

The Senate is about to put an advocate of the male assimilation theory of women's rights onto the Supreme Court and to earn plaudits from the feminist establishment for doing so, not to mention plaudits from the media for confirming a moderate.

So it probably won't matter that, for this nominee, moderation is a political tactic, rather than a legal practice. Nor will it matter that the nominee's reasoning on abortion is premised on the notion, to paraphrase the *Dred Scott* decision, that the unborn have no rights that the born are bound to respect. But I think it is a tragedy that we have sunk to the point that this is our idea of a non-controversial nominee.

Mr. Chairman, I do thank you and the committee for the opportunity to come here and say so today.

The CHAIRMAN. Thank you for a reasoned, dispassionate, well-stated statement. As I said, it is nice to have you back before the committee and it is nice to know that you would rather be a witness than a nominee. I guess it is a different role.

Welcome back, Mr. Phillips. One thing for certain, you are non-partisan in your criticism. The last time you were here, if I remember—I mean this to establish your bona fides here—you were not reluctant to oppose a Republican nominee, and you are not reluctant to oppose a Democratic nominee.

Mr. PHILLIPS. I am nonpartisan. I am bipartisan.

The CHAIRMAN. That is a better way of saying it. The floor is yours.

STATEMENT OF HOWARD PHILLIPS

Mr. PHILLIPS. Thank you very much, sir, Senator Hatch, Senator Specter.

When we are told that a unanimous vote is in the offing, the American people have the right to ask, in all seriousness, do all Senators share the same standard of judgment. In 1990, when you accorded me the opportunity to testify in opposition to the nomination of David Souter, I asserted that the overarching moral issue in the political life of the United States in the last third of the 20th century is the question of abortion: Is the unborn child a human person entitled to the protections pledged to each of us by the Founders of the Nation?

The first duty of the law and the civil government established to enforce that law is to prevent the shedding of innocent blood. As Notre Dame law professor Charles Rice has pointed out, this is so, because the common law does not permit a person to kill an innocent nonaggressor, even to save his own life.

I have no reason to believe that Mrs. Ginsburg has personally caused human lives to be extinguished, as was clearly the case with David Souter, when President Bush put his name forward. Nor do I in any other way challenge Mrs. Ginsburg's nomination on grounds of personal character. I do, however, urge that Mrs. Ginsburg's nomination be rejected on grounds that the standard of judgment she would bring on the overriding issue of whether the Constitution protects our God-given right to life is a wrong standard.

Instead of defending the humanity and divinely imparted right to life of preborn children, she would simply be another vote for the

proposition that our unborn children are less than human, and that their lives may be snuffed out, without due process of law and with impunity. As a matter of practice and belief, Mrs. Ginsburg has failed to acknowledge or recognize that the first duty of the law is indeed the defense of innocent human life.

If it is Mrs. Ginsburg's position, and it does seem to be her view, that the extinguishment of innocent unborn human lives without due process of law is not only constitutionally permissible, but that those who engage in the practice of destroying unborn lives should enjoy constitutional protection for doing so, she may have a perspective consistent with that held by members of this committee. But it is not one which is consistent with either the plain language of the Constitution or with the revulsion toward abortion which prevailed at the time when our Constitution was drafted and ratified.

While Ms. Ginsburg has disagreed with the reasoning in *Roe v. Wade*, she has at no time expressed dissatisfaction with the millions of legal abortions which were facilitated by that decision, even though she would have argued that discrimination rather than privacy was the core issue. By Ms. Ginsburg's logic, it is unconstitutional discrimination to deny females the opportunity to extinguish any lives which may result from their sexual conduct. Her argument would seem to be with our creator inasmuch as he did not equally assign the same childbearing function to males. Consistent with her warped perspective, Ms. Ginsburg as a litigator argued that pregnancy should be treated as a disability rather than as a gift from God.

The question of personhood and of the humanity of the preborn child is at the very heart of the abortion issue in law, in morals, and in fact. Justice John Paul Stevens expressed his opinion in the 1986 *Thornburgh* case that there is a fundamental and well-recognized difference between a fetus and a human being. He admitted that indeed if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the State legislatures.

In the *Roe v. Wade* decision, the Supreme Court indicated that if the unborn child is a person, the State could not allow abortion even to save the life of the mother. In fact, the majority opinion deciding *Roe v. Wade*—in that opinion, the Supreme Court said that if the personhood of the unborn child is established, the pro-abortion case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the 14th amendment.

Although my reasoning is different, I agree with Justice Stevens when he argues that if the unborn child is recognized as a human person, there is no constitutional basis to justify Federal protection of abortion anywhere in the United States of America. Indeed, on the contrary, if the preborn child is, in fact, a human person created in God's image, premeditated abortion is unconstitutional in every one of the 50 States.

Ms. Ginsburg should be closely questioned by members of the Judiciary Committee concerning whether she believes the unborn child is a human person created in God's image. This is the core issue. If this is not her understanding—and it does not seem to

be—she should be asked to indicate by what logic she reaches a contrary conclusion.

It has been reported concerning Ms. Ginsburg that several of her writings provide a glimpse into her approach to the Constitution. In an article in *Law and Inequality*, a journal of theory and practice, she wrote that, “a too strict jurisprudence of the Framers’ original intent seems to me unworkable.” She went on to write that adherence to our 18th century Constitution is dependent on change in society’s practices, constitutional amendment, and judicial interpretation.

Furthermore, in the Washington University Law Quarterly she remarked that boldly dynamic interpretation, departing radically from the original understanding of the Constitution, is sometimes necessary. And in a speech this March at New York University, Judge Ginsburg advocated using the Supreme Court to enact social change. Without taking giant strides, the Court, through constitutional adjudication, she said, can reinforce or signal a green light for social change.

It is not surprising that different people might reach different conclusions about the intent of the Framers, but it is quite another thing for a prospective Justice of the Supreme Court to presume to substitute his or her own opinion for the plain meaning of the original document, as lawfully amended.

I hope the members of this committee will probe more deeply into Ms. Ginsburg’s present view of the opinions she expressed in these briefs, articles, and speeches. If she is unwilling to repudiate them credibly and entirely, then even aside from her apparent failure to recognize the duty of the State to safeguard innocent humanity, she would seem to have disqualified herself from a position in which she is expected to be a guardian of the Constitution. Otherwise, a vote to confirm Ms. Ginsburg becomes a vote to empower a permanent one-woman constitutional convention which never goes out of session.

Indeed, in view of the position taken by Ms. Ginsburg that it is the duty of Supreme Court Justices to disregard the plain words and intentions of the Constitution, it is particularly important that her personal opinions be even more closely scrutinized.

It is the particular obligation of those who might disagree with Ms. Ginsburg’s ideology and policy objectives to either oppose her nomination on the basis of such disagreement or to henceforth cease their personal professions of conviction on those particular issues, whether they relate to abortion, to homosexuality, or to some other issue where Ms. Ginsburg’s philosophical predilections are a matter of public record.

I see that my time is up, so I will terminate my testimony there, asking that the balance of it be submitted to the record.

The CHAIRMAN. It will be placed in the record.

[The prepared statement of Mr. Phillips follows:]