# Order Without Formalism

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## Abstract

*The quest for order and structure is a powerful force underlying influential jurisprudential theories such as originalism and textualism. This Article suggests that Justice Ginsburg's jurisprudence represented an alternative vision of order in federal judicial practice—one guided by commitment to judicial virtues like concern for the methodical administration of justice, sensitivity to context, and epistemic humility. In short, Justice Ginsburg's jurisprudence highlights the possibility of order without formalism. Justice Ginsburg's attachment to that vision emerges from her opinions on topics including jurisdiction, procedure, and stare decisis. The Article draws out implications of Justice Ginsburg's approach for current controversies, such as the role of precedent and the meaning of judicial restraint.*

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## Introduction

The quest for order, structure, and fixity is a powerful force underlying influential jurisprudential theories. Take originalism. It may be challenging to determine the meaning of the Constitution at the Founding. But whatever those challenges, the argument runs, originalism provides a common target at which judges can aim, as distinct from consulting their idiosyncratic views about the needs of American society.[1] Or take textualism. It may be noted that members of Congress often do not read the text of the bill and may be more familiar with the legislative history. Nonetheless, a textualist may contend, tex-

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1 *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 856–62 (1989).

tualism narrows interpretive debate to the critical moment of the text's passage and blocks freewheeling judicial discretion to pick and choose from the legislative history.[2] Originalism and textualism are complex and multifaceted theories, but one common thread is that they are frequently traced to the separation of powers. In declining to "make things up,"[3] the federal judiciary upholds its constitutional responsibility not to usurp the role of more popularly accountable branches of government.[4]

Justice Ginsburg's jurisprudence represents an alternative vision of order in federal judicial practice. Her alternative was guided not by adherence to overarching theories like originalism and textualism, but by adherence to judicial virtues such as concern for the orderly administration of justice, epistemic humility, caution, and willingness to be flexible when the circumstances so require. In adhering to these virtues, Justice Ginsburg's approach was compatible with the federal courts' limited role in constitutional government and with the value of judicial restraint.

In short, Justice Ginsburg's jurisprudence highlights the possibility of order without formalism. The term "formalism" can be understood in multiple ways;[5] the goal here is less to present an authoritative definition than to capture the general flavor of an approach. A formalistic approach is one focused on the objectively ascertainable meaning of an authoritative text, as distinct from the purposes behind a law or the law's consequences.[6] Both originalism in constitutional interpretation and textualism in statutory interpretation are often viewed as examples of "formalist" theories.[7] Justice Ginsburg's work, then, suggests that the "opposite" of formalism is not necessarily chaos.

This Article has the following structure. First, I discuss Justice Ginsburg's concern for the orderly administration of justice, as manifested in her approach toward procedural and jurisdictional questions.

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2 *See, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2123 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2016)); *see also* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.").

3 Christopher R. Green, *Originalism as Faithfulness*, U. CHI. L. REV. ONLINE 1 (2019).

4 *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 318 (1990).

5 *See, e.g.*, Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

6 *See Formalism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

7 *See* Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 596 (2021).

Second, I note Justice Ginsburg's commitment to epistemic humility and avoidance of prejudgment on the part of the federal judiciary. Third, I identify in Justice Ginsburg's jurisprudence the idea, perhaps paradoxical, that judicial restraint requires a measure of flexibility. Fourth, I apply these reflections on Justice Ginsburg's jurisprudence to an issue that is today the subject of considerable controversy: the role of stare decisis. Overall, Justice Ginsburg combined an aversion to a judicial free-for-all with an emphasis on contextual sensitivity and a rejection of rigid restrictions on federal judicial power.

## I. The Orderly Administration of Justice

The orderly administration of justice was a consistent theme in Justice Ginsburg's work. Justice Ginsburg was famously a proceduralist; she cared deeply about the conditions under which federal courts could exercise jurisdiction and their methods in doing so.[8] Some values she highly prized were the orderliness, predictability, and efficiency of judicial procedures. For example, in the 2018 case *China Agritech, Inc. v. Resh*,[9] Justice Ginsburg wrote for a unanimous Supreme Court in a case involving statutes of limitations in class actions.[10] The Supreme Court had previously held that "the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint."[11] The question the Court confronted in *China Agritech* was whether, "[u]pon denial of class certification . . . a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, [may] commence a class action anew beyond the time allowed by the applicable statute of limitations[.]"[12]

The Supreme Court, per Justice Ginsburg, answered "no."[13] One reason was that an affirmative answer "would allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation."[14] Such a result would not advance the val-

8 *See, e.g.*, Scott Dodson, *A Revolution in Jurisdiction*, *in* The Legacy of Ruth Bader Ginsburg 137, 137–38 (Scott Dodson ed., 2015); Zachary D. Tripp & Gillian E. Metzger, *Professor Justice Ginsburg: Justice Ginsburg's Love of Procedure and Jurisdiction*, 121 Colum. L. Rev. 729, 729 (2021).

9 138 S. Ct. 1800 (2018).

10 *Id.* at 1803–04.

11 *Id.* at 1804.

12 *Id.*

13 *Id.*

14 *Id.* at 1808.

ues of "efficiency and economy of litigation," the "watchwords" of the Court's prior case law in this area and Federal Rule of Civil Procedure 23, which governs class actions.[15] Thus, Justice Ginsburg was averse to an outcome that she viewed as thwarting streamlined, predictable judicial proceedings.

Justice Ginsburg maintained her concern for order and structure while rejecting attempts to use Article III of the Constitution to circumscribe the power of the federal courts in a rigid manner. An example comes from her longstanding effort to curb what she called the "profligate" use of the term "jurisdiction."[16] According to Justice Ginsburg—in a position widely adopted by the Supreme Court—procedural rules governing litigation should not be treated as limitations on the federal courts' subject-matter jurisdiction absent a clear statement by Congress to that effect.[17] For instance, the requirement that litigants who wished to pursue a suit in federal court under Title VII first file a charge before the Equal Employment Opportunity Commission was not "jurisdictional" because Congress had not explicitly said so.[18]

Losing its jurisdictional character, however, did *not* mean that a rule turned into jelly. To the contrary: a rule (such as Title VII's charge-filing requirement) could be a "mandatory claim-processing rule" even without being jurisdictional.[19] Such a "mandatory" rule could rarely, if ever, be subject to "equitable exceptions"—that is, exceptions from the rule on the basis that its application to a particular litigant would be inequitable.[20] In this way, Justice Ginsburg sought to preserve the orderly workings of litigation. Litigants could not willy-nilly escape the operation of procedural rules. Yet federal courts were not constitutionally precluded from adjudicating suits in which litigants had failed to comply with mandatory claim-processing rules.[21] Rather, federal courts might be able to consider such suits in severely extenuating circumstances. Perhaps more importantly, federal courts

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15 *Id.* at 1811.

16 Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1848 (2019) (quoting Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013)); *see* Tripp & Metzger, *supra* note 8, at 731–32.

17 *See Fort Bend*, 139 S. Ct. at 1850. This past Term, the Court reiterated the clear-statement rule for jurisdictionality. *See* Boechler, P.C. v. Comm'r, 142 S. Ct. 1493, 1497 (2022).

18 *Fort Bend*, 139 S. Ct. at 1850.

19 *Id.* at 1851.

20 *Id.* at 1849 n.5 ("The Court has 'reserved whether mandatory claim-processing rules may [ever] be subject to equitable exceptions.'" (alteration in original) (quoting Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 18 n.3 (2017))).

21 *Id.* at 1849.

would not need to ascertain compliance with nonjurisdictional rules on their own—a result that preserved judicial resources.[22]

Justice Ginsburg's views on jurisdictionality, then, rejected a "formalistic" approach to defining the constitutional limits of Article III judicial power. Justice Ginsburg's perspective was informed by the impact of various rules on courts and litigants, not by the inner meaning of Article III. Nevertheless, she treated structure and clarity in procedural rules as critical features of the litigation process.

## II. Epistemic Humility and the Risks of Prejudgment

Another set of values underlying Justice Ginsburg's approach to order in judging involves epistemic humility and the risks of prejudgment. We can begin by noting Justice Ginsburg's affinity for a statement by Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit. When she was a law student, Justice Ginsburg very much admired Judge Hand. She later said she "would have given anything to clerk for Learned Hand," but he declined to take a woman as a law clerk because he "would feel uncomfortable" as she would "inhibit [his] speech."[23] Still, Justice Ginsburg continued to think highly of Judge Hand's jurisprudence. At her Supreme Court confirmation hearing in 1993, she said that she "fully embrace[d]" the following sentiment from Judge Hand: the spirit of liberty is the spirit "which is not too sure that it is right," the spirit of liberty is the spirit that "seeks to understand the mind[] of other men and women . . . ."[24]

"The spirit of liberty is the spirit which is not too sure that it is right." By the time I clerked for her in the October Term 2018, Justice Ginsburg was sure of many things. As an individual, she had clear opinions about cases, and she firmly made up her mind. When it came to her approach toward federal judicial power, however, Justice Ginsburg embraced the sense of epistemic humility and caution apparent in the quote from Judge Hand. From an institutional perspective, Jus-

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22 *See* Tripp & Metzger, *supra* note 8, at 732.

23 Ruth Bader Ginsburg, Gillian Metzger & Abbe Gluck, *A Conversation with Justice Ruth Bader Ginsburg*, 25 Colum. J. Gender & L. 6, 20 (2013).

24 *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 50–51 (1993); *see also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1209 (1992) ("I will recall the counsel my teacher and friend, Professor Gerald Gunther, offered when I was installed as a judge. Professor Gunther had in mind a great jurist, Judge Learned Hand . . . The good judge, Professor Gunther said, is 'openminded and detached, . . . heedful of limitations stemming from the judge's own competence and, above all, from the presuppositions of our constitutional scheme . . . .'" (quoting *Professor Gerald Gunther Speaks at Investiture of Judge Ruth Ginsburg in Washington, D.C.*, Colum. L. Alumni Observer, Dec. 31, 1980, at 8)).

tice Ginsburg was alive to the risks of judicial overextension into domains that judges were not yet fully prepared to enter.

That concern manifested itself, for example, in her practices as a Justice, including her views on the Supreme Court's certiorari process and her questions at oral argument. Justice Ginsburg wanted cases to be presented cleanly to the Court, without procedural complexities that made the case a poor "vehicle" for answering the legal question. She was less comfortable than some other Justices with the Court's taking cases that were in an interlocutory posture; for, in those cases, further proceedings might eliminate the need for the Court to answer the question presented. When it came to oral argument, Justice Ginsburg was known for asking about the record and threshold issues such as jurisdiction.[25] In addition to clarifying the case, these questions manifested Justice Ginsburg's emphasis on the form in which legal questions were presented to the Supreme Court. An obstacle standing in the way of the Court's review was a serious legal matter, not simply an annoyance to be overcome.

Was Justice Ginsburg's interest in cleanly presented cases merely pedantry, evidence of a hypertechnical mind? Far from it: her interest reflected deeper points about the nature of the Supreme Court's work and the judicial function. In Justice Ginsburg's view, judges should not generally adjudicate legal issues in a way that the facts of a particular case did not warrant or demand. In fact, she sometimes wrote separately to note that she would have refrained from deciding an issue that had not been adequately aired before the courts below or before the Justices.[26] As Zachary Tripp and Gillian Metzger have written, Justice Ginsburg's commitment to the principle of "party presentation,"

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25 *See* Cynthia Kelly Conlon & Julie M. Karaba, *May It Please the Court: Questions About Policy at Oral Argument*, 8 Nw. J. L. & Soc. Pol'y 89, 101, 116–17 (2012); *see also, e.g.*, Transcript of Oral Argument at 14, Brumfield v. Cain, 576 U.S. 305 (2015) (No. 13-1433) ("Did you ask the State court for funds as a matter of Federal right? The other side says, did you ask for funds for State habeas only under State law and not under Federal law; is that true?").

26 *See, e.g.*, Davis v. Fed. Election Comm'n, 554 U.S. 724, 758 (2008) (Ginsburg, J., concurring in part and dissenting in part) ("I resist joining other portions of Justice Stevens' opinion, however, to the extent that they address *Buckley*'s distinction between expenditure and contribution limits . . . . Appellee Federal Election Commission has not asked us to overrule *Buckley*; consequently, the issue has not been briefed."); *see also* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 346 (2008) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Resolving this case on a ground neither argued nor addressed below, the Court holds . . . . "); Palazzolo v. Rhode Island, 533 U.S. 606, 653 (2001) (Ginsburg, J., dissenting) ("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.").

or the idea that courts rely on the parties to frame issues in the first instance, animated one of her last opinions for the Court.[27] In part, these features of Justice Ginsburg's jurisprudence underscore the value she placed on the orderly administration of justice, as previously discussed.

Yet we can also see in Justice Ginsburg's caution an endorsement of an institutional epistemic humility: a recognition that legal issues might look different when seen in the light of new factual circumstances, an acceptance that judges cannot fully predict the results of their pronouncements and so should not opine too broadly. Circumstances can change, arguments can change, and momentous legal questions should not be prejudged. In the face of the great uncertainty that is constantly present in the legal and social world, it is better to be safe than sorry.[28]

## III. Judicial Restraint and Judicial Flexibility

Along with her concern for the orderly administration of justice and the value she placed on the judiciary's epistemic humility, Justice Ginsburg was committed to judicial restraint.[29] But hers was a particular kind of restraint: one that went hand in hand with a measure of flexibility. Although it may sound paradoxical to say that judicial restraint requires flexibility, that juxtaposition is at the heart of Justice Ginsburg's vision of order without formalism.

Here is one illustration, again from her opinions on jurisdiction and procedure. The Supreme Court has "decline[d] to endorse" the doctrine of "hypothetical jurisdiction," under which judges may assume the existence of Article III jurisdiction and resolve the case on the merits.[30] According to the Court, hypothetical jurisdiction offends the principle that "[w]ithout jurisdiction the court cannot proceed at

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27 *See* United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020); Tripp & Metzger, *supra* note 8, at 732–35.

28 Ruth Bader Ginsburg, *An Overview of Court Review for Constitutionality in the United States*, 57 La. L. Rev. 1019, 1024 (1997) ("[J]udges are fallible and can make dreadful mistakes.").

29 For other contributions on this theme, see generally Joseph S. Diedrich, *Article III, Judicial Restraint, and This Supreme Court*, 72 SMU L. Rev. 235 (2019) (categorizing Justices' tendency to exercise judicial restraint in the sense of whether they voted for an exercise or assertion of Article III judicial power); Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 New Eng. L. Rev. 725 (2009) (focusing on Justice Ginsburg's approach to the sequence of deciding jurisdictional issues); Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 Brook. L. Rev. 629 (2003) (focusing on Justice Ginsburg's style of judging and writing).

30 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).

all in any cause."[31] Despite the Court's rejection of hypothetical jurisdiction, Justice Ginsburg wrote opinions clarifying that "a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'"[32] In particular, a federal court may sometimes address personal jurisdiction and *forum non conveniens* before complex issues of subject-matter jurisdiction.[33]

In these opinions, Justice Ginsburg emphasized that tackling other threshold issues before subject-matter jurisdiction was appropriate when the other threshold issue was straightforward and subject-matter jurisdiction presented a complicated or novel question.[34] As Heather Elliott and Scott Dodson have separately written, Justice Ginsburg's view on this matter represented a concern not only for judicial economy and efficiency, but also for judicial restraint.[35] In Elliott's words, "resequencing"—that is, resolving other threshold issues before subject-matter jurisdiction—permits courts to avoid complex questions about the margins of their power.[36] This is because thorny issues of subject-matter jurisdiction have broad ramifications for the nature of Article III judicial power. Permitting courts to sidestep these issues in favor of other threshold grounds for dismissal provides courts with an "escape hatch" from constitutional holdings that might have sweeping or unintended consequences.[37]

Justice Ginsburg's writings on the order of operations in jurisdictional rulings suggest a view that judicial restraint is compatible with judicial flexibility. She declined to bake into Article III a vision of judging that required federal courts to issue potentially expansive rulings on subject-matter jurisdiction. Instead, her opinions gave judges the option of applying a lighter touch when available. In other words, judges have flexibility to act in more restrained ways.

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31 *Id.* (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)).

32 Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 431 (2007) (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999)).

33 *Ruhrgas*, 526 U.S. at 588 (personal jurisdiction); *Sinochem*, 549 U.S. at 436 (*forum non conveniens*).

34 *Ruhrgas*, 526 U.S. at 588; *Sinochem*, 549 U.S. at 436.

35 Dodson, *supra* note 8, at 146; Elliott, *supra* note 29, at 726–28.

36 Elliott, *supra* note 29, at 746.

37 In fact, some lower federal courts' interest in such "escape hatches" is so great that they have sought to distinguish the Supreme Court's rejection of "hypothetical jurisdiction" in various circumstances. For example, the Second Circuit has held that "where a question of statutory (non-Article III) jurisdiction is complex and the claim fails on other more obvious grounds, this Court can assume hypothetical jurisdiction in order to dismiss on those obvious grounds." Miller v. Metro. Life Ins. Co., 979 F.3d 118, 123 (2d Cir. 2020).

The union of restraint and flexibility is also pertinent to Justice Ginsburg's approach to constitutional and statutory interpretation. Justice Ginsburg's methodology is not easily summed up with a soundbite.[38] She was by no means an originalist in the sense of treating the original understanding of the constitutional text as *the* guide to its contemporary meaning or application. But she did not treat the original understanding of constitutional terms, or the historical background against which the Constitution was ratified, as irrelevant.[39] Further, Justice Ginsburg would not conventionally be considered a textualist in statutory interpretation; for example, she had no aversion to considering legislative history to interpret statutes.[40] Yet the plain language of the statute was a key factor in Justice Ginsburg's statutory interpretation.[41] Perhaps the "legal process" label could be applied to Justice Ginsburg's jurisprudence;[42] she put substantial store in clear and fair procedures, and in productive dialogue among different branches of government.

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38 *See, e.g.*, Paul Schiff Berman, *Ruth Bader Ginsburg and the Interaction of Legal Systems*, *in* THE LEGACY OF RUTH BADER GINSBURG 151, 170 (Scott Dodson ed., 2015) ("Ginsburg eschews bright-line rules that close off avenues through which a system might be allowed to articulate its norms, and she bends over backward to seek Solomonic solutions that will effectuate multiple interests.").

39 *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1992 (2019) (Ginsburg, J., dissenting) (justifying an outcome that would involve overruling precedent based partly on the actions of the Framers and early courts); Oregon v. Ice, 555 U.S. 160, 168 (2009) (Ginsburg, J.) (analyzing whether "the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.'" (quoting Harris v. United States, 536 U.S. 545, 557 (2002) (plurality opinion))); Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (Ginsburg, J.) ("read[ing] the Framers' instruction" to mean that "the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause").

40 *See, e.g.*, Artis v. District of Columbia, 138 S. Ct. 594, 598 (2018) (Ginsburg, J.) (relying partially on a House Report to interpret the supplemental jurisdiction statute); Gustafson v. Alloyd Co., 513 U.S. 561, 596 (1995) (Ginsburg, J., dissenting) (joining Justice Thomas's dissent regarding a statute's language, but also dissenting separately to make points regarding "drafting history and the longstanding scholarly and judicial understanding" of the statute).

41 *See, e.g.*, Mount Lemmon Fire Dist. v. Guido, 139 S. Ct. 22, 27 (2018) (resting opinion on text of statute); John F. Manning, *Justice Ginsburg and the New Legal Process*, *in* ESSAYS IN HONOR OF JUSTICE RUTH BADER GINSBURG 43, 48 (Feb. 4, 2013) (on file with the Harvard Law School Library), https://dash.harvard.edu/bitstream/handle/1/10582566/Manning.pdf?sequence=1&isAllowed=Y [perma.cc/3MXG-AC27] (describing Justice Ginsburg's statutory jurisprudence as "Congress legislates to make policy, and a judge who wishes to show fidelity to Congress must take policy into account . . . but only to the extent that a statute allows").

42 *See* Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 35 (2004) ("Justice Ginsburg . . . seems to me to have a view drawn from the Hart & Sacks legal process methodology."). Justice Ginsburg was exposed to legal process thinking as a law student. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 27 (1994).

On the whole, however, Justice Ginsburg's jurisprudence is not readily associated with a grand or unified theory of constitutional or statutory interpretation.[43] The absence of such a theory is an agent of judicial flexibility, but it is also an agent of judicial restraint.[44] A comprehensive theory generates pressure to adhere to its strictures in a wide set of cases, even when the particular characteristics of a case warrant a different approach. The result may be to change the status quo in bold and potentially risky ways.[45] Of course, a broad theory can contain internal resources to account for the importance of contextual sensitivity. But theories devised in a quest for strict consistency or general application may result in more muscular judicial action. Justice Ginsburg's jurisprudence suggests that drawing on a diverse toolbox in constitutional and statutory interpretation may, perhaps paradoxically, advance a narrower form of judging.

## IV. JUSTICE GINSBURG'S JURISPRUDENCE AND STARE DECISIS

Another key value that animated Justice Ginsburg's jurisprudence, and further highlights her commitment to order without formalism, is respect for precedent. Justice Ginsburg viewed stare decisis as highly significant, describing the concept as follows: "the notion that departures from the status quo, *i.e.*, innovations, are the exceptions rather than the rule in judicial decisionmaking[.]"[46] She saw stare

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43 *Cf.* David L. Franklin, *Justice Ginsburg's Common-Law Federalism*, 43 NEW ENG. L. REV. 751, 766 (2009) ("Justice Ginsburg's enduring contribution to the jurisprudence of federalism lies in her respect for the remedial role of common law courts, and she has expressed that respect in the most fitting way possible: not through broad pronouncements or grand theories, but quietly, steadily, case by case.").

44 In fact, Justice Ginsburg approvingly described sex discrimination cases from the 1970s as follows: "[t]he Supreme Court wrote modestly, it put forward no grand philosophy; but by requiring legislative reexamination of once customary sex-based classifications, the Court helped to ensure that laws and regulations would 'catch up with a changed world.'" Ginsburg, *supra* note 24, at 1204–05 (footnote omitted) (quoting Wendy W. Williams, *Sex Discrimination: Closing the Law's Gender Gap*, *in* THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986, at 109, 123 (Herman Schwartz ed., 1987)).

45 Justice Scalia, for his part, suggested at a certain juncture that he was a "faint-hearted originalist," and noted that despite the original understanding of cruel and unusual punishment, "I am confident that public flogging and hand-branding would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality." Scalia, *supra* note 1, at 861, 864.

46 Ruth Bader Ginsburg, *On Muteness, Confidence, and Collegiality: A Response to Professor Nagel*, 61 U. COLO. L. REV. 715, 717 (1990). For discussion of Justice Ginsburg's views on stare decisis, see, for example, Mei-Fei Kuo & Kai Wang, Comment, *When Is an Innovation in Order?: Justice Ruth Bader Ginsburg and Stare Decisis*, 20 U. HAW. L. REV. 835, 849 (1998); Elijah Yip & Eric K. Yamamoto, *Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure*, 20 U. HAW. L. REV. 647, 657–60 (1998).

decisis as a tool of judicial restraint, explaining that "[t]he need to 'fit[] the current decision into the body of past decisions' operates to 'reduce[] individuality of judgment.'"[47] In a study of Justices' votes during the 1994 to 2000 Terms, Justice Ginsburg came next-to-last in the number of times she voted to alter precedent—ahead of only Justice Souter.[48] That result might be attributable partly to the fact that the Supreme Court had a majority of Republican appointees during this time; Republican-appointed justices may have been more prepared to overturn precedents from prior "liberal" Courts than their Democratic-appointed counterparts.[49] For Justice Ginsburg, however, adherence to stare decisis was not merely a political tool; it was a deeply rooted part of a judicial philosophy that emphasized caution and attentiveness to the limitations of the judicial role.

Nonetheless, Justice Ginsburg did not treat stare decisis as an "inexorable command"—to borrow a phrase the Supreme Court is wont to use in overruling cases.[50] In her last years on the bench, she voted in divided opinions to overturn constitutional rules permitting nonunanimous jury verdicts[51] and successive prosecutions for the same offense by separate sovereigns,[52] as well as a constitutional rule concerning taxation and physical presence in a state.[53] Justice Ginsburg, that is, was not a defender of stare decisis come-what-may.

Justice Ginsburg's willingness to break from prior decisions might be perceived as a failure to adhere to the values of order, structure, and restraint, in the sense that she was ready to change the status quo. Yet that willingness to overturn precedent could also be understood as of a piece with these values rather than a departure from them. An institutional commitment to judicial humility applies not only to the judges of the present, but also to the judges of the past. The judges of the past could also err badly, and so judges today need not accord absolute respect to their decisions. Of course, stare decisis requires sticking to erroneous decisions, not simply to correct ones.[54] But past

47 Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 138 n.27 (1990) (quoting Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 229 (1986)).

48 Jason J. Czarnezki, William K. Ford & Lori A. Ringhand, *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 140 (2007).

49 *Id.* at 139 & n.42.

50 Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020).

51 *See id.* at 1395, 1404.

52 Gamble v. United States, 139 S. Ct. 1960, 1995 (2019) (Ginsburg, J., dissenting).

53 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096 (2018).

54 *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (stare decisis "has conse-

judges, in addition to erring badly, could make errors with serious negative results, the magnitude of which is realized over time. Under these circumstances, overturning precedent may be compatible with the value of judicial humility.

In other words, when judges really get it wrong, they are not entitled to lay down the rule for all time. The judiciary as an institution should be open to revising its errors—in a cautious, gradual way.[55] What does Justice Ginsburg's method tell us about stare decisis in the current day? It suggests that overruling cases may be appropriate and is not out of line with judicial restraint in every instance. But overruling precedent can take the form of a jolt that upsets public expectations or perceptions, or the political landscape.[56] Alternatively, overruling precedent can take the form of a smoother transition to a different legal rule that builds on developing momentum in the case law and the public sphere. Justice Ginsburg's jurisprudence would seem to favor the latter approach.

## V. Order Without Formalism?

It may be argued that judicial virtues like the orderly administration of justice, epistemic humility, and sensitivity to context are no real bulwark against the kind of political or arbitrary judging that formalism is designed to erect. Those virtues may be appropriate in a common law system, the argument may run, but federal courts are not generally common law courts. And we cannot necessarily count on federal judges to take a gradualist or restrained approach. Perhaps the heavier machinery of constitutionalized restrictions on the judicial role is needed in order to confine federal judges to a limited role in American democracy. Put differently, it may be contended that restraint without clear-cut rules and labels is no restraint at all.

A common rejoinder is that formalism does not actually produce the type of fixity that its proponents embrace.[57] Originalist and textu-

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quence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up").

55 *See* William J. Stuntz, *Christian Legal Theory*, 116 Harv. L. Rev. 1707, 1745 (2003) (book review) ("[H]umility always sees the possibility of its own mistake. That implies not blindness to the errors and injustices that attend the status quo, but awareness that proposed solutions must be tentative, subject to revision as experience dictates.").

56 *See* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2316 (2022) (Roberts, C.J., concurring in the judgment) (describing "[t]he Court's decision to overrule *Roe* and *Casey*" as "a serious jolt to the legal system").

57 *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 291–92 (2009) (describing such critiques).

alist judges are frequently charged with engaging in results-oriented judging, and doing so while purporting to draw on originalist and textualist methodologies.[58] This argument cannot be taken too far; there is a limit to the theoretical conclusions that can be drawn from judges' departures from their professed methodology. No judge is entirely consistent. For example, one could identify cases in which Justice Ginsburg acted in a manner out of sync with her general preferences for caution and gradualism.

Further, it may be contended that formalism is, as Justice Scalia suggested of originalism, the "lesser evil"[59]: it constrains judges more than the available alternatives. The accuracy of that statement depends on empirical realities. But observers with different normative commitments are likely to interpret the relevant data points—for instance, how often particular judges vote "against political interest"—in divergent ways. And there remains the question whether some increase in constrained judging outweighs the potential negative effects of opinions that announce they are following formal rules while actually reflecting other considerations.

A fuller exposition of the constraining effect of formalism is beyond the scope of this contribution. The point here is to suggest that Justice Ginsburg provided a genuine alternative to judging based on policy preferences, on the one hand, and judging focused on adherence to formal rules, on the other. Her style of judging, though it reflected concern for the law's future impact as well as its past development, was not a freewheeling enterprise. All in all, Justice Ginsburg's jurisprudence suggests that flexibility and doubt may be virtues, not vices, in a judge's approach.

58 *See id.* at 292–93.

59 *See* Scalia, *supra* note 1.