

## Keynote Address

### Justice Ruth Bader Ginsburg: A Judge's Perspective

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It is an extraordinary honor for me to deliver these remarks at this Symposium on the Jurisprudence of Justice Ruth Bader Ginsburg, a true American hero. No living judge has had a greater impact on American law. While this is a conference about Justice Ginsburg's jurisprudence, and particularly her jurisprudence since joining the Supreme Court in 1993, that jurisprudence is inevitably shaped by Justice Ginsburg's experiences before she joined the Court. She is a pioneer. When she entered Harvard Law School in 1956, she was one of only nine women in her class, and she faced the formidable obstacles to equal participation in professional and public life that women faced at that not-so-distant time in the past.

After she graduated from Columbia Law School at the top of her class, no law firm in New York offered her a job. When in 1960 the Dean of the Harvard Law School recommended her for a clerkship with Supreme Court Justice Felix Frankfurter, the Justice replied that he was not ready to hire a woman.<sup>1</sup> She joined the faculty at Rutgers and then moved to Columbia where she was the first woman to become a tenured law professor.<sup>2</sup> As the Director of the Women's Rights Project at the ACLU, she won *Reed v. Reed*,<sup>3</sup> in which she represented the appellant, and five of the six sex discrimination cases she argued before the Supreme Court, including the 8–1 decision in *Frontiero v. Richardson*,<sup>4</sup> altering the course of American constitutional law, and opening the path to the recognition of the equality of women under that fundamental charter of equality. In 1980, President Jimmy Carter appointed her to the United States Court of Appeals for the District of

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<sup>1</sup> Neil Lewis, *Rejected as a Clerk, Chosen as a Justice*, N.Y. TIMES, June 15, 1993, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> 404 U.S. 71 (1971).

<sup>4</sup> 411 U.S. 677 (1973). Justice Ginsburg's other victories came in *Edwards v. Healy*, 421 U.S. 772 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977); and *Duren v. Missouri*, 439 U.S. 357 (1979).

Columbia Circuit, and in 1993, President William Jefferson Clinton elevated her to the United States Supreme Court, where she serves with such distinction today. She is only the second woman to sit on that Court, and is the only woman among the nine current members of our High Court.

You have heard already today about Justice Ginsburg's impact on a variety of substantive areas of the law: civil procedure, equal rights, other areas of constitutional law. But I want to talk about Justice Ginsburg as a judge, about what her jurisprudence tells us about her approach to judging, and about what her work teaches us about the proper role of courts and judges in our constitutional system.

This is a topic that is of particular interest to me as a judge. But, as Justice Ginsburg doubtless recognizes, it is of broader importance to society at large. The role of the courts in our system of government, and the way they ought to function, is a question of ongoing debate and deep significance that touches all Americans, and, indeed, in light of the unique position of the United States, one that touches people everywhere in the world.

From the description of her substantive work, you will by now have realized that courage and candor are the hallmarks of her jurisprudence. It is a matter of debate whether these are characteristics that can be taught or learned, but because she possesses them, Justice Ginsburg has earned a distinctive place in the judicial pantheon.

In my remarks today, however, I want to focus upon three lessons implicit in Justice Ginsburg's work on the Supreme Court that can indeed be learned, but that have at best been hinted at by the sessions examining her jurisprudence in various substantive areas of law. The first has to do with the appropriate scope of the judicial power. The second with the nature of the judicial function. And the third has to do with collegiality on a multimember court.

You have heard today about some of Justice Ginsburg's justly famous opinions, from *United States v. Virginia*<sup>5</sup> to *M.L.B.*<sup>6</sup> to *Ledbetter*.<sup>7</sup> But the lens through which I want to begin my examination of her approach to judging is a case that has received little attention. It is *Kontrick v. Ryan*,<sup>8</sup> a case from 2004 about whether a time limit contained in a Federal Rule of Bankruptcy Procedure is jurisdictional.

Now I know what you're thinking: I had thought this event might be entertaining, but I never imagined that I would get to hear a talk about something as exciting as the time limits in the Bankruptcy Rules. But if

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<sup>5</sup> 518 U.S. 515 (1996).

<sup>6</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

<sup>7</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (Ginsburg, J., dissenting).

<sup>8</sup> 540 U.S. 443 (2004).

you'll bear with me, you'll find that the way in which Justice Ginsburg parsed those Rules is deeply revealing.

The Bankruptcy Code contains a rule that limits the time within which one may file a complaint objecting to a debtor's discharge. Such a complaint must be filed within sixty days of the first date set for a meeting of creditors.<sup>9</sup> That same rule provides that an extension of time may be granted if a motion seeking to extend the time is filed before the time for filing has expired.<sup>10</sup> And another rule makes clear that an enlargement of time for filing the complaint is not permitted for any reason except as stated in the rule itself.<sup>11</sup>

There are other rules like the latter one with which you may be more familiar. This Bankruptcy Rule is modeled on Federal Rule of Civil Procedure 6(b), which prohibits extending the time for certain post-trial motions—for example motions under Rule 50(b) for judgment as a matter of law or Rule 59(b) for a new trial, which must be brought within ten days of the entry of judgment.<sup>12</sup>

In *Kontrick*, the debtor brought a Chapter 7 bankruptcy petition.<sup>13</sup> A creditor filed a timely complaint objecting to the discharge, but subsequently, and outside the sixty-day time limit, filed an amended complaint that added a new claim.<sup>14</sup> That untimely claim was litigated to judgment. The debtor never raised its untimeliness before the bankruptcy court. But after judgment, for the first time, the debtor argued that that court was powerless to adjudicate the claim because it was filed untimely.<sup>15</sup> The court's action, he claimed, was in violation of a jurisdictional time limit. And eventually he brought that argument to the United States Supreme Court, which granted certiorari on the question of whether the deadline set in the rule was, in the words of one of the Court's prior cases, "mandatory and jurisdictional" and thus could not be waived.<sup>16</sup>

Justice Ginsburg wrote the opinion in *Kontrick* for a unanimous court. And she concluded that the debtor was not entitled to raise the untimeliness of the creditor's new claim after the debtor had "litigated and lost the case on the merits."<sup>17</sup> Although the claim had not been timely when it was filed, the

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<sup>9</sup> FED. R. BANKR. P. 4004(a).

<sup>10</sup> FED. R. BANKR. P. 4004(b).

<sup>11</sup> FED. R. BANKR. P. 9006(b)(3).

<sup>12</sup> See FED. R. CIV. P. 6(b)(2), 50(b), 59(b).

<sup>13</sup> *Kontrick*, 540 U.S. at 448.

<sup>14</sup> *Id.* at 448–49.

<sup>15</sup> *Id.* at 451.

<sup>16</sup> *Id.* at 452 n.7 (quoting language in the Question Presented originally used by the Court in *United States v. Robinson*, 361 U.S. 220, 228–29 (1960)).

<sup>17</sup> *Id.* at 458–60.

deadline imposed by the rule was not, Justice Ginsburg concluded, “jurisdictional.” Questions of a federal court’s jurisdiction, of course, may not be waived. They may be raised by the parties at any time, and, indeed, the court has an obligation in every case to determine *sua sponte* whether it has jurisdiction.<sup>18</sup>

In *Kontrick*, there was no dispute that the deadline contained in the rule determined when a creditor’s complaint could be filed. Nor was there any question that it was a rigid deadline. The courts were without power to extend it.

Justice Ginsburg noted, however, that courts, including the Supreme Court, had been, in her words, “less than meticulous” in their use of the word “jurisdictional” to describe mandatory filing deadlines.<sup>19</sup> Congress confers subject-matter jurisdiction upon the courts, and in this case jurisdiction was conferred upon the bankruptcy court by a statute that contained no time limitation.<sup>20</sup> The Bankruptcy Rules, promulgated by the Supreme Court like the rules of practice and procedure in the district courts and courts of appeals, while imposing what Justice Ginsburg called an “inflexible” rule,<sup>21</sup> neither created nor extinguished federal jurisdiction. The deadline thus was not “jurisdictional.” As a consequence, even if such an inflexible claim processing rule was unalterable on a party’s application, if the opposing party failed to raise the violation of the rule in a timely fashion, that objection could be waived. Put another way, the untimeliness of a creditor’s complaint in a case like the one before the Court, could not be raised for the first time on appeal.

*Kontrick* is a rather remarkable decision in many dimensions. It highlights Justice Ginsburg’s precision of thinking, which is a hallmark of her jurisprudence and an example for other judges. It highlights, too, her insistence upon the precise use of language. As she wrote in that case, “[c]larity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”<sup>22</sup>

But most important, *Kontrick* shows the nature of Justice Ginsburg’s approach to adjudication. The adjudicatory power, she wrote while serving as a Circuit Judge on the United States Court of Appeals, is an “awesome

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<sup>18</sup> See *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884).

<sup>19</sup> *Id.* at 454.

<sup>20</sup> *Kontrick*, 540 U.S. at 444.

<sup>21</sup> *Id.* at 444, 456.

<sup>22</sup> *Id.* at 455.

authority.”<sup>23</sup> Of course there is an enormous literature about the importance of limitations on that authority, for the proper functioning of democracy,<sup>24</sup> for each of the co-equal branches of the federal government to robustly play its appropriate role,<sup>25</sup> and for the proper balance of power within our federal system.<sup>26</sup> And the fundamental limits upon judicial authority are jurisdictional limits: only when there is subject-matter and personal jurisdiction over the parties, Justice Ginsburg explained in her 1999 decision in *Ruhrgas AG v. Marathon Oil*, may a court’s decision bind those parties.<sup>27</sup> And a court must ensure that it has jurisdiction before it exercises what Justice Ginsburg has elsewhere characterized as its “substantive ‘law-declaring power.’”<sup>28</sup>

But *Kontrick* concludes that the limits placed on the filing of the complaint in that case were not jurisdictional. Her opinion for the Court in that case demonstrates that for Justice Ginsburg, questions of jurisdiction are not mechanisms to be used for policy reasons to avoid adjudication. *Kontrick* expresses a commitment to the dual bedrock proposition about federal court jurisdiction articulated by Chief Justice Marshall in 1821 in *Cohens v. Virginia*,<sup>29</sup> a proposition Justice Ginsburg expressly invoked in the opening lines of her opinion in *Marshall v. Marshall*, the Anna Nicole Smith case, where she wrote:

In *Cohens v. Virginia*, Chief Justice Marshall famously cautioned: “It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should . . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”<sup>30</sup>

There, Justice Ginsburg had concluded that the “probate exception” to federal jurisdiction was a narrow one that did not bar Smith’s suit against the

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<sup>23</sup> Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1186 (1992).

<sup>24</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

<sup>25</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); CASS R. SUNSTEIN, *ONE CASE AT A TIME* (1999).

<sup>26</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

<sup>27</sup> See 526 U.S. 574, 577 (1999).

<sup>28</sup> *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 433 (2007) (citing *Ruhrgas AG*, 526 U.S. at 584–85, in turn quoting *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998)).

<sup>29</sup> 19 U.S. 264 (1821).

<sup>30</sup> *Marshall v. Marshall*, 547 U.S. 293, 298–99 (2006) (citing *Cohens*, 19 U.S. at 404 (1821)).

son of her late husband, a suit that was otherwise within the jurisdiction of the federal courts under the terms of the bankruptcy statute.<sup>31</sup>

Recognizing that there is a difference between an absence of jurisdiction and a failure to meet some nonjurisdictional deadline, which leaves the Court with the power to exercise its jurisdiction, is not just the dry, technical stuff of federal procedure. For the importance of cabining claims of a jurisdictional bar to those cases in which the bar truly is jurisdictional is quite profound. To see this, one need look no further than the 2007 case of *Bowles v. Russell*,<sup>32</sup> where the Court divided closely about the application of the rule articulated by Justice Ginsburg in *Kontrick*.<sup>33</sup>

In that case, a district judge extended the time within which a prisoner could appeal from the denial of his petition for habeas relief. The judge set a due date for the notice of appeal that was seventeen days after his order.<sup>34</sup> The Federal Rules and the statute, however, allowed him to extend the time only for fourteen days.<sup>35</sup> As the Court majority noted, the judge's action was "inexplicabl[e]."<sup>36</sup>

The Supreme Court divided 5–4 about whether that fourteen-day limit was jurisdictional. Justice Thomas wrote the opinion of the Court that held the prisoner's appeal barred.<sup>37</sup> Even though the district judge had told the prisoner that he could file his notice of appeal on the date it was filed, the Court held, the prisoner had missed the deadline.<sup>38</sup>

Justice Ginsburg joined the dissent, which was written by Justice Souter. The dissent concluded that it was "intolerable for the judicial system to treat people this way," and, it concluded that, because the rule providing for only a fourteen-day extension was not jurisdictional, such treatment was not required by law.<sup>39</sup> The dissenting opinion put the gravamen of the matter aptly, saying:

The stakes are high in treating time limits as jurisdictional. While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible,

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<sup>31</sup> *Id.* at 299–300.

<sup>32</sup> 551 U.S. 205 (2007).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 207.

<sup>35</sup> See 28 U.S.C. § 2107(c); FED. R. APP. P. 4(a)(6).

<sup>36</sup> *Bowles*, 551 U.S. at 207.

<sup>37</sup> *Id.* at 206–07.

<sup>38</sup> *Id.* at 214–15.

<sup>39</sup> *Id.* at 215 (Souter, J., dissenting).

meritorious excuse irrelevant (unless the statute so provides), and *sua sponte* consideration in the courts of appeals mandatory . . . .<sup>40</sup>

So a first lesson about judging in Justice Ginsburg's jurisprudence is to take care not to exceed one's jurisdiction, but—and here there is a hint of the courage I spoke of at the outset—to exercise that jurisdiction where it is properly invoked.

A second lesson is to be attentive in exercising judicial authority to the proper role of the courts. Our courts exist to resolve disputes, and they do so within the context of an adversarial system. In criminal cases, in particular, the adversary nature of our system reflects the departure of the English common law from inquisitorial continental European systems that rely upon examination by judicial officers. We are justly proud of our adversary system as—in Wigmore's words about cross-examination, its inherent constituent—an "engine . . . for the discovery of truth."<sup>41</sup>

Justice Ginsburg's jurisprudence is animated by recognition that the judge's role is that of adjudicator in a system that is fundamentally an adversarial one. Indeed, that is an animating principle in the *Kontrick* decision that I have already been using as an example. In that case, the creditor brought a claim outside the time limit provided for by the Rules. But, Justice Ginsburg wrote, despite that, the decision against the debtor could not be reversed for that reason on appeal—because he had failed to raise the point in the adversarial proceeding below.<sup>42</sup>

The lesson for judges is that, once satisfied that there is jurisdiction, courts in our system should in general decide the cases as they are presented to them. They are to adjudicate. Thus, in a case last June Justice Ginsburg wrote:

In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present . . . . As cogently explained [by the late Judge Richard Arnold of the United States Court of Appeals for the Eighth Circuit]: "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come

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<sup>40</sup> *Id.* at 216–17.

<sup>41</sup> 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (J. Chadbourn rev. 1974).

<sup>42</sup> *Kontrick*, 540 U.S. at 458–60.

to us, and when they do we normally decide only questions presented by the parties.”<sup>43</sup>

And here she quoted Ben Kaplan, the great former Justice of the Massachusetts Supreme Judicial Court who remains to this day, four days after his ninety-eighth birthday, my colleague as a Recall Justice on the Massachusetts Appeals Court, who wrote in 1960 that our system—in a uniquely American way—“exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge.”<sup>44</sup>

This is not to say that this is an inflexible rule for Justice Ginsburg. She has noted that courts will depart from this rule to protect the rights of pro se litigants,<sup>45</sup> and has suggested that the same might be permissible in certain circumstances in the case of criminal defendants who are represented.<sup>46</sup> But she has been clear in articulating and abiding by the general rule.

And it is a rule that judges valuably heed. For even when a court has power to decide a case on a ground not raised by a party, the adoption of a position that has not been tested before us in the crucible of the adversary process may have unintended consequences, much like the expression of rules that are broader than necessary for decision. And, while, as many appellate judges have noted, the briefs before us may not always be of uniform quality,<sup>47</sup> the courts’ assumption of the responsibility for crafting arguments on behalf of the parties can only undermine the important incentives for counsel zealously and thoroughly to present their clients’ cases. The rule of restraint articulated by Justice Ginsburg, like many of the rules that cabin our work as judges, does not exist simply for its own sake. As I have found in my own work, it reflects a profound insight into the prudent use of judicial power.

Finally, I want to talk about Justice Ginsburg and the question of collegiality on a multimember court. Courts are by nature human institutions. If that is something one can recognize as a layperson, law student, or lawyer, if it is something one can see at close hand as a law clerk, it is something the myriad dimensions of which one can perhaps not really grasp until one has

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<sup>43</sup> *Greenlaw v. United States*, 128 S. Ct. 2559, 2564 (2008) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987)).

<sup>44</sup> Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 431 (1960).

<sup>45</sup> *Greenlaw*, 128 S. Ct. at 2560.

<sup>46</sup> *See id.*

<sup>47</sup> *E.g.*, Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 10 (2008); Interview with Richard A. Posner, 7th Cir. Judge, How Appealing’s 20 Questions Site (Dec. 1, 2003), [http://howappealing.law.com/20q/2003\\_12\\_01\\_20q-appellateblog\\_archive.html](http://howappealing.law.com/20q/2003_12_01_20q-appellateblog_archive.html).



had the experience of sitting as a judge on such a multimember court. Certainly it is something I have come to appreciate more fully since my own appointment to the bench.

One cannot discuss Justice Ginsburg's role on the Supreme Court without discussing collegiality. It is a topic on which she wrote while serving on the D.C. Circuit,<sup>48</sup> and recognition of its importance animates not just her jurisprudence, but her life.

We are not so many years from Justice Holmes' reputed remark that the Justices of the High Court were "nine scorpions in a bottle."<sup>49</sup> In the years since that time, Justice Black after the Court's weekly conference once reported of his colleague Justice Felix Frankfurter, "I thought Felix was going to hit me today, he got so mad."<sup>50</sup> Even closer to home, while Justice Ginsburg sat on the D.C. Circuit, one of her colleagues said to another in the private conference held after oral argument, "if you were 10 years younger, I'd be tempted to punch you in the nose."<sup>51</sup> In 1990, Judge Posner, who sits on the Seventh Circuit, wrote:

The tensions within an appellate court in which all the judges sit en banc (rather than in rotating panels, the normal mode in the federal courts of appeals) are great; they are greatest in the Supreme Court. It is like arranged marriage in a system with no divorce. The tensions fester, generating debilitating personal rivalries, resentments, apathy, burnout, idiosyncrasy, and a shrill and nasty rhetoric of invective.<sup>52</sup>

Yet by all accounts, the era during which Justice Ginsburg has sat on the Supreme Court has been perhaps the most collegial in its history. Justice Breyer has said that he has never heard a voice raised in anger in the Justices' private conference room.<sup>53</sup> There can be no doubt of the significant role Justice Ginsburg has played in this collegiality. The public evidence is remarkable. Shortly after joining the Court, Justice Ginsburg appeared in costume with one of the Justices with whom she most often disagrees, her friend Justice Antonin Scalia, in the Washington Opera Production of

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<sup>48</sup> See Ginsburg, *supra* note 23.

<sup>49</sup> Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990) (attributing this phrase to Justice Holmes).

<sup>50</sup> HUGO BLACK, JR., MY FATHER: A REMEMBRANCE 234 (1975).

<sup>51</sup> Neil A. Lewis, *The 1992 Campaign: Selection of Conservative Judges Insures a President's Legacy*, N.Y. TIMES, July 1, 1992, at A13.

<sup>52</sup> Posner, *supra* note 49, at 14.

<sup>53</sup> John F. Kennedy Library Foundation, *A Conversation with Justice Stephen Breyer* (Sept. 21, 2003), <http://www.jfklibrary.org/NR/rdonlyres/0B208E56-8F66-4C2C-A1B4-B7B997CAB5D0/30051/BREYER.pdf>.

*Ariadne auf Naxos*.<sup>54</sup> She and Justices Anthony Kennedy and Steven Breyer appeared—playing judges—in a Washington production of *Die Fledermaus* in 2003.<sup>55</sup> Justices Ginsburg and Scalia and their spouses spend New Year's Eve together every year.<sup>56</sup> And she has traveled abroad at various times with colleagues, including Justices Scalia and O'Connor.

Collegiality is important for a number of reasons, but perhaps the most important is the role it plays in assuring clarity in the law. For whenever possible, a court should speak with clarity, in a single voice. Under our system, we abandoned seriatim opinions near the very beginning, in the time of Chief Justice Marshall. Yet we have, in Justice Ginsburg's words, "place[d] no formal limit on the prerogative of each judge to speak out separately."<sup>57</sup> Given this framework, Justice Ginsburg has explained that "overindulgence in separate opinion writing may undermine both the reputation of the judiciary for judgment and the respect accorded court dispositions. Rule of law virtues of consistency, predictability, clarity, and stability may be slighted when a court routinely fails to act as a collegial body."<sup>58</sup>

One of the most interesting things that I have come to realize since becoming a judge is that, regardless of the similarity of their views, no two people will write exactly the same opinion. Indeed, as Justice Ginsburg herself noted in an article in 1992, Chief Justice Stone once wrote to Karl Llewellyn: "You know, if I should write in every case where I do not agree with some of the views expressed in the opinions, you and all my other friends would stop reading my separate opinions."<sup>59</sup>

Yet for the sake of the clarity and usefulness of the law, judges on multimember courts must routinely join opinions that are not written as they would have written them. It is an obligation inherent in our system. And if this presents a challenge on a court that sits in panels, like mine or the D.C. Circuit on which Justice Ginsburg sat, how much more difficult must it be on a nine-member court like the Supreme Court that hears every case en banc?

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<sup>54</sup> Stephen Wigler, *Staging, Singing Make Washington Opera's 'Ariadne' Almost Magical*, BALT. SUN, Jan. 10, 1994, at 2D.

<sup>55</sup> Ann Geracimos & Kevin Chaffee, *Opera Season Opens in Supreme Fashion*, WASH. TIMES, Sept. 9, 2003, at B8.

<sup>56</sup> Joan Biskupic, *Justices Strike a Balance*, USA TODAY, Dec. 26, 2007, at 1D.

<sup>57</sup> Ginsburg, *supra* note 23, at 1190.

<sup>58</sup> *Id.* at 1191.

<sup>59</sup> *See id.* (quoting WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 62 (1964), in turn quoting Letter from Harlan F. Stone, Associate Justice, Supreme Court of the U.S., to Karl Llewellyn, Professor, Columbia Law Sch. (Feb. 4, 1935)) (internal brackets omitted).

In this regard, Justice Ginsburg clearly recognizes the importance of human relations on a court in furthering rule of law values. As their voting records make clear, no Justice's mind has been changed merely by the friendships among them. But federal judges are appointed for life. They may serve with one another for years, even decades. Examining an opinion circulated by a person you have come to like and trust is likely to be a different experience entirely from examining an opinion from a colleague with whom you are not friendly, one with whom you have not built a similar bond of trust. Likewise the process of reviewing suggestions from another judge that might permit him or her to join your opinion. Anecdotes from Supreme Court history confirm this human truth, and there can be little doubt that, while it may not be quantifiable with precision, Justice Ginsburg's conduct toward her colleagues, and the atmosphere it has helped engender more broadly—and the pun is indeed intentional—has played a role in allowing the Court to speak with one voice, where the views of its Justices make that possible.

Collegiality, too, is part of a virtuous circle, and Justice Ginsburg has cautioned against separate writing that generates more heat than light. Needless invective and personal attack, she noted, disserve the causes of public respect for the courts and the administration of justice.<sup>60</sup> Indeed, such attacks can make collegial work more difficult in the human institutions that are our courts. Thus, for example, she concurred only in the judgment in *Washington v. Glucksberg*,<sup>61</sup> disagreeing with Justice O'Connor, who had joined the Court's opinion and written her own opinion concurring in it.<sup>62</sup> Nonetheless, Justice Ginsburg wrote only a short opinion stating that she concurred in the judgment—that she thought the case came out correctly even though she disagreed with the majority opinion—“substantially for the reasons stated by Justice O'Connor in her concurring opinion.”<sup>63</sup> In somewhat the same vein, in her separate dissent in the 1995 affirmative action case, *Adarand Constructors v. Pena*,<sup>64</sup> Justice Ginsburg wrote, in her words, “to underscore not the differences the several opinions in this case display, but the considerable field of agreement—the common understandings and concerns—revealed in opinions that together speak for a majority of the Court.”<sup>65</sup>

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<sup>60</sup> See Ginsburg, *supra* note 23, at 1194–98.

<sup>61</sup> 521 U.S. 702 (1997).

<sup>62</sup> See *id.* at 736–38 (O'Connor, J., concurring).

<sup>63</sup> *Id.* at 789 (Ginsburg, J., concurring in the judgment).

<sup>64</sup> 515 U.S. 200, 271 (1995) (Ginsburg, J., dissenting).

<sup>65</sup> *Id.*

But this brings me back (again) to where I began, to Justice Ginsburg's courage and candor. For while she is sensitive to the need for collegiality, the lesson she teaches for judges of all stripes is not that judging is a passionless or bloodless activity. Those who know her can attest to her passion, as do the published reports of her reading aloud her dissents two Terms ago in *Ledbetter* and *Carhart*.<sup>66</sup> Justice Ginsburg recognizes what is at stake in the job of judging, particularly at the Court on which she sits.

Her concern about collegiality thus does not overshadow her sense of obligation to dissent or to concur separately when she concludes that doing so is warranted by her views. Rather, the very collegiality that she has sought to encourage provides space for the candid and forthright manner in which she writes when she disagrees with her colleagues. And this, too, is an important lesson for judges who serve on multimember courts.

In a *New York University Law Review* article in 1992, she emphasized that separate writing was not, in her words, a "consummation[] devoutly to be avoided,"<sup>67</sup> and Justice Ginsburg has written powerful and significant dissents in a wide range of cases. These dissents are not characterized by personal attack. They avoid needless invective, but Justice Ginsburg's prose can be unflinching and direct. She does not shy away from clear expressions of the significance of the case before her or of the depth of her disagreement with the views of the Court majority.

This directness was perhaps on clearest display in her dissent in what is perhaps the most important case on which she has ruled, *Bush v. Gore*, in which the Court majority of course stopped the counting of presidential election ballots in Florida ordered by that State's Supreme Court.<sup>68</sup> One of her law clerks at the time has been quoted as saying that, despite the stakes and the division on the Court, "I was struck by how much of an institutional citizen [Justice Ginsburg] was, how attuned to the wishes of her colleagues and to not giving offense."<sup>69</sup> Yet there she wrote: "the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of the United States. I dissent."<sup>70</sup>

That degree of clarity is a hallmark of her most significant writing on the Court, in majority opinions and dissents, in cases of substantial and less substantial national importance. The strength it demonstrates is doubtless a reflection in large measure of Justice Ginsburg's background and experience.

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<sup>66</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007); see Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice*, N.Y. TIMES, May 31, 2007, at A1.

<sup>67</sup> Ginsburg, *supra* note 23, at 1194.

<sup>68</sup> *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam).

<sup>69</sup> Greenhouse, *supra* note 66.

<sup>70</sup> *Bush*, 531 U.S. at 144 (Ginsburg, J., dissenting) (paragraph break omitted).

And regardless of whether one agrees or disagrees with the merits of her decisions, Justice Ginsburg's understanding of her ultimate obligation—to rule on the cases before her to the best of her ability, and to state her conclusions, even when controversial, with directness and without fear—is perhaps the most important lesson for other judges of her work on our Supreme Court.

