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ARTICLES

JUSTICE GINSBURG AND THE MIDDLE WAY*

Laura Krugman Ray[†]

When President Clinton nominated Ruth Bader Ginsburg to the Supreme Court in 1993, she presented the nation with a conundrum. To her admirers, and some of her detractors as well, she was the pioneering liberal litigator who, as Director of the American Civil Liberties Union's Women's Rights Project, had scored legal victories that transformed the jurisprudence of gender discrimination. To observers of her career on the Court of Appeals for the District of Columbia, she was a judicial moderate who decided each case on its merits outside the framework of any controlling ideology. To the President, she was a consensus builder likely to reduce friction among the Justices. Her ninety-six to three Senate confirmation vote suggests that most senators saw in Ginsburg a range of values well suited to the Court, but not necessarily the same values. In her nine Terms on the Court, Ginsburg has probably satisfied most of her supporters, at least part of the time, while continuing to elude simple labels. She has,

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however, made one thing clear: Her judicial performance cannot be explained by ideology alone.

Justice Ginsburg would be among the first to accept that characterization of her work on the Court. In fact, she presented herself to the Senate Judiciary Committee at her confirmation hearing as a determined neutral: "Let me try to state in a nutshell how I view the work of judging. My approach, I believe, is neither 'liberal' nor 'conservative.' Rather, it is rooted in the place of the judiciary—of judges—in our democratic society."¹ That place is, in her view, a modest one, behind the people and their elected representatives.² Judges, particularly the appellate judges who craft the law, should remain detached from any ideological alliance that might bias their decisions. Writing several years before her Supreme Court nomination, Ginsburg called such neutrality "the hallmark of the federal judiciary."³ She explained that the federal judiciary's

greatest figures—Learned Hand perhaps is the best example in this century—have not been born once or reborn later liberals or conservatives. They have been independent-thinking individuals with open, but not drafty, minds, individuals willing to listen and, throughout their days, to learn. They have been notably skeptical of party lines; above all, they have exhibited a readiness to reexamine their own premises, liberal or conservative, as thoroughly as those of others. They set a model I strive to follow.⁴

Ginsburg's judicial model also precludes bold or dramatic decisionmaking. She told the assembled senators that judges should act "without fanfare, but with due care," and she quoted approvingly the observation of another member of her pantheon, Justice Cardozo, that "[j]ustice is not to be taken by storm. She is to be wooed by slow advances."⁵

Ginsburg's vision of a modest, neutral Justice was not a recent concoction to impress her audience. As a member of the

¹ 18 HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1993: RUTH BADER GINSBURG 260 (Roy M. Mersky et al. eds., 1995) [hereinafter HEARINGS AND REPORTS].

² *Id.*

³ Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. J.L. & PUB. POL'Y 41, 45 (1986).

⁴ *Id.*

⁵ HEARINGS AND REPORTS, *supra* note 1, at 260. Asked later about her role models, Ginsburg named Learned Hand, Louis Brandeis, Oliver Wendell Holmes, Benjamin Cardozo and John Harlan. *Id.* at 420.

Court of Appeals for the District of Columbia for thirteen years before her elevation, Ginsburg wrote frequently about the work of appellate courts, and her off-the-bench essays provide some valuable clues to her judicial record on the Supreme Court. Ideology turns out to be an inadequate explanation because Ginsburg's jurisprudence is driven as well by three guiding principles that define her judicial context: collegiality, moderation and respect for tradition. As an appellate judge she sees herself not as an individual actor but as part of a collegial institution that makes distinct claims on all its members. She believes that the law should develop with moderation rather than through radical innovation. And she locates her work within a tradition of what she calls "way pavers," judges who are responsible for preparing the ground for those who follow.

This Article explores how Justice Ginsburg has applied these guiding principles in her nine Terms as a Supreme Court Justice. Part I draws on Ginsburg's extra-judicial writings to define the principles of collegiality, moderation and tradition. The Article then examines her application of these principles to her majority opinions in Part II, to her dissenting opinions in Part III and to her concurring opinions in Part IV.

I. THE GUIDING PRINCIPLES

A. *Collegiality*

Ginsburg's emphasis on the collegial nature of appellate judging helps to explain one of the vital mainsprings of her jurisprudence, her powerful sense of institutional identity. In one of her most important off-the-bench essays, *Remarks on Writing Separately*,⁶ she defines the crucial tension for appellate judges as "the competing tugs of collegiality and individuality."⁷ As an individual, the judge is drawn toward resolutions that reflect personal ideology in its most direct form. As a member of a collegial body, however, the judge is drawn toward resolutions that protect "the well-being of the court," particularly "the authority and respect its pronouncements command."⁸ The appellate judge tempted to strike out on her own, with a dissent or concurrence that

⁶ Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990) [hereinafter *Writing Separately*].

⁷ *Id.* at 141.

⁸ *Id.* at 142.

rejects or modifies the consensus view, must pause to consider the institutional values at stake. Such a judge, Ginsburg counsels, "might profitably exercise greater restraint before writing separately."⁹

Two years later, in her Madison Lecture delivered shortly before her nomination to the Supreme Court, Ginsburg elaborated on what she called "collegiality in style."¹⁰ Although her talk drew considerable attention for its criticism of the methodology of *Roe v. Wade*,¹¹ her discussion of collegiality sheds more light on her subsequent Supreme Court conduct. In this lecture, Ginsburg identified "three distinct patterns of appellate opinion-casting: individual, institutional, and in-between."¹² The individual pattern is typified by the seriatim opinions of the British Law Lords, while the institutional pattern is typified by the anonymous court judgments of the civil law tradition. The American system, evolving from John Marshall's original insistence on unanimity to his subsequent tolerance of occasional dissent, is the "middle way," a balanced resolution of competing interests.¹³ Ginsburg herself responds more strongly to the institutional than to the individual model. As a Federal Circuit Court judge, she once suggested to her colleagues that issuance of unanimous panel opinions as per curiams "would encourage brevity . . . and might speed up dispositions."¹⁴ She recalled regretfully that her proposal attracted little support.¹⁵

Although her conception of the middle way does not require complete avoidance of individual expression, it does call for significant judicial restraint in matters of both form and tone:

[O]verindulgence in separate opinion writing may undermine both the reputation of the judiciary for judgment and the respect accorded court dispositions. Rule of law virtues of consistency, predictability, clarity, and stability may be slighted when a court routinely fails to act as a collegial body. Dangers to the system are posed by two tendencies: too frequent resort to separate opinions and the

⁹ *Id.* at 134.

¹⁰ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992) [hereinafter *Judicial Voice*].

¹¹ *Id.* at 1198-1209 (discussing *Roe v. Wade*, 410 U.S. 113 (1973)).

¹² Ginsburg, *Judicial Voice*, *supra* note 10, at 1189.

¹³ *Id.*

¹⁴ *Id.* at 1192.

¹⁵ *Id.*

immoderate tone of statements diverging from the position of the court's majority.¹⁶

Citing Justice Brennan's classic defense of the role played by dissenting opinions,¹⁷ Ginsburg acknowledged their value,¹⁸ but she remains skeptical of the impulse to write separately unless the author has an independent legal argument worth making. Thus, she cited with approval Justice Brandeis's classic dictum that "it is more important that the applicable rule of law be settled than that it be settled right."¹⁹ She also praised both Brandeis and Cardozo for their willingness to withdraw dissenting opinions in common law cases to permit unanimous results.²⁰

Even when separate opinions are appropriate, Ginsburg worries about the aggressive tone that marks some dissents. As an author, she acknowledges that dissents "have a therapeutic value for the writer" and "can be spicy, more fun to write."²¹ But she counsels renunciation of such guilty pleasures in favor of separate opinions that set forth unadorned legal arguments "without condemning the judgment of one's colleagues as base, absurd, unprincipled, Orwellian."²² Appellate court judges should look to their colleagues not as adversaries but as collaborators. In their comments on circulating drafts, even in their strong dissents, colleagues are, in a theatrical metaphor, "both dress rehearsal and opening night critics."²³ Viewed from Ginsburg's perspective, even sharp divisions between members of a court may be productive sources of improvement as long as the judge remains willing to engage in "dialogue . . . not

¹⁶ *Id.* at 1191.

¹⁷ See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986).

¹⁸ Ginsburg, *Judicial Voice*, *supra* note 10, at 1194.

¹⁹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Ginsburg notes that Brandeis was speaking of statutory interpretation cases where error could be corrected by legislation. Ginsburg, *Judicial Voice*, *supra* note 10, at 1191. At her confirmation hearing, Ginsburg again referred to the Brandeis position, emphasizing the weight to be accorded reliance interests and the stability of the 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." HEARINGS AND REPORTS, *supra* note 1, at 403.

²⁰ Ginsburg, *Judicial Voice*, *supra* note 10, at 1191.

²¹ Ruth Bader Ginsburg, *Styles of Collegial Judging: One Judge's Perspective*, 39 FED. B. NEWS & J. 199, 201 (1992) [hereinafter *Styles of Collegial Judging*].

²² *Id.*

²³ Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119, 2126 (1995) [hereinafter *Communicating and Commenting*].

diatribe."²⁴ In her enthusiasm for the collaborative approach, she comes close to endorsing, with some irony, Chief Justice Hughes's reported willingness to incorporate his colleagues' proposed language, however inconsistent with his own, "and let the law reviews figure out what it meant."²⁵

B. *Moderation*

Ginsburg's endorsement of Hughes's expansive attitude can only be ironic because she has made it clear that, for her, "the way we decide cases is . . . as important as what we decide."²⁶ As lawmakers in a democracy, judges must proceed cautiously, with due respect for the parts played by the other branches of government and by the people.²⁷ This doctrine of moderation, applicable to both the occasions for judicial action and the content of opinions, is the second of the principles informing Ginsburg's jurisprudence. The caution she urges should discourage judges from taking bold steps to change the law. In Ginsburg's formula, "[m]easured motions seem to me right, in the main, for constitutional as well as common law adjudication."²⁸ Even in the area of gender discrimination, where she might be expected to celebrate bolder judicial action, Ginsburg prefers these "measured motions."²⁹ Recently, she

²⁴ Ginsburg, *Judicial Voice*, *supra* note 10, at 1186.

²⁵ Ruth Bader Ginsburg, *Informing the Public About the U.S. Supreme Court's Work*, 29 LOY. U. CHI. L.J. 275, 283 (1998) (quoting WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 302 (1987)). At her confirmation hearing, Ginsburg spoke about her collegial approach to appellate decisionmaking:

This is an area where style and substance tend to meet. It helps in building collegiality if you don't take zealous positions, if you don't write in a [sic] overwrought way, if you state your position logically and without undue passion for whatever is the position you are developing. Think of [it] this way: Suppose one colleague drafts an opinion and another is of a different view. That other says, "Here's what I think, perhaps you can incorporate my ideas in your opinion, then we can come together in a single opinion for the court; otherwise, consider this a statement I am thinking about making for myself."

That is one way of inviting or encouraging accommodation.

HEARINGS AND REPORTS, *supra* note 1, at 407.

²⁶ Ruth Bader Ginsburg, *In Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1359, 1361 (2000). Ginsburg attributes the point to Wechsler, though she distinguishes his absolutist position ("he might say always") from her own more qualified approach ("I would say ordinarily"). *Id.* In an earlier piece, she credited a similar point to Patricia Wald, at the time Chief Judge of the District of Columbia Circuit: "it is vitally important *how* [cases] are decided, not just *that* they are decided." Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 1007 (1987).

²⁷ Ginsburg, *Judicial Voice*, *supra* note 10, at 1198.

²⁸ *Id.*

²⁹ *Id.*

approvingly noted the steady, gradual pace of Supreme Court decisions on gender discrimination from the 1970s leading to her own majority opinion in the Virginia Military Institute ("VMI") case.³⁰ Indicating her endorsement of this moderate pace, she stated: "The Court wrote modestly, it put forth no grand philosophy."³¹ Its gradualist approach permitted the other branches of government to reconsider their own use of gender classifications in light of the changing law and even, in one instance, rendered a pending case moot.³² For Ginsburg, judicial caution that obviates the need for judicial decision-making is an institutional virtue.

Ginsburg has found the principle of moderation equally applicable to the work of intermediate appellate courts and of the Supreme Court. As a circuit court judge, constrained by the narrow questions of statutory and administrative law that often formed the bulk of her court's docket, she observed that the nature of the cases combined with the collegiality principle "to tug judges strongly toward the middle, toward moderation and away from startlingly creative or excessively rigid positions."³³ Writing seven years later, after six Terms on the Supreme Court, she recast the issue to reflect the rather different situation of the Court's heavily constitutional docket. In this context, the constraint was the precedential force of Supreme Court decisions: "The reality that decisions set precedent tugs us strongly toward the middle; it also tends to discourage expression of unprecedented, startlingly creative views."³⁴ The common note is the tug toward moderation, away from "creative" lawmaking, reflecting a clearly expressed distaste for the doctrinal adventures of an individualistic judge. It is no coincidence that Ginsburg has named as her Supreme Court Justice role models Brandeis, Cardozo and the second

³⁰ *United States v. Virginia (VMI)*, 518 U.S. 515 (1996).

³¹ Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 270 (1997) [hereinafter *Constitutional Adjudication*].

³² *Id.* at 270-71, 271 n.26 (referring to *Edwards v. Schlesinger*, 377 F. Supp. 1091 (D.D.C. 1974), rev'd sub nom. *Waldie v. Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974), which Congress mooted by its reversal of the policy excluding women from the United States military academies).

³³ Ginsburg, *Styles of Collegial Judging*, *supra* note 21, at 200.

³⁴ Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 570 (1999).

Justice Harlan rather than such unconstrained champions of equality and individual rights as Black, Douglas and Warren.³⁵

This preference for moderation is linked to Ginsburg's belief that the Court, lacking any enforcement capacity and largely dependent for its power on the respect it commands, must be careful not to move too far in front of the national mood. "[T]he Justices," she has noted, "generally follow, they do not lead, changes taking place elsewhere in society."³⁶ Ideally, the Court, like its Justices, acts cautiously, implementing change at a pace that validates constitutional values without alarming an unprepared nation. She has argued for the pragmatic advantages of this judicial gradualism: "But without taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for a social change."³⁷ Her criticism of *Roe* is based on the boldness of the decision, which, in her view, cut off change through the political process and provoked precisely the kind of backlash that undermines both the Court and its holdings.

C. Tradition

Ginsburg's preference for judicial moderation and gradualism is linked to the third principle informing her jurisprudence, the chain of influence that she calls "way paving." She has used the expression in talks about women in the federal judiciary, Jewish Supreme Court Justices and Jewish women, in each instance defining herself as the beneficiary of a long-standing tradition.³⁸ Just as Florence

³⁵ At her confirmation hearing, Ginsburg described the second Justice Harlan as "one of my heroes as a great Justice." HEARINGS AND REPORTS, *supra* note 1, at 172. For a comparison of Harlan and Ginsburg, see Toni J. Ellington, *Ruth Bader Ginsburg and John Marshall Harlan: A Justice and Her Hero*, 20 U. HAW. L. REV. 797 (1998), especially Ellington's discussion of the use by both Justices of separate opinions as "pathmarkers" for gradual change in the law. *Id.* at 825-31. In contrast, Ginsburg has pointed to Justice Black as an example of a highly individualistic judge who "carried a copy of the Constitution in his pocket and looked to our fundamental instrument of government for answers to constitutional questions, without large concern for the different opinions of his colleagues." Ginsburg, *Styles of Collegial Judging*, *supra* note 21, at 199.

³⁶ Ginsburg, *Judicial Voice*, *supra* note 10, at 1208.

³⁷ *Id.* Jeffrey Rosen has described Ginsburg the Justice as "a cautious codifier of popular opinion rather than a crusader for social reform." Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, sec. 6, at 65.

³⁸ See Ruth Bader Ginsburg, *Reflections on Way Paving Jewish Justices and Jewish Women*, 14 Touro L. REV. 283 (1998); Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change*

Allen, the first woman named to a federal appeals court, marked the path later followed by the substantial number of women appointed by President Carter, including Ginsburg herself, so the line of Jewish Justices, starting with Brandeis, runs directly to Ginsburg and her colleague, Justice Breyer. The way pavers may begin with difficult and unwelcome steps—Judge Allen's 1934 appointment apparently sent a Sixth Circuit colleague to his sickbed for two days³⁹—but they make possible the achievements of those who follow.

For Ginsburg, the line of way pavers is analogous to the line of judicial precedent that also draws strength from what has come before. These two lines converge for her in Justice O'Connor, her forerunner on the Court and the author of *Mississippi University for Women v. Hogan*,⁴⁰ the decision holding unconstitutional the state's women-only nursing school. Just as Ginsburg followed O'Connor to the Court twelve years later, Ginsburg's opinion in *United States v. Virginia* ("VMI"), holding unconstitutional VMI's men-only admissions policy, followed *Hogan* by fourteen years.⁴¹ These lines of precedent, both personal and jurisprudential, impose an obligation on grateful recipients "to do our best for the sake of the law and for the sake of those for whom we pave the way."⁴² Ginsburg sees herself not only as the inheritor of a tradition, but as the shaper of one. Speaking to students at a law review dinner, she advised them to "leave tracks," to become way pavers for the lawyers and judges to follow.⁴³

The three principles shaping Ginsburg's approach to her work on the Court are linked in several ways. Her commitment to collegiality and her strong sense of tradition have in common a rejection of the Justice as unconstrained individualist. Ginsburg locates herself in a tradition, reaching from Brandeis to Cardozo to Harlan, in which the judge is not liberated by appointment to the Supreme Court but instead willingly subjects herself to the constraints of the institution and its history. Ginsburg's preference for advancing doctrine by

President Carter Wrought, 64 *FORDHAM L. REV.* 281 (1995) [hereinafter *Women in the Federal Judiciary*].

³⁹ Ginsburg & Brill, *Women in the Federal Judiciary*, *supra* note 38, at 283.

⁴⁰ 458 U.S. 718 (1982).

⁴¹ Ginsburg, *Constitutional Adjudication*, *supra* note 31, at 270.

⁴² Ginsburg & Brill, *Women in the Federal Judiciary*, *supra* note 38, at 289.

⁴³ Ruth Bader Ginsburg, *Remarks*, *New York Law School Law Review Dinner*, 44 *N.Y.L. SCH. L. REV.* 7, 10 (2000).

"measured motions" rather than creative leaps also reflects the principle of collegiality. The Court has its colleagues as well, the other two branches of government, the state courts and the national community. Even when it acts to vindicate central constitutional values like equality, the Court must remain sensitive to the responses of those constituencies. Completing the circle, the pull of a continuing tradition acts to restrain the Court from jumping the track and moving too vigorously to transform doctrine. The Court and its Justices are constrained not just by their present colleagues but also by the way pavers who came before and by those who will follow.

Although Ginsburg completed most of her off-the-bench writing while she sat on a circuit court subject to the supervision of the Supreme Court, the pieces written after her appointment reveal no sudden change in her perspective. If, as she repeatedly tells us, appellate judges, including Supreme Court Justices, should accept the constraints imposed by collegiality, moderation and tradition, we may fairly ask whether she has applied her theory to her practice. This Article now turns to Justice Ginsburg's Supreme Court opinions to answer that question.

II. WRITING FOR THE COURT

In her nine Terms, Ginsburg has written eighty opinions for the Court.⁴⁴ The most remarkable aspect of this body of work is how unremarkable most of these opinions are. Of the eighty, she wrote twenty-eight—over one third—for a unanimous Court, and those opinions contain little controversial matter. The dissenting votes in the remaining opinions tend, with substantial consistency, to be those of Chief Justice Rehnquist and Justices Scalia and Thomas, with a smaller number of appearances by Justices Kennedy and O'Connor, and a handful of cases containing dissents by such usual Ginsburg allies as Justices Stevens, Souter and Breyer.

⁴⁴ This figure is based on the *Harvard Law Review's* annual statistical summary of the Supreme Court's Term. *The Supreme Court 2001 Term*, 116 HARV. L. REV. 13, 453 (2002); *The Supreme Court 2000 Term*, 115 HARV. L. REV. 1, 539 (2001); *The Supreme Court 1999 Term*, 114 HARV. L. REV. 23, 390 (2000); *The Supreme Court 1998 Term*, 113 HARV. L. REV. 26, 400 (1999); *The Supreme Court 1997 Term*, 112 HARV. L. REV. 1, 366 (1998); *The Supreme Court 1996 Term*, 111 HARV. L. REV. 51, 431 (1997); *The Supreme Court 1995 Term*, 110 HARV. L. REV. 4, 367 (1996); *The Supreme Court 1994 Term*, 109 HARV. L. REV. 10, 340 (1995); *The Supreme Court 1993 Term*, 108 HARV. L. REV. 26, 372 (1994).

Many of the cases (like much of the Court's docket) raised statutory interpretation issues, which Ginsburg resolved in a straightforward manner, without elaborate digressions or discussions of policy implications. Most striking is the number of cases dealing with civil procedure issues. Ginsburg taught civil procedure and published in the field during her academic career, and her opinions in this area are clear, concise and confident.⁴⁵ So far as members of the Court may be said to have staked out areas of particular expertise or interest, Ginsburg seems to have established herself as the resident proceduralist.

Most of Ginsburg's majority opinions follow the strictures laid down in her off-the-bench writing. They seek, and often find, consensus; they avoid broad resolutions or expansive discussion; where there is disagreement, they refrain from strong criticisms of the dissident Justices. Her opinions demonstrate concern for both form and substance. Even the style and diction of these opinions tend to follow the path of moderation, usually avoiding the colorful word or distinctive phrase in favor of a solid, impersonal style. Writing for the Court, Ginsburg is almost without exception a model of the collegial Justice.

Yet, even her earliest opinions for the Court signal that Ginsburg's middle way does not require the complete extinction of judicial personality. In her second Term, Ginsburg made a point of referring to a hypothetical generic customer in a banking regulation case as a female.⁴⁶ The gesture was small but clearly intended to be noticed, and it heralded a more assertive stance. In her final Court opinion of the 1994 Term, Ginsburg seemed for the first time eager to find her own voice.

⁴⁵ Ginsburg's first post-clerkship position was as a research associate for Columbia University School of Law's Project on International Procedure from 1961-62; the following year she served as the associate director. As a faculty member at the law schools of Rutgers University (Newark) from 1963-72 and Columbia from 1972-80, she taught civil procedure and conflict of laws regularly and comparative law and procedure occasionally. Ginsburg's publication list submitted to the Senate at the time of her confirmation includes a book on Swedish civil procedure, a project for which she learned Swedish and spent time in Sweden, together with ten law review articles and book chapters on procedural topics. Beginning in the early 1970s, the focus of her scholarship shifted to issues of gender discrimination; in 1972, she became director of the Women's Rights Project of the American Civil Liberties Union. *HEARINGS AND REPORTS*, *supra* note 1, at 264-65, 272-74. For a discussion of Ginsburg's approach to procedural issues, see Elijah Yip & Eric K. Yamamoto, *Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure*, 20 U. HAW. L. REV. 647 (1998).

⁴⁶ *NationsBank of North Carolina, N.A. v. Variable Life Ins. Co.*, 513 U.S. 251, 259 (1995). The opinion was unanimous.

The issue in *Gutierrez de Martinez v. Lamagno*⁴⁷ was whether the Attorney General's certification that a federal agent acted within the scope of his employment was subject to judicial review. Since the agent at issue had acted in a foreign nation, the Attorney General invoked sovereign immunity under an exception to the Federal Torts Claims Act, thus leaving the plaintiffs without remedy. Unlike the uninflected application of basic statutory interpretation principles in her earlier opinions, Ginsburg's approach in *Lamagno* was considerably more complicated. At the outset, Ginsburg was openly critical of the relevant provision, which she described as "a statutory fog."⁴⁸ More broadly, she found "perplexing"⁴⁹ the consequences of denying federal courts the authority to review an executive branch ruling determining access to the courts: "[T]he proposed reading would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct."⁵⁰ Declaring the notion that Congress would assign the federal courts "only rubber-stamp work" an affront, she described the scheme approved below as "surreal" in its exclusion of any "fair proceeding."⁵¹

The larger context in which she placed the federal law contained a principle central to her jurisprudence: the protective role of the federal courts in providing judicial review of executive branch determinations to afford litigants fair and disinterested resolutions of their legal claims. Ginsburg underscored the resonance of this value with the sources she cited: not only James Madison in *The Federalist* but also Blackstone, Pascal and Publius Syrus.⁵² She also signaled her strong engagement with the case through her mild but distinct irritation with Justice Souter's dissent, whose "abstract and unrelenting logic," she noted, would always produce the same result for this class of cases: "[P]laintiffs always lose."⁵³ That

⁴⁷ 515 U.S. 417 (1995).

⁴⁸ *Id.* at 425.

⁴⁹ *Id.* at 426.

⁵⁰ *Id.*

⁵¹ *Id.* at 429.

⁵² *Lamagno*, 515 U.S. at 428-29. The latter two citations also display a breadth of learning not usually displayed in Court opinions. Westlaw finds no other citations to Pascal or Publius Syrus in Supreme Court opinions.

⁵³ *Id.* at 436 n.11. Justice Souter's dissent was joined by Chief Justice Rehnquist and by Justices Scalia and Thomas. *Id.* at 438.

irritation was consigned to a footnote, but it is notable as the first occasion on which Ginsburg, writing for the Court, criticized her dissenters.

In the following Term, Ginsburg was assigned her best known opinion, *VMI*,⁵⁴ a case challenging single-sex education and thus linked directly to her experience in the 1970s litigating gender discrimination cases with the Women's Rights Project. As an advocate, Ginsburg argued six gender cases before the Supreme Court, losing only one.⁵⁵ She also wrote briefs for the Court in several other cases, including a seminal amicus submission she later called "the grandmother brief"⁵⁶ in *Reed v. Reed*, the foundational case that first identified gender discrimination as an equal protection violation.⁵⁷ In shaping her litigation campaign, Ginsburg combined a bold legal argument—that gender discrimination should be judged by the same strict scrutiny standard applied to racial discrimination—with a more moderate strategy of steady progress.⁵⁸ Her strategy recognized that "courts needed to be educated and that requires patience. It may even mean holding back a case until the way has been paved for it."⁵⁹ She selected her cases, each carefully building on its predecessors, with an eye to their likely success. This analysis included her assessment of the Justices' probable responses. As a result, a number of her plaintiffs were males disadvantaged by statutes based on the same gender stereotypes that more commonly restricted females.⁶⁰ This blending of a radical goal with a cautious strategy seems typical of Ginsburg's preference for moderation, even in the pursuit of dramatic legal change.

⁵⁴ 518 U.S. 515 (1996).

⁵⁵ *Duren v. Missouri*, 439 U.S. 357 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Edwards v. Healy*, 421 U.S. 772 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973). The Court decided against Ginsburg in *Kahn*.

⁵⁶ Ginsburg has said that "[t]he basic argument in all these briefs" in fact "came from the *Reed* brief—the 'grandmother' brief." Ruth B. Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976*, 8 COLUM. HUM. RTS. L. REV. 373, 392 (1976) (quoting an interview with Ruth Bader Ginsburg (June 25, 1975)).

⁵⁷ 404 U.S. 71 (1971) (holding an Idaho statute preferring men over women as estate administrators a violation of the Equal Protection Clause).

⁵⁸ For a thorough account of Ginsburg's litigation of gender discrimination cases, see Deborah L. Markowitz, *In Pursuit of Change: One Woman's Work to Change the Law*, 11 WOMEN'S RTS. L. REP. 73 (1989).

⁵⁹ Jeanette Friedman, *Ruth Bader Ginsburg: A Rare Interview*, LIFESTYLES, March 1994, at 6.

⁶⁰ Markowitz, *supra* note 58, at 97.

Coming as it did a quarter century after *Reed*, the opinion in *VMI* offered Ginsburg an opportunity to celebrate the fruits of her past successes and to enlarge the boundaries of women's rights. Ginsburg welcomed that opportunity in her characteristically modest manner, writing an opinion that seems more interested in consolidating gains than in pushing limits. She opened the analytic section of the opinion with one of her favorite adjectives, citing "this Court's pathmarking decisions" as the source of the standard to be applied, the "exceedingly persuasive justification" needed to maintain VMI as a single-sex institution closed to women.⁶¹ She traced the line of precedent back to *Reed*, which she treated as the origin of the now established principle that government violates equal protection when its law "denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."⁶² This principle explained the central flaw in VMI's admissions policy, its focus on what Virginia viewed as the inability of "*most women*"⁶³ to tolerate the school's rigorous adversative method rather than on the acknowledged ability of some women, however few, to thrive under the system.

Just as Ginsburg began her analysis with *Reed* as the jurisprudential source for her opinion, she ended it with another pathmarking decision, *Sweatt v. Painter*,⁶⁴ where the Court ruled that a new law school created by the state of Texas for black students was not substantially equal to the University of Texas's law school. By invoking *Sweatt* as the precedent controlling the adequacy of Virginia's proffered remedy of a separate program for women, Ginsburg placed her opinion within two distinct but related traditions, the women's rights line of cases, which she helped to shape, and the earlier racial discrimination line of cases.

Although the *VMI* opinion makes its point effectively, it does so without any of the rhetorical flourishes that might have proved irresistible to another Justice with Ginsburg's litigation history. Only the mildest of metaphors appear. Ginsburg

⁶¹ *United States v. Virginia (VMI)*, 518 U.S. 515, 531 (1996). Although the language "exceedingly persuasive justification" did not appear in *Reed*, Ginsburg clearly viewed the case as the first step in the Court's development of that standard.

⁶² *Id.* at 532.

⁶³ *Id.* at 550.

⁶⁴ 339 U.S. 629 (1950).

chastised Virginia for a plan that served her “sons” but made “no provision whatever for her daughters,”⁶⁵ a family image that was echoed toward the end of the opinion to emphasize the unfair exclusion of women from VMI’s benefits.⁶⁶ When Ginsburg described the basis for nineteenth century experts’ opposition to education for women—including the harm to their health and reproductive capacity—she did so in a neutral footnote, resisting the temptation to ridicule the discredited theories.⁶⁷ Of the eight sitting Justices, only two failed to join Ginsburg’s opinion; Chief Justice Rehnquist wrote separately to concur in the judgment, and Justice Scalia dissented. Ginsburg referred only briefly to the sole dissenter, once in a footnote to suggest that, on one point, “the dissent sees fire where there is no flame,”⁶⁸ and again in a good-natured observation that “even our dissenting colleague might agree” that most men, like most women, would not choose VMI’s adversative educational climate.⁶⁹ Even the dissenter was briefly brought within the fold, willingly or not, to join the consensus that, whatever its virtues, the VMI method is not for everyone.

Most striking about Ginsburg’s *VMI* opinion is the total absence of any indication that its author was a major player in the development of gender discrimination law. Although it is not common for Justices to interject bits of personal history into their opinions, there are what Ginsburg would call way pavers for the practice, generally authors of dissents or concurrences who reveal some personal link to the legal substance of a case. In his celebrated *Youngstown Sheet & Tube* concurrence, Robert Jackson made clear his role as advisor to President Roosevelt and, directly related to *Youngstown*, his endorsement as Attorney General of the government’s right to seize an aircraft plant.⁷⁰ Similarly, Justice Black referred more broadly to his expertise in statutory interpretation accumulated during his years as a

⁶⁵ *VMI*, 518 U.S. at 540.

⁶⁶ *Id.* at 557 (noting that “Virginia has closed this facility to its daughters”).

⁶⁷ *Id.* at 536 n.9. According to one of the sources Ginsburg cites, “the physiological effects of hard study and academic competition with boys would interfere with the development of girls’ reproductive organs.” *Id.*

⁶⁸ *Id.* at 535 n.8.

⁶⁹ *Id.* at 542.

⁷⁰ *Youngstown Co. v. Sawyer*, 343 U.S. 579, 647, 649 n.17 (1952) (Jackson, J., concurring).

senator,⁷¹ and Justice Douglas commented occasionally on his personal knowledge or experience in connection with the subject matter of a case.⁷² In a 1998 Court opinion, Ginsburg did cite one of her own academic publications, a *Harvard Law Review* article on the full faith and credit doctrine, but the cite appeared discreetly in a footnote.⁷³ Since the reference contained only the author's not uncommon last name, many readers (among the subset of those who peruse footnotes) might remain unaware that she was the author of both opinion and article.

The *VMI* opinion tested Ginsburg's professional modesty more severely because her prominent role in establishing the line of controlling precedents is widely known and respected. Yet in handling this remarkable judicial moment, she was guided by the principle of collegiality, which encourages the author of a collective opinion—here one commanding the votes of six out of eight sitting Justices—to restrain her individuality and speak instead in a detached and neutral voice. No uninformed reader of *VMI* would have any reason to suspect the author's contribution to the legal principles she articulated or the particular satisfaction she must have felt in writing the opinion.

The choice of an impersonal mode of expression is related to Ginsburg's clearly demonstrated preference for a judicial style that avoids dramatic outbursts or emotional rhetoric of any sort. That preference appears most notably in cases concerning topics that in other hands might generate warmer expression. In *M.L.B. v. S.L.J.*,⁷⁴ for example, the issue was whether the biological mother of two children could be precluded from appealing the termination of her parental rights because she was unable to pay the cost of preparing a transcript. A majority of six Justices held that the Mississippi statute conditioning the mother's right of appeal on her ability to pay violated the Fourteenth Amendment's Equal Protection and Due Process Clauses.⁷⁵ One might excuse a Justice faced

⁷¹ *Duncan v. Louisiana*, 391 U.S. 145, 164-65 (1968) (Black, J., concurring).

⁷² See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 335 (1974) (Douglas, J., dissenting) (noting that, "coming as I do from Indian country in Washington," he is familiar with the philosophies of young Indians).

⁷³ *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 236 n.9 (1998). The article cited is Ruth Bader Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969).

⁷⁴ 519 U.S. 102 (1996).

⁷⁵ *Id.* at 107. Justice Kennedy concurred in the judgment, and three members

with the emotional issue of parental rights and a divided Court for employing heightened rhetoric to describe the significant deprivation imposed on the petitioner. Instead, Ginsburg acknowledged the importance of the issue while simultaneously placing it in a distinctly legal context: "We approach M. L. B.'s petition mindful of the gravity of the sanction imposed on her and in light of two prior decisions most immediately in point."⁷⁶ Her opinion never discussed the significance of the bond between parent and child, the sanctity of the family or the devastating nature of the blow to the petitioner. In finding for the petitioner, she never employed any of the eminently quotable language like that used by other Justices in many of the Court's earlier substantive due process cases.

Instead, Ginsburg made clear in calm and understated language the values involved in the case and its serious implications for the petitioner: "She is endeavoring to defend against the State's destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication."⁷⁷ The severity of the consequences, Ginsburg then observed, was "the very reason we have paired her case" with a more protective precedent rather than with two cases more tolerant of state interests.⁷⁸ The opinion gave the petitioner a victory on the merits, but it offered little in the way of rhetorical sympathy.

The same calm and reasoned tone marks two other opinions treating potentially emotional subjects. In *Olmstead v. Zimring*,⁷⁹ Ginsburg wrote for a divided Court to hold that the state's refusal to move two mentally disabled women from an institutional facility to a community-based program constituted discrimination under the Americans with Disabilities Act.⁸⁰ In defining the respondents' "unjustified institutional isolation" as

of the Court—Chief Justice Rehnquist and Justices Scalia and Thomas—dissented.

⁷⁶ *Id.* at 117.

⁷⁷ *Id.* at 125.

⁷⁸ *Id.* Ginsburg found that the case was controlled by *Mayer v. Chicago*, 404 U.S. 189 (1971), where the Court recognized an indigent criminal defendant's right to a transcript for two nonfelony offenses, rather than by *Ortwein v. Schwab*, 410 U.S. 656 (1973) and *United States v. Kras*, 409 U.S. 434 (1973), where the Court found no fundamental interest and declined to waive court fees for the review of a reduction in welfare benefits and for a bankruptcy filing.

⁷⁹ 527 U.S. 581 (1999).

⁸⁰ *Id.* at 597. The Court also recognized that the right of the respondents to a community-based placement was subject to the trial court's assessment of the state's resources and its obligation to distribute those resources equitably to others with competing claims. *Id.*

“a form of discrimination,” Ginsburg found that such placement “perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life” and “diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”⁸¹

The rejection of “unwarranted assumptions” about the capacities of individuals has long been central to Ginsburg’s thinking about women’s rights. She has written that “[g]eneralizations about the way women or men are—my life experience bears out—cannot guide me reliably in making decisions about particular individuals,”⁸² a position that found expression in her appellate advocacy and eventually in *VMI*.⁸³ In light of such deeply held views, it is not difficult to imagine an *Olmstead* opinion framed more broadly to challenge government willingness to classify people based on easy but unrefined categories. It is characteristic of Ginsburg, however, that in writing for the Court she preferred to address the legal issue before her without enlarging the scope of the opinion to accommodate a wider perspective. *Olmstead* also reflects Ginsburg’s insistence on maintaining a detached and unemotional tone.

That detached tone was also notable in a capital punishment case, *Shafer v. South Carolina*,⁸⁴ where the defendant was sentenced to death after the trial court rejected his requested jury instruction that, if sentenced to life imprisonment, he would be ineligible for parole. Ginsburg presented the issue as “whether the South Carolina Supreme Court misread our precedent” in refusing to apply an earlier decision to its sentencing scheme.⁸⁵ Again, there was no mention of the irreversible consequences of a capital sentence or of the particular care that courts must exercise when supervising such momentous determinations. The defendant prevailed and the South Carolina Supreme Court was reversed,

⁸¹ *Id.* at 600-01.

⁸² Ruth Bader Ginsburg, *A Grand Ideal for the Future*, OREGON STATE BAR BULL., Aug.-Sept. 1993, at 19, 21. Ginsburg used the same passage in a later talk. See Ruth Bader Ginsburg, *Remarks on Women’s Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13, 20 (1997).

⁸³ 518 U.S. 515 (1996).

⁸⁴ 532 U.S. 36 (2001).

⁸⁵ *Id.* at 40.

but without any lecture or scolding. The opinion was carefully constructed, clearly presented and completely unemotional; it is the quintessential Ginsburg opinion.

Ginsburg's preference for moderation extends beyond tone to the scope of her opinions. She consistently declines to go beyond the narrow legal contours of a case, looking to precedent as her primary tool.⁸⁶ As she announced early in one opinion, "[p]recedent guides our review,"⁸⁷ and she is reluctant to supplement precedent with innovative doctrine or policy-based arguments. Such statements by other appellate judges may signal little more than lip service to the force of precedent, but from Ginsburg they provide an essentially accurate account of her decisionmaking process. A typical Ginsburg opinion identifies the controlling precedent, describes in some detail its holding and applies it to the case before her with precision. Ginsburg is not, however, so rigidly committed to precedent that she strains to harmonize divergent cases. Recently, faced with two conflicting decisions, she overturned one and approvingly quoted Justice Kennedy's observation that "[o]ur precedents are not sacrosanct."⁸⁸ Even precedent is subject to the moderating effect of reason.

In reviewing cases that precedent does not directly control, she is skeptical of both highly abstract arguments and highly comprehensive courses of action; she keeps her eye on the practical consequences of the Court's decisions and expects litigants to do the same. When an Indian tribe insisted on reading a contractual waiver clause very narrowly to preserve its immunity, Ginsburg reminded the tribe that "the contract's dispute resolution regime . . . has a real world objective; it is not designed for regulation of a game lacking practical consequences."⁸⁹ And when the state of Georgia mandated drug tests for all candidates for state office, she noted the lack of "any indication of a concrete danger" to support the sweeping

⁸⁶ For an examination of Ginsburg's views on *stare decisis* and her practice during her first Term on the Court, see Mei-Fei Kuo & Kai Wang, *When is an Innovation in Order?: Justice Ruth [Bader] Ginsburg and Stare Decisis*, 20 U. HAW. L. REV. 835 (1998). See also Joyce Ann Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1 (1994).

⁸⁷ *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186 (1999).

⁸⁸ *Ring v. Arizona*, 122 S.Ct. 2428, 2443 (2002) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

⁸⁹ *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 422 (2001).

policy.⁹⁰ Georgia's testing scheme, she concluded, "diminishes personal privacy for a symbol's sake."⁹¹

Ginsburg applies a similarly pragmatic standard to the lower courts, which play a major role in her decisionmaking model. For example, in *Arizonans for Official English v. Arizona*, she was troubled when both the district court and the court of appeals declined to certify an issue of state constitutional law to the Arizona Supreme Court for resolution. Offering what is for Ginsburg a serious rebuke, she observed that "[a] more cautious approach was in order" to conserve judicial resources and promote "judicial federalism."⁹² Caution, like moderation, is a value central to her jurisprudence. In this case, that value overlaps with the value of collegiality: Just as appellate judges should respect one another and work in harmonious collaboration, so judges of one court should respect the authority of judges of another court, whether within the federal or a state judicial system. Ginsburg's own opinions express that respect through their detailed exposition of the positions held by the lower courts, especially those of the federal courts of appeals. It is a mark of respect to those judges, even when they are about to be reversed, that their opinions are consistently treated seriously and never dismissed as incompetent or untenable.

Ginsburg's commitment to mutual respect among members of the bench does not, however, preclude her from criticizing her colleagues' conclusions. Although her earliest Supreme Court opinions demonstrated little interest in calling other Justices to task, her approach gradually relaxed to permit some mildly acerbic rejoinders. In a 1998 opinion dealing with the Full Faith and Credit Clause implications of a lower court's preclusive order, Ginsburg, the former civil procedure scholar, clearly felt herself on familiar ground.⁹³ Although the decision was unanimous, she nevertheless chided Justice Kennedy, whose opinion, concurring in the judgment,

⁹⁰ *Chandler v. Miller*, 520 U.S. 305, 319 (1997). In a recent opinion, Ginsburg again rejected a litigant's position "because we doubt that the supporting scenario is likely to occur outside the realm of theory." *TRW Inc. v. Andrews*, 539 U.S. 19, 26 (2001). See also *Lee v. Kemna*, 534 U.S. 362, 366 (2002) (quoting *Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (noting that petitioner's "right to defend should not depend on a formal 'ritual . . . [that] would further no perceivable state interest'")).

⁹¹ *Chandler*, 520 U.S. at 322.

⁹² *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997).

⁹³ This is the case mentioned *supra* note 73, in which she cites her own law review article.

garnered two votes, for “emphasiz[ing] the obvious” in rejecting preclusion against nonparties.⁹⁴

Ginsburg took a stronger tone against Chief Justice Rehnquist when he dissented from her opinion in *Buckley v. American Constitutional Law Foundation*,⁹⁵ where the Court held an Ohio statute imposing disclosure requirements on initiative-petition circulators to be in violation of the First Amendment. She dismissed as “imaginary” the concern expressed in Rehnquist’s solitary dissent that the Court’s holding would make convicted drug dealers, children and noncitizens eligible to circulate initiative petitions and quoted a former colleague on the appeals court, Robert Bork, in support of her skepticism: “This familiar parade of dreadfuls calls to mind wise counsel: ‘Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.’”⁹⁶ The quoted passage is particularly resonant, coming as it does from the celebrated conservative and, more particularly, from his book attacking the confirmation process that denied him a seat on the Supreme Court. Ginsburg called on one conservative voice to reproach another for excess; she also demonstrated that she was comfortable drawing on the work of a highly ideological former colleague when it made her point with wit and common sense. Significantly, in this passage Ginsburg criticized Rehnquist’s method of argument. In criticizing other dissenters, she has usually confined herself to characterizing their positions as “puzzling”⁹⁷ or “to say the least, extravagant.”⁹⁸ Her good humored rebuke of Rehnquist’s method, bolstered by an authority he was likely to respect, reflected her own belief that how a judge approaches a case may be more important than the opinion’s substance.

As a writer, Ginsburg values clarity above elegance. She has explained that she greatly admires the second Justice

⁹⁴ *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 237 n.11 (1998). Kennedy’s opinion was joined by Justices O’Connor and Thomas. *Id.* at 243.

⁹⁵ 525 U.S. 182 (1999).

⁹⁶ *Id.* at 194 n.16 (quoting ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 169 (1990)).

⁹⁷ *Arizona v. California*, 530 U.S. 392, 409 n.4 (2000). The opinion Ginsburg is responding to was written by Chief Justice Rehnquist, who concurred in part and dissented in part. *Id.* at 422.

⁹⁸ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 188 n.4 (2000). The dissenter was Justice Scalia. *Id.* at 198. For a sharper characterization of a dissent, delivered in the form of a metaphor, see *Lee v. Kemna*, 534 U.S. 362, 385 (2002) (asserting that “[t]he dissent, in this and much else, tilts at a windmill of its own invention”).

Harlan's manner of opinion writing because "he always told us his reasoning—he never hid it; it was always spelled out with great clarity."⁹⁹ Her insistence on clarity in her own writing means that she "will often read a sentence aloud and consider, 'Can I say this in fewer words—can I write it so that the meaning will come across with greater clarity?'"¹⁰⁰

Ginsburg's preference for clarity distinguishes her judicial style. Her opinions for the Court are so consistently moderate in tone that they rarely offer the reader any language distinctive enough to identify her at once as the author. She does, however, favor a few locutions that appear with sufficient regularity to become familiar markers. One such term is to "home in on," used figuratively as to seek out or focus on. Thus, a litigant did not "home in on" a particular contention in its petition for certiorari,¹⁰¹ and the Court itself prepared to "home in on" the central question.¹⁰² Ginsburg also repeatedly uses the adjective "pathmarking" as a shorthand way of identifying important precedents and insisting on their critical role in guiding Court decisions. In resolving a tax challenge by an Indian tribe, she "placed in clear view a pathmarking decision,"¹⁰³ and in the VMI case she cited "this Court's pathmarking decisions" in earlier gender discrimination cases.¹⁰⁴ Ginsburg has revived another distinctive expression, "mine run," used in place of the more usual "run of the mill" for something ordinary or unexceptional, as in "mine run civil actions"¹⁰⁵ or "the mine run of procedural rules;"¹⁰⁶ she also occasionally uses a variant form, referring in one opinion to "run-of-the-mine, ordinarily nondispositive, evidentiary rulings."¹⁰⁷ Ginsburg occasionally will use a term that has a

⁹⁹ HEARINGS AND REPORTS, *supra* note 1, at 378.

¹⁰⁰ Quoted in Friedman, *supra* note 59, at 12.

¹⁰¹ *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400 n.7 (1996).

¹⁰² *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 70 (1996). *See also* *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 368 (1999) (stating that regulation "homes in on the insurance industry"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997) (noting that the court "homed in on settlement terms"); *United States v. O'Hagan*, 521 U.S. 642, 670 (1997) (finding that the Eighth Circuit "homed in on the essence of §14(e)'s rulemaking authorization").

¹⁰³ *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 714 (1998).

¹⁰⁴ *United States v. Virginia (VMI)*, 518 U.S. 515, 531 (1996). *See also* *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) ("the pathmarking case concerning tribal civil authority over nonmembers"); *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 n.14 (1996) ("[t]he pathmarking voting and ballot access decisions").

¹⁰⁵ *M.L.B.*, 519 U.S. at 127. *See also id.* at 123 ("the mine run of cases").

¹⁰⁶ *Lee v. Kemna*, 534 U.S. 362, 387 (2002).

¹⁰⁷ *Weisgram v. Marley Co.*, 528 U.S. 440, 452 n.9 (2000). Justices other than

slightly antiquated flavor, as when statutory language "bespeaks a deliberate legislative choice."¹⁰⁸ At one moment she may select a surprisingly formal word, like "crystalline"¹⁰⁹ or "incantation,"¹¹⁰ while at another she uses an informal expression, like "hook, line, and sinker."¹¹¹ This variety in diction suggests a sensitivity to language not surprising in someone who studied with Vladimir Nabokov in college and remembered that he loved "the sound of words."¹¹²

Ginsburg's occasional use of literary allusions illustrates her interest in style. Her majority opinions contain three unidentified allusions to Shakespeare. She twice borrowed Polonius's simile for inevitability that "it must follow, as the night the day,"¹¹³ both times using it to reject the logic of a proffered theory. She cited it once to counter the argument that evidence of occasional fraud means that "paid petition circulators are likelier to commit fraud than volunteers,"¹¹⁴ and again to reject an insistence on reading two instances of the same statutory language in precisely the same way.¹¹⁵ In

Ginsburg seldom have used the term "mine run." See *Sumner v. Mata*, 446 U.S. 1302 (1980) (Rehnquist, J., Circuit Justice) (referring to "the numerous mine-run decisions on the reliability of identification"); *Monroe v. Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting) (noting that issue is not "merely a mine-run statutory question"). The term means "a product of common or average grade." WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1438 (3d ed. 1993). In its longer form, "run-of-the-mine," the term has been used with some frequency by Chief Justice Rehnquist and less often by Justice Scalia. See, e.g., *Rubin v. United States*, 524 U.S. 1301, 1302 (1998) (Rehnquist, C.J.) ("This case is obviously not a run-of-the-mine dispute."); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 786 (1994) (Scalia, J., concurring and dissenting) ("run-of-the-mine labor picketing"). In the 1940s and 1950s, the term was used by a number of Justices. See, e.g., *Holland v. United States*, 348 U.S. 121, 126 (1954) (Clark, J.) ("run-of-the-mine cases"); *Dalehite v. United States*, 346 U.S. 15, 28 n.19 (1953) (Reed, J.) ("run-of-the-mine accidents"); *Baltimore & Ohio R.R. Co. v. United States*, 345 U.S. 146, 148 (1958) (Black, J.) ("run-of-mine regulations"); *United States v. Scophony Corp. of Am.*, 333 U.S. 795, 814 n.26 (1948) (Rutledge, J.) ("run-of-the-mine casual or intermittent sales of commodities").

¹⁰⁸ *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192, 205 (1997).

¹⁰⁹ *Kawaauhau v. Geiger*, 523 U.S. 57, 63 (1998) (noting that "[t]he exposition in the *Tinker* opinion is less than crystalline").

¹¹⁰ *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (noting that a legal "principle does not demand the incantation of particular words").

¹¹¹ *Henderson v. United States*, 517 U.S. 654, 666 (1996) (noting that "[t]he dissent adopts this argument hook, line, and sinker").

¹¹² Friedman, *supra* note 59, at 12.

¹¹³ WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 1, sc. 3, ll. 83-85. In the passage, Polonius advises his son, Laertes: "This above all: to thine ownself be true, And it must follow, as the night the day, Thou canst not then be false to any man." *Id.*

¹¹⁴ *Buckley v. Am. Constitutional L. Found.*, 525 U.S. 182, 204 n.23 (1999).

¹¹⁵ *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 212 (2001)

another opinion, she referred to a litigant's "all's well that ends well' approach."¹¹⁶ She did not attribute these Shakespearean references to the author, since all are expressions that have passed into common usage. The single literary source that Ginsburg did identify is from the trial of the Knave of Hearts in Lewis Carroll's *Alice in Wonderland*.¹¹⁷ After criticizing the treatment of a litigant, she referred to procedural systems "real and imaginary, less concerned than ours with the right to due process."¹¹⁸ Her example of such a system, quoted at length in a footnote, is the Knave's celebrated trial, where the White Rabbit, serving as herald, interrupts the King who is about to send the case to the jury before the introduction of any evidence.¹¹⁹ Ginsburg is the first Justice to offer Carroll's trial as the perfect antithesis of due process.¹²⁰

Ginsburg's occasional use of metaphor to sharpen a point further illustrates the literary strain in her opinions.

("We do not agree that the latter follows from the former like the night, the day.").

¹¹⁶ *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996). See WILLIAM SHAKESPEARE, *ALL'S WELL THAT ENDS WELL*. Ginsburg's interest in Shakespeare appears in other contexts as well. For a quotation from *Othello*, see Ginsburg, *Communicating and Commenting*, *supra* note 23, at 2126. Ginsburg also made a cameo appearance at the Shakespeare Theatre in Washington, D.C. See Elaine Sciolino, *Lear Gets a Break From Supreme Court Justices Who Think the Play's the Thing*, N.Y. TIMES, June 16, 2001, at B19.

¹¹⁷ LEWIS CARROLL, *ALICE IN WONDERLAND* (Donald J. Gray ed., 1971).

¹¹⁸ *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 (2000).

¹¹⁹ A well-known work offers this example:

"Herald, read the accusation!" said the King.

On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment scroll, and read as follows:

"*The Queen of Hearts, she made some tarts,*

All on a summer day: The Knave of Hearts, he stole those tarts,

And took them quite away!"

"Consider your verdict," the King said to the jury.

"Not yet, not yet!" the Rabbit interrupted. "There's a great deal to come before that!"

LEWIS CARROLL, *ALICE IN WONDERLAND & THROUGH THE LOOKING GLASS* 108 (Messner, 1982), *quoted in Nelson*, 529 U.S. at 468 n.2.

¹²⁰ Other Justices have cited *Alice*, but usually to refer generally to illogical or bizarre interpretations or events. See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 705 (2001) (Scalia, J., dissenting) (referring to the Court's "*Alice in Wonderland* determination that there are such things as judicially determinable 'essential' and 'nonessential' rules of a made-up game"); *United States v. Winstar Corp.*, 518 U.S. 839, 928-29 (1996) (Rehnquist, J., dissenting) (finding that "[s]uch a result has an *Alice in Wonderland* aspect to it"). Justice Ginsburg joined the Rehnquist dissent in *Winstar*. In her opinion for the Court in a recent case, Ginsburg quoted with approval a passage from an Eighth Circuit dissent which made use of *Alice* (Eighth Circuit dissenter stating that insistence on a written motion for continuance during trial "would be so bizarre as to inject an *Alice-in-Wonderland* quality into the proceedings."). *Lee v. Kemna*, 534 U.S. 362, 383 (2002) (Ginsburg, J., dissenting) (citation omitted) (quoting *Lee v. Kemna*, 213 F.3d 1037, 1047 (8th Cir. 2000) (Bennett, J., dissenting)).

Some metaphors, like “the lion’s share”¹²¹ or “one more arrow in its quiver,”¹²² are little more than familiar expressions that have lost much of their figurative impact. In a few instances, however, Ginsburg develops her own metaphors to achieve stronger effects. Speaking of a custodial interrogation governed by the *Miranda* rules, she used a theatrical metaphor: “Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve ‘the ultimate inquiry.’”¹²³ The literary analogy indicates the proper judicial detachment with which emotionally provocative cases should be analyzed. When the Court addressed the copyright infringement claims of authors whose articles were included in large electronic databases, Ginsburg again employed a literary metaphor as part of her insistence that such inclusion is not “revision” for purposes of the copyright statute: “The Database no more constitutes a ‘revision’ of each constituent edition than a 400-page novel quoting a sonnet in passing would represent a ‘revision’ of that poem.”¹²⁴ By analogizing a freelance article to a sonnet, Ginsburg gave it the dignity of a valid and independent piece of writing, thus supporting the statutory rights of the article authors.

Ginsburg’s most original and elaborate metaphor, appropriately enough, describes a procedural rule determining the authority of state court judges to review damages awards under the Seventh Amendment. In a footnote responding to Justice Scalia’s dissent, Ginsburg compared his proposed rule to a peculiarly constructed creature: “The sphinx-like, damage-determining law he would apply to this controversy has a state forepart, but a federal hindquarter. The beast may not be brutish, but there is little judgment in its creation.”¹²⁵ The beast offends Ginsburg’s preference for clarity and rationality in the law, even among the complexities of *Erie* doctrine. This unusually vivid image echoes one of Shakespeare’s most familiar passages, Antony’s funeral oration for Julius Caesar, in which Antony also links the loss of judgment with a “brutish” loss of reason: “O judgment, thou art fled to brutish beasts, And men have lost their reason!”¹²⁶ In spite of her

¹²¹ *Cleveland v. United States*, 531 U.S. 12, 22 (2000).

¹²² *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 212 (2001).

¹²³ *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

¹²⁴ *New York Times Co. v. Tasini*, 533 U.S. 483, 500 (2001).

¹²⁵ *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 n.23 (1996).

¹²⁶ WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 2, ll. 119-20. Like

collegiality principle, which counsels toleration for the dissenter's views, in this instance she found Scalia's hybrid proposal sufficiently bizarre to warrant the oblique but potent criticism of her extended metaphor, a criticism only somewhat muted by its placement in a footnote.

III. WRITING IN DISSENT

As a circuit court judge, Ginsburg observed that "United States appellate judges might profitably exercise greater restraint before writing separately."¹²⁷ One might, therefore, have expected her to follow her own advice after joining the Supreme Court. Her record as a dissenter, however, does not quite match her theory of collegial restraint. In nine Terms on the Court, she has written forty-nine dissents, with the tally per Term ranging from a low of three to a high of eight dissents.¹²⁸ Those numbers place her slightly below the Court's average in every Term but one—surprisingly her first Term—when she wrote eight dissents, more than any of her colleagues except Justices Stevens, Blackmun and Thomas.¹²⁹ Although she has never come close to matching Stevens's record of twenty-one dissents, she has also never matched Kennedy's record of a single dissent.¹³⁰

Ginsburg's other Shakespearean allusions, this reference is not made explicit and may reflect a general sense of the passage rather than a deliberate paraphrase.

¹²⁷ Ginsburg, *Writing Separately*, *supra* note 6, at 134.

¹²⁸ See *supra* note 44.

¹²⁹ Stevens wrote thirteen dissents, Blackmun eleven, and Thomas nine. These figures are based on the *Harvard Law Review's* annual statistical summary of the Court's Term. The average number of dissents for the years of Ginsburg's tenure has remained in a narrow range, from 7.1 to 7.4. The following table lists Ginsburg's record of dissent, omitting (as did the *Harvard Law Review*) two very brief dissents from denials of stays of execution. Computations of averages by the author based on data from the *Harvard Law Review* annual statistical studies, *supra* note 44.

Term	Dissents	Court Average
1993	8	7.2
1994	7	7.1
1995	3	7.4
1996	3	7.3
1997	6	7.1
1998	6	7.4
1999	6	7.4
2000	5	7.4
2001	4	7.2

¹³⁰ Stevens wrote twenty-one dissents in the 1995 Term; Kennedy wrote only one dissent in the 1993 Term.

Ginsburg has been a moderate dissenter, willing to voice her disagreement with the majority on a regular basis and unwilling to embrace consensus at any cost. Like Justice Brennan, whose defense of dissent she has cited with approval, Ginsburg recognizes that the act of dissenting is not a betrayal of institutional values.¹³¹ Rather, it is an essential part of a Justice's role, an occasion when, in her terms, the tug of individuality properly defeats the rival tug of collegiality. Ginsburg has responded most directly to that tug of individuality by filing thirteen solitary dissents.¹³² In fourteen of her dissents, however, she has been joined by a coalition of Justices Stevens, Souter and Breyer.¹³³ Of her remaining colleagues, only Justice Thomas has never joined a Ginsburg dissent.¹³⁴

The most interesting question is not how often Ginsburg dissents or who joins her but what concerns prompt her to write separately. The body of her dissenting opinions suggests that her principles of moderation, way paving and collegiality continue to guide her. She is, for example, likely to object when she believes that the majority has reached an unnecessarily sweeping result, disregarded binding precedent or failed to accord appropriate respect to another court or another branch of government. Several of her dissents focus on institutional concerns: how the Court should respond to the claims of an unscrupulous litigant or how consensus may be derived from apparently divergent positions. She does not use her dissents to express her indignation at the follies of her colleagues in the manner of Justice Scalia¹³⁵ or to lament her own inability to

¹³¹ Ginsburg, *Judicial Voice*, *supra* note 10, at 1194. Brennan argues that the dissenting opinion serves a number of valuable functions on a collegial court. It identifies errors in the majority opinion, keeps the majority accountable, serves as a "damage control" mechanism when a majority opinion is unnecessarily broad, and offers litigants guidance concerning alternate ways of securing relief. Brennan, *supra* note 17, at 430. According to Brennan, the dissent "is not an egoistic act—it is duty." *Id.* at 438.

¹³² For statistical purposes, I follow the *Harvard Law Review* in counting opinions dissenting in part and concurring in part as dissents.

¹³³ This figure includes dissents which members of the coalition joined only in part; Souter and Breyer each joined in part on two occasions.

¹³⁴ Chief Justice Rehnquist has joined five Ginsburg dissents, Justices Kennedy and O'Connor two, and Justice Scalia one.

¹³⁵ Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 227 (2002). See, e.g., Scalia's characterization of the majority in *Romer v. Evans* as having "mistaken a Kulturkampf for a fit of spite." 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

ensure a just result in the manner of Justice Blackmun.¹³⁶ She has not been tempted, even by some of the Court's high profile cases, to deliver what she has called "spicy" dissents,¹³⁷ which relieve the author's emotions by attacking her colleagues. In defeat as in victory, she remains a voice of moderation and restraint.

Ginsburg's strong regard for precedent, a recurring theme of her jurisprudence, leads her to dissent if she believes that the majority is misusing prior decisions. When the Court found no Sixth Amendment violation in a prosecutor's comments on the defendant's ability to make use of prior witnesses in shaping his own testimony, Ginsburg complained that the majority was improperly attempting to constitutionalize one precedent "by yoking it" to another.¹³⁸ In a bankruptcy case, she also complained that the Court was evading its own precedent by engaging in "an end-run around the filed rate doctrine so recently and firmly upheld."¹³⁹ Such evasion, she argued, was the wrong way to deal with an uncomfortable precedent: "[T]he way to correct that error, if error it was, is to overrule the unsatisfactory precedent, not to feign fidelity to it while avoiding its essential meaning."¹⁴⁰ Precedent is not an absolute for Ginsburg;¹⁴¹ it may be altered or abandoned, as long as the Court is forthright in its approach. If the Court is usually obligated to follow precedent, it is also obligated to create precedent when there is no governing case law. After joining a dissent by Justice Stevens

¹³⁶ Ray, *supra* note 135, at 232-33. See, e.g., Blackmun's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* observing that "I am 83 years old. I cannot remain on this Court forever." 505 U.S. 833, 943 (1992) (Blackmun, J., concurring and dissenting).

¹³⁷ Ginsburg, *Styles of Collegial Judging*, *supra* note 21, at 201.

¹³⁸ *Portuando v. Agard*, 529 U.S. 61, 81 (2000) (Ginsburg, J., dissenting).

¹³⁹ *Sec. Servs., Inc. v. KMart Corp.*, 511 U.S. 431, 458 (1994) (Ginsburg, J., dissenting).

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., *Gray v. J.D. Netherland*, 518 U.S. 152, 183 (1996) (Ginsburg, J., dissenting) (noting that "*Teague* is not the straitjacket the Commonwealth misunderstands it to be"). Ginsburg recently dissented from the Court's denial of certiorari in a case raising the issue of capital punishment as the sentence for a crime committed by someone under the age of eighteen on the ground that a 2002 decision by the Court changing its position on the execution of mentally retarded criminals had "made it tenable for the petitioner to urge reconsideration" of a 1989 precedent. *Patterson v. Texas*, 123 S. Ct. 24, 24 (2002) (Ginsburg, J., dissenting). Noting that "I think it appropriate to revisit the issue at this time," she relied on the reasons provided by Justice Stevens in his dissent, which cited the "apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender." *Id.* (Stevens, J., dissenting).

in a teacher-student harassment case, Ginsburg added a separate dissent to insist that the Court should have resolved an issue reserved by Stevens because “this Court’s pathmarkers are needed to afford guidance to lower courts and school officials.”¹⁴² It is the Court’s responsibility both to create and to follow precedent, and Ginsburg protests when the Court fails to do either.

Ginsburg’s respect for precedent, though strong, is not rigid. She recognizes that the application of precedent to a new factual setting is not a mechanical process, and she has dissented vigorously when she finds that the Court has failed to acknowledge significant distinctions between a precedent and a new set of facts. A recent case on school drug testing, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,¹⁴³ offers a vivid illustration. In *Pottawatomie*, the Court relied on its earlier decision in *Vernonia School District 47J v. Acton*¹⁴⁴ to uphold a school policy of random drug tests for all students engaged in extracurricular activities. Ginsburg’s dissent systematically undermined the relevance of *Vernonia*, which dealt with a drug-testing plan for student athletes, to the later case; she pointed to the lack of a serious drug problem at the Pottawatomie school, the significant risks of physical injury incident to athletic competition, the differing privacy expectations of athletes and chorus members, and other factual distinctions.¹⁴⁵ Her larger point was that the Court had read its precedent incorrectly, “cut[ting] out an element essential to the *Vernonia* judgment,”¹⁴⁶ and otherwise failed to provide a nuanced reading of its own decision. She reserved her direct irony for the federal government’s amicus brief, which argued that students engaged in homemaking activities, farming programs and band risk physical injuries similar to those of athletes. “Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas,” she noted, most students subject to the plan under review “are not safety sensitive to an unusual degree.”¹⁴⁷ That commonsensical

¹⁴² *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 307 (1998) (Ginsburg, J., dissenting).

¹⁴³ 122 S.Ct. 2559 (2002).

¹⁴⁴ 515 U.S. 646 (1995).

¹⁴⁵ *Pottawatomie County*, 122 S.Ct. at 2574-75 (Ginsburg, J., dissenting).

¹⁴⁶ *Id.* at 2576.

¹⁴⁷ *Id.* at 2577.

attitude also extended to the majority, which she suggested had made a disproportionate response to circumstances far less dangerous than those in *Vernonia* and, thus, permitted the school district to violate rights protected by the Fourth Amendment. Precedent controls, but only when it clearly matches the particular factual situation before the Court.

Although Ginsburg's regard for precedent is flexible enough to accommodate change as well as variation, she tends to prefer incremental rather than dramatic transformations of the law and to require substantial support for significant doctrinal developments. Thus, it is not surprising that she has dissented when she thinks that the majority is striking out unwisely in a new direction. Responding to a decision that permitted federal courts to exercise supplemental jurisdiction over state administrative agency actions, Ginsburg the proceduralist described the majority's holding as "a watershed opinion,"¹⁴⁸ but one that ignored substantial authority to the contrary. Her analysis began with a simple statement of that authority: "I catalog first the decisions, in addition to the Seventh Circuit's, that the Court today overrides."¹⁴⁹ The lengthy paragraph that followed, listing the holdings of eight circuit court opinions, provided a visual expression of the weight of authority that the Court rejected. The passage conveyed a secondary theme as well: the Court's lack of respect for this broad consensus. Although the Court was not bound by these lower court holdings, she considered it unwise to reject them.

Ginsburg has also resisted doctrinal change when she thought that the Court was substituting its policy preferences for those of Congress. In a case interpreting a securities statute, she found the Court's reliance on "impressive policy reasons" inadequate to overcome the substantial "drafting history and the longstanding scholarly and judicial understanding"¹⁵⁰ of the statute in question. She would, therefore, "leave any alteration to Congress."¹⁵¹ This deference to the legislative branch reflects Ginsburg's view of the coordinate branches of the federal government as the Court's

¹⁴⁸ *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 175 (1997) (Ginsburg, J., dissenting).

¹⁴⁹ *Id.* at 178.

¹⁵⁰ *Gustafson v. Alloyd Co.*, 513 U.S. 561, 596 (1995) (Ginsburg, J., dissenting).

¹⁵¹ *Id.*

colleagues and, therefore, deserving of respect. Faced with a long-standing judicial interpretation based on legislative history, she declined to accept a new policy, however strong the Court's argument, until Congress expressed its intention of making the change.

Ginsburg's preference for gradual change leads her to dissent when she believes that the Court has moved too quickly. A Fourth Amendment case, *Arizona v. Evans*,¹⁵² illustrates this preference. The defendant was charged with possession of marijuana after a search of his car based on an outstanding arrest warrant; in fact, a Justice of the Peace had quashed the warrant prior to the arrest, but that information had not been properly entered into the computer records of the Sheriff's Office. Responding to the defendant's motion to suppress, the Arizona Supreme Court ruled that the good faith exception to the exclusionary rule did not apply to clerical errors in maintaining accurate computer records; the United States Supreme Court reversed. Ginsburg approached the case as an example of "an evolving problem this Court need not, and in my judgment should not, resolve too hastily."¹⁵³ Such new legal issues, including those based on the increasing use of computer technology in law enforcement, were "frontier legal problems" that would benefit from "percolation," the opportunity for lower state and federal courts to address the issue and perhaps "yield a better informed and more enduring final pronouncement by this Court."¹⁵⁴ Ginsburg was careful to note that she took no position on the substance of relevant federal precedents;¹⁵⁵ her objection was to the Court's unnecessary haste in resolving an issue that she viewed as essentially "empirical" and therefore likely to benefit from Justice Brandeis's perception of the states as laboratories experimenting with a range of solutions.¹⁵⁶

Although Ginsburg asserted her neutrality on the substantive issue before the Court in *Arizona v. Evans*,¹⁵⁷ she reached a similar conclusion in a case where she held strong views about the subject matter. In *Missouri v. Jenkins*,¹⁵⁸ the

¹⁵² 514 U.S. 1 (1995).

¹⁵³ *Id.* at 23 (Ginsburg, J., dissenting).

¹⁵⁴ *Id.* at 23 n.1.

¹⁵⁵ *Id.* at 29.

¹⁵⁶ *Id.* at 30.

¹⁵⁷ 514 U.S. 1.

¹⁵⁸ 515 U.S. 70 (1995).

Court by a five to four vote found that orders issued under a school desegregation decree exceeded the district court's remedial authority over the Kansas City School District. Ginsburg joined Justice Souter's dissent but also wrote separately to emphasize the basis for her view that the Court was acting too hastily in terminating the desegregation effort. In a capsule history beginning with the issuance of a slave code by France in 1724, she traced the difficult progress toward desegregation in Missouri through *Brown v. Board of Education*¹⁵⁹ and post-*Brown* remedial orders. "Given the deep, inglorious history of segregation in Missouri," she concluded, "to curtail desegregation at this time and in this manner is an action at once too swift and too soon."¹⁶⁰ The caution invoked in *Jenkins* is grounded not in the need for further experimentation but in the certainty that immediate action will block further progress. Both cases, however, reflect Ginsburg's deeply ingrained distaste for what she considers precipitate action.¹⁶¹

Ginsburg also identifies other methodological errors in majority opinions that disturb her sense of the importance of the way in which opinions are written. In one case, she criticized the Court's "divide and conquer"¹⁶² strategy employed to reformulate and distort a litigant's position: "The Court first slices [petitioner's] whole claim into pieces; it then deals discretely with each segment."¹⁶³ When the Court in an ERISA case attributed to Congress an intention to invoke fine distinctions drawn from the history of equity jurisprudence, Ginsburg found the approach "fanciful."¹⁶⁴ Viewing the statute from a commonsensical perspective, she found it obvious that "[t]he rarefied rules underlying this rigid and time-bound conception of the term 'equity' were hardly at the fingertips of those who enacted § 502(a)(3)."¹⁶⁵ Ginsburg also objected to the

¹⁵⁹ 347 U.S. 483 (1954).

¹⁶⁰ *Jenkins*, 515 U.S. at 176.

¹⁶¹ In *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), Ginsburg identified a third basis for dissenting from the majority's undue haste in upholding an arbitration agreement. She argued that "the Court has reached out prematurely to resolve the matter in the lender's favor" and noted that she "would remand for clarification of Green Tree's practice." *Id.* at 96 (Ginsburg, J. concurring in part and dissenting in part).

¹⁶² *Gray v. Netherland*, 518 U.S. 152, 181 (1996).

¹⁶³ *Id.*

¹⁶⁴ *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 225 (2002) (Ginsburg, J., dissenting).

¹⁶⁵ *Id.* at 224.

Court's expansive holding in a Fourth Amendment case limiting the legitimate expectations of privacy of guests.¹⁶⁶ She would have confined the decision to the case's distinct factual situation and "would not reach classroom hypotheticals like the milkman or the pizza deliverer."¹⁶⁷ All of these cases reflect her insistence on caution and practicality in the decisionmaking process.

There is a paradoxical quality to the dissenting opinions in which Ginsburg finds the members of the majority to lack proper respect for their judicial and legislative colleagues. As Chief Justice Hughes observed, the dissenter is a "free lance" who operates without the constraints imposed by the majority author's need to accommodate the views of other Justices.¹⁶⁸ For Ginsburg, the impetus to a dissent is often her perception that the Court has failed to accord due respect to the decisions of lower courts. Thus, she departs from her own prescription for collegiality in order to defend it. Ginsburg expresses her respect for lower federal court judges in several ways. She may quote extensively from a lower court opinion that she finds more accurate than the Court's opinion, a strategy she used in concluding an early dissent with the language in which the circuit court judge under review "persuasively explained" the proper resolution of the case.¹⁶⁹ She may insist that circuit judges be paid their due: "When this Court rejects the considered judgment prevailing in the Circuits, respect for our colleagues demands a cogent explanation."¹⁷⁰ She may also insist that circuit court judges be given the first opportunity to rule on a new issue, as she did in criticizing the Court for "speak[ing] the first word on the content of Delaware preclusion law."¹⁷¹ Ginsburg affords similar respect to state

¹⁶⁶ *Minnesota v. Carter*, 525 U.S. 83 (1998) (Ginsburg, J., dissenting).

¹⁶⁷ *Id.* at 107. Ginsburg cited with disapproval a hypothetical in Justice Kennedy's concurrence—"a stop of a minute or two at the 19th of 20 homes to drop off a packet"—as presenting circumstances "which scarcely resemble" the case's stipulated facts. *Id.* at 109 n.2.

¹⁶⁸ According to Hughes, "[d]issenting opinions enable a judge to express his individuality. He is not under the compulsion of speaking for the court and thus of securing the concurrence of a majority. In dissenting, he is a free lance." CHARLES HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

¹⁶⁹ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 686 (1994) (Ginsburg, J., dissenting).

¹⁷⁰ *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 643-44 (2001) (Ginsburg, J., dissenting).

¹⁷¹ *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part).

court judges whose decisions come before the Court, and she has chided her colleagues when she believes that the majority “unnecessarily and unwisely ventures into territory traditionally within the States’ domain” by finding an award of punitive damages grossly excessive.¹⁷²

Ginsburg’s thirteen year career as a circuit court judge certainly contributes to her sense that lower court judges, particularly those on the appellate bench, may on occasion be better situated than Supreme Court Justices to resolve a case. Dissenting from the decision vacating a stay of execution issued by the Eighth Circuit, Ginsburg objected to the Court’s refusal to seek clarification of the lower court’s order: “Appreciation of our own fallibility, and respect for the judgment of an appellate tribunal closer to the scene than we are, as I see it, demand as much.”¹⁷³ There are two strands to her objection. One is the conventional notion that judges closer to the litigation have a unique perspective that the Court should value. The second strand is the more subversive notion that the Court should retain a measure of skepticism concerning its own abilities. Echoing Justice Jackson’s famous epigram that “[w]e are not final because we are infallible, but we are infallible only because we are final,”¹⁷⁴ Ginsburg gently reminds her fellow Justices that even they may commit errors. She suggests that one further aspect of collegiality is the responsibility of each Justice to help her colleagues to remember their shared limitations and to recognize the assistance available to them.

A variation on the theme of collegiality dominates what is probably the most widely read of Ginsburg’s dissents, her opinion in *Bush v. Gore*.¹⁷⁵ Ginsburg’s principal objection to the majority opinion was its refusal to honor the decision of the Florida Supreme Court interpreting state election law to permit a recount. She reminded the Court that, even when state law issues affect federal law, “we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State’s highest court.”¹⁷⁶ More

¹⁷² *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting). Ginsburg found that “[t]he respect due the Alabama Supreme Court requires that we strip from this case a false issue.” *Id.*

¹⁷³ *Bowersox v. Williams*, 517 U.S. 345, 347 (1996) (Ginsburg, J., dissenting).

¹⁷⁴ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

¹⁷⁵ 531 U.S. 98, 135 (2002) (Ginsburg, J., dissenting).

¹⁷⁶ *Id.* at 137.

specifically, Ginsburg bristled at the majority's linkage of the Florida decision with a handful of state supreme court cases in which the Court rejected interpretations of state law that blocked the exercise of federal constitutional rights.¹⁷⁷ Those cases were decided by state supreme courts intent on using state law as a weapon to disadvantage litigants engaged in the civil rights struggle. In contrast, she found that the Florida Supreme Court had provided a responsible and credible reading of state election law and "surely should not be bracketed with state high courts of the Jim Crow South."¹⁷⁸ The imputation, never quite articulated, is that the majority is accusing the Florida court of twisting the law to produce a politically desirable result. Ginsburg rejected the majority's overt accusation of judicial legislation and offered a firm defense: "There is no cause here to believe that the members of Florida's high court have done less than 'their mortal best to discharge their oath of office,' . . . and no cause to upset their reasoned interpretation of Florida law."¹⁷⁹

Ginsburg staked out a delicate position, championing the Florida judges as responsible jurists while at the same time refraining from the kind of harsh attack on the majority that she elsewhere deplores. In the opening paragraph of her dissent, she referred to "[m]y colleagues" in the majority and even suggested that she might have joined Rehnquist's position "were it my commission to interpret Florida law."¹⁸⁰ Along with these collegial gestures, however, she also allowed herself a pointed reference to the surprising alignment of the Justices usually vocal in their defense of state prerogatives, though she stopped short of accusing them of flagrant hypocrisy: "Were the other Members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court."¹⁸¹ In the final section of the opinion, she again defended "the good faith and diligence" of Florida judges and officials against the majority's prediction that there was insufficient time for judicial review of a recount.¹⁸² That conclusion, she noted, was "an untested prophecy [that] should not decide the Presidency of the United

¹⁷⁷ *Id.* at 139-41.

¹⁷⁸ *Id.* at 141.

¹⁷⁹ *Id.* at 136.

¹⁸⁰ *Bush*, 531 U.S. at 136.

¹⁸¹ *Id.* at 142-43.

¹⁸² *Id.* at 144.

States.”¹⁸³ Ginsburg barely succeeded in her difficult task of defending one set of colleagues without attacking another, and some readers noted with interest that the final sentence of her opinion, “I dissent,” omitted the adverb “respectfully.”¹⁸⁴ In fact, Ginsburg has very seldom used the formula “I respectfully dissent” to end an opinion,¹⁸⁵ but its absence here may reflect the sharper than usual criticism of her colleagues detectable beneath the surface of the opinion.

If Ginsburg’s dissent in *Bush v. Gore* emphasized her belief in the collegial relationship that should exist between judges of different judicial systems, her dissent in *Adarand Constructors, Inc. v. Peña*¹⁸⁶ emphasized the ties between members of the Court even when they appeared to be deeply divided. *Adarand*, the Court’s most recent affirmative action decision, imposed strict scrutiny as the standard for analyzing all racial classifications, including those favoring racial minorities. The Court, divided five to four, barely managed to produce a majority opinion by Justice O’Connor;¹⁸⁷ two Justices wrote opinions concurring only in part, and three wrote dissents.¹⁸⁸ The dissenters argued vigorously that benign racial classifications should be subject to a less rigorous standard, though they disagreed among themselves as to the rationale for that distinction. From this welter of views, Ginsburg in dissent attempted to create a measure of consensus. Although she joined the dissents by Justices Stevens and Souter, she had an original point to make in her own opinion: “I write separately to underscore not the differences the several opinions in this case display, but the considerable field of agreement—the common understandings and concerns—revealed in opinions

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ I have identified only four opinions that use the formula, all of them earlier than *Bush v. Gore*. See *United States v. Balsys*, 524 U.S. 666, 701 (1998) (Ginsburg, J., dissenting); *Gray v. J.D. Netherland*, 518 U.S. 152, 171 (1996) (Ginsburg, J., dissenting); *Sandin v. Conner*, 515 U.S. 472, 488 (1995) (Ginsburg, J., dissenting); *Sec. Servs., Inc. v. Kmart Corp.*, 511 U.S. 431, 455 (1994) (Ginsburg, J., dissenting).

¹⁸⁶ 515 U.S. 200 (1995).

¹⁸⁷ All but one section of Justice O’Connor’s opinion was designated as “for the Court,” subject to a strict qualification that it was “for the Court except insofar as it might be inconsistent with the views expressed in Justice Scalia’s concurrence.” *Id.* at 204.

¹⁸⁸ See *id.* at 239 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 242 (Stevens, J., dissenting); *id.* at 264 (Souter, J., dissenting); *id.* at 271 (Ginsburg, J., dissenting).

that together speak for a majority of the Court.”¹⁸⁹ Ginsburg argued that a majority of Justices called for strict scrutiny to identify malign classifications “masquerading as benign,” not to eliminate all race-conscious government programs.¹⁹⁰ This reading allowed her to accept the Court’s decision as something less than a defeat for proponents of affirmative action, more precisely “as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.”¹⁹¹ The effort to find consensus in such a divisive case—and to use a dissenting opinion to do so—reflects Ginsburg’s powerful response to both the issue of racial justice and the tug of collegiality. In his nominating speech, President Clinton described Ginsburg as a “force for consensus-building on the Supreme Court.”¹⁹² Her opinion in *Adarand* is little short of heroic in its determination to find some common ground on this difficult issue and to keep open the line of doctrinal development.

Other varieties of institutional concern also prompt Ginsburg to dissent. When the Court in *Miller v. Johnson*¹⁹³ established a new standard for legislative districts prohibiting the use of race as the dominant factor, she characterized that decision as “a counterforce.”¹⁹⁴ It would, she argued, expand the judicial role by drawing “[f]ederal judges in large numbers . . . into the fray”¹⁹⁵ and make the redistricting process “perilous work for state legislators.”¹⁹⁶ This was, in her view, the antithesis of the Court’s appropriate tasks of avoiding self-aggrandizement and showing respect for the work of other government branches.

The possibility that an unscrupulous litigant had manipulated the Court into reviewing a claim not raised below also prompted a dissent. With surprisingly vivid imagery, she accused the petitioner, a landowner, of executing a “bait-and-switch ploy”¹⁹⁷ and “mov[ing] the pea to a different shell”¹⁹⁸ in

¹⁸⁹ *Id.* at 271 (Ginsburg, J., dissenting).

¹⁹⁰ *Id.* at 275.

¹⁹¹ *Adarand Constructors*, 515 U.S. at 276.

¹⁹² HEARINGS AND REPORTS, *supra* note 1, at 10.

¹⁹³ 515 U.S. 900 (1995).

¹⁹⁴ *Id.* at 949 (Ginsburg, J., dissenting).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Palazzolo v. Rhode Island*, 533 U.S. 606, 648 (2001) (Ginsburg, J., dissenting).

¹⁹⁸ *Id.* at 652.

his efforts to evade a state supreme court ruling that his takings claim was not ripe. Her concern went beyond mere pique at the petitioner's conduct to concern for the implications of the Court's gullibility: "This Court's waiver ruling thus amounts to an unsavory invitation to unscrupulous litigants: Change your theory and misrepresent the record in your petition for certiorari; if the respondent fails to note your machinations, you have created a different record on which this Court will review the case."¹⁹⁹

Her proceduralist's distaste for misuse of rules appeared most vividly in *Agostini v. Felton*,²⁰⁰ where the Court agreed to revisit a twelve-year-old Establishment Clause precedent based on a Rule 60(b)(5) motion for relief from judgment.²⁰¹ Since, as a matter of procedure, Rule 60(b)(5) does not permit relitigation of underlying claims, she accused the majority of bending the rule "to a purpose—allowing an 'anytime' rehearing" rather than awaiting a more suitable vehicle raising the same issue.²⁰² She spelled out the basis for her objection by explaining the "just cause" she found for denying review: "That cause lies in the maintenance of integrity in the interpretation of procedural rules, preservation of the responsive, non-agenda-setting character of this Court, and avoidance of invitations to reconsider old cases based on 'speculat[ions] on chances from changes in [the Court's membership].'"²⁰³ Fidelity to procedural rules was more than a matter of fastidious nitpicking. Ginsburg expressly linked it to the crucial institutional responsibility for preserving the Court's stature as an institution above politics. Justices as well as litigants must be bound by procedural rules to avoid the perception that they are manipulating the system to pursue a substantive agenda.²⁰⁴

¹⁹⁹ *Id.* at 653.

²⁰⁰ 521 U.S. 203 (1997).

²⁰¹ Rule 60(b)(5) of the Federal Rules of Civil Procedure permits relief from a judgment when "it is no longer equitable that the judgment should have prospective application." FED. R. CIV. P. 60(b)(5), *quoted in Agostini*, 521 U.S. at 215. The twelve-year-old precedent was *Aguilar v. Felton*, 473 U.S. 402 (1985).

²⁰² *Agostini*, 521 U.S. at 259 (Ginsburg, J., dissenting).

²⁰³ *Id.* at 260 (quoting *Illinois v. Illinois Cent. R.R. Co.*, 184 U.S. 77, 92 (1902)).

²⁰⁴ Ginsburg made a similar point in her opinion "respecting the denial of certiorari" in *Texas v. Hopwood*, the case in which the Fifth Circuit had ruled unconstitutional an admissions program of the University of Texas Law School favoring minority applicants. Noting that the university had discontinued the program at issue and that the petitioners were challenging the rationale rather than the judgment of the court below, Ginsburg asserted that "we must await a final judgment on a program genuinely in controversy before addressing the important question raised

Ginsburg identified a similar institutional concern with judicial integrity when, in *Republican Party of Minnesota v. White*,²⁰⁵ the Court struck down on First Amendment grounds a Minnesota statute prohibiting judicial candidates from discussing their views on legal or political issues during election campaigns. Arguing that elections for judges differ significantly from elections for political representatives, she emphasized the role of the judiciary as an “essential bulwark of constitutional government, a constant guardian of the rule of law.”²⁰⁶ Permitting judges to stake out positions on issues that may subsequently come before them, however informative to voters, would endanger litigants’ due process rights by giving judges a personal interest in keeping their campaign promises and their jobs; it would also weaken the public’s faith in the integrity of the judiciary. Ginsburg delivered her criticism of the majority, particularly Justice Scalia as author of the Court’s opinion, in a particularly oblique manner. In the first paragraph of her opinion, she quoted two passages on judicial independence—both authored by Scalia.²⁰⁷ The first, drawn from one of his dissents, stated simply that “judge[s] represen[t] the Law;”²⁰⁸ the second, drawn from one of his best known law review articles, described the role of judges as “stand[ing] up to what is generally supreme in a democracy: the popular will.”²⁰⁹ In a footnote, she subsequently cited as support for Minnesota’s restraint on judicial candidates Scalia’s statement at his own confirmation hearing when he declined to indicate whether he would overrule a precedent: “I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.”²¹⁰ The message, never quite formulated as a direct attack, was that all members of the Court share an institutional commitment to preserving their own judicial

in this petition.” *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996).

²⁰⁵ 122 S.Ct. 2528 (2002).

²⁰⁶ *Id.* at 2550 (Ginsburg, J., dissenting).

²⁰⁷ *Id.*

²⁰⁸ *Id.* (quoting *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting)).

²⁰⁹ *Id.* (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989)).

²¹⁰ *Republican Party*, 122 S.Ct. at 2558 n.4. In an earlier footnote, Ginsburg pointed out that “every Member of this Court declined to furnish” information on specific issues “to the Senate, and presumably to the President as well” during the confirmation process. *Id.* at 2551 n.1.

independence and that the majority's refusal to accept Minnesota's similar concern was inconsistent, ill-founded and lacking in respect for the constitutional balance between "judicial integrity and free expression" struck by the state legislature.²¹¹

As this oblique criticism illustrates, the style of Ginsburg's dissents, like their content, reflects her chosen principles of appellate decisionmaking. Although she has recognized that the dissenter is understandably tempted to produce "spicy" opinions that serve to release frustration with the majority's obtuseness and willful perversity, she never succumbs to that temptation. The language of her dissents is in fact calmer, less critical and less metaphorical than the language of her Court opinions. Unlike Justice Scalia, in this respect her opposite on the Court, she never treats the dissenting opinion as an opportunity to express her disapproval with bluntness, expansiveness and savage wit.²¹² Her critiques of the majority are restrained and measured, with only an occasional use of mild sarcasm.²¹³ Even writing as a "free lance," Ginsburg remains a collegial Justice and a paragon of moderation.

In some respects, there is stylistic continuity between Ginsburg's majority opinions and her dissents. She continues to invoke variations of the term "pathmarker" to emphasize the value of precedent,²¹⁴ and such favorite expressions as "home in

²¹¹ *Id.* at 2559. Ginsburg asserted that the statute at issue "comes to this Court bearing a weighty title of respect." *Id.* (citations omitted).

²¹² *See, e.g.,* *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

²¹³ *See, e.g.,* her response to the government's argument that the deletion of "feloniously" from a federal statute was intended "to grant homesick ex-convicts like Lewis their wish to return to prison":

Nor can I credit the suggestion that Congress' concern was to cover the Government's fictional terrorist, or the frustrated account holder who "withdraws" \$100 by force or violence, believing the money to be rightfully his, or the thrill seeker who holds up a bank with the intent of driving around the block in a getaway car and then returning the loot, or any other defendant whose exploits are seldom encountered outside the pages of law school exams.

Carter v. United States, 530 U.S. 255, 284 (2000) (Ginsburg, J., dissenting). The sarcasm is directed at the government's brief, not squarely at the majority. *See also* Ginsburg's criticism of a Scalia concurrence on the subject of equitable relief: "There is no such thing as an injunction *at law*, and therefore one cannot expect to find long-ago plaintiffs who quested after that mythical remedy and received voluntary relief." *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 633 n.8. The comment is, characteristically, placed in a footnote.

²¹⁴ *See, e.g.,* *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 449

on” and “mine run” make an occasional appearance.²¹⁵ Her preferred Shakespeare allusions—“much ado about nothing,”²¹⁶ “all’s well that ends well,”²¹⁷ and “it must follow, as the night the day”²¹⁸—again appear as uncredited references.²¹⁹ There is a second allusion to Lewis Carroll, this time to *Through the Looking-Glass*.²²⁰ When a prosecuting attorney insisted that coherence between the defendant’s and the complaining witness’ testimony was a sign that the defendant was lying, Ginsburg objected to the illogic of the argument: “To claim that such an argument helps find truth at trial is to step completely through the looking glass.”²²¹ Ginsburg also included an oblique allusion to the Gilbert and Sullivan operetta *The Pirates of Penzance* when she referred lightly to the “felonious little plans” of a defendant anxious to return to prison who notified the authorities of his intention of robbing a bank.²²²

(1997) (Ginsburg, J., concurring in part and dissenting in part) (describing court of appeals opinion as “pathmarking”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 610 (1996) (referring to the Alabama Supreme Court’s “pathmarking decisions”); *Miller v. Johnson*, 515 U.S. 900, 939 n.2 (referring to a Supreme Court vote dilution case as “a pathmarker”); *Arizona v. Evans*, 514 U.S. 1, 34 (1995) (noting that the United States supports petitioner but “does not see this case as a proper vehicle for a pathmarking opinion”).

²¹⁵ Both expressions appear in a single sentence in a recent decision. *Dusenbery v. United States*, 534 U.S. 161, 177 (2002) (Ginsburg, J., dissenting) (observing that earlier cases “home in on the particular proceedings at issue and do not imply that in the mine run civil action, a plaintiff may dispense with the straightforward, effective steps required to secure proof of service or waiver of formal service”).

²¹⁶ *Evans*, 514 U.S. at 31 (noting that requests for reconsideration are not “much ado about nothing”).

²¹⁷ *Sandin v. Conner*, 515 U.S. 472, 489 n.1 (1995) (concluding with regard to a liberty interest that “[a]ll’s well that ends well’ cannot be the measure here”).

²¹⁸ *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 94 (2000) (noting that “[i]t does not follow like the night the day, however, that the party resisting arbitration” must also carry the burden of showing financial inaccessibility).

²¹⁹ There may also be a more oblique Shakespearean allusion when Ginsburg asks whether a rule that leads defendants to negotiate settlement terms and counsel fees “is not a consummation to applaud, not deplore?” *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 639 (2001). The question echoes a line in Hamlet’s celebrated soliloquy, speaking of death and asking whether “’tis a consummation Devoutly to be wish’d.” *HAMLET*, *supra* note 113, act 3, sc. 1, ll. 70-71.

²²⁰ Lewis Carroll, *Through The Looking-Glass And What Alice Found There*, in *ALICE IN WONDERLAND*, *supra* note 117, at 101.

²²¹ *Portuando v. Agard*, 529 U.S. 61, 79 n.1 (2000) (Ginsburg, J., dissenting).

²²² *Carter v. United States*, 530 U.S. 255, 283 (2000). Ginsburg is describing an earlier circuit court case cited by the government in support of its theory and not referring to the defendant in the case under review, which explains the lightness of tone. The phrase, unattributed by Ginsburg, is contained in the policeman’s song in Act II of *The Pirates of Penzance*. The relevant verse follows:

When a felon’s not engaged in his employment-

In other respects, however, Ginsburg's dissents seem deliberately more muted than her majority opinions. She uses a handful of metaphors, but none is elaborated in the manner of her sphinx-like beast.²²³ Thus, a statute with unreconciled provisions is "janus faced,"²²⁴ a presumption is an "imperfect barometer of state courts' intent"²²⁵ and a state supreme court "could have displayed its labor pains more visibly."²²⁶ In a few instances, she extends metaphors slightly. The Court relies on "the 'sufficiency of the evidence' label, . . . but the label will not stick,"²²⁷ and it is irrational to believe that "only a defendant's opportunity to spin a web of lies could explain the seamlessness of his testimony."²²⁸ One such extended image comes close to punning; the Court's opinion lacked examples and thus left its readers "at sea, unable to fathom" the Court's meaning.²²⁹ None of these images, however, is formulated as a direct attack on the majority.

The tone of the dissents is consistently unemotional, and Ginsburg tends to characterize the majority opinion she

His employment,
Or maturing his felonious little plans-
Little plans,
His capacity for innocent enjoyment-
'Cent enjoyment-
Is just as great as any honest man's-
Honest man's.

WILLIAM S. GILBERT & ARTHUR SULLIVAN, *The Pirates of Penzance*, in 1 THE COMPLETE ANNOTATED GILBERT AND SULLIVAN 145-46 (Ian Bradley ed., 1985). Ginsburg's familiarity with the Gilbert and Sullivan operettas is made clear by her quotation, in a law review article, of a passage from *Iolanthe* to discuss the principle of judicial neutrality:

That Nature always does contrive
That ev'ry boy and ev'ry gal
That's born into the world alive
Is either a little Liberal
Or else a little Conservative.

The passage is quoted in Ruth Bader Ginsburg, *Inviting Judicial Activism: A 'Liberal' or 'Conservative' Technique?*, 15 GA. L. REV. 539, 557 (1981) (quoting *Iolanthe*). This familiarity is not surprising in light of her well known love of opera. She has appeared in costume, together with Justice Scalia, as an extra in a performance of *Ariadne auf Naxos* at the Washington Opera. *Opera a High Note for Ginsburg*, HOUSTON CHRON., Mar. 5, 2001, at A2. See also ELEANOR H. AYER, RUTH BADER GINSBURG: FIRE AND STEEL ON THE SUPREME COURT 108 (1994).

²²³ See *supra* note 125 and accompanying text.

²²⁴ *Holder v. Hall*, 512 U.S. 874, 956 (1994) (Ginsburg, J., dissenting).

²²⁵ *Arizona v. Evans*, 514 U.S. 1, 31 (1995).

²²⁶ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 611 (1996).

²²⁷ *Carmell v. Texas*, 529 U.S. 513, 561 (2000) (Ginsburg, J., dissenting).

²²⁸ *Portuondo v. Agard*, 529 U.S. 61, 86 (Ginsburg J., dissenting).

²²⁹ *Sandin v. Conner*, 515 U.S. 472, 490 n.2 (1995).

rejects as “enigmatic”²³⁰ or “puzzling”²³¹ rather than deliberately distorted or flagrantly wrong. A few of her opinions are surprisingly conversational and even playful in presenting the bases for their disagreement.²³² In *Muscarello v. United States*,²³³ the most sustained example, where Ginsburg rejected the majority’s conclusion that the word “carries” in a firearm statute imposed an enhanced sentence on a defendant who merely transports or possesses a gun, she clearly relished the process of linguistic analysis. Ginsburg’s primary argument was that words derive their meaning from context, and she pursued the varied meanings for what she called “the hydra-headed word”²³⁴ through newspapers, biblical references, poetry, films and television programs. Referring to variations in biblical language for a single passage, she observed dryly that “[t]he translator of the Good Book, it appears, bore responsibility for determining whether the servants of Ahaziah ‘carried’ his corpse to Jerusalem.”²³⁵ Dry wit gave way to antic humor when she quoted Hawkeye Pierce’s dialogue from the television series *Mash*:

I will not carry a gun. . . . I’ll carry your books, I’ll carry a torch, I’ll carry a tune, I’ll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I’ll even “hari-kari” if you show me how, but I will not carry a gun!²³⁶

Responding to the government’s reliance on the use of “carries” in other statutes, Ginsburg invoked another television series, *Sesame Street*, and annotated its familiar refrain that “one of these things [a statute *authorizing* conduct] is not like the other [a statute *criminalizing* conduct].”²³⁷ The lighthearted references were accompanied by an unusually informal tone. She responded with “[q]uite right”²³⁸ to the government’s claim

²³⁰ *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 455 (1997).

²³¹ *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 187 (1997).

²³² See, e.g., *Jones v. United States*, 527 U.S. 373, 417 (1999) (Ginsburg, J., dissenting) (“I would demur (say so what) to that position”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275 (1995) (“yielded a pass”); *Miller v. Johnson*, 515 U.S. 900, 937 (1995) (“hence no muscle to lobby the legislature for change”).

²³³ 524 U.S. 125 (1998).

²³⁴ *Id.* at 143 (Ginsburg, J., dissenting).

²³⁵ *Id.* at 142 n.4.

²³⁶ *Id.* at 144 n.6.

²³⁷ *Id.* at 147 n.11.

²³⁸ *Muscarello*, 524 U.S. at 147 n.11. Ginsburg has referred to the same refrain from *Sesame Street* in another dissent. See *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 183 (1997) (Ginsburg, J., dissenting) (“But one of these things

before undermining it, and patiently conceded that “[y]es, the words ‘carry’ and ‘transport’ often can be employed interchangeably”²³⁹ before pointing out Congress’ awareness of their discrete meanings. Most of these usages appeared in footnotes, where Ginsburg typically locates her criticisms of other Justices as a way of blunting their impact. Nonetheless, the presence of a light note in a dissent, particularly one in which the length of the defendant’s confinement is at stake, is a surprising departure from her usually sober tone. The dissent suggested her sensitivity to the nuances of words and the care with which she chooses them when she is putting herself in opposition to her colleagues, but it also suggested that she is more inclined to moderate her criticism with playfulness than to intensify it with an aggressively hostile tone.

It is characteristic of Ginsburg that even her strongest dissents avoid the soaring rhetoric other members of the Court often use. In her recent dissent in the student drug testing case, however, she came closer than usual to such language, though with her own twist. In the closing paragraphs of the opinion, Ginsburg applied Justice Brandeis’s notion of government teaching the people by its example, observing that “government is nowhere more a teacher than when it runs a public school.”²⁴⁰ She found it “a sad irony” that the school district’s testing policy failed to meet that obligation and instead imposed “symbolic measures that diminish constitutional protections.”²⁴¹ The final sentence of the opinion does soar, but only because it was written by one of the Court’s great stylists, Justice Jackson, in a celebrated decision striking down a school board resolution requiring all students, regardless of their religious principles, to salute the flag: “That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”²⁴² A comparison of Jackson’s prose with Ginsburg’s is instructive. Where her language is

is not necessarily like the other.”).

²³⁹ *Muscarello*, 524 U.S. at 147 n.10.

²⁴⁰ *Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 2559, 2578 (2002).

²⁴¹ *Id.*

²⁴² *Id.* (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

clear, direct and syntactically straightforward, Jackson's sentence is metaphorical, complex and dramatic in its image of strangulation. As her own occasional metaphorical indulgences indicate, Ginsburg has an ear for language and an appreciation for its possibilities. She remains, however, true to her principles of moderation and collegiality, allowing a remarkably gifted colleague to express her sentiments instead of attempting her own stylistic adventure.

IV. WRITING TO CONCUR

The concurrence occupies an ambiguous position in Supreme Court decisionmaking. A Justice who concurs neither endorses a colleague's opinion wholeheartedly nor rejects it decisively. Instead, the concurring Justice signals a willingness to accompany the author part of the way while still asserting the need to specify their differences in print.²⁴³ The resulting concurrence may modify the majority opinion in a number of ways, most often by limiting or expanding its holding or simply by emphasizing one aspect as the most significant.²⁴⁴ In its more extreme form, the concurrence may accept only the majority's result and reject its rationale completely; in that case, the Justice concurs only in the Court's judgment and formulates an independent legal theory. Whichever form the disagreement takes, the concurring Justice has breached the norm of collegiality with less compelling reason than the dissenter, who is unable to accept either the Court's result or its rationale. It would seem that a Justice strongly committed to collegiality would find it easier to dispense with a concurrence than with a dissent, to swallow hard and join a majority opinion that is unsatisfactory in some way but not totally abhorrent. It would, in short, seem that Ginsburg would be less likely to concur than to dissent and that her record on the Court would reflect that tendency.

Surprisingly, Ginsburg has written more concurrences than dissents. In nine Terms she has produced fifty

²⁴³ For a discussion of the nature of the concurrence, see Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 780-83 (1990).

²⁴⁴ The Rehnquist Court has used several varieties of concurrence for a range of purposes. These include the limiting concurrence, the expansive concurrence, the emphatic concurrence, and the doctrinal concurrence. For an analysis of these various forms of concurrence, see *id.* at 784-809.

concurrences, compared to her forty-nine dissents.²⁴⁵ She was most prolific in her first Term, writing ten concurrences; in more recent Terms she has slowed her pace, writing between three and six separate opinions instead.²⁴⁶ Fourteen of her opinions concurred only in the Court's judgment, indicating the strongest basis for divergence. Ginsburg has written twenty-eight concurrences for herself alone and has been joined by one or more colleagues in the remaining twenty-two. Justice Breyer is her most frequent companion, joining ten times; neither Justice Scalia nor Justice Thomas has ever joined one of her concurrences.²⁴⁷ Her record of concurrences places her above the Court average in five Terms out of nine.²⁴⁸ She remains, however, significantly below Justice Scalia, the Court's most prolific concurren, though also significantly above Chief Justice Rehnquist, its least prolific.²⁴⁹

This statistical summary does not fully reveal Ginsburg's approach to concurring opinions. Most of her concurrences are remarkably short, many are no more than a single paragraph, and a few are no longer than a handful of sentences. She ends one three-sentence opinion with the observation that "I see no need to say more,"²⁵⁰ which might serve as the motto for her concurring enterprise. These opinions seldom engage the substance of the majority opinion in a sustained argument. They are in the nature of brief comments on the majority's work rather than serious efforts to counter that work with alternate theories or detailed critiques. Ginsburg seems most interested in characterizing what the Court has done, with an eye to its future jurisprudence. In the words of one of her favorite expressions, she is serving as an auxiliary way paver, making sure that the record reflects the exact parameters of the Court's opinion so that it will not be

²⁴⁵ See *supra* note 44.

²⁴⁶ *Id.*

²⁴⁷ Of her other current colleagues, Souter has joined Ginsburg's concurrences six times, Stevens five times, O'Connor five times, and Rehnquist and Kennedy once each. Statistics compiled by the author.

²⁴⁸ Averages computed by the author based on data from the *Harvard Law Review's* annual statistical summaries, *supra* note 44.

²⁴⁹ Scalia has averaged ten concurrences over the past nine Terms, with his highest output, nineteen, occurring in the 1993 Term. In contrast, Rehnquist averaged 1.2 for the same period, which included four Terms in which he filed no concurrences. Averages computed by the author based on data from the *Harvard Law Review's* annual statistical summaries, *supra* note 44.

²⁵⁰ *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 512 (2001) (Ginsburg, J., concurring) (per curiam).

misapplied to constrict or distort the next opinion in the jurisprudential line.

The consistent motif in most of Ginsburg's concurrences is her determination to limit the reach of the Court's opinion. In its purest form, she offers this determination as the sole basis for the concurrence, as when she states clearly that "I write separately only to emphasize that we do *not* decide today a question on which the Courts of Appeals remain divided."²⁵¹ She may specify that she "read[s] the Court's decision to leave open"²⁵² a particular question or more precisely "as reserving the question"²⁵³ that concerns her.²⁵⁴ In other cases, she may recognize the implications of the decision and insist that the current posture of the case does not allow the Court to resolve a related issue. For instance, agreeing with the majority that waiver may permit the government to impeach by using statements from plea bargaining negotiations, she noted that use of the same statements "in the case in chief would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining."²⁵⁵ Since the government had not requested the second kind of waiver, "we do not here explore this question."²⁵⁶

Ginsburg's concurrences play variations on this central motif. She "resist[ed] in this case the plea to 'break new ground,'"²⁵⁷ while looking ahead in another case she "note[d]

²⁵¹ *United States v. Alvarez-Sanchez*, 511 U.S. 350, 361 (1994) (Ginsburg, J., concurring).

²⁵² *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 789 (2000) (Ginsburg, J., concurring in the judgment).

²⁵³ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (Ginsburg, J., concurring). *See also* *Reno v. Koray*, 515 U.S. 50, 65 (1995) (Ginsburg, J., concurring) ("The Court thus does not foreclose the possibility that the fundamental fairness we describe as 'due process' calls for notice and a comprehension check.").

²⁵⁴ A particularly striking example of this use occurs in *Harris v. Forklift Systems, Inc.*, a sexual harassment case decided in the autumn of Ginsburg's first Term on the Court, in which she joined Justice O'Connor's majority opinion holding a hostile work environment sufficient to establish a Title VII claim of gender discrimination. 510 U.S. 17 (1993). Adding a brief concurrence, Ginsburg noted in a footnote that "it remains an open question whether 'classifications based on gender are inherently suspect,'" an issue she had litigated vigorously but unsuccessfully earlier in her career. *Id.* at 26 n.* (Ginsburg, J., concurring).

²⁵⁵ *United States v. Mezzanatto*, 513 U.S. 196, 211 (1995) (Ginsburg, J., concurring).

²⁵⁶ *Id.* *See also* *Quality King Distrib., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 154 (1998) (Ginsburg, J., concurring) ("I join the Court's opinion recognizing that we do not today resolve cases in which the allegedly infringing imports were manufactured abroad.").

²⁵⁷ *Albright v. Oliver*, 510 U.S. 266, 281 (1994) (Ginsburg, J., concurring).

that it may be incumbent on the Court, in an appropriate case, to define more precisely" relevant categories beyond those already discussed.²⁵⁸ In one case she insisted that she "would not prejudge the question" arising "when and if" respondents seek review,²⁵⁹ while in another she noted that she would "resist expounding or offering advice on the constitutionality of what Congress might have done, but did not do."²⁶⁰ In a First Amendment case where the Court struck down a state statute prohibiting the circulation of anonymous campaign literature, Ginsburg used her concurrence to anticipate explicitly situations in which the result might well be different: "We do not thereby hold that the State may not, in other, larger circumstances require the speaker to disclose its interest by disclosing its identity."²⁶¹

Ginsburg sometimes makes her insistence on limiting the reach of the Court's opinion the condition for her willingness to join the majority. She may explain her interpretation and note that "[o]n this understanding, I join the Court's opinion,"²⁶² or define "the precise issue" decided and join "[w]ith the caveat that I do not read today's opinion as precedent foreclosing issues not tendered for review."²⁶³ All these variations have in common her tendency to contract an opinion to the narrow issue before the Court and to defer until a more suitable time the exploration of its ramifications. When in a recent case the Court limited tribal court jurisdiction, Ginsburg announced that "I write separately only to emphasize that *Strate v. A-1 Contractors* . . . similarly deferred larger issues."²⁶⁴ Sounding her familiar insistence on limitation, she concluded that "[t]he Court's opinion, as I understand it, does not reach out definitively to answer the jurisdictional questions left open in *Strate*."²⁶⁵

²⁵⁸ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 154 (2000) (Ginsburg, J., concurring).

²⁵⁹ *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 492 (1999) (Ginsburg, J., concurring in part and in the judgment).

²⁶⁰ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 134 (1998) (Ginsburg, J., concurring in the judgment).

²⁶¹ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358 (1995) (Ginsburg, J., concurring).

²⁶² *Edwards v. Balisok*, 520 U.S. 641, 650 (1997) (Ginsburg, J., concurring).

²⁶³ *United States v. Armstrong*, 517 U.S. 456, 471 (1996) (Ginsburg, J., concurring).

²⁶⁴ *Nevada v. Hicks*, 533 U.S. 353, 425 (2001) (Ginsburg, J., concurring).

²⁶⁵ *Id.*

Just as Ginsburg is careful to delineate what the Court is not deciding, she is also at times equally careful to emphasize what she considers the most significant aspects of an opinion she joins. In two concurrences to cases decided in 1996, she used an identical formula to open her separate opinions: "I join the opinion of the Court and highlight features of the case key to my judgment."²⁶⁶ Ginsburg made significantly different use of the emphatic concurrence in *Brogan v. United States*²⁶⁷ when she joined only in the Court's holding that a plain denial of wrongdoing was covered by the federal statute criminalizing false statements made to government investigators. Concurring in the judgment, she conceded that the broad statutory language included such false denials, but she used her opinion to argue at some length a larger point concerning the statute. "I write separately," she explained, "to call attention to the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes."²⁶⁸ The opinion then proceeded to explain the potential for prosecutorial abuse, the legislative history of the statute, government policy covering prosecutions under the statute and proposals for reform.²⁶⁹ It concluded with the observation that "[t]he extensive airing this issue has received, however, may better inform the exercise of Congress' lawmaking authority."²⁷⁰ Her concurrence was a deliberate part of that extensive airing, used as an educational tool to explore in detail the negative consequences of a statute that she felt compelled by its text to interpret as upholding the defendant's conviction.

Ginsburg's use of the concurrence to limit or to emphasize some aspect of the Court's opinion contrasts with her use of majority and dissenting opinions to articulate her favorite themes, which appear infrequently in her concurring opinions. She did, however, on one occasion assert the norm of collegiality, chiding the dissent for its failure to show respect to a state supreme court and for its attack on the trial court,²⁷¹

²⁶⁶ *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring); *Bennis v. Michigan*, 516 U.S. 442, 457 (1996) (Ginsburg, J., concurring). See also *Field v. Mans*, 516 U.S. 59, 78 (1995) (Ginsburg, J., concurring) ("I concur in the Court's opinion and write separately to highlight a causation issue still open for determination on remand.").

²⁶⁷ 522 U.S. 398, 408 (1998) (Ginsburg, J., concurring in the judgment).

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 410-18.

²⁷⁰ *Id.* at 418.

²⁷¹ *Bennis v. Michigan*, 516 U.S. 442, 457 (1996) (Ginsburg, J., concurring).

and in another case she briefly invoked her preference for “real-life examples” as a basis for legal reasoning.²⁷² In two other concurrences she sounded a familiar note of caution, in one case adding “a cautionary note”²⁷³ and in the other agreeing “that it is wise to remand, erring, if at all, on the side of caution.”²⁷⁴

In general, however, the concurrences most often work to place majority opinions in context rather than to address the substance of even the most controversial issues. The companion cases of *Washington v. Glucksberg*²⁷⁵ and *Vacco v. Quill*,²⁷⁶ in which the Court unanimously rejected physician assisted suicide as a substantive due process right, illustrate Ginsburg’s restrained use of the form. Justices O’Connor, Stevens, Souter and Breyer all filed concurring opinions of some length to address the difficult issue before the Court. In contrast, Ginsburg filed a one sentence opinion, applicable to both cases, concurring in the judgments: “I concur in the Court’s judgments in these cases substantially for the reasons stated by Justice O’Connor in her concurring opinion”²⁷⁷ She resisted even the temptation to explain the reservation implied by “substantially,” instead letting her slightly opaque sentence speak for itself.

Ginsburg exhibited similar reserve three years later, when the Court in *Stenberg v. Carhart*²⁷⁸ struck down Nebraska’s statute prohibiting “partial birth abortion” by a vote of five to four; Justice Breyer wrote for the majority, and each of the other eight Justices wrote separately. Ginsburg’s opinion consisted of two paragraphs and opened with characteristic restraint: “I write separately only to stress that amidst all the emotional uproar caused by an abortion case, we should not lose sight of the character of Nebraska’s ‘partial birth abortion’ law.”²⁷⁹ Her opinion consisted largely of a paraphrase of Stevens’s concurrence and of quotations from the majority opinion, from *Planned Parenthood of Southeastern*

²⁷² *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Ginsburg, J., concurring).

²⁷³ *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 41 (1997) (Ginsburg, J., concurring).

²⁷⁴ *Bragdon v. Abbott*, 524 U.S. 624, 656 (1998) (Ginsburg, J., concurring).

²⁷⁵ 521 U.S. 702 (1997).

²⁷⁶ 521 U.S. 793 (1997).

²⁷⁷ *Glucksberg*, 521 U.S. at 789 (Ginsburg, J., concurring in the judgments).

²⁷⁸ 530 U.S. 914 (2000).

²⁷⁹ *Id.* at 951 (Ginsburg, J., concurring).

*Pennsylvania v. Casey*²⁸⁰ and from Chief Judge Posner's Seventh Circuit dissenting opinion on a similar statute.²⁸¹ In combination, these sources served to define an undue burden, and Ginsburg synthesized them, without adding more than a few connective passages in her own words, to conclude that the Nebraska statute created such an unconstitutional obstacle.²⁸² She condensed into this brief opinion her respect for both precedent and a distinguished circuit court colleague, together with her dispassionate approach to the most volatile of issues. Speaking largely through the voices of others, she used her concurrence to distill a consensus based not on emotion but on reasoned judicial discourse.

The preference for restraint that marks the approach and substance of Ginsburg's concurrences is evident as well in their style. These opinions are plainer in language than her other opinions, both majority and dissenting, and less likely to contain metaphorical or colorful language. The concurrences use her signature expressions—mine run, home in on, pathmarking—only a few times.²⁸³ There are also only a few metaphors. In one opinion she doubts that "Congress intended . . . to cast so large a net"²⁸⁴ in drafting its statute, and in another she "would not venture further into the mist surrounding" an unclear statute.²⁸⁵ One of her earliest concurrences included a sustained metaphor comparing a criminal prosecution to a play; the prosecutor is the "principal player," while under the defendant's theory of the case "the star player is exonerated, but the supporting actor is not."²⁸⁶ In one curious exception to her marked tendency to avoid colorful language, Ginsburg used an unusual expression to describe the Court's limited holding: "In for a calf is not always in for a

²⁸⁰ 505 U.S. 833 (1992).

²⁸¹ *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, C.J., dissenting).

²⁸² *Steinberg*, 530 U.S. at 951-52 (Ginsburg, J., concurring).

²⁸³ See *Raygor v. Regents of the Univ. of Minnesota*, 534 U.S. 533, 548 (2002) (Ginsburg, J., concurring in part and in the judgment) (using "pathmarking"); *Saucier v. Katz*, 533 U.S. 194, 210-12 (2001) (Ginsburg, J., concurring) (using "mine run" and "home in on"); *Central State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 129 (1999) (Ginsburg, J., concurring) (using "mine run").

²⁸⁴ *Brogan v. United States*, 522 U.S. 398, 412 (1998).

²⁸⁵ *Raygor*, 534 U.S. at 549.

²⁸⁶ *Albright v. Oliver*, 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J., concurring). The passage also refers to "the police officer's role." *Id.*

cow,"²⁸⁷ apparently a variant of the more familiar "in for a penny, in for a pound."

Otherwise, the concurrences are notable for only two other usages. Acknowledging a change in her position, she quoted Justice Frankfurter's graceful endorsement of such reversals: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."²⁸⁸ Finally, in one of her few attributed literary allusions, she found support for the existence of unintoxicated but still careless drivers in the work of a celebrated American humorist: "It is not only in fiction, see J. Thurber, *The Secret Life of Walter Mitty* (1983) (originally published in *The New Yorker* in 1939), but, sadly, in real life as well, that sober people drive while daydreaming or otherwise failing to pay attention to the road."²⁸⁹ Walter Mitty is a whimsical character, but as invoked in this passage, complete with its double attribution, the reference is somber rather than playful and in keeping with the general tenor of her concurrences.

CONCLUSION

Justice Ginsburg's jurisprudence offers a remarkably precise reflection of her theories of appellate judging. Her opinions consistently follow the path of moderation, avoiding both expansive legal formulations and harsh attacks on those who disagree with her positions. This is not to say that she is driven entirely by the narrowest demands of the case at hand. Her body of work makes clear that there are certain issues on which she holds strong views that inform her approach to cases raising them. These issues include, most prominently: racial discrimination, before the Court in affirmative action, redistricting and desegregation cases; gender discrimination, extending to the use of stereotypes to define or limit any group; fidelity to the rules governing the litigation process as the surest way to protect due process rights; and the role of the federal courts as protectors of constitutional rights. Even in cases raising these issues, Ginsburg refrains from sweeping

²⁸⁷ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358 (1995).

²⁸⁸ *Spencer v. Kemna*, 523 U.S. 1, 22 (1998) (Ginsburg, J., concurring) (quoting *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)).

²⁸⁹ *Montana v. Egelhoff*, 518 U.S. 37, 60 n.1 (1996) (Ginsburg, J., concurring in the judgment).

statements or ringing pronouncements, and she does not provide her readers with a supply of readily quotable passages. Her opinions tend to look inward rather than outward. They are scholarly in tone and likely to contain detailed procedural histories, multiple footnotes and abundant citations to precedent. They are not, however, likely to stake out broad positions that might constrain her options in later cases.

Ginsburg's opinions also consistently demonstrate respect for her colleagues. The tone of even her most strongly argued opinions remains calm, and her criticisms of her opponents, often tucked away in footnotes, are couched in measured language that expresses bewilderment rather than anger or scorn. As someone who has deplored in print the willingness of appellate judges to write separately, she has produced a surprising number of dissents and concurrences on the Supreme Court. Paradoxically, these opinions document her principles of restraint. Her dissents are most often prompted by the majority's failure to follow precedent, to respect the appropriate role of another court or branch of government or to discipline the reach of its opinion. Her concurrences are usually quite short and tend to share a common theme, the limited nature of the majority decision she has joined. These separate opinions are never occasions for fiery attacks or emotional outpourings. Far from seeking to draw attention to herself, she writes to deflect that attention back to the Court's opinion and its failings. She regrets the errors of her colleagues and views it as her judicial responsibility to address them, but she takes no obvious pleasure in the act of divergence.

Finally, Ginsburg's opinions consistently locate her as part of a jurisprudential tradition in which she serves not as an independent actor but as a way paver, a contributor to an ongoing judicial process. Writing for the Court, she feels constrained by precedent and by her allegiance to the institutional values embodied by the Court's past history. Writing separately, she asks whether her colleagues have recognized their duty to subordinate individual views to the broader context in which the Court operates. Her opinions reflect her preference for a cautious approach to legal change and her reluctance to move the Court forward too aggressively. They reflect as well her sense of herself as a member of the select company of Supreme Court Justices who prepare the ground for their successors.

Justice Ginsburg's middle way is an amalgam of these principles. She is dispassionate but not detached, concerned with methodology but committed to a core of strong ideological beliefs, independent but a willing part of the traditions that have shaped the law and her career. Her opinions consistently subordinate the elements of judicial personality—the stylistic and substantive features that distinguish the work of a particular Justice—to a blander, less assertive voice that invites collaboration rather than conflict or competition. As a member of the Court, she pursues a balanced response to “the competing tugs” of caution and principle, of tradition and change, of collegiality and individuality, that she has described as the challenge of the judicial role.