

The Undiscovered Justice: Justice Ruth Bader Ginsburg’s “New Democratic” Jurisprudence

President Clinton’s first appointment to the United States Supreme Court, Justice Ruth Bader Ginsburg, is best known for her long campaign to promote gender equity. Her successful advocacy before the Supreme Court throughout the 1970s justified the President’s characterization of her, when announcing her nomination, as the “Thurgood Marshall of gender equality law.” This most prominent facet of Justice Ginsburg’s jurisprudence reached its zenith in her authorship of the Court’s landmark majority opinion in *United States v. Virginia*, which very nearly puts gender equality on the same, strictly protected constitutional footing as racial equality.

This is the aspect of Justice Ginsburg’s tenure on the Supreme Court by which most constitutional scholars and observers of the Court will continue to evaluate her, and by association, a part of President Clinton’s constitutional legacy. It is a view the President seems to have invited, particularly in light of the fact that he used the first Democratic appointment in twenty-six years to seat the second woman to serve on the Court. It emphasizes, however, the most progressive edge of Justice Ginsburg’s jurisprudence to the neglect of a more moderate and restrained judicial doctrine expressive of the centrist political vision of President Clinton.

Surprisingly, the moderate core of Justice Ginsburg’s jurisprudence is most clear with respect to two themes that serve as frequent Republican critiques of Democratic constitutional policy: judicial activism and states’ rights. Contrary to these criticisms, Justice Ginsburg pursues a distinctly moderate agenda with respect to these themes, as she emphasized in her dissent to *BMW of North America, Inc. v. Gore*: “The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the *States’ domain*, and does so in the face of reform measures recently adopted or currently under consideration in *legislative arenas*.”

Judicial Activism

Most notably in her criticism of *Roe v. Wade*, but frequently in her scholarship and discernable in her opinions, Justice Ginsburg unambiguously asserts a commitment to judicial restraint in favor of the legislative process as a mechanism for social change. She urges respect for precedent, preferring the legislature as the vehicle for extensive change. She finds the legislature to be more flexible and responsive to the public mood whereas she characterizes change by constitutional interpretation as too inflexible.

States’ Rights

Justice Ginsburg has shown clear respect for states’ rights in a variety of contexts, in spite of her dissents in the Court’s revolutionary commerce clause cases, which Chief Justice Rehnquist and Justice Scalia have cast as the *sine qua non* of a renewed states’ rights movement. Instead, Justice Ginsburg has advocated for process federalism, especially in the preemption doctrine context, arguing that the role of the judiciary in enforcing states’ rights should be limited to maintaining the integrity of the political processes, which the framers intended as the safeguards of federalism. She has strongly advocated that the Supreme Court owes respect to the work of state supreme courts, nowhere more poignantly than in her impassioned dissent in *Bush v. Gore*.