

THE GINSBURG COURT? A CONTRARIAN VIEW

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JUNE 2010: SCENE CHANGE

During the last week of June 2010, the life of Justice Ruth Bader Ginsburg and the history of the U.S. Supreme Court changed forever:

- *June 27*: Justice Ginsburg’s “biggest booster”¹ and larger-than-life² husband, Marty, lost a long bout with cancer.
- *June 28*: Ginsburg returned to the bench to announce an opinion during the final day of the Court’s term.³
- *Hours later*: Justice John Paul Stevens retired, informally elevating Ginsburg to the seniormost position on the more liberal side of the Court.⁴

As if that weren’t enough, just two days later the diminutive New York progressive—clearly still grieving—interviewed and soon hired a lanky conservative law clerk from Kentucky. Unlike the rest of the week’s events, this hiring of an aberrant “counterclerk”—now a baby judge back in the Bluegrass State—would not, far as I know, leave any discernible imprint on history. Though perhaps it should’ve tipped us off: The Court in the 2010s might look a little different than what came before.

On one level, it surely did. The Court, try as it might, rarely escaped the headlines during the ten years between Justice Stevens’s departure in 2010 and Justice Ginsburg’s in 2020. On another level, however, the Court

* Judge, U.S. District Court for the Western District of Kentucky, and law clerk to Justice Ruth Bader Ginsburg during October Term 2011.

1. Michael S. Rosenwald, “My Dearest Ruth”: The Remarkable Devotion of Ruth Bader Ginsburg’s Husband, *Wash. Post* (Oct. 25, 2018), <https://www.washingtonpost.com/history/2018/10/25/my-dearest-ruth-remarkable-devotion-ruth-bader-ginsburgs-husband/> (on file with the *Columbia Law Review*) (quoting then-Judge Ginsburg’s remarks about Marty at the announcement of her Supreme Court nomination).

2. Just a touch of Marty, from the best “About the Author” section you’ll ever read in a leading tax treatise:

Professor Ginsburg is . . . a frequent speaker at tax seminars, mainly in warm climates, and the author of a ghastly number of articles on corporate and partnership taxation, business acquisitions, and other stimulating things. Professor Ginsburg’s spouse was a lawyer before she found better work. Their older child was a lawyer before she became a schoolteacher. The younger child, when he feels grumpy, threatens to become a lawyer.

Martin D. Ginsburg, Jack S. Levin & Donald E. Rocab, *Mergers, Acquisitions, and Buyouts: A Transactional Analysis of the Governing Tax, Legal, and Accounting Considerations*, at v (2019 ed.).

3. *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).

4. Adam Liptak, Justices Bid Farewell on Last Day, *N.Y. Times* (Jun. 28, 2010), <https://www.nytimes.com/2010/06/29/us/29lastday.html> (on file with the *Columbia Law Review*).

largely stayed the course. Even as it became a larger public target during fraught political times, and even as it chalked up one blockbuster-filled “term of the century” after another, the Court’s workaday business and overarching role remained largely consistent. As we mark the passing of a legal legend and a momentous decade for her Court, the conservation of its civility and professionalism is a Burkean victory worth at least two cheers.

Imagine that Supreme Court advocates with a few arguments under their belts—say, a Carter Phillips and a Lisa Blatt—time-traveled from 2010 to 2020. They could walk into the courtroom⁵ without missing a beat; the faces would look different, but the process would not. The same collaborative process of cert-pool memos, handshakes, and untelevised proceedings would’ve led up to the argument. Followed by the same seniority-driven process of lunch, conference, drafting assignments, and (mostly) respectful dissents.

Could we say the same about a Member of Congress transported from 2010 to 2020? A President or Cabinet secretary? I doubt it. As we watched America’s institutional “Take-for-Granted Quotient”⁶ fall far and fast, the Court’s long-standing and largely uncodified norms and conventions did not buckle. The neutral rules of the road, so valuable to our constitutional order and the rule of law, continue to hold—despite an unusually high number of doctrinal challenges inside the Court and public challenges outside the building.

Will this conservation factor into scholars’ assessments of that tumultuous period at the U.S. Supreme Court? The 2010s present something of a paradox. Blockbuster cases emerged that induced fear in this or that camp, yet fizzled as often as not. A “conservative” court delivered many “liberal” results. Personnel uncertainty and turnover persisted. Increasing public attention was unwelcome to Justices who increasingly resemble well-known public figures. And perhaps—by the end—judicial conservatives and liberals alike shared (quietly, mind you) a sliver of common ground: a nagging worry that the Supreme Court might have grown too powerful.

Looking back, how will we refer to this busy ten-year period in the Court’s history? The Roberts Court? Too soon to say. The Kennedy Court? Perhaps, though the period of his outsized influence began well before 2010 and ended before 2020.

5. Not the real courtroom, of course; maybe 2019 would be a better example. Mentioning “Zoom arguments” back in 2010 probably *would’ve* made Carter and Lisa think of time travel.

6. See George Will, *The Morning After: America’s Successes and Excesses, 1981–1986*, at 375–76 (1986). The works of George Will also featured prominently in the counsel I was most well-qualified to give Justice Ginsburg: introducing her to writings on Curt Flood, Marvin Miller, and the infield-fly rule as she prepared to visit Cooperstown, New York, for a trip to the Baseball Hall of Fame (and, ahem, the opera). See George Will, *Bunts* (1998) (sketching Flood and Miller); William S. Stevens, *The Common Law Origins of the Infield Fly Rule*, 123 U. Pa. L. Rev. 1474 (1975).

Who better, then, to signify the Court's paradoxes than late-career Justice Ginsburg: the quiet civil procedure professor turned ubiquitous pop culture icon. She reached the peak of her jurisprudential powers during a decade of transition and turmoil at the Court, bracketed precisely by her husband's and her own sad passings in 2010 and 2020. President Clinton's apparent fallback pick⁷—initially criticized by some on the left for her perceived caution⁸—somehow became the “Notorious RBG,” symbolizing judicial fearlessness while leading an emboldened minority bloc. Yet in my (perhaps idiosyncratic) view, her legacy at the Court reflects more institutionalism than iconoclasm. Now *that* is what you call a paradox. Welcome to—the Ginsburg Court?⁹

1993 TO 2010: SETTING THE STAGE

That fateful week back in June 2010 marked the turning of an important page in Supreme Court history. Stevens's exit was the last of the five Nixon/Ford appointees, whose shifting coalition-building and on-again/off-again bromance with their Warren Court predecessors was lionized (or perhaps indicted) in the 1980 bestseller, *The Brethren*.¹⁰ While that insider's account was flying off the shelves of D.C. bookstores,¹¹ the fraternal term that supplied its title—long used self-referentially—quietly disappeared from Supreme Court opinions.¹² The Justices retired it in anticipation of the overdue arrival of a woman at the highest court in the land. They were right, and timely; Justice O'Connor would soon join their club. But what gumshoe reporter back then would've predicted that another trailblazer—a quiet feminist litigator newly confirmed to the

7. See Richard L. Berke, Clinton Names Ruth Ginsburg, Advocate for Women, to Court, *N.Y. Times* (June 15, 1993), <https://www.nytimes.com/1993/06/15/us/supreme-court-overview-clinton-names-ruth-ginsburg-advocate-for-women-court.html> (on file with the *Columbia Law Review*).

8. See Nikki Schwab, Clinton-Era Memo Outlines Ruth Bader Ginsburg's 'Style Problems', *U.S. News & World Rep.* (July 18, 2014), <https://www.usnews.com/news/blogs/washington-whispers/2014/07/18/clinton-era-memo-outlines-ruth-bader-ginsburgs-style-problems> [<https://perma.cc/S58X-VA6B>].

9. The only reference to a “Ginsburg Court” of which I'm aware takes a substantive rather than institutional approach, unlike this Article, and paints the picture of an alternative constitutional jurisprudence circa 2003 that looks quite different from ours today. See James A. Kushner, Introducing Ruth Bader Ginsburg and Predicting the Performance of a Ginsburg Court, 32 *Sw. U. L. Rev.* 181, 185–88 (2003).

10. See Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* 312 (1979) (“The remnants of the Warren Court, so hated by Nixon, and the emerging Nixon Court, so hated by both Warren and Brennan, had banded together . . .”).

11. See Victor S. Navasky, *The Selling of the Brethren*, 89 *Yale L.J.* 1028, 1028 (1980) (contrasting the critical reaction of the Supreme Court bar with the enthusiastic reaction of the reading public).

12. Josh Blackman, *The Use of the Term “Brother” and “Brethren” in Supreme Court Opinions*, *Josh Blackman's Blog* (Feb. 28, 2011), <http://joshblackman.com/blog/2011/02/28/the-use-of-the-term-brother-and-brethren-in-supreme-court-opinions> [<https://perma.cc/2JY9-MT75>] (describing the rapid disappearance of this phrasing around 1980–1981).

Court of Appeals—would overshadow so many of her taller colleagues thirty years later?

Ruth Bader Ginsburg would not make the short trip up Constitution Avenue from the D.C. Circuit until 1993. And her first seventeen years at the Supreme Court represented a time of remarkable continuity. The Rehnquist/O'Connor Court set historical records for stability in membership (no new blood for eleven years after Breyer's arrival the next year¹³), doctrinal focus (federalism and sentencing “revolutions”¹⁴), and predictability.¹⁵

True, the era had its share of “Nino being Nino” moments.¹⁶ But overall the conference operated with remarkable consistency in its rhythms and rules: Advocates knew they couldn't lose O'Connor's vote, the Chief Justice would end court as soon as the light turned red, and the Court would adjourn before July. With a few notable exceptions—*Bush v. Gore*,¹⁷ *Lawrence v. Texas*,¹⁸ *District of Columbia v. Heller*,¹⁹ the Guantanamo Bay cases²⁰—by the end of June, year after year, the Court would crank out performances worth watching, though not that many blockbusters.

2010–2020: CRESCENDO INSIDE THE COURTHOUSE

That millennial stability could not last forever. Skip ahead to the summer of 2010—past the first few Roberts years—and cracks begin to show. The following decade—Ginsburg's last—was jam-packed: three new justices (four if we count Sotomayor finishing her first partial term), epic confirmation fights, multiple media-anointed “terms of the century,”²¹ substantial doctrinal uncertainty, and the rise of hyper-focused and

13. Linda Greenhouse, Change and Continuity on the Supreme Court, 25 Wash. U. J.L. & Pol'y 39, 39 (2007) (“The eleven years without personnel change, from 1994 until 2005, made this the longest ‘natural court’ . . . since the 1820s.”).

14. See generally Erwin Chemerinsky, The Federalism Revolution, 31 N.M. L. Rev. 7 (2001) (describing the “Federalism Revolution”); Douglas A. Berman, Beyond *Blakeley* and *Booker*: Pondering Modern Sentencing Process, 95 J. Crim. Law & Criminology 653, 654 (2005) (“The Sentencing Revolution”).

15. See, e.g., Mark Klock, Cooperation and Division: An Empirical Analysis of Voting Similarities and Differences During the Stable Rehnquist Court Era—1994 to 2005, 22 Cornell J.L. & Pub. Pol'y 537, 539 (2013) (measuring a 4-2-3 voting distribution and noting that “[w]hich Justices fall into which category will not come as a surprise to legal scholars”); Lawrence Sirovich, A Pattern Analysis of the Second Rehnquist U.S. Supreme Court, 100 Proc. Nat'l Acad. Science 7432, 7433 (2003) (identifying dominant patterns in voting distribution between 1995 and 2002).

16. Robert Draper, The Pariah, GQ (May 1, 2009), <https://www.gq.com/story/david-souter-supreme-court-robert-draper> [<https://perma.cc/V6QB-VBRV>] (quoting Justice Souter).

17. 531 U.S. 98 (2000).

18. 539 U.S. 558 (2003).

19. 554 U.S. 570 (2008).

20. *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

21. See *infra* note 27 and accompanying text.

celebrity-style coverage in the media (be it mainstream, internet, or social).

As we begin to look back on Justice Ginsburg's legacy and the Court's journey during the 2010s, one thing stands out to even the casual court-watcher: the sheer frequency of major cases and developments at One First Street. Whether newsworthiness spiked because of "energetic executive[s]," lack of "legislat[ive] . . . promptitude of decision," or perceived "superiority of the judiciary" is an important question that, to my knowledge, remains unanswered.²² What I do know is that the Court always seemed to have just granted, heard, or decided another potential blockbuster.

The frequency with which such major areas of the law came up for reconsideration—even if the Court ultimately stayed the course, dodged the question, or restored the law—remains remarkable. (Particularly considering the simultaneous shrinkage of the certiorari docket.²³) If we could plot the Court's activity on a jurisprudential Richter scale, the magnitude of the needle's peaks and troughs might prove less interesting than the rapidity and persistence of its movement across such an extended period. To paraphrase Lin-Manuel Miranda, these Justices were *Non-Stop!*²⁴

To test my intuition, I took an unscientific sample. (Yes, I will grant your *Daubert* motion,²⁵ but at least allow me my proffer.) Jotting down a list of cases that stood out at the time as potential blockbusters produced forty-seven, across the ten terms between October Term 2010 and October Term 2019.²⁶ The list surely could have run longer. Remarkably, no fewer than five of those nine terms (each marked with an asterisk below)

22. The Federalist Nos. 70, 78, at 423, 426, 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

23. To oversimplify, since approximately 2005, the Justices are writing more and longer opinions in fewer and fewer cases. See generally Meg Penrose, *Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket*, 72 SMU L. Rev. Forum 8 (2019); Meg Penrose, *Supreme Verbosity: The Roberts Court's Expanding Legacy*, 102 Marq. L. Rev. 167 (2018).

24. See Lin-Manuel Miranda, *Non-Stop*, on Hamilton (Atlantic Records 2015). Why the Justices "write like they're running out of time," however, remains perfectly clear: The Court continues to (almost always) break for summer before July.

25. See *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579, 579–80 (1993).

26. These cases addressed questions whose importance to the legal system, the public, and often both exceeded that of your standard cert grant by a large margin. Nothing more should be read into the selections: We lower-court judges learned well from Justices Ginsburg and Kagan, among others, not to grade the Supreme Court's work. See, e.g., *Hearing on the Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 124* (2010) (statement of then-Solicitor General Kagan in response to questioning by Sen. Grassley) ("[M]y approach in these hearings has been not to grade cases, even if I thought I had the wherewithal to grade them, which I'm not sure I do . . .").

achieved once-coveted, now-commonplace “term of the century” status, according to at least some contemporaneous commentators.²⁷

| 2010 | |
|--------------------------------|---|
| Free Speech | <i>Snyder v. Phelps</i> , 562 U.S. 443 <i>Brown v. Ent. Merchs. Ass’n</i> , 564 U.S. 786 |
| 2011* | |
| Affordable Care Act | <i>NFIB v. Sebelius</i> , 567 U.S. 519 |
| Habeas/Ineffective Assistance | <i>Martinez v. Ryan</i> , 566 U.S. 1 <i>Maples v. Thomas</i> , 565 U.S. 266 |
| Immigration/Federalism | <i>Arizona v. United States</i> , 567 U.S. 387 |
| Labor Unions/Free Speech | <i>Knox v. Serv. Emps. Int’l Union, Local 1000</i> , 567 U.S. 298 |
| Religious Freedom | <i>Hosanna-Tabor Evangelical Church & Sch. v. EEOC</i> , 565 U.S. 171 |
| Search & Seizure (GPS Tracker) | <i>United States v. Jones</i> , 565 U.S. 400 |

27. **2011:** Adam Liptak, A Significant Term, with Bigger Cases Ahead, N.Y. Times (Jun. 28, 2011), <https://www.nytimes.com/2011/06/29/us/29scotus.html> (on file with the *Columbia Law Review*) (quoting Tom Goldstein); Bill Mears, Justice Ginsburg Suggests ‘Sharp Disagreement’ over Hot-Button Cases, CNN (Jun. 16, 2012), <https://www.cnn.com/2012/06/15/us/scotus-ginsburg-health-care/index.html> [<https://perma.cc/3TQ8-4UAS>] (“The term has been more than usually taxing[;] some have called it the term of the century.” (internal quotation marks omitted) (quoting Ginsburg)).

2012: Chantal Valery, U.S. Supreme Court Readies Historic Rulings, Const. Accountability Ctr. (May 11, 2013), <https://www.theconstitution.org/news/us-supreme-court-readies-historic-rulings> [<https://perma.cc/R8SU-2C8X>] (“Everyone thought that last term was the term of the century because of the health care arguments But this term might be even more historic” (internal quotation marks omitted) (quoting Elizabeth Wydra)).

2014: Adam Liptak, Supreme Court’s Robust New Session Could Define Legacy of Chief Justice, N.Y. Times (Oct. 4, 2014), <https://www.nytimes.com/2014/10/05/us/supreme-courts-robust-new-session-could-define-legacy-of-chief-justice.html> (on file with the *Columbia Law Review*) (quoting Pratik Shah); Press Release, Center for American Progress, CAP to Hold Panel on What Is at Stake for Remainder of Supreme Court Term (Jun. 2, 2015), <https://www.americanprogress.org/press/advisory/2015/06/02/114136/advisory-cap-to-hold-panel-on-what-is-at-stake-for-remainder-of-supreme-court-term> [<https://perma.cc/XUX9-X3Z9>].

2016: Dahlia Lithwick, Order in the Court!, Slate (Feb. 23, 2016), <https://slate.com/news-and-politics/2016/02/john-roberts-will-not-let-there-be-chaos-at-the-supreme-court.html> [<https://perma.cc/ED3J-87XF>].

2017: Q&A: Supreme Court Returns to Work After Relatively Low-Key Term, Carolina J. (Oct. 13, 2017), <https://www.carolinajournal.com/news-article/qa-supreme-court-returns-to-work-after-relatively-low-key-term> [<https://perma.cc/X68C-FFD8>] (interview with Ilya Shapiro).

| 2012* | |
|---|--|
| Affirmative Action/ Equal Protection | <i>Fisher v. Univ. of Tex. at Austin (Fisher I)</i> , 570 U.S. 297 |
| International Law | <i>Kiobel v. Royal Dutch Petroleum Co.</i> , 569 U.S. 108 |
| LGBT Rights/ Federalism | <i>Hollingsworth v. Perry</i> , 570 U.S. 693 <i>United States v. Windsor</i> , 570 U.S. 744 |
| Voting Rights Act | <i>Shelby County v. Holder</i> , 570 U.S. 529 |
| 2013 | |
| Abortion/Free Speech | <i>McCullen v. Coakley</i> , 573 U.S. 464 |
| Affirmative Action/ Federalism | <i>Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)</i> , 572 U.S. 291 |
| Establishment Clause | <i>Town of Greece v. Galloway</i> , 572 U.S. 565 |
| Labor Unions/Free Speech | <i>Harris v. Quinn</i> , 573 U.S. 616 |
| Recess Appointments | <i>NLRB v. Noel Canning</i> , 573 U.S. 513 |
| Religious Freedom | <i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 |
| Treaty Power | <i>Bond v. United States</i> , 572 U.S. 844 |
| 2014* | |
| Affordable Care Act | <i>King v. Burwell</i> , 576 U.S. 473 |
| Death Penalty | <i>Glossip v. Gross</i> , 576 U.S. 863 |
| LGBT Rights/ Federalism | <i>Obergefell v. Hodges</i> , 576 U.S. 644 |
| Redistricting/Federalism | <i>Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n</i> , 576 U.S. 787 |
| Search & Seizure (Cell Phone) | <i>Riley v. California</i> , 573 U.S. 373 |
| 2015 | |
| Abortion | <i>Whole Woman's Health v. Hellerstedt</i> , 136 S. Ct. 2292 |
| Affirmative Action/ Equal Protection | <i>Fisher v. Univ. of Tex. at Austin (Fisher II)</i> , 136 S. Ct. 2198 |
| Immigration | <i>United States v. Texas</i> , 136 S. Ct. 2271 |

| 2016* | |
|-------------------------------|--|
| Free Exercise Clause | <i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S. Ct. 2012 |
| Labor Unions/Free Speech | <i>Friedrichs v. Cal. Teachers Ass'n</i> , 136 S. Ct. 1083 |
| 2017* | |
| Abortion | <i>Nat'l Inst. of Family & Life Advocates v. Becerra</i> , 138 S. Ct. 2361 |
| Immigration | <i>Trump v. Hawaii</i> , 138 S. Ct. 2392 |
| Labor Unions/Free Speech | <i>Janus v. AFSCME, Council 31</i> , 138 S. Ct. 2448 |
| LGBT Rights/Free Exercise | <i>Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n</i> , 138 S. Ct. 1719 |
| Redistricting | <i>Gill v. Whitford</i> , 138 S. Ct. 1916 |
| Search & Seizure (Cell Phone) | <i>Carpenter v. United States</i> , 138 S. Ct. 2206 |
| State Taxes | <i>South Dakota v. Wayfair, Inc.</i> , 138 S. Ct. 2080 |
| 2018 | |
| Agency Deference | <i>Kisor v. Wilkie</i> , 139 S. Ct. 2400 |
| Census | <i>Dep't of Com. v. New York</i> , 139 S. Ct. 2551 |
| Nondelegation Doctrine | <i>Gundy v. United States</i> , 139 S. Ct. 2116 |
| Redistricting | <i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 |
| 2019 | |
| Abortion | <i>June Med. Servs., L.L.C. v. Russo</i> , 140 S. Ct. 2103 |
| Census | <i>Trump v. New York</i> , 141 S. Ct. 530 |
| COVID-19/Free Exercise | <i>S. Bay Utd. Pentecostal Church v. Newsom</i> , 140 S. Ct. 1613 |
| Electoral College | <i>Chiafalo v. Washington</i> , 140 S. Ct. 2316 |
| Immigration (DACA) | <i>Dep't of Homeland Sec. v. Regents of the Univ. of Cal.</i> , 140 S. Ct. 1891 |
| LGBT Rights/Employment | <i>Bostock v. Clayton County</i> , 140 S. Ct. 1731 |
| Presidential Immunity | <i>Trump v. Vance</i> , 140 S. Ct. 2412 |
| Separation of Powers | <i>Trump v. Mazars</i> , 140 S. Ct. 2019 |

That docket is exhausting for a forty-year-old to review—not to mention for eightyish-year-olds to decide. And over time, persistently high stakes must surely take a toll on nerves and relationships.

2010–2020: CRESCENDO OUTSIDE THE COURTHOUSE

The list above, moreover, only accounts for those stressors native to the Court's own (carefully curated) docket. Now add to it the 2010s' many external (or at least non-case-related) shocks to the system: a State of the Union controversy,²⁸ high-profile leaks,²⁹ Justice Scalia's sudden death, other health scares, four nominations, three confirmations, increasing attention in the media and on the campaign trail, party-line confirmation votes and the rise and fall of the filibuster in the Senate,³⁰ an increasingly active "shadow docket" of non-argued and non-merits decisions,³¹ and an impeachment trial to boot.

Even if no single event shattered the Court's health, the repeated trauma must've left scar tissue. To borrow a morbid football example, head injuries can come from one violent concussion *or* from repeated low-impact hits.³² Few would doubt that the Court's bruising decade affected the Justices individually and collectively—not to mention their relationship with the other branches of government, the media, the academy, the bar, and the broader public.³³

28. See Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. Times (Jan. 28, 2010), <https://www.nytimes.com/2010/01/29/us/politics/29scotus.html> (on file with the *Columbia Law Review*).

29. See, e.g., Joan Biskupic, *Behind Closed Doors During One of John Roberts' Most Surprising Years on the Supreme Court*, CNN (July 27, 2020), <https://www.cnn.com/2020/07/27/politics/john-roberts-supreme-court-liberals-daca-second-amendment/index.html> [<https://perma.cc/R7DT-LGHX>].

30. See Carl Hulse, *Should Democrats Have Saved Their Filibuster for the New Court Fight?*, N.Y. Times (July 14, 2018), <https://www.nytimes.com/2018/07/14/us/politics/supreme-court-filibuster.html> (on file with the *Columbia Law Review*).

31. See William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 3–5 (2015).

32. Cf. *Gilchrist v. Nat'l Football League*, 137 S. Ct. 591, 591 (2016) (mem.) (denying certiorari to *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016)).

33. Certainly the legal academy—or at least many prominent voices and platforms among it—has not shied away from the theme of a legitimacy crisis. See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 Yale L.J. 148 (2019) (“Recent events have already taken a toll on perceptions of the Court’s legitimacy” and “gravely threate[n] the Court’s legitimacy”); Michael J. Klarman, *The Degradation of American Democracy—and the Court*, 134 Harv. L. Rev. 1 (2020) (“canvass[ing] the Supreme Court’s contribution to” the “recent degradation of American democracy”); David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. L. Legis. & Pub. Pol’y 949 (2019) (“[L]iberal commentators have been pondering tactics such as impeachment, jurisdiction stripping, and especially ‘packing the court’ to a degree that would have been unthinkable a few years ago.”).

Take another example from a particularly taxing time: October 2018, in the immediate aftermath of Justice Kavanaugh's confirmation. If you glanced at the headlines on *How Appealing*,³⁴ as I do most every day, some of the nation's most prominent mouthpieces declared the precariousness of the Court's position:

- *Slate*: "The Supreme Court Is a Historically Regressive and Presently Expendable Institution."³⁵
- *Washington Post*: "Stop Pretending Everything Is Okay" [previously titled: "The Supreme Court Celebrates Its Own Corruption"].³⁶
- Dahlia Lithwick: "America's Compromised Supreme Court."³⁷
- Professor Eric Segall: "A Supremely Dark Future."³⁸
- *USA Today*: "Witches Plan to Hex Brett Kavanaugh Using Effigies, Coffin Nails, Graveyard Dirt and More."³⁹

RECURRING THEMES

But as politicians and press outside the courthouse decried the Court as a fundamentally broken institution, a strange thing happened inside the building: The Court's work continued, steadily and professionally. Alongside the outsider critiques, *How Appealing* featured other headlines—largely from insider perspectives focused on the day-to-day docket—which told quite a different story:

- *Bloomberg*: "Supreme Court Shakes Hands and Goes Back to Work: The Justices Welcome Kavanaugh with Rituals Totally Unlike His Raucous Confirmation."⁴⁰

34. *How Appealing, Above the Law*, <https://howappealing.abovethelaw.com> [<https://perma.cc/8NWK-WSZJ>] (last visited Mar. 4, 2021).

35. Christopher Jon Sprigman, *The Supreme Court Is a Historically Regressive and Presently Expendable Institution*, *Slate* (Oct. 11, 2018), <https://slate.com/news-and-politics/2018/10/supreme-court-bad-history-reform.html> [<https://perma.cc/2NMX-FUU6>].

36. Molly Roberts, *Opinion, Stop Pretending Everything Is Okay*, *Wash. Post* (Oct. 11, 2018), <https://www.washingtonpost.com/blogs/post-partisan/wp/2018/10/11/the-supreme-court-celebrates-its-own-corruption> (on file with the *Columbia Law Review*).

37. Dahlia Lithwick, *America's Compromised Supreme Court*, *Prospect* (Oct. 12, 2018), <https://www.prospectmagazine.co.uk/magazine/americas-compromised-supreme-court-trump-kavanaugh> [<https://perma.cc/5XJB-6KGN>].

38. Eric Segall, *A Supremely Dark Future*, *Dorf on Law* (Oct. 8, 2018), <http://www.dorfonlaw.org/2018/10/a-supremely-dark-future.html> [<https://perma.cc/26NQ-5JUS>].

39. Joel Shannon, *Witches Plan to Hex Brett Kavanaugh Using Effigies, Coffin Nails, Graveyard Dirt and More*, *USA Today* (Oct. 13, 2018), <https://www.usatoday.com/story/news/nation-now/2018/10/13/witches-brooklyn-plan-hex-brett-kavanaugh/1630491002> [<https://perma.cc/BS8F-GJDQ>] (last updated Oct. 19, 2018).

40. Noah Feldman, *Supreme Court Shakes Hands and Goes Back to Work*, *Bloomberg* (Oct. 9, 2018), <https://www.bloomberg.com/opinion/articles/2018-10-09/kavanaugh-s-first-day-at-supreme-court-is-filled-with-courtesy> (on file with the *Columbia Law Review*).

- *Slate*: “Brett Kavanaugh’s First Day on the Bench Was Disturbingly Normal.”⁴¹
- *Washington Post*: “At Kavanaugh’s Supreme Court Debut, Protesters Outside, Business as Usual Inside.”⁴²
- *USA Today*: “Brett Kavanaugh’s First Day on the Supreme Court Bench Includes Warm Welcome—and Some Pinching.”⁴³
- *Reuters*: “For Kavanaugh, a Collegial Start to Supreme Court Career.”⁴⁴

That doesn’t sound much like a Court or Constitution in crisis. More like reports that could apply to cert grants, oral arguments, and opinions back in the 2000s, or the ’90s, or the ’80s. Collegial colleagues shook hands in the robing room, took the bench in seniority order, offered their typical wish for their new colleague’s “long and happy career in [their] common calling,” and unpacked the Armed Career Criminal Act.⁴⁵ Justice Ginsburg, for her part, described her new colleagues (Kavanaugh and Gorsuch) as “very decent and very smart.”⁴⁶ Two years later, after another death, confirmation, and election, the Court appears ready to carry on in much the same way.⁴⁷

41. Mark Joseph Stern, Brett Kavanaugh’s First Day on the Bench Was Disturbingly Normal, *Slate* (Oct. 9, 2018), <https://slate.com/news-and-politics/2018/10/brett-kavanaugh-supreme-court-first-day-2018.html> [<https://perma.cc/B7NK-68UN>].

42. Robert Barnes, Ann E. Marimow & Marissa J. Lang, At Kavanaugh’s Supreme Court Debut, Protesters Outside, Business as Usual Inside, *Wash. Post* (Oct. 9, 2018), https://www.washingtonpost.com/politics/courts_law/at-kavanaughs-supreme-court-debut-protesters-outside-business-as-usual-inside/2018/10/09/34b0afb2-cbdf-11e8-920f-dd52e1ae4570_story.html (on file with the *Columbia Law Review*).

43. Richard Wolf, Brett Kavanaugh’s First Day on the Supreme Court Bench Includes Warm Welcome—and Some Pinching, *USA Today* (Oct. 9, 2018), <https://www.usatoday.com/story/news/politics/2018/10/09/brett-kavanaugh-first-day-supreme-court/1577871002> [<https://perma.cc/GF7B-LVYK>]. The most unusual thing about that day’s argument was Justice Sotomayor’s pantomime pinch of Justice Gorsuch, who gamely played along to illustrate her point about “sufficient force” under the Armed Career Criminal Act. *Id.*

44. Andrew Chung & Lawrence Hurley, For Kavanaugh, a Collegial Start to Supreme Court Career, *Reuters* (Oct. 9, 2018), <https://www.reuters.com/article/us-usa-court-kavanaugh/for-kavanaugh-a-collegial-start-to-supreme-court-career-idUSKCN1MJ0ZM> (on file with the *Columbia Law Review*).

45. *Id.*

46. Ginsburg offered particular praise for Kavanaugh’s hiring of an all-female group of law clerks during his first term, which led to the full Court’s first majority-female slate of law clerks. See Amy Russo, Ruth Bader Ginsburg Praises Kavanaugh and Gorsuch as “Very Decent and Very Smart”, *HuffPost* (July 26, 2019), https://www.huffpost.com/entry/ruth-bader-ginsburg-praises-kavanaugh-gorsuch-very-decent-smart_n_5d3b2dbce4b0c31569ea744d [<https://perma.cc/XE9Q-C4ML>].

47. Except Justice Barrett’s first day of arguments occurred virtually due to COVID-19, of course. See, e.g., Adam Liptak, Justice Amy Coney Barrett Hears Her First Supreme Court Argument, *N.Y. Times* (Nov. 2, 2020), <https://www.nytimes.com/2020/11/02/us/politics/amy-coney-barrett-supreme-court.html> (on file with the *Columbia Law Review*) (last updated Nov. 26, 2020) (discussing Justice Barrett’s Freedom of Information Act rules-versus-standards questions posed to Assistant to the Solicitor General Matt Guarnieri).

To be sure, the law has not remained in equilibrium. Though neither has it changed as much as partisans on either side might've predicted in 2010. Despite persistent sirens, *Casey*,⁴⁸ the nondelegation doctrine, qualified immunity, *NFIB v. Sebelius*,⁴⁹ *Grutter/Gratz*,⁵⁰ *Chevron*,⁵¹ and even *Auer*⁵² still stand in some form or fashion. Let the empiricists debate whose regression best captures the Court's ideological valence (or its commitment to stare decisis, or its minimalism, or its maximalism, and on and on). Regardless, the *process* for interpreting the law in cases and controversies—typical certiorari standards, apolitical arguments, specialized appellate counsel, judiciously phrased opinions, professionally respectful dissents—largely has stayed the course.⁵³ This despite a decade of warnings that the Court had or would become a “compromised” partisan institution.⁵⁴ How many times did we hear how this or that precedent would be toast if Judge X became Justice X? Yet the most significant decision as the decade wound down was perhaps *Bostock v. Clayton County*.⁵⁵

Whether the decision is *Bostock*⁵⁶ or *Hobby Lobby*,⁵⁷ however, the Supreme Court's handiwork still depends on widespread acceptance—necessary to effectuate the rulings of a judiciary that famously has neither force nor will, but merely judgment.⁵⁸ Maintaining the real and perceived neutrality of the Court's rules is hugely significant outside the court. And the quickest way to lose the public's trust is for those on the inside to cry foul. Yet it would be practically unimaginable today for the Solicitor General of, say, California or Texas, or the Trump or Biden DOJ (much less a Justice) to blame a loss on a “corrupt” and “compromised” Supreme Court.

Among rule-of-law conservatives, liberals, and moderates who cherish the role of our independent judiciary, the situation is better than it might have been after such a disruptive decade. During that time frame we have

48. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

49. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

50. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

51. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

52. *Auer v. Robbins*, 519 U.S. 452 (1997).

53. The intensification of the Court's “shadow docket” activity might supply a confounding variable. Though the attention given this fraction of the Court's overall output may prove the point: Most developments at the Court have not been revolutionary, but rather incremental and perhaps even timebound.

54. See *supra* notes 35–39.

55. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) (holding that Title VII prohibits dismissing a gay or transgender employee based on that status).

56. *Id.*

57. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

58. See Ruth Bader Ginsburg, *Madison Lecture: Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1186 (1992) [hereinafter *Madison Lecture*] (“Mindful of th[e] reality” that “judges hold neither the sword nor the purse of the community,” Justice Ginsburg explained, “the effective judge . . . strives to persuade, and not to pontificate.” (citing *The Federalist No. 78*, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

learned many lessons about institutions and fragility. To be clear, this is not to say that the 2010s Court always colored within the lines. But its preservation of those lines shouldn't be underestimated as we look back—or taken for granted as we look ahead.

A LESS NOTORIOUS DIVA?

How does Ginsburg the Justice fit into this story of a Ginsburg Court? She began the decade known primarily to the legal world: as a civil procedure specialist, women's rights hero (based significantly on her pre-judicial career), opera buff, and one half of an odd-couple friendship with the better-known and more notorious Justice Scalia.

She ended the decade known the world over: as a constitutional law maven, progressive hero, never-ending source of memes, recurring *Saturday Night Live* character, two-time feature-film subject, weight-lifting “super diva,”⁵⁹ and one of the Court's Great Dissenters alongside her friend Nino.⁶⁰ Through RBG, the Court was back on bumper stickers—though for a never-before-seen reason.⁶¹ A truly stunning turn of events, culminating in perhaps the most august sendoff ever afforded an American woman.⁶²

Following Justice Stevens's departure, her jurisprudential influence peaked. Justice Ginsburg led a group of four who often managed to count to five. When they fell short, she owned the “I dissent” lane so completely that we all now know what a “jabot” is (if not how to pronounce it). This new pop culture icon even achieved, for some, a quasi-religious status:

59. Thanks to her trainer-turned-author Bryant Johnson and the intrepid Stephen Colbert, millions of Americans now know about Justice Ginsburg's evening courthouse workouts and “Super Diva” sweatsuits. See Sarah Polus, The Meaning Behind That “‘Super Diva!’” Sweatshirt and Other Revelations from RBG's Personal Trainer, *Wash. Post* (Oct. 25, 2017), <https://www.washingtonpost.com/news/reliable-source/wp/2017/10/25/the-meaning-behind-that-super-diva-sweatshirt-and-other-revelations-from-rbgs-personal-trainer> (on file with the *Columbia Law Review*); Yohana Desta, See Ruth Bader Ginsburg Barely Tolerate a Workout with Stephen Colbert, *Vanity Fair* (Mar. 22, 2018), <https://www.vanityfair.com/hollywood/2018/03/ruth-bader-ginsburg-workout-stephen-colbert> (on file with the *Columbia Law Review*). Ginsburg's oft-expressed desire to become an operatic diva is easy enough for any late-night viewer to grasp. Interrupting her late-night workouts in order to discuss emergency appeals in the Supreme Court gym, however, was really something else.

60. See Sara Aridi, How Ruth Bader Ginsburg Lives on in Pop Culture, *N.Y. Times* (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/at-home/ruth-bader-ginsburg-pop-culture-rbg.html> (on file with the *Columbia Law Review*) (last updated Oct. 15, 2020).

61. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, Opinion, Impeachment's Trickle-Down Effect, *N.Y. Times* (Jan. 18, 1999), <https://www.nytimes.com/1999/01/18/opinion/impeachments-trickledown-effect.html> (on file with the *Columbia Law Review*) (describing repercussions of “Impeach Earl Warren” bumper stickers and billboards).

62. See Capturing How Ruth Bader Ginsburg Was Honored in Washington, *N.Y. Times* (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/us/politics/ruth-bader-ginsburg-mourning.html> (on file with the *Columbia Law Review*) (last updated Sept. 25, 2020). How fitting for the law school valedictorian whom the legal profession shunned before she turned the tables.

Adults could fall to tears at the mere sight of Justice Ginsburg entering a crowded room.⁶³

And she of course picked up an epic rap nickname. To media producers, sidewalk peddlers, and sticker-clad law-student laptops, this arranged marriage of Brooklyn jurist and rapper proved irresistible. The Notorious RBG persona emphasized a steadfast resistance to a perceived right-leaning court, an unmuzzled voice (you “can’t spell truth without Ruth,” after all), and an ironic grandmotherly bravado. The conceit suggested a Justice whose impact may have waned inside an increasingly conservative Court, even as it waxed in the outside world.⁶⁴

My mildly contrarian take, however, is that the principal legacy of the would-be diva and her Court is not judicial celebrity, but judicial continuity. Unlike a rather more distinguished Ginsburg clerk, I’m not prepared to argue the case that she was “conservative” by any conventional measure.⁶⁵ But the public record includes several ways in which she proved more of an institutionalist than an iconoclast—even at the height of the Notorious RBG wave.

ICON, ICONOCLAST, INSTITUTIONALIST?

Indeed, Ginsburg’s institutionalism was a big reason that meme was funny: She had spent years with her head tilted down, tending to the Court’s work deep into the night—searching furiously and expertly to nail just the right word and syntax. The legal world knew her for her halting speaking style, fast opinion writing, and immense command of procedure. To be sure, she could be an *outspoken* institutionalist,⁶⁶ as could her friend Scalia. But the Notorious RBG dissenter motif spread so far, so fast, that I

63. True story! This occurred at the Sustained Dialogue Institute’s National Dialogue Award Ceremony, held at the National Press Club on November 29, 2016. See Ferdous Al-Faruque, Supreme Court Justice Ginsburg Calls for ‘Sustained Dialogue’ to Calm Political Climate, Nat’l Press Club (Nov. 29, 2016), <https://www.press.org/newsroom/supreme-court-justice-ginsburg-calls-sustained-dialogue-calm-political-climate> [<https://perma.cc/P7CF-TMUZ>]. During the event, Ginsburg called for “sustained dialogue and not shouting matches.” *Id.*

64. Though the aptness of the comparison remains in question. At least to this child of the 1990s, there’s more than a little tension in juxtaposing a distinguished feminist judge and a rapper whose lyrics did not always, shall we say, celebrate women and the rule of law.

65. See David M. Schizer, Opinion, The Conservative Legacy of Ruth Bader Ginsburg, *Newsweek* (Sept. 23, 2020), <https://www.newsweek.com/conservative-legacy-ruth-bader-ginsburg-opinion-1533831> [<https://perma.cc/R24L-NYMJ>].

66. For example, she prudently walked back controversial comments in 2016, including about former NFL quarterback Colin Kaepernick’s decision to kneel in protest during the national anthem. “[M]y comments were inappropriately dismissive and harsh,” Ginsburg explained. “I should have declined to respond.” See Adam Liptak, Ruth Bader Ginsburg Regrets Speaking Out About Colin Kaepernick, *N.Y. Times* (Oct. 14, 2016), <https://www.nytimes.com/2016/10/15/us/ruth-bader-ginsburg-colin-kaepernick-national-anthem.html> (on file with the *Columbia Law Review*).

can't help but worry it will displace some of this legacy. From my perspective, at least, that would not faithfully mark the path of her time on the bench. Rather, she was widely known and respected, regardless of ideological stripe, for embodying several aspects of the civility, professionalism, and collegiality that brought the Court largely unscathed through a decade that could've fractured its cohesiveness.

First, her speed. Like so much of the Court's work, this occurred largely behind the scenes but produced tangible public benefits. She typically (and proudly) authored the first opinion the Court published each term. That pace did not relent as the Term progressed. Her opinion drafting helped keep the Court's work on track and mitigated friction-inducing June pile-ups.

Second, her edits. She proposed clarifying and tightening revisions to her colleagues' draft opinions, policing inadvertent impacts on lower courts and litigants while earning trust and appreciation from her colleagues.⁶⁷ "Ruth's . . . the only" Justice, according to Scalia, "from whom I recall regularly receiving comments for improvements rather than corrections."⁶⁸ Constructive memos of this sort are commonplace in the Courts of Appeals, and I began my clerkship expecting even more incisive feedback from The Nine. Counterintuitively, however, eight potential editors seemed less effective than two had been: For reasons perhaps attributable to game theory or sheer numerosity, Justice Ginsburg's polite and precise memos proved the exception rather than the rule.⁶⁹

Third, her persnickety proceduralist side. Not every case can involve high constitutional theory; many of our errors or disagreements down in the mines of the lower courts concern questions of jurisdiction and procedure. Often these cases are hard, and hardly scintillating. Just as the D.C. Circuit relied on the administrative-law legend Stephen Williams to handle seemingly all the tough FERC cases, the Supreme Court relied on the expertise and enthusiasm of its resident civil procedure professor to ensure these questions were handled with care. That trust surely grew over the years as her role within the Court expanded.⁷⁰

Fourth, her somewhat formal approach to opinion-drafting. I tread cautiously here, because no one would describe Ginsburg's interpretive philosophy as hidebound. But her approach to legal writing largely followed relatively structured syntax and modes of legal argumentation,

67. See Antonin Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* 389 (Christopher J. Scalia & Edward Whelan eds., 2017) ("Not 'this is wrong, Nino' but 'the point would be even stronger if.' . . . Ruth and I had developed something of a mutual improvement society . . .").

68. *Id.* at 377–78.

69. See Madison Lecture, *supra* note 58, at 1186 (advocating a judicial "voice" that "engages in dialogue with, not a diatribe against . . . her own colleagues").

70. Cf. William H. McRaven, *Make Your Bed 111* (2017) ("If you can't do the little things right, you will never do the big things right.").

rather than a more cosmic approach to persuasion.⁷¹ Justice Ginsburg's voice was not a shout-it-from-the-parapets type; as many a sleep-deprived law clerk can attest, it was more of a "let's stare at this sentence as long as it takes until we vaporize one or two more words" type. (Which is another reason why the Notorious RBG meme drew a laugh.)

The benefits of formalism in the judicial role go far in constraining courts to their proper role.⁷² A formalist's emphasis on following rules and adhering to customs—even and especially in her manner of responding to the arguments of litigants and colleagues—carries obvious benefits in keeping the peace among members of a multimember, life-tenured court. Although their public profile and reputational capital were similar in many respects, Ruth Bader Ginsburg and William O. Douglas made for quite different colleagues.⁷³

Did the pendulum swing too far in the other direction? Justice Ginsburg candidly admitted her preference that the four more progressive Justices "speak with one voice."⁷⁴ This represented a subtle but self-conscious departure from the more varied separate writings under Justice Stevens's leadership.⁷⁵ She disfavored the seriatim approach of *Bush v. Gore*⁷⁶—an extreme example, to be sure—in which four dissenters offered four separate dissents.⁷⁷ Justice Ginsburg led her increasingly united bloc, despite a perceived conservative majority, to recognize a capacious view of a surprising number of constitutional provisions in a surprising number of majorities.⁷⁸

71. See Madison Lecture, *supra* note 58, at 1194 ("In writing for the court, one must be sensitive to the sensibilities and mindsets of one's colleagues, which may mean avoiding certain arguments and authorities, even certain words.").

72. See Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner, The Federal Judiciary*, 116 U. Mich. L. Rev. 819, 834 (2018).

73. See generally G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 Va. L. Rev. 17, 65–66 (1988) (critiquing Justice Douglas's "unwillingness to buttress the results he reached in cases by resort to the common analytical techniques").

74. See Nina Totenberg, *Ginsburg: Liberal Justices Make a Point to Speak with One Voice*, NPR (July 10, 2015), <https://www.npr.org/sections/itsallpolitics/2015/07/10/421811833/ginsburg-liberal-justices-make-a-point-to-speak-with-one-voice> [<https://perma.cc/XB2E-RSSJ>]. This approach echoed the Madison Lecture's concern that "overindulgence in separate opinion writing" may undermine the Court through "too frequent resort to separate opinions and the immoderate tone of statements diverging from the position of the court's majority." Madison Lecture, *supra* note 58, at 1191.

75. By contrast, while serving as the senior (and ideologically unaligned) Associate Justice alongside Chief Justice Rehnquist, Justice Stevens wrote more dissents than any of his colleagues. See Sirovich, *supra* note 15, at 7433.

76. 531 U.S. 98 (2000).

77. See Totenberg, *supra* note 74.

78. Tactically, this approach often proved successful. *Bostock, NFIB v. Sebelius, McGirt v. Oklahoma*, and *DHS v. Regents (DACA)*, to name a few, would all rank as surprises under the arch-conservative court promised since the 1980s. See Poppy Harlow & Jeffrey Toobin,

One sacrifice of methodological harmony in a given case, however, is the chance for heterodox approaches to flourish over time. During the 2000s, a high-profile constitutional case might've exposed the lower courts, the academy, the bar, and law students to varied approaches to the same question. These separate writings, to be sure, can serve to confuse rather than clarify the law, as any lower-court judge could tell you after divining a *Marks*-majority holding.⁷⁹ But those opinions also can channel energy and oxygen in the development of the law—in a manner that unified 5-4 majorities and dissents may not. Indeed, a partial explanation for the doctrinal pressure of the 2010s could be the interpretive tectonics of the 2000s. Personnel played a role, to be sure, but so did the emergence of new (or rediscovered) approaches to interpreting old texts. Consider shifting thinking on administrative deference,⁸⁰ for example, or qualified immunity, or even textualism itself.⁸¹ Will future Justices strike different chords based on the Ginsburg bloc's tendency to sing in unison?

Their more common-law approach to constitutional interpretation, moreover, with a relatively greater emphasis on pragmatic considerations in a given case,⁸² may lend itself less well to a meta-theory of interpretation that could take root outside the courtroom. Scalia, of course, spent a career bending his considerable persuasive skills to embed a competing and overarching philosophy in the pages of the U.S. Reports—as well as in

Staying Power, RBG: Beyond Notorious, CNN Audio (Aug. 20, 2018), <https://www.cnn.com/audio/podcasts/rbg-beyond-notorious?episodeguid=63b2806b4a75e533dc7295e8004f5107.wav> [<https://perma.cc/VG54-SV6G>] (predicting Ginsburg “would hardly ever win” after Justice Kennedy's retirement); see also, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2213, 2220 (2018) (holding that cell-site location data, at least in bulk, amounted to a search subject to the protections articulated in *Katz v. United States*, 389 U.S. 347 (1967)); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018) (holding that a criminal-code definition was impermissibly vague and violated due process); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214–15 (2016) (holding that a race-conscious admissions program did not violate equal protection).

79. See *Marks v. United States*, 430 U.S. 188, 193 (1977).

80. Compare, for example, Justice Scalia's opinion for the Court in *Auer v. Robbins*, 519 U.S. 452 (1997), and his later repudiation of the doctrine in *Decker v. Nw. Env't. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) (“I believe that it is time” for the Court “to ‘reconsider *Auer*’”).

81. Justice Kagan's famous remark that “we're all textualists now,” the dueling linguistic expositions of Scalia and Stevens on the Second Amendment in *Heller*, and the Justices' textualist debates in *Bostock* all come to mind as developments years in the making. See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *District of Columbia v. Heller*, 554 U.S. 570 (2008); Justice Elena Kagan, A Dialogue with Justice Elena Kagan on the Reading of Statutes at the 2015 Scalia Lecture, at 8:09 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<https://perma.cc/F9SE-GZCV>].

82. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996) (arguing that a common-law approach best explains and justifies American constitutional jurisprudence); cf. Brannon P. Denning, *Common Law Constitutional Interpretation: A Critique*, 27 Const. Comment. 621 (2011) (describing aspects of common-law constitutional interpretation as poorly elaborated and juxtaposed against a strawman of originalism).

books, articles, and speeches. This undoubtedly provided guideposts to current and future lawyers to follow in current and future cases. Ginsburg also had quite a pen, platform, and perspective. And her impact on scholars and students alike is enormous. Yet one wonders how our ongoing debates about the role of the courts might've benefited from a more sustained and high-level response to her friend's project. Because any jurisprudential legacy confined to the casebooks, as shown by both Justices' passing, is fragile. Who doubted that Ginsburg would will her way through another Term? Yet change is always a heartbeat away.

Fifth, and finally, we come to the sheer length and depth of those relationships she shared with her colleagues. Familiarity does not always breed contempt; in the right precincts it can promote good faith and respect. Ginsburg served alongside Justice Scalia, with one short interruption, for *thirty-seven years* on the D.C. Circuit and Supreme Court. And for thirty years with Justice Thomas, again with one interregnum. Thomas's words about the close of his and Ginsburg's shared history made the point beautifully:

Ruth and I first met when I began my tenure on the D.C. Circuit in 1990. With the exception of the brief period between our respective appointments to the Supreme Court, we have since been judicial colleagues. Through the many challenges both professionally and personally, she was the essence of grace, civility and dignity. She was a superb judge who gave her best and exacted the best from each of us, whether in agreement or disagreement. And, as outstanding as she was as a judge, she was an even better colleague—unfailingly gracious, thoughtful, and civil.

Through her loss of her wonderful husband, Marty, and her countless health challenges, she was a picture of grace and courage. Not once did the pace and quality of her work suffer even as she was obviously suffering grievously. Nor did her demeanor toward her colleagues diminish.⁸³

All quarters of our country are grappling with an us-versus-them mindset remarkable for its polarization, tribalism, and disaffection.⁸⁴ The Supreme Court has borne more than its share of the angst and ire. Yet for now their work carries on inside the courthouse, despite the storms swirling outside. Surely that has something to do with these nine lawyers

83. Press Release, Sup. Ct. of the U.S., Statements from the Supreme Court Regarding the Death of Associate Justice Ruth Bader Ginsburg (Sept. 19, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-19-20 [<https://perma.cc/EPM3-2FA4>].

84. See, e.g., Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind* 127–32 (2018) (examining data on polarization and describing how “the physical and the electronic isolation from people we disagree with allow the forces of confirmation bias, groupthink, and tribalism to push us still further apart”).

spending years together, sitting around the same conference and lunch tables, working at their common calling.

How strong or stable can a judicial system—indeed a Republic—claim to be when one side or the other views octogenarian health and retirement plans as crucial to the system’s very legitimacy?⁸⁵ A degree of judicial celebrity (or hagiography) that contributes to such concerns is not an obviously good thing for the country’s perception of the Court as a sober institution that interprets legal language heedless of political and popular winds.⁸⁶

Yet the Justices have not succumbed to the expectations of vocal outsiders when it comes to their conduct on the Court. Are these institutional customs and personal contributions of Ginsburg’s Court—judicial collegiality, open debate, high standards of professionalism—incommensurate to the task of preserving the judiciary’s role as an independent constitutional check on majoritarian or administrative excess? Some may think so. Yet these disciplining habits have served the nation well for far longer, and through even greater tests, than those of the past decade. To calls for the Court to heal thyself in order to avoid “reform,” Justice Ginsburg and Edmund Burke might agree that a better response is to conserve long-standing norms that have resisted ever-changing outside threats and preserved the legitimacy of the Court’s decisions.⁸⁷

CODA

This state of affairs places a tremendous amount of pressure on nine judges who must choose whether and how to wield their outsized authority in a principled and constrained manner. Enforceable external restraints are few and far between. That heightens the stakes for professionalism, civility, and a (classically) liberal respect for the arguments with which and the people with whom we disagree.

85. Ginsburg’s non-retirement clearly frustrated some natural allies who would have preferred if she had retired during the Obama Administration. See, e.g., Randall Kennedy, *The Case for Early Retirement*, *New Republic* (Apr. 28, 2011), <https://newrepublic.com/article/87543/ginsburg-breyer-resign-supereme-court> [<https://perma.cc/TKT2-AAK3>].

86. See Chad M. Oldfather, *The Inconspicuous DHS: The Supreme Court, Celebrity Culture, and David H. Souter 26–27* (Marquette Univ. L. Sch., Research Paper No. 20-04, 2020), <https://ssrn.com/abstract=3651361> (on file with the *Columbia Law Review*) (“[T]he incentives that the celebrity justice faces to cultivate an aura of personal consistency across opinions . . . comes at the expense of institutional consistency.”).

87. See, e.g., Adam Liptak, *The Precedent, and Perils, of Court Packing*, *N.Y. Times* (Oct. 12, 2020), <https://www.nytimes.com/2020/10/12/us/supreme-court-packing.html> (on file with the *Columbia Law Review*) (“Nine seems to be a good number.” (internal quotation marks omitted) (quoting Justice Ginsburg)); Keith E. Whittington, *Opinion, Why the Supreme Court Has Nine Justices*, *Newsweek* (Oct. 21, 2020), <https://www.newsweek.com/why-supreme-court-has-nine-justices-opinion-1540685> [<https://perma.cc/CH95-MK7K>] (describing the Senate Judiciary Committee’s Adverse Report in response to President Roosevelt’s plan to “reorganize the judicial branch” (citing S. Comm. on the Judiciary, *Reorganization of the Federal Judiciary*, S. Rep. No. 75-711 (1937))).

Justice Ginsburg carried herself with a grace well-suited to such a fundamentally human institution. It trickled down to her clerks, too. The most important words she left with me bring us back to the beginning—to that momentous week in June 2010. The day after my interview, Justice Ginsburg called with “bad news and good news.” Justice Scalia (with whom I had recently interviewed) was full the next year, but she would love to have me in her chambers. A couple minutes later she signed off: “I think you’ll have a great year here at the Court, Ben. You’ll work with great people on interesting questions. And you and I, in particular, may cause each other to think a little bit harder about some of these cases.”

That prediction—our only nod to ideology while I served as her clerk—certainly proved true on my end. Now my own clerks hear a similar message: Whether on the Supreme Court or the trial court, judges benefit from respectful skeptics, not just cheering fans. The more our customs reinforce this, the longer our courts should last.