.

30. The one Democratic senator who did not appear for the vote was Donald W. Riegle Jr. (D-MI). *Id.*

31. *A Conversation Between Justice Ginsburg and Professor Strossen*, *supra* note 4, at 30.

32. This is a reference to Bill Clinton's withdrawal of his first nomination for the attorney general position, Zoe Baird, after it came to light that (among other issues) she and her husband had not timely paid the Social Security taxes that they owed for the woman who worked as their young child's nanny (an unauthorized immigrant from Peru).

33. Calvin Trillin, *On the Nomination of Ruth Bader Ginsburg*, The Nation, July 12, 1993, at 1, 53.

The important takeaway from this history, for purposes of this essay, is not the Senate's failure to grill Ginsburg about her support for the ACLU, but rather her preparation and commitment to express and explain that support. As she put it during our NYLS exchange: "[N]othing . . . would lead me to speak of the ACLU in any but the most praiseworthy terms."[34] This support for the ACLU, in turn, reflected Ginsburg's own wide-ranging support for civil liberties and human rights, which steered her toward the ACLU in the first place.

IV. GINSBURG'S INCREMENTAL STRATEGY FOR PROMOTING WOMEN'S RIGHTS

The changes in the law that Ginsburg first envisioned and then brought about were nothing short of radical and revolutionary in nature, upending the gender roles that had been entrenched in the Anglo-American legal system throughout its history. Her visionary goal, as well as her concrete steps to pursue and achieve that goal, were eloquently described by Rabbi Lauren Holtzblatt of the Adas Israel Congregation in Washington, D.C., in her powerful memorial tribute:

> To be born into a world that does not see you, that does not believe in your potential . . . and despite this, to be able to see beyond the world you are in, to imagine that something can be different, that is the job of a prophet. And it is the rare prophet who not only imagines a new world, but also makes that new world a reality in her lifetime.[35]

Radical as Ginsburg's gender equality goal was for its time, her remarkable success in achieving it resulted from strategies that were anything but. She famously pursued a step-by-step approach in persuading the Supreme Court gradually to move from a position of reading the Constitution's Equal Protection Clause[36] as not having anything at all to do with gender equality,[37] to reading that clause as presumptively barring gender inequality. That approach has often been compared (including by the above-quoted Trillin ditty) to the one that Thurgood Marshall pursued as a litigator on behalf of the NAACP, most famously in the 1954 case of *Brown v. Board of Education*.[38] Specifically, Marshall used an incremental approach to challenge *Plessy v. Ferguson*'s "separate but equal" doctrine, and to overturn racial segregation in

34. *A Conversation Between Justice Ginsburg and Professor Strossen*, *supra* note 4, at 30.

35. *Rabbi Lauren Holtzblatt Leads Ruth Bader Ginsburg Memorial Service*, C-SPAN (Sept. 23, 2020), https://www.c-span.org/video/?c4909017/rabbi-lauren-holtzblatt-leads-ruth-bader-ginsburg-memorial-service.

36. U.S. Const. amend. XIV, § 1.

37. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 377 (1985) [hereinafter *Some Thoughts on Autonomy and Equality*] ("From the 1860s until 1971, the record remained unbroken: the Supreme Court rejected virtually every effort to overturn sex-based classification by law. Without offense to the Constitution, for example, women could be kept off juries and could be barred from occupations ranging from lawyer to bartender." (footnote omitted)).

38. 347 U.S. 483, 488 (1954). For a discussion on Marshall's "long trek toward May 1954," see Kenneth F. Ripple, *Thurgood Marshall and the Forgotten Legacy of* Brown v. Board of Education, 55 Notre Dame L. Rev. 471, 472–74 (1980).

public schools.[39] In Ginsburg's words: "Real change, enduring change, happens one step at a time."[40] In the same vein, she said: "Fight for the things that you care about, but do it in a way that will lead others to join you."[41]

An important element of Ginsburg's strategy was to select cases that highlighted the adverse impact that gender stereotypes have on not only women, but also on men and, often, on children. Some of her cases involved male plaintiffs and some involved female plaintiffs, but in all cases, the gender-based classifications necessarily violated the rights of all people to be treated as individuals, all free "to develop [their] own individual potential," as she wrote in the above-quoted 1974 letter to Pauli Murray. Justice Ginsburg also stressed this theme when I interviewed her at NYLS, citing the 1975 *Weinberger v. Wiesenfeld* case, in which she represented a widowed father who was denied the Social Security childcare benefits that were available to widowed mothers.[42] While the Court ruled unanimously in favor of the widowed father, striking down this gender-based classification, the justices arrived at that shared conclusion via three different rationales. Here's how Justice Ginsburg summarized their opinions during our interview:

> Justice [Lewis F.] Powell [Jr.] led a group that said, of course the discrimination begins with the woman: The woman pays the same Social Security taxes as the man, but her taxes don't get for her family the same benefits that a male wage-earner family would get.
>
> But several justices thought this is discrimination against men as parents: If women are widows, they have the choice to take personal care of their infants, but men don't have that choice; they must work and provide a substitute for themselves at home. And then . . . Justice [William] Rehnquist[] said this is totally arbitrary from the point of view of the baby: Why should the child have the opportunity for care from a sole surviving parent if that parent is female but not if the surviving parent is male?[43]

As Justice Ginsburg concluded: "That case illustrates how gender-based lines in the law hurt everyone. They hurt women, they hurt men, and they hurt children."[44]

In the wake of Ginsburg's death, a number of the accolades she received singled out the strategic efficacy of her measured, reformist approach. For example, ACLU National Legal Director David Cole wrote: "Her career illustrates that one can be

39. *See* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483; *see also A Conversation Between Justice Ginsburg and Professor Strossen*, *supra* note 4, at 40–41.

40. Joshua Barajas, *After RBG's Death, This Poet Urges Us to Follow in Her Steps*, PBS NewsHour (Sept. 24, 2020), https://www.pbs.org/newshour/arts/poetry/after-rbgs-death-this-poet-urges-us-to-follow-in-her-steps.

41. Alanna Vagianos, *Ruth Bader Ginsburg Tells Young Women: 'Fight for the Things You Care About*,' Harv. Radcliffe Inst. (June 2, 2015), https://www.radcliffe.harvard.edu/news-and-ideas/ruth-bader-ginsburg-tells-young-women-fight-for-the-things-you-care-about.

42. 420 U.S. 636 (1975).

43. *A Conversation Between Justice Ginsburg and Professor Strossen*, *supra* note 4, at 32 (last alteration added) (footnote omitted).

44. *Id.*

radical and incrementalist at the same time; indeed, as she argued, it may be the only way to achieve enduring change."[45] Likewise, Eboo Patel, the founder and president of the Interfaith Youth Core, wrote:

> She revolutionized the system by working within it. . . . [N]ot only did she create a revolution, she showed us that it could be done within the system and without destroying your opponents. Improving our democracy through the established system . . . really matters. If you destroy a system, either through revolutionary violence or by cynicism or by slowly leeching away people's faith in it, you have to take the responsibility to build a better one. Far wiser to improve this one. . . .
>
> If there is anyone who doubts that revolutionary change is possible within America's democratic processes, Ruth Bader Ginsburg is your answer.[46]

V. GINSBURG'S JUDICIAL INCREMENTALISM

In her capacity as a judge on the U.S. Court of Appeals for the D.C. Circuit, Ginsburg continued to both practice and preach the virtues of moderation and incrementalism. When she delivered the prestigious James Madison Lecture at New York University School of Law (the "Madison Lecture") in 1992, this was the overriding theme of her lecture and the resulting *N.Y.U. Law Review* article.[47] She approvingly cited the Supreme Court's rulings in the series of gender equality cases in which she had been an advocate as appropriately "cautious dispositions,"[48] and famously contrasted this incremental judicial approach with the Court's "breathtaking" decision in *Roe v. Wade*, in which the Court for the first time recognized a constitutional right to have an abortion.[49] She commended the Court's gender equality cases for effecting "change through a temperate brand of decision making, one that"—unlike *Roe*—"was not extravagant or divisive."[50]

In this context, Ginsburg invoked her favored concept of "dialogue," stressing that in most of the gender equality cases,

> the Court, in effect, opened a dialogue with the political branches of government[, tossing] . . . [t]he ball . . . back into the legislators' court, . . . requiring legislative reexamination of . . . sex-based classifications . . . . *Roe v. Wade*, in contrast, invited no dialogue with legislators. . . . [I]t seemed entirely to remove the ball from the legislators' court.[51]

45. David Cole, *Ruth Bader Ginsburg, 1933–2020*, N.Y. Rev. (Sept. 20, 2020), https://www.nybooks.com/daily/2020/09/20/ruth-bader-ginsburg-1933-2020/.

46. Eboo Patel, *Ruth Bader Ginsburg: Pillar of American Democracy*, Inside Higher Ed (Sept. 23, 2020), https://www.insidehighered.com/blogs/conversations-diversity/ruth-bader-ginsburg-pillar-american-democracy.

47. *Speaking in a Judicial Voice*, *supra* note 2, at 1185–86.

48. *Id.* at 1198, 1200–04.

49. 410 U.S. 113 (1973).

50. *Speaking in a Judicial Voice*, *supra* note 2, at 1208.

51. *Id.* at 1204–05 (footnote omitted).

Even in Ginsburg's capacity as a Supreme Court justice, who gained celebrity as "the Notorious RBG" precisely because of her vigorous dissents, she nonetheless continued to display her moderate, temperate approach. Longtime *New York Times* Supreme Court reporter Linda Greenhouse once labeled Ginsburg a "judicial-restraint liberal"[52]—in other words, someone who continued to believe that legal reforms that are implemented one step at a time are more enduring than those that are implemented through more radical, activist approaches.

VI. GINSBURG'S INCREMENTAL, WOMEN'S RIGHTS-CENTERED APPROACH TO THE ABORTION ISSUE

The abortion issue is an important illustration of Ginsburg's preference for moderate, incremental reform. On the one hand, Ginsburg unequivocally championed a woman's right to choose an abortion as an essential aspect of her autonomy and equality—the cause to which Ginsburg had dedicated her professional life. On the other hand, Ginsburg believed that the Supreme Court's specific ruling in *Roe v. Wade* did not reflect the optimal approach, either in constitutional law terms or in terms of garnering public and political support. In December 2021, the Supreme Court heard oral arguments urging it to overturn *Roe* outright, or at least to substantially curtail the rights that *Roe* protected. Therefore, a reexamination of Ginsburg's alternative constitutional strategy for securing a woman's right to reproductive autonomy is especially timely now.

I will first provide a summary overview of the respects in which Ginsburg's favored approach to securing abortion rights, in contrast with *Roe*'s, is moderate and incrementalist, paralleling her overall approach to securing women's rights. I will then lay out in more detail what the Court held in *Roe*, and how it contrasted with Ginsburg's preferred approach.

A. Summary of the Moderate, Incrementalist Aspects of Ginsburg's Favored Approach

The Court's *Roe* holding was relatively—and in Ginsburg's view—unnecessarily radical. *Roe* set out a detailed, comprehensive framework for reviewing all government restrictions on abortion, throughout pregnancy, with the result that, in one fell swoop, the Court "called into question the criminal abortion statutes of every state, even those with the least restrictive provisions."[53] Instead, Ginsburg maintained, the Court should have confined its holding to the particular, unusually extreme restriction that was directly at issue: Texas's almost complete ban on all abortions, excepting only those pursuant to "medical advice for the purpose of saving the life of the mother."[54] A ruling

52. Linda Greenhouse, *A Sense of Judicial Limits*, N.Y. Times, July 22, 1993, at A1.

53. *Some Thoughts on Autonomy and Equality*, *supra* note 37, at 381. It should be noted that, on the same day that it decided *Roe*, the Court also decided a companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), which further "define[d] with precision the state regulation of abortion henceforth permissible." *See Some Thoughts on Autonomy and Equality*, *supra* note 37, at 381.

54. Roe v. Wade, 410 U.S. 113, 118–19 (1973).

limited to this Texas law—"the most extreme prohibition"[55] in the United States—Ginsburg believed, would have been more acceptable to more people. Such a holding would have laid the groundwork for subsequent decisions, each striking down laws that were somewhat less restrictive, in the kind of step-by-step approach that Ginsburg had been using to challenge laws that contained express gender-based classifications.[56]

Ginsburg also maintained that abortion rights would have had a more durable constitutional foundation if they had been based on women's gender equality rights, which were then gaining traction in the Supreme Court (as well as in the court of public opinion), thanks in substantial part to her advocacy. While not at all questioning *Roe*'s privacy/autonomy rationale as a substantive matter, she maintained that a gender equality approach would be not only constitutionally correct, but also strategically advantageous, avoiding the furious charges of "judicial activism" that *Roe* unleashed. Gender equality claims flow from the explicit language in the Constitution's Equal Protection Clause,[57] whereas the *Roe* opinion upheld a constitutionally unenumerated privacy/autonomy right that the Court deemed to be implicit in the Constitution's Due Process Clauses.[58] Given its more direct textual grounding, the gender equality rationale might well have escaped the critiques that the *Roe* justices were simply reading their personal policy preferences into the Constitution.[59] Indeed, even prominent critics of *Roe* have voiced support for abortion rights that are based on gender equality principles.[60] Summarizing the two respects

55. *Some Thoughts on Autonomy and Equality*, *supra* note 37, at 380.

56. *See Speaking in a Judicial Voice*, *supra* note 2, at 1198–99; *see also A Conversation Between Justice Ginsburg and Professor Strossen*, *supra* note 4, at 41 (noting that the Texas law at issue in *Roe* was "the most extreme law in the nation," that "[t]he Court could have declared that most extreme law unconstitutional," and that would have been "an easy case," and "the beginning, the first step" before "other cases").

57. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court has held that this language implicitly applies to the federal government as well. Bolling v. Sharpe, 347 U.S. 497, 498–500 (1954).

58. The Due Process Clauses in the Fifth and Fourteenth Amendments, respectively, provide that neither federal nor state government shall deprive any person of "life, liberty, or property, without due process of law." U.S. Const. amends. V, XIV.

59. *See, e.g.*, Zoë Robinson, *A Comparative Analysis of the Doctrinal Consequences of Interpretative Disagreement for Implied Constitutional Rights*, 11 Wash. U. Glob. Stud. L. Rev. 93, 122–27 (2012) (noting three major criticisms of *Roe*: (1) *Roe* was not grounded in the interpretive orthodoxy of text and history, (2) *Roe* was not decided under the Equal Protection Clause, and (3) that *Roe* was a "legislative decision"), Daniel A. Farber, *Did* Roe v. Wade *Pass the Arbitrary and Capricious Test?*, 70 Mo. L. Rev. 1231, 1232 nn.7–10 (2005) (highlighting one liberal commentator's critique of *Roe*, namely, that it lacked grounding in constitutional text (citing John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 935–36, 947 (1973))).

60. For example, Harvard Law Professor Charles Fried, former U.S. solicitor general in the Reagan administration who in 1989 had urged the Supreme Court to overturn *Roe*, subsequently concluded that the Court should continue to protect women's abortion rights because in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851–53 (1992) (joint opinion), the Court had put *Roe*'s "central holding . . . on a firmer constitutional basis: the dignity and autonomy of the pregnant woman and the equal rights of women more generally." Charles Fried, *I Once Urged the Supreme Court to Overturn* Roe. *I've Changed My Mind*, *Opinion*, N.Y. Times (Nov. 30, 2021), https://www.nytimes.com/2021/11/30/opinion/supreme-court-roe-v-wade-dobbs.html.

in which her more moderate, incrementalist approach might have garnered more widespread, enduring support, Ginsburg wrote:

> The *Roe* decision might have been less of a storm center had it both homed in more precisely on the women's equality dimension of the issue and, correspondingly, attempted nothing more bold at that time than the mode of decisionmaking [sic] the Court employed in the 1970s gender classification cases.[61]

During Ginsburg's confirmation hearings for her Supreme Court nomination, she took "the unprecedented step [for a Supreme Court nominee] of strongly endorsing abortion rights,"[62] based on both *Roe*'s rationale and the gender equality rationale, which she described as mutually reinforcing. For example, she stated:

> It is essential to woman's equality with man that she be the decisionmaker [sic], that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex. . . . Abortion prohibition by the State . . . controls women and denies them full autonomy and full equality with men.[63]

Likewise, she repudiated the suggestion that her advocacy of the gender equality rationale for abortion rights implied any rejection of *Roe*'s reasoning:

> [Y]ou asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.[64]

In her dissent from the Court's 2007 *Gonzales v. Carhart* decision, which upheld the federal "partial-birth abortion" ban,[65] Justice Ginsburg again stressed the integral interrelationship between women's equality and the particular privacy/autonomy right *Roe* had recognized. She stated, "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[66]

---

61. *Speaking in a Judicial Voice*, *supra* note 2, at 1200 (footnote omitted).

62. Joe Marguette, *The Week: Ginsburg Aces Hearings*, TIME, Aug. 2, 1993, at 11, 12.

63. *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 207–08 (1994) (statement of the Honorable Ruth Bader Ginsburg).

64. *Id.* at 243 (adding that the rationale for *Roe* should not be an "either/or . . . matter of equal protection or personal autonomy").

65. 550 U.S. 124, 132–33 (2007).

66. *Id.* at 172 (Ginsburg, J., dissenting).

B. Roe*'s Approach and How It Contrasted with Ginsburg's*

I will now highlight the key distinctions between *Roe* and Ginsburg's favored approach to abortion rights, which places women and women's equality front and center. It is eye-opening to read *Roe*'s description of the right it protected, as set out in Justice Harry Blackmun's majority opinion.[67] In the many dozens of law school classes in which I have led discussions of *Roe* throughout my long teaching career, whenever I ask students—who have read the full decision—to state the right the Court protected, they invariably answer: "A woman's right to have (or choose) an abortion," or, "A woman's right, in consultation with her physician, to have (or choose) an abortion." I then direct the students to the three pertinent passages in the Court's *Roe* opinion, ask them to re-read those passages, and, with this language before them, to re-state the right at issue.

Two of these passages occur near the end of the opinion, where it summarizes the three holdings it had laid out regarding the scope of the right it recognized and the extent of government power to restrict that right during the three trimesters of a pregnancy. The first such holding, regarding the first trimester, is as follows: "For the stage prior to approximately the end of the first trimester, *the abortion decision* and its effectuation *must be left to the medical judgment of the pregnant woman's attending physician*."[68] Shortly after this summary of its holdings, the Court comments that its "decision vindicates *the right of the physician to administer medical treatment according to his professional judgment*."[69] My students are consistently shocked to learn that the pregnant woman herself is granted no agency at all in these crucial passages, let alone any right.

Earlier in the opinion when *Roe* initially sets out its holding about the first trimester, it states: "[F]or the period of pregnancy prior to [the end of the first trimester], *the attending physician*, in consultation with his patient, *is free to determine*, without regulation by the State, *that*, *in his medical judgment*, *the patient's pregnancy should be terminated*."[70] In short, at best the woman is granted the right to be consulted by her physician (who is referred to by the Court with male pronouns only), but the sentence clearly states that it is "the attending physician" who "is free to determine . . . that, in his medical judgment," the "patient" should have an abortion.[71]

67. Roe v. Wade, 410 U.S. 113, 153–54, 162–65 (1973).

68. *Id.* at 164 (emphasis added).

69. *Id.* at 165 (emphasis added).

70. *Id.* at 163 (emphasis added).

71. *Id.* In an earlier passage describing the abortion rights that certain lower courts had recognized, *Roe* refers to "a physician and his pregnant patient [who] might decide that she should have an abortion in the early stages of pregnancy." *Id.* at 156. Perhaps this language indicates that these lower courts were recognizing a more central role for the woman concerning abortion rights. In any case, the very fact that the Supreme Court eschewed any such language when it described the right it was protecting, just a few pages later in the *Roe* opinion, indicates that the High Court downplayed the woman's role at least negligently, if not intentionally. *See id.* at 163–65.

By the stage in their law school careers that students study *Roe* (which at my law school has usually been in their second year, as is common), they have had much training in carefully reading judicial rulings and parsing their precise holdings. Therefore, the fact that so many students nonetheless superimpose their general "understanding" of the right protected in *Roe* on the Court's actual language underscores how far our legal and popular notions about women's rights have advanced since 1973—in no small measure due to Ginsburg's advocacy. So many members of the public have come to accept the principles that women should have equal opportunities in general and in their reproductive autonomy in particular, that they unsurprisingly assume that these principles undergirded *Roe*.

In fairness to Justice Blackmun and the other justices who supported his *Roe* opinion, they should be judged in the context of that historical period and not solely with the benefit of hindsight. Two contextual factors serve to explain the *Roe* Court's framing of the right at issue as pertaining to the physician and as not rooted in women's equality rights. First, although the challenge to Texas's law had been initiated by Jane Roe, a pregnant woman who sought an abortion, a licensed physician was permitted to "intervene" in her action because he was facing two criminal prosecutions under the law. He argued that the Texas statute violated his right to privacy in the doctor-patient relationship and his right to practice medicine.[72] For this reason, it is not so surprising that the Court focused on the doctor's rights. That said, the intervening doctor also asserted his patient's rights—as Jane Roe herself did—so it is nonetheless noteworthy that the Court did not also expressly focus on the pregnant woman's rights.

The second important contextual factor to consider in assessing the *Roe* opinion is this: when the Court issued that opinion, its gender equality jurisprudence was still quite undeveloped. To be sure, the Court's 1971 *Reed v. Reed* decision[73] had marked a major milestone in recognizing—for the very first time—that the Equal Protection Clause imposed some impediment to gender discriminatory laws, thanks to Ginsburg's advocacy.[74] Nonetheless, *Reed* held that gender discriminatory laws were presumptively constitutional, subject only to deferential judicial review.[75] The Court did not explicitly[76] subject gender discriminatory laws to more invigorated judicial review[77] until its *Frontiero* decision, which it did not issue until four months

72. *Id.* at 120–21.

73. 404 U.S. 71, 74 (1971).

74. ACLU *Tribute*, *supra* note 3.

75. *See Reed*, 404 U.S. at 76–77. "Deferential judicial review" is more commonly known as "rational basis review" or "rational basis scrutiny." Katie R. Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L. Rev. 1317, 1319, 1366 (2018).

76. Although the *Reed* Court said it was enforcing a deferential level of scrutiny, the very fact that it struck down the challenged gender-based classification constitutes some indication that it was in fact applying a more invigorated level of review. *See* William R. Engles, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. Chi. L. Rev. 149, 157–58 (1985).

77. This more "invigorated judicial review" is more commonly known as "intermediate scrutiny" or "strict scrutiny." *See* Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. 121, 123–26 (1989).

after its ruling in *Roe*.[78] Moreover, even after *Frontiero*, the Court continued to uphold multiple gender-based classifications, rejecting arguments by Ginsburg and other women's rights advocates.[79] In sum, given its historic context, it is not surprising that *Roe* was not framed in terms of women's rights.

The Supreme Court did expressly connect abortion rights to gender equality concerns in its historic 1992 *Planned Parenthood of Southeastern Pennsylvania v. Casey* ruling, which upheld what the Court called *Roe*'s "central" holding: Until the point of fetal viability, a woman has the right to an abortion free from any regulations that "unduly burden" that right.[80] Notably, the pertinent language was in an unusual "joint opinion,"[81] co-authored by three justices, one of whom was the Court's first female justice: Sandra Day O'Connor.[82] Ginsburg, who was still a federal court of appeals judge when *Casey* was decided, praised the joint opinion for "add[ing] an important strand to the Court's opinions on abortion . . . [by] acknowledg[ing] the intimate connection [sic] between [women's reproductive rights and women's equality rights]."[83]

The *Casey* joint opinion's description of the "most central principle"[84] in *Roe* was strikingly different from *Roe*'s own language in its description of whose rights were at stake. The joint opinion omitted any reference to the doctor and instead focused solely on the pregnant woman: "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*."[85] Moreover, although the Court had decided multiple intervening cases about the right that *Roe* had initially recognized, *Casey* was its first decision explicitly recognizing the critical role that right plays for promoting women's equality. As the joint opinion eloquently declared: "[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. . . . The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[86] In the same vein, the joint opinion noted that, "[t]he ability of women to

78. Frontiero v. Richardson, 411 U.S. 677 (1973). *Frontiero* was decided on May 14, 1973, and *Roe* was decided on January 22, 1973.

79. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 83 (1981) (upholding military draft registration limited to men); Michael M. v. Superior Court, 450 U.S. 464, 476 (1981) (upholding state statutory rape law penalizing males but not females); Kahn v. Shevin, 416 U.S. 351, 356 (1974) (upholding state property tax benefit reserved for widows).

80. 505 U.S. 833, 874 (1992) (joint opinion).

81. *See id.* at 843–44. A "joint opinion" is one co-authored by two or more named justices as a collaborative effort, as opposed to, for example, a "per curiam" opinion in which no one justice is named as author. *See generally* Laura Krugman Ray, *Circumstance and Strategy: Jointly Authored Supreme Court Opinions*, 12 Nev. L.J. 727, 727–28 (2012). The "joint opinion" format has been employed by the Court only rarely. *Id.*

82. *Casey*, 505 U.S. at 843–44.

83. *See Speaking in a Judicial Voice*, *supra* note 2, at 1199.

84. *Casey*, 505 U.S. at 871.

85. *Id.*

86. *Id.* at 852.

participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[87]

VII. GINSBURG REACHED ACROSS IDEOLOGICAL DIVIDES TO FORGE BOTH PERSONAL FRIENDSHIPS AND PROFESSIONAL ALLIANCES

Ginsburg's moderate, reformist, incrementalist approach to gender equality issues, including abortion, was integrally connected to her consistent pattern of building collegial relationships with ideologically diverse individuals. While both aspects of her life and work may well have reflected personal predilections, they also served the strategic purpose of advancing her women's rights goals and other causes she championed as a lawyer and judge. Through both her incremental and inclusive approaches, Ginsburg broadened support for those causes.

Ginsburg often recounted the advice her then-new mother-in-law gave her on the day of her wedding to Martin "Marty" Ginsburg: "In every good marriage, it helps sometimes to be a little deaf."[88] She quoted that advice as having made a positive contribution not only to her fifty-six-year-long happy marriage, but also to her professional relationships, including those on the Supreme Court: "When a thoughtless or unkind word is spoken, best tune out. Reacting in anger or annoyance will not advance one's ability to persuade."[89] She often quoted similar advice of her mother's, too: "Don't be distracted by emotions like anger, envy, resentment. These just sap energy and waste time."[90]

A celebrated example of someone who had dramatically different views on many important legal and other issues, with whom Ginsburg enjoyed both a warm personal friendship and a constructive collegial relationship, was Justice Antonin Scalia. Ginsburg wrote that, "[f]rom our years together at the D.C. Circuit, we were best

87. *Id.* at 856. It is especially noteworthy that the *Casey* opinion of Justice Blackmun, *Roe*'s author, moved even further away from *Roe*'s (male) doctor-centric framing of the abortion right, and even closer toward re-grounding the abortion right on a gender equality rationale than *Casey*'s joint opinion had done. *See id.* at 922–43 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see* Roe v. Wade, 410 U.S. 113 (1971) (conditioning a woman's "right" to have an abortion on her doctor's professional judgement). While the joint opinion referred to "[t]he ability of women to participate equally in" society, as a practical matter, it did not explicitly advert to women's constitutional right to do so. *Casey*, 505 U.S. at 856 (joint opinion). In contrast, Justice Blackmun's separate opinion in *Casey* expressly stated that abortion restrictions "implicate constitutional guarantees of gender equality." *Id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). He further stated that these restrictions "rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause," citing two major Court rulings that struck down gender-based classifications under that Clause. *Id.* (first citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–26 (1982); and then citing Craig v. Boren, 429 U.S. 190, 198–99 (1976)). "Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life." *Id.*

88. *R.B.G.'s Advice for Living*, N.Y. Times, Oct. 2, 2016, at SR4.

89. *Id.*

90. MAKERS, *Ruth Bader Ginsburg: Mom's Message*, YouTube (June 21, 2012), https://youtu.be/0J41QawDxDs.

buddies,"[91] and they shared many experiences beyond their joint judicial work on that court and the Supreme Court.

In her moving remarks at Scalia's memorial service, Ginsburg paid tribute to his reciprocal welcoming of personal and professional relationships across the kinds of ideological divides that are now polarizing—and to some extent paralyzing—our society at large. She quoted Scalia as saying: "I attack ideas. I don't attack people. Some very good people have some very bad ideas."[92] What a welcome contrast to the too-prevalent current societal norm of disproportionately punishing someone for any perceived deviation from approved ideas!

Ginsburg's memorial reflections about Scalia also recounted how he had promptly presented her with his draft of his dissenting opinion in the landmark 1996 case of *United States v. Virginia*,[93] the historic gender discrimination case in which she was then writing the majority opinion.[94] He stressed that he wanted her to have it as soon as he had completed it, so that she could have as much time as possible to respond to his arguments.[95] Again, what a welcome contrast to the too-prevalent current societal norm of eschewing any engagement with people holding different perspectives on such hotly-contested issues, let alone helping those with such competing perspectives to improve their counterarguments!

Throughout Ginsburg's judicial career—starting with her appointment to the U.S. Court of Appeals for the D.C. Circuit in 1980—she both practiced and preached civility in modes of communication, even while issuing robust critiques of other judges' opinions with which she disagreed. Above, I alluded to a pertinent passage from her 1992 Madison Lecture, in which she said that "the effective judge . . . strives to persuade, and not to pontificate[, and] . . . speaks in a 'moderate and restrained' voice . . . ."[96] In that lecture, Ginsburg also endorsed a report that another circuit court of appeals had commissioned:

> [J]udges [should] avoid "disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge," and instead . . . "be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge [generally] is the result of that judge's earnest effort to interpret the law and the facts correctly."[97]

---

91. Press Release, Supreme Court of the United States, Statements from the Supreme Court Regarding the Death of Justice Antonin Scalia (Feb. 14, 2016) (statement of Justice Ruth Bader Ginsburg).

92. C-SPAN, *Justice Ruth Bader Ginsburg Eulogy at Justice Scalia Memorial Service*, YouTube (Mar. 1, 2016), https://youtu.be/jb_2GgE564A.

93. 518 U.S. 515 (1996).

94. *See A Conversation Between Justice Ginsburg and Professor Strossen*, *supra* note 4, at 42 n.60.

95. *Id.*

96. *Speaking in a Judicial Voice*, *supra* note 2, at 1186.

97. *Id.* at 1198 (quoting Marvin E. Aspen et al., Comm. on Civility of the Seventh Jud. Cir., Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit 7A (1992)).

Yet again, this advice is especially well taken in our current hyper-polarized environment, with ramped-up rhetorical attacks even on those who differ only on relatively insignificant details.

Ginsburg practiced and prescribed a particular approach for framing one's perspectives that organically leads to constructive disagreement, rather than destructive divisiveness. To quote her, this approach constitutes "a dialogue with, not a diatribe against," the other parties to the dispute.[98] Specifically, she said that whether she was working as a lawyer writing a brief or as a judge writing an opinion, she would consistently write "affirmative statements of [her] reasons, drafted before receiving" the document whose arguments she was countering. Only after writing her own affirmative case would she later make "adjust[ments], as needed, to [respond to] the . . . presentation" in the other document.[99] The focus on advancing one's own position, rather than rebutting someone else's, is more likely to surface areas of agreement and also is strategically advantageous in avoiding a defensive tone while maintaining the rhetorical high ground.

VIII. CONCLUSION

I first had the enormous privilege of crossing paths with Ruth Bader Ginsburg in 1973, when she was serving as the founding director of the ACLU Women's Rights Project and I was a student at Harvard Law School attending an event at which she was a guest speaker. Her presentation had an outsized impact on my sense of what I could accomplish—both as a woman and as a lawyer-to-be. She planted in my mind the idea that I could pursue my deep commitments to women's rights and reproductive freedom while simultaneously pursuing my commitments to other civil liberties and human rights with which the former is integrally interconnected, including by working with the ACLU. In fact, no sooner did I graduate from law school than I began my ACLU career in the same way Ginsburg had begun hers before she joined the ACLU staff: by handling cases as an unpaid "cooperating" ACLU lawyer.[100] I was also deeply honored, later in my career, to follow in Ginsburg's footsteps as a member of the ACLU Board of Directors and as one of its national general counsel.

For many of the NYLS students who were in the overflow audience during my 2018 interview of Justice Ginsburg, and who thus were at the same stage in their legal careers when they heard her speak as I was when I first did, Ginsburg will also have a profound ongoing impact on their lives and careers. In the almost half-century between those two law school appearances, Ginsburg increased exponentially the significant mark she had already made while I was still a law student. Thanks to her ongoing contributions from the two sides of the Supreme Court bench—as both advocate and justice—we are much closer to our national ideal of "liberty and justice

98. *In Her Own Words: Ruth Bader Ginsburg*, N.Y. Times, June 15, 1993, at A24 (taking the same approach in dialogue with "co-equal departments of government, state authorities, and even her own colleagues").

99. *Speaking in a Judicial Voice*, *supra* note 2, at 1196.

100. Thousands of "cooperating" lawyers provide pro bono efforts to complement the work of salaried ACLU staff attorneys.

for all" than we were during my law school days. Yet, as highlighted in Justice Ginsburg's forceful dissenting opinions during her last years on the Court, much work remains to be done. For all members of the NYLS community and beyond who seek to further her legacy, the moderate, incremental, and inclusive path she pursued offers the most promising approach.