

# Ruth Bader Ginsburg, a Judge's Judge

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The contrast in the Rose Garden yesterday was striking—Ruth Bader Ginsburg is as physically tiny as the president is large. Yet Judge Ginsburg is an exceptionally powerful woman, and one with a remarkably consistent and clear vision of what the rule of law really means.

Read a lot of Judge Ginsburg's opinions, and you are struck by the voice. It is a voice of scrupulous honesty, freedom from cant, and strong moral commitment. When you read her description of the facts of the case, or of the precedents that point in opposite directions, you don't know which way the case is going to come out. You approach the point of decision, at which many a less talented or more ideological judge would indulge in rhetoric, and you get instead a measured expression of reasons in her own words, not those of the latest political slogan.

Judge Ginsburg founded and directed the Women's Rights Project of the American Civil Liberties Union. In the 1970s she argued—and won—most of the important constitutional challenges to gender discrimination that were decided by the Supreme Court. She also handled many cases in lower courts. Her views on sex discrimination are firmly anchored in the "equal protection" language of the Fourteenth Amendment. Thus, some of the landmark gender discrimination cases that she argued successfully before the Supreme Court were brought on behalf of male plaintiffs (*Frontiero v. Richardson*, 1973).

During the 1970s, Judge Ginsburg performed a legal high-wire act, arguing in the political arena for the enactment of the Equal Rights Amendment while simultaneously convincing the Supreme Court that similar protections are already a part of the

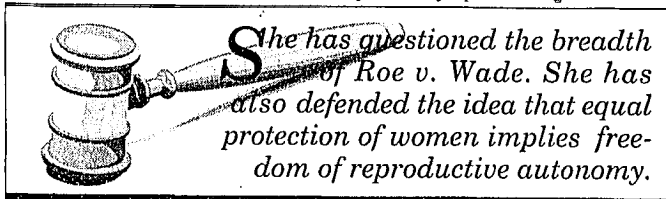
amendment's equal protection clause.

Judge Ginsburg has been equally sensitive to equal protection claims advanced by other victims of discrimination. As an appellate judge, for example, she wrote major opinions affirming liberal standing rules (access to courts) for minority groups seeking to raise claims of race discrimination.

In a series of speeches and articles, Judge Ginsburg has articulated a nuanced position on the issue of abortion. She has

cap. She was joined by then-Judge Antonin Scalia and, in a separate opinion, Judge Kenneth Starr, later solicitor-general under President Bush.

In matters of free speech and the press, Judge Ginsburg has written major opinions defending free speech on the airwaves and freedom of information. In one statement, for example, she emphasized the importance of keeping libel law firmly tied to the "actual malice" standard, which is the press's major protection against the chill-



questioned the "breathtaking" breadth of the majority opinion in *Roe v. Wade*. At the same time, she has steadfastly defended the core idea that equal protection of women engaged in the economic and social life of the nation necessarily implies freedom of reproductive autonomy. The disadvantageous treatment of a woman because of pregnancy or reproductive choice, Judge Ginsburg has written, is a paradigm case of discrimination on the basis of sex.

Judge Ginsburg's legal career before her appointment to the bench was also animated by her commitment to civil liberties and the Bill of Rights. On the bench she has written major opinions affirming freedom of religion and the separation of church and state. One significant 1984 pronouncement, for example, condemned the Air Force determination to ban an officer from wearing a yarmulke, or Jewish skull-

ing effects of open-ended liability. In 1989 Judge Ginsburg, relying on the First Amendment, dissented from a decision upholding the Reagan-Bush administrations' "Mexico City Policy," which banned aid to any foreign family-planning organization that furnished abortion counseling or referral. The Clinton administration was later to repeal that ban.

In her 13-year tenure on the bench, Judge Ginsburg has written numerous opinions on searches and seizures, criminal procedure, rules of evidence, and prisoners' rights. The only common denominator in her opinions on criminal matters is that they are scrupulously free of ideology. In a particularly notable 1987 case, Judge Ginsburg, in dissent, argued in favor of the constitutionality of the Independent Counsel law. The Supreme Court, with only Justice Scalia dissenting, subsequently vindicated Judge Ginsburg's position.

When Ruth Ginsburg was nominated to the D.C. Circuit, the American Bar Association rated her "exceptionally well qualified"—the ABA's highest rating, and one accorded rather rarely. That rating has been fully vindicated by her record on the bench. Judge Ginsburg's opinions are marked by rigorous analysis of statutory and constitutional texts and respect for precedent. She has frequently emphasized how Congress can simplify (and contain) the role of the courts by drafting clear statutes and responding to judicial pronouncements with new legislation. Judge Ginsburg cares deeply about the institutional role of the courts in American government, and has demonstrated great skill in bridging ideological differences. As Judge Ginsburg recently declared in a lecture, a judge should "engage" in a dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even her own colleagues."

As a scholar, advocate and jurist, Ruth Bader Ginsburg has lived with the steadfast conviction that the soaring promise of equality in the American Constitution can become down-to-earth legal reality. She carried that conviction to the Supreme Court. She has faithfully reconciled personal conviction with a judge's duty to apply the law.

We know her well—both personally and from her many writings. Ruth Ginsburg is a judge's judge, like Henry Friendly and Learned Hand: She believes in the rule of law. She should be supported by liberals and conservatives alike.

Mr. Huber, a fellow at the Manhattan Institute, is a former law clerk to Judge Ginsburg and Supreme Court Justice Sandra Day O'Connor. Mr. Taranto, an attorney, has clerked for Justice O'Connor and Judge Robert Bork.