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A LOOK AT . . . Roe v. Wade v. Ginsburg:
History Lesson for the Judge: What Clinton's Supreme Court Nominee Doesn't Know About Roe

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IN NOMINATING U.S. Court of Appeals Judge Ruth Bader Ginsburg for a seat on the U.S. Supreme Court, President Bill Clinton claimed that her much publicized criticisms of Roe v. Wade represented a "very provocative and impressive argument." But Ginsburg's complaints about the "sweep" and "muscularity" of Justice Harry Blackmun's opinion in Roe manifest a surprising ignorance of abortion law developments in the five years preceding the January 1973 decision. And by suggesting that the Roe decision "stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures," Ginsburg has misconstrued the political context of the Court's landmark decision.

Ginsburg first offered her analysis of Roe in a talk at the University of North Carolina at Chapel Hill in April 1984, some three years after she joined the D.C. Circuit Court of Appeals. In Roe, Ginsburg argued, the Court "ventured too far in the change it ordered and presented an incomplete justification for its action." She suggested that the Roe majority should have "simply invalidated" Texas's 19th-century anti-abortion law -- which allowed for legal abortions only in those rare instances when a woman's life was actually endangered -- and refrained from any additional discussion of what further parameters such statutes had to meet. Such a limited ruling, Ginsburg said, would have left primary responsibility for the legal status of abortion with state legislatures and would have been a "more acceptable" judicial decision.

Ginsburg's attack on Roe as "heavy-handed judicial intervention" appeared in published form in the January 1985 issue of the North Carolina Law Review. In 1992, in a brief essay in Constitution magazine, Ginsburg repeated her criticisms, complaining that Roe "is not fairly described as 'moderate.' " On March 9, 1993, Ginsburg delivered the fullest exposition of her views at the New York University School of Law (see excerpt elsewhere on this page). She suggested that "a decision of Roe's muscularity" was "unnecessary" in light of the "marked trend" toward liberalization in abortion law across the nation. Thus Roe supposedly "halted a political process that was moving in a reform direction and thereby . . . prolonged divisiveness and deferred stable settlement of the issue."

Although liberalization forces had scored a series of dramatic breakthroughs between 1967 and 1970, the emergence of powerful right-to-life forces in 1970 and 1971 resulted in an all-but-complete deadlock on abortion liberalization in state legislatures across the country. Many of the political dynamics that Ginsburg and other commentators believe commenced only in the wake of Roe (and its too often slighted companion decision Doe v. Bolton) were very much present on the national political scene for almost three full years prior to 1973.

The first successful efforts to reform American abortion laws took place in the spring of 1967. Legislatures in Colorado, North Carolina and California each adopted "reform" laws -- new statutes that allowed individual women with serious health problems to petition hospital committees for "therapeutic" abortions. Only a very small percentage of women with unwanted pregnancies qualified for legal abortions under these statutes. In 1968, Georgia and Maryland passed similiar laws, followed in 1969 by New Mexico, Arkansas, Kansas, Oregon and Delaware.

This "reform" movement quickly gave way to the "repeal" movement. As the initial reform statutes were taking effect in 1967 and 1968, liberalization advocates began to conclude that the actual repeal of restrictive abortion laws was fast becoming an openly discussable and winnable goal. By early 1969, even the two most prominent physicians supporting abortion law reform, Alan F. Guttmacher and Robert E. Hall, were acknowledging that repeal was actually preferable to reform.

In state after state, early champions of abortion reform rapidly evolved into forthright backers of repeal. By that time, virtually all activists on the issue realized how very few women were being aided by "therapeutic" abortion laws and that individual choice, at least within the first 20 weeks of an unwanted pregnancy, ought to be pursued both in state legislatures and in federal courts.

Until 1969, the only abortion cases being decided in U.S. courts were criminal prosecutions of medical and non-medical abortion providers. In the fall of 1969, both the California Supreme Court, in People v. Belous, and U.S. District Judge Gerhard A. Gesell of Washington, in U.S. v. Vuitch, threw out criminal charges against two abortionists. Those rulings supplied a crucial stimulus to young litigators who were already aiming toward a series of declaratory judgment challenges to abortion statutes. These lawyers relied principally upon the Supreme Court's own 1965 right-to-privacy ruling in Griswold v. Connecticut, where the justices held unconstitutional a Connecticut criminal statute prohibiting any use of birth control.

Just a few days after the California court handed down Belous, a pathbreaking litigator, Roy Lucas, filed the first such abortion law challenge in New York, with an almost identical suit being filed shortly thereafter in New Jersey. Two young women lawyers in Texas, Linda Coffee and Sarah Weddington, followed with Roe v. Wade, as did several women attorneys in Atlanta with Doe v. Bolton, which challenged the "reform" statute that Georgia had adopted in 1968. In the summer of 1970, three-judge federal courts issued rulings in Roe and Doe, holding both the Texas and Georgia laws unconstitutional.

Far more important than those rulings, however, was the political event that rendered moot Lucas's challenge to New York's abortion law: the state legislature's stunning, one-vote passage of an abortion repeal bill. The New York law, which took effect on July 1, 1970, made the state an immediate mecca for American women with unwanted pregnancies. The unexpected triumph of repeal forces in a major state immediately spurred efforts of Roman Catholic leaders and others nationwide who were unalterably opposed to any widespread availability of abortion. When Washington state held a referendum on an abortion-repeal proposal in the fall of 1970, Catholic right-to-life forces launched a billboard campaign picturing a four-month fetus and the

caption "Kill Referendum 20, Not Me." Despite the church's hard-fought efforts, Washington voters adopted the repeal proposal by a 56-to-44 percent margin.

The Washington state victory represented the political high-water mark of abortion liberalization forces. Following the dramatic legislative, judicial and popular vote triumphs of 1970 (Hawaii and Alaska also legalized abortion that year), no significant victories were registered in any state legislature during 1971. As anti-abortion forces organized and gained strength coast-to-coast, repeal proponents acknowledged privately that ever since the Washington vote, all they had racked up was "an impressive series of losses throughout the country."

In December 1971, the Supreme Court heard arguments in both Roe and Doe, but in June of 1972 the Court announced that the cases would be reconsidered that fall. Repeal supporters worried that the presence of newly confirmed justices Lewis F. Powell and William H. Rehnquist might make for a less favorable outcome than would have occurred before the two conservative Nixon nominees had joined the Court. But for repeal proponents even a conservative court now seemed to offer a more promising means to liberalization, than the political arena.

In New York, a right-to-life campaign aimed at winning legislative revocation of the 1970 repeal law was derailed only by Gov. Nelson Rockefeller's veto. The advocates of abortion rights concentrated their hopes on a fall referendum vote in Michigan, where one repeal leader proclaimed that "it would set the movement back 10 years if we lose." Anti-abortion forces gained the upper hand thanks to an extensive advertising campaign, and when the votes were tallied, Michigan's 19th-century anti-abortion law remained in force thanks to a 61-to-39 percent popular vote.

The politics of the issue were obvious to one Michigan repeal leader who observed that anti-abortion forces had mustered "a tremendous grassroots organization that we couldn't begin to match." New York's Gov. Rockefeller privately complained to Guttmacher that he had "felt very lonely" in vetoing the right-to-life bill "because there was no public evidence of grassroots support for his stand." One pro-choice leader warned his colleagues that "the opposition now employs superb strategy and organization," especially in their increased use of fetal photos. The net result of the fall votes and the rapidly shifting media coverage was that "we are being steamrollered."

Another repeal activist presciently told a reporter, "Now that I have seen the fierceness of the opposition, I no longer feel if we got a favorable ruling" from the Supreme Court the battle would really be over. "Instead of it being the end," it would represent only "the beginning of a tough new era."

Thus Judge Ginsburg's belief that had the Supreme Court said as little as possible in Roe, and passed entirely on Doe, abortion law liberalization would have gradually continued to spread across America, and that the emergence of a powerful and outspoken right-to-life movement would have been either much delayed or largely averted, is undercut by even a cursory review of abortion struggles in the early 1970s. The divisiveness of America's abortion battle was evident well before Roe and Doe, and there was no way the Supreme Court could have avoided being drawn into the fray. Roe and Doe were only the first of more than a dozen lower court decisions

on challenges to state abortion laws that were on their way to the nation's highest court or already there on Jan. 22, 1973.

The two opinions in Roe and Doe rightfully represent just as important a landmark in the progress of American freedom as does Brown v. Board of Education, a fundamental point that O'Connor, Kennedy and Souter's joint opinion in Planned Parenthood v. Casey movingly acknowledged. Judge Ginsburg ought to give the Court's momentous achievement in Roe far more careful consideration once she ascends the bench. Virtually all other aspects of her record suggest that she will quickly realize how far off target her ill-aimed attacks on Roe v. Wade have been.

David Garrow won a Pulitzer Prize for "Bearing the Cross." His book, "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade," will be published next winter.