Justice Ginsburg's Gradualism in Criminal Procedure

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Justice Ruth Bader Ginsburg's preference for narrow rulings that adhere closely to precedent and that avoid grand pronouncements is well-known.[1] Commentators have noted her judicial moderation in fields as diverse as abortion rights,[2] affirmative action,[3] civil procedure,[4] death penalty jurisprudence,[5] and even gender discrimination, the area of law in which she

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[1] *See* Jason J. Czarnezki, William K. Ford & Lori A. Ringhand, *An Empirical Examination of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 140 tbl.B (2007) (finding that Justice Ginsburg voted to alter precedent in 1.5% of the cases decided between 1994–2004, with only Justice Souter demonstrating less willingness to do so at 1.3%, and Justice Thomas being most willing to do so at 4.3%).

[2] *See* Mei-Fei Kuo & Kai Wang, *When Is an Innovation in Order?: Justice Ruth Bader Ginsburg and Stare Decisis*, 20 U. HAW. L. REV. 835, 861 (1998) (noting Ginsburg's belief that *Roe v. Wade* "ventur[ed] too far in the change it ordered") (quoting Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992)).

[3] *See* Toni J. Ellington, *Ruth Bader Ginsburg and John Marshall Harlan: A Justice and Her Hero*, 20 U. HAW. L. REV. 797, 811 (1998) ("Ginsburg's desire to leave major changes in the law to the state legislatures is especially evident in her writings on affirmative action cases.").

[4] *See* Elijah Yip & Eric K. Yamamoto, *Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure*, 20 U. HAW. L. REV. 647, 695 (1998) ("Aware of the precedential impact of her opinions [in the class action area], she is careful not to articulate a view that may be used in a future case to disrupt the balance among process values.").

[5] *See* Sidney Harring & Jeffrey L. Kirchmeier, *Scrupulous in Applying the Law: Justice Ruth Bader Ginsburg and Capital Punishment*, 7 N.Y. CITY L. REV. 241, 269 (2004) ("In her death penalty opinions, Justice Ginsburg has been consistently

is considered a pioneer.[6] Nor is this caution about things legal new with her ascent to the Supreme Court. It was also evident in her thirteen years on the D.C. Circuit Court of Appeals[7] as well as during her tenure as an advocate with the ACLU.[8] Justice Ginsburg herself has noted the cautious nature of her judicial philosophy, both before and after she joined the Supreme Court.[9] As she said at her confirmation hearing, a judge should "strive to write opinions that both 'get it right' and 'keep it tight.'"[10]

At the same time, Justice Ginsburg believes that the Constitution is a dynamic document rather than a frozen text that must be interpreted in light of practices that existed at the time of the Framers. Thus, as she has recently written, the Constitution should be read "as belonging to a global twenty-first century, not as fixed forever by eighteenth-century understandings."[11] Indeed, in one analysis of confirmation hearing statements by the nine Justices who were on the Court in 2004, Justice Ginsburg was considered the Justice who was least committed to originalism theories,[12] a finding that presumably would not change now that Chief Justice Roberts and Justice Alito have joined the Court. None of this means, of course, that Justice

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'scrupulous in applying law on the basis of legislation and precedent . . . .'") (citing Kuo & Wang, *supra* note 2, at 863).

[6] *See* Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 634 (2003) ("Even in the area of gender discrimination, where she might be expected to celebrate bolder judicial action, Ginsburg prefers these 'measured motions.'") (quoting Ginsburg, *supra* note 2, at 1198).

[7] *See* Sheila M. Smith, Comment, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893, 1905 (1995) (noting that as an appellate judge, Justice Ginsburg adhered to the notion that "appellate courts, even the United States Supreme Court, must tread carefully when developing new doctrine, going only as far as necessary for the instant case to be decided and building upon previous precedent whenever possible") (citing Ginsburg, *supra* note 2, at 1198–1208).

[8] Toni J. Ellington et al., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 U. HAW. L. REV. 699, 720 (describing Justice Ginsburg in her days at the ACLU as "[a] firm believer in precedent [who] recognized the need for a well-developed, long-range strategy to chip away at precedent, to establish new principles incrementally . . .").

[9] *See, e.g.*, Ginsburg, *supra* note 2, at 1198–99 (criticizing *Roe*, and asserting that "[d]octrinal limbs too swiftly shaped, experience teaches, may prove unstable").

[10] *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 53 (1993) (statement of Judge Ruth Bader Ginsburg).

[11] Ruth Bader Ginsburg, *"A Decent Respect for the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 99 AM. SOC'Y INT'L L. PROC. 351, 355 (2005) (keynote address at the Ninety-Ninth Annual Meeting of the American Society of International Law, April 1, 2005).

[12] Czarnezki, Ford & Ringhand, *supra* note 1, at 142 tbl.D.

Ginsburg ignores Framers' "intent" when that elusive mental state can be discerned; rather she believes the overriding intent of the Framers was to draft a document that is flexible rather than static.

On the surface, at least, these two tenets—a preference for circumspect rulings adhering closely to precedent and rejection of originalism as the dispositive interpretive guidepost—are in some tension. But change can come in small steps as well as giant leaps; these two notions, when combined, suggest that Justice Ginsburg believes that it is important to re-interpret the Constitution in light of the times, but that such re-interpretations should be arrived at, as she puts it, in "measured motions." [13] Or as she has more whimsically stated, the best judges are those with "open, but not drafty, minds . . . ."[14] Cass Sunstein has referred to a similar approach as minimalism.[15] Here, however, I will call it gradualism, because the latter term suggests movement in a particular direction, albeit only minimally with respect to any given decision. Thus, for instance, Justice Ginsburg's long crusade aimed at making gender a suspect classification—a crusade that has in large measure been successful—consisted of a number of incremental moves,[16] but all pushing toward a particular goal.

Justice Ginsburg believes that gradualism is not only required by the judicial role but also strategically beneficial. As she said in an article criticizing the decision in *Roe v. Wade*,[17] "[W]ithout taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for a social change."[18] The tactic of nibbling away so as to not alarm may well explain why she continues to "tinker with the machinery of death," something her colleague Justice Harry Blackmun ultimately refused to do,[19] as did Justices William Brennan and Thurgood Marshall before her time.[20] Justice Ginsburg

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[13] Ginsburg, *supra* note 2, at 1198 ("Measured motions seems to me right, in the main, for constitutional as well as common law adjudication.").

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

[15] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix (Harvard University Press 1999).

[16] *See* Ray, *supra* note 6, at 635; *see also* Ellington et al., *supra* note 8, at 720–63 (recounting Justice Ginsburg's gender discrimination jurisprudence through three decades of decision-making).

[17] 410 U.S. 113 (1973).

[18] Ginsburg, *supra* note 2, at 1208.

[19] *See, e.g.*, Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

[20] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 229 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

may believe that fiddling with the death penalty—by insisting on time-consuming and expensive procedural regularity and occasionally narrowing its scope in cases like *Atkins v. Virginia*,[21] *Roper v. Simmons*,[22] and *Kennedy v. Louisiana*[23]—is the only feasible way of ultimately doing away with capital punishment or rendering it moot.

To date, no one has taken a sustained looked at Justice Ginsburg's approach to decision-making in the area of criminal procedure, by which I mean the types of subjects normally taught in law schools under that name, including search and seizure, interrogation, the right to counsel, trial rights, sentencing procedures, and the criminal appeals and collateral review processes.[24] It turns out, not surprisingly, that here too there is evidence of Justice Ginsburg's gradualism. After surveying Justice Ginsburg's contribution to the Supreme Court's criminal procedure jurisprudence, this article zeroes in on her decisions regarding search and seizure law under the Fourth Amendment, which comprise far and away the largest category of constitutional criminal procedure cases and thus provide the most fertile ground for assessing Justice Ginsburg's gradualist tendencies and their impact.

I. JUSTICE GINSBURG'S CONTRIBUTION TO CONSTITUTIONAL CRIMINAL PROCEDURE

Nowhere is it more obvious where a Justice stands on civil rights issues than in criminal cases, where the battle lines between the state and the individual are usually clearly drawn. Some commentators have lamented that Justice Ginsburg has not sided with the defense as often as one might expect from a Justice appointed by a Democratic president and hailing from the ACLU.[25] Of Justice Ginsburg's seventy-one written opinions (majority and

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[21] 536 U.S. 304, 321 (2002) (exempting people with mental retardation from the death penalty).

[22] 543 U.S. 551, 578–79 (2005) (exempting juveniles from the death penalty).

[23] 128 S. Ct. 2641, 2646, 2664 (2008) (exempting child molesters from the death penalty).

[24] Cases on substantive criminal law, the federal rules of evidence, and the ex post facto clause were excluded in this survey.

[25] *See* Joyce Ann Baugh, Christopher E. Smith, Thomas R. Hensley & Scott Patrick Johnson, *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 29 (1994) ("Although she ultimately supported liberal outcomes in a majority of cases, she did not fulfill liberals' hopes, even with respect to the death penalty issue upon which she had been so evasive during her confirmation hearings."); *see also* Edward Lazarus, The Transformation of Justice Ruth Bader Ginsburg, as the Roberts Court Shifts from Harmony and Consensus to Bitter Division (June 21, 2007) http://writ.news.findlaw.com/lazarus/20070621.html (calling Ginsburg "[o]riginally an

concurring) dealing with criminal procedure since she joined the Court in 1993, forty-two have sided with the defense but twenty-nine (or over 40%) have agreed with a result favoring the prosecution.[26] In the 266 criminal procedure opinions which she joined but did not write, her vote supported the government in 110 (or over 41%) of the cases.[27] Combining both written and joined opinions (a total of 337 through the 2008 Term), she voted for the prosecution in 41.2% of the criminal procedure cases decided during her tenure on the Court.[28] One can see how this percentage could be disappointing to some defense advocates.

These numbers require some context, however. Researchers who have looked at voting patterns in all criminal cases (not just criminal procedure cases) have found that several Warren Court Justices, such as Justice Marshall and Justice Brennan, voted for the prosecution's side noticeably less often (20% and 27%, respectively) than Justice Ginsburg.[29] But the only current Justice who approaches Justice Ginsburg's tendencies on this score is Justice Stevens, who has voted for the government in approximately 37% of the criminal cases in which he participated.[30] A study that looked at all the Court's procedural and substantive criminal decisions between 1994 (the year after Justice Ginsburg joined the Court) and 2004 put Justice Ginsburg in what the survey authors called the "liberal" camp in 63.1% of the opinions, with only Justice Stevens opting for that position more often (at 72.9%).[31] And a survey of all of the Court's criminal justice decisions since 2005 (the beginning of the Roberts Court era) found that Justice Ginsburg

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outwardly bland moderate known for denying rumors of internal Court strife," but also noting that "[she] has changed quite radically into a passionate, even bitter, dissenter from the increasingly conservative drift of the Roberts era").

[26] *See* Christopher Slobogin, *Criminal Procedure Cases in Which Justice Ginsburg Participated* (chart on file with author and *Ohio State Law Journal*) [hereinafter *Ginsburg Criminal Procedure Cases*]. With respect to each criminal procedure case decided by the Supreme Court since Justice Ginsburg joined the Court (see *supra* note 24 and accompanying text for definition of "criminal procedure case"), this chart provides: (1) citation; (2) type of opinion that Ginsburg authored or joined (majority, dissent, or concurrence, unanimous, and unanimous with concurring opinion); (3) legal genre (e.g., Fourth Amendment; habeas); (4) the issue or holding; and (5) whether Ginsburg sided with the prosecution or the defense. Cases in which Justice Ginsburg authored an opinion are in bold.

[27] *Id.*

[28] *See id.*

[29] Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1413 tbl.2 (2006).

[30] *Id.*

[31] Czarneski, Ford & Ringhand, *supra* note 1, at 149.

was the *most* "liberal" justice, voting in that direction 80% of the time, with Justice Souter next at 74%, and Justices Alito and Thomas bringing up the rear at 14% and 19%, respectively.[32] Meanwhile, in the fifteen years of Justice Ginsburg's tenure, the Supreme Court as a whole has decided for the defense in only about 35% of its criminal justice cases, close to the converse of Justice Ginsburg's decision-making proclivities in that area of law.[33]

Moreover, these general data obscure two important aspects of the decisions in which Justice Ginsburg joined in a government-oriented opinion. First, many of these opinions have been concurrences that distance her from the majority's holding. Nineteen of the twenty-nine government-oriented opinions that she authored, or over 65%, were concurrences of this type, and seventeen of the 110 government-oriented opinions that she joined but did not write were also concurrences.[34] That still leaves a number of Ginsburg votes—specifically 103 (or about 31%) of the Court's 337 criminal procedure opinions—that favor an unabashedly prosecution position. But here, the second unremarked aspect of her voting patterns is important to note. Many of these latter decisions were unanimous, meaning that even the other "liberals" on the Court were willing to go along. Of the eleven Ginsburg-authored government-oriented majority opinions, six were unanimous, and almost two-thirds of the remaining ninety-five government-oriented opinions (sixty) were joined by all Justices who participated.[35]

Turning to specific aspects of criminal procedure, Justice Ginsburg's defense-orientation has been particularly noticeable in three areas. The first is sentencing, where she has expressed strong support for expanding the role of juries in dispositional decision-making.[36] Justice Ginsburg was in the majority in the three leading cases in this area, *Apprendi v . New Jersey*,[37]

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[32] Christopher E. Smith, Michael A. McCall & Madhavi M. McCall, *The Roberts Court and Criminal Justice at the Dawn of the 2008 Term*, 3 CHARLESTON L. REV. 265, 271 tbl.2 (2009).

[33] Lee Epstein et al., *The Bush Imprint on the Supreme Court: Why Conservatives Should Continue to Yearn and Liberals Should Not Fear*, 43 TULSA L. REV. 651, 662 (2008) (noting that the Rehnquist Court decided for the prosecution in 66% of its criminal cases, while the Roberts Court, in its first two terms, decided similarly in 64% of its criminal cases).

[34] *Ginsburg Criminal Procedure Cases*, *supra* note 26.

[35] A few of these "unanimous" opinions featured concurring opinions that Justice Ginsburg did not join. *Id.*

[36] *See The Supreme Court 2006 Term—Leading Cases*, 121 HARV. L. REV. 225, 230 (2007) ("Justice Ginsburg's seemingly formalistic rejection of the dissenters' state-oriented and defendant-oriented models may in fact signal the reemergence of an antiquated theory about one of the Sixth Amendment's purposes: to preserve meaningful citizen participation in the judicial process.").

[37] 530 U.S. 466, 475–76 (2000).

Blakely v. Washington,[38] and *United States v. Booker*,[39] all of which interpreted the Sixth Amendment right to jury trial to prohibit imposition of a sentence beyond statutory or guidelines maxima unless the enhancing facts are proven to a jury beyond a reasonable doubt. And she authored the majority opinions in *Ring v. Arizona*[40] (interpreting *Apprendi* to require that facts supporting a death sentence be proven to a jury); *Cunningham v. California*[41] (interpreting *Blakely* and *Booker* to strike down a California sentencing regime that permitted judges to impose upper term limits based on their own factual findings); and *Greenlaw v. United States*[42] (holding that a court of appeals may not, on its own, order an increase in sentence). She also dissented in *Washington v. Recuenco*,[43] arguing, contrary to the majority's ruling, that a failure to submit a sentencing factor to the jury is a "structural error."[44]

Another body of criminal procedure law in which Justice Ginsburg has played a conspicuous role is the Sixth Amendment right to counsel. In the twenty-seven cases decided in the past fifteen years that addressed whether defendants are entitled to counsel or received effective assistance of counsel, Justice Ginsburg voted for the defense in nineteen (or 70%), well over her 58% average in criminal procedure cases generally.[45] She authored majority opinions in *Alabama v. Shelton*,[46] which required counsel at proceedings at which the defendant receives a suspended sentence, as well as in *Halbert v.*

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[38] 542 U.S. 296, 313 (2004).

[39] 543 U.S. 220, 244 (2005).

[40] 536 U.S. 584, 609 (2002).

[41] 549 U.S. 270, 293 (2007).

[42] 128 S. Ct. 2559, 2570 (2008).

[43] 548 U.S. 212, 229 (2006) (Ginsburg, J., dissenting).

[44] At the same time, Justice Ginsburg has signed onto opinions that permit sentences to be based on judge-determined facts in sentencing regimes where the maxima are "advisory." *Id.*; *see, e.g.*, Gall v. United States, 128 S. Ct. 586, 595 (2007) (holding that trial judges need not find "extraordinary" circumstances to depart from guidelines range); Rita v. United States, 551 U.S. 338, 347 (2007) (holding that appellate courts may presume reasonableness of a sentence based on judge-found factors if it is within the federal sentencing guidelines). And she wrote the majority opinions in *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007) (holding that a downward departure for a sentence in a cocaine case should have been upheld by the appellate court), and in *Oregon v. Ice*, 129 S. Ct. 711, 718 (2009) (holding that the judge may find facts necessary to impose a consecutive rather than concurrent sentence because "no erosion of the jury's traditional role was at stake" in such a process).

[45] *See Ginsburg Criminal Procedure Cases*, *supra* note 26.

[46] 535 U.S. 654, 674 (2002).

Michigan,[47] which mandated counsel for defendants who seek leave to appeal a guilty plea. She also usually found counsel to be ineffective in capital cases.[48] In the one case in which she authored a majority opinion that found against a defendant's Sixth Amendment claim, *Florida v. Nixon*,[49] the entire Court agreed with her conclusion that a defense attorney who concedes the guilt of his client at a capital murder trial is not ineffective when the client refuses to provide the attorney with any direction, the attorney satisfies himself that his client's guilt is overwhelming, and the attorney goes on to argue vigorously for mitigation at sentencing. And in her most recent majority opinion in a criminal procedure case, involving the right to speedy trial, she made the eye-opening statement that "[d]elay resulting from a systemic 'breakdown in the public defender system,' could be charged to the State,"[50] which might open the door to ineffective assistance claims based on the same "breakdown" theory.[51] Justice Ginsburg's allegiance to the right to counsel is matched, perhaps inevitably, only by her hostility to the Sixth Amendment right to self-representation, which she has been willing to limit in four opinions she has written or joined.[52]

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[47] 545 U.S. 605, 623–24 (2005).

[48] *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 393 (2005) (finding ineffective assistance of counsel in a capital case); Wiggins v. Smith, 539 U.S. 510, 537–38 (2003) (same); Williams v. Taylor, 529 U.S. 362, 398–99 (2000) (same); *see also* Mickens v. Taylor, 535 U.S. 162, 209 (2002) (Ginsburg, J., dissenting) (concerning a capital case where majority held no constitutionally cognizable conflict arose when defendant's attorney had been representing victim at time of death). *But see* Bell v. Cone, 535 U.S. 685, 702 (2002) (where Justice Ginsburg joined an opinion holding that a state court's determination in a capital case that counsel was not deficient not unreasonable). The latter case came back to the Supreme Court last term on a *Brady* claim, which the Court, with Ginsburg in the majority, held was justiciable on federal habeas. Cone v. Bell, 129 S. Ct. 1769, 1786 (2009).

[49] 543 U.S. 175 (2004)

[50] Vermont v. Brillon, 129 S. Ct. 1283, 1292 (2009) (citing State v. Brillon, 955 A.2d 1108, 1111 (Vt. 2008)).

[51] *Cf.* State v. Peart, 621 So. 2d 780, 783 (La. 1993) (holding that low funding levels, high caseloads, and inadequate investigative support all combined to create a "rebuttable presumption" in every criminal case that public defenders were providing ineffective assistance of counsel).

[52] *See* Indiana v. Edwards, 128 S. Ct. 2379, 2385–86 (2008) (finding no pro se right for competent but mentally ill defendants); Kane v. Espitia, 546 U.S. 9, 10 (2005) (per curiam) (finding no right to a prison library); Iowa v. Tovar, 541 U.S. 77, 93–94 (2004) (Justice Ginsburg's opinion for the Court finding no right to be informed of fact that attorney might alert defendant to possible defenses); Martinez v. Court of Appeal of Cal., 528 U.S. 152, 163 (2000) (finding no right to represent oneself on direct appeal).

A final criminal procedure area that is of special interest to Justice Ginsburg concerns the jurisdictional aspects of the writ of habeas corpus,[53] both as a constitutional and a statutory matter. Almost 20% of her written opinions have dealt with this issue: six majority opinions, four dissents and three concurrences.[54] Although three of her majority opinions favored the prosecution,[55] overall, as with the right to counsel issue, she voted for the petitioner in over 70% (forty-three) of the Court's cases grappling with the writ of habeas corpus,[56] including in every one of the cases contesting the Bush Administration's attempts to exempt its war on terrorism from federal court jurisdiction.[57]

Further evidence of Justice Ginsburg's leanings is found in the fact that she has even signed onto pro-defendant opinions that could put her at odds with her feminist colleagues. In *Georgia v. Randolph*,[58] the Court held, 5–3 (Justice Alito not participating) that a man's refusal to let police inside a home superseded his estranged wife's desire to let them enter the premises, in a setting reeking of domestic discord.[59] In *Davis v. Washington*,[60] the Court held, with one dissenter, that a woman's hearsay statements about domestic abuse obtained by a responding officer after the alleged abuser had departed were "testimonial" under the Sixth Amendment, and thus not admissible.[61] And in *Giles v. California*,[62] the Court reversed a lower court's

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[53] Excluded from this discussion are cases in which the writ of habeas corpus is used merely as a vehicle for determining the substantive law of criminal procedure, including cases governing retroactive application of the law under *Teague v. Lane*, 489 U.S. 288, 315–16 (1989) and 28 U.S.C. § 2254(d)(1) (2006) (granting federal habeas relief only when the state court ruling was an "unreasonable" application of existing law).

[54] *See Ginsburg Criminal Procedure Cases*, *supra* note 26.

[55] *See* Reed v. Farley, 512 U.S. 339, 354–55 (1994) (holding that speedy trial claims are not cognizable on habeas); Mayle v. Felix, 545 U.S. 644, 649–50 (2005) (holding that amended habeas petition does not relate back when it asserts a new ground for relief supported by facts that differ in both time and type from those set forth in the original pleading); Day v. McDonough, 547 U.S. 198, 202 (2006) (holding that a federal court may dismiss a federal habeas petition as untimely even when state concedes timeliness issue).

[56] *See Ginsburg Criminal Procedure Cases*, *supra* note 26.

[57] *See* Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008); Munaf v. Geren, 128 S. Ct. 2207, 2213 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 566 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004); Rasul v. Bush, 542 U.S. 466, 468 (2004); Rumsfeld v. Padilla, 542 U.S. 426, 455 (2004).

[58] 547 U.S. 103 (2006).

[59] *See id.* at 106.

[60] 547 U.S. 813 (2006).

[61] *See id.* at 834.

[62] 128 S. Ct. 2678 (2008).

admission of a murder victim's hearsay statements about threats of physical violence the defendant made toward her, holding, 6–3, that under the Sixth Amendment such statements are not admissible unless the prosecution shows that the defendant had the specific intent at the time of the murder to prevent the victim from testifying against him.[63] In these cases, all of which Justice Ginsburg joined (the latter in a concurrence), any gender-based concerns she may have had about the holding were trumped by her view of history and precedent, a view that happens to coincide with a staunchly liberal view of defendants' constitutional rights.

So Justice Ginsburg's criminal procedure jurisprudence is decidedly defense-oriented compared to most other justices, present and past. A separate issue, much harder to get a handle on, has to do with the *nature* of her defense-orientation. The defense bar's disappointment about her decision-making, to the extent it exists, might have more to do with the perception that her support of defense-oriented positions is somewhat lacking in intensity, and thus has not had a significant impact as it might have had. In other words, her pro-defense tendencies may appear to be too gradualist to many with a defense-minded perspective.

The actual impact of Justice Ginsburg's penchant for gradualism in criminal procedure cases is difficult to determine in other than a speculative way. By definition, gradualism can only have a major impact over several cases, all of which focus on the same constitutional doctrine (because a gradualist approach does not contemplate pronouncements that bleed over into other doctrines). Despite the fifteen-year span of Justice Ginsburg's career on the Supreme Court, there is a paucity of data of this type. Cases dealing with the privilege against self-incrimination or double jeopardy under the Fifth Amendment, the right to counsel, jury trial and confrontation under the Sixth Amendment, and free-standing procedural due process issues under the Fourteenth Amendment are too few and too disparate to enable one to discern any definitive patterns. While, as recounted above, opinions construing the scope of habeas review are more numerous, they too are disconnected doctrinally, and frequently too technical as well, to permit any kind of meaningful assessment of progression in a particular area.

One criminal procedure arena that does provide a big enough sample allowing such an assessment is search and seizure caselaw, which since 1993 has comprised close to one-fifth of the Court's criminal procedure docket. A more detailed look at how Justice Ginsburg's brand of gradualism has fared in the Fourth Amendment context provides some interesting insights.

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[63] *See id.* at 2684.

II. JUSTICE GINSBURG AND SEARCH AND SEIZURE LAW

At first glance, Justice Ginsburg's contribution to Fourth Amendment jurisprudence appears miniscule. During her fifteen-year tenure, she wrote only four majority opinions out of sixty-one decisions on search and seizure, and in none of them was the Court closely divided.[64] But the small number of opinions takes on a different light when one realizes that only eighteen of those sixty-one cases resulted in a defense victory; [65] few opportunities to write majority opinions arose for her, given her generally defense-oriented bent.

In light of that bent, a bit more surprising is the fact that Justice Ginsburg sided with the government in twenty-nine of the Court's Fourth Amendment decisions (including one of the four majority opinions she authored).[66] That number represents almost 50% of the search and seizure docket, a proportion noticeably higher than her pro-government tendencies in criminal procedure cases generally. However, in sixteen of these twenty-nine cases the opinions were unanimous, suggesting that the government had a particularly strong argument.[67] Moreover, in six of the remaining thirteen cases she wrote concurrences distancing herself from the majority holding, and in another four she joined concurring opinions that did the same.[68] That leaves just three cases in which she fully joined a conservative majority against one or more of her liberal colleagues.[69] Thus, although she abhors these types of labels,[70]

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[64] *See* Arizona v. Johnson, 129 S. Ct. 781, 784 (2009) (unanimous opinion permitting frisk of car passenger when citation is issued to driver); Florida v. J.L., 529 U.S. 266, 268 (2000) (unanimous decision that tip regarding the location and clothing of person alleged to be carrying a gun is insufficient for reasonable suspicion); Chandler v. Miller, 520 U.S. 305, 322 (1997) (by a vote of 8–1, invalidating drug testing program for political officials); Powell v. Nevada, 511 U.S. 79, 85 (1994) (by a vote of 7–2, holding that the rule that arraignment must take place within forty-eight hours of arrest is retroactive).

[65] *See Ginsburg Criminal Procedure Cases*, *supra* note 26.

[66] *See id.* The one majority opinion Justice Ginsburg wrote supporting the government in a Fourth Amendment case came in *Johnson*, 129 S. Ct. at 784, and is discussed in more detail below.

[67] *See Ginsburg Criminal Procedure Cases*, *supra* note 26.

[68] *See id.* Justice Ginsburg also wrote a concurrence in *Virginia v. Moore*, 128 S. Ct. 1598, 1608 (2008) (Ginsburg, J., concurring), a unanimous prosecution-oriented opinion that is counted in the group of sixteen unanimous opinions rather than this group.

[69] *See* Samson v. California, 547 U.S. 843, 845 (2006) (6–3 vote); Illinois v. McArthur, 531 U.S. 326, 327 (2001) (8–1 vote); Maryland v. Wilson, 519 U.S. 408, 409 (1997) (7–2 vote).

Justice Ginsburg's liberal credentials are intact in the Fourth Amendment area. She has been a firm advocate for the exclusionary rule,[71] the bête noire of conservatives, and she has also usually stood tall for individualized suspicion requirements in the face of claims that the exigencies of law enforcement should eliminate them.[72]

Justice Ginsburg's approach to search and seizure issues evidences two types of gradualism. Occasionally, Justice Ginsburg has been able to engage in what might be called "positive" gradualism, writing or joining a majority opinion that tries to emulate her incrementally-attained success in gender discrimination cases by moving the Court in a defendant-oriented direction. The best example of this type of gradualism is her majority opinion on behalf

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[70] In her confirmation testimony Justice Ginsburg stated: "My approach, I believe, is neither 'liberal' nor 'conservative.' Rather it is rooted in the place of the judiciary—of judges—in our democratic society." 18 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916–1993: RUTH BADER GINSBURG 260 (Roy M. Mersky et al. eds., 1995).

[71] Herring v. United States, 129 S. Ct. 695, 704 (2009) (Ginsburg, J., dissenting) (opposing the Court's rejection of rule's application to search incident to arrest based on stale warrant); Hudson v. Michigan, 547 U.S. 586, 604 (2006) (Breyer, J., dissenting) (Justice Ginsburg joining a dissent to Court's rejection of rule's application to knock and announce violations); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 370 (1998) (Souter, J., dissenting) (Justice Ginsburg joining a dissent to Court's rejection of rule's application at parole proceedings); Arizona v. Evans, 514 U.S. 1, 23 (1995) (Ginsburg, J., dissenting) (disagreeing with the Court's adoption of a good faith exception to the rule).

[72] *See, e.g.*, Justice Ginsburg's votes in Brendlin v. California, 551 U.S. 249, 251 (2007); Illinois v. Caballes, 543 U.S. 405, 417 (2005) (Ginsburg, J., dissenting); Groh v. Ramirez, 540 U.S. 551, 552 (2004); Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 197 (2004) (Breyer, J., dissenting); Bd. of Educ. v. Earls, 536 U.S. 822, 842 (2002) (Ginsburg, J., dissenting); Ferguson v. City of Charleston, 532 U.S. 67, 69 (2001); Atwater v. City of Lago Vista, 532 U.S. 318, 360 (2001) (O'Connor, J., dissenting); Kyllo v. United States, 533 U.S. 27, 29 (2001); City of Indianapolis v. Edmond, 531 U.S. 32, 33 (2000); Florida v. J.L., 529 U.S. 266, 268 (2000); Illinois v. Wardlow, 528 U.S. 119, 126 (2000) (Stevens, J., concurring in part and dissenting in part); City of Chicago v. Morales, 527 U.S. 41, 45 (1999); Wyoming v. Houghton, 526 U.S. 295, 309 (1999) (Stevens, J., dissenting); Florida v. White, 526 U.S. 559, 567 (1999) (Stevens, J., dissenting); and Richards v. Wisconsin, 520 U.S. 385, 387 (1997). But Justice Ginsburg has also voted against individualized suspicion requirements in several cases. *See, e.g.*, Samson v. California, 547 U.S. 843, 845 (2006); Muehler v. Mena, 544 U.S. 93, 104 (2005) (Stevens, J., concurring in judgment); United States v. Flores-Montano, 541 U.S. 149, 150 (2004); Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 666 (1995). From a liberal perspective, probably the most troubling of the latter cases is *Samson*. As Justice Stevens stated in his dissent, *Samson* is the first case to permit a suspicionless search outside a "special needs" situation, a holding which could come back to haunt the liberal side of the Court. *See* 547 U.S. at 857–58 (Stevens, J., dissenting).

of a unanimous Court in *Florida v. J.L.*,[73] holding unconstitutional a stop based on an anonymous tip.[74] Her opinion for the Court stated more than once that an informant's accuracy about a person's *non*criminal affairs "does not show that the tipster has knowledge of concealed criminal activity,"[75] thus possibly setting the stage for a more direct repudiation of innuendo in several Supreme Court decisions that police corroboration of innocent detail alone is sufficient demonstration of informant reliability.[76]

Most of Justice Ginsburg's gradualism, however, has been of the "negative" variety, in which she has attempted to constrain a Supreme Court whose membership is predominantly prosecution-oriented through concurring or dissenting opinions suggesting limitations on the reach of the majority's ruling. Of course, every Justice uses concurring and dissenting opinions to advance circumscriptions of the Court's holding. But Justice Ginsburg's non-majority opinions in the Fourth Amendment area, as on criminal procedure topics generally, differ from the writings of many of these other Justices; typically, rather than lambasting the majority for its blindness or illogic in broad and far-reaching language, these concurrences pay close attention to precedent and rely on precise "lawyerly" analysis detailing how narrow the majority ruling is, or could be construed to be.

The rest of this article will focus on two Fourth Amendment cases—*Vernonia School District v. Acton*[77] and *Ohio v. Robinette*[78]—that, together with their progeny, demonstrate this negative gradualism phenomenon. As posited earlier, gradualism is based on the view that cases should be decided one at a time, narrowly and according to precedent, but with the attitude that the Constitution is not a rigid document and can be re-interpreted to take into account changing realities. Both *Vernonia* and *Robinette* involve modern phenomena unknown to the Framers—drug testing and car stops for traffic citations, respectively—and both feature concurring opinions written by

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[73] 529 U.S. 266 (2000).

[74] *Id.* at 268.

[75] *Id.* at 272.

[76] *See generally* Peter Erlinder, Florida v. J.L.—*Withdrawing Permission to "Lie with Impunity": The Demise of "Truly Anonymous" Informants and the Resurrection of the* Aguilar/Spinelli *Test for Probable Cause*, 4 U. PA. J. CONST. L. 1, 57–79 (2001) (making this argument). Similarly, in *Thornton v. United States*, 541 U.S. 615, 625 (2004) (Scalia, J., concurring in judgment), Justice Ginsburg joined a concurring opinion written by Justice Scalia arguing that unless, as occurred in *Thornton* itself, there is probable cause to believe evidence is in a car, police should not be able to search it once its occupants have been arrested and placed in a police cruiser. That reasoning was eventually adopted by a majority of the Court last term in *Arizona v. Gant*, 129 S. Ct. 1710, 1713 (2009).

[77] 515 U.S. 646 (1995).

[78] 519 U.S. 33 (1996).

Justice Ginsburg concluding that precedent dictated a prosecution-oriented result but that the majority's holding should be read narrowly. Analysis of these cases and the cases related to them provides some insight into how negative gradualism works, as well as some hints at how it might backfire.

Justice Ginsburg's concurrence in *Vernonia*, decided in 1995, was her first in a Fourth Amendment case.[79] As is true of many of her concurrences (especially in her earlier years on the Court),[80] it is extremely short, providing the minimum explanation necessary to make clear the limits she would impose on the majority's ruling. The other five members in the majority in *Vernonia*, including her sometime liberal colleague Justice Breyer, upheld the constitutionality of a drug testing program that focused on high school student athletes, relying on past cases upholding drug testing of railway workers and customs agents.[81] While Justice Ginsburg agreed with this result, her concurrence briefly noted that the decision did not apply to "all students required to attend school,"[82] but only to students who chose to participate in athletic programs, and cited to a Second Circuit opinion in which Judge Friendly had sanctioned airport searches in part because people can choose to avoid them by deciding not to fly.[83]

Justice Ginsburg's reservation in *Vernonia* turned into a full-blown dissent seven years later in *Board of Education v. Earls*,[84] where five members of the Court, including Justice Breyer, concluded that *Vernonia's* rationale extended to students engaged in *any* type of extracurricular activity, including cooking classes, animal husbandry, band, choir and academic teams. Justice Ginsburg pointed out that these types of activities are much more integrated into the school program and thus much less of an elective than athletics; as she put it, "[s]tudents 'volunteer' for extracurricular pursuits in the same way they might volunteer for honors classes: They subject themselves to additional requirements, but they do so in order to take

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[79] In *Albright v. Oliver*, 510 U.S. 266, 276 (1994) (Ginsburg, J., concurring), Justice Ginsburg wrote a concurrence asserting that the petitioner's claim should have been based on the Fourth Amendment, but the Court focused on whether the claim sounded in due process.

[80] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 471 (1996) (Ginsburg, J., concurring); Bennis v. Michigan, 516 U.S. 442, 457–58 (1996) (Ginsburg, J., concurring); Reno v. Koray, 515 U.S. 50, 65 (1995) (Ginsburg, J., concurring); Simmons v. South Carolina, 512 U.S. 154, 174–75 (1994) (Ginsburg, J., concurring); United States v. Alvarez-Sanchez, 511 U.S. 350, 361 (1994) (Ginsburg, J., concurring).

[81] *See* 515 U.S. at 658–65 (relying in particular on Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989)).

[82] *Id.* at 666 (Ginsburg, J., concurring).

[83] *See id.* (citing United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974)).

[84] 536 U.S. 822, 842 (2002) (Ginsburg, J., dissenting).

full advantage of the education offered them."[85] And she also noted that, while significant drug problems had been documented among the student athletes involved in *Vernonia*, no such demonstration had been made here, a point she made in wonderfully sarcastic but typically understated language that suggests her antipathy toward the Court's decision: "Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of [the school], the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree."[86] In support of this approach to analyzing drug testing cases, she cited to her own majority opinion in *Chandler v. Miller*,[87] which had struck down a drug testing program for politicians on the ground that the State had not been able to show that the program responded to any "concrete danger."[88]

Despite these arguments, she obviously failed to prevail in *Earls*. So the negative gradualism of her *Vernonia* concurrence did not forestall a result that Justice Ginsburg wanted to avoid. Would a more activist approach in the latter case have made any difference? Perhaps not. But note that Justice O'Connor, normally in the conservative camp, joined Justice Ginsburg's dissent in *Earls*,[89] a move consistent with her long dissent in *Vernonia* castigating the majority for reasons similar to those Ginsburg gave in her *Earls* dissent.[90] Had Justice Ginsburg joined Justice O'Connor's dissent in *Vernonia* or authored her own and thereby made *Vernonia* a 5–4 squeaker instead of a 6–3 decision, one wonders whether Justice Breyer, who clearly agonized over his deciding vote in *Earls*,[91] might have gone the other way in that case.

Even more troubling for someone of Justice Ginsburg's persuasion is the likely result in the next student drug testing case, when it inevitably arrives at the Court. Now that Justice Alito has replaced Justice O'Connor, it is very likely there are five votes to approve the type of drug testing program that Justice Ginsburg was most worried about in *Vernonia*—one aimed at *all* high school students—even if Justice Breyer finally jumps ship on the issue. The lesson one might draw about gradualism? While it can often be a successful strategy, its slow pace might also exact significant costs.

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[85] *Id.* at 845–46.

[86] *Id.* at 852.

[87] 520 U.S. 305, 308 (1997).

[88] *Id.* at 319.

[89] 536 U.S. at 842.

[90] *See* 515 U.S. at 666 (O'Connor, J., dissenting).

[91] *See* 536 U.S. at 841 (Breyer, J., concurring) (calling the issue a "close question" and implying that a different decision would be warranted if drug testing applied to the entire school).

Ohio v. Robinette, decided the year after *Vernonia* and featuring Justice Ginsburg's second concurrence in a Fourth Amendment case, may have been another missed opportunity to put the brakes on a majority intent on limiting the scope of the Fourth Amendment. In *Robinette* all members of the Court agreed that, contrary to the holding of the Ohio Supreme Court, the Fourth Amendment does not require the police to tell motorists who have been issued a traffic citation that they are "free to go" in order to ensure that any subsequent consent to search the car is voluntary.[92] Chief Justice Rehnquist's majority opinion relied heavily on *Schneckloth v. Bustamonte*,[93] which twenty-three years earlier had held that police need not tell individuals they have a right to refuse consent to a police request to search.[94] But *Schneckloth* did not necessarily dictate the outcome in *Robinette*, which focused not on a warning about the right to refuse consent but on whether police need to tell stopped individuals when they are free to leave. Absent notification of their rights, people are much more likely to believe they cannot terminate an encounter with police than think they cannot refuse consent to a search, if only because in the latter situation the police have to telegraph the existence of the right by *asking* for consent. No such signal necessarily comes from the police when they start asking questions about matters beyond the scope of the initial stop.

Justice Ginsburg's concurrence implicitly recognized this point when she quoted from the Ohio Supreme Court's opinion in the case that "[m]ost people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them."[95] But calling *Schneckloth* "controlling jurisprudence,"[96] her opinion focused on the point that, on remand, the Ohio courts could rely on its perception about people's typical response to police stops and require, as a matter of *state* constitutional law, a warning to motorists that they are free to leave before asking for consent.[97] Only Justice Stevens worried explicitly about the fact that *Robinette* appeared to allow suspicionless post-citation seizures for the purpose of

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[92] *See* 519 U.S. at 40.

[93] 412 U.S. 218 (1973).

[94] *See id.* at 249.

[95] 519 U.S. at 41 (Ginsburg, J., concurring).

[96] *Id.* at 42.

[97] *Id.* at 42–44. This is a type of observation that Justice Brennan championed—*see* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)—and that Justice Ginsburg has put forward in at least two other opinions concerning the Fourth Amendment. *See* Virginia v. Moore, 128 S. Ct. 1598, 1609 (2008) (Ginsburg, J., concurring); Arizona v. Evans, 514 U.S. 1, 30–32 (1995) (Ginsburg, J., dissenting).

extracting consent or gathering incriminating information in some other way.[98]

Six years later this passivity came back to haunt the liberals on the Court in *United States v. Drayton*, where the majority concluded that armed officers are not engaging in a Fourth Amendment seizure when they board a bus and ask passengers for consent to search their luggage without telling them they are free to leave or refuse consent.[99] Justice Kennedy cited *Robinette* in writing for the six member majority (including Justice Breyer) that "[t]he Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."[100] Justice Souter's dissent, joined by Justices Ginsburg and Stevens, repeated the concern of the Ohio Supreme Court in *Robinette*: "It is very hard to imagine that either [of the defendants] would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether."[101] And Justice Souter (and therefore, presumably, Justice Ginsburg) came close to echoing the Ohio Supreme Court's solution to this problem: "While I am not prepared to say that no bus interrogation and search can [avoid Fourth Amendment regulation] without a warning that passengers are free to say no, the facts here surely required more from the officers than a quiet tone of voice."[102]

Robinette's implicit assumption that police may manipulate citizen encounters without explanation or seeking affirmative consent has infected other Court decisions that Justice Ginsburg has not liked. Most obviously, that assumption seemed to underpin the Court's decision in *Illinois v. Caballes*,[103] which held that a dog sniff of a car at a validly established roadblock does not infringe Fourth Amendment interests so long as it does not extend the length of the stop.[104] Ironically, given his opinion in *Robinette*, Justice Stevens wrote the majority opinion in *Caballes*, which focused on the idea he had long advanced that when a police investigative technique, such as a dog sniff, detects only the presence of contraband, no expectation of privacy is violated.[105] As Justice Ginsburg wrote in dissent, however, even if

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[98] *See* 519 U.S. at 45 (Stevens, J., dissenting).

[99] 536 U.S. 194 (2002).

[100] *Id.* at 206.

[101] *Id.* at 212 (Souter, J., dissenting).

[102] *Id.*

[103] 543 U.S. 405, 406 (2005).

[104] *See id.* at 408.

[105] *See* United States v. Jacobsen, 466 U.S. 109, 123 (1984) (in which Justice Stevens, writing for the Court, concluded that "governmental conduct that can reveal

a dog sniff by itself is not a Fourth Amendment "search," when a dog is brought in during a roadblock "[t]he stop becomes broader, more adversarial, and (in at least some cases) longer."[106]

Although she did not say so, and may not have realized it, the same statement could have characterized how the traffic stop in *Robinette* was changed by the officer's continued questioning of the motorist and subsequent request for consent. There, after issuing the citation, the officer had said, "One question before you get gone: Are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"[107] After Robinette said no, the officer asked for consent to search the car.[108] Here too police actions made the stop "broader," "more adversarial" and "longer."[109]

Thus, as in *Vernonia*, so in *Robinette*: a narrow initial take on an issue made later incursions into Fourth Amendment protections easier (although unlike in *Earls*, where only Justice Breyer needed to be coaxed to change his position, the dissenters in *Drayton* and *Caballes* would have had to sway one or more of the traditionally conservative justices to their side to prevent the holdings in those two cases). And in fact it may be that even Justice Ginsburg has given up on the issue. Just this last Term in *Arizona v. Johnson*[110] she

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whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest"). Justice Stevens relied on this aspect of *Jacobsen* in *Caballes*. *See* 543 U.S. at 408–09.

[106] 543 U.S. at 421 (Ginsburg, J., dissenting).

[107] 519 U.S. at 35–36.

[108] *See id.* at 36.

[109] The same thing could be said about the police behavior in *Muehler v. Mena*, 544 U.S. 93 (2005), where police, with probable cause to believe a large, multi-dwelling home housed a gang member and guns, detained and handcuffed everyone in the home, including Mena, for two to three hours, during which time she was interrogated. Although the Court did not address Mena's claim that the detention's continuation after the police had determined she was not dangerous was unjustified, it did find that the continued use of handcuffs and close supervision did not violate the Fourth Amendment. *Robinette* was not cited, but its influence was felt. *See id.* at 100 ("The duration of a detention can, of course, affect the balance of interests . . . . However, the 2- to 3-hour detention in handcuffs in this case does not outweigh the government's continuing safety interests."). Justice Stevens' concurrence, which Justice Ginsburg joined, fastened on the duration point in arguing that the majority too blithely reached the quoted conclusion and in suggesting the kinds of issues the lower courts should consider on remand: "In short . . . a jury could have reasonably found from the evidence that there was no apparent need to handcuff Mena for the entire duration of the search and that she was detained for an unreasonably prolonged period." *Id.* at 111 (Stevens, J., concurring in judgment).

[110] 129 S. Ct. 781 (2009).

authored a unanimous opinion for the Court[111]—the only prosecution-oriented majority opinion she has written in the Fourth Amendment context and only one of eleven such opinions in criminal procedure cases overall[112]—that permitted a police officer whose colleague had issued a traffic citation to the driver of a stopped car both to ask a passenger in the car to get out and to frisk that passenger. Although the Court seemed to assume that the frisk took place while the original traffic stop was ongoing, and there was further evidence that the officer had reason to believe the passenger was armed before asking him to get out of the car,[113] Justice Ginsburg's language went beyond those possible rationales for the decision in stating: "An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."[114]

To those not used to Fourth Amendment nuances, all of this may sound like dancing on the head of a pin. What does it matter whether officers ask questions unrelated to the original purpose of a stop or whether police actions extend, by some imperceptible measure, the duration of a stop? The additional intrusions seem de minimis and, as *Robinette*, *Drayton*, *Caballes*,

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[111] *Id.* at 784.

[112] *See* Bobby v. Bies, 129 S. Ct. 2145, 2148, 2152 (2009) (unanimous opinion holding that re-litigation of the mental retardation issue in light of intervening *Atkins* decision exempting people with mental retardation from the death penalty does not violate the Double Jeopardy Clause); Rivera v. Illinois, 129 S. Ct. 1446, 1449, 1453 (2009) (unanimous opinion holding that judge's erroneous decision prohibiting defense use of peremptory challenge on *Batson* grounds did not violate Constitution); Vermont v. Brillon, 129 S. Ct. 1283, 1287 (2009) (7-2 opinion holding that public defenders are not state actors for purposes of the speedy trial right); Oregon v. Ice, 129 S. Ct. 711, 714, 717 (2009) (5-4 opinion holding that judge may find facts determining whether sentence will be imposed consecutively or concurrently); Day v. McDonough, 547 U.S. 198, 200, 211 (2006) (5-4 opinion holding that federal court may dismiss a federal habeas petition as untimely even when state conceded timeliness issue); Mayle v. Felix, 545 U.S. 644, 647, 664 (2005) (7-2 opinion holding that trial and conviction do not qualify as conduct, transaction or occurrence relevant to relation back doctrine); Iowa v. Tovar, 541 U.S. 77, 80–81 (2004) (unanimous opinion finding waiver of right to counsel voluntary); Florida v. Nixon, 543 U.S. 175, 177, 192 (2004) (unanimous opinion finding no ineffective assistance of counsel); United States v. Martinez-Salazar, 528 U.S. 304, 306, 317 (2000) (unanimous opinion holding that use of peremptory challenge to remove wrongfully retained juror does not violate Sixth Amendment); Reed v. Farley, 512 U.S. 339, 341–42 (1994) (plurality opinion holding that speedy trial claim not cognizable on habeas).

[113] *See Johnson*, 129 S. Ct. at 784–85 (noting that the second officer attended to the passenger "while" the first officer obtained the driver's license and that the passenger had on gang clothing, possessed a scanner, and admitted to a prior burglary).

[114] *Id.* at 788.

and *Johnson* demonstrate, can result in discovering evidence of criminal activity.

But as Justice Ginsburg herself recognized in *Robinette* in an admirable attempt to put the case in a realistic, modern-world context, police routinely use traffic stops to achieve other ends; she noted that the officer in that case was not an ordinary traffic cop but rather was assigned to a drug interdiction unit that depended on traffic violations as a way of obtaining "consent" to search cars.[115] Many have pointed out that this law enforcement use of traffic infractions, which occurs throughout the country, is the new version of the general warrant, the practice upbraided by the colonists because it allowed British soldiers to confront anyone they felt like investigating for sedition or trafficking in uncustomed goods.[116] Because of their ubiquity and triviality, traffic rules are routinely violated by all of us, a fact that gives the police virtual carte blanche to stop anyone they want, just as the colonial writs of assistance did.[117] In other words, the *Robinette* line of cases deals with one of the most crucial issues arising under the Fourth Amendment: the government's authority to detain and search without individualized suspicion.

Abuse of that authority in the car stop context can have serious consequences. The empirical evidence indicates that the vast proportion of car searches do not result in the discovery of drugs or guns, and it also suggests that most people whose cars are searched after traffic stops are African-American or Hispanic.[118] A failure to cabin executive authority in these types of cases can have and has had a significant impact on Americans' freedom and trust in government.[119] Unfortunately, the *Robinette* line of

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[115] 519 U.S. at 440 (Ginsburg, J., concurring).

[116] The pre-Revolutionary "writs of assistance," which permitted roving searches for contraband, were reviled precisely because "they placed 'the liberty of every man in the hands of every petty officer.'" *See* Boyd v. United States, 116 U.S. 616, 625 (1886).

[117] *See, e.g.*, Barbara Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 223 (1989).

[118] *See* MATTHEW R. DUROSE ET AL., *Bureau of Justice Statistics Special Report: Contacts Between Police and the Public* 1 (2007) (reporting nationwide statistics from 2005 indicating that, while whites, blacks, and Hispanics were stopped at similar rates, blacks and Hispanics were more than twice as likely to be searched by police and only 11.6% of the stops resulted in the discovery of drugs); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 561–66 (1997) (reporting study that found that drug-free Hispanic and African-American drivers were far more likely to be stopped and searched than drug-free white drivers).

[119] *Cf.* Jeffrey Fagan & Tom R. Tyler, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 264

cases enhances this kind of discretion. Had *Robinette* instead held that drivers must be told they are free to leave after they receive a citation, or had it in some other way limited post-citation inquiries,[120] police and citizens would know that not every traffic stop can be converted into a car search, a frisk or an interrogation, and this modern version of the general warrant would be exploited much less often. Of course, such a holding would have been a long-shot given the make-up of the Court. But a strong dissent from Justice Ginsburg in *Robinette*, bolstering Justice Stevens's, might have made the majority think longer and harder before reaching its decision, and might have also influenced votes down the road in cases that ended up reaffirming and expanding the reach of that case.

III. CONCLUSION

The takeaway message from all of this is admittedly unclear. On the one hand, the foregoing analysis of Justice Ginsburg's gradualism in Fourth Amendment cases may indicate that chipping away at a holding instead of taking a big swipe at it can leave a Justice with fewer options or less influence down the road, or even lead one to forget why the chipping began in the first place. On the other hand, this analysis is based, by necessity, on speculation about the Justices' decision-making process and predilections. Moreover, even if gradualism does have some downside, it clearly has many benefits, as Justice Ginsburg and others have pointed out, and may in any event be the only proper role for a judge in our tripartite system of government. Perhaps all that can be said with certainty is that there are degrees of gradualism and that the foregoing discussion hints at when, and why, a bit more willingness to push the envelope might be worthwhile even for a judge who tends to gradualist.

(2008) (reporting research showing that "people evaluate the legitimacy of the police largely in terms of their judgments about the fairness by which the police exercise their authority.").

[120] Another solution to this problem would be to try to figure out whether the traffic stop was a pretext to search, frisk, or interrogate, but that approach would require difficult assessment of officers' mental states and in any event was foreclosed in *Whren v. United States*, 517 U.S. 806, 813 (1996), one of the unanimous prosecution-oriented decisions that Justice Ginsburg joined. A third solution is to exclude evidence that is not related to the initial purpose of the stop, which would remove the incentive to use stops pretextually.