After Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction

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ABSTRACT

In 2003, Columbia Law School marked Justice Ruth Bader Ginsburg's first ten years on the Supreme Court with a symposium. There, Harvard Law School Professor David Shapiro offered an assessment of those ten years with a specific focus on her contributions in the fields of procedure and federal jurisdiction. This piece picks up where Professor Shapiro left off and assesses the balance of Justice Ginsburg's contributions in these same fields during her latter seventeen years on the Court. Her opinions on procedure and jurisdiction from this period span a range of issues, including preclusion, abstention, standing, arbitration, forum non conveniens*, pleading standards, burdens of proof, subject matter jurisdiction, personal jurisdiction, joinder, governmental and officer liability and immunity, habeas corpus, territorial jurisdiction, congressional control over the judicial power, mootness, and appellate jurisdiction, just to name a few.*

As Professor Shapiro wrote in his earlier assessment, Justice Ginsburg's opinions are "characterized by qualities that evince judging at its best." The more recent examples explored here underscore the correctness of his appraisal and shed light on additional aspects of Justice Ginsburg's legacy, including her steadfast commitment to making the legal system (especially the federal courts) more accessible and to promoting constitutional accountability of government entities and officials. In all, this article reveals how during her forty years as a federal judge—twenty-seven of them on the Supreme Court—Justice Ginsburg heralded the importance of procedural integrity in our legal system while pursuing gender equality and a larger vision of what our country could be—a "more perfect Union."

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INTRODUCTION

I had the profound privilege of serving as law clerk to the Honorable Ruth Bader Ginsburg in the October 1999 Term.[1] In law school, I had studied her as a famous, successful, and heroic advocate for gender equality. But one of my favorite and most inspiring professors, David Shapiro, made sure that I also knew that Justice Ginsburg was a former civil procedure scholar and professor. Given my own love of the topic (instilled in Professor Shapiro's classroom), it was a special privilege to clerk for a judge who was passionate about procedure and who also appreciated its enormous importance both to successful advocacy and the integrity of the legal system.

In 2003, Columbia Law School marked Justice Ginsburg's first ten years on the Supreme Court with a symposium in which Professor Shapiro offered an assessment of the Justice's first decade on the Court.[2] He specifically focused on her contributions in the fields of procedure and federal jurisdiction.[3] Still grieving the loss of these two incredible mentors—Justice Ginsburg, who passed in 2020, and Professor Shapiro, who passed in 2019—I honor both in this Article by picking up where Professor Shapiro left off and assessing the balance of Justice Ginsburg's contributions in these same fields during her latter years on the Court.

Let us begin with an overview of Justice Ginsburg's larger contributions as a public servant. As a federal judge for forty years—twenty-seven of them on the Supreme Court—she continued and ex-

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1 For earlier tributes that I have written about Justice Ginsburg, see Amanda L. Tyler, *To Have Known Her: Remembering a Woman Who Meant the World to Those Lucky Enough to Work for Her*, ATLANTIC (Sept. 21, 2020), https://www.theatlantic.com/ideas/archive/2020/09/have-known-ruth-bader-ginsburg/616419/ [https://perma.cc/Z4H4-X4RN]; Amanda L. Tyler, *Lessons Learned from Justice Ruth Bader Ginsburg*, 121 COLUM. L. REV. 741 (2021) [hereinafter Tyler, *Lessons Learned*].

2 *See* David L. Shapiro, *Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21 (2004).

3 *See id.* My tribute to Professor Shapiro may be found at Amanda L. Tyler, *In Memoriam: Professor David L. Shapiro*, 133 HARV. L. REV. 2454 (2020). Justice Ginsburg's tribute to Professor Shapiro may be found at Justice Ruth Bader Ginsburg, *In Memoriam: Professor David L. Shapiro*, 133 HARV. L. REV. 2443 (2020).

panded upon her earlier work, emphasizing the importance of procedural integrity in our legal system while pursuing gender equality and a larger vision of what our country could be—a "more perfect Union."[4] First as an advocate and later as a Justice, she tirelessly fought to dismantle discrimination and more generally to open opportunities for every person to live up to their full human potential. At times—sometimes famously—this calling witnessed her in dissent chastising her colleagues for improperly walking back earlier gains or halting future progress.[5] In total, she wrote over 700 opinions on the D.C. Circuit and over 480 opinions on the Supreme Court.[6] The latter group included 153 dissents, which, Justice Ginsburg once said, "speak to a future age."[7]

As for her jurisprudence in the areas of procedure and jurisdiction, her number of opinions in these fields remained high during the latter part of her tenure on the Court. Professor Shapiro noted that in that first decade, Justice Ginsburg wrote some 200 opinions, with roughly a quarter of them involving issues of procedure, jurisdiction, federal courts questions, or some combination thereof.[8] In the latter seventeen years, Justice Ginsburg wrote some 280 opinions, with approximately seventy-five involving such matters.[9] In other words, the percentage of opinions touching on procedure and federal courts issues was even higher (albeit slightly) than during her first decade on the Court. This should not surprise anyone. First, such issues are, as Professor Shapiro noted correctly, ubiquitous.[10] Second, Justice Ginsburg cared deeply about such issues and—if my own experience as her law clerk is any indication—not infrequently desired to have her own say in such cases, even if no one joined her. Of the seventy-five or so opinions from this latter period of study, about twenty were dissents

4 U.S. CONST. pmbl.

5 For an overview of her career and legacy as a Supreme Court Justice, see RUTH BADER GINSBURG & AMANDA L. TYLER, JUSTICE, JUSTICE THOU SHALT PURSUE: A LIFE'S WORK FIGHTING FOR A MORE PERFECT UNION 1–18 (2021). It was my great privilege to work with her on this book during the final year of her life. Notably, when I asked her to identify the opinions she wrote that she would most like people to read from her tenure as a judge, three of the four she chose were dissents.

6 *See* Tyler, *Lessons Learned*, *supra* note 1, at 741.

7 *See id.*; The NPR Politics Podcast, *Ruth Bader Ginsburg, Progressive Icon, Dead at 87*, NPR (Sept. 18, 2020, 10:24 PM), https://www.npr.org/transcripts/914652984 [https://perma.cc/A58Y-63V8] (capturing a soundbite of an archived NPR interview of Justice Ginsburg by legal affairs correspondent Nina Totenberg).

8 *See* Shapiro, *supra* note 2, at 21.

9 These numbers derive from an assessment of Justice's Ginsburg's opinions conducted by me and my research assistant.

10 Shapiro, *supra* note 2, at 21.

and about the same number (twenty-one) were separate concurrences.[11] This means that approximately thirty-five opinions were majority opinions, a statistic that suggests the assigning justice in such cases often considered her expertise as a favorable factor in handing out opinion assignments.[12]

Justice Ginsburg's opinions on procedure and jurisdiction from this period span a range of issues, including preclusion, abstention, standing, arbitration, *forum non conveniens*, pleading standards, burdens of proof, subject matter jurisdiction, joinder, governmental and officer liability and immunity, habeas corpus, territorial jurisdiction, congressional control over the judicial power, mootness, and appellate jurisdiction, just to name a few.[13] My assessment of Justice Ginsburg's opinions in these areas during her latter seventeen years on the Supreme Court is similar to that reached by Professor Shapiro with respect to her first decade. As Professor Shapiro wrote some years ago:

> [Justice Ginsburg's opinions are] characterized by qualities that evince judging at its best: a high level of knowledge of the subject matter, lawyerly analysis of the issues at hand, a pragmatic approach that places great weight on the particular context and on what works best in that context in the interests of both judicial efficiency and fairness to litigants, and an insistence that decisions not be unnecessarily broad in their scope or implications.[14]

The more recent examples offered below underscore this appraisal and shed light on additional aspects of Justice Ginsburg's legacy, including her steadfast commitment to making the legal system—especially the federal courts—more accessible and to advancing the idea that constitutional accountability of government entities and officials should be a bedrock principle in our legal system.

I. Justice Ginsburg's Procedure and Federal Courts Jurisprudence

Various groups of decisions demonstrate these dominant themes from Justice Ginsburg's jurisprudence. There are many examples to highlight, but this Article explores only a sampling to underscore its conclusions.

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11 Again, these numbers derive from an accounting by me and my research assistant.

12 Professor Shapiro made this same point in his assessment. *See* Shapiro, *supra* note 2, at 21.

13 *See generally id.*

14 *Id.* at 21–22.

A. Territorial Jurisdiction

I will begin with a favorite—her stirring dissent for three justices in *J. McIntyre Machinery, Ltd. v. Nicastro*.[15] The case involved the question whether an employee (Nicastro) at a scrap metal company could sue the manufacturer of a $24,900 three-ton metal shearing machine in tort after the machine severed four of his fingers.[16] The foreign manufacturer in question had used an independent distributor to sell the machine in the United States and, on the stipulated facts, had effectively charged the distributor to sell wherever in the country it could.[17] Unsurprisingly, the product made its way to New Jersey, a "hotbed" of the scrap metal business.[18] But a Court plurality, joined in judgment by two concurring justices, held that Mr. Nicastro could not sue for his injuries in New Jersey state courts because those courts could not constitutionally exercise personal jurisdiction over the defendant U.K. manufacturer absent a showing that it had "purposefully availed" itself specifically of the New Jersey market, and not just the entire United States market.[19]

Justice Ginsburg's dissent laid bare the absurdity of the Court's holding. To begin, on the facts of the case, the Court's decision meant that Mr. Nicastro could only go after the distributor with his design defect claims (a party that, incidentally, had declared bankruptcy), or find another state in which he could sue the manufacturer—unlikely, but perhaps Nevada where it attended trade shows. Otherwise, Mr. Nicastro would have to go to the United Kingdom to sue the manufacturer. Mr. Nicastro would have to go through all of this for an injury sustained in New Jersey as a result of a product the manufacturer happily sold to a New Jersey buyer (albeit through a distributor), after which the manufacturer enjoyed the fruits of that sale as they flowed back to it in the United Kingdom.[20]

In contrast to the plurality and concurring opinions, Justice Ginsburg's dissent painstakingly worked its way through the facts of the case[21]—something that, for better or worse, the governing *Interna-*

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15 564 U.S. 873 (2011). Justices Sotomayor and Kagan joined Justice Ginsburg's dissent.

16 *See id.* at 894 (Ginsburg, J., dissenting).

17 *See id.* at 878 (plurality opinion).

18 *Id.* at 895 (Ginsburg, J., dissenting).

19 *Id.* at 886 (plurality opinion).

20 As the dissent noted, internal documents revealed that this was what the manufacturer, McIntyre U.K., sought from the outset. *See id.* at 897 (Ginsburg, J., dissenting) (quoting one document that read, "All we wish to do is sell our products in the [United] States—and get paid!").

21 *See id.* at 894–98.

tional Shoe Co. v. Washington[22] personal jurisdiction framework requires courts to do when engaging in the relevant inquiry. In an opinion that called upon pragmatism, fairness, and precedent, we see Justice Ginsburg at the top of her game. In a particularly powerful passage, she highlighted the pernicious incentives created by the Court's holding. The Court, she wrote, has now sanctioned a foreign manufacturer's decision to "sell as much as it can, wherever it can" in the United States, excluding no market within the country, while "all things considered, it prefers to avoid products liability litigation in the United States."[23] "To that end, it engages a U.S. distributor to ship its machines stateside," and "escap[es] personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user[.]"[24] Why, she asked, would we construct our legal system in such a senseless way?[25] The majority offered no answer.

B. Class Actions

Justice Ginsburg was also a regular voice favoring access to the federal courts for plaintiffs seeking to join together to bring class-wide claims. In this respect, she often found herself in dissent. An important case is *Wal-Mart Stores, Inc. v. Dukes*,[26] in which she broke ranks with a majority holding that made it significantly harder for plaintiffs to come together based on an aggressive reading of the threshold "commonality" requirement in Federal Rule of Civil Procedure 23(a)(2).[27] Specifically, the majority held that plaintiffs in a class-wide gender discrimination suit against a shared nationwide employer must allege a "pattern or practice" of discrimination.[28] But the majority's decision placed a significant limitation on collective discrimination

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22 326 U.S. 310, 316–21 (1945).

23 *Nicastro*, 564 U.S. at 893 (Ginsburg, J., dissenting).

24 *Id.*

25 Further pointing out the senselessness of the Court's holding, Justice Ginsburg noted that the European Union, of which the United Kingdom was then still a member, adopts precisely the opposite jurisdictional rule. *See id.* at 909.

26 564 U.S. 338 (2011).

27 *Id.* at 349, 351, 367. Justice Ginsburg joined the majority's interpretation of Rule 23(b)(2), a holding that went against the plaintiffs. *See id.* at 368 (Ginsburg, J., concurring in part and dissenting in part). This is another example of something discussed below—namely, the Justice's ability to recognize limits to the propositions for which she advocated. *See* discussion *infra* Section I.C. Here, that translated into an opinion that was generally supportive of class actions but did not countenance the idea that anything goes.

28 *Wal-Mart*, 564 U.S. at 352.

claims where the employer has a policy of allowing local supervisors to exercise discretion over hiring and promotion decisions.[29]

In an opinion that walked the reader through relevant precedents along with the purposes animating Title VII and the class action procedure, Justice Ginsburg described the reality of how the law and the real world intersect, an insight lacking in the majority opinion.[30] To that end, she argued that a policy of discretion could still produce discriminatory outcomes that could be common to a class and meet the requirements under Rule 23(a)(2), highlighting how policies granting discretion like the one at issue have in practice long been wielded to cover up discriminatory practices.[31]

A similar approach informed her dissent in *Comcast Corp. v. Behrend*,[32] in which she criticized another Court holding making it harder for plaintiffs to band together in class actions.[33] In her view, a class should be certified so long as "liability questions common to the class predominate over damages questions unique to class members."[34] Here, too, Justice Ginsburg seems to have the better of the argument. The majority's conclusion, demanding a tighter connection among the plaintiffs' damages claims as a threshold matter (an inquiry that a clear reading of Rule 23 suggests should come only later),[35] has the potential to eviscerate the class action device in damages cases altogether.[36] These opinions reflect an appreciation of the importance of federal courts as a neutral forum, need for legal accountability that often comes only when class-wide claims are permitted to proceed, and an approach to judging that is not divorced from how the law works in the real world.

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29 *See id.* at 350, 352, 355.

30 *See id.* at 372–74 (Ginsburg, J., concurring in part and dissenting in part). In this respect, the dissenting portion of her opinion reads similarly to her masterful dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting).

31 *See Wal-Mart*, 564 U.S. at 377 (Ginsburg, J., concurring in part and dissenting in part).

32 569 U.S. 27 (2013).

33 *Id.* at 43 (Ginsburg & Breyer, JJ., dissenting).

34 *Id.*

35 Specifically, the majority imported that inquiry into the Rule 23(a) threshold analysis, rather than leaving it to the Rule 23(b)(3) analysis, where the Rule's text indicates it should lie. *See* FED. R. CIV. P. 23.

36 Justice Ginsburg did get to write for a majority in one case that favored plaintiff classes at the certification stage. In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), the Court held that plaintiffs do not have to demonstrate materiality of defendant's alleged misrepresentation and omissions at the class certification stage. *See id.* at 459. Justice Ginsburg's commonsense approach controlled, recognizing as it did that "failure of proof on the common question of materiality" would not result in individual questions predominating the litigation; rather, it would end the case entirely. *Id.* at 467–68.

C. *"Stay in Your Lane" Jurisprudence*

Another pair of opinions are also emblematic of Justice Ginsburg's belief that the Court's role, while substantial in constitutional cases,[37] must recognize its limitations and avoid treading on Congress's turf. I am thinking here of her majority opinion in *Bank Markazi v. Peterson*[38] and her concurrence in *Patchak v. Zinke*.[39] The former produced a dissent from Chief Justice Roberts contending that the majority had permitted Congress to intrude on judicial independence.[40] But, as Justice Ginsburg observed, that is wrong. As she explained in her opinion for the Court, the relevant issue in *Peterson* involved whether Congress could alter the underlying law of foreign sovereign immunity such that it deprived the Iranian government of an immunity defense in a substantial number of consolidated pending—and not final—cases.[41] Given that the entirety of foreign sovereign immunity law is under the control of Congress—that is, any such immunity enjoyed by foreign sovereigns in United States courts exists by the grace of Congress— of course Congress can alter the underlying law so long as it does not seek to undo a final judgment.[42] To be sure, Justice Ginsburg noted in *Peterson* that Congress "may not exercise [its authority, including its power to regulate federal jurisdiction,] in a way that requires a federal court to act unconstitutionally."[43] But

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37 *See* discussion *infra* Section I.D.

38 136 S. Ct. 1310 (2016).

39 138 S. Ct. 897, 912–13 (2018) (Ginsburg, J., concurring in the judgment).

40 *See Peterson*, 136 S. Ct. at 1329–38 (Roberts, C.J., dissenting).

41 *See id.* at 1317.

42 *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (holding that Congress may not order a final judgment reopened by the courts). The case oft-invoked for the idea that Congress cannot step on the toes of the courts is *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), but it bears noting that in *Klein*, the Supreme Court went out of its way to reaffirm its earlier decision in *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), which directly supports the Justice's conclusion in *Peterson*. As the *Klein* Court wrote:

> [W]e do not at all question what was decided in the case of *Pennsylvania v. Wheeling Bridge Company*. In that case, after a decree in this court that the bridge, in the then state of the law, was a nuisance and must be abated as such, Congress passed an act legalizing the structure and making it a post-road; and the court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion. No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act.

Klein, 80 U.S. (13 Wall.) at 146–47 (footnote omitted); *see also* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992) (holding unanimously that Congress could enact a statutory provision that declared certain agency actions lawful that were the basis of two pending lawsuits).

43 *Peterson*, 136 S. Ct. at 228 n.19 (alteration in original) (quoting Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549 (1998)); and citing, to my

Congress altering a law that falls under its plenary control is a far cry from such an evil.[44]

D. Government and Officer Accountability Under the Constitution

Justice Ginsburg also was a consistent voice in favor of permitting, among other things, actions brought against federal and state officials for alleged violations of a party's constitutional rights sounding in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[45] 42 U.S.C. § 1983, and Section 5 of the Fourteenth Amendment,[46] regularly finding herself in dissent. As she wrote in one such opinion, these cases shed light on a legal system's core values. Indeed, there she invoked nothing less than Marbury *v.* Madison[47] for the proposition that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[48]

In that case, *Wilkie v. Robbins*,[49] Justice Ginsburg argued that a *Bivens* action should lie where an individual sought to sue federal officials for violating the Fifth Amendment's Takings Clause when the officials attempted to acquire the plaintiff's private property "coercively and cost free" and, when the plaintiff did not agree to the scheme, the officers aggressively retaliated in various ways against the property owner.[50] To be sure, the *Bivens* action is on life support.[51] But for Justice Ginsburg, the larger principles at stake and the fact that *Bivens* remains (for now, at least) formally good law counseled in favor of a judicial role in such cases. As she wrote,

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delight, Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, *in* FEDERAL COURTS STORIES 87, 112 (Vicki C. Jackson & Judith Resnik eds., 2010).

44 In *Patchak*, Justice Ginsburg similarly emphasized Congress's plenary authority to waive or reclaim sovereign immunity of the United States from suit as crucial to understanding why Congress could do so in a pending case involving a patch of contested real property. *See Patchak*, 138 S. Ct. at 912–13 (Ginsburg, J., concurring).

45 403 U.S. 388, 397 (1971) (holding that a plaintiff could sue federal officers for damages stemming from violations of the Fourth Amendment).

46 U.S. CONST. amend XIV, § 5.

47 5 U.S. (1 Cranch) 137 (1803).

48 Wilkie v. Robbins, 551 U.S. 537, 574 (2007) (Ginsburg, J., concurring in part and dissenting in part) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

49 551 U.S. 537 (2007).

50 *Id.* at 569 (Ginsburg, J., concurring in part and dissenting in part).

51 *See, e.g.*, Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006–2007 CATO SUP. CT. REV. 23, 70 (bemoaning the evisceration of *Bivens*).

> Thirty-six years ago, the Court created the Bivens remedy. In doing so, it ensured that federal officials would be subject to the same constraints as state officials in dealing with the fundamental rights of the people who dwell in this land. Today, the Court decides that elaboration of Bivens to cover Robbins' case should be left to Congress. The Bivens analog to § 1983, however, is hardly an obscure part of the Court's jurisprudence. If Congress wishes to codify and further define the Bivens remedy, it may do so at anytime. Unless and until Congress acts, however, the Court should not shy away from the effort to ensure that bedrock constitutional rights do not become "merely precatory."[52]

Justice Ginsburg's subsequent dissent in *Hernandez v. Mesa*,[53] a case from her final Term on the Court, is consistent with this idea. There, the Court majority held that no *Bivens* action should lie where a Border Patrol officer shot and killed a Mexican teenager just across the border.[54] After dismantling the majority's reasoning point-by-point, she concluded with a statement as simple as it was forceful in explaining the stakes in the case: "In short, it is all too apparent that to redress injuries like the one suffered here, it is Bivens or nothing. . . . I resist the conclusion that 'nothing' is the answer required in this case."[55]

Though certainly not often, on occasion, Justice Ginsburg wrote for the Court in cases involving matters of governmental accountability. For example, in *Skinner v. Switzer*,[56] she upheld a convicted state prisoner's right to seek DNA testing of crime-scene evidence in a § 1983 suit, doing so notwithstanding a dissent objecting that permitting the suit would undermine the federal habeas regime.[57] And in a federal habeas case, she commanded a majority for the proposition that an untimely first habeas petition alleging actual innocence could proceed under the Court's pre-existing "miscarriage of justice exception" to procedural default rules that the Court had previously determined survived the enactment of the habeas statutory scheme put in place by the Anti-Terrorism and Effective Death Penalty Act.[58] As she wrote, the Court's approach in such weighty matters must "see[k]

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52 *Wilkie*, 551 U.S at 585 (Ginsburg, J., concurring in part and dissenting in part) (citations omitted).

53 140 S. Ct. 735 (2020).

54 *Id.* at 739.

55 *Id.* at 760 (Ginsburg, J., dissenting).

56 562 U.S. 521 (2011).

57 *Id.* at 525; *id.* at 541–42 (Thomas, J., dissenting).

58 McQuiggin v. Perkins, 569 U.S. 383, 392 (2013).

to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case."[59] I could not agree more.

Similarly, Justice Ginsburg regularly endorsed a broad view of congressional remedial authority under Section 5 of the Fourteenth Amendment.[60] In addition to voting numerous times in favor of the position,[61] she wrote opinions expressing her view that Congress has broad authority to override state sovereign immunity to protect the values at the heart of the Fourteenth Amendment. In *Tennessee v. Lane*,[62] for example, she concurred and agreed that Congress may abrogate state sovereign immunity to permit lawsuits against states under Title II of the Americans with Disabilities Act.[63]

Coleman v. Court of Appeals of Maryland,[64] by contrast, found Justice Ginsburg in dissent.[65] In chastising the majority's cramped reading of the Section 5 power, she argued that the Family and Medical Leave Act's ("FMLA") self-care provision should be understood as an appropriate exercise of that power to protect individuals from gender discrimination in the workplace.[66] This followed for two reasons. First, as the Court had recognized on many earlier occasions, Section 5 granted Congress the power to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[67] In other words, Congress's power to legislate under Section 5 is not limited to actions that directly contravene Section 1 of the Fourteenth Amendment. Otherwise, what was the point of including Section 5 in the first place?

Second, the gender-equality-advocate-turned-Justice explained precisely how the FMLA accomplished this preventive and deterrent end:

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59 *Id.* at 393 (quoting Schlup v. Delo, 513 U.S. 298, 324 (1995)).

60 As is very well known, the Justice became "notorious" for her similar view that Congress holds broad remedial power under Section 2 of the Fifteenth Amendment. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 559 (2013) (Ginsburg, J., dissenting).

61 *See, e.g.*, Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 723, 739–40 (2003) (joining majority and concurring opinions upholding the Family and Medical Leave Act against state sovereign immunity arguments); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 648–49 (1999) (Stevens, J., dissenting) (joining dissent arguing that Congress had power to abrogate state sovereign immunity in the Patent Remedy Act).

62 541 U.S. 509 (2004).

63 *Id.* at 534–35 (Souter, J., concurring); *id.* at 535–38 (Ginsburg, J., concurring).

64 566 U.S. 30 (2012).

65 *See id.* at 45 (Ginsburg, J., dissenting).

66 *See id.* at 46 (Ginsburg, J., dissenting).

67 Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727–28 (2003).

> The plurality pays scant attention to the overarching aim of the FMLA: to make it feasible for women to work while sustaining family life. Over the course of eight years, Congress considered the problem of workplace discrimination against women, and devised the FMLA to reduce sex-based inequalities in leave programs. Essential to its design, Congress assiduously avoided a legislative package that, overall, was or would be seen as geared to women only. Congress thereby reduced employers' incentives to prefer men over women, advanced women's economic opportunities, and laid the foundation for a more egalitarian relationship at home and at work. The self-care provision is a key part of that endeavor, and, in my view, a valid exercise of congressional power under § 5 of the Fourteenth Amendment.[68]

Together, these opinions, and countless votes, demonstrate Justice Ginsburg's unwavering commitment to larger principles of accountability that are, I submit, vital in a constitutional republic. As a consistent voice against the retreat from accountability that has governed so much of the Court's jurisprudence in recent decades,[69] she envisioned a constitution that was not "merely precatory,"[70] but instead one that could be wielded both as a shield and a sword by the constituents whose rights it purports to protect.

II. Justice Ginsburg's Judicial Philosophy

This survey of Justice Ginsburg's opinions during the latter part of her tenure on the Supreme Court also yields three prevailing themes that influenced her judicial philosophy: a pragmatic approach that recognized limitations to almost every principle, continuity, and emphasizing the importance of revisiting unworkable precedent.

To begin, it is noteworthy that Justice Ginsburg recognized limits to almost every principle for which she advocated. Take the matter of territorial jurisdiction, for example. Although her *Nicastro* dissent sensibly advocated for a plaintiff-friendly vision of personal jurisdic-

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68 *Coleman*, 566 U.S. at 65 (Ginsburg, J., dissenting).

69 I am thinking here of the Court's state sovereign immunity, qualified immunity, § 1983, Section 5, and *Bivens* cases—just to name a few. *See, e.g.*, Wilkie v. Robbins, 551 U.S. 537, 574 (2007) (Ginsburg, J., concurring in part and dissenting in part); Skinner v. Switzer, 562 U.S. 521, 525 (2011); McQuiggin v. Perkins, 569 U.S. 383, 392 (2013); Shelby Cnty. v. Holder, 570 U.S. 529, 559 (2013) (Ginsburg, J., dissenting).

70 *Wilkie*, 551 U.S. at 585 (Ginsburg, J., concurring in part and dissenting in part) (quoting Davis v. Passman, 442 U.S. 228, 242 (1979)).

tion in stream-of-commerce cases,[71] when it came to cases without ties to a particular jurisdiction, she saw a different story.[72] In such cases, commonly known as those involving "general jurisdiction," the Justice believed that the law should discourage a limitless jurisdictional approach, lest jurisdictional boundaries be rendered meaningless.[73] Thus, in two cases, she concluded that state courts could not hold a defendant accountable for overseas activities with no direct ties to the state unless a defendant was essentially "at home" in the state such that its ties to the state more generally were overwhelming.[74] Notably, the first of those decisions, *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[75] came out the same day as *Nicastro*, revealing her coherent vision of territorial jurisdiction—broad in specific jurisdiction cases like *Nicastro* and narrow in general jurisdiction cases.[76] Unfortunately, because she was in dissent in *Nicastro* and carried the Court in a series of general jurisdiction cases, the net effect has been a narrowing of territorial jurisdiction in both realms.

In the class action context, she tempered her views with an appreciation of the primacy of states in setting the terms of accountability under state law as well as the importance of reading Rule 23 as limited to *procedure*, a point that one would think is hardly controversial. Thus, she argued in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[77] that the majority had erred in holding that Rule 23 preempted a New York law that limited statutory damages.[78] Rule 23, she argued, prescribes rules governing class certification.[79] The New York law, by contrast, "control[s] the size of a monetary award a

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71 *See* J McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 909–10 (2011) (Ginsburg, J., dissenting).

72 *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

73 *See id.*

74 *Id.* at 919–20; Daimler AG v. Bauman, 571 U.S. 117 (2014); *see also* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).

75 564 U.S. 915 (2011).

76 She explained all of this in her opinion for the Court in *Daimler*:

> As is evident from *Perkins*, *Helicopteros*, and *Goodyear*, general and specific jurisdiction have followed markedly different trajectories post-*International Shoe*. Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized. As this Court has increasingly trained on the "relationship among the defendant, the forum, and the litigation," i.e., specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme.

Daimler, 571 U.S. at 132–33 (footnotes omitted) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

77 559 U.S. 393 (2010).

78 *See id.* at 437 (Ginsburg, J., dissenting).

79 *See id.* at 446 (Ginsburg, J., dissenting).

class plaintiff may pursue."[80] In approaching the interpretive question at hand, she asked a fundamental, yet too oft-ignored question: "Is this conflict really necessary?"[81] This question regularly influenced her approach to federalism cases more generally and, in this case, led her to land in a position that far better respected the balance of authorities between the states and federal government.[82]

Justice Ginsburg's opinions also reveal her consistent desire to maintain continuity in the law, rather than interpret new statutes to evince major change in the absence of clear evidence that Congress desired such an outcome. Consider her dissent in *Exxon Mobil Corp. v. Allapattah Services, Inc.*[83] There, this practice led her to a position that limited access to federal courts, further underscoring the care with which she approached each case and that she never let a desired bottom line control the analysis.[84] In that case, the Court finally tangled with interpreting the effects of Congress's supplemental jurisdiction statute, 28 U.S.C. § 1367, on complex diversity jurisdiction cases.[85] Specifically, the Court faced deciding whether § 1367 had overruled *Zahn v. International Paper Co.*,[86] a case in which the Court had held that all members of a plaintiff class must independently meet the amount-in-controversy requirement of the diversity statute, 28 U.S.C. § 1332.

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80 *Id.* at 447 (Ginsburg, J., dissenting).

81 *Id.* at 437 (Ginsburg, J., dissenting). More generally, she posited: "Our decisions, however, caution us to ask, before undermining state legislation: Is this conflict really necessary?" *Id.* The question comes originally from Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959). Justice Ginsburg was not just a procedure scholar, but a conflicts scholar as well. *See*, *e.g.*, Ruth B. Ginsburg, *Judgements in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969).

82 Justice Ginsburg showed similar care in Rule 23 cases where there were serious concerns about plaintiffs potentially gaming the system. *See, e.g.*, China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1806–07 (2018) (holding that although the filing of a class action suit tolls the statute of limitations for all putative class members, members of a failed class cannot file a follow-on class action beyond the statute of limitations period because principles of efficiency favor all class representatives to come forward sooner rather than later so that the district court "can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel").

83 545 U.S. 546, 577, 579 (2005) (Ginsburg, J., dissenting).

84 *See id.*

85 *See id.* at 549 (majority opinion). The Court was poised to interpret the statute in an earlier case, *Free v. Abbott Laboratories, Inc.*, 529 U.S. 333 (2000) (per curiam), but due to a recusal on the part of one justice, the Court split 4-4 without issuing a decision. I will share that a certain law clerk who loved working with her boss on procedure cases and hoped to work on an opinion with her boss in this particular case was none too pleased about this turn of events.

86 414 U.S. 291, 301 (1973).

Without retreading the ground that has been covered in legions of articles dissecting § 1367, let me say this: the statute is a mess. It is terribly written.[87] And, truth be told, there are problems with both Justice Kennedy's majority opinion and Justice Ginsburg's dissent in *Allapattah Services*. On behalf of the majority, Justice Kennedy held that ride-along plaintiffs need not individually meet the threshold amount-in-controversy requirement of the diversity statute to come into federal court because of § 1367's expansion of supplemental jurisdiction.[88] In so doing, Justice Kennedy disclaimed the proposition that § 1367 did away with the longstanding complete diversity requirement of *Strawbridge v. Curtiss*.[89] (That is, Justice Kennedy's opinion specifically rejected the proposition that ride-along plaintiffs were relieved of themselves being diverse from the defendants, even though they need not meet the requisite amount-in-controversy.) But his explanation as to why the statute did not accomplish that end but did eliminate the amount-in-controversy requirement finds no basis whatsoever in the statutory language.

For her part, Justice Ginsburg could not explain why certain aspects of the statute's language exist; they are superfluous in her interpretation.[90] Nonetheless, what is admirable in the Justice's opinion is that in the face of a terribly written statute that was packaged as a nonrevolutionary jurisdictional provision bent on making limited changes to the Court's longstanding jurisprudence,[91] she argued that the Court should try to make the best sense it could of the statute in light of its preexisting extensive jurisprudence on point and the larger

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87 *See, e.g.*, Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 403 ("Congress could have passed a brief, general amendment overturning the result in *Finley* while leaving to the courts the task (in which they had been engaged, in cases like *Kroger Equipment*, prior to the *Finley* decision) of elaborating the standards for supplemental jurisdiction in a fashion that was viewed as consistent with the complete diversity rule, the jurisdictional amount requirement, and other relevant jurisdictional policies."); David L. Shapiro, *Supplemental Jurisdiction: A Confession, an Avoidance, and a Proposal*, 74 IND. L.J. 211, 218 (1998) (suggesting it would be preferable were Congress to "enact a law establishing the principle of supplemental jurisdiction, and then . . . leave all or most of the details to be worked out by the courts"). Even the statute's drafters saw that it could be interpreted to do away with the complete diversity rule. *See* Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 961 n.91 (1991) ("We can only hope that the federal courts will plug that potentially gaping hole in the complete diversity requirement . . . .").

88 *See Allapattah Servs.*, 545 U.S. at 549.

89 7 U.S. (3 Cranch) 267 (1806); *Allapattah Servs.*, 545 U.S. at 558.

90 I am thinking specifically of § 1367(b)'s references to Rule 19 and Rule 24 plaintiffs.

91 She said it much better. *See Allapattah Servs.*, 545 U.S. at 594 (Ginsburg, J., dissenting) (stating that "§ 1367's enigmatic text defies flawless interpretation") (footnote omitted).

proposition that "close questions of [statutory] construction should be resolved in favor of continuity and against change."[92] For the latter proposition, she cited and quoted none other than David L. Shapiro.[93] There is a judicial modesty here that marries well with Justice Ginsburg's longstanding, sensible approach that reads statutes in light of their context and purpose so as to best honor Congress's objectives in adopting the relevant law.[94]

In his earlier assessment, Professor Shapiro also noted that after her first decade on the Court, "[o]ne of the Justice's admirable qualities as a judge is her willingness to write a concurrence (often a brief one, and, if possible, joining in the Court's opinion as well as its judgment) pointing out what the Court has not decided (or in some instances need not have decided)."[95] He cited this practice as helpful for future cases and far more useful "than the well-known and overused 'parade of horribles' in an overblown dissent."[96] This practice continued throughout her remaining years on the Court.[97]

In addition, Justice Ginsburg often used separate opinions to suggest that the Court revisit doctrine that seems unworkable or out of touch with the realities of the world today,[98] a practice that should be

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92 *Id.* at 594–95 (Ginsburg, J., dissenting) (quoting David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 925 (1992)).

93 *Id.* (arguing that "the precedent-preservative reading . . . better accords with the historical and legal context of Congress'[s] enactment of the supplemental jurisdiction statute and the established limits on pendent and ancillary jurisdiction" and "does not attribute to Congress a jurisdictional enlargement broader than the one to which the legislators adverted") (citations omitted); *cf.* James E. Pfander, S*upplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. Pa. L. Rev. 109 (1999). As a general proposition, I agree with this approach to statutory interpretation. *See* Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. Rev. 1389 (2005).

94 Professor Shapiro similarly described the Justice's approach to statutory interpretation in this way. *See* Shapiro, *supra* note 2, at 27. Another example of where the Justice sought to interpret a statute in conformity with longstanding preceding jurisprudence may be found in the actual innocence habeas case discussed earlier, *McQuiggin v. Perkins*, 569 U.S. 383, 391–98 (2013). This same principle informed how the Justice thought about the Federal Rules of Civil Procedure as well, as evidenced by her joining the dissent in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 572 (2007) (Stevens, J., dissenting).

95 Shapiro, *supra* note 2, at 27–28.

96 *Id.* at 28.

97 Another example from the relevant period in keeping with this practice may be found in Justice Ginsburg's concurrence in *Scott v. Harris*, 550 U.S. 372, 386–87 (2007) (Ginsburg, J., concurring), in which she briefly noted that the Court had no occasion in the current case to confront whether the Court's approach to the qualified immunity inquiry set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), should be revisited. She also sometimes noted the limits of a Court decision when writing for the majority. *See, e.g.*, Marshall v. Marshall, 547 U.S. 293, 314–15 (2006).

98 *See* Ginsburg & Tyler, *supra* note 5, at 6.

celebrated. Of course, she is not alone in the practice, but there are some noteworthy opinions in this batch, including perhaps most of all her opinion in *District of Columbia v. Wesby*.[99] There, writing solely for herself, she opined that the caselaw too heavily favors police unaccountability in qualified immunity cases, and should be reexamined.[100] As she counseled, "[t]he Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection."[101] This followed, she wrote, because the Court's earlier jurisprudence established that "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause."[102] She instead would have left open, "for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry."[103] Here, as in so many other aspects of her jurisprudence, one witnesses a jurist who married the high theory of the Court's decisions with how the law actually works on the ground.[104] One also sees a jurist prodding her colleagues to ensure that the courts do not sit on the sidelines in cases that play a crucial role in holding governments and government officials accountable under the Constitution.[105]

III. Some "Puzzlements"

Now, as anyone who knew Professor Shapiro appreciates, he was polite to the extreme, even when a critic. Thus, in his article reviewing Justice Ginsburg's first decade of opinions in procedure and jurisdiction cases, he referred to opinions by the Justice with which he was not in total agreement as "puzzlements."[106] Taking my lead from his example, I shall flag some "puzzlements" of my own in Justice Ginsburg's jurisprudence in these fields. The main opinion I have in mind is one that anyone who has taken civil procedure with me knows I find deeply puzzling. In so doing, I am reaching beyond the time period to which I pledged to limit myself in this Article, and diving into Justice Ginsburg's first decade on the Court. This only makes my puzzlement

99 138 S. Ct. 577, 593 (2018) (Ginsburg, J., concurring in the judgment in part).

100 *See id.* at 594 (Ginsburg, J., concurring in the judgment in part).

101 *Id.*

102 *Id.* (quoting Devenpeck v. Alford, 543 U.S. 146, 153 (2004)).

103 *Id.*

104 I have written about this aspect of Justice Ginsburg's jurisprudence before. *See* Ginsburg & Tyler, *supra* note 5, at 7–8.

105 *See id.* at 8–9.

106 In classic David Shapiro prose, he noted that none of his "'puzzlements' . . . pose[] any threat to the future of the Republic." Shapiro, *supra* note 2, at 28.

all the greater, for the case I have in mind did not merit anything other than a passing footnote citation in Professor Shapiro's earlier assessment. If the opinion did not puzzle my brilliant civil procedure professor, maybe I am misguided to focus on it here. All the same, here goes.

The case I have in mind is Justice Ginsburg's opinion for a unanimous Court in *Caterpillar Inc. v. Lewis*.[107] There, the Court held that the nonexistence of subject matter jurisdiction at the moment that a defendant removes a case from state to federal court should not be held to invalidate a subsequent trial and judgment in that defendant's favor.[108] Specifically, when the defendant in question, Caterpillar, removed the case with one day to spare before the one-year deadline for removal, the remaining parties in the lawsuit did not satisfy the longstanding requirement of complete diversity.[109] It was only later—before trial, but after the time limit on removal had passed—that complete diversity existed by reason of a settlement between an intervening plaintiff and a remaining defendant that was not diverse from the original plaintiff.[110] No problem, Justice Ginsburg concluded, and certainly no reason to dispute the subsequent jury verdict in favor of Caterpillar.[111] Notwithstanding the lack of subject matter jurisdiction at the time of removal, Justice Ginsburg argued that "an overriding consideration" controlled.[112] "Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming."[113]

Justice Ginsburg's reasoning married well with her larger approach to statutory interpretation. She sought to reach "harmony with a main theme of the removal scheme Congress devised."[114] Accordingly, her belief that Congress would have supported the Court's resolution of the issues raised in the case dictated the result.[115] Further, she observed, "[t]o wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional re-

107 519 U.S. 61 (1996).

108 *See id.* at 69.

109 *See id.* at 64; *see also* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (interpreting the diversity statute to require complete diversity).

110 *See Caterpillar*, 519 U.S. at 64.

111 *See id.*

112 *Id.* at 75.

113 *Id.*

114 *Id.* at 76.

115 *See id.* at 76–77.

quirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice."[116] Here, another common theme in Justice Ginsburg's jurisprudence emerges—a concern for judicial efficiency and aversion to wasted judicial resources. She seemed especially troubled by the fact that both federal judge and jury would see their time and efforts negated.[117] It is true, of course, that such an outcome would be hardly desirable.

But it is also true that sometimes efficiency must stand aside in the name of higher principles. Consider first the effects of permitting the judgment to stand versus sending the case back to state court. In an opinion that explores the incentives on the parties created by the possible rules under debate,[118] Justice Ginsburg declined to analyze the different incentives for lower court judges that would result under the potential rules.[119] On the one hand, the judge below was given a pass for screwing up a basic and rather important subject matter ruling. An alternative course, by contrast, could have had a powerful effect on federal district judges, encouraging them to police their removal jurisdiction more carefully rather than risk an embarrassing and wasteful reversal on appeal.

There is also a more fundamental principle at stake in *Caterpillar*—the authority of Congress to delineate the subject matter jurisdiction of the federal courts. The basic premise underlying the judicial power as we have come to accept it is that Article III sets the outer boundaries of potential jurisdiction for the inferior federal courts and Congress then decides how much of that to vest.[120] But it has never vested all of it.[121] And the Court has repeatedly said (and not just in opinions by Justice Scalia) that the absence of jurisdiction vested by Title 28 of the U.S. Code with respect to diversity cases, if not other cases, means quite simply that jurisdiction does not exist.[122] Alas,

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116 *Id.* at 77.

117 *See id.* at 76.

118 Justice Ginsburg was skeptical of the plaintiff's argument that allowing the judgment to stand "will 'encourag[e] state court defendants to remove cases improperly.'" *Id.* at 77 (quoting Brief for Respondent at 19).

119 *See id.*

120 *See* U.S. CONST. art. III, § 1.

121 Indeed, the first Judiciary Act established an amount-in-controversy for diversity cases. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The Act also left to the state courts cases arising under federal law. *See id.*

122 *See*, *e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) (observing with respect to a limitation on the diversity jurisdiction of federal courts: "Courts created by statute can have no jurisdiction but such as the statute confers."). *See also* Paul M. Bator, *Congressional Power over*

there was no federal court jurisdiction at the time the *Caterpillar* case was removed. Why does that not settle the matter? Consider here the classic case on subject matter jurisdiction: *Capron v. Van Noorden*.[123] In that 1804 decision, the Court held that it did not matter that a case had been tried to a verdict before a jury.[124] The fact that the record did not clearly establish that the parties were diverse at the outset before trial rendered the judgment invalid on the grounds that the subject matter jurisdiction of the lower federal court could not be assured.[125] True, *Capron*,[126] unlike *Caterpillar*,[127] involved a potential violation of Article III and not simply a statute.[128] But, in *Capron*, the Court—the same Court that decided *Marbury v. Madison* one year earlier—was entirely unmoved by the fact that the plaintiff who lost at trial would now get a second bite at the apple in the form of another trial.[129] Efficiency, in other words, was irrelevant to the larger principles at stake.

Thus, although it is true that minimal diversity existed when *Caterpillar* was removed, therefore avoiding any problems under Article III, the Court's holding negates the clear lines drawn by Congress governing the jurisdiction of the federal courts. In this respect, it is an incursion on the background separation of powers principles that govern the relationship between Congress and the courts on which the very legitimacy of the federal courts is thought to rest.[130] Alas, it is

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the Jurisdiction of Federal Courts, 27 VILL. L. REV. 1030, 1032 (1982) ("Indeed, the dramatic fact is that not a single Supreme Court case can be cited casting the slightest doubt on the validity of the hundreds of statutes premised on the notion that it is for Congress to decide which, if any, of the cases to which the federal judicial power extends should be litigated in the first instance in the lower federal courts.").

123 6 U.S. (2 Cranch) 126 (1804).

124 *See id.* at 127 ("[B]y the record aforesaid it manifestly appeareth that the said Circuit Court had not any jurisdiction of the cause . . . but ought to have dismissed the same . . . ."). In *Capron*, the Court put the onus on assuring the existence of subject matter jurisdiction on the federal court, not the parties. *See id.*

125 *See id.*

126 *See id.* at 126.

127 *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 64–65 (1996).

128 In *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530–31 (1967), the Court clarified that the complete diversity rule is statutory, not constitutional in origin.

129 *See Capron*, 6 U.S. (2 Cranch) at 127 ("Here it was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it. It is therefore an *error of the Court*, and the plaintiff has a right to take advantage of it.").

130 *See* Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975) (observing that congressional power to control federal court jurisdiction "is the rock on which rests the legitimacy of the judicial work in a democracy"). As for precedent, it is true that Chief Justice Marshall did not address the "curing" of jurisdictional defects after-the-fact in his foundational subject matter jurisdiction opinions, but *Mollan v. Torrance*, 22 U.S. (9 Wheat.)

puzzling that Justice Ginsburg elevated efficiency over these principles in this case.[131] Equally puzzling is the similar approach she took in dissent in *Grupo Dataflux v. Atlas Global Group, L.P.*[132]

Professor Shapiro raised similar concerns in his assessment of *Ruhrgas AG v. Marathon Oil Co.*,[133] some years ago.[134] There, the Court held that a district court could dismiss a case on either personal jurisdiction or subject matter jurisdiction grounds—whichever presented, in the court's view, the "surer ground" for dismissal.[135] As Professor Shapiro observed:

> If the federal court did lack subject-matter jurisdiction (perhaps in terms of its power under Article III), is it appropriate for that court—given the limited, nonwaivable subject-matter authority of the judicial branch in our federal system—nevertheless to be deciding an issue that, under accepted notions of issue preclusion, may well bar a state court that does have subject matter jurisdiction from considering whether it has personal jurisdiction over the defendant?[136]

He concluded by asking: "Does *Ruhrgas*, in other words, carry pragmatism a step too far?"[137] To which one might add, does *Caterpillar* do the same?

537, 539 (1824), does establish the opposite proposition: "[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."

131 Even more "puzzling" is that Justice Scalia, author of *Finley v. United States*, 490 U.S. 545 (1989), would join such an opinion. *See id.* at 553–54 (holding that unless Congress specifically and expressly confers pendent jurisdiction, the courts should not exercise it).

132 541 U.S. 567, 582 (2004) (Ginsburg, J., dissenting). In her dissent, Justice Ginsburg found fault with the Court's holding, written by Justice Scalia, that a judgment should be reversed where a lower court did not have diversity jurisdiction at the outset of a case, but the lack of diversity was "cured" before judgment. *See id.* at 590–92 (Ginsburg, J., dissenting). In the Court's view, "[u]ncertainty regarding the question of jurisdiction is particularly undesirable." *Id.* at 582 (majority opinion). Justice Ginsburg, by contrast, opined that she "would leave intact the results of the six-day trial between completely diverse citizens, and would not expose Atlas and the courts to the 'exorbitant cost' of relitigation." *Id.* at 583 (Ginsburg, J., dissenting). It bears noting that Justice Ginsburg did sometimes vote to send to state court to start anew a case that had been tried before a jury in federal court. Consider, for example, her dissent in *Allapattah Services*. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 577, 593–95 (2005) (Ginsburg, J., dissenting). The Exxon class action had been tried to a jury verdict in federal court before the case went up on appeal. *See id.* at 550 (majority opinion). Thus, her elevation of efficiency did not always win out.

133 526 U.S. 574 (1999).

134 *See* Shapiro, *supra* note 2, at 30–31.

135 *See Ruhrgas*, 526 U.S. at 578.

136 Shapiro, *supra* note 2, at 30.

137 *Id.*

Conclusion

Notwithstanding his "puzzlements," Professor Shapiro concluded his earlier assessment of Justice Ginsburg's first decade by celebrating

> a judicial record that represents the best qualities a judge can have: lawyerly precision, a strong sense of the importance of context and of resolving the controversy at hand without reaching well beyond that controversy to resolve disputes not yet presented, and a determination to interpret and apply statutes, rules, and the common law with respect for the humane and efficient administration of justice.[138]

I agree wholeheartedly with his bottom line. Now, unlike Professor Shapiro, I may be biased as a former clerk to the extraordinary human being that Ruth Bader Ginsburg was. But I take comfort in knowing that Justice Ginsburg likewise found a huge fan in my former professor, who was (despite his exceptional politeness) never one to shy away from finding fault in the work of others.

Justice Ginsburg's legacy as a jurist is vast and monumental. We cannot do that legacy justice without heeding attention to the cases that are typically not fodder for headlines in newspapers, but nonetheless have to do with the ordinary machinery of justice in this country—cases involving intricate questions of procedure and jurisdiction. Those cases, I submit, provide an important and deeply revealing portrait of a justice's values. Here, they reveal a jurist who cared passionately about access to justice, strove to protect an important role for the federal courts while also recognizing their limitations, worked tirelessly to make our Constitution one that holds our government accountable, and tried to ensure that the law on the books married with the realities on the ground. It is these things, I submit further, that make hers a legacy worth celebrating—and even more so worth carrying forward.

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138 *Id.* at 31.