1993 ANSWERS BY JUDGE GINSBURG

Below are some of the questions asked to Judge Ginsburg during her 1993 hearings. The question is shown in **bold text** and quotations. The answers provided by Judge Ginsburg follow each question in *italics*.

Questions from Republicans

1. In 1993, **Senator Hatch** asked Judge Ginsburg whether she agreed with the following: **"[I]n my view it is impossible, as a matter of principle, to distinguish *Dred Scott* v. *Sanford* and the *Lochner* cases from the Court's substantive due process/privacy cases like *Roe* v. *Wade.* The methodology is the same; the difference is only in the results, which hinge on the personal subjective values of the judge deciding the case."**

This is what Judge Ginsburg told Senator Hatch: *"In one case the Court was affirming the right of one man to hold another man in bondage. In the other line of cases, the Court is affirming the right of the individual to be free. So I do see a sharp distinction between the two lines."* (Ginsburg Hrg. at 271)

2. In 1993 **Senator Hatch** told Judge Ginsburg that he regarded the establishment of a right to privacy by the Supreme Court as a **"recent"** development.

Here's how Judge Ginsburg responded to Senator Hatch: *"I don't think [the right to privacy] is a recent development. I think it started decades ago. . . . It started in the 19th century. The Court then said no right is held more sacred or is more carefully guarded by the common law. It grew from our tradition, and the right of every individual to the control of his person. The line of decisions continued through* Skinner v. Oklahoma *(1942), which recognized the right to have offspring as a basic human right. I have said to this committee that the finest expression of that idea of individual autonomy and*

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personhood, and of the obligation of the State to leave people alone to make basic decisions about their personal life, Justice Harlan's dissenting opinion in Poe v. Ullman. . . . After Poe v. Ullman, I think the most eloquent statement of it, recognizing that it has difficulties—and it certainly does—is by Justice Powell in Moore v. City of East Cleveland (1977), the case concerning the grandmother who wanted to live with her grandson. Those two cases more than any others—Poe v. Ullman, which was the forerunner of the Griswold (1965) case, and Moore v. City of East Cleveland—explain the concept far better than I can." (Ginsburg Hrg. at 269)

3. In 1993 **Senator Hatch** asked Judge Ginsburg if she agreed that "**one can favor various privacy interests as a matter of policy and support legislation to protect them and still recognize the illegitimacy of judges making up rights that aren't found in the Constitution**."

Here's how Judge Ginsburg answered: "*Senator Hatch, I agree with the Moore v. City of East Cleveland statement of Justice Powell. He repeats the history [of] the Lochner era, and says that history 'demonstrates there is reason for concern lest judicial intervention become the predilections of those who happen at the moment to be members of the Court.' He goes on to say that history 'counsels caution and restraint,' and I agree with that. He then says, 'but it does not counsel abandonment,' abandonment of the notion that people have a right to make certain fundamental decisions about their lives without interference from the State. And what he next says is, history 'doesn't counsel abandonment, nor does it require what the city is urging here'—cutting off the family right at the first boundary, which is the nuclear family. He rejects that. In taking the position I have in all of my writings on this subject, I must associate myself with Justice Powell's statements."* (Ginsburg Hrg. at 271)

4. In 1993 **Senator Hatch** asked Judge Ginsburg whether she agreed with the following statement: **"The only legitimate way for a judge to go about defining the law is by attempting to discern what those who made the law intended."**

Here's how Judge Ginsburg answered: *"I think all people could agree with that. But as I tried to say in response to the chairman's question, trying to divine what the Framers intended, I must look at that matter two ways. One is what they might have intended immediately for their day, and the other is their larger expectation that the Constitution would govern, as Cardozo said, not for the passing hour, but for the expanding future. And I know no better illustration of that than to take the words of the great man who wrote the Declaration of Independence. . . . So I see an immediate intent about how an ideal is going to be recognized at a given time and place, but also a larger aspiration as our society improves. I think the Framers were intending to create a more perfect union that would become ever more perfect over time."* [p. 127]

5. In 1993 **Senator Specter** asked Judge Ginsburg whether she had **"any concern about an issue of legitimacy for the Supreme Court to identify new rights in the equal protection clause, in light of the failure of the passage of ERA."**

Here's how Judge Ginsburg answered: *"Senator Specter, I tried to answer that question before. I will try once more. The 14th amendment says that no State shall deny, neither the United States nor any State shall deny to any person within its jurisdiction the equal protection of its laws. Before women were full citizens, before they could vote, maybe one could justify the lack of equal treatment. Ever since the 19th amendment, women are citizens of equal stature with men. The Equal Rights Amendment is a very important symbol, in my judgment, because it would explicitly correct the unfortunate history of the treatment of women as something less than full persons. However, the Constitution has been corrected by the 19th amendment to make women full citizens. I can't imagine anyone not reading the equal protection clause today to mean that women and men are persons of equal stature and dignity before the law. I don't think that is at all an activist position with regard to the proper interpretation of the equal protection clause of the 14th amendment."* (Ginsburg Hrg. at 193)

6. In 1993 **Senator Brown** from Colorado asked Judge Ginsburg whether she agreed that **"the equal protection clause suggests a sex-blind standard with regard to legislation and programs?"**

Here's how Judge Ginsburg answered: *"In most instances, that is correct. [The equal protection clause states:] 'Nor shall any person be denied the equal protection of the laws.' It is my firm belief that for purposes of being whatever a person wishes and is able to be, sex is not a relevant criterion."* (Ginsburg Hrg. at 338-339)

7. In 1993 **Senator Brown** asked Judge Ginsburg **whether a father might have a competing interest in the termination of a pregnancy under the equal protection clause. He asked her: "since [the equal protection clause] may well confer a right to choose on the woman, it [could] also follow that the father would be entitled to a right to choose in this regard or some rights in this regard."**

Here's how Judge Ginsburg answered: *"That was an issue left open in Roe v. Wade (1973). But if I recall correctly, it was put to rest in Casey (1992). . . . The Casey majority understood that marriage and family life is not always all we might wish them to be. There are women whose physical safety, even their lives, would be endangered, if the law required them to notify their partner. . . . I will rest my answer on the Casey decision, which recognizes that it is her body, her life, and men, to that extent, are not similarly situated. They don't bear the child. . . . It is essential to woman's equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex."* (Ginsburg Hrg. at 207)

8. In 1993, **Senator Simpson** asked Judge Ginsburg: "**under the ninth amendment, rights left unnamed in the Constitution are retained by the people. When considering that designation of the right retained by the people, how would you reason the grant or denial of a new right not enumerated in the Constitution?"**

Here's her response: *"[T]he primary guardian of the 9th and 10th amendments has really got to be the Congress itself. The national government is one of enumerated powers. To create a conflict, an arguable conflict with the 10th amendment, Congress would have to take action vis-a-vis the States. So I think these amendments, first about not restricting people's rights and then about the reserved rights of the States, these amendments are peculiarly directed to Congress. A question about the 10th amendment would never come to Court apart from some action Congress has taken.*

So I think these two amendments are instructions first and foremost to Congress itself. Congress is not to limit people's freedom and not to encroach upon the States. And it is only when Congress takes an action with regard to the States that the States consider intrusive, that a 10th amendment issue would come to the Court. So I think that these amendments are directed to the Congress. I think you suggested that in the way you put the question". (Ginsburg Hrg. at 188)

Questions from Democrats

9. **Senator Biden** asked Judge Ginsburg the following question at her 1993 hearings: **"what is it that allows the Court to recognize such rights that the drafters of the Constitution or specific amendments did not mention or even contemplate at the time the amendment, in the case of the 14th amendment, or the Constitution and the Bill of Rights were drafted?"**

Here's how Judge Ginsburg answered: *"I think the Framers are shortchanged if we view them as having a limited view of rights, because they wrote, Thomas Jefferson wrote, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these"—among these—"are life, liberty, and the pursuit of happiness," and that government is formed to protect and secure those rights.*

Now, when the Constitution was written, as you know, there was much concern over a Bill of Rights. There were some who thought a Bill of Rights dangerous because one couldn't enumerate all the rights of the people; one couldn't compose a complete catalog. The thing to do was to limit the powers of government, and that would keep government from trampling on people's rights.

But there was a sufficient call for a Bill of Rights, and so the Framers put down what was in the front of their minds in the Bill of Rights. Let's look at the way rights are stated in the Bill of Rights in contrast to the Declaration of Independence, let's take liberty as it appears in the fifth amendment.

The statement in the fifth amendment—"nor shall any person be deprived of life, liberty, or property, without due process of law"—is written as a restriction on the government. The Founders had already declared in the Declaration that liberty is an unalienable right, and the government is accordingly warned to keep off, both in the structure of the Constitution, which limits the powers of government, and in the Bill of Rights. And, as you also know, Mr. Chairman, the Framers were fearful that this limited catalog might be perceived—even though written as a restriction on government rather than as a grant of rights to people—as skimpy, as not stating everything that is. And so we have the ninth amendment, which states that the Constitution shall not be construed to deny or disparage other rights.

Now, it is true that the immediate implementation in the days of the Founding Fathers in many respects was limited. "We the People" was not then what it is today. The most eloquent speaker on that subject was Justice Thurgood Marshall [who] reminded us that the Constitution's immediate implementation, even its text, had certain limitations, blind spots, blots on our record. But he said that the beauty of this Constitution is that, through a combination of judicial interpretation, constitutional amendment, laws passed by Congress, "We the People" has grown ever larger. So now it includes people who were once held in bondage. It includes women who were left out of the political community at the start…. The view of the Framers, their large view, I think was expansive." (Ginsburg Hrg. at 118-19)

10. **Senator Biden** asked Judge Ginsburg the following question at her 1993 hearings: "**in thinking about how the Constitution protects unenumerated rights, including rights of privacy, will**

you use the methodology that looks to going back to a specific right being sought, guaranteed, or will you use the more traditional method of more broadly looking at the right that is attempting, seeking constitutional protection before the Court? What methodology will you use? What role will history and tradition play for you in determining whether or not a right exists that is not enumerated?

Here's how Judge Ginsburg answered: *"Senator Biden, I have stated that I associate myself with the dissenting opinion in Poe v. Ullman (1961), the method revealed most completely by Justice Harlan in that opinion. The next best statement of it appears in Justice Powell's opinion in Moore v. City of East Cleveland (1977). My understanding of the O'Connor/Kennedy position in the Michael H. case is that they, too, associate themselves with that position. Justice O'Connor cited the dissenting opinion in Poe v. Ullman as the methodology she employs. She cited Loving as her reason for not associating herself with the footnote, the famous footnote 6 in Justice Scalia's Michael H. opinion, a footnote in which two Justices concurred."* (Ginsburg Hrg. at 281-82)

11. In 1993 **Senator Simon** posed the following question to Judge Ginsburg: **"we had a nominee before us who said, when the ninth amendment says certain rights shall not be construed to deny or disparage others retained by the people, that they probably meant by the States, rather than the people. Now, that's a very, very important distinction. That nominee was not approved by this committee, I might add. But when the ninth amendment says 'by the people,' do you believe it means by the people?"**

Here was Judge Ginsburg's reply: *"The 10th amendment addresses the powers not delegated to the United States and says they are reserved to the States. The 10th amendment deals with the rights reserved to the States. The ninth amendment—and you have recited the history—speaks of the people. There was a concern, as you said, that if we had a Bill of Rights, some rights would surely be left out. Therefore, it was better, some thought, just to rely on the fact that the Federal Government was to be a government of enumerated, delegated powers, and leave it at that. The ninth amendment is part*

of the idea that people have rights. The Bill of Rights keeps the Government from intruding on those rights. We don't have a complete enumeration in the first 10 amendments, and the ninth amendment so confirms." (Ginsburg Hrg. at 209)

12. In 1993, **Senator Heflin** asked, **"the Court reversed a 5-year-old precedent in *Payne* v. *Tennessee,* and in its opinion, the majority reasoned that <u>stare decisis</u> is less vital in cases that don't involve property or contract rights because litigants have not built up reliance on the current state of the law. In your judgment, is this a sound theory of stare decisis? Would you prefer some other version such as the test . . . which would inquire into the soundness of the reasoning in a prior opinion without regard to the substantive area of the law?"**

Here's how she answered: *"The soundness of the reasoning is certainly a consideration. But we shouldn't abandon a precedent just because we think a different solution more rational. Justice Brandeis said some things are better settled than settled right, especially when the legislature sits. So if a precedent settles the construction of a statute, stare decisis means more than attachment to the soundness of the reasoning. Reliance interests are important; the stability, certainty, predictability of the law is important. If people know what the law is, they can make their decisions, set their course in accordance with that law. So the importance of letting the matter stay decided means judges should not discard precedent simply because they later conclude it would have been better to have decided the case the other way. That is not enough. . . . But even in constitutional adjudication, stare decisis is one of the restraints against a judge infusing his or her own values into the interpretation of the Constitution. . . . So how has a precedent worked in practice? What about reliance interests? Those things count, as well as the soundness of the decision. Stare decisis is also important because it keeps judges from infusing their own value judgments into the law."* [p. 197-98]

13. In 1993, **Senator Biden** asked Judge Ginsburg, **"do you agree that the right of privacy is fundamental, meaning that it is so important —I am not asking about any specific rights of privacy—meaning that it is so important, that the Government may interfere with it only for compelling reasons, when it finds that such a right exists, the right of privacy?"**

Here's how she responded: *"The line of cases that you just outlined, the right to marry, the right to procreate or not, the right to raise one's children, the degree of justification the State must have to interfere with those rights is large. . . . You mentioned Meyer v. Nebraska (1923) and Pierce v. Society of Sisters (1925). Although pigeonholed in the free exercise of religion area, I would put the Yoder (1972) case in that same line."* (Ginsburg Hrg. at 279)