

THE GEORGE WASHINGTON LAW REVIEW



SPRING 2022 SYMPOSIUM: THE LEGACY OF JUSTICE RUTH BADER GINSBURG

FOREWORD

Spring 2022 Symposium: The Legacy of Justice Ruth Bader Ginsburg 1399 *Bradford R. Clark*

SPECIAL REMARKS

A Conversation Regarding the Legacy of Justice Ruth Bader Ginsburg 1405 *The Honorable Stephen G. Breyer & Laura A. Dickinson*

Reflections on the Legacy of Justice Ruth Bader Ginsburg 1409 *The Honorable Goodwin H. Liu, The Honorable John B. Owens, The Honorable Paul J. Watford & Bradford R. Clark*

ARTICLES

Ruth Bader Ginsburg and a Jurisprudence of Legal Pluralism 1427 *Paul Schiff Berman*

Order Without Formalism	1458	<i>Rachel Bayefsky</i>
Justice Ginsburg's Republican Jurisprudence	1471	<i>Daphna Renan</i>
The Discrete Charm of Leveling Down	1487	<i>Aziz Z. Huq</i>
The Orthodox, and Unorthodox, RBG: Administrative Law and Civil Procedure	1532	<i>Abbe R. Gluck & Anne Joseph O'Connell</i>
<i>After Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction</i>	1572	<i>Amanda L. Tyler</i>



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 Ken Rodriguez, B.A., M.A., M.S.L.I.S., J.D., *Professorial Lecturer in Law; Reference/
 Intellectual Property Librarian*
 Caroline Rogus, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Stacey Rohrs, B.A., J.D., *Professorial Lecturer in Law*
 Margaret A. Rose, B.A., J.D., *Professorial Lecturer in Law*
 Meredith Filak Rose, A.B., J.D., *Professorial Lecturer in Law*
 Peter F. Rose, B.A., J.D., *Professorial Lecturer in Law*
 Mark E. Rosen, A.B., J.D., LL.M., *Professorial Lecturer in Law*
 Paul Rosenzweig, B.A., M.S., J.D., *Professorial Lecturer in Law*
 Eleanor Ross, B.A., J.D., *Professorial Lecturer in Law*
 Melinda Roth, B.A., M.P.P., J.D., *Professorial Lecturer in Law*
 Jane E. Rueger, B.A., J.D., M.B.A., *Professorial Lecturer in Law*
 Robin R. Runge, B.A., J.D., *Professorial Lecturer in Law*
 Jayna Rust, B.J., M.A., J.D., *Professorial Lecturer in Law*
 Christopher Michael Ryan, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Peter O. Safir, B.A., J.D., *Professorial Lecturer in Law*
 Michael I. Sanders, B.S., LL.B., LL.M., *Professorial Lecturer in Law*
 Chad T. Sarchio, B.A., J.D., *Professorial Lecturer in Law*
 Frank Scaduto, B.A., J.D., *Professorial Lecturer in Law*
 Mark E. Schamel, B.S., J.D., *Professorial Lecturer in Law*
 Charles D. Schmitz, B.A., J.D., *Professorial Lecturer in Law*
 Brian D. Schnapp, B.A., J.D., *Professorial Lecturer in Law*
 David Shaw, B.A., M.S., J.D., *Professorial Lecturer in Law*
 William H. Shawn, B.A., J.D., *Professorial Lecturer in Law*
 Scott S. Sheffler, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Mohammad Shouman, B.A., M.D., B.Sc., *Professorial Lecturer in Law*
 Rami Sibay, B.A., J.D., *Professorial Lecturer in Law*
 Stacy Plotkin Silber, B.A., J.D., *Professorial Lecturer in Law*
 Soumya Silver, B.A., J.D., M.S.T., *Professorial Lecturer in Law*
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 Stephen Silverman, B.A., J.D., *Professorial Lecturer in Law*
 Stephen C. Silverman, B.A., J.D., *Professorial Lecturer in Law*
 Thomas J. Simeone, B.S., J.D., *Professorial Lecturer in Law*
 Madeline Smedley, B.A., J.D., *Professorial Lecturer in Law*
 Brian D. Smith, B.A., J.D., *Professorial Lecturer in Law*
 Jack D. Smith, B.A., J.D., *Professorial Lecturer in Law*
 Robert J. Smith, B.A., J.D., *Professorial Lecturer in Law*
 Thomas R. Snider, B.A., J.D., *Professorial Lecturer in Law*
 Lauren Snyder, B.A., J.D., *Professorial Lecturer in Law*
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 The Honorable Jeri Somers, B.A., J.D., *Professorial Lecturer in Law*
 Keith E. Sonderling, B.S., J.D., *Professorial Lecturer in Law*
 Regina Y. Speed-Bost, A.B., J.D., *Professorial Lecturer in Law*
 Samara Spence, B.Arch., J.D., *Professorial Lecturer in Law*
 Leonard P. Stark, B.A., B.S., M.A., D.Phil., J.D., *Professorial Lecturer in Law*
 Andrew A. Steinberg, B.A., J.D., *Professorial Lecturer in Law*
 William Steinman, B.A., J.D., *Professorial Lecturer in Law*
 Dan E. Stigall, B.A., J.D., LL.M., *Distinguished Professorial Lecturer in National Security Law*
 Lisa Strauss, B.A., J.D., *Professorial Lecturer in Law*
 Sydney L. Stringer, B.A., J.D., *Professorial Lecturer in Law*
 Sandra Lee Strokoff, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Charles F. Stuart, B.A., J.D., *Professorial Lecturer in Law*
 John H. Sturc, B.A., J.D., *Professional Lecturer in Law*
 Dwight H. Sullivan, B.A., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 Patrice Sulton, B.A., J.D., *Professorial Lecturer in Law*

Michael J. Surgalla, Jr., B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Jennifer L. Sutton, B.A., J.D., *Professorial Lecturer in Law*
 Collin David Swan, B.A., J.D., *Professorial Lecturer in Law*
 Carolyn Sweeney, B.A., M.Ed., J.D., *Professorial Lecturer in Law*
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 Monica R. Talley, B.S.B.A., J.D., *Professorial Lecturer in Law*
 Mary Lynn Tate, B.A., J.D., *Professorial Lecturer in Law*
 Steven M. Tepp, B.A., J.D., *Professorial Lecturer in Law*
 Alessandro Terenzoni, B.A., J.D., *Professorial Lecturer in Law*
 Michael A. Terry, B.A., J.D., *Professorial Lecturer in Law*
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 Karen DaPonte Thornton, B.A., J.D., LL.M., *Professorial Lecturer in Law*
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 Rick Alyn Toering, B.S., M.Eng., J.D., *Professorial Lecturer in Law*
 Mike Torres, B.A., J.D., *Professorial Lecturer in Law*
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 Melvin I. Urofsky, A.B., M.A., Ph.D., J.D., *Professorial Lecturer in Law*
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 James Villa, B.A., J.D., *Professorial Lecturer in Law*
 Eleanor Magers Vuono, B.A., J.D., *Professorial Lecturer in Law*
 Daniel Waldman, B.A., J.D., *Professorial Lecturer in Law*
 Johnny Hillary Walker, A.A., B.A., J.D., *Professorial Lecturer in Law*
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 Hank B. Walther, B.A., J.D., *Professorial Lecturer in Law*
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 Marc Warren, B.A., J.D., LL.M., M.S., S.J.D., *Professorial Lecturer in Law*
 Edward Waters, B.A., J.D., *Professorial Lecturer in Law*
 Bradley Watts, B.A., J.D., *Professorial Lecturer in Law*
 Charles Wayne, B.A., J.D., *Professorial Lecturer in Law*
 Max A. Webb, B.A., Ph.D., J.D., *Professorial Lecturer in Law*
 Victor W. Weedn, B.A., M.D., J.D., *Professorial Lecturer in Law*
 Robert L. Weinberg, B.A., LL.B., Ph.D., *Professorial Lecturer in Law*
 Jason M. Weinstein, B.A., J.D., *Professorial Lecturer in Law*
 Larry Weinstock, B.S., J.D., *Professorial Lecturer in Law*
 William K. West, Jr., B.S.M.E., LL.B., *Professorial Lecturer in Law*
 Jessica L. Wherry, B.A., M.S.Sc., J.D., *Professorial Lecturer in Law*
 Megan Murphy Wilcox, B.A., J.D., *Professorial Lecturer in Law*
 Luke Wilson, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Max Wolson, B.A., J.D., *Professorial Lecturer in Law*
 Lance D. Wood, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Derek Woodman, B.A., J.D., *Professorial Lecturer in Law*
 David W. Woodworth, B.A., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 Raymond J. Wyrsh, B.A., J.D., LL.M., M.B.A., *Professorial Lecturer in Law*
 David Philip Yaffe, B.A., J.D., *Professorial Lecturer in Law*
 John H. Zacharia, B.A., J.D., *Professorial Lecturer in Law*
 Imran Zaidi, B.A., J.D., *Professorial Lecturer in Law*
 Walter E. Zalenski, B.A., J.D., *Professorial Lecturer in Law*
 Lisa M. Zarlenga, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Ellen M. Zavian, B.S., J.D., *Professorial Lecturer in Law*
 Robert W. Zelnick, A.B., J.D., *Professorial Lecturer in Law*
 Shira Renee Zeman, B.A., J.D., *Professorial Lecturer in Law*
 Jenny Zhang, A.B., J.D., *Professorial Lecturer in Law*

FOREWORD

Spring 2022 Symposium: The Legacy of Justice Ruth Bader Ginsburg

*Bradford R. Clark**

Justice Ruth Bader Ginsburg was a significant figure in the law. She was a brilliant law professor, litigator, judge, and Justice. This symposium in *The George Washington Law Review* examines her legacy. In my role as faculty adviser to the *Law Review*, I proposed this conference and asked my colleague and former Ginsburg clerk, Paul Berman, to help organize it. We recruited an impressive group of judges and scholars—all of whom clerked for Justice Ginsburg—to discuss various aspects of her legacy. Justice Stephen Breyer opened the conference with his recollections of Justice Ginsburg and then answered some questions from Laura A. Dickinson¹ about what it was like to serve with Justice Ginsburg on the Supreme Court.² Next, I interviewed California Supreme Court Justice Goodwin Liu³ and Ninth Circuit Judges John B. Owens⁴ and Paul J. Watford⁵ to learn

* William Cranch Research Professor of Law, The George Washington University Law School. I thank A.J. Bellia for insightful comments, John Seidman (GW Law '22) for excellent research assistance, and the editors of *The George Washington Law Review* for holding this symposium under challenging circumstances due to COVID-19.

¹ Oswald Symister Colclough Research Professor of Law, The George Washington University Law School.

² The Honorable Stephen G. Breyer & Laura A. Dickinson, *A Conversation Regarding the Legacy of Justice Ruth Bader Ginsburg*, 90 Geo. Wash. L. Rev. 1405 (2022).

³ Associate Justice, Supreme Court of California.

⁴ Judge, United States Court of Appeals for the Ninth Circuit.

⁵ Judge, United States Court of Appeals for the Ninth Circuit.

how Justice Ginsburg influenced their careers and their work on the bench.⁶ Finally, Professors Rachel Bayefsky,⁷ Paul Schiff Berman,⁸ Abbe R. Gluck,⁹ Aziz Z. Huq,¹⁰ Anne Joseph O'Connell,¹¹ Daphna Renan,¹² and Amanda L. Tyler¹³ analyzed various aspects of the Justice's jurisprudence. My colleagues Laura Dickinson and Maeva Marcus¹⁴ moderated the academic panels and shared some of their personal recollections of the Justice.

In this brief Foreword, I want to highlight two aspects of Justice Ginsburg's legacy that should not go unnoticed on this occasion. First, as evidenced by the extraordinary participants in this symposium, an important part of the Justice's legacy is the distinguished group of law clerks she hired and trained during her four decades on the bench. Justice Ginsburg was known for her precision and attention to detail, and she held her law clerks to the same high standards.¹⁵ I have no doubt that she imparted her habits of mind to all those who had the privilege to clerk for her. Many of her law clerks followed in her professional footsteps. As noted, three of the participants in this symposium are appellate judges. At least two more of her clerks have been appointed to the bench: Benjamin Beaton¹⁶ and Toby Heytens.¹⁷ Many of her clerks have served in government, including Elizabeth Prelogar, the current Solicitor General of the United States.¹⁸ In addi-

⁶ The Honorable Goodwin H. Liu, The Honorable John B. Owens, The Honorable Paul J. Watford & Bradford R. Clark, *Reflections on the Legacy of Justice Ruth Bader Ginsburg*, 90 GEO. WASH. L. REV. 1409 (2022).

⁷ Associate Professor of Law, University of Virginia School of Law.

⁸ Walter S. Cox Professor of Law, The George Washington University Law School.

⁹ Alfred M. Rankin Professor of Law and Faculty Director of the Solomon Center for Health Law and Policy, Yale Law School; and Professor of Internal Medicine (General Medicine), Yale Medical School.

¹⁰ Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School.

¹¹ Adelbert H. Sweet Professor of Law, Stanford Law School.

¹² Peter B. Munroe and Mary J. Munroe Professor of Law, Harvard Law School.

¹³ Shannon Cecil Turner Professor of Law, University of California, Berkeley School of Law.

¹⁴ Director of the Institute for Constitutional Studies and Research Professor of Law, The George Washington University Law School.

¹⁵ Amanda L. Tyler, *Lessons Learned from Justice Ruth Bader Ginsburg*, 121 COLUM. L. REV. 741, 745 (2021).

¹⁶ Judge Beaton was appointed by President Trump to the United States District Court for the Western District of Kentucky. See *District Judge Benjamin Beaton*, U.S. COURTS, <https://www.kywd.uscourts.gov/content/district-judge-benjamin-beaton> [<https://perma.cc/Z3K6-XCW7>].

¹⁷ Judge Heytens was appointed by President Biden to the United States Court of Appeals for the Fourth Circuit. See *Judge Toby J. Heytens*, U.S. COURTS, <https://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-toby-j-heyten> [<https://perma.cc/5CMC-4VJ8>].

¹⁸ See *Meet the Solicitor General*, U.S. DEP'T JUST. (Apr. 13, 2022), <https://www.justice.gov/osg/staff-profile/meet-solicitor-general> [<https://perma.cc/8M9B-BSRJ>].

tion, a significant number of her clerks became law professors, including all seven academic contributors to this symposium. Several others have served as law school deans and university administrators.¹⁹ Many have practiced law of various kinds across the nation. Thus, even before one considers Justice Ginsburg's jurisprudence, it is no exaggeration to say that she had a profound impact on the law solely by virtue of the law clerks she hired, trained, and mentored.

Second, Justice Ginsburg set an important example—through both words and deeds—that people with differing political viewpoints and legal philosophies can listen respectfully to counterarguments, learn from one another, and even form deep and lasting friendships. Of course, this example was nowhere more evident than in her notorious friendship with Justice Antonin Scalia. I clerked for Justice Scalia and witnessed their enduring relationship over many years. They first got to know one another when they were on the D.C. Circuit together, and their friendship only deepened during their time on the Supreme Court. During a joint appearance with Justice Ginsburg in 2015,²⁰ Justice Scalia quipped when asked why he was so fond of her: “Call us the odd couple[.] . . . She likes opera, and she's a very nice person. What's not to like? Except her views on the law.”²¹ Following Justice Scalia's death in 2016, Justice Ginsburg wrote: “From our years together at the D.C. Circuit, we were best buddies. . . . It was my great good fortune to have known him as a working colleague and treasured friend.”²² Indeed, they liked each other so much that they often traveled and made public appearances together.²³ Less well known to the public was that they and their spouses regularly celebrated New Year's Eve together.²⁴

¹⁹ These include Paul Schiff Berman (former Dean of Arizona State University, Sandra Day O'Connor College of Law and The George Washington University Law School), M. Elizabeth Magill (current President of the University of Pennsylvania, former Dean of Stanford Law School, and former Provost of the University of Virginia), Trevor W. Morrison (former Dean of NYU Law School), and David Schizer (former Dean of Columbia Law School).

²⁰ Julyssa Lopez, *Justices Ginsburg and Scalia: An Unlikely Bond*, GW TODAY (Feb. 13, 2015), <https://gwtoday.gwu.edu/justices-ginsburg-and-scalia-unlikely-bond-0> [<https://perma.cc/SM7Y-3JAA>].

²¹ David G. Savage, *From the Archives: BFFs Ruth Bader Ginsburg and Antonin Scalia Agree to Disagree*, L.A. TIMES (June 22, 2015), <https://www.latimes.com/local/lanow/la-na-court-odd-couple-20150622-story.html> [<https://perma.cc/NCA2-4477>].

²² Statement of Justice Ruth Bader Ginsburg, *Statements from the Supreme Court Regarding the Death of Justice Antonin Scalia*, SUP. CT. U.S. (Feb. 14, 2016), https://www.supremecourt.gov/publicinfo/press/pr_02-14-16.pdf [<https://perma.cc/6DY8-CDZQ>].

²³ See Savage, *supra* note 21.

²⁴ Debra Cassens Weiss, *Ginsburg and Scalia Celebrate New Year Together, Despite Differences*, ABA JOURNAL (Jan. 2, 2008, 12:36 PM), <https://www.abajournal.com/news/article/gins->

When Justice Ginsburg was appointed to the Supreme Court in 1993, Justice Scalia had already become a leading conservative voice on the Court.²⁵ Justice Ginsburg, of course, quickly became a leading liberal voice.²⁶ Thus, in many important cases, they disagreed—even sharply.²⁷ But the two jurists did not let these disagreements affect their friendship. Indeed, they saw such disagreements as an opportunity to learn from one another. Both recognized that their exchange of ideas would make their opinions stronger. As Justice Ginsburg explained: “We disagreed now and then, but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation.”²⁸ Likewise, Justice Scalia described their working relationship as “a mutual improvement society.”²⁹ According to Scalia’s son Chris, Justice Ginsburg “wouldn’t just correct his typos or change punctuation—she helped him strengthen his arguments.”³⁰ Both Justices sought to produce the most persuasive opinions possible and were happy to challenge and assist one another in this endeavor.

I personally witnessed then-Judge Ginsburg’s openness to constructive criticism when I clerked for Judge Robert Bork on the D.C. Circuit.³¹ The two judges were good friends and were assigned to hear

burg_and_scalia_celebrate_new_year_together_despite_differences [https://perma.cc/CTN3-ZABS].

²⁵ Matt Ford, *The Remarkable Life of Antonin Scalia*, ATLANTIC (Feb. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/02/antonin-scalia-death-legacy/462753/> [https://perma.cc/Q8J3-YGCN].

²⁶ Lawrence Hurley, *U.S. Supreme Court’s Ginsburg, a Liberal Dynamo, Championed Women’s Rights*, REUTERS (Sept. 18, 2020), <https://www.reuters.com/article/us-usa-court-ginsburg-obituary/u-s-supreme-courts-ginsburg-a-liberal-dynamo-championed-womens-rights-idUSKBN26A003> [https://perma.cc/GDN9-R5TL].

²⁷ See, e.g., *United States v. Virginia*, 518 U.S. 515, 519 (1996) (Justice Ginsburg writing for the Court and ruling that the Virginia Military Institute’s male-only admissions policy violates the Equal Protection Clause); *id.* at 566 (Scalia, J., dissenting) (“To achieve [its] desired result, [the Court] rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people.”).

²⁸ Statement of Justice Ruth Bader Ginsburg, *supra* note 22.

²⁹ Christopher J. Scalia, *Christopher J. Scalia: My Father’s Relationship with Justice Ginsburg – ‘Best of Friends,’* FOX NEWS (Sept. 21, 2020, 6:00 AM), <https://www.foxnews.com/opinion/ruth-ginsburg-antonin-scalia-relationship-friends-christopher-scalia> [https://perma.cc/TK5C-UTG3].

³⁰ *Id.*

³¹ Judge Ginsburg’s chambers were right next to Judge Bork’s, so I saw her from time to time. Because she was somewhat reserved, I was surprised when she stopped me in the hallway one day, addressed me by name, and asked about my experiences at Columbia Law School. She shared some recollections about her time there as both a student and a professor and was particularly interested in hearing about my favorite courses and teachers. Being a professor in D.C., I also had the good fortune to interact with her on various occasions over the ensuing years.

an appeal involving alleged police misconduct in the District of Columbia.³² As the senior judge, Judge Ginsburg assigned the opinion to herself and circulated an initial draft to the panel. Judge Bork agreed with most of her analysis but sent her a substantive memorandum explaining his points of disagreement and suggesting ways to strengthen the opinion. Then-Judge Ginsburg not only incorporated all of his suggestions, but also insisted on issuing the revised version as the joint opinion of “Circuit Judges GINSBURG and BORK.”³³ I believe that this is the only joint majority opinion Justice Ginsburg ever issued during her time on the bench. This episode illustrates an important point about the Justice. She welcomed constructive criticism from her colleagues, even—and perhaps especially—from those who disagreed with her judicial philosophy. She received such criticism with an open mind and was willing to reconsider and revise her opinions when persuaded.

The example set by Justice Ginsburg is more important now than ever. In recent years, our academic institutions, our politicians, and our citizens have become increasingly intolerant of opposing viewpoints. On both the left and the right, those who disagree with others often seek to demonize or silence their opponents rather than engage in reasoned discourse and debate.³⁴ At many universities, students have attempted to prevent unpopular speakers from even appearing—let alone speaking—on campus.³⁵ Their tactics range from shouting down speakers during their remarks to disrupting events by yelling, banging on desks, and even pounding on the walls from outside.³⁶

³² See *Carter v. District of Columbia*, 795 F.2d 116 (D.C. Cir. 1986).

³³ *Id.* at 118.

³⁴ See Teresa Bejan, *You Don’t Have to be Nice to Political Opponents. But You Do Have to Talk to Them.*, WASH. POST (Mar. 8, 2017, 12:27 PM), <https://www.washingtonpost.com/post-everything/wp/2017/03/08/you-dont-have-to-be-nice-to-political-opponents-but-you-do-have-to-talk-to-them/> [<https://perma.cc/9UWH-XJ88>].

³⁵ See, e.g., Yaron Steinbuch, *Yale Law Students Disrupt Bipartisan Free Speech Panel, Trigger Police Escort*, N.Y. POST (Mar. 17, 2022 8:07 AM) <https://nypost.com/2022/03/17/yale-law-students-disrupt-bipartisan-free-speech-panel/> [<https://perma.cc/4PK9-SJ6J>]; see also Josh Moody, *Law Students Shout Down Controversial Speakers*, INSIDE HIGHER ED (Mar. 23, 2022), <https://www.insidehighered.com/news/2022/03/23/law-student-protests-stifle-speakers-yale-uc-hastings> [<https://perma.cc/65MS-9GR3>] (describing recent incidents at both Yale Law School and UC Hastings College of the Law).

³⁶ See Moody, *supra* note 35. A few months after these events, Dean Heather Gerken released “A Message to Our Alumni on Free Speech at Yale Law School,” reaffirming the school’s “enduring commitment to the free and unfettered exchange of ideas.” See *A Message to Our Alumni on Free Speech at Yale Law School*, YALE L. SCH. (Oct. 12, 2022), <https://law.yale.edu/yls-today/news/message-our-alumni-free-speech-yale-law-school> [<https://perma.cc/SMK3-3BDE>].

Shutting down free and open debate on controversial topics undermines free speech³⁷ and is corrosive to democracy.³⁸

Student intolerance of opposing viewpoints is especially concerning in the nation's law schools. The United States has an adversary system premised on the idea that the fair and accurate resolution of disputes requires that both parties have a full and fair opportunity to present their best arguments and respond to those of their opponent. The parties do not have the option of simply preventing the other side from speaking—no matter how offensive they find their opponent's position to be. Legal education is meant to prepare students to function effectively within this system. An essential legal skill is the ability to listen carefully to opposing arguments and formulate effective counterarguments. Allowing law students to censor or shout down disfavored speakers leaves students ill prepared to practice law in the real world.

Justice Ginsburg showed us a better way. Throughout her career as a lawyer, law professor, judge, and Justice, she fought tirelessly for her beliefs. At the same time, she always respected—and even welcomed—opposing views. Even when such views did not persuade her, she recognized that they could strengthen her arguments and that all sides are entitled to be heard in a free society. In short, she believed—as Judge Bork and Justice Scalia did—that the power of one's ideas is the best way to change minds and gain adherents. She also demonstrated that if we look past our differences, we often have more in common than we think. As we honor Justice Ginsburg's legacy, we should remember her lifelong commitment to free, open, and civil discourse on matters of public policy and strive to emulate her approach.

³⁷ Erwin Chemerinsky & Howard Gillman, Opinion, *Free Speech Doesn't Mean Hecklers Get to Shut Down Campus Debate*, WASH. POST (Mar. 24, 2022, 5:53 PM), <https://www.washingtonpost.com/opinions/2022/03/24/free-speech-doesnt-mean-hecklers-get-shut-down-campus-debate/> [https://perma.cc/T7KJ-GXQQ].

³⁸ Editorial, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html> [https://perma.cc/4ZWA-NJNK].

A Conversation Regarding the Legacy of Justice Ruth Bader Ginsburg

*A Conversation Held on February 24, 2022, at
The George Washington University Law School*

The Honorable Stephen G. Breyer & Laura A. Dickinson***

PROFESSOR LAURA A. DICKINSON: Welcome Justice Breyer and thank you for coming. It's very meaningful to have you here today. We'll start with whatever recollections you'd like to share and then I'll ask you a few questions about Justice Ginsburg's legacy.

JUSTICE STEPHEN G. BREYER: A great jurist, a great Justice, a woman of valor, a rock of righteousness, and my very, very good friend.

Justice Ruth Bader Ginsburg will be remembered as a brilliant judge, a great jurist who did much for women—indeed for everyone—before she became a Justice and after she became a Justice. She was intelligent. She was logical. She was hardworking. And her opinions reflect her principles. When I wanted to know what she was thinking—and I always wanted to know what she was thinking—I would read her memos and her drafts. Her analysis of a case would be clear. It would be true to the record. It would be true to the party's argument. She would explain the law succinctly, and she would not omit necessary detail. As a Justice, she wrote opinions that reflected her basic decency. She understood the basic indecency of discrimination and unfair treatment. She correctly assumed that law, its object, is to try to help people lead better lives.

Ruth was a woman who made the world a better place for us to live in, not just in big ways, but in small ones too. She paid attention to the details, and that included her clothes—she dressed well! She loved those collars that she wore with her robes on the bench. And she paid attention to the details of human relationships. Only a few weeks before she died, she sent my newly born grandchild a T-shirt with the words, “future RBG law clerk” printed on it. Her note to the grandchild said, “This is too large for you. It's going to have to be for Brian (his older half-brother), until you get big enough to fill it.”

* Justice, United States Supreme Court, 1994–2022.

** Oswald Symister Colclough Research Professor of Law, The George Washington University Law School.

She was a thoughtful person. Ruth understood, perhaps not like me or a few others, that not every silence needs to be filled. She would think before she spoke, even on social occasions. She had a good sense of humor. Over the years, I might go into her office to tell her something I found funny. And I would say, “Ruth, what do you think of that?” And she would find it funny, usually. She would chat about it. We would chat about it. As long as I did not stay too long. If I stayed too long, she would just stand up from behind her desk, and I knew what that meant. That meant she wanted to get back to work, and that is what she did. She was a rock.

When I came back to D.C. for her memorial service and went into my office, I found a birthday card she had sent on my birthday a few days before. The card had a picture of her, and it said, “I order you to have a happy birthday.” And it added, “To my *younger* colleague, stay cool and well.” And she underlined “younger.” Which she always thought was very funny; and I liked it too. She wrote, “We will get together when this epidemic is over, and see an opera, and life will go on.” Even now, thinking about that cheers me up.

What was it like to work with Ruth? It was always interesting. It was always challenging. It was always educational. The longer you knew her, the more you liked her. And I did know her, for many years, and I did like her, very much. I think sometimes, “What would Ruth say?” And then I cannot ask Ruth. So I will miss Ruth, very much indeed.

QUESTION & ANSWER

LAURA DICKINSON: Thank you, Justice Breyer for those insightful and really very moving remarks. They are an important element of Justice Ginsburg’s legacy. We are thankful that you are willing to take just a few questions. And so I wanted to begin by asking you whether there might be any particular lessons that you have taken from serving with Justice Ginsburg as a colleague on the Supreme Court?

JUSTICE BREYER: Well, the second piece of advice my father gave me before he died—I saw her put that into practice. My father told me, “Do your job.” Just do it, and do it as well as you can. And that is just it. And you know what his first piece of advice was? His first piece of advice was, “Stay on the payroll.” And I have managed to do that too. But that was it. You have a case and you put your heart and soul into it. It matters to people, and that is true, whatever level of judiciary you are on. It matters what the judge is doing. You pay at-

tention. There is no case that you can let up on. And I saw her do that. I saw her do it seriously, and I saw her do it thoroughly. She was a good model.

LAURA DICKINSON: What would you say, for you, are some of the most significant aspects of her jurisprudential legacy?

JUSTICE BREYER: There are two separate things in that question, aren't there? None of us really knows what future history will say about something we did. Fifty years from now, who knows? About me or anybody else. Historians look at what happened afterwards, and then they say it was obvious to those people who lived 40 years before. But as for Ruth, I think it will be something about her doing a good job. And then, perhaps even importantly, I think, here is something else your question brought to my mind. I was talking to Sandra O'Connor, maybe 15 years ago, and she told me that Thurgood Marshall came to her one day, and he was looking gloomy. And she asked, "Thurgood, what's the problem?" He said, "You know, I don't know that I have really accomplished very much on this Court." She said, "Thurgood! What are you talking about? You are the only member of this Court who, even if he had never been a member of the Supreme Court of the United States, would have been a national hero." You see. And Ruth? I think that is her, too.

She did a lot just to overcome stereotypes, discrimination, and stereotypical thinking; she did a lot. And even if she had never been on the Court, she would be remembered for that. And that, I think, endures. It is impossible to take away from that.

LAURA DICKINSON: That is a really powerful way of putting it, Justice Breyer. You know, one distinctive aspect of Justice Ginsburg's legacy that is less often discussed than the kind of impact you just mentioned, is the fact that she was a civil procedure professor and a conflicts of laws professor before she became a judge. She wrote many judicial opinions in those areas, and those cases are less popular and less well-known, we might say, than some of her other decisions. Do you think it is important to have an expert in these areas on the Supreme court?

JUSTICE BREYER: No, I mean, it helps. Nothing is absolutely essential. I think a broad set of backgrounds—and not everybody has the same background—I would probably say that was helpful. When I was a law clerk at the Supreme Court, Justice Hugo Black had been a senator, Justice Earl Warren had been a governor, and Justice Arthur Goldberg had been Secretary of Labor and a union leader. You had a wide range. And Justice Thurgood Marshall, of course, had his back-

ground, and so forth. So I think it is helpful to have members of the Court with a broad set of backgrounds.

Do you need specialists? I am not sure that you do. It is helpful, I admit that! As I would be working on a case, I would very often think, “I wonder what Ruth is thinking?” And I would go ask her. If it was a procedure case, I would think, “I *wonder* what Ruth is thinking?!” You see? And, indeed, that was particularly helpful.

LAURA DICKINSON: That is so interesting, Justice Breyer! You have shared so much already, but is there anything else, or any additional personal recollection that you would like to share with us today?

JUSTICE BREYER: Oh, she could be teased. I remember talking to her one time, and I would say, “Well, what would Swedish civil procedure say about this?” She wrote a book about Swedish civil procedure, and I said she would know the answer to that question. But she would say, “I am not sure if it is relevant or not.” I thought it was quite funny, and she thought it was funny too, actually. Once, we were visiting a court, the European Court of Justice in Luxembourg. We went through Paris, I think, to get there, and we were being interviewed by a group of journalists. She had terrible laryngitis, and they were interviewing us in English, I think, but she could not make herself heard. So she asked me if I would tell them what she was saying. And so they were asking some really obvious things, and we would answer them yes or no. And every time she would say yes, I would say no. And she realized what I was doing, and so did the journalists. And she did think that was sort of funny, but I could only get away with it for a short time.

LAURA DICKINSON: It is so generous of you, Justice Breyer, to share those reflections on your time serving with Justice Ginsburg, both the substantive accounts of her legacy and also your personal memories—they are so meaningful for us to hear. So we are very grateful to you for participating in this event and contributing to our recollection of her life and legacy. Thank you so much.

JUSTICE BREYER: Well, thank you very much. Thank you very much for asking me. She was a wonderful person.

Reflections on the Legacy of Justice Ruth Bader Ginsburg

*A Conversation Held on February 24, 2022, at
The George Washington University Law School*

*The Honorable Goodwin H. Liu,**

*The Honorable John B. Owens,***

*The Honorable Paul J. Watford****

*& Bradford R. Clark*****

MIRANDA HERNANDEZ: Good afternoon everyone, thank you so much for joining us. My name is Miranda Hernandez and I am the Senior Projects Editor of the George Washington Law Review and I have the distinct pleasure of introducing our moderator, Professor Bradford R. Clark, who is the William Cranch Research Professor of Law at GW Law, serves as the faculty advisor of the law review, and clerked for Justice Antonin Scalia. He's going to introduce our panelists, Justice Liu, Judge Owens, and Judge Watford at this time, and we look forward to hearing what everyone has to say, so thank you again for joining us.

PROFESSOR BRADFORD R. CLARK: Thank you Miranda and thanks to the Law Review for hosting this symposium.

One of the great things about this conference and this symposium is that all of our participants clerked for Justice Ruth Bader Ginsburg, and that includes the three judges we'll hear from today. And it includes all of the academic panelists you'll hear from tomorrow. I would be remiss if I didn't mention that the group of participants in this conference is one of the important parts of Justice Ginsburg's legacy. The law clerks that she hired and trained have gone on to have amazing careers in the law and were undoubtedly influenced by her jurisprudence, her character, and her intellect. So today we have with us three distinguished jurists. First, we'll hear from the Honorable Goodwin Liu, who is an Associate Justice of the Supreme Court of California. He was appointed in 2011 and then retained by the voters

* Associate Justice, Supreme Court of California, 2011–present.

** Judge, U.S. Court of Appeals for the Ninth Circuit, 2014–present.

*** Judge, U.S. Court of Appeals for the Ninth Circuit, 2012–present.

**** William Cranch Research Professor of Law, The George Washington University Law School.

in 2014. Before becoming a Justice, he was a professor of law and an Associate Dean at UC Berkeley School of Law. His primary areas of expertise are constitutional law, education law and policy, and diversity in the legal profession. He earned his bachelor's degree in biology from Stanford University, a master's in philosophy and physiology from Oxford when he was a Rhodes Scholar, and he received his law degree from Yale Law School in 1998. Justice Liu then clerked on the DC circuit for Judge David Tatel and subsequently for Justice Ginsburg on the Supreme Court. He also worked in government in the U.S. Department of Education and in private practice in the Washington D.C. office of O'Melveny & Myers. He continues to teach constitutional law every year as a visiting professor at Harvard Law School. We're so happy to welcome him to this conference.

Next, we'll hear from the Honorable John B. Owens, who has been a circuit judge on the United States Court of Appeals for the Ninth Circuit since 2014. Prior to becoming a federal judge, he was a partner at Munger, Tolles & Olson where he focused on white collar investigations and appellate matters. Before that, he was a federal prosecutor for more than a decade in Washington, D.C., Los Angeles, and San Diego. Judge Owens graduated first in his class from Stanford Law School in 1996, where he was an Executive Editor of the Stanford Law Review. After graduation, he clerked for Judge J. Clifford Wallace on the Ninth Circuit, and then for Justice Ruth Bader Ginsburg on the Supreme Court. He's published works in the California Law Review, UCLA Law Review, Northwestern Law Review, and many other journals.

Finally, we'll hear from the Honorable Paul J. Watford, who has been a circuit judge on the Ninth Circuit United States Court of Appeals since 2012. He received his undergraduate degree from the University of California, Berkeley, and his law degree from the UCLA School of Law. After law school, he clerked for Judge Alex Kozinski on the Ninth Circuit and then for Justice Ginsburg on the Supreme Court. Prior to joining the bench, Judge Watford worked in government as an assistant US attorney in Los Angeles, and in private practice at Munger, Tolles & Olsen in Los Angeles, where he focused primarily on appellate litigation.

We are extremely happy and honored to have all three of you here with us today. We will proceed in alphabetical order, and we'll start with a pretty general question: In your opinion, what are the most significant aspects of Justice Ginsburg's legacy?

JUSTICE GOODWIN H. LIU: Well, good afternoon, everyone, and thank you, Professor Clark, for pulling together this wonderful symposium, and to the editors of the Law Review. It's a tremendous contribution to the legal profession and to Justice Ginsburg's memory that you are all doing this. It's an honor to be on this panel with my friends and colleagues, Judge Watford and Judge Owens. It's great to be with you both.

I think that it's fair to say that if Justice Ginsburg—Ruth Bader Ginsburg, the lawyer—had simply hung up her law license after being the founding director of the ACLU women's rights project, her place in history would have already been secure. She litigated some of the most important decisions in the equal protection area as applied to gender discrimination and then saw the fruits of those precedents take even greater shape when she was a judge and then a justice. I think there's much that can be said about her legal legacy, and she said so much of it in her own confirmation hearings, which she then lived out, in her work on the bench. She believed so much in this country and its widening circle of inclusion, as she might put it, and that the promises made in the Declaration of Independence and the Constitution were essentially works in progress and that she herself was devoted to playing her own small but eventually big part in realizing those promises. And there's a long list of decisions and opinions that could be cited to support all of that.

I wanted to say a couple words, and I know John and Paul will probably say even more, about her personal legacy as well. I think it's interesting that she became such a notable public figure in American life. That was a later stage phenomenon in her career. For most of her career as a public servant, she was a pretty shy person, and her very larger-than-life husband Marty was the front person when it came to social outings or just generally being in public. He was very funny and outgoing and sometimes made jokes at her expense. She was sort of shy and retiring and often hanging out giggling in the background. But I think that she—in the last decade of her life, especially—showed just tremendous savvy in how to manage her own public identity and how to use her voice both on and off the bench. And I think it's instructive to any of us who live public lives to study how she did that, because it's not something people typically think of when they think of judges. She was not a politician, but she certainly had great political instincts, and that's part of her legacy as well.

PROFESSOR CLARK: Judge Owens?

JUDGE JOHN B. OWENS: Yeah, I would echo a lot of what Goodwin just said. I think one of the things that is overlooked about her is that she was definitely not a politician, just like Goodwin said. You'd be at a big conference, and everyone wanted to talk to her, and she wanted to hide in the corner, or hide with Marty, or if she saw someone she knew, like a law clerk, she'd want to talk with them the whole time. One time, there was a mob of people waiting to talk to her and she kind of hid behind me. I'm sure she hid behind Paul and Goodwin in other settings. But all that being said, she was very, very savvy, and here's what I mean by that. If you look at her career as a lawyer, she had to convince panels of three men of a position that, back then, seemed crazy. And she kept winning. She kept winning over and over and over again. She knew how to connect with people. And even though Marty Ginsburg was certainly the master handshaker and one of the most socially intelligent people I've ever met—she had her own way of convincing people she was right. And maybe because she was the opposite of Marty, right? Maybe because she was so reserved, if she spoke, you just wanted to believe her, that she wasn't putting on a show. But her ability as a litigator—and as a colleague on the Court—to make connections with people, was extraordinary. I've talked about this before. Everyone talks about her bonds with Justice Scalia and that's very well known, but when I was at the Court, I was more impressed with the bonds she had with Chief Justice Rehnquist and Justice O'Connor. Those were the ones that she had very strong bonds with, and especially in Paul's instance and my instance, we were there on the Court when she was very new to the Court. It was very different than later on, in 2016, 2017, 2018—when she played a different role on the Court. But her ability to connect with those two, and the Chief especially, Chief Justice Rehnquist, really respected her. And they had this connection. What do they have in common? You know, he even kind of made a crack one time, I think about the Susan B. Anthony dollar one time when she was trying to argue a case before him. And yet, she was still able to connect with this guy, and I saw it. So that was one of the things I think that it's hard to know about unless you actually saw it happen, but she really had an amazing way to connect with people in her own way, not as a big showman. But in her own way, she got people to go her direction. And that's what, as a litigator, you want to do, and she was really good at it.

JUDGE PAUL J. WATFORD: I agree with everything my friends just said. The only thing I would add is that, you know, we certainly look at Justice O'Connor as being the first woman to serve

and she rightly gets a lot of the attention in that respect, but I sometimes think it's lost—that people forget—that Justice Ginsburg was just the second woman to serve on the Court. She also played a role in kind of blazing that path for women. I'm trying to remember the phrase she used when she was nominated, but I think she said she looked forward to the day when women in these kinds of high places would not be one-at-a-time curiosities or something to that effect. I think the contrast between her and Justice O'Connor on the bench was a really beneficial one and I do think she, in her own way, following obviously in Justice O'Connor's footsteps, blazed a path for women on the bench. And hopefully today we think of it as much less of an extraordinary thing, and hopefully soon we're about to have four women on the Court. So, that's all I would add to that in terms of her legacy.

PROFESSOR CLARK: Thank you. I just want to add one recollection. In the Fall of 2005, just a few months after Chief Justice Rehnquist passed away, GW Law Review held a Symposium on the Legacy of the Rehnquist Court and Justice Ginsburg was kind enough to come over and open the conference for the Law Review. And she spoke so fondly of Chief Justice Rehnquist and how kind he was to her, especially when she was ill, and how he tried to accommodate her in every way possible. So, that just came back to me when you were speaking.

The second question for the panel is do you have any personal recollections of Justice Ginsburg that you want to share with us today? Things that she imparted to you, or an impact that she had on you personally or on your career that you can share with the audience today?

Justice Liu, we'll start with you.

JUSTICE LIU: There are so many. So, I'll tell a couple stories.

I think her attention to detail and her carefulness as a writer, as an editor, are really legion. I think people know this about her, that she was an incredibly focused and meticulous person. And this was driven home to me by this recollection. One time during the clerkship, I happened to go into her office in the chambers, probably to retrieve a case file she was reading. She wasn't there, but I happened to notice on her desk there was a bench memo that one of us law clerks had written—luckily, I don't think it was me—and on this bench memo there were faint pencil marks with her little corrections of typos or missed commas or wording differences that she would've made, and those kinds of things. I was so shocked to see it because she never

handed back these bench memos to us. They're just internal documents from us telling her what we think about a case, and it's not something that's a written product that's going to be circulated. Yet here she was reading these things, and not handing them back, but correcting as she went along. And it impressed upon me that this was her way of demanding perfection in everything that appeared before her eyes. Of course, after seeing this, I was completely mortified that any of us law clerks might have turned in something to her that was less than perfect. I duly reported this back to my co-clerks, and I'm sure we all triple proofed everything thereafter. It makes an impression to see someone at her level sweat all the small stuff, and it's something that I carry with me today.

JUDGE OWENS: Yeah, I mean her work ethic was incredible. She always taught us you can never be the second most prepared person in the courtroom if you want to win. I mean, that was one thing that came across.

But in terms of a funny story, she was pretty funny actually in her own way. And I'll give you an example. So, Walter Dellinger, who sadly passed away last week. I think, Goodwin, you and I both worked for him. He was a great man, and you could probably do a symposium on him as well. But he argued before her when he was the acting Solicitor General and he was one of the people who made the mistake of either calling Justice Ginsburg Justice O'Connor or calling O'Connor Ginsburg—he got the names wrong. And he might've done it twice, actually. I don't know—Goodwin, do you remember—he botched that maybe more than once. So, anyway, he did that. I think he was there '96 to '97 as the acting Solicitor General. So, I'm a law clerk of the Court '97 to '98, and there was some ceremony for Walter at the SG's office, and someone from the Court has to go over there and talk and Justice Ginsburg is eight of nine, right, so, low on the totem pole, and she gets set to go speak at this thing.

So, she's at the Walter Dellinger event, and she gets up there and says, there's never been an advocate as smart, as funny, as intelligent, I've ever seen before the court as Drew Days. So, she intentionally got the name wrong. And that was good, and it was her way of kind of a little bit of a zinger and that's where her pauses would be so perfect because she paused before the name. The pauses were tough at times when you're supposed to say something or not say something, when are you supposed to leave the room not leave the room. But she could deliver a good joke and so that's one thing I always, I liked about her, that was a good one.

JUDGE WATFORD: Yeah, as all of us would say, there are just too many personal recollections to try to recount. I'll just offer two quick ones. On the personal side, one of the side benefits of the clerkship with Justice Ginsburg was getting to watch her and Marty interact with one another. That's just one of the most extraordinary marriages and partnerships that anyone could ask to witness. I have a distinct memory of Marty coming by in the evenings. It'd be maybe 7:00 or 7:30 and he would come by to pick her up because she didn't want to drive very much. And he was always trying to make sure that she got enough sleep and got enough to eat and so he would be trying to kind of gently usher her out. And I just remember her scolding him constantly, "Marty sit down I'm not done yet." I'd be sitting there having a conversation with her about a case and he'd say, "Ruth we really do need to get home, it's getting late," and she'd say, "no, I'm not done, sit down and take a nap or something, I'm almost finished." But just the love between the two of them, how much he supported her in her career and just took so much pride in all of her achievements and vice versa. That really has affected me in a big way, and I've tried to model what I saw between them in my own marriage to be quite honest. So that's on the personal side. On the professional side, before the clerkship with Justice Ginsburg, I didn't know people who were good friends with others with whom they really, really strongly disagreed on important things. And, as John said, it wasn't just her friendship with Justice Scalia, but that certainly was the most significant one that we got to watch and observe. But that has had a lasting impact on how I interact with other people, how I try to go about my relationships certainly with my colleagues on the court. I just really can't say enough about how that affected me. My interactions up until then with people I strongly disagreed with was basically, I don't want to have anything to do with you, I'm not going to be able to be friends with you, we can't see eye to eye on some really fundamental issue. But she really taught me that that is something you can do, you just need to be open minded and obviously have respect for the other person. But I've certainly taken that lesson to heart in my own professional life since then.

PROFESSOR CLARK: That's great. I actually saw that dynamic with Justice Ginsburg and Justice Scalia, but I also clerked for Judge Robert Bork on the DC Circuit when she was a judge on the same court. Her chambers were right next to Judge Bork's and she was actually quite good friends with him. They even published a joint majority opinion together at her insistence. Judge Bork offered her some comments on an opinion she was writing, and she insisted on issuing it as the joint opinion of Judges Ginsburg and Bork. I think that shows

the respect she had for her colleagues and for people with whom she didn't always see eye to eye.

This may have been covered a little bit, but I wanted to ask a bit more about your experience working for Justice Ginsburg as a clerk. Is there anything else that she taught you that you've incorporated into your own work as a judge or in how you run your chambers now?

JUSTICE LIU: I got to see Justice Ginsburg in a particularly unusual situation. I clerked in the Bush vs Gore year, which was unusual to say the least. And it was a fairly stressful time. There was a lot happening all at once and much of it was unexpected and new. The most stunning thing about the whole experience in watching her through it was just how calm she was the whole time. The law clerks all over the building were highly exercised; people were in the building all hours of the day and night because there was such a time crunch on everything that was going on. We wanted to make sure that we were exhaustive in dealing with all of the issues and we never knew when certain filings were going to come through or how long they'd be. It was such an unusual time, but Justice Ginsburg was so incredibly steady. Even in frustrating moments, she was not of a frame of mind to let an unusual case rattle her or rattle the Court. She was very attentive to the personal relationships involved and very much had the long view in mind. Throughout it all, no matter how high the passions were about the matter, she knew that she had to work with these people for a very long time. And I think it's a good reminder that, and she always said this, when one case is over, you move on to the next and you can't dwell. You do the best job you can on that matter, and she was very much of the [view that you] don't look back, don't second guess yourself, don't torture yourself by thinking what you could have done. So, although I didn't know it then, these were all things that have been helpful to me when I have disagreements with colleagues over matters far less significant than the presidency of the United States. To watch her be a model of calm temperament in that very high-pressure setting set a standard for all of us and all the other disagreements we could possibly have.

JUDGE OWENS: My recollection is a very technical one. When Justice Ginsburg got an assignment from the Chief on a Friday to write an opinion, she would just launch, like boom, right then she would start writing. We had the old school fax machine back then that she used because although we had email in the office, we couldn't use it at home. So, she had this fax machine, it was awful, it was like the size of a car, and it was one of those fax machines that relied on basic

encryption and decryption of the fax, so it was difficult to use. But she would just start sending stuff. Paul talked about how Marty would pull her out of there at 8:00, but she wasn't done working. She was back home going and going and going until 10 o'clock at night all of the sudden you hear this sound of the fax machine and here she is she's writing something I think she thought you're never going to be better at an opinion than right away. And that kind of flows with what Goodwin was saying that don't look back, get it done, move onto the next one and I definitely adopted that because one thing on her Court is there is a term and you gotta get it done. On our court in the Ninth Circuit, there technically is no term and so you could take a lot of time, and I think the discipline that she had and showed me really helped me in my job and it's good for everybody. You have to spend time on it but there is a time when you have to be done because more stuff is coming, and she was always really good at modeling that work ethic. So, from a technical aspect, that's one of the biggest favors she ever showed me.

JUDGE WATFORD: I'll echo the comment about watching how hard Justice Ginsburg worked. I mean she loved the work of the Court and gave it her all. But I think what I took away was that people who are successful at that level, at least most people, really have to work extremely hard to get there and to achieve that level of success and perfection. Her work hours were the strangest work hours of anyone I've known. She would usually get in, as I recall, around 1:30 or 2 in the afternoon maybe even a little bit later. I mean she would work until 3:00 or 4:00 in the morning. I remember coming in in the morning and getting these voicemails from her from 3:30am leaving a five-minute message for you about some opinion she was working on or some case she was working through. And I have two recollections about the sort of non-morning person that she was. I remember this one emergency stay application we got that needed an answer before noon and so around 10:00 o'clock I realized I was going to have to call her at home. And I went to Linda, her lead JA, and said is it okay if I call the Justice? Linda said this is way too early and it better be a real emergency. I said no it really is, we need to get her vote. So, I remember calling and I did not recognize the voice on the other end. I asked, Justice Ginsburg is this you? She said yes, basically like what do you want, do you realize what time it is, it is 10 am. So I explained to her that we had this emergency and was able to get her vote. That story reminds me just how stupid and immature or unknowing we were when we were much younger. I remember when I got the interview with Justice Ginsburg, I was told to call her office and set up the inter-

view. I called and her JA said yes, she'll see you at 2 o'clock on such and such day, and I said well could it be earlier in the day because I was hoping more for like 10:00 am, not knowing at the time that this was the dumbest thing you could possibly ask. She said let me check with the Justice and I'll call you back. She called back and said the Justice will see you at 11:00 am, which is just ridiculous. She made a special trip in at that early hour just to do a law clerk interview. Anyway, I just think back on how stupid I was to ask for an earlier time not knowing that she is definitely not a morning person.

PROFESSOR CLARK: Great, I'm glad you got the job! The next question is are there any aspects of your working relationship with the Justice when you were law clerks that you've incorporated into how you use your own law clerks or, conversely, that caused you to go in the other direction and do things differently?

JUSTICE LIU: As can be discerned from all the stories we've told today, one thing is that when you're in this intimate relationship in a chambers, it's just you and the law clerks, that's really it and they're the only people who you can talk with about anything of substance. It's a very close working relationship and it's important to remember now that we are on this side of the desk that the law clerks really pay attention to every little thing we do, just as we did when we were law clerks paying attention to every little thing that our bosses did. So, it's really important to think carefully about what kind of behavior you're modeling for your clerks and what might be the memorable takeaways that they get from the experience. You realize that even small acts or doing something that you may think is not that significant, may provide an important lesson for your law clerk. So, I think about that when I give feedback on a document that my law clerk has sent me. I think about how the editing process could be used to be a teachable moment. Often, in the press of business, these are not very conscious things because you're just trying to get the work done and you're trying to move as quickly as possible, but you never know when a small thing that you do could make a real impression. Justice Ginsburg was also very good about the personal stuff, like birthdays and taking an interest in her law clerks' marriages and meeting their children. My kids have met Justice Ginsburg, as is true for probably the kids of every law clerk that she's had. She was really good about all the personal things. In fact, she was just perfect at that. It's very hard to be that good at those things, and it really makes an impression because you think these really busy people surely have other things that they could be worrying about. But Justice Ginsburg

definitely sweat all the small stuff, including answering every note I ever sent her. I think about what comes into my inbox these days and I realize it's important to answer every single thing. These are some of the things I think that I took away from my relationship with the Justice.

JUDGE OWENS: I have a kind of a small one and a big one. The small one is that, at least back then in the mid-nineties, Justice Ginsburg would often start the first draft of an opinion. Now, that might have changed over the years I don't know, but during my time with her she did a lot of that. And I now do the first draft of opinions in chambers. Sometimes it doesn't look like something that I would hire someone with. If that's what they gave to me, I probably would say get lost, but I do, do the first drafts now and I did learn that from her. I think the more important thing for my job is, she taught me that at the end of the day it's the judge's call. Now sometimes that can really destroy a law clerk's ego, when the judge has to say, you know that's great but I'm making the call, not you. But at the same time, it's actually reassuring to a law clerk to tell them, look, just do your best. I've got to make the decision and as long as you gave me your best recommendation, you're good. You're not charged with figuring this thing out, your job is to help me figure it out, but ultimately, I'm the one who has to figure it out. I definitely learned that from her, that I can make a recommendation to her, and she may not agree with it, but that doesn't mean I did my job wrong. That means I'm doing my job, but it's her decision.

PROFESSOR CLARK: I feel like you haven't had any GW clerks because this is one of the things that we talk to our students about when they're applying for clerkships which is, your job as a law clerk is to assist the judge, and it's the judge's job to make the decision.

JUDGE OWENS: Yep.

JUDGE WATFORD: You know, when I think about the clerkship experience I had with Justice Ginsburg, I guess what I feel the most is just how far I'm falling short with my own clerks, because I don't think I am able to give them nearly the learning experience that I got working for Justice Ginsburg. I clerked maybe a term or two before John did, and she definitely had us do the full first drafts, so what she would draft was just the opening introductions, it was usually a paragraph or two that set the table in terms of what the issue was. But she would just give us that, and then we'd talk through what the rest of the analysis would look like and then she left it to us, at least at

that time, to do the first draft. But, boy the editing process involved a lot of back and forth. You'd put the drafts in triple space, so she'd have plenty of room to write with a really sharp pencil in this very meticulous handwriting. I remember that process of going back and forth with her, over several drafts, and just seeing all the changes she made. Very often she'd sit down and explain why she thought this word was better or we needed to break this sentence up into two, just that whole teaching process that comes from having somebody sit down and carefully edit your work. And then, just watching over that succession of drafts, something that was pretty pedestrian that you produced and then it just got transformed somehow into her voice. Her opinions have a very distinctive voice, and you can always tell when she's written something. And I have not been able to figure out how she was able to do that. I get a draft from my clerks, and I pretty much just rewrite the whole thing because I can't sit there and just edit in the way that she would and go through that iterative process. I do that on the back end, but I haven't been able to do that on the front end, and I feel bad about that because I learned so much from her about what good writing entails. The other thing I would say is that she was an incredibly kind and caring boss. I have very much tried to replicate that in my own chambers. I don't think I ever heard her raise her voice a single time. She always treated everyone in chambers with respect and demanded that we treat each other with respect. The chambers atmosphere was one of just real collegiality and regard for one another. And so, I've tried to do the same thing in my own chambers, in terms of the relationship I have with my clerks and that they have with me.

PROFESSOR CLARK: So just to pick up on something that's coming through, perhaps Justice Ginsburg's relationship with her law clerks was influenced by the fact that she was a law professor before becoming a judge. Justice Liu, you were a law professor before becoming a justice and I clerked for two judges who were law professors as well and I always thought that clerking for a judge who had been a law professor was an especially great opportunity because they have an instinct to teach you something. I think a lot of judges have that instinct, but I wonder if you think Justice Ginsburg's career as a law professor influenced the way she saw her role as a judge not just to the outside world, but as a teacher to her law clerks within her chambers. Do you think that played a role?

JUSTICE LIU: The amazing thing about Justice Ginsburg is that she really had four careers, each one of which would have stood on its

own bottom as an accomplished career. Her first was being one of the early tenured women law professors in the United States, and she was an expert on civil procedure. But not just civil procedure, comparative civil procedure, including spending a year mastering Swedish civil procedure and then writing one of the (at the time) definitive treatises on Swedish civil procedure. It just showed you a little bit about the kind of scholarly devotion that she had to this subject. Unsurprisingly, when procedure issues arose inside the court, it was clear that she was a subject matter expert and she occasionally got assignments that reflected this and I think it's fair to say she was pretty good at it. She sorted things out quite clearly and it was very impressive, especially because many other members of the Court, or more generally the profession, might find these issues somewhat arcane, but she was just really good at it. In terms of her knack for teaching, I think it's overdetermined in a way because it wasn't just her role as a professor, but it was the way she was as a human being. As John and Paul have relayed, she was a teacher to all of us through all of the ways and modes they shared. I will say that she was very comfortable in academic settings and so had many friends throughout the professoriate and this would occasionally result in lectures that she agreed to give. I remember helping her with one or two of these, and that was another great opportunity to interact with her on something that was extracurricular. But it was also another window into seeing her mind at work, the way she stayed at a very high level on many themes. I think the year I was there she was working on variations on a lecture on judicial independence, and she was very careful in choosing her evidence and examples to illustrate the general theme. It was neat to see how she thought about these broader issues in the law, and that she entrusted a law clerk to help her articulate those ideas.

PROFESSOR CLARK: Does anyone else want to comment on Justice Ginsburg's role as a teacher?

JUDGE OWENS: Well, I would say the one time she got frustrated with me was when I made the mistake of disagreeing with her on a civil procedure case. You know, me with my vast years of experience, obviously I knew something that she did not know. So, yeah, that was the one time I heard her raise her voice. I think Paul said he never did, but he didn't clerk my year. It was on the phone, and she made it pretty clear that I was the law clerk in that case. So, she taught me that.

PROFESSOR CLARK: That is a great story because, as Justice Liu mentioned, she kept her cool during *Bush v. Gore*,¹ but when it came to disagreements over civil procedure, that was a bridge too far.

JUDGE OWENS: She actually said what the case was at an event I attended so I feel comfortable now discussing it. The case was called *City of Chicago*.² It had to do with removal jurisdiction and whether you could review a decision from an administrative agency whether it was removed or not. She was pretty fired up about it, which was funny because you know, you think about what were the things that got her upset. Boy, you get civil procedure wrong, woo baby, that, that was not good. And she would get really worked up. I remember her kind of walking around saying you know Justice Stevens agrees with me on this, but it was seven to two, so we were kind of out gunned in this case. But she was glad to have his vote and remarked “oh he agrees with me and I know I’m right on this.” Your boss, Justice Scalia, did not agree with her on that one, so on that one I was with Justice Scalia, but I was just the law clerk so what did I know.

PROFESSOR CLARK: She actually wrote Justice Scalia a note about his dissent in a different civil procedure case, *Ferens v. John Deere*.³ This was before she was on the Supreme Court, and she wrote him a private note saying that his dissent was one of the finest procedure opinions she’d ever read. I remember him beaming with pride when he received that letter from then-Judge Ginsburg. Judge Watford, do you have any thoughts you’d like to share?

JUDGE WATFORD: Not so much on the initial question you posed about her background as a professor, but she absolutely was a natural teacher. I don’t know if that came from her experience as a professor, and I don’t know that I’m even sure that she was making a conscious effort to try to impart so much to us as law clerks. Maybe it was just kind of second nature to her. I never remember feeling like she was going out of her way to try to say hey this is a teachable moment let me sit down with you and explain something, it just came naturally to her. I know the respect she treated us with, and I have no doubt that that was the same for each of the three of us. I mean, we know that our law clerks are just at the very beginning of their careers and hopefully they’re going to go off and do great things. So certainly, we do feel a responsibility as judges to try to impart as much as we can to give a firm foundation to build on as they go forward. But just in

¹ *Bush v. Gore*, 531 U.S. 98 (2000).

² *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156 (1997).

³ *Ferens v. John Deere, Co.*, 494 U.S. 516 (1990).

my interactions with her after the clerkship, she really took a lot of pride in seeing what her law clerks went on to do. She was really interested in keeping up with what was happening in our professional lives and, as Goodwin said, in our personal lives as well. None of it was forced. All of it was just purely instinct on her part. I think it just had to do with her regard for us as part of her clerk family.

JUDGE OWENS: You know, Brad, if I could just add one thing to that. We gave her a year, and I think all three of us would agree it was a hard year. I don't mean hard like she was mean, but she was demanding. And we didn't want to embarrass her. We didn't want to let her down. That, at least for me, was so important. I cannot let this woman down. But we gave her a year. But in my experience, and I think all three of us would say, she gave us her whole life. Our clerkship ended after that year. But her duty to us never ended. She never said, "well you had a good year, good luck." No. It was always supporting us throughout the whole way. And that's something I try to do with my law clerks. Now, I'm no Justice Ginsburg, but I really try to tell them "Look, you gave me this year, my job now is to try to help you however I can the rest of the way through." And I definitely learned that from her. She would go to bat. She really, really fought for us. I know I would not have this job without her, and I think these two guys would say the same thing.

JUDGE WATFORD: Can I jump in with one story? I've told it before, but I think it's emblematic of what John just said. Probably about three or four years after I clerked for the Justice, it was the first time I was back in DC. I went to the Supreme Court to watch an argument. I wasn't arguing myself. I was just there in the audience. After the argument ended, everyone was kind of filing out and I thought "Oh man, it sure would be nice if I could go up and say hi to the Justice, I haven't seen her in a couple of years." I thought, no she doesn't have time for me, she's busy. Obviously, she's just finished the argument, she's gotta go do this or that. And a couple of days later, maybe the next day, I got an email from her assistant saying "hey the Justice saw you in the audience and wants to know why you didn't come by to say hello." And I was just so shocked. Not only did she not mind if I stopped by, but she was disappointed I didn't. So, every time I was in DC after that, I would make a point of reaching out to her Chambers to see if she had time to see me. And again, I can't think of an occasion she didn't make time. The conversations I had with her during those visits, they are some of the best memories I have of my

relationship with the Justice. As John said, this relationship continued even twenty plus years after the clerkship ended.

PROFESSOR CLARK: That's wonderful. Well, for our last question, it's kind of an open-ended question for the three of you which is, is there anything else that we haven't covered that you want to share about Justice Ginsburg, or your working relationship, or her legacy that you think is important to mention on this occasion?

JUSTICE LIU: I just have a couple memories that I'll share. One of them is about her battle with illness. I think the year I clerked was the year just after she had gotten her very first cancer diagnosis. And she was in and out of the hospital to do treatment throughout that Term. And anyone who's ever been through it, or who's had a close loved one who's been through this kind of thing, knows that is really hard. She was absolutely tenacious. She showed up to conference every week, and she showed up to arguments every time. She was determined not to let any of her health issues get in the way of anything in our experience as clerks, but also the work of the chambers and the work of the Court. And I don't think at that early stage of life, I really appreciated what kind of fortitude it takes for a person who is really ill to do that. Over the years—over the next 20 years, when she would have a bout of this or a bout of that—it almost became desensitizing how capable she was of fending off mortal illness and bouncing back repeatedly. One time, she relayed to me this funny story. She said, "There's so much speculation about my health," and I said, "well Justice, obviously people are very concerned about you." And she said, "Well, it's a little excessive." She said one time she was at argument, and she was a little slow in getting up from the bench at the end. Later that day, the press office had passed her an inquiry from a reporter who asked, "Is Justice Ginsburg sick? What happened at the end of the argument?" because she was slow getting up off the bench. And she told me, "I had just kicked off my heels during argument and I was having difficulty getting one of my shoes back on"—which was very her of course. So, we—meaning not just law clerks, but the citizenry—were really witness to a person of tremendous tenacity and fortitude. And the last thing I'll share is that all the law clerks had the great honor of being at her memorial service in DC in September a couple years ago when her casket was placed on the top of the steps of the Court for public viewing for a period of few days and the clerks stood vigil next to the casket for this period of time. And it was so interesting. I had numerous shifts, as did many law clerks, to observe the people below who were paying their respects to her. It was an

amazing tableau of people—young, old, every race, men and women, people from every walk of life. And the line was around the block and more. I have these indelible images of some of the people: There was an elderly woman who came in a wheelchair. She was wheeled to the center of the viewing area and just sort of stared up. She didn't want to leave, and she was eventually wheeled away, and she wiped away a tear. And then there was a mother who had brought three young girls—they looked like triplets actually. They were all wearing “RBG” emblazoned t-shirts with a little picture of RBG on it – it was so cute. They don't even know who she is, but they will be reminded that they were there at some later point in their lives. And the last one was a middle-aged African American woman who was walking the length of the viewing area and just before exiting off to the side, she paused for quite some time, and she just looked up—and burst into applause. It was so moving to see all these people who didn't even know her personally but were so touched by all that she stood for.

JUDGE OWENS: I think the one characteristic of hers that stands out to me the most was something that Goodwin just said. . . it's that she's the toughest person I've ever met. And I don't mean rough. I just mean tough. I mean she was a tough person. And if you think about all the things she went through in her life. I mean all the things that happened by the age of 25! All the things that had happened to her. She had so many off-ramps in life where she could have said “you know what, I don't need to do this anymore. I don't have to do that anymore.” And yet, she just kept getting up and going forward. We always talk about “this athlete is mentally tough” and “that athlete is mentally tough.” I used to box. And you deal with boxers, those guys are tough. But no one is as tough as her. And you never heard her make an excuse. Goodwin when you were there, she was having all these health problems. I'm sure you never heard her say “Sorry guys I didn't read that I wasn't feeling well.” Never. The excuses that we offer all the time, about why we didn't do this, about why we didn't do that. I'm guilty of it. Never heard her say that one time! Not once. We know her background. She was not in a space where she could make excuses given the hands she was dealt at an early age. But just to have that toughness really inspired me to think. . . “what am I really complaining about? What's the problem? Let's get this done.” And I think that's a good reminder for everybody when we're feeling sorry for ourselves about why we can't do this and why we can't do that. Look what she went through! And look what she accomplished despite all of that. And I think that's a good thing no matter what age you are or what stage your life is at. It's a good

thing. You gotta reflect a little bit. You know. . . keep going. No one ever stopped her – she’s incredible.

JUDGE WATFORD: I’ll share just a quick story rather than any kind of grand pronouncement about her legacy that follows on John’s point about toughness because it involved both of us. We were going to the Court for some kind of a reception. And she, true to form as I said before, was going to make time to see us. I don’t know if she was delayed with work – John you remember what it was – but anyway, it finally came down, it was about 7 o’clock. And they told us you know that she’ll be happy to see you, but you’ll need to go down to the Supreme Court gym, because she’s gonna go down there to work out. So, John and I walked down, and we got to watch the whole RBG workout! And of course, she had the book that her trainer published, which had just come out. She had a copy for each of us. And you know, how old was she at that point, John? She was well into her eighties I would say.

JUDGE OWENS: Oh yeah. . . yeah. . . that was probably 2017 or 2018.

JUDGE WATFORD: Yeah. But she was just tenacious! She was not going to miss her workout. We watched the whole routine, and it was just amazing to see. She knew it was good for her health and that she needed to stay in shape. Just even at that age to watch her go through that. But also, just to see her regard for her clerks. . . She was going to run out of time and wouldn’t have been able to see us. So, she just invited us down to come talk to her while she worked out. That’s one of the fondest memories I have. That wasn’t the last time I saw her, but it might have been the second to last time. That memory came to mind when John was talking about her toughness.

JUDGE OWENS: And it was funny because we both thought we’d just pop in and say hi. Noooo! Oh no no no. We spent a full hour!

PROFESSOR CLARK: That’s great. That speaks to her work ethic and her determination, which obviously came through in all aspects of her life and career. Well, this has been a tremendous panel. And we really appreciate the fact that all three of you took time out of your busy schedules—and maybe your exercise schedules as well—to be here with us today. This is a great way to start off the symposium today. . . first with Justice Breyer and now with all three of you. So, I’d like to sincerely thank each of you on behalf of the law school and law review for being here today.

Ruth Bader Ginsburg and a Jurisprudence of Legal Pluralism

Paul Schiff Berman*

ABSTRACT

The idea of legal pluralism is that law must always negotiate situations when multiple communities and legal authorities seek to regulate the same act or actor. In such situations, judges must develop strategies for determining how best to balance the competing claims of multiple communities: does the law of one community triumph, does the law of the other community triumph, or is some hybrid solution possible?

This Article surveys the jurisprudence of Justice Ruth Bader Ginsburg, revealing that across a variety of substantive legal areas Justice Ginsburg often chose a path that provided maximum play among the legal systems at issue. Beginning with her earliest scholarly writings, she tended to oppose doctrines allowing one legal system to block another from adjudicating a dispute, and throughout her later career Justice Ginsburg likewise tended to reject bright-line rules that chose one legal system over another. Instead, she seemed to prefer procedural arrangements that sought accommodation and flexibility, in order to ensure that multiple legal systems and a variety of norms and processes were respected.

By taking stock of Justice Ginsburg's navigation of legal pluralism in a set of representative writings, we can better theorize her contribution to a jurisprudential approach that seeks ongoing negotiation in an interlocking world of multiple jurisdictions and multiple legal norms. Just as important, this discussion provides a case study for thinking more broadly about possible judicial responses to the reality of legal pluralism.

TABLE OF CONTENTS

INTRODUCTION	1428
I. TOWARDS A JURISPRUDENCE OF LEGAL PLURALISM ...	1432
II. A JURISPRUDENCE OF LEGAL PLURALISM APPLIED	1438
A. <i>Policing Court Rulings that Interfere with the Processes of Other Courts</i>	1439
B. <i>Navigating Federalism</i>	1444
1. <i>Deference to State Law Domains</i>	1445

* Walter S. Cox Professor of Law, The George Washington University Law School. This Article was presented at a symposium on the legacy of Justice Ruth Bader Ginsburg held at The George Washington University Law School in February 2022. Some material derived from Paul Schiff Berman, *Ruth Bader Ginsburg and the Interaction of Legal Systems*, in *THE LEGACY OF RUTH BADER GINSBURG* (Scott Dodson ed. 2022).

2. Solomonic Effectuation of Plural Interests.....	1448
C. Deference to International and Transnational Law and Process	1452
CONCLUSION	1456

INTRODUCTION

Law often operates based on the convenient fiction that human activity is only subject to the rules of one legal system at a time. Yet jurisdictional overlap is unavoidable, and law therefore must inevitably negotiate situations when multiple communities and legal authorities seek to regulate the same act or actor. Scholars studying interactions among these multiple communities have often used the term “legal pluralism” to describe the intermingling of these normative systems.¹

So, how should law respond to the reality of multiple overlapping legal systems? Often, these hybrid legal spaces have been viewed simply as a problem to be solved. This is perhaps why forum-shopping is often referenced pejoratively. Thus, even when jurisdictional overlap or regulatory interdependence is undeniable, we see what Robert Ahdieh has termed “the standard dualist response.”² Law seeks to delimit each entity’s jurisdiction and authority more effectively and thereby eliminate such overlap. This paradigm of jurisdictional line drawing has been prevalent both in the international/transnational realm³ and in discussions of federalism,⁴ as courts and scholars try to

¹ For a brief summary of legal pluralism scholarship, see generally Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225 (2009).

² Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 867 (2006).

³ For example, debates in the United States about judicial citation of foreign authority have often centered around delineating when it is permissible and impermissible to reference foreign or international law. See, e.g., Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 630 (2007). Similarly, theories of jurisdiction and choice of law have long sought to provide a single answer to the question of which law should apply to a cross-border dispute. Compare *Pennoyer v. Neff*, 95 U.S. 714, 733–34 (1877) (holding that states have complete authority within their territorial boundaries but no authority outside those boundaries), with *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (establishing a test for determining whether an assertion of personal jurisdiction comports with the due process clause of the U.S. Constitution on the basis of whether the defendant had sufficient contacts with the relevant state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))); compare also RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (AM L. INST. 1934) (“The law of the place of wrong determines whether a person has sustained a legal injury.”), with RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (AM L. INST. 1971) (providing a more flexible inquiry aimed at determining the place with the “most significant relationship” to the dispute in question).

demarcate distinct spheres for state and federal authority. As Ahdieh notes, “Such reactions are hardly surprising. At heart, they reflect some visceral sense of law’s project as one of categorization, clear definition, and line-drawing.”⁵

Yet this single-minded focus on certainty and clarity not only fails to describe a world of inevitable cross-border jurisdictional overlap, but also ignores the crucial question of whether leaving open space for such overlapping regulatory authority might actually be *beneficial*. Indeed, while jurisdictional overlap is frequently viewed as a problem because it potentially creates conflicting obligations and uncertainty,⁶ we might also view jurisdictional redundancy as a necessary adaptive feature of a multivariate, pluralist legal system. The very “existence of overlapping jurisdictional claims often leads to a nuanced negotiation—either explicit or implicit—between or among the various communities making those claims.”⁷

In focusing on the pluralist opportunities inherent in jurisdictional overlap, we can draw on the insights of Robert Cover’s article *The Uses of Jurisdictional Redundancy*.⁸ Cover analyzed American federalism and celebrated the benefits that accrue from having multiple overlapping jurisdictional assertions.⁹ Such benefits include a greater possibility for error correction, a more robust field for norm articulation, and a larger space for creative innovation.¹⁰ Moreover, when decision makers are forced to consider the existence of other possible decision makers, they may tend to adopt, over time, a more restrained view of their own power and come to see themselves as part of a larger tapestry of decision making in which they are not the only potentially relevant voice.¹¹ Finally, though Cover acknowledged that it might seem perverse “to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict,” he nevertheless argued that we should “embrace” a system “that permits the tensions and conflicts of the social order” to

⁴ See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005).

⁵ Ahdieh, *supra* note 2, at 867.

⁶ See PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 236–43 (2012).

⁷ *Id.* at 237.

⁸ Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

⁹ See *id.* at 642–43.

¹⁰ See *id.* at 649.

¹¹ See *id.* at 678.

be played out in the jurisdictional structure of the system.¹² Judith Resnik likewise has noted the “multiple ports of entry” that a federalist system creates¹³ and has argued that what constitutes the appropriate spheres for “local,” “national,” and “international” regulation and adjudication changes over time and should not be essentialized.¹⁴

Building on these principles, we can perhaps identify two different strategies for responding to legal pluralism.¹⁵ On the one hand, judges facing an issue of intersystemic complexity can seek to bring order by engaging in line drawing and delimiting separate spheres of authority. This is what Cover calls a “jurispathic” approach because it necessarily requires the decision maker to anoint one jurisdiction as the legitimate authority and decree that all other jurisdictions are disabled from applying their norms.¹⁶ In doing so, the decision maker “kills off” conflicting interpretations and authorities.¹⁷ The contrasting approach is what Cover would call “jurisgenerative.”¹⁸ This pluralist approach seeks modes of accommodation, deference, and hybridity that will allow multiple jurisdictions to continue to speak to a particular legal problem, without blocking the dialogue among systems.¹⁹ Thus, the pluralist framework provides a way of analyzing jurisprudence concerning the interaction of legal systems in terms of whether it preserves or cuts off intersystemic dialogue. This framework can also reveal patterns in the jurisprudence of individual judges across a variety of substantive legal areas.

¹² *Id.* at 682.

¹³ Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1579 (2006).

¹⁴ See Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465, 473–74 (1996) (“My point is not only that particular subject matter may go back and forth between state and federal governance but also that the tradition of allocation itself is one constantly being reworked; periodically, events prompt the revisiting of state or federal authority, and the lines move.”).

¹⁵ It is worth noting that *responding* to legal pluralism is not the same as *eliminating* it. Legal pluralism is inevitable. For example, a supreme court may be supreme within the contours of a particular formal legal system, but even its edicts are subject to contestation, resistance, and alternative assertions of authority.

¹⁶ See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

¹⁷ See *id.*

¹⁸ See *id.* at 11–15.

¹⁹ See Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17, 18, 25 (2005) (“[Cover] wanted the state's actors . . . to be uncomfortable in their knowledge of their own power, respectful of the legitimacy of competing legal systems, and aware of the possibility that multiple meanings and divergent practices ought sometimes to be tolerated, even if painfully so.”).

From her early days writing *Civil Procedure in Sweden*,²⁰ to her time as law professor, judge, and Justice, Ruth Bader Ginsburg was acutely sensitive to the fact that legal systems are not hermetically sealed from each other. There must always be ways of negotiating the interactions among such systems. In the United States, such interactions often involve navigating a federalist structure of fifty-one different sovereignties, in addition to the District of Columbia, tribal governments, and a number of semi-autonomous territories. Internationally, the interaction of legal systems may involve the degree to which U.S. constitutional norms govern officials abroad, the impact of foreign judgments in the United States, and the potential influence of international or transnational law in domestic cases.

This Article begins by outlining some of the philosophical and jurisprudential principles underlying a more pluralist approach to the inevitable overlapping of normative communities and legal systems. Then, it surveys some of Justice Ginsburg's key writings on the interaction of legal systems, both in law journals and judicial opinions. This analysis reveals a theme in Justice Ginsburg's jurisprudence. Across a variety of substantive legal areas, Justice Ginsburg often chose a path that provided maximum play among the legal systems at issue. Beginning with her earliest scholarly writings, she tended to oppose doctrines allowing one legal system to completely block another from adjudicating a dispute. Throughout her later career, Justice Ginsburg likewise tended to reject bright-line rules that chose one legal system over another. Instead, she often seemed to prefer procedural arrangements that sought accommodation and flexibility in order to ensure that multiple legal systems and a variety of norms and processes were respected. These principles also carried over to Justice Ginsburg's views about international and transnational law. A committed internationalist, Justice Ginsburg advocated the importance of seeking wisdom from others. This nondogmatic, deferential approach to plural legal systems characterized much of her jurisprudence on intersystemic conflicts. By taking stock of Justice Ginsburg's navigation of legal pluralism in a set of representative writings, we can better theorize her contribution to a jurisprudential approach that seeks ongoing negotiation in an interlocking world of multiple jurisdictions and multiple legal norms. Just as importantly, this discussion provides a case study for thinking more broadly about what it would mean to pursue a jurisprudence of legal pluralism.

²⁰ See RUTH BADER GINSBURG & ANDERS BRUZELIUS, *CIVIL PROCEDURE IN SWEDEN* (1965).

I. TOWARDS A JURISPRUDENCE OF LEGAL PLURALISM

Imagine two communities: call them clans, villages, tribes, states, nations, or anything you wish. At some point, people or businesses located in one of those communities are bound to affect people in the other community. That is particularly true if the communities are located near each other geographically, but physical proximity is not necessary given cross-border travel, trade, e-commerce transactions, supply chains, social media groups, data storage, environmental harms, health crises, and so on.²¹ Thus, at some point, it is likely that a member of one community will try to bring a legal action against a member of the other community.

At that point, the question is how law, which is historically delimited based on territorial location, should respond to this reality of legal pluralism. Whose legal system has jurisdiction, what law should that legal system apply, and should a decision issued by a legal authority in one community be recognized in the other community? These are the age-old questions that are often grouped under the rubric of conflicts of law. Most conflicts questions, however, are framed in binary terms: either one law applies, or another does. But we might also ask: are there ways of establishing institutional relationships between the communities that can somehow help resolve the differences?

Two strategies for addressing legal pluralism problems immediately present themselves, which in prior work I have called sovereigntist territorialism and universalism.²² Sovereigntist territorialism seeks a regime where only one of the two communities has primacy in imposing its legal jurisdiction.²³ And this primacy will most often be established based on the territorial location of a relevant act or actor.²⁴ Here, we see the old idea that if you are located within the territory of a sovereign, then that sovereign can exercise dominion over you. This regime often works just fine. If I am from Community A and I choose

²¹ As a thought experiment, one can imagine an “effects map,” in which one identifies a territorial locality and plots on a map every action that affects that locality. Five hundred years ago, the effects would almost surely have been clustered around the territory, with perhaps some additional effects located in a particular distant imperial location. One hundred years ago, those effects might have begun spreading out. But today, while locality is surely not irrelevant, the effects would likely be diffused over many corporate, governmental, technological, and migratory centers. See David G. Post, *Against “Against Cyberanarchy,”* 17 BERKELEY TECH. L.J. 1365, 1381–83 (2002) (articulating this thought experiment).

²² See BERMAN, *supra* note 6, at 61–140; see also Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1180–91 (2007).

²³ See BERMAN, *supra* note 6, at 61–127.

²⁴ See *id.*

to drive in Community B, it is relatively uncontroversial that Community B can assert jurisdiction over me and impose its laws if I cause an accident there. But as soon as I assert that the reason for the collision was that my brakes failed, the question becomes more complicated because the brakes may have been designed in a third community, built in a fourth, with possibly defective parts from a fifth, shipped to a sixth, sold through a distributor in a seventh, and then sold to me. Now, where should my lawsuit be heard and whose laws should apply? Here the problem is that the dispute involves actors in multiple territorial locations.

In addition, even when there is an obvious physical location, that location may be arbitrary and unrelated to the underlying dispute. For example, if an Alabama railroad employee wants to sue an Alabama company based on negligence committed by other employees in Alabama, should Mississippi law apply just because that is where the ultimate injury manifests?²⁵ Finally, sometimes a physical location is difficult to establish. Where does an e-commerce transaction occur? Where is an e-mail message located? Where is a bank account? And so on.²⁶

It is not that there is no way to try to address these questions. Indeed, there are numerous legal doctrines that have evolved to try to resolve them. But the point is that legal pluralism creates *difficult* questions, and the solutions that sovereigntist territorialist legal systems have devised to solve them are always necessarily imperfect and troubling. In the end, there is no perfect solution because sovereigntist territorialism always insists that only one legal system must govern, and in situations of legal pluralism the whole point is that there is no single legal regime that has obvious primacy.

Perhaps even more troubling, the assumption that communities are or should be hermetically sealed from one another makes it difficult to address cross-border problems precisely at a time when many of the problems facing the world increasingly require coordinated solutions and *more* interaction among legal and political systems, not less. Such problems include issues of how to effectively maintain life on this planet (climate change, biodiversity, ecosystem losses, and water deficits); issues of how human beings will sustain themselves on it (poverty, conflict prevention, and global infectious diseases); and

²⁵ See Ala. Great S.R.R. v. Carroll, 11 So. 803 (Ala. 1892).

²⁶ For further discussion, see generally Paul Schiff Berman, *Legal Jurisdiction and Virtual Social Life*, 27 CATHOLIC U. J. L. & TECH. 103 (2019) (summarizing a variety of jurisdictional problems raised because of human activity that is not particularly tied to any territorial location).

issues of how to develop global cooperative rules for living together given that much human activity crosses territorial borders (nuclear proliferation, toxic waste disposal, data protection, trade rules, finance and tax regimes, and so on).²⁷ These sorts of problems cannot plausibly be addressed solely within one legal system.

In response to these problems of legal pluralism and the limitations inherent in sovereigntist territorialism, universalism may at first seem a welcome alternative. After all, if instead of multiple communities there were only one normative community with one authorized interpreter of law, then in theory there would no longer be a legal pluralism problem to solve. Thus, if our two hypothetical communities banded together to form one community with one legal system, then there would no longer be a conflicts-of-law concern.

As with sovereigntist territorialism, universalism can sometimes be an important mechanism for normative authority. In United States history, of course, the independent colonies ultimately became part of one country with a federal Constitution, a Supremacy Clause declaring federal law the supreme law of the land,²⁸ and a U.S. Supreme Court to be the ultimate arbiter of national law.²⁹ And even on the international level, a wide variety of institutions, treaties, courts, tribunals, arbitral bodies, industry standards, corporate codes, and normative assertions wield various forms of universal authority, albeit often without a clear and undisputed enforcement mechanism.³⁰ In one way or another, all of this activity represents the desire to harmonize conflicting norms and normative systems. And on many fronts, both in public and private law, norms may converge to a degree, whether through hegemonic imposition or global embrace. Moreover, such harmonization has important benefits because it tends to lower transaction costs and uncertainty as to what norms will be applied to any given activity.³¹ Yet again, as with sovereigntist territorialism, there are reasons to question both the desirability and the feasibility of universalism.

As to desirability, it is not at all clear that universalism is an unalloyed good. Just as it is problematic to divide ourselves into sealed-off communities, it is also problematic to think of ourselves solely as citi-

²⁷ See DAVID HELD, *COSMOPOLITANISM: IDEALS AND REALITIES* 49–55 (2010).

²⁸ U.S. CONST. art. VI.

²⁹ U.S. CONST. art. III, § 1.

³⁰ See HELD, *supra* note 27, at 51–53.

³¹ See, e.g., Emanuela Carbonara & Francesco Parisi, *The Paradox of Legal Harmonization*, 132 *PUB. CHOICE* 367, 369 (2007).

zens of the world because we will tend to dissolve the multi-rootedness of community affiliation into one global community. Universalism, by definition, ignores the extreme emotional ties people still feel toward distinct transnational or local communities and therefore tends to ignore the very attachments people hold most deeply.

In addition, universalism inevitably erases diversity. This is a problem for three reasons. First, such erasure may involve the silencing of less powerful voices. Thus, the presumed universal may also be the hegemonic. Second, preserving legal diversity can be seen as a good in and of itself because it means that multiple forms of regulatory authority can be assayed in multiple local settings. Just as states in a federal system can potentially function as “laboratories” of innovation,³² so too the preservation of diverse legal spaces makes innovation possible. Voices unheard in one legal community can be heard in another. For example, in the United States more liberal states can establish alternative regulatory regimes when conservatives control the federal government, and vice versa.³³ Likewise, a voice unheard within a local political and legal system might gain power by leveraging external authority. Third, a legal system that provides mechanisms for mediating diversity without dissolving difference necessarily also provides an important model for mediating diversity in day-to-day social life. Thus, a legal system that demands dialogue across difference rather than the erasure of difference is more likely to create the context for a functioning pluralist society than one that, in contrast, seeks uniformity as its goal.

Nevertheless, even if one rejects these normative arguments and embraces universalism as a goal, it is difficult to believe that, as a practical matter, harmonization processes will ever fully bridge the significant differences that exist among communities. This is because many differences both in substantive values and attitudes about law arise from fundamentally different histories, philosophies, and worldviews.³⁴ People are therefore likely to be either unable or unwill-

³² See, e.g., *United States v. Lopez*, 514 U.S. 549, 580–81 (1995) (Kennedy, J., concurring) (“[T]he theory and utility of our federalism are revealed” when “considerable disagreement exists about how best to accomplish [a] goal” because “the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”).

³³ See, e.g., Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User’s Guide*, DEMOCRACY, <https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/> [<https://perma.cc/GRP4-EFTM>].

³⁴ See, e.g., CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 173 (1983) (arguing that law provides a “distinctive manner of imagining the real” and therefore must be studied in cultural context).

ing to trade in their perspectives for the sake of universalist harmony. Indeed, even when communities do band together to form more universal units, there is inevitably resistance. Nation-states form and then pull apart. Ethnic conflicts persist. Secession talk is ever present. Universalism is therefore inevitably a slow, laborious undertaking—think of the European Union—and one that immediately faces resistance as soon as it is established. Accordingly, even the most optimistic universalist would have to acknowledge that normative conflict among communities is at the very least a constant reality that will require alternative processes to address.

Although sovereigntist territorialism and universalism are very different strategies for dealing with legal pluralism, they share in common the assumption that legal pluralism is a problem to be solved. Thus, they each seek ways to ensure that one legal system and set of norms governs while alternative systems and norms are suppressed. Accordingly, these approaches are both jurispathic in that they aim to kill off all but one legal regime.

A jurisprudence of legal pluralism seeks an alternative. Rather than eliminating the multiplicity, we might seek to manage and balance it, while giving voice to the various competing systems and norms to the extent possible. As a philosophical grounding for such a jurisprudence, we might look to Hannah Arendt. In *Understanding and Politics*, Arendt advocates “a mental capacity appropriate for an active relation to that which is distant.”³⁵ Thus, we can address conflicts-of-law problems with an approach that encourages an active relationship with other legal systems. That does not mean one always defers to those other systems; only that one actively considers the claims of those systems and self-consciously seeks to restrain one’s own jurispathic voice to the extent possible.

This active relationship can be understood as similar to Emmanuel Levinas’s concept of “responsivity.”³⁶ In the encounter between

³⁵ Phillip Hansen, *Hannah Arendt and Bearing with Strangers*, 3 CONTEMP. POL. THEORY 3, 3 (2004); see also HANNAH ARENDT, *Understanding and Politics (The Difficulties of Understanding)*, in ESSAYS IN UNDERSTANDING: 1930–1954, 307, 307, 322 (Jerome Kohn ed., 1994).

³⁶ See generally EMMANUEL LEVINAS, HUMANISM OF THE OTHER (Nidra Poller trans., 2003) (locating the humanity of human beings in their recognition of others). In focusing on Levinas and an ethic of responsivity in thinking about conflicts-of-law problems, I draw from Horatia Muir Watt, *Hospitality, Tolerance, and Exclusion in Legal Form: Private International Law and the Politics of Difference*, 70 CURRENT LEGAL PROBS. 111 (2017) and Ralf Michaels, *Private International Law as an Ethic of Responsivity*, in DIVERSITY AND INTEGRATION IN PRIVATE INTERNATIONAL LAW 11 (Verónica Ruiz Abou-Nigm & María Blanca Noodt Taquela eds., 2019).

Self and Other, Levinas argues that as an ethical matter the claims of the Other should neither be rejected, nor should they be merely tolerated.³⁷ Rather, the claims of others create an obligation to respond, to take seriously, to engage in dialogue.³⁸

Thus, instead of trying to eliminate the conflict among competing norms and systems, a more pluralist jurisprudence recognizes that such conflict is unavoidable and so seeks to manage it through procedural mechanisms, institutions, and practices that might at least draw the participants in the conflict into a shared social space. This approach builds on Ludwig Wittgenstein's idea that agreements among people are reached principally through participation in common forms of life, rather than through agreement on substance.³⁹ The goal is to transform "enemies"—who have no common symbolic space—into "adversaries." Those adversaries still might vociferously disagree with one another, but at least they are part of the same system of language, procedure, and institutional structure. In this vision, the Other is neither treated as wholly external, nor is it asked to assimilate into a universal. The goal instead is dialogue across difference through procedural and institutional mechanisms that ask decision makers to consider alternative normative systems, recognize that their vision is not the only vision, and always consider restraining their own jurispactic voice in order to accommodate competing voices.

A more pluralist approach may in fact be a better way to bridge divides among people. It is often assumed that such bridging requires a form of universalism: each side must come to see the other's shared humanity.⁴⁰ "The goal is for people to listen to others' experiences and feelings and to walk out saying, 'That person isn't so different from me,' or, 'If I'd gone through that experience, I might feel exactly the same way.'"⁴¹ This sounds reasonable, but the implicit belief underlying this style of bridging is that we can only learn to love each other by seeing that we are all deeply the same. Yet, as April Lawson, founder of a not-for-profit called Braver Angels Debate, points out, "this misses a fundamental insight about relationship that most of us know from experience: We have the capacity to build relationship *through*

³⁷ See LEVINAS, *supra* note 36, at 32–33.

³⁸ See *id.*

³⁹ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* para. 241, at 88 (G.E.M. Anscombe trans., 3d ed. 1967).

⁴⁰ April Lawson, *Building Trust Across the Political Divide*, COMMENT (Jan. 21, 2021), <https://comment.org/building-trust-across-the-political-divide/> [<https://perma.cc/UQ48-YVNW>].

⁴¹ *Id.*

conflict.”⁴² Indeed, sometimes the ethic of toleration itself, though it seems neutral and open, “denudes public argument of its profound spiritual dimensions and thereby guts the richness of pluralism.”⁴³ Tolerance treats the Other as separate and wrong. Ralf Michaels has therefore called tolerance “secret contempt”: we tolerate that which we disagree with.⁴⁴ Obviously, tolerance is better than intolerance, but it is still not the same as active engagement with the Other. In contrast:

[C]reating space for . . . people to have their conflicts in relatively constructive ways can . . . be productive for the group. It is a way for the participants to engage together on a joint enterprise, despite their many disagreements, and thus to preserve the enterprise as a going concern that binds them.⁴⁵

Of course, even a more pluralist approach that seeks engagement with competing systems will sometimes find a particular foreign norm or system to be such an anathema that the norm will not be enforced. But when such “public policy” exceptions are invoked within a pluralist framework, they should be treated as unusual occasions requiring strong normative statements regarding the contours of the public policy. This means that, as Cover envisioned, a jurispathic act that “kills off” another community’s normative commitment is always at least accompanied by an equally strong normative commitment.⁴⁶ The key point is to make decision makers self-conscious about their sometimes necessary jurispathic actions.⁴⁷ Such an approach helps prevent adversaries from turning into enemies.

II. A JURISPRUDENCE OF LEGAL PLURALISM APPLIED

It is unclear whether Justice Ginsburg was aware of legal pluralism scholarship or whether she explicitly considered legal pluralism in her own thinking about law. However, from the beginning of her scholarly career, Justice Ginsburg was clearly interested in questions

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Michaels, *supra* note 36, at 18 (quoting KARL JASPERS, *ORIGIN AND GOAL OF HISTORY* 221 (Michael Bullock trans., Routledge 2014) (1953)); see also Muir Watt, *supra* note 36, at 118 (Tolerance “suggests disapproval of whatever or whomever is being tolerated. It is sufferance rather than respect . . .”).

⁴⁵ Monica Hakimi, *The Integrative Effects of Global Legal Pluralism*, in *THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM* 557, 558 (Paul Schiff Berman ed., 2020).

⁴⁶ See Cover, *supra* note 16, at 53 (describing judges as inevitably “people of violence” because their interpretations “kill” off competing normative assertions).

⁴⁷ See Resnik, *supra* note 19, at 25.

of intersystemic interaction. And a close reading of her work as both a professor and a justice strongly suggests that she often pursued a jurisprudence of legal pluralism, even if she never named it. We can see this emphasis in her work regarding the attempts by courts to interfere in the legal processes of other courts, her efforts to navigate the contours of federal-state authority, and her understanding of the relationship of foreign and international sources of law to U.S. constitutional jurisprudence. This Article considers each of these areas in turn.

A. *Policing Court Rulings that Interfere with the Processes of Other Courts*

A court ruling that reaches into the legal processes of another court is a fundamentally jurispathic act in that it prevents the other court from coming to its own conclusions about a legal issue. Such assaults on legal pluralism were a concern of Justice Ginsburg throughout her career. Indeed, her first major law review article focused largely on the problem of antisuit injunctions.⁴⁸ Entitled *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, then-Professor Ginsburg considered in this article what should happen when a court in one state enjoins parties before it from proceeding in a lawsuit in another state.⁴⁹ In particular, she asked whether such antisuit injunctions should receive full faith and credit in the second state, thereby blocking the litigation process in that state.⁵⁰

After noting the U.S. Supreme Court's silence on this issue, Ginsburg set forth the two extreme possible options in response. First, one might view the Full Faith and Credit Clause of the U.S. Constitution⁵¹ as such an exacting command that even an antisuit injunction must be respected by the second court.⁵² Ginsburg suggested that such a rule would be "consistent with the generally strict line the Supreme Court has taken on full faith and credit to judgments," but she also observed that "[s]tate courts on the receiving end of such injunctions have not

⁴⁸ Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969).

⁴⁹ *Id.*

⁵⁰ *Id.* at 798–99.

⁵¹ U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.").

⁵² Ginsburg, *supra* note 48, at 828.

found this a palatable solution.”⁵³ Second, there could be “a general rule denying the states authority to issue injunctions directed at proceedings in other states.”⁵⁴ Although such a rule would protect the interests of the second court in pursuing its judicial process, the rule would disable the first court from issuing the relief sought by one of the parties. Thus, either option seems jurispathic, cutting off the legal process of one or the other of the courts at issue.

Significantly, Ginsburg rejected both of these jurispathic options and argued in favor of a middle ground approach: “permitting the injunction to issue but not compelling any deference outside the rendering state.”⁵⁵ Thus, the initial court could still issue the injunction, but such an injunction would not be binding on the second court. Instead, the injunction *might* be accorded respect—and enforcement—by the second court, but only “as a matter of comity.”⁵⁶

Given how much this article foreshadows Ginsburg’s later jurisprudence, it is worth pausing to consider her solution to the problem of antisuit injunctions. Neither court ends up wielding absolute authority independent of the other; neither court fully silences the other. Although the second court seems on the surface to retain the ultimate power to accept or reject the first court’s injunction, such power cannot be wielded without significant cost because, under Ginsburg’s approach, the second court would lose credibility and legitimacy if it rejected the first court’s injunction without at least addressing the first court’s reasoning. Thus, even if the second court retains ultimate authority, it must engage the first court’s views before wielding jurispathic power. This built-in intersystemic dialogue—whereby one court asks another to refrain from litigation and the other court then must decide how much it can defer to the first court’s order—respects both courts as adjudicatory actors and leaves resolution of individual cases to a dialogic and dialectical process among courts exercising restraint, deference, and comity.

As a Justice, Ginsburg took a similar approach to the Full Faith and Credit Clause in two U.S. Supreme Court cases. First, in *Matsushita Electric Industries Co. v. Epstein*,⁵⁷ the Court considered whether a Delaware class-action settlement should preclude litigation in a California federal court pursued by class members who argued that they

⁵³ *Id.*

⁵⁴ *Id.* at 829.

⁵⁵ *Id.*

⁵⁶ *Id.* at 830.

⁵⁷ 516 U.S. 367 (1996).

were not adequately represented in Delaware.⁵⁸ Although the Court granted preclusive effect to the Delaware settlement, thereby blocking the California litigation, Justice Ginsburg dissented in relevant part.⁵⁹ Justice Ginsburg argued that the Full Faith and Credit Clause should not automatically bar the California litigation, especially given the assertion that the lawyers in Delaware did not represent the interests of all class members.⁶⁰ Indeed, she suggested that in this case the attorneys for the class may have too easily relinquished the class's rights to pursue the federal litigation in order to pocket their attorneys' fees.⁶¹ Accordingly, due process, Justice Ginsburg argued, required an inquiry regarding the adequacy of class representation in the first litigation before the second litigation should be blocked by full faith and credit.⁶² Thus, although preclusion doctrine is somewhat different from the antisuit injunctions discussed in her earlier article, Justice Ginsburg similarly rejected automatic enforcement of an injunction that would have the effect of blocking litigation elsewhere.

Two years later, in *Baker v. General Motors Corp.*,⁶³ Justice Ginsburg returned to the realm of antisuit injunctions—even citing her own early law review article⁶⁴—and commanded a majority for her view regarding the proper operation of the Full Faith and Credit Clause when one court's order aims to block the operation of a second court's judicial process.⁶⁵ *Baker* concerned a stipulated injunction submitted to and signed by a Michigan court to settle a lawsuit between General Motors ("GM") and Ronald Elwell, a former GM employee.⁶⁶ Among other terms, the stipulated injunction purported to prevent Elwell from testifying against GM in subsequent legal proceedings.⁶⁷ The question posed before the U.S. Supreme Court was whether, in a separate wrongful death suit brought in a Missouri federal court by the Bakers against GM, Elwell could be called as a plaintiff's witness or whether, instead, the Michigan injunction blocked Elwell from testifying.⁶⁸ And while it was clear that the Michigan judgment could not preclude the *Bakers*, who were not parties to the

⁵⁸ *Id.* at 369–73.

⁵⁹ *See id.* at 388 (Ginsburg, J., concurring in part & dissenting in part).

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See id.* at 399.

⁶³ 522 U.S. 222 (1998).

⁶⁴ *Id.* at 236 n.9.

⁶⁵ *Id.* at 225–26.

⁶⁶ *Id.* at 228–29.

⁶⁷ *See id.*

⁶⁸ *See id.* at 225–228.

Michigan proceedings, the difficult question was whether it could bind *Elwell*, who had been a party in Michigan, and therefore keep him from testifying.⁶⁹ The Missouri federal district court judge ruled that allowing such a result would run counter to public policy and therefore invoked a public policy exception to the Full Faith and Credit Clause, whereby rendering courts would be free to ignore prior court judgments anathema to the rendering court's local policies.⁷⁰

Thus, the Supreme Court appeared to be faced with a binary choice. On the one hand, the Court could endorse the Missouri district court's ruling and allow courts to extricate themselves from the Full Faith and Credit Clause simply by deeming a sister jurisdiction's judgment contrary to public policy. On the other, the Court could enforce the Michigan court's order, thereby allowing Michigan's ruling to prevent any other court in the country from hearing *Elwell*'s testimony in cases against GM.

Not surprisingly, as with the antisuit injunctions discussed in her article, Justice Ginsburg rejected both of these jurisprudential options. Writing for the Court, she first made it clear that, although choice-of-law doctrines permit courts to use public policy objections in choosing the *law* to apply in a cross-jurisdictional case, the command of the Full Faith and Credit Clause with regard to prior *judgments* is far more "exacting" and permits no such set of broad exceptions. According to the opinion, "A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."⁷¹ Thus, the Missouri court could not simply ignore the Michigan judgment based on assertions of public policy.

At the same time, the Michigan court could not automatically block the adjudication in Missouri. "Michigan's judgment," she wrote, "cannot reach beyond the *Elwell*-GM controversy to control proceedings against GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered."⁷² The problem with the Michigan order, according to Justice Ginsburg, was that "Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify

⁶⁹ See *id.* at 237 n.11.

⁷⁰ See *id.* at 230.

⁷¹ *Id.* at 233.

⁷² *Id.* at 238.

and what evidence is relevant and admissible in their search for the truth.”⁷³

Thus, Ginsburg aimed to maintain a system in which courts respect each other’s authority and judgments. Michigan’s judgment could not silence Missouri in matters that Missouri had a right to adjudicate, just as Missouri could not simply ignore a lawful Michigan judgment by interposing local public policy concerns.⁷⁴ A Full Faith and Credit Clause without a public policy exception helps ensure an interlocking system of justice whereby parties cannot evade legal judgments simply by fleeing the jurisdiction. But at the same time, Justice Ginsburg called on courts to be restrained in the kinds of judgments they issue, remaining mindful of the prerogatives of other courts to pursue their own proceedings unfettered by foreign judgments.⁷⁵ As a result, both the need for interdependence and independence within a federalist court system can be maintained. Her decision therefore preserves pluralist, intersystemic interaction.

Justice Ginsburg reached a similar result in *Marshall v. Marshall*,⁷⁶ when, writing for the Court, she clarified that no broad exception to traditional jurisdictional rules should allow a state probate court decision to divest federal bankruptcy courts of jurisdiction in a case involving claims related to an inheritance dispute.⁷⁷ As in *Matsushita* and *Baker*, Justice Ginsburg rejected the idea that an exercise of power by one court should be transformed into a broad assertion of *exclusive* power that would prevent other courts from litigating issues over which they would otherwise have jurisdiction.⁷⁸ Instead, though she acknowledged that a probate court, once it exercised jurisdiction over the assets of an estate, might retain exclusive jurisdiction over the distribution of those assets, she limited the scope of exclusivity only to the administration of a decedent’s estate.⁷⁹ The probate court could not, she wrote, “bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.”⁸⁰

In each of these instances Justice Ginsburg opted to establish and preserve spaces of concurrent jurisdiction among multiple courts, neither foreclosing courts from speaking to issues before them, nor

⁷³ *Id.*

⁷⁴ *See id.* at 240–41.

⁷⁵ *See id.* at 233–39.

⁷⁶ 547 U.S. 293 (2006).

⁷⁷ *Id.* at 299–305.

⁷⁸ *See id.* at 314.

⁷⁹ *Id.* at 311–12.

⁸⁰ *Id.* at 312.

permitting them to foreclose subsequent courts from litigating related matters on their own. The danger, according to Justice Ginsburg's jurisprudence, lies in decisions that usurp power over the judicial processes of other courts. Instead, these opinions suggest that mutual voice, restraint, deference, and comity are more the touchstones of her judicial vision.

B. *Navigating Federalism*

These same principles of deference carried over to areas of federalism, where Justice Ginsburg often demonstrated her willingness to defer to state prerogatives in interpreting state law. This deference may surprise those who focus on Justice Ginsburg's Fourteenth Amendment jurisprudence in gender-related cases. Certainly, Justice Ginsburg supported a muscular interpretation of federal constitutional rights. After all, her most prominent pre-judicial role was as the head of the Women's Rights Project of the American Civil Liberties Union.⁸¹ And of course her forceful advocacy in the 1970s⁸²—as well as her own decision for the U.S. Supreme Court in *United States v. Virginia*⁸³—helped establish gender as a category for heightened scrutiny in equal protection analysis.

Yet, though she was clearly a strong advocate for protecting federal rights, Justice Ginsburg was often likely to seek ways to defer to and accommodate state interests to the extent possible. Indeed, she was far more deferential to the prerogatives of states than one might expect if one focused only on the gender cases.⁸⁴ This Section first surveys four dissents in which Justice Ginsburg argued against federal intrusion into traditional state-law domains. Then, it turns to three cases either applying the so-called *Erie* doctrine or federal preemption doctrine, two areas where courts are asked to negotiate the fault lines between state and federal law. These cases show Justice Ginsburg seeking creative ways to effectuate both state and federal interests to the extent possible.

⁸¹ See Karen O'Connor & Barbara Palmer, *The Clinton Clones: Ginsburg, Breyer, and the Clinton Legacy*, 84 JUDICATURE 262, 265 (2001).

⁸² See Russell A. Miller, *Clinton, Ginsburg, and Centrist Federalism*, 85 IND. L.J. 225, 226–27 (2010).

⁸³ 518 U.S. 515 (1996).

⁸⁴ See Russell A. Miller, *In a Dissenting Voice: Justice Ginsburg's Federalism*, 43 NEW ENG. L. REV. 771, 774 (2009) ("In the shadow of [Ginsburg's] progressive gender equity jurisprudence resides a commitment to state autonomy, a position generally viewed as the prerogative of the right. This belies the claims of conservative commentators and empirical scholars who view Justice Ginsburg as one of the Court's most consistently liberal and activist justices.").

1. *Deference to State Law Domains*

In the 1994 case of *Honda Motor Co. v. Oberg*,⁸⁵ the U.S. Supreme Court considered a provision of the Oregon Constitution prohibiting judicial review of the amount of punitive damages awarded by a jury “unless the court can affirmatively say there is no evidence to support the verdict.”⁸⁶ The Court ruled that such a provision violated the Due Process Clause of the federal Constitution.⁸⁷ Justice Ginsburg dissented, focusing on the variety of ways in which Oregon statutory law already protected against excessive punitive damage awards.⁸⁸ In particular, Justice Ginsburg noted that, under Oregon law, the plaintiff in product liability cases must prove by “clear and convincing evidence” that the defendant “show[ed] wanton disregard for the health, safety and welfare of others.”⁸⁹ Moreover, the statute set forth seven substantive criteria to cabin the discretion of the factfinder.⁹⁰ And Oregon permitted judges to overturn a jury punitive damages award “if reversible error occurred during the trial, if the jury was improperly or inadequately instructed, or if there is no evidence to support the verdict.”⁹¹ Given these protections, Justice Ginsburg saw no reason for federal due process concerns to trump the Oregon constitutional provision forbidding general reexamination of a jury’s punitive damage awards.⁹²

Four years later, Justice Ginsburg again dissented from a U.S. Supreme Court decision overturning a state law punitive damages verdict. In *BMW of North America, Inc. v. Gore*,⁹³ the Court found an Alabama jury award “grossly excessive,” in violation of the Fourteenth Amendment’s Due Process Clause.⁹⁴ Justice Ginsburg, in contrast, argued that the award should be policed by the Alabama courts and that the U.S. Supreme Court should “resist unnecessary intrusion into an area dominantly of state concern.”⁹⁵ Significantly, Justice Ginsburg’s dissent rested on two core arguments. First, she suggested that the Court should defer to the Alabama Supreme Court, which

⁸⁵ 512 U.S. 415 (1994).

⁸⁶ *Id.* at 418.

⁸⁷ *Id.*

⁸⁸ *See id.* at 436–51 (Ginsburg, J., dissenting).

⁸⁹ *Id.* at 439 (quoting OR. REV. STAT. § 30.925 (1991)).

⁹⁰ *See id.* at 440–42 (quoting OR. REV. STAT. § 30.925(3) (1991)).

⁹¹ *Id.* at 436.

⁹² *See id.*

⁹³ 517 U.S. 559 (1996).

⁹⁴ *Id.* at 562, 585–86.

⁹⁵ *Id.* at 607 (Ginsburg, J., dissenting).

“report[ed] that it ‘thoroughly and painstakingly’” reviewed the jury’s award according to federal due process criteria.⁹⁶ According to Justice Ginsburg, this judgment was entitled to a “presumption of legitimacy,”⁹⁷ and the U.S. Supreme Court should not “be quick to find a constitutional infirmity.”⁹⁸

Second, she noted that, by entering this traditional state domain with a constitutional ruling binding on all the states, the U.S. Supreme Court would be deprived of the wisdom that comes from having multiple courts develop jurisprudence in concert.⁹⁹ Indeed, she juxtaposed the Court’s new punitive damages review process with what typically occurs in habeas corpus review under 28 U.S.C. § 2254.¹⁰⁰ In contrast to such habeas cases, Justice Ginsburg pointed out, the Court, when reviewing punitive damages verdicts under *Gore*, “will work at this business alone. It will not be aided by the federal district courts and courts of appeals. It will be the *only* federal court policing the area.”¹⁰¹ Thus, by refusing to defer to states and by building its own ad hoc review process, Justice Ginsburg opined, the Supreme Court would be left to review damage awards with neither the potential guidance of the state courts nor the potential wisdom of other federal courts.¹⁰² In short, she objected to the hierarchical lack of pluralism in the emerging jurisprudence.

Ginsburg argued for greater deference to state processes in other contexts as well. *City of Chicago v. International College of Surgeons*¹⁰³ began as a case involving state court review of a municipal agency’s denial of demolition permits.¹⁰⁴ Such review is generally deferential under state law, limited to whether there was adequate evidence in the record to support the agency’s discretionary judgment.¹⁰⁵ Nevertheless, the U.S. Supreme Court permitted federal courts to exercise supplemental jurisdiction—and possibly full de novo review—over such claims if appended to other federal claims.¹⁰⁶ While acknowledging that the “bare words” of the federal jurisdictional statute

⁹⁶ *Id.* at 610–11.

⁹⁷ *Id.* at 611.

⁹⁸ *Id.*

⁹⁹ *See id.* at 613.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ 522 U.S. 156 (1997).

¹⁰⁴ *See id.* at 159–60.

¹⁰⁵ *Id.* at 175 (Ginsburg, J., dissenting).

¹⁰⁶ *Id.* at 174 (majority opinion).

permit the exercise of jurisdiction in such cases,¹⁰⁷ Justice Ginsburg dissented, arguing that the statute should not be read to extend federal jurisdiction over these sorts of state appellate reviews of state agency decisions.¹⁰⁸ According to Justice Ginsburg, permitting such “cross-system appeals” would encroach upon areas traditionally within state authority.¹⁰⁹ She criticized the majority for “displac[ing] state courts as forums for on-the-record review of state and local agency actions.”¹¹⁰ And she worried that:

[a]fter today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions. Exercising this cross-system appellate authority, federal courts may now directly superintend local agencies by affirming, reversing, or modifying their administrative rulings.¹¹¹

One could imagine an even more pluralist approach than Justice Ginsburg’s. For example, the Court might have permitted federal jurisdiction but incorporated the state standard of deferential review. Alternatively, the Court might have developed a form of abstention doctrine that permits federal courts to proceed, but only after allowing state courts a first crack at resolving the issue. However, both of these avenues would be complicated given the language of the jurisdictional statute. Thus, Ginsburg’s position likely went as far as she could: denying federal supplemental jurisdiction over such claims but allowing the exercise of that authority to be checked by federal constitutional review, thereby preserving intersystemic dialogue. In contrast, the interpretation of the jurisdictional statute adopted by the majority allows the federal court to function as a fully independent alternative appellate forum in diversity cases, one that could trump state practices and standards of review.

This same concern for preserving the states’ ability to interpret their own laws carried over to Justice Ginsburg’s opposition to the U.S. Supreme Court’s 1983 decision in *Michigan v. Long*.¹¹² In *Long*, the Court had determined that in criminal cases, when it is unclear whether a state court decision rests on state or federal law, the federal court should assume that the state court relied on federal law, thereby

¹⁰⁷ *Id.* at 176 (Ginsburg, J., dissenting).

¹⁰⁸ *See id.* at 176–80.

¹⁰⁹ *Id.* at 176–77.

¹¹⁰ *Id.* at 176.

¹¹¹ *Id.* at 175.

¹¹² 463 U.S. 1032 (1983).

subjecting the state court decision to federal review.¹¹³ This presumption, according to Ginsburg, gets it backwards. Although she was not on the Court when *Long* was decided,¹¹⁴ in a subsequent dissent she wrote: “The *Long* presumption, as I see it, impedes the States’ ability to serve as laboratories for testing solutions to novel legal problems.”¹¹⁵ Instead, she argued that “this Court should select a jurisdictional presumption that encourages States to explore different means to secure respect for individual rights in modern times.”¹¹⁶

In all four of these dissents, Justice Ginsburg was concerned that federal courts were inappropriately displacing the ability of states to have voice regarding matters of traditional state dominion. However, that does not mean that Justice Ginsburg always simply opted for greater state autonomy in every case. For example, she joined the dissents in both *United States v. Lopez*¹¹⁷ and *United States v. Morrison*,¹¹⁸ in which the Court curtailed Congress’ Commerce Clause power. And of course, she advocated for more robust federal enforcement of constitutional equal protection norms in gender discrimination cases. Thus, it might be more appropriate to view Justice Ginsburg as a cooperative or dialogic federalist rather than a separate-spheres federalist.¹¹⁹ She seemed most concerned with giving states voice in a multisystem conversation rather than displacing federal authority altogether.

2. *Solomonic Effectuation of Plural Interests*

This emphasis on accommodating both state and federal authority is most easy to see in those cases in which Justice Ginsburg explicitly sought to effectuate both sets of interests simultaneously. As noted above, many of the doctrines aimed at navigating the relative domains of state and federal sovereignty are built on binary decision making and clear lines of demarcation. Either a case is within state or federal jurisdiction; either state law or federal law applies, and so on. But Justice Ginsburg tended to favor overlapping jurisdictional schemes and more deferential accommodation of multiple interests. In

¹¹³ See *id.* at 1040–41.

¹¹⁴ Justice Ginsburg’s position regarding *Michigan v. Long* echoes the concerns originally expressed by Justice Stevens in *Long* itself. See *id.* at 1065–72 (Stevens, J., dissenting).

¹¹⁵ *Arizona v. Evans*, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting).

¹¹⁶ *Id.* at 30.

¹¹⁷ 514 U.S. 549 (1995).

¹¹⁸ 529 U.S. 598 (2000).

¹¹⁹ I am grateful to Scott Dodson for suggesting this particular encapsulation of my views regarding Justice Ginsburg’s federalism jurisprudence.

the three cases that follow, she worked mightily to achieve this sort of pluralist resolution, even when the path for doing so was less than obvious.

The first case is *Gasperini v. Center for Humanities, Inc.*¹²⁰ Here, the U.S. Supreme Court continued a line of cases considering when a federal court hearing a state claim should apply state or federal law.¹²¹ Ever since the Court's landmark decision in *Erie Railroad Co. v. Tompkins*,¹²² federal courts hearing state claims are required to apply state substantive law, essentially as if the case were being decided in a state court.¹²³ But what happens if applying the state law conflicts with the rules governing the general operation of federal courts? These are some of the knotty problems in what has become known as the *Erie* doctrine.

Gasperini presented a particularly difficult application of the doctrine because both the state and federal interests at stake were so strong. New York had passed a tort reform statute that sought to rein in what were perceived to be excessive jury awards.¹²⁴ Under the statute, state appellate courts were empowered to review the size of jury verdicts and to order new trials whenever the jury's award "deviate[d] materially from what would be reasonable compensation."¹²⁵ Thus, it would seem that, if such a situation happened to arise in a state law case brought in federal court, the federal appellate court should, pursuant to *Erie* and its progeny, apply the New York law allowing appellate reexamination of the jury verdict. However, under the Seventh Amendment of the U.S. Constitution, which governs proceedings in federal court but not in state court, "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."¹²⁶ This provision would normally block a federal court from conducting the sort of review mandated by the New York law. Accordingly, the U.S. Supreme Court was faced with the question of which rule would prevail in a diversity suit brought in a federal court in New York.¹²⁷

¹²⁰ 518 U.S. 415 (1996).

¹²¹ See, e.g., *id.* at 419.

¹²² 304 U.S. 64 (1938).

¹²³ See *id.* at 64, 78.

¹²⁴ *Gasperini*, 518 U.S. at 423.

¹²⁵ N.Y. C.P.L.R. § 5501(c) (McKinney 1995).

¹²⁶ U.S. CONST. amend. VII.

¹²⁷ *Gasperini*, 518 U.S. at 418–19.

Justice Scalia, in dissent, took the jurispathic path, arguing categorically that federal courts must follow the Seventh Amendment's command, regardless of what a New York court would do.¹²⁸ Thus, the New York law would have no impact at all in a federal diversity suit. In contrast, Justice Ginsburg worked hard to create a Solomonic solution whereby both New York's tort reform interests and the Seventh Amendment could be accommodated.¹²⁹

To do this, Justice Ginsburg construed the Seventh Amendment's Reexamination Clause to apply to federal *appellate* courts but not to the traditional power of federal *trial* judges to grant new trials notwithstanding a contrary jury verdict.¹³⁰ Thus, she reasoned that New York's law reviewing compensation awards for excessiveness or inadequacy could be given effect, without detriment to the Seventh Amendment, if the review standard set out in the state statute were applied by the federal trial court judge, with appellate control of the trial court's ruling confined to "abuse of discretion."¹³¹ Under this approach, the trial judge could apply state law reviewing the jury verdict, thereby retaining this state policy choice in state law cases tried in federal courts,¹³² while the Seventh Amendment prohibition on reexamining jury verdicts would continue to bind the federal appellate court—absent a flagrant abuse of discretion.¹³³

Whatever one thinks of the soundness of Justice Ginsburg's historical and jurisprudential analysis, what is most significant is the extraordinarily creative way in which she worked to accommodate both state and federal interests. Had the Court adopted Justice Scalia's approach, a litigant from outside New York involved in a state lawsuit with a New Yorker would be able to avoid the state's tort reform provision simply by filing that case in, or removing that case to, federal court. On the other hand, had the Court simply applied the state law without limitations, it would have been ignoring the significant command of the U.S. Constitution regarding the sanctity of jury verdicts. By splitting the difference, the Court arguably protected the core of both the state and federal interests at stake.

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,¹³⁴ Justice Ginsburg again sought to vindicate both state and fed-

¹²⁸ See *id.* at 450 (Scalia, J., dissenting).

¹²⁹ See *id.* at 418–39 (majority opinion).

¹³⁰ See *id.* at 432–35.

¹³¹ *Id.* at 419.

¹³² See *id.* at 437–39.

¹³³ See *id.* at 419.

¹³⁴ 559 U.S. 393 (2010).

eral interests in an *Erie* case. This time the question was whether, in a federal court, Rule 23 of the Federal Rules of Civil Procedure, governing class actions, would override another New York state law, this one aimed at preventing certain kinds of suits from being brought as class actions.¹³⁵ Justice Scalia's plurality opinion took the jurispactic position that because the state law addressed class-action suits it was necessarily trumped by Rule 23 in cases heard in federal courts.¹³⁶ Justice Ginsburg, in dissent, chose a more nuanced reading. She took Justice Scalia to task for "relentlessly" making choices that would override state law.¹³⁷ Instead, she pointed out—in true pluralist fashion—that "before undermining state legislation" the Court should ask whether the federal and state laws truly conflict.¹³⁸ Thus, in contrast to the plurality opinion, she "would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies."¹³⁹ Taking this approach, she read Rule 23 to dictate only the *procedures* for certifying and pursuing a class-action claim. In contrast, she argued, the New York state law addressed what sort of *relief* could be pursued through the class mechanism.¹⁴⁰ And, as with *Gasperini*, regardless of whether one agrees with her particular way of accommodating both federal and state law, there can be no doubting her passion to pursue an approach to *Erie* that attempted to provide maximum space for the effectuation of important state policy judgments.

Justice Ginsburg's approach to federal preemption law reveals the same impulse towards mutual accommodation and splitting the difference. For example, in *American Airlines, Inc. v. Wolens*,¹⁴¹ the question was whether the federal law deregulating the airline industry preempted state consumer-fraud and breach-of-contract claims brought against American Airlines related to changes the airline made unilaterally and retroactively to its frequent-flyer program.¹⁴² Two Justices argued that federal law preempted both the fraud and contract claims,¹⁴³ while another argued that neither type of claim should be

¹³⁵ *Id.* at 397–398.

¹³⁶ *See id.* at 398–406.

¹³⁷ *Id.* at 437 (Ginsburg, J., dissenting).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 446–47.

¹⁴¹ 513 U.S. 219 (1995).

¹⁴² *Id.* at 221–223.

¹⁴³ *Id.* at 238 (O'Connor, J., concurring in the judgment in part and dissenting in part).

deemed preempted.¹⁴⁴ Ginsburg, writing for the Court, took the middle ground, holding that federal law preempted the fraud claims but not the contract claims.¹⁴⁵ The Airline Deregulation Act explicitly preempted state-imposed regulation “relating to [air carrier] rates, routes, or services,”¹⁴⁶ which would include consumer fraud claims based in state law.¹⁴⁷ However, the contract claims, she concluded, were based not on state regulation but on claimed breaches of terms agreed upon by the parties themselves.¹⁴⁸ Thus, they could be maintained without running afoul of the Airline Deregulation Act.¹⁴⁹

In each of these cases, we see Justice Ginsburg working mightily to make subtle distinctions to preserve space for both federal and state interests to be vindicated. Indeed, none of the conclusions she reached was clearly dictated by the cases, rules, or statutes she interpreted.¹⁵⁰ Thus, they are best understood as efforts to maintain a pluralist structure to American federalism, one that will allow sufficient play in the joints and overlapping jurisdiction so that all sovereignties are afforded an opportunity to weigh in with policy judgments. In short, understanding Justice Ginsburg’s pluralist jurisprudence creates a way of interpreting these cases as part of a broader approach to the interaction of legal systems.

C. *Deference to International and Transnational Law and Process*

Of course, principles of deference are often easier in domestic cases because, although federalism opens up a wide range of structural pluralism, both state and federal governments sit within one constitutional system. This Section turns to Justice Ginsburg’s attitude towards foreign law as interpreted and applied by courts and tribunals from around the world. Here, Justice Ginsburg showed her willingness to learn from foreign judges, her interest in comparative examples, and her efforts to build deferential principles into cases with transnational implications. Yet, at the same time, Justice Ginsburg believed that foreign law cannot displace core U.S. constitutional principles when U.S. officials act abroad. Thus, both foreign norms and U.S. norms operate in an active relationship.

¹⁴⁴ *Id.* at 235 (Stevens, J., concurring in part and dissenting in part).

¹⁴⁵ *Id.* at 222 (majority opinion).

¹⁴⁶ *Id.* at 221–22 (quoting 49 U.S.C. app. § 1305(a)(1)).

¹⁴⁷ *Id.* at 228.

¹⁴⁸ *Id.* at 233.

¹⁴⁹ *Id.* at 228–29.

¹⁵⁰ See, e.g., Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637, 1657–58 (1998) (criticizing the decision).

Justice Ginsburg was interested in comparative law from the beginning of her career. As an academic, she attended multiple gatherings of the International Academy of Comparative Law.¹⁵¹ She also was affiliated with the Columbia Law School Project on International Procedure, was a member of the American Foreign Law Association, and served from 1964 to 1972 on the Board of Editors of the American Journal of Comparative Law.¹⁵² These experiences, she later stated, “powerfully influenced” her work as a lawyer, law professor, and judge.¹⁵³

Perhaps for this reason, she often looked to foreign law in a way that emphasized the ongoing interaction of legal systems in dialogue with each other:

[M]y own view is simply this: If U.S. experience and decisions may be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so too can we learn from others now engaged in measuring ordinary laws and executive actions against fundamental instruments of government and charters securing basic rights.¹⁵⁴

Of course, as she recognized, political, historical, and cultural contexts vary from country to country, and so the fit from system to system is imperfect. But that should not, she argued, “lead us to abandon the effort to learn what we can from the experience and wisdom foreign sources may convey.”¹⁵⁵

In 2011, Justice Ginsburg went so far as to predict that the U.S. Supreme Court would over time more assiduously follow the lead of the Declaration of Independence by according “‘a decent Respect to the Opinions of [Human]kind’ as a matter of comity and in a spirit of humility.”¹⁵⁶ Note those two words: comity and humility. Both were core to Justice Ginsburg’s pluralist jurisprudence. By invoking comity, she recognized that “projects vital to our wellbeing—combating international terrorism is a prime example—require trust and cooperation of nations the world over.”¹⁵⁷ And by focusing on humility, she sug-

¹⁵¹ See Ruth Bader Ginsburg, Introductory Remarks, “*A Decent Respect to the Opinions of [Human]kind*”: *The Value of a Comparative Perspective in Constitutional Adjudication*, 26 AM. U. INT’L L. REV. 927, 927 (2011).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 929.

¹⁵⁵ *Id.* at 931.

¹⁵⁶ *Id.* at 933–34 (alteration in original).

¹⁵⁷ *Id.* at 934.

gested that legal systems should not see themselves as sealed off and unable to learn from the innovations that may exist elsewhere.¹⁵⁸ Thus, judges may gain wisdom and learn from the experimentation of others. This is one of the core reasons that pluralist processes may sometimes be preferable to more jurispathic approaches.¹⁵⁹

Justice Ginsburg's pluralist perspective regarding the need to accommodate foreign legal processes carried over to cases involving the interlocking day-to-day functions of courts transnationally. For example, in *Intel Corp. v. Advanced Micro Devices, Inc.*,¹⁶⁰ Justice Ginsburg, writing for the Court, broadly interpreted a federal statute that permits a party in a foreign or international tribunal to seek discovery in federal district courts from persons subject to the federal courts' jurisdiction.¹⁶¹ Significantly, Justice Ginsburg rejected the broad exception urged by Intel that federal courts should not permit such discovery if the foreign court could not itself have obtained such discovery under its local laws.¹⁶² Instead, she reasoned that the foreign court's inability or refusal to order discovery itself says nothing about whether it would be happy to receive assistance from a U.S. court that is willing to do so.¹⁶³ Thus, a blanket prohibition on such discovery might actually thwart the wishes of the foreign jurisdiction.¹⁶⁴ Instead, she wrote, the best way to effectuate the aim of helping with the discovery needs of foreign jurisdictions is to permit—without requiring—such discovery, instead of imposing categorical limitations.¹⁶⁵ Of course, as in many Ginsburg opinions, she emphasized that district judges retain discretion to refuse or limit discovery based on a myriad of factors particular to each case.¹⁶⁶ But she refused to place broad prohibitions on such intersystemic discovery and thereby cabin such case-by-case discretion. In the end, this approach allowed both the foreign court and the U.S. court to engage in dialogue without categorical rules either requiring or preventing discovery.

Another key aspect of intersystemic interaction is the principle that one should not be able to evade local law simply by relocating. As

¹⁵⁸ See *id.*

¹⁵⁹ See Berman, *supra* note 22, at 1190–91.

¹⁶⁰ 542 U.S. 241 (2004).

¹⁶¹ *Id.* at 246–47.

¹⁶² *Id.* at 261–62.

¹⁶³ See *id.* at 261 (“A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions—reasons that do not necessarily signal objection to aid from United States federal courts.”).

¹⁶⁴ See *id.* at 262.

¹⁶⁵ See *id.* at 264–65.

¹⁶⁶ See *id.*

shown above, Justice Ginsburg was clear that, at least in the domestic context, there can be no broad public policy exceptions to the Full Faith and Credit Clause in order to prevent such evasion. But what about regulatory evasion in the transnational context, where there is no constitutionally mandated Full Faith and Credit Clause? This issue can arise if a litigant relocates abroad, but even more controversially when a U.S. governmental official acts abroad in ways that would be impermissible under the U.S. Constitution.

In this long-running debate about whether “the Constitution follows the flag,”¹⁶⁷ Justice Ginsburg took the position that U.S. officials cannot evade constitutional limitations by acting abroad rather than on U.S. soil. For example, in *DKT Memorial Fund Ltd. v. Agency for International Development*,¹⁶⁸ she wrote: “[J]ust as our flag ‘carries its message . . . both at home and abroad,’ so does our Constitution and the values it expresses.”¹⁶⁹ Accordingly, she concluded, “wherever the United States acts, it can only act in accordance with the limitations imposed by the Constitution.”¹⁷⁰ Similarly, in *United States v. Balsys*,¹⁷¹ Justice Ginsburg argued that “the Fifth Amendment privilege against self-incrimination prescribes a rule of conduct generally to be followed by our Nation’s officialdom” and “should command the respect of United States interrogators, whether the prosecution reasonably feared by the examinee is domestic or foreign.”¹⁷²

Finally, it is significant that Justice Ginsburg cited, with approval, the intriguing decision in *United States v. Tiede*.¹⁷³ In *Tiede*, a foreign national accused of hijacking a Polish aircraft abroad was tried under German substantive law in Cold War Berlin in a court created by the United States.¹⁷⁴ The U.S. court held that, despite the use of German substantive law, the foreign national was entitled to a jury trial as a matter of U.S. constitutional right because the U.S. court must act in accordance with the Constitution even when situated beyond U.S. ter-

¹⁶⁷ See generally, e.g., KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? (2009) (tracing the history of debate about whether the U.S. Constitution’s commands apply outside the physical borders of the United States).

¹⁶⁸ 887 F.2d 275 (D.C. Cir. 1989).

¹⁶⁹ *Id.* at 307–08 (Ginsburg, J., concurring in part & dissenting in part) (alteration in original) (citing *Texas v. Johnson*, 491 U.S. 397, 437 (1989) (Stevens, J., dissenting)).

¹⁷⁰ *Id.* at 308 (internal quotation marks omitted).

¹⁷¹ 524 U.S. 666 (1998).

¹⁷² *Id.* at 701–02 (Ginsburg, J., dissenting).

¹⁷³ 86 F.R.D. 227 (U.S. Ct. Berlin 1979); see *DKT Mem’l Fund*, 887 F.2d at 308 (Ginsburg, J., concurring in part & dissenting in part).

¹⁷⁴ *Tiede*, 86 F.R.D. at 228–29.

ritorial borders.¹⁷⁵ According to the court, “It is a first principle of American life—not only life at home but life abroad—that everything American public officials do is governed by, measured against, and must be authorized by the United States Constitution.”¹⁷⁶ Thus, Justice Ginsburg appears to have taken very seriously the idea that the U.S. government is bound by the U.S. Constitution even beyond its borders.

All of these different aspects of Justice Ginsburg’s transnational jurisprudence had a common theme: the desire to maintain a functioning global legal order characterized by respect among different systems, productive interaction among those systems, and the maintenance of cooperative efforts to cut off regulatory evasion while recognizing difference. These are core aspects of a pluralist cross-border jurisprudence. Indeed, Justice Ginsburg’s background as a comparative proceduralist made her well positioned to articulate how this sort of intersystemic perspective might work in day-to-day legal decisions.

CONCLUSION

It is difficult, of course, to pick out a handful of cases from decades of jurisprudence in order to spot trends. And there is always the danger of cherry-picking those cases that seem to support a thesis, while ignoring other decisions that might point in a different direction. Moreover, each case presents different facts and different substantive law contexts, making broad generalizations inherently problematic.

Nevertheless, a pronounced preference for legal pluralist approaches can be discerned in Justice Ginsburg’s scholarship and in her judicial opinions. When faced with questions involving the interaction of legal systems, Justice Ginsburg often chose a path that emphasized mutual accommodation, deference, and the opportunity for different systems to pursue their processes and speak to an issue. Justice Ginsburg eschewed bright-line rules that closed off avenues through which a system might be allowed to articulate its norms, and she bent over backward to seek Solomonic solutions that would effectuate multiple interests. In the international arena, she humbly sought wisdom abroad, aimed to accommodate foreign processes if possible, and made sure U.S. officials abroad followed constitutional commands.

¹⁷⁵ *Id.* at 244–51.

¹⁷⁶ *Id.* at 244.

All of these jurisprudential paths aimed to make the United States a partner in the world system, not a hierarchically dominant voice.

Just as importantly, this analysis suggests that we can evaluate judicial opinions, legacies, and philosophies through the lens of legal pluralism. This interpretive lens focuses less on substantive outcomes or political labels such as liberal or conservative, and more on the way in which the judge understands his or her role in an interlocking, multijurisdictional legal tapestry. And given that judges inevitably face questions involving the interaction of legal systems, we can legitimately ask how each judge seeks to navigate the hybrid spaces that result. Thus, a pluralist framework provides an untapped means of considering jurisprudential legacies. In the case of Justice Ginsburg, an emphasis on mechanisms for managing pluralism illuminates tendencies in her judicial approach that otherwise may have escaped notice.

Order Without Formalism

Rachel Bayefsky*

ABSTRACT

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

TABLE OF CONTENTS

INTRODUCTION	1458
I. THE ORDERLY ADMINISTRATION OF JUSTICE	1460
II. EPISTEMIC HUMILITY AND THE RISKS OF PREJUDGMENT.....	1462
III. JUDICIAL RESTRAINT AND JUDICIAL FLEXIBILITY	1464
IV. JUSTICE GINSBURG'S JURISPRUDENCE AND STARE DECISIS.....	1467
V. ORDER WITHOUT FORMALISM?.....	1469

INTRODUCTION

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

* Associate Professor of Law, University of Virginia School of Law. I thank Caroline Gozigian for helpful research assistance.

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

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

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

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

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

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

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

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

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

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

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

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

I. THE ORDERLY ADMINISTRATION OF JUSTICE

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

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

⁸ See, e.g., Scott Dodson, *A Revolution in Jurisdiction*, in THE LEGACY OF RUTH BADER GINSBURG 137, 137–38 (Scott Dodson ed., 2015); Zachary D. Tripp & Gillian E. Metzger, *Professor Justice Ginsburg: Justice Ginsburg's Love of Procedure and Jurisdiction*, 121 COLUM. L. REV. 729, 729 (2021).

⁹ 138 S. Ct. 1800 (2018).

¹⁰ *Id.* at 1803–04.

¹¹ *Id.* at 1804.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 1808.

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

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

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

¹⁵ *Id.* at 1811.

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

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

¹⁸ *Fort Bend*, 139 S. Ct. at 1850.

¹⁹ *Id.* at 1851.

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

²¹ *Id.* at 1849.

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

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

II. EPISTEMIC HUMILITY AND THE RISKS OF PREJUDGMENT

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

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

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

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

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

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

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

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

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

²⁶ See, e.g., *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 758 (2008) (Ginsburg, J., concurring in part and dissenting in part) ("I resist joining other portions of Justice Stevens' opinion, however, to the extent that they address *Buckley*'s distinction between expenditure and contribution limits . . . Appellee Federal Election Commission has not asked us to overrule *Buckley*; consequently, the issue has not been briefed."); see also *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 346 (2008) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Resolving this case on a ground neither argued nor addressed below, the Court holds . . ."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 653 (2001) (Ginsburg, J., dissenting) ("This Court's waiver ruling thus amounts to an unsavory invitation to unscrupulous litigants: Change your theory and misrepresent the record in your petition for certiorari; if the respondent fails to note your machinations, you have created a different record on which this Court will review the case.").

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

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

III. JUDICIAL RESTRAINT AND JUDICIAL FLEXIBILITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁶ Elliott, *supra* note 29, at 746.

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

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

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

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

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

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

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

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

IV. JUSTICE GINSBURG'S JURISPRUDENCE AND STARE DECISIS

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

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

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

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

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

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

Nonetheless, Justice Ginsburg did not treat stare decisis as an “inexorable command”—to borrow a phrase the Supreme Court is wont to use in overruling cases.⁵⁰ In her last years on the bench, she voted in divided opinions to overturn constitutional rules permitting nonunanimous jury verdicts⁵¹ and successive prosecutions for the same offense by separate sovereigns,⁵² as well as a constitutional rule concerning taxation and physical presence in a state.⁵³ Justice Ginsburg, that is, was not a defender of stare decisis come-what-may.

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

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

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

⁴⁹ *Id.* at 139 & n.42.

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

⁵¹ *See id.* at 1395, 1404.

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

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

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

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

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

V. ORDER WITHOUT FORMALISM?

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

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

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

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

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

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

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

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

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

⁵⁸ See *id.* at 292–93.

⁵⁹ See Scalia, *supra* note 1.

Justice Ginsburg's Republican Jurisprudence

*Daphna Renan**

ABSTRACT

Justice Ginsburg's opinions challenge us to rethink the role of statutes in American constitutional democracy, and how to interpret the authority of the people to innovate on the lawmaking process itself. Her legacy includes a body of opinions that comprises a forceful rebuttal to the Court's current interpretive dogma. Justice Ginsburg's writing poses an alternative vision of American public law—a "republican" jurisprudence that puts the power to make law back in the hands of the people. This Symposium Essay elucidates three aspects of that jurisprudence: what work it understands legislation to do in the polity, how it understands the authority of Congress to make law, and how it interprets the authority of the people to innovate on the lawmaking process itself.

TABLE OF CONTENTS

INTRODUCTION	1471
I. THE ROLE OF STATUTES.....	1474
II. THE AUTHORITY OF CONGRESS.....	1479
III. THE AUTHORITY OF THE PEOPLE TO INNOVATE ON LAWMAKING.....	1482
CODA: A KABUKI REPUBLIC	1484

INTRODUCTION

It is a great privilege to be here today to reflect on the legacy of Justice Ruth Bader Ginsburg—a giant in the law and a treasured former boss. Justice Ginsburg was a visionary in the fight for a more egalitarian polity. She was as careful in her drafting as she was powerful in her reasoning and bold in her argument. She was grace and grit combined, and she never lost sight of the human impact of the law and the grave responsibility of judges as participants in shaping it.

Justice Ginsburg's opinions challenge us to rethink the role of statutes in American constitutional democracy, and how to interpret the authority of the people to innovate on the lawmaking process itself. Her jurisprudence emphasizes the centrality of the people, work-

* Peter B. Munroe and Mary J. Munroe Professor of Law, Harvard Law School. For terrific research and editorial assistance, I thank Jessica Levy and Eric Xu.

ing through the institutions of lawmaking, to constitute the constitutional order that exists. “Most urgently needed,” Justice Ginsburg pressed in her hearing for confirmation to the Supreme Court, “is clear recognition by all branches of government that in a representative democracy important policy questions should be confronted, debated, and resolved by elected officials.”¹

The animating principle of what I will call Justice Ginsburg’s *republican* jurisprudence is a constitution in which “We the People” govern, and in which lawmaking is a central mechanism of the people’s governance.² As an account of interpretation, this approach advances the republican principle of nondomination by ensuring that judicial construction (both constitutional and statutory) accommodates a state answerable to the people—that is, the people as currently constituted.³ A republican jurisprudence thus anchors in the people

¹ *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 110 (1993).

² See, e.g., THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (“In republican government, the legislative authority necessarily predominates.”); THE FEDERALIST NO. 10, at 80–81 (James Madison) (Clinton Rossiter ed., 1961) (defining a “republic” as a “government in which the scheme of representation takes place,” and the “republican principle” as that “which enables the majority to defeat [a minority faction’s] views by regular vote.”); cf. Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548 (1988) (describing James Madison’s view of republicanism as government deriving its power from the people and describing all forms of republicanism as united by a commitment to collective self-determination). The term “republican” has been used to describe a variety of conflicting perspectives in the history of political thought. Among American constitutional theorists, the term emerged as part of a broader normative debate over whether the ideal relationship between the state and individuals was best characterized by a classical conception of civic virtue or by a liberal conception of personal autonomy. See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* (1992). More recently, the term has been used by proponents of a normative political theory premised on eliminating public and private forms of arbitrary domination. See, e.g., PHILIP PETTIT, *ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* (2012); Frank Lovett, *Domination and Distributive Justice*, 71 J. POL. 817 (2009); Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, in *REPUBLICANISM AND POLITICAL THEORY* 83 (Cécile Laborde & John Maynor eds., 2008); see also RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007). It is this latter tradition of nondomination that this Essay builds upon here and in earlier work. See generally Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022).

³ See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* ix (1997) (identifying nondomination as a central value of republican theory and arguing that “freedom as non-domination supports a conception of democracy under which contestability takes the place usually given to consent; what is of primary importance is not that government does what the people tells it but, on pain of arbitrariness, that people can always contest whatever it is that government does”); see generally Bowie & Renan, *supra* note 2 (discussing the Court’s current “juristocratic” approach to the separation of powers and how it undermines the value of nondomination); cf. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L.

themselves the power both to safeguard democracy and to reimagine it.⁴

As Justice Ginsburg urged over her twenty-seven years on the Court, a republican approach to legal interpretation is incompatible with a cramped, overly literalistic approach to statutory and constitutional text.⁵ Abandoning Justice Ginsburg's jurisprudential premises, however, a more fundamentalist approach to statutory and constitutional text became dominant during her time on the Court. Such an approach to legal interpretation, Justice Ginsburg cautioned, impedes the authority of the people to govern; it uses high textualism to gut republican self-rule.⁶

Justice Ginsburg's legacy includes a body of opinions that, in combination, comprise a forceful rebuttal to the Court's current interpretive dogma. Justice Ginsburg's writing poses an alternative vision of American public law—a republican jurisprudence that puts the power to make law back in the hands of the people.⁷ This Essay eluci-

REV. 407, 476–77 (1989) (advancing a civic republicanist argument that courts should “generously construe statutes designed to protect traditionally disadvantaged groups and nonmarket values” and make interpretive decisions that strive to “further political equality”).

⁴ As Justice Ginsburg noted in her 2019 Frank and Kula Kumpuris Distinguished Lecture: “Think about how things were in 1787. Who were ‘We the people’? Certainly not people who were held in human bondage because the original Constitution preserves slavery. Certainly not women whatever their color and not even men who own no property. It was a rather elite group, ‘We the people,’ but I think the genius of our Constitution is what Justice Thurgood Marshall said. He said he doesn’t celebrate the original Constitution but he does celebrate what the Constitution has become, now well over two centuries. That is the concept of ‘We the people’ has become ever more inclusive. People who were left out at the beginning – slaves, women, men without property, Native Americans – were not part of ‘We the people.’ Now all the once left out people are part of our political constituency. We are certainly a more perfect union as a result of that.”

Ruth Bader Ginsburg, J., Frank and Kula Kumpuris Distinguished Lecture (Sept. 3, 2019).

⁵ See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting); see also Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 324 (1979).

⁶ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 625 (2009) (Ginsburg, J., dissenting) (critiquing the majority for “show[ing] little attention to Congress’ design” in Title VII and failing “to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose” (quoting *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631–32 (1973))); see also Marc Spindelman, *Toward a Progressive Perspective on Justice Ginsburg’s Constitution*, 70 OHIO ST. L.J. 1115, 1119 (2009) (noting how Justice Ginsburg’s constitutional vision places emphasis on how “the political branches of government—and so, through them, in a sense, the American people—are to take up their rightful place in constitutional conversation”).

⁷ See Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 127 HARV. L. REV. 437, 443 (2013) (describing Justice Ginsburg’s work as “demosprudential” insofar as it “invited a wider audience into the conversation” and “linked public engagement with insti-

dates three aspects of that jurisprudence: what work it understands legislation to do in the polity, how it understands the authority of Congress to make law, and how it interprets the authority of the people to innovate on the lawmaking process itself. In closing, the Essay contrasts Justice Ginsburg's jurisprudential approach with the kabuki republic of *United States v. Arthrex*,⁸ perhaps the first time in which the loss of Justice Ginsburg on the Court changed the outcome of a case.

I. THE ROLE OF STATUTES

Statutory interpretation is often presented as a matter of how to read words.⁹ But in the hard cases it requires a normative account of what role legislation can and should play in the polity.¹⁰ Justice Ginsburg's republican jurisprudence sought to make good on the potential for the people, working through our representative institutions, to make legislation an engine of social change. She regarded statutes as a central means for the people to advance the value of political equality.¹¹

Statutes are imperfect instruments promulgated in imperfect ways. But in a representative democracy, legislation is the best tool we have to translate hard-fought political changes to the substance of a multiracial democracy and the content of a more egalitarian polity into the nation's lived experience.¹² When lawyers and jurists turn statutory interpretation into a game of textualist gotcha, they render the state less answerable to the people.¹³

tutional legitimacy" and so emphasized how "the Constitution belongs to the people, not just to the Supreme Court").

⁸ 141 S. Ct. 1970 (2021).

⁹ Justice Kagan famously remarked that "[w]e are all textualists now." Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=DPEtszFT0Tg> [<https://perma.cc/RE4H-HLHE>].

¹⁰ Cf. Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 Nw. L. REV. 269, 303–04 (2019).

¹¹ See Amanda L. Tyler, *Lessons Learned from Justice Ruth Bader Ginsburg*, 121 COLUM. L. REV. 741, 752 (2021) ("[T]he Justice did not believe that looking to the courts was the only way—or even always the best way—to achieve meaningful, progressive change. . . . [L]egislation was the preferred course for securing change.").

¹² Cf. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545–46 (1947).

¹³ Cf. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 595 (1995) (theorizing ways judges can use discretion in statutory interpretation to preserve, reconstruct, complement, or discipline politics and thus "advanc[e] a larger democratic project").

Justice Ginsburg wrote against a kind of *work-to-rule textualism* that Justice Scalia and others brought into the heartland of statutory interpretation.¹⁴ In the labor context, work to rule is a form of industrial action wherein workers, by employing an unrealistically literalistic interpretation of governing contracts or rules, actively seek to undermine workplace efficacy or otherwise incapacitate production.¹⁵ There is an analogous type of textualism that has gained traction in the current Court: an unrealistically rigid and cramped view of text that is deliberately undermining or incapacitating.¹⁶

On this approach, textualism becomes a way for lawyers and jurists to actively impede the efficacy of statutes by making them unrealistically literalistic.¹⁷ While work to rule in the labor context uses a kind of undermining literalism as a strategy to exercise collective power to improve conditions,¹⁸ however, here undermining literalism serves nearly the opposite end: to take power away from the people through the stingy reading of statutes. Indeed, this form of textualism is often used to impede hard-fought legal changes to workplace conditions and other statutory advancements of political equality.¹⁹ Work-to-rule textualism thus builds antirepublican power; it is a way for lawyers and jurists to actively undermine the authority of the people reflected in legislation.²⁰

Justice Ginsburg's legacy includes a repudiation of this type of textualism as a threat to republican self-rule. To illustrate, consider Justice Ginsburg's dissent in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*²¹ The case concerned the ability of Title VII to remediate pay

¹⁴ Cf. Diarmuid F. O'Scannlain, "We Are All Textualists Now": *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304–06 (2017) (tracing Justice Scalia's influence on statutory interpretation).

¹⁵ See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 90–91 (2009) ("[W]orkers bring an enterprise to a halt by refusing to cut the corners necessary for things to function smoothly.").

¹⁶ Cf. Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 120–21 (2009).

¹⁷ See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 290 (1990) (critiquing "wooden literalism").

¹⁸ See Marc J. Bloch & Scott A. Moorman, *Working to Rule and Other Alternate Job Actions*, 9 LABOR L. 169, 177–78 (1993).

¹⁹ See, e.g., Ruth Bader Ginsburg & Susan Deller Ross, *Pregnancy and Discrimination*, N.Y. TIMES (Jan. 25, 1977), <https://www.nytimes.com/1977/01/25/archives/pregnancy-and-discrimination.html> [<https://perma.cc/GVM2-STMD>] (arguing—as an advocate, prior to her appointment as a justice—that the court's narrow reading of the statute "leaves a gaping hole" in women's protection against pregnancy discrimination).

²⁰ See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992).

²¹ 550 U.S. 618 (2007).

discrimination in the workplace.²² Title VII provides that a charge of discrimination “shall be filed within [180] days after the alleged unlawful employment practice occurred.”²³ A majority of the Court held that any annual pay decision not contested within 180 days becomes, as Justice Ginsburg put it in dissent, “a *fait accompli*” beyond the reach of Title VII to repair.²⁴ Such an interpretation, Justice Ginsburg apprehended, guts the remedial statute in a context in which it is most sorely needed: to address discrimination that has quietly fed on itself over time.²⁵

To give meaning to a statute designed to remediate workplace discrimination, Justice Ginsburg reasoned, a court must be attuned to how such discrimination in fact unfolds.²⁶ “The Court’s insistence on immediate contest,” Justice Ginsburg cautioned, “overlooks common characteristics” of discriminatory pay²⁷:

It is only when the disparity becomes apparent and sizable, e.g., through future raises calculated as a percentage of current salaries, that an employee . . . is likely to comprehend her plight and, therefore, to complain. Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.²⁸

This context is necessary for a judge to understand how discrimination stealthily grows in the workplace. And it makes possible a construction of Title VII that regards every paycheck as *itself* an act of discriminatory pay because it “delivers less to a woman than to a similarly situated man.”²⁹ By contrast, the Court’s “cramped interpretation” of the statute was not truer to Title VII’s words.³⁰ It was simply more obtuse about the meaning that those words could have in the context of a remedial regime addressed to discrimination on the basis of sex.³¹ The Court’s cramped reading thus impeded Title VII’s ability to effectively address discrimination in the workplace.

²² See *id.* at 643.

²³ 42 U.S.C. § 2000e-5(e)(1).

²⁴ *Ledbetter*, 550 U.S. at 644 (Ginsburg, J., dissenting).

²⁵ See *id.* at 645.

²⁶ See *id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 661.

³¹ See Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 6–7 (2010) (“The Court’s ruling, I observed for the four dissenters, ignored real-world employment practices that Title VII was meant to govern . . . [It] could not be what Congress intended when,

Justice Ginsburg's more contextualist account of statutes must not be confused with an inattention to detail. Justice Ginsburg was the most precise writer I have ever encountered. In her own writing, she pored over every word, often revisiting an important line to ensure that there was no more precise formulation. When we clerks would hand in a draft opinion, we could expect to get it back with big red circles—around ideas, around particular words, even around semicolons. Justice Ginsburg was scrupulous; she strove to make her written work concise, exact, and—at the level of each and every word—deliberate and compelling.³²

But Justice Ginsburg did not scrutinize *statutory* language under the same grammarian magnifying glass.³³ For she understood—and her former law clerk Abbe Gluck has shown through painstaking research³⁴—that this is simply not how a collective and complex institution like Congress actually drafts.³⁵ At least as important, Justice Ginsburg recognized that we cannot comprehend the social change a statute aims to effectuate by looking at words on the page alone.³⁶ If statutes are policy instruments, we have to understand the social problems and policy debates at stake.

Perhaps most fundamentally, Justice Ginsburg understood that Congress *needs* the courts to implement or enforce its legislation. This is what makes work-to-rule textualism so pernicious. By dogmatically hewing to literalistic meaning or the stingy interpretation of text, the Court in a case like *Ledbetter* is effectively refusing to put antidis-

in Title VII, it outlawed discrimination based on race, color, religion, sex, or national origin in our Nation's workplaces.”).

³² Daphna Renan, *In Memoriam: Justice Ginsburg*, 134 HARV. L. REV. 899, 900 (2021); see also Tyler, *supra* note 11 at 745 (“Justice Ginsburg was precise in everything she did . . . [H]er law clerks will tell you that she taught us to go over *every single word* to ensure that it was accomplishing something in an opinion.”).

³³ Cf. *W. Va. Univ. Hosps. Inc. v. Casey*, 499 U.S. 83, 113 (1991) (Stevens, J. dissenting) (arguing that “when the Court has put on its thick grammarian’s spectacles” it has adopted interpretations inconsistent with congressional intent).

³⁴ See generally Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pts. I & II), 65 STAN. L. REV. 901 (2013), 66 STAN. L. REV. 725 (2014); Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020).

³⁵ See Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1421 (1987) (“Congress may intend to be precise, yet fail for want of a grammarian.”).

³⁶ See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1640 (2018) (Ginsburg, J., dissenting) (“[T]he Court ignores the reality that sparked the NLRA’s passage”); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2400 (2020) (Ginsburg, J., dissenting) (arguing for statutory interpretation contextualized to the Affordable Care Act’s protections of women’s access to contraceptive care).

crimination legislation to work.³⁷ There is nothing neutral or minimalist about this form of interpretation. It is subversive: Work-to-rule textualism undermines the power and authority of Congress to create effective governance institutions like Title VII. It is a way to inhibit government from within the four corners of enacted law³⁸—and to impose limits on government power beyond those that constitutional law makes available.³⁹ Used in this way, textualism becomes deeply antistatist.

To ignore context in the name of textualism is thus to impoverish crucial instruments of policy and governance in a democratic republic.⁴⁰ This is not about magical thinking about what was in the unitary mind of a composite body like Congress. It is about what normative role statutes can meaningfully play in society, and the role of courts in effectuating the will of the people reflected in legislation.⁴¹ On Justice Ginsburg's account, statutes constitute the small-c constitution: they construct and revise the substance of our constitutional commitment to political equality.⁴² Rather than protect legislative supremacy,

³⁷ In her Stevens Lecture at the University of Colorado, Justice Ginsburg remarked: "My dissent [in *Ledbetter*] said basically, 'Congress, you wrote a law that says thou shalt not discriminate on the basis of sex in employment. Surely, you meant Lilly Ledbetter's case to be covered. My colleagues have given a parsimonious reading to this law.' My statement ended, 'The ball is now in Congress's court to correct what I see as a misperception by my colleagues of the will of Congress.'"

Ruth Bader Ginsburg, *A Conversation with Justice Ruth Bader Ginsburg*, 84 U. COLO. L. REV. 909, 926 (2013).

³⁸ Cf. Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 842 (2015) (analyzing the phenomenon of "uncivil obedience" and arguing that it "manages to provoke through and within the law by exploiting gaps between the letter of legal directives and the customs or purposes associated with them").

³⁹ Similar critiques have been made about substantive canons of statutory interpretation, such as federalism "clear statement" rules, which limit Congress's practical ability to govern in ways that constitutional law would not restrict. See generally JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION & REGULATION: CASES AND MATERIALS* 425–27 (4th ed. 2021).

⁴⁰ See Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 425–37, 453–61 (1988); cf. Note, *Textualism's Mistake*, 135 HARV. L. REV. 890, 910–11 (2022).

⁴¹ Cf. Julie C. Suk, "A More Egalitarian Relationship at Home and at Work": Justice Ginsburg's Dissent in *Coleman v. Court of Appeals of Maryland*, 127 HARV. L. REV. 473, 477 (2013) ("Justice Ginsburg's *Coleman* dissent . . . illustrates . . . her ongoing commitment to a comprehensive gender equality, which will arrive not only through the enforcement of rights by courts, but also through a democratic constitutionalism that can be supported, reframed, and encouraged by a wise judicial voice."); Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 127 HARV. L. REV. 437, 439 (2013) (discussing Ginsburg's *Ledbetter* dissent as a "democratizing form of judicial speech . . . [that] engage[d] an external audience in a conversation about our country's commitment to equal pay for equal work" and noting that Ginsburg herself described this dissent as "[s]peaking to Congress.").

⁴² See Goodwin Liu, *Reflections on RBG: Mentor, Friend, Hero*, 121 COLUM. L. REV. 609,

judges impede the normative potential of legislation when they embrace a cramped view of decontextualized text.

II. THE AUTHORITY OF CONGRESS

The problem is not limited to how jurists read the statutes that Congress enacts. It is also about how jurists construe Congress's authority to construct a more egalitarian polity through legislation. Justice Ginsburg's jurisprudence emphasized that the people empowered Congress to construct a more equal citizenry through the Reconstruction Amendments. Her opinions locate in those Amendments, moreover, the constitutional authority *for Congress* to decide what a more egalitarian polity should look like. To collapse the nature of discrimination, and the scope of permissible state responses to it, into an exercise of judicial literalism, Justice Ginsburg cautioned, is to extinguish the constitutional imagination of "We the People" in the pursuit of equal citizenship.⁴³

The power of the people to elaborate on the idea of equality through their representative institutions is at the crux of Justice Ginsburg's dissents in *Coleman v. Court of Appeals of Maryland*⁴⁴ and *Shelby County v. Holder*.⁴⁵ In *Coleman*, the Court considered the self-care provision of the Family and Medical Leave Act,⁴⁶ which entitles eligible employees to job-secured leave where the employee has a serious health condition that makes her unable to do her job.⁴⁷ A majority of the Court held that the self-care provision did not address sex discrimination and, as a result, that Congress lacked the authority to enact the provision under section five of the Fourteenth Amendment.⁴⁸

But to understand the policy decision encapsulated in the self-care provision, Justice Ginsburg argued in dissent, requires under-

612–13 (2021) (describing how Justice Ginsburg conceived of statutes, especially those countering discrimination, as advancing a "vision of equal citizenship"); *see also* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 77 (2013) (arguing that the small-c constitution, anchored in legislation, is more capable than the U.S. Constitution alone of advancing the "nation's fundamental commitments").

⁴³ See Annenberg Classroom, *A Conversation on the Constitution: The Fourteenth Amendment*, YOUTUBE (Sept. 13, 2018), <https://www.youtube.com/watch?v=9m4E60pXFgs&t=117s> [<https://perma.cc/APF9-QB5C>]; *see also* Guinier, *supra* note 7, at 443.

⁴⁴ 566 U.S. 30 (2012).

⁴⁵ 570 U.S. 529 (2013).

⁴⁶ Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381–6387, 29 U.S.C. §§ 2601–2654.

⁴⁷ *See Coleman*, 566 U.S. at 33.

⁴⁸ *See id.* at 36–37.

standing the underlying policy debates, in particular, the disagreement between “equal treatment” and “special treatment” feminists about how to combat effectively gender discrimination in the workplace—lines of disagreement initially forged in the context of pregnancy discrimination.⁴⁹ In contrast with special-treatment feminists, equal-treatment feminists “believe[d] that viewing pregnancy as *sui generis* perpetuated widespread discrimination against women”; for this reason, equal-treatment feminists advanced the goal of gender-neutral leave protections.⁵⁰ In enacting the Family Medical Leave Act’s self-care provision, Congress implemented equal-treatment feminists’ policy vision.⁵¹

Drawing on evidence in the Senate Committee Report, Justice Ginsburg showed how the self-care provision “[a]dhere[d] to equal-treatment feminists’ aim . . . [by] prescrib[ing] comprehensive leave for women disabled during pregnancy or while recuperating from childbirth—without singling out pregnancy or childbirth.”⁵² Once the policy disagreement between equal-treatment and special-treatment feminists is properly understood, Justice Ginsburg urged, “it is impossible to conclude that ‘nothing in particular about self-care leave . . . connects it to gender discrimination.’”⁵³ Justice Ginsburg thus drew on the legislative history, not to pretend that Congress has a unitary mind but to show that Congress enacted the Family Medical Leave Act in the context of a particular policy debate—context relevant to an informed understanding of the gender-neutral language of the statute.⁵⁴

By contrast, the *Coleman* plurality’s decision to focus instead on the gender-neutral face of the statute “pa[id] scant attention” to a hard-fought political win: a statute reflecting the vision of equal-treat-

49 See Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 325–27 (1984); see also Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1221 (1986) (explaining and challenging this dichotomy). Justice Ginsburg was particularly attuned to the nature of these debates given her work prior to joining the bench as an advocate, see Tyler, *supra* note 11, at 752–54, and her contributions as a scholar, see Ruth Bader Ginsburg, *Some Thoughts on the 1980’s Debate over Special Versus Equal Treatment for Women*, 4 L. & INEQ. 143, 144–45 (1986).

50 *Coleman*, 566 U.S. at 49 (Ginsburg, J., dissenting).

51 Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279, 279 (1998) (describing the debate and how “equal treatment forces mobilized to gain passage of the [Family and Medical Leave Act]”).

52 *Coleman*, 566 U.S. at 49–51 (Ginsburg, J., dissenting).

53 *Id.* at 51 (Ginsburg, J., dissenting).

54 See generally Suk, *supra* note 41.

ment feminists about how to create a more equitable workplace.⁵⁵ It wiped that policy perspective off the table as a viable means to construct a more egalitarian polity.

A respect for statutes—or what Jeremy Waldron has called the “dignity of legislation”—entails instead the recognition that statutes achieve social change “*in the circumstances of politics*,” including the circumstances of deep policy disagreement.⁵⁶ Legislation does not claim respect “as an intimation of what an ideal society would be like,” but rather because it reflects the capacity to act collectively even in the face of genuine disagreement about what that ideal society *should* entail.⁵⁷ Recognizing the goals of equal-treatment feminists and how they informed the policy debate casts the legislation enacted in a different light; it enables the jurist to respect the legislative bargain rather than to rewrite it.

Coleman concerned Congress’s authority to enforce, by appropriate legislation, the Fourteenth Amendment’s commitment to equal protection. *Shelby County* addressed Congress’s authority, under the Fifteenth Amendment, to safeguard the franchise from race discrimination through the Voting Rights Act.⁵⁸

The question presented in *Shelby County*, as Justice Ginsburg pressed in dissent, “is who decides whether . . . § 5 [of the Voting Rights Act] remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments ‘by appropriate legislation.’”⁵⁹ In enacting the Voting Rights Act, and creating—through its preclearance regime—an instrument to address discrimination in a more systematic fashion, Congress engaged in “one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation’s history.”⁶⁰ Congress chose to reauthorize the Voting Rights Act, first, to “facilitate completion of the impressive gains thus far made” and, second, to “guard against backsliding.”⁶¹ Congress’s decision—reached with “great care and seriousness”⁶²—warranted the Court’s “unstinting approbation.”⁶³

⁵⁵ *Coleman*, 566 U.S. at 65 (Ginsburg, J., dissenting).

⁵⁶ JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 156–57 (1999) (emphasis added).

⁵⁷ *Id.*

⁵⁸ See generally James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote*: *Shelby County v. Holder*, 8 HARV. L. & POL’Y REV. 39 (2014).

⁵⁹ *Shelby Cnty. v. Holder*, 570 U.S. 529, 559 (2013) (Ginsburg, J., dissenting).

⁶⁰ *Id.* at 562.

⁶¹ *Id.* at 559–60.

⁶² *Id.* at 580.

But instead a majority of the Court chose to second-guess Congress's policy judgment and to put an end to the Voting Rights Act's more systematic protections. A republican jurisprudence, Justice Ginsburg urged, would "have left the matter where it belongs: in Congress' bailiwick."⁶⁴

Jurisprudentially, her dissent is a powerful argument for *McCulloch* deference⁶⁵—here, anchored in the Fifteenth Amendment⁶⁶ and sensitive to the ways in which the Amendment itself advances the logic of *McCulloch* in the context of Reconstruction's distinctive aims.⁶⁷ For Justice Ginsburg, the people, working through their representative institutions, can achieve grand aims. And the "grand aim" of the Voting Rights Act was "to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race."⁶⁸

III. THE AUTHORITY OF THE PEOPLE TO INNOVATE ON LAWMAKING

Justice Ginsburg's republican jurisprudence thus centered the authority of the people to speak through their representative institutions in the lawmaking process. But it also emphasized the authority of the people to innovate on the lawmaking process itself.

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,⁶⁹ Justice Ginsburg—writing this time for a majority of the Court—rejected a "wooden interpretation" of the Elections Clause that would have prohibited redistricting by independent commission.⁷⁰ Rather, Justice Ginsburg emphasized that "the animating principle of our Constitution" is that "the people themselves are the originating source of all the powers of government."⁷¹ Even if the initiative and the referendum "were not yet in our democracy's arsenal" when the Elections Clause was drafted, the Clause should not be read "to disarm States from adopting modes of legislation that place the lead rein in the people's hands."⁷²

⁶³ *Id.* at 560.

⁶⁴ *Id.* at 590.

⁶⁵ See John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 10–15 (2014) (describing the "*McCulloch* theory of structural constitutional law" and tracing the Court's uses of "*McCulloch* deference" over time).

⁶⁶ *Shelby Cnty.*, 570 U.S. at 567–68.

⁶⁷ See *id.* at 568; cf. Manning, *supra* note 65, at 10–15.

⁶⁸ *Shelby Cnty.*, 570 U.S. at 592 (Ginsburg, J., dissenting).

⁶⁹ 576 U.S. 787 (2015).

⁷⁰ *Id.* at 813.

⁷¹ *Id.*

⁷² *Id.* at 816.

The Elections Clause of the Constitution provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations”⁷³ In 2000, Arizona voters adopted an initiative, Proposition 106, that amended the State constitution to remove redistricting authority from the State legislature and vest it instead in an independent commission.⁷⁴ The Arizona Legislature brought suit, arguing that the commission and its maps for congressional districts violated the federal Elections Clause.⁷⁵ In particular, the Arizona Legislature alleged that “[t]he word ‘Legislature’ in the Elections Clause means [specifically and only] the representative body which makes the laws of the people.”⁷⁶

Justice Ginsburg rejected this rigid textualism as an unjustified constraint on the constitutional meaning of lawmaking and its evolving forms. Underscoring the republican commitment at the crux of her approach, Justice Ginsburg elaborated:

The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution’s conception of the people as the font of governmental power. As Madison put it: “The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted [sic] with it should be kept in dependence on the people.”⁷⁷

She continued:

The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have “an habitual recollection of their dependence on the people.” In so acting, Arizona voters sought to restore “the core principle of republican government,” namely, “that the voters should choose their representatives, not the other way around.”⁷⁸

⁷³ U.S. CONST. art. I, § 4, cl. 1.

⁷⁴ See *Ariz. State Legis.*, 576 U.S. at 792.

⁷⁵ See *id.*

⁷⁶ *Id.* (quoting Compl., app. 21, ¶ 37) (alteration in original).

⁷⁷ *Id.* at 819 (first alteration in original) (quoting THE FEDERALIST No. 37, 227 (James Madison)).

⁷⁸ *Id.* at 824 (citation omitted) (first quoting THE FEDERALIST No. 57, 352 (James

Justice Ginsburg thus advanced a republican jurisprudence—a vision of a Court capable of enabling the political process to constitute, and, as importantly, to reform, the institutions of American democracy.⁷⁹ This deference to the people as lawmakers led Justice Ginsburg to reject the current Court’s high textualism. It called for a more subtle appreciation of the normative role of lawmaking in a constitutional democracy, as an imperfect but crucial engine of social change. As importantly, it called for judges to defer to those who exercise the lawmaking power in the name of the people on the complex and deeply contested questions of state design.⁸⁰

CODA: A KABUKI REPUBLIC

Arthrex is perhaps the first case in which Justice Ginsburg’s absence from the Court was decisive for the outcome. And it offers a striking contrast to the republican principles at the crux of Justice Ginsburg’s approach. The case concerned the question whether the statutorily prescribed appointment of Administrative Patent Judges by their agency head (the Secretary of Commerce) complied with the Appointments Clause of Article II.⁸¹ That Clause explicitly authorizes “Congress . . . by [l]aw [to] vest the [a]ppointment of such inferior [o]fficers, as they think proper, . . . in the Heads of Departments.”⁸²

If the Court had applied Justice Ginsburg’s republican approach, reflected in cases like *Shelby County* and *Coleman*,⁸³ it would have deferred to the more democratic judgment of the representative branches.⁸⁴ The decision to locate in the agency head the appointment of administrative patent judges would have been an especially easy case, for it accords with the discretion constitutionally allocated to Congress in Article II to structure a working government.⁸⁵

Madison); then quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005)).

⁷⁹ Cf. Michelman, *supra* note 2.

⁸⁰ See generally Bowie & Renan, *supra* note 2.

⁸¹ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1976 (2021).

⁸² U.S. CONST. art. II, § 2 (emphasis added).

⁸³ Cf. *Bank Markazi v. Peterson*, 578 U.S. 212, 236 (2016) (“By altering the law governing the attachment of particular property belonging to Iran, Congress acted comfortably within the political branches’ authority over foreign sovereign immunity and foreign-state assets.”).

⁸⁴ Justice Breyer in dissent suggested such an approach: “The words ‘by Law . . . as they think proper’ strongly suggest that Congress has considerable freedom to determine the nature of an inferior officer’s job, and that courts ought to respect that judgment.” *Arthrex*, 141 S. Ct. at 1988 (Breyer, J., concurring in judgment in part and dissenting in part) (citing *Lucia v. SEC*, 138 S. Ct. 2004, 2062 (2018) (Breyer, J., concurring in judgment in part and dissenting in part)) (alteration in original).

⁸⁵ U.S. CONST. art. II, § 2, cl. 2 (“Congress may by Law vest the Appointment of such

Instead, a majority of the Court overruled that more democratic judgment articulated in legislation—all in the name of democratic accountability. “Today, thousands of officers wield executive power on behalf of the President in the name of the United States,” wrote Chief Justice Roberts; “That power acquires its legitimacy and accountability to the public [only] through ‘a clear and effective chain of command’ down from the President, on whom all the people vote.”⁸⁶

This kabuki republic was too much for Justice Thomas, who wrote for four Justices in dissent: “For the very first time, this Court holds that Congress violated the Constitution by vesting the appointment of a federal officer in the head of a department.”⁸⁷ Yet “[t]he Executive Branch is large, and the hierarchical path from President to administrative patent judge is long.”⁸⁸ A proper understanding of the judicial role should have resulted in the “Court deferring to Congress’ choice of which constitutional appointment process works best.”⁸⁹ If Justice Ginsburg were still on the Court, this more deferential approach to the judgment of the political branches almost certainly would have garnered a majority.⁹⁰

What makes *Arthrex* all the more stunning is that, even as it struck down an institutional arrangement reached through the democratic process of lawmaking, the Court itself was unable to arrive at a majority position on what the separation of powers requires. Justice Gorsuch, who joined the Chief Justice’s plurality to strike down the statute as unconstitutional, believed that the Court’s chosen remedy *itself* created a different separation of powers problem.⁹¹ The plurality ruled that the statute “cannot constitutionally be enforced to the extent that its requirements prevent the Director [of the Patent Trial and Appeal Board] from reviewing final decisions rendered by APJs” because, in the Court’s view, this was inconsistent with the constitutional

inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

⁸⁶ *Arthrex*, 141 S. Ct. at 1979 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010)).

⁸⁷ *Id.* at 1997–98 (Thomas, J., dissenting).

⁸⁸ *Id.* at 1998.

⁸⁹ *Id.* at 1999.

⁹⁰ Cf. James Brudney, *The Supreme Court as Interstitial Actor: Justice Ginsburg’s Eclectic Approach to Statutory Interpretation*, 70 OHIO STATE L.J. 889, 924–25 (2009) (arguing Justice Ginsburg’s approach to statutory interpretation reflects a commitment to “fostering institutional dialogue and interbranch sensitivity”).

⁹¹ See *Arthrex*, 141 S. Ct. at 1988, 1990–92 (Gorsuch, J., concurring in part and dissenting in part).

appointment process for APJs.⁹² For Justice Gorsuch, however, this remedy was *also* a separation of powers violation because it amounted to the judicial seizure of legislative power.⁹³

Even as the Court failed itself to reach a majority position on what the separation of powers should tolerate, it nonetheless overrode the majority view of the political branches on the same question. Put differently, the Court ruled that the separation of powers was sufficiently rigid and precise to reject the administrative structure chosen by the representative institutions of American democracy, even as the Court itself could not even get to a majority view on what such a rigid and precise separation of powers would legally entail.

Such a ruling is anathema to Justice Ginsburg's republican jurisprudence. In the name of democratic accountability and political legitimacy, it impedes the ability of the people, working through the representative branches, to design a democratically legitimate government.⁹⁴

⁹² *Id.* at 1987.

⁹³ *See id.* at 1988, 1990–92 (Gorsuch, J., concurring in part and dissenting in part).

⁹⁴ *See generally* Bowie & Renan, *supra* note 2.

The Discrete Charm of Leveling Down

Aziz Z. Huq*

ABSTRACT

Starting from Justice Ginsburg’s 2017 opinion in Sessions v. Morales-Santana, this Article explores the choice between “leveling up” and “leveling down” as a judicial response to an unlawful difference in the legal or regulatory treatment of two distinct groups. That problem can arise in the Equal Protection, Free Speech, Free Exercise, and dormant Commerce Clause contexts. But it has come to the fore in the equality and speech contexts of late. My analysis starts by developing the idea of a leveling-down disposition in the context of a constitutional equality claim. After exploring analogies in other areas of constitutional law, I then turn to two alternative ways of analyzing and evaluating the leveling-down disposition as a remedy for an inequality—one through the lens of Article III standing doctrine, and the other by reference to severability doctrine—to suggest that both are inadequate. This Article offers two ways in which a leveling-down disposition can be derived from a constitutional theory of equality. While hardly unproblematic, leveling down has greater merit than previously recognized. I conclude by flagging an “exit” from the seemingly dichotomous choice between leveling up and leveling down.

TABLE OF CONTENTS

INTRODUCTION	1488
I. THE LEVELING-DOWN DISPOSITION IN CONSTITUTIONAL EQUALITY LAW	1493
A. <i>Defining Leveling Down</i>	1493
B. <i>Illustrating Leveling Down</i>	1496
1. The Roberts Court and Leveling Down	1498
2. Retroactivity as Leveling Down	1501
C. <i>Criticizing Leveling Down</i>	1505
II. CLARIFYING THE PROBLEMS IMPLICATED IN A LEVELING-DOWN DISPOSITION	1509
A. <i>Leveling Down and Severability Analysis Reconsidered</i>	1510
B. <i>Reconsidering the Litigation Incentive and Parfit’s Leveling-Down Objections</i>	1515
III. THE (MODEST) CASE FOR LEVELING DOWN	1520

* Frank and Bernice Greenberg Professor of Law, University of Chicago Law School. My thanks to Mike Seidman for insightful feedback, and for the editors for their excellent work; all errors are mine. The Frank Cicero, Jr. Faculty Fund provided research support.

A. <i>Leveling Down as Antibalkanization</i>	1521
B. <i>Leveling Down as Antisubordination</i>	1524
CONCLUSION	1529

INTRODUCTION

The final opinion on constitutional equality written by Justice Ruth Bader Ginsburg was handed down in 2017, some three years before her death.¹ Her reasoning there at first blush delighted, but then dismayed, many of her erstwhile admirers. The underlying case concerned a complicated federal law governing how U.S. citizenship can be acquired by a child born overseas to only one American parent.² Under the provision at issue in the case,³ an American father had to show ten years' physical presence in the United States in order to transmit his citizenship to his child.⁴ In contrast, an American mother needed to demonstrate just one such year.⁵ The father of respondent Luis Ramón Morales-Santana fell short of a decade's presence by just twenty days.⁶ Upon being placed into immigration proceedings pending removal to the Dominican Republic, Morales-Santana objected on the ground that the gender gap in physical-presence prerequisites violated the Equal Protection component of the Fifth Amendment.⁷ As a result, he contended that his expulsion could not proceed simply because he could not show that his father had complied with that lopsided statutory command; instead, he was eligible for citizenship.⁸

The Supreme Court, with Justice Ginsburg wielding the pen for a six-Justice majority, began by embracing Morales-Santana's theory of constitutional equality.⁹ In a brilliant scherzo, Justice Ginsburg reca-

¹ *Biography of Associate Justice Ruth Bader Ginsburg*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographyginsburg.aspx> [<https://perma.cc/6VMS-ARDT>]; see *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

² *Morales-Santana*, 137 S. Ct. at 1686.

³ One of several. Other provisions had been at issue in *Nguyen v. INS*, 533 U.S. 53, 58 (2001), and *Miller v. Albright*, 523 U.S. 420, 420–21 (1998).

⁴ *Morales-Santana*, 137 S. Ct. at 1686.

⁵ See 8 U.S.C. §§ 1401(g), 1409(c) (2012).

⁶ *Morales-Santana*, 137 S. Ct. at 1686.

⁷ *Id.*

⁸ Morales-Santana sued to enforce the constitutional right of his deceased father to equal protection under familiar third-party standing rules. See *id.* at 1688–89. For the balance of this Article, I ignore that complication and talk of Morales-Santana's equality interests for the sake of simplicity.

⁹ See *id.* at 1685–86. In a concurrence in the judgment joined by Justice Alito, Justice Thomas opined that “[b]ecause respondent cannot obtain relief in any event, it is unnecessary for us to decide whether the 1952 version of the INA was constitutional” *Id.* at 1701 (Thomas, J., concurring in the judgment).

pitulated in short order her key victories as an advocate and then as a jurist respecting gender equality, before applying the rule that legislative gender classifications require an “exceedingly persuasive justification.”¹⁰ Such a justification was woefully wanting when it came to the challenged immigration provision, the majority opinion explained, given its origin in “an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are.”¹¹

But then, in a swift antiphonal swerve, Justice Ginsburg pulled back the prize that Morales-Santana sought when he first filed his legal challenge.¹² Rather than “level up” citizen fathers to the one-year physical residency rule for citizen mothers, her opinion “leveled down” by extending the ten-year physical presence requirement to children of both citizen fathers and citizen mothers alike.¹³ In consequence, not only Morales-Santana but also citizenship applicants who would have previously prevailed under the law found themselves barred from citizenship. Framing the matter as controlled by inferred congressional intent, Justice Ginsburg posited that “[p]ut to the choice, Congress . . . would have abrogated [the citizen-mother] exception, preferring preservation of the general rule” of ten-years’ physical presence.¹⁴ Not only would the claimant Morales-Santana continue to face deportation to the Dominican Republic, but the children of citizen mothers born overseas in the time period covered by the provision¹⁵—non-parties to the case—suddenly found themselves

¹⁰ *Id.* at 1690 (quoting, *inter alia*, *United States v. Virginia*, 518 U.S. 515, 524 (1996)). In 1996, Chief Justice Rehnquist caviled at the language of “exceedingly persuasive justification.” *United States v. Virginia*, 518 U.S. at 559 (Rehnquist, C.J., concurring) (“[T]he phrase ‘exceedingly persuasive justification’ . . . is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself.”). By 2017, it was unequivocally “a formulation of the test itself.” *Id.*

¹¹ *Morales-Santana*, 137 S. Ct. at 1689. The Court explored at length the reasons for the seemingly beneficial treatment of unwed mothers. It ranked that measure as one of many “[l]aws according or denying benefits in reliance on ‘[s]tereotypes about women’s domestic roles,’ . . . [which] ‘creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver.’” *Id.* at 1693 (alteration in original) (quoting *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003)).

¹² *Id.* at 1700–01. The Solicitor General, on behalf of the United States, argued in favor of a leveling-down remedy in the event the Court found a constitutional violation—albeit on different grounds from the Court’s argument. Brief for the Petitioner at 51, *Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191) (arguing that leveling down was necessary “to preserve the degree of flexibility necessary for Congress to address the problem, balancing competing interests while exercising its exclusive authority over naturalization”).

¹³ See *Morales-Santana*, 137 S. Ct. at 1686.

¹⁴ *Id.* at 1700.

¹⁵ See *id.* at 1687, 1687 n.3 (characterizing temporal scope of the regime challenged by Morales-Santana).

laboring under a new, more minatory regulatory regime. Equality in *Morales-Santana* made no one better off. More startlingly, the decision made some nonparties worse off.

To many supporters of gender equality, the Court's leveling-down disposal in the *Morales-Santana* case was cause for dismay.¹⁶ Ardent welfarists of a Benthamite bent might have felt the same way: What justifies litigation if the ultimate remedy is to make everyone worse off? Indeed, whenever the leveling-down disposition has been applied in cases involving one of the Constitution's equality commands—for example, the Equal Protection Clause, the First Amendment, or the dormant Commerce Clause—it has predictably prompted stern disapproval from most commentators.¹⁷ Leveling down is seen as a disposition sharply at odds with the core normative project of equality under the Constitution.

Yet Justice Ginsburg's decision not only to join in that result, but even to write for a majority that included both liberals and conservatives, suggests that there is something more at work.¹⁸ To begin with, the disposition of *Morales-Santana* cannot plausibly be ascribed to its author's indifference to the plight of the marginalized at the sharp end of state coercion. To the contrary, those who worked with Justice Ginsburg know that her approach to adjudication was always inflected not just by unstinting precision and precedential fidelity in the crafting of legal doctrine—even when demurring to the relevant precedent—but also by a keenly felt sense of the specific burdens and pains shouldered by the particular litigants whose cases reached the Court.¹⁹ It strains credulity to suggest she was unaware or indifferent to the

¹⁶ For immediate responses, see, for example, Deborah L. Brake, *Remedial Grief: Leveling Down in Sessions v. Morales-Santana*, L. PROFESSOR BLOGS NETWORK: HUMAN RIGHTS AT HOME BLOG (June 14, 2017), http://lawprofessors.typepad.com/human_rights/2017/06/remedial-grief-leveling-down-in-sessions-v-morales-santana.html [<https://perma.cc/7VSS-6PG7>] (discussing the remedy ordered in the *Morales-Santana* decision as “a classic example of leveling down” that can make everyone worse off); Michael Dorf, *Equal Protection and Leveling Down as Schadenfreude*, DORF ON L. (June 14, 2017), <http://www.dorfonlaw.org/2017/06/equal-protection-and-leveling-down-as.html> [<https://perma.cc/E38H-WJC4>] (contrasting his views with Ian Samuel and concluding that “[l]eveling down as a remedy for an equal protection violation has an element of schadenfreude about it” but also comports with our notions of equality); Ian Samuel, *Morales-Santana* and the “Mean Remedy,” PRAWFSBLAWG (June 12, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/06/12/index.html> [<https://perma.cc/FJ3P-P2YP>] (referring to the remedy provided in *Morales-Santana* as the “mean remedy”).

¹⁷ See *infra* text accompanying notes 96–115 (summarizing academic criticisms of *Morales-Santana* and leveling down more generally).

¹⁸ *Morales-Santana*, 137 S. Ct. at 1685.

¹⁹ See Aziz Huq & Pam Karlan, *Ginsburg Helped Those Excluded by the Legal System. The Court Needs That View*, WASH. POST (Sept. 22, 2020, 6:00 AM), <https://>

practical consequences of leveling down for *Morales-Santana* and others within the law's scope. A realpolitik lens might focus on the need to keep a majority as a justification for the result, and therefore cast the decision as an effort to advance the larger goal of gender equality, even if the specific litigant could not be helped. But even then, why not add a concurrence to the effect that a better remedy would have helped the petitioner?

A more cogent account of *Morales-Santana* might instead train on Justice Ginsburg's oft and early articulated respect for "[m]easured" doctrinal motions and "dialogue with other organs of government, and with the people."²⁰ Constitutional norms, on this view, are best achieved through carefully titrated interventions that do not stimulate popular backlash, and that afford maximal space for a democratic response, where one is legitimate.²¹ There is something to this explanation.²² But I think it is too general and abstract a story to count as a satisfactory explanation for the decision to level down in *Morales-Santana*. Put simply, a democratic "dialogue"²³ could have been sustained either by leveling up or by leveling down in that case. And it is hardly clear that the Court in *Morales-Santana* indeed encouraged legislative consideration through its leveled-down outcome,

www.washingtonpost.com/outlook/2020/09/22/ginsburg-advocate-court-sympathy-elitist/ [https://perma.cc/S785-M9D8].

²⁰ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) [hereinafter Ginsburg, *Speaking in a Judicial Voice*]; see also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985) (expressing reservations about the manner in which the fundamental right to an abortion was articulated). Such deference to other actors and institutions has been frequently remarked. See, e.g., Richard J. Lazarus, Norfolk & Western Railway v. Ayers, 538 U.S. 135 (2003), 127 HARV. L. REV. 451, 454 (2013) (commenting on Justice Ginsburg's "sincere and genuine application of judicial restraint"); cf. Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 38 (2004) (commending Justice Ginsburg's "historically constrained evolution" as "attractive" and "the only possible version of originalism as time goes on"). For a useful theoretical take on backlash, see Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 473 (2005) (arguing that decisions create backlash when they "raise the salience of an issue, they incite anger over 'outside interference' or 'judicial activism,' and they alter the order in which social change would otherwise have occurred").

²¹ Aziz Z. Huq, *A Liberal Justice's Limits: Justice Ruth Bader Ginsburg and the American Criminal Justice System*, in THE LEGACY OF RUTH BADER GINSBURG 117, 117–18 (Scott Dodson ed., 2015) (describing how Justice Ginsburg warned judges to avoid "boldly venturing where popular majorities fear to tread . . . [and to] hesitantly 'step ahead' of democratic sentiment as articulated by the national political branches," instead encouraging judges to "write 'modestly' by opening 'a dialogue' with the political branches").

²² Cf. *id.* at 117 (noting "the tension between [Justice Ginsburg's] unflinching support for substantive justice and her tempered view of the 'measured' judicial steps possible under that flag").

²³ Ginsburg, *Speaking in a Judicial Voice*, *supra* note 20, at 1198.

because Congress was predictably unlikely to swoop in to aid a class of alien children without representation or monied interest groups at their side. Something more by way of explanation is required.

Indeed, it is not just that *Morales-Santana*'s resolution presents a puzzle. Its dissonant and unresolved final chords, set alongside its surprising composer, stir larger questions about the relationship between a commitment to constitutional equality on the one hand and the doctrinal apparatus used to translate that commitment into practice on the other hand. The immediate negative reactions to *Morales-Santana* implicitly rest, I think, on the view that Justice Ginsburg's heartfelt and unquestioned commitment to equality cannot be logically squared with a judicial disposition pursuant to which no one is better off. No account of equality, that is, can result in a positive justification for the judicial decision to level down after an equality claim has been recognized. If leveling down is justified, on this view, it is at a very minimum a tragic, second-best compromise. It is a partial defeat for equality that flows perhaps from the sharp conflict between equality values on the one hand and some other independent value on the other hand, that is compromised by leveling up—e.g., the risk of losing respect for a democratic decision instantiated via a duly enacted statute. Leveling down is simply the least worst option given that conflict.

No doubt, there is much to be said against leveling down. But there is more to be said on behalf of leveling down as a disposition—even if it is not a remedy for claimants such as *Morales-Santana*—including some points that can be squeezed out from certain theories of equality as a constitutional value. In my view, it is possible to deduce a leveling-down outcome as affirmatively desirable by applying certain theories of constitutional equality without any appeal to the existence of tragic conflicts or negative externalities from an equality judgment. The judicial decision to level down also illuminates the specific theory of equality that a bench of Justices is enforcing. The decision to level down, that is, helps us grasp and articulate such a theory even when it is not spelled out by a majority opinion. Contrary to the prevailing wisdom, I also do not think that leveling down is the sole province of mean-spirited, remedially penurious jurists unwilling to destabilize a status quo cut across with race, gender, or other malign hierarchies, although it can be that too. Instead, I think that a racially progressive theory of the Equal Protection Clause committed to a more just and equitable world in relation to both race and gender re-

lations could also lean upon leveling-down dispositions in appropriate cases.

This Article begins by defining the leveling-down disposition in the context of a constitutional equality claim in general, exploring analogous problems, and summarizing a range of criticisms of that judicial resolution. It then turns to two alternative framings of the leveling-down phenomenon—through the lens of Article III standing doctrine, or as an application of severability doctrine and hence a form of statutory interpretation—to suggest that both are inadequate. Neither, that is, provide either an adequate justification or a comprehensive condemnation of leveling down. Finally, a final section offers two ways in which the leveling-down remedy can be derived from a constitutional theory of equality and an “exit” from the seemingly dichotomous choice between leveling up and leveling down. In the end, this leads me to wonder whether *Morales-Santana* was indeed rightly decided, or whether a more subtle, and also more just, resolution might not have been feasible.²⁴

I. THE LEVELING-DOWN DISPOSITION IN CONSTITUTIONAL EQUALITY LAW

A. *Defining Leveling Down*

The possibility of leveling down arises when there is a legal mandate for formal equality in the sense of a command that members of class A and class B be evaluated and treated alike—i.e., without respect to their membership in either class A or class B.²⁵ On this view, a leveling-down disposition is a judicial ruling that *creates formal equality by eliminating one group’s advantage (or extending one group’s legal encumbrance) in a fashion that leaves no person advantaged (or less encumbered) by the law*. This definition assumes that (1) the relevant action is taken by a court, (2) the relevant classification is binary, and the disposition ensures that a regulated person or entity’s position on either side of that binary is irrelevant to their legal status, and (3) the facts of the matter lend themselves to an intuitive and prelegal sense

²⁴ Consistent with the ambition of this symposium, my aim is not to criticize but to celebrate the work of Justice Ginsburg. That said, I do not think that the Justice would have appreciated a reflexively uncritical approach. The critiques I offer, nevertheless, are meant to be in the spirit of her larger corpus of work.

²⁵ See Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1636 (2017) (“In simplest terms, formal equality norms all derive from the Aristotelian norm to ‘treat like cases as like.’”); see also Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542–48 (1982) (deriving formal equality to the work of Aristotle).

of advantage or encumbrance.²⁶ A law invalidated because it gave men apples and women pears—and hence denied them formal equality—could be addressed without either leveling up or down, then, for two reasons. First, it is not clear which of apples and pears is better or worse than the other. Second, the constitutional flaw, if any, can be resolved without either leveling up or down—i.e., by simply allowing everyone to choose their fruit.

This Article focuses on leveling down as a *judicial* remedy only, because judicial action presents different considerations from action taken by other elected branches of government. Some commentators have characterized non-judicial actions as leveling down, citing the 1971 decision of *Palmer v. Thompson*.²⁷ *Palmer* concerned a decision by the city of Jackson, Mississippi, to close or privatize its swimming pools after being ordered to desegregate them.²⁸ The *Palmer* Court rejected a number of different theories of constitutional violation, most notably the idea that “a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”²⁹ The municipal decision to close swimming pools leveled down in the same fashion as a judicial decision because it eliminated public facilities for both races, rather than extending them to Black residents, following a conclusion that unequal access was unconstitutional. But if that decision was legally or morally problematic, it is likely because the decision to close the pools, but not the golf courses, was motivated by the racially tinged fear of different colored bodies mixing.³⁰ Viewing the case now, it is impossible to view the city of Jackson’s action

²⁶ But consider *Orr v. Orr*, 440 U.S. 268 (1979), which concerned an Alabama law requiring husbands, but not wives, to pay alimony. Depending on whether one takes the plaintiff’s or defendant’s perspective, either kind of resolution can be characterized as leveling down.

²⁷ 403 U.S. 217 (1971); see, e.g., Tracy A. Thomas, *Leveling Down Gender Equality*, 42 HARV. J.L. & GENDER 177, 200 (2019) (discussing *Palmer*); Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 518 (2004) (“The current understanding of leveling down’s compatibility with equality norms may be traced to *Palmer v. Thompson* . . .”).

²⁸ *Palmer*, 403 U.S. at 218–19.

²⁹ *Id.* at 224.

³⁰ See Randall Kennedy, *Reconsidering Palmer v. Thompson*, 2018 SUP. CT. REV. 179, 190 (“Resistance to desegregation at pools was also attributable to sex. People disrobe at swimming pools and gaze at others who are similarly bare.”). In *Washington v. Davis*, the Court characterized *Palmer*’s holding as follows: “the city was not overtly or covertly operating segregated pools” and “the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations.” *Washington v. Davis*, 426 U.S. 229, 243 (1976). Of course, the problem with *Palmer* was that its conclusion, that there was no “racially discriminatory purpose,” was implausible on the facts. *Id.* at 240.

without perceiving the noxious tint of Jim Crow lurking in the background.

But extract the facts of *Palmer* from their specific time and place, and the wrongfulness of the municipal action becomes less clear: local government, as a matter of routine, often changes the contours of the governmental services that it provides. It tacks between the funding of libraries, elementary schools, fire stations, and roads. Normally, those decisions are subject to rational-basis review, if they are even considered appropriate objects of litigated scrutiny at all.³¹ If the bare fact of leveling down was always *prima facie* constitutionally problematic, a city would be faced with a one-way fiscal ratchet. It would also be deprived of discretion to reallocate resources between under-resourced communities.³² Elected actors routinely engage in the allocation and recalibration of resources across many different groups and institutions; it seems implausible to characterize decisions to withdraw services provided to one but not another protected group as *eo ipso* invalid or even facially constitutionally suspect. If *Palmer*'s facts are problematic, it is not because of some general prohibition on legislative leveling down.

Of course, had Jackson maintained segregated pools, and had that arrangement subsequently been challenged and the challenge had gone through, a federal court could have had to choose whether to level up or down. In making that decision, though, a court cannot appeal to the full range of quotidian, trivial, and partisan reasons that an elected body can legitimately consider. Its legitimate grounds for toggling between leveling up or down comprise a far smaller set.³³ And of course, leveling down by a court—like Jackson's decision in *Palmer*—can also be condemned as unconstitutional because of its motive.³⁴ To be sure, the frequency of impermissibly motivated action by elected bodies is likely to be higher than the rate of impermissibly motivated action by judges. Indeed, it is striking how few instances there are in which judges at any level of the federal or state judicial system have

³¹ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

³² That's not to say that the recession of social services cannot have racially regressive effects. See, e.g., Jin Lee & Christopher Lubienski, *The Impact of School Closures on Equity of Access in Chicago*, 49 EDUC. & URB. SOC'Y 53 (2017) (analyzing 2013 school closures in Chicago and finding that minority children's outcomes suffered).

³³ See *infra* Section I.B.1 for discussion of grounds upon which the Roberts Court has justified—or rejected—judicial leveling down as a constitutionally permissible solution.

³⁴ See *infra* text accompanying notes 61–65.

been held to account for constitutionally impermissible motivations.³⁵ Perhaps this is because judges are less frequently biased; perhaps it is because there is a cultural norm against impugning the motives of “independent” judges.³⁶ But it is not because there is any reason to think that judges cannot have improper motives.

Judicial leveling down, therefore, is typically not subject to the same legal regime as leveling down by the elected branches. The latter is both more frequent and more frequently amenable to an equality challenge than is judicial action. This is so because the elected branches have much more leeway in making allocative policy decisions, and also because elected and bureaucratic actors are assumed to act more frequently than judges for bad—i.e., unconstitutional—reasons.

B. *Illustrating Leveling Down*

The Constitution contains several mandates for formal equality. The Equal Protection Clause³⁷ requires formal neutrality in respect to race,³⁸ prohibits certain gender distinctions,³⁹ and bars certain other

³⁵ There are very few published opinions in which the possibility of an improper judicial motive is considered. For an important exception, however, see *infra* text accompanying notes 61–67. In another instance, a plurality opinion by the Court suggests that “[i]f a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.” *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion). But does the same rule of institutional equivalence apply to the Equal Protection Clause? Consider that a court must treat litigants in statutory and constitutional cases differently based on their race or gender. The Court has never considered whether doing so passes muster under strict scrutiny. Of particular interest here is the question whether the redress of private discrimination is a compelling state interest. Certainly, it does not appear to be so when it is a legislature acting. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–06 (1989) (“To accept Richmond’s claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group.”). So why should not the same rule apply to courts? For a discussion of this point, see Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. Rev. 1195, 1253 (2002).

³⁶ If so, and if bias were widespread, that might be a strike against judicial independence. See Aziz Z. Huq, *Why Judicial Independence Fails*, 115 Nw. U. L. Rev. 1055, 1100 (2021).

³⁷ U.S. CONST. amend. XIV, § 1.

³⁸ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013) (“[S]trict scrutiny must be applied to any admissions program using racial categories or classifications.”).

³⁹ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (“The defender of legislation that differentiates on the basis of gender must show ‘at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’” (alteration in original) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996))).

formal classifications.⁴⁰ The free speech component of the First Amendment also imposes a rule of content neutrality.⁴¹ And both the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV preclude certain distinctions between state citizens and non-citizens.⁴² The dormant Commerce Clause, for instance, has been described in terms of a “strict rule of equality.”⁴³ A claim advanced under any one of these theories can provide an opportunity for a court to engage in leveling down.

As a historical matter, instances of leveling down have been few and far between.⁴⁴ During the Roberts Court, nevertheless, there have been two high-profile instances in which the Court has embraced a leveling-down remedy.⁴⁵ In other instances, however, it has suggested that leveling up is constitutionally mandated.⁴⁶ I document this pattern here, and then point to a longstanding pattern in the doctrine where the Court is confronted with a persisting choice between leveling up and leveling down, albeit not denominated in those terms. At the

⁴⁰ Aziz Z. Huq, *The Double Movement of National Origin Discrimination*, 87 U. CHI. L. REV. 2397, 2404 (2020) (discussing origins and strength of the ban on national origin discrimination).

⁴¹ Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 649–50 (2002) (arguing that the doctrine of content neutrality has negative implications for other competing interests but noting that the “doctrine of content neutrality has become the cornerstone of the Supreme Court’s First Amendment jurisprudence”).

⁴² See *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2471 (2019) (finding “dormant Commerce Clause principles” violated when a state measure “deprive[d] citizens of their right to have access to the markets of other States on equal terms” (quoting *Granholm v. Heald*, 544 U.S. 460, 473 (2005))); see also *McBurney v. Young*, 569 U.S. 221, 231 (2013) (noting that Article IV “secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State” (quoting *Mo. Pac. R.R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922))).

⁴³ *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 73 (1963); see also *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981) (noting the requirement of “equality of treatment”).

⁴⁴ Leveling down is rare because, in some cases, the Supreme Court has found an equality violation in a state law and then remanded to the state court for determination of a statutory scheme required after invalidation. See, e.g., *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 427 (2010); *Orr v. Orr*, 440 U.S. 268, 271, 283–84 (1979); *Stanton v. Stanton*, 421 U.S. 7, 18 (1975). In *Stanton*, the state court leveled down upon remand. See *Stanton v. Stanton*, 564 P.2d 303 (Utah 1977). The possibility of leveling down, though, was recognized without being applied in *Iowa-Des Moines Nat’l Bank v. Bennett*, 284 U.S. 239, 247 (1931), and then extensively discussed in a concurring opinion by Justice Harlan in *Welsh v. United States*, 398 U.S. 333, 344 (1970) (Harlan, J., concurring).

⁴⁵ See *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017); *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335 (2020).

⁴⁶ *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020).

same time, I flag instances in which judicial practice has diverged, without explanation, from stated norms.

1. *The Roberts Court and Leveling Down*

The first of the recent cases, of course, is *Morales-Santana*. There, Justice Ginsburg framed the dispositional choice between leveling down—applying the ten-year physical presence rule to both mothers and fathers—or leveling up—universally applying the one-year rule—as a matter of “the legislature’s intent, as revealed by the statute at hand” to which the Equal Protection Clause simply did not speak.⁴⁷ Justice Ginsburg began by observing that earlier gender-equality cases tended to concern a carveout from a general rule that disadvantaged a protected class.⁴⁸ In contrast, *Morales-Santana*’s case concerned a “discriminatory exception [that] consists of *favorable* treatment for a discrete group.”⁴⁹ To dispose of the case, Justice Ginsburg invoked “the same approach as in those benefits cases,” noting that “striking the discriminatory exception—leads here to extending the general rule of longer physical-presence requirements to cover the previously favored group.”⁵⁰ Finding guidance in Title VII cases in which lower courts had declined to extend special benefits for women to all employees, Justice Ginsburg reasoned that “Congress . . . would have abrogated § 1409(c)’s exception, preferring preservation of the general rule.”⁵¹ Notably, her majority opinion did not embrace the Solicitor General’s suggestion, drawing on an earlier opinion by Justice Scalia, that the federal courts simply had no power to grant a remedy that functioned in practice as a grant of citizenship.⁵²

The second instance of leveling down during the Roberts Court arose in a case applying the First Amendment’s command that “equality of status in the field of ideas” prohibited content-based discrimination.⁵³ In *Barr v. American Ass’n of Political Consultants*,⁵⁴ the Court found a First Amendment defect in provisions of the Telephone Consumer Protection Act (“TCPA”) that restricted ‘robocalls’ to cellphones, but that made an exception for calls relating to the collec-

⁴⁷ *Morales-Santana*, 137 S. Ct. at 1699.

⁴⁸ *See id.* at 1698–99.

⁴⁹ *Id.* at 1699.

⁵⁰ *Id.*

⁵¹ *Id.* at 1700, 1700 n.27.

⁵² *See id.* at 1684; *see also* Brief for Petitioner at 48–49, *Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191); *Miller v. Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring).

⁵³ *See Police Department of Chicago v. Mosely*, 408 U.S. 92, 96 (1972).

⁵⁴ 140 S. Ct. 2335 (2020).

tion of debts that were owed to or backed by the federal government.⁵⁵ Writing for a plurality of the Court, Justice Kavanaugh held that this content-based restriction failed strict scrutiny.⁵⁶ This left the Court with a choice of leveling up (allowing robocalls) or leveling down (barring all robocalls). To resolve this choice, Justice Kavanaugh did not appeal to congressional intent, which was the touchstone in *Morales-Santana*.⁵⁷ He instead invoked a “presumption of severability” that “reflects the confined role of the Judiciary.”⁵⁸ Applying such a presumption, the Court held that the “constitutionally offending provision” excepting government debt-related calls, enacted twenty-five years after the TCPA’s general prohibition, was “an unconstitutional amendment to a prior law.”⁵⁹ The sequencing of statutory enactment and the constrained breadth of the rule for government debt-related calls, therefore, seemed to play pivotal roles in Justice Kavanaugh’s severability analysis.

Yet in other areas, the Roberts Court has suggested that leveling down is not just undesirable, but even constitutionally impermissible. Most salient here are cases applying the free exercise component of the First Amendment. The Court in *Espinoza v. Montana Department of Revenue*⁶⁰ took up a Montana state scholarship program for private schools that excluded students attending religiously affiliated schools.⁶¹ Writing for the dissent, Justice Ginsburg would have accepted the state supreme court’s decision to resolve the constitutional problem “by striking the scholarship program in its entirety” so as to create a permissible “neutrality” between religious and secular entities.⁶² The majority opinion by Chief Justice Roberts, however, rejected the Montana court’s leveling-down remedy.⁶³ According to the majority, the state constitutional provision upon which the state court relied “expressly discriminate[d] on the basis of religious status,” and as such could not be the basis for a resolution of the case.⁶⁴ The majority did not explain why the formally discriminatory character of the

⁵⁵ See *id.* at 2343, 2347 (plurality opinion).

⁵⁶ See *id.* at 2347.

⁵⁷ See *id.*; *Morales-Santana*, 137 S. Ct. at 1699.

⁵⁸ *Barr*, 140 S. Ct. at 2351. Justice Kavanaugh is probably best read here as insisting that as much of the statute be saved as feasible, i.e., a presumption that the minimal amount of statutory text will be severed.

⁵⁹ *Id.* at 2353 (describing the exception as “the constitutionally offending provision”).

⁶⁰ 140 S. Ct. 2246 (2022).

⁶¹ See *id.* at 2249.

⁶² *Id.* at 2279–80 (Ginsburg, J., dissenting).

⁶³ See *id.* at 2251, 2262.

⁶⁴ *Id.* at 2262.

state constitutional provision mattered once the state court had determined that religious and secular entities would be treated alike. It seemed to presume that the state court leveled down because of the initial federal constitutional “mistake,” but this is far from clear given the facts. Because it is unlikely that the Court would have reached the same outcome had the Montana court leveled up, *Espinoza* seems to be a case in which leveling down functioned as a necessary part of the constitutional wrong.

Espinoza is noteworthy because it is one of the rare instances in which a downward-directed *judicial* action was found to have rested upon constitutionally impermissible grounds.⁶⁵ Its outcome is all the more striking given that its predicate factual premise of judicial impropriety was not premised on any information about the actual attitudes or beliefs of the Montana judges involved, or a factual finding that the state court treated religious and secular entities differently.⁶⁶ *Espinoza* also contrasts sharply with instances in which the Court has refused to attribute constitutional significance to the historical predicates of a legislative action.⁶⁷ Nor is *Espinoza* the only decision where a state actor’s leveling down was deemed constitutionally impermissible. A year later, the Court resolved a Free Exercise challenge to the exclusion of religious groups from Philadelphia’s scheme for foster-care placements by mandating a leveling up in the provision of discretionary state funding.⁶⁸ There was simply no discussion of whether leveling up or leveling down was the appropriate remedy.⁶⁹ Leveling up was simply assumed to be the correct approach without any debate or

⁶⁵ See *supra* notes 61–62 and accompanying text. One might say, though, that the problem was not the state court’s action, but the putative bias of the state constitutional drafters. On this view, *Espinoza* is not a case about improper judicial motive.

⁶⁶ *Espinoza*, 140 S. Ct. at 2262.

⁶⁷ See *Abbott v. Perez*, 138 S. Ct. 2305, 2313, 2316–18, 2325–26 (2018) (noting that legislatures enjoy a “presumption of legislative good faith,” a plaintiff has the burden of rebutting that presumption, and the Texas court erred in requiring the legislature to purge the taint of a previous legislature’s prejudice).

⁶⁸ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1875 (2021); see Aziz Huq, *The Court’s Religious Liberty ‘Compromise’ Is Actually a Victory for the Right*, WASH. POST (June 21, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/06/21/fulton-religious-liberty-compromise-conservative-victory/> [<https://perma.cc/R5N4-6YLL>].

⁶⁹ See *Fulton*, 141 S. Ct. 1868. The same is true of cases involving religious objections to pandemic restrictions. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). But see *Does 1–3 v. Mills*, 142 S. Ct. 17 (2021) (mem.) (denying to enjoin the COVID-19 vaccination mandate for those who objected on religious grounds pending a decision on the petition for certiorari). The remedial disposition of these cases is very hard to square with the analytic framework offered the same Term by Justice Kavanaugh in *Barr*. See *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335 (2020) (plurality opinion).

analysis of the question. Such freewheeling exercise of discretionary authority by the Roberts Court, of course, is at odds with any strong claims about its rule-of-law character.

It is, in short, hard to discern a trend in the Roberts Court's approach to the leveling-up or leveling-down choice of dispositions in cases concerning formal constitutional equality. *Barr* and *Morales-Santana* might indicate a measure of judicial restraint akin to the approach long counseled by Justice Ginsburg, at least where the Court does not see a de facto preferred constitutional liberty in play. These cases might also be viewed as of-a-piece with other constitutional cases, principally sounding in the separation of powers, in which the Court has opted for narrower remedial dispositions even after finding a constitutional error.⁷⁰ Putting together *Morales-Santana*, *Barr*, and these recent separation-of-powers decisions, it is possible to perhaps discern a default position of modesty on the Roberts Court's part when it comes to addressing constitutional harms. But the religious liberty cases suggest that this reading should not be taken too far; to an uncomfortable degree, it is hard to explain the observed pattern of remedies without appealing to what is known of the Justices' substantive policy preferences.

2. *Retroactivity as Leveling Down*

A choice that is somewhat akin to the election between leveling up and leveling down arises in one other line of cases. It appears that other commentators have not perceived these cases as raising questions like those in *Morales-Santana* and *Barr*. This seemingly extraneous line of cases not only presents a similar—albeit certainly not identical—problem, they also offer another potential disposition for formal equality cases. So, this Article briefly discusses them here because they cast some indirect light on the central problem at issue.

When the Court recognizes a new criminal procedure right, or a new application or extension of such a right, it often does so in a case involving a specific criminal defendant (“D”) whose offense and

⁷⁰ The most interesting cases concern the separation of powers. See, e.g., *Collins v. Yellen*, 141 S. Ct. 1761, 1761, 1784–87 (2021) (finding that the Director of the Federal Housing Finance Authority could not be protected by a “for cause” restriction, but not invalidating the statute); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021) (opting for “a tailored approach” to an Appointment Clause violation); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (finding that the Consumer Finance Protection Bureau’s “leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers,” but declining to invalidate the statute or vacate the proceeding first brought against the plaintiff).

whose trial are necessarily in the past. Recognition of the new right raises an immediate question of who *else* other than D benefits from the new right.⁷¹ Should the newly minted right, for instance, be available to all those who were tried and convicted at the same time as D? Should it apply only to those whose convictions have not, when the Supreme Court acts in D's case, become final? What of those who were charged at the same time as D, whose convictions have become final, but whose convictions are being challenged in ongoing state or federal collateral—i.e., habeas—review? And can the Court deny D, and all others whose trial has already occurred, any relief and instead opt for a wholly prophylactic remedy? This suite of questions is often analyzed under the rubric of retroactivity.⁷² But it is worth noting here that these are also questions about formal equality. In granting a remedy to D, that is, the Court must ask about what kinds of equality count, and whether to level up or level down with respect to the different groups of other defendants who have been or will be convicted under the same shadow of constitutional error. The question of equality may play out in terms of comparisons between a defendant's status in the criminal justice system, but they are nonetheless questions of whether one status is equal or different to another status.

In thinking through these questions, the Court has also explicitly appealed to the value of formal equality. In one pivotal decision, it observed that the “selective application of new rules violates the principle of treating similarly situated defendants the same.”⁷³ This is the norm at issue in the constitutional cases canvassed above.⁷⁴ The Court has settled on three rules to ensure compliance with that principle. First, the Court has never taken advantage of the possibility of pure prospectivity—i.e., leveling down for all criminal defendants, including D, who have experienced constitutionally defective processes.⁷⁵ It

⁷¹ See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738 (1991).

⁷² For this terminology and a discussion of retroactivity, see generally *id.*

⁷³ *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).

⁷⁴ See *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) (“[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently.”); *Shea v. Louisiana*, 470 U.S. 51, 51 (1985).

⁷⁵ For a discussion of cases in which “the Court moved . . . toward a rule of pure prospectivity, according to which the rule announced in a given case would apply only to subsequent cases,” but still granted relief to the defendant at bar, see Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1359 (2010); see also Richard S. Key, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMPAR. L. 37, 43 (2014) (defining pure prospectivity as “[t]he simple approach of starting the rule running[] at the moment of deci-

has nevertheless left that possibility open.⁷⁶ Second, it has said that new rights should be fully retroactive in criminal cases on direct review at the time the right is announced.⁷⁷ For these litigants, the Court has decided to level up.⁷⁸ Third, with exceptions of little practical importance here, the same treatment is not accorded in cases where a criminal conviction has become final, but where collateral review in either state or federal court is ongoing.⁷⁹ Hence, with some relatively insignificant exceptions, a conviction cannot generally be disturbed on the basis of new law arising after that conviction has become final.⁸⁰

One way to summarize this constellation of doctrine is to see that new rules of constitutional criminal procedure are applied to all cases pending on direct review at the time such a rule is announced, but not to cases pending on collateral review. Another, not at all inaccurate, way to think about the doctrine is as a mix of leveling up—between the case in which a new right is recognized and all other cases on direct review—and leveling down—between the case at bar and all matters on collateral review. The first characterization rests implicitly on the assumption that direct and collateral review are fundamentally different, and so explanation for their uneven treatment is unnecessary.⁸¹ This second way of looking at the cases snaps into focus if one starts instead with the assumption that collateral and direct review are not, in fact, all that different. And this is surely a starting point for analysis given the realities of the criminal justice system. In some state systems, a criminal defendant has a first chance to raise some constitutional claims on direct review, and a first chance in respect to other

sion . . . [such that n]either the litigant in the case announcing the new rule, nor any other person whose claim is based on prior events, will be subject to that rule”).

⁷⁶ See *Harper v. Va. Dep’t of Tax’n*, 509 U.S. 86, 115 (1993) (O’Connor, J., dissenting) (“But no decision of this Court forecloses the possibility of pure prospectivity—refusal to apply a new rule in the very case in which it is announced and every case thereafter.”).

⁷⁷ *Griffith*, 479 U.S. at 322.

⁷⁸ *Id.*

⁷⁹ *Teague v. Lane*, 489 U.S. 288, 305–07, 311 (1989) (plurality opinion) (although “new rules generally should not be applied retroactively to cases on collateral review,” watershed rules of criminal procedure are an exception to this). But the Court recently rejected *Teague*’s exception for “watershed” rules. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1557–60 (2021) (“New procedural rules do not apply retroactively on federal collateral review. The watershed exception . . . must ‘be regarded as retaining no vitality.’”).

⁸⁰ See Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 35–36 (2015) (“By holding that habeas petitioners could not obtain relief based on violations of constitutional rules announced after their convictions became final, it held state officials responsible for extant constitutional law, but not potential expansions.” (footnote omitted)).

⁸¹ Fallon & Meltzer, *supra* note 71, at 1815 (discussing reasons for distinguishing direct from collateral review).

claims in collateral review.⁸² Hence, in many states, assistance of counsel claims cannot be raised on direct review but can be raised on collateral review.⁸³ In these states, that is, both direct and collateral review operate as “first bites” at the apple for different constitutional claims. Moreover, whether a particular defendant will be in the direct or the collateral review process at the time that the Supreme Court announces a new rule will depend on how long the trial and appeal take—i.e., it will vary arbitrarily based on congestion in state-court dockets and other extraneous factors.⁸⁴ From that vantage point, it appears that the Court has drawn something of an arbitrary line around the domain of formal equality—leveling up on one side, direct appeals, while leveling down in the other, collateral review—as a way to avoid more difficult questions about disposition.

The retroactivity jurisprudence also brings into focus a third disposition that is different from both leveling up and leveling down, called “selective prospectivity.”⁸⁵ Selective prospectivity occurs when a court vacates the conviction of the defendant wise or lucky enough to bring the winning case, but disturbs no other past conviction decision, whether the cases are on direct or collateral review at the time of the Court’s new ruling.⁸⁶ In effect, this is a refusal to level up for all but the case at bar. The Court, indeed, used this technique for the famous *Miranda v. Arizona*⁸⁷ decision, perhaps because application of *Miranda*, even to cases then pending on direct appeal, would have had a destabilizing effect on state criminal justice systems.⁸⁸ The Court subsequently rejected this selective prospectivity approach in both criminal⁸⁹ and civil cases.⁹⁰ It is worth noting that the Court’s decision

⁸² Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 546 (2014).

⁸³ *Id.*

⁸⁴ For a detailed study of such variation, see Brian J. Ostrom, Roger A. Hanson & Matthew Kleiman, *Improving the Pace of Criminal Case Processing in State Trial Courts*, 29 CRIM. JUST. POL’Y REV. 736 (2018).

⁸⁵ See Key, *supra* note 75, at 44.

⁸⁶ *Id.* (“[T]he new rule [applies] to the litigants in the instant case but ‘then returns to the old [rule] with respect to all other[] [cases] arising on facts predating the pronouncement.’” (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536–37 (1991)) (plurality opinion)).

⁸⁷ 384 U.S. 436 (1966).

⁸⁸ *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966) (holding that *Miranda* would not apply retroactively to other cases in which the trial had already occurred).

⁸⁹ *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (“[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.”).

⁹⁰ *James B. Beam Distilling Co.*, 501 U.S. at 540 (plurality opinion) (“*Griffith* cannot be

to set aside selective prospectivity in the civil context did not purport to rest upon constitutional foundations. Instead, the Court invoked generic equality values.⁹¹ It may then be possible to argue that where there are countervailing concerns counseling in favor of selective prospectivity, that method should be used. This is a possibility to which I will return later in this Article.⁹²

C. *Criticizing Leveling Down*

Leveling down has a bad rap. With one notable exception, it is hard to find anything more than grudging acceptance in the literature. The following Section briefly catalogs the main objections that dominate the existing literature and suggests that these objections—although not without merit—are often overstated. That said, the aim here is to state these objections in their best and most forceful light. This allows this Section to suggest that a positive case can be made for leveling down *despite* objections pushing in the other direction.

To begin with, it is uncontroversial to say that either leveling up or leveling down can be impermissible when such a remedy imposes new and unexpected costs on third parties. This sort of argument from negative externalities can run in either direction. It is less an argument for or against either leveling up or leveling down. More simply, it is a recognition that judicial remedies can have complex, ramifying effects. For instance, a ruling that women had impermissibly been excluded from jury venires could not be remedied by excluding both men and women from future juries.⁹³ The only available remedy here is leveling up. Similarly, a criminal statute that has been found to be impermissibly limited to a suspect class cannot be remedied by retroactively expanding liability to a comparator class without violating due process.⁹⁴ By contrast, where extending a benefit to both classes would create too great a fiscal burden on the state, leveling down may be the sole

confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context.”).

⁹¹ See *id.*

⁹² See *infra* text accompanying notes 207–09.

⁹³ See Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1187 n.8 (1986) (discussing *Taylor v. Louisiana*, 419 U.S. 522 (1975)).

⁹⁴ Professor Brake suggests that “a legislative attempt to thwart a court’s ability to remedy a constitutional violation would itself violate the Constitution.” Brake, *supra* note 27, at 548 n.127 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984)). But this assumes that the legislature has an opportunity to act before a court has imposed a remedy and then does so for impermissible reasons. This may describe the facts in *Palmer*. See *supra* notes 27–36 and accompanying text.

option.⁹⁵ Private parties might also have reliance interests that preclude certain remedies. For example, where a court expands a right to alimony from women-only to both men and women, the reliance interests of female spouses who would suddenly be faced with retroactive financial obligations might bar certain remedial options.

Let us say, though, that there is no objection from negative externalities either to leveling up or down. Under those conditions, commentators have lodged a series of objections to leveling down that can be organized into three main clusters.

First, commentators express a concern that the adoption of certain leveling-down remedies will have the effect of reducing or eliminating the incentive of litigants to bring cases in the first instance.⁹⁶ Tracy Thomas hence contended that a leveling-down remedy undermines “the ability of citizens to act as private attorney generals to help enforce the public laws of gender equality . . . , and fewer actions will be brought to challenge discriminatory conduct.”⁹⁷ In a complementary vein, Rebecca Aviel has argued that “the leveling-down decisions have the potential to erode public support for the very idea of equality itself.”⁹⁸ Sounding a somewhat similar tone, Justice Gorsuch in *Barr* worried about the dynamic effect on litigants of awarding “no relief at all.”⁹⁹ This critique usefully draws attention to the way in which the final disposition of a constitutional equality claim will, over time, alter the conditions under which such suits can or will be filed in the first place. That is, it is a dynamic rather than static argument.

A variation on this argument might be that the prospect of leveling down creates a problem for Article III standing purposes, insofar as it denies the possibility that the plaintiff will obtain redress for her constitutional wrong.¹⁰⁰ Standing doctrine, at a minimum, implies that

⁹⁵ See, e.g., *Mathews*, 465 U.S. at 732–33.

⁹⁶ Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2028 (1998). Professor Karlan here discusses the possibility of remedying racially selective prosecution by requiring prosecution of a white person for every Black person prosecuted. She calls this a leveling-up situation. To my ear, this sounds like a leveling-down remedy because it attempts to solve an equality problem by denying rights to another class of people. I treat it here as an instance of leveling down, consistent with my definition.

⁹⁷ Thomas, *supra* note 27, at 201.

⁹⁸ Rebecca Aviel, *Rights as a Zero-Sum Game*, 61 ARIZ. L. REV. 351, 385 (2019).

⁹⁹ *Barr v. Am. Ass’n of Pol. Consultants*, 140 U.S. 2335, 2366 (2020) (Gorsuch, J., concurring in part and dissenting in part) (“What is the point of fighting this long battle, through many years and all the way to the Supreme Court, if the prize for winning is no relief at all?”).

¹⁰⁰ See *Spokeo, Inc. v. Robins*, 136 U.S. 1540, 1547 (2016) (“The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”).

the availability of “individually focused” remediation is “a constitutionally mandated threshold matter.”¹⁰¹ The Court in *Heckler v. Mathews*¹⁰² rejected the idea that plaintiffs had to show they would secure pecuniary gain from a win, reasoning that even if they would not receive a financial benefit, plaintiffs could still secure a remedy for the fact of “unequal treatment” solely because of gender.¹⁰³ *Mathews* suggests that the possibility of not gaining anything material need not defeat a plaintiff’s standing. But it is worth noting that the nature of the remedy sought might nonetheless matter. The *Heckler* plaintiffs sought only declarative relief.¹⁰⁴ The Court has long cautioned that “standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek.”¹⁰⁵ If plaintiffs seek money damages for the past material consequences of a benefit denial, as well as an injunction, the question would arise whether they would have standing for both the injunctive claim and the damages claim. Hence, the prospect of leveling down might indeed compromise Article III standing to secure money damages, if not forward-looking relief. To the extent that the motive for plaintiffs to lodge equality cases in the first instance, the potential frailty of Article III standing for damages claims may have a dynamic impact on the rate of equality claims. But it is wrong to say that standing problems would compromise any and all suits, regardless of the relief sought.

Second, some commentators have suggested that the Constitution is “not indifferent” between leveling-up and leveling-down dispositions,¹⁰⁶ and that at least in Equal Protection cases, “the Constitution requires that leveling up be the presumptively correct remedy.”¹⁰⁷ In the gender equality context, for example, it is argued that there is a “constitutional concern about the disempowerment of women . . . that favors extension” of measures aiding women.¹⁰⁸ A related argument is

¹⁰¹ Thomas, *supra* note 27, at 207.

¹⁰² 465 U.S. 728 (1984).

¹⁰³ *Id.* at 737–38 (1984). In *Mathews*, the statute in question contained a “severability” clause, stating that if the gender differential were invalidated on constitutional grounds, benefits would be withdrawn from men and women alike. *Id.* at 734. *Mathews* does not illuminate what the Court would do if confronted by “nonseverability [used] for truly coercive reasons.” Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 340 (2007). Nor does it completely solve the standing question.

¹⁰⁴ See *Mathews*, 465 U.S. at 735.

¹⁰⁵ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

¹⁰⁶ See Caminker, *supra* note 93, at 1198.

¹⁰⁷ Thomas, *supra* note 27, at 198.

¹⁰⁸ Caminker, *supra* note 93, at 1198, 1202 (appealing to the concept of “underenforced”

that the protected group will be unable to use the political process to level up universally, and so the court should default to a leveling up remedy.¹⁰⁹ For example, if the reason that the group's interests were ignored in the first instance was prejudice, or even a malign sort of negligence, then there may be no particular reason to think that the legislature will reach a better outcome next time around. Justice Gorsuch made a roughly analogous point about constitutional purposes with respect to the First Amendment's ambitions in *Barr*.¹¹⁰ The core idea advanced here by commentators and judges alike is that there is a tight relationship between the threshold constitutional demand of formal equality on the one hand, and the disposition of leveling up—because the relevant constitutional norm also has a substantive component—on the other.¹¹¹

A third and related objection is an argument that the philosopher Derek Parfit has famously labeled the “Levelling Down Objection.”¹¹² This argument objects to leveling down on the ground that an action that “would be worse for some people, and better for no one,” cannot be desirable.¹¹³ As legal scholar Pam Karlan succinctly puts the same point: “Misery loves company, but not that much.”¹¹⁴ Or, in Peter Westen's words, leveling down makes equality “so preposterous a moral proposition that, if it were what equality really meant, no one would give it a moment's thought.”¹¹⁵

constitutional norms); see also Karlan, *supra* note 96, at 2027 (noting the theory that “the Equal Protection Clause is meant to address racially selective sympathy or indifference”); Thomas, *supra* note 27, at 200 (arguing that leveling down “fails to honor or effectuate the ultimate meaning of the operative constitutional right”); Brake, *supra* note 27, at 516 (arguing that “leveling down proceeds from an abstracted and objectified analysis of equality that ignores the lived experience of inequality and implicitly privileges the perspective of those doing the abstracting”); Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. REV. 322, 351 (2016) (arguing that “in suits challenging laws that provided social security and similar welfare benefits, . . . invalidating these laws would have harmed some vulnerable groups”).

¹⁰⁹ See Brake, *supra* note 27, at 610–11.

¹¹⁰ See *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2366 (2020) (Gorsuch, J., concurring in part and dissenting in part) (“[S]omehow, in the name of vindicating the First Amendment, our remedial course today leads to the unlikely result that not a single person will be allowed to speak more freely and, instead, more speech will be banned.”).

¹¹¹ See Thomas, *supra* note 27, at 198.

¹¹² Derek Parfit, *Equality or Priority?*, in *THE IDEAL OF EQUALITY* 81, 98 (Matthew Clayton & Andrew Williams eds., 2002).

¹¹³ *Id.* For an adoption of this view, see Jean Marie Doherty, *Law in an Elevator: When Leveling Down Remedies Let Equality Off in the Basement*, 81 S. CAL. L. REV. 1017, 1019–20 (2008).

¹¹⁴ Karlan, *supra* note 96, at 2028.

¹¹⁵ Westen, *supra* note 25, at 546.

None of this is to say that leveling down lacks any defenders. Perhaps the most articulate of those defenders has been one Professor Ruth Bader Ginsburg.¹¹⁶ Writing in 1979, well after she had undertaken her work for the ACLU Women's Rights Project,¹¹⁷ still-Professor Ginsburg concurred with the analytic frame adopted by the dissenting Justices in a recent gender equality case, *Califano v. Westcott*,¹¹⁸ in their votes for leveling down.¹¹⁹ A "candid recognition of the role [of] court," Justice Ginsburg explained, required the recognition that it was engaged in "essentially legislative" behavior because it would serve as a "short-term surrogate for the legislature."¹²⁰ To decide whether to level up or down, Professor Ginsburg focused her attention on "the strength of the legislature's commitment to the residual policy" as well as the "disruption a solution one way or the other would entail."¹²¹ These twin factors, almost forty years later, could have been used as lodestars for her analysis in *Morales-Santana*, even if they do not appear in so many words in that opinion.

II. CLARIFYING THE PROBLEMS IMPLICATED IN A LEVELING-DOWN DISPOSITION

Given the battery of arguments that have been offered against leveling down, it is perhaps surprising that the Court still uses that disposition at all. This Part reconsiders some of the arguments offered about leveling down and attempts to clear away a number of imprecise formulations and confusions that may hinder clear-sighted consideration of leveling down.

To begin with, this Part returns to the way in which Justices Ginsburg and Kavanaugh formulate the choice between leveling up and down as a problem of statutory interpretation, akin to the analysis of severability. This Part suggests that this misses an important distinction and elides the most peculiar feature of equality cases. Then, to get

¹¹⁶ See Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301 (1979) [hereinafter Ginsburg, *Some Thoughts*].

¹¹⁷ See *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU, <https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff> [https://perma.cc/YTK2-P22T] ("The ACLU Women's Rights Project was born in 1972 under Ginsburg's leadership . . .").

¹¹⁸ 443 U.S. 76 (1979).

¹¹⁹ See Ginsburg, *Some Thoughts*, *supra* note 116, at 314–16 (discussing *Westcott*, 443 U.S. at 93–96 (Powell, J., concurring in part and dissenting in part)). To be sure, Justice Ginsburg would have leveled up on the specific facts of *Westcott*, but she agreed with Justice Powell's framing.

¹²⁰ *Id.* at 317.

¹²¹ *Id.* at 318.

a better grip on the affirmative case for leveling down, this Part returns to the various critiques of that disposition enumerated in Part I, and suggest that, at least in some instances, there is less than meets the eye. This Part offers a reformulation of the litigation incentives critique and responds to Parfit's leveling-down critique, drawing, indeed, on arguments that Parfit and others have made.

I defer until the following Part a proper response to arguments from the constitutional purpose of a particular clause, because my main defense of leveling down starts with the postulation of a different function of equality within the constitutional design. The aim of this Part is to clear the ground so that the different function can more clearly and easily be perceived.

A. *Leveling Down and Severability Analysis Reconsidered*

In *Morales-Santana* and *Barr*, Justices Ginsburg and Kavanaugh offered two slightly different formulations of how judges should comprehend and analyze the choice between leveling up and down. Despite their differences, both jurists framed that choice in fundamentally the same way: as a permutation of the statutory interpretation question raised in severability analysis.¹²² One way of reading their varying rules in a single unifying frame is by understanding them both as efforts to subsume the question of leveling up or down under the rubric of statutory interpretation, bracketing significant differences in the toolkit applied to that task.

Hence, recall that Justice Ginsburg spoke in *Morales-Santana* of "the legislature's intent, as revealed by the statute at hand."¹²³ Justice Ginsburg asked whether "Congress . . . would have abrogated § 1409(c)'s exception, preferring preservation of the general rule."¹²⁴ In contrast, Justice Kavanaugh in *Barr* invoked a "presumption of severability" as an explicit alternative to an inquiry into legislative intent.¹²⁵ In effect, he offered a "default rule against a certain reading."¹²⁶ Despite their methodological differences, their positions may be closer than first appears. Justice Kavanaugh's brand of textual-

¹²² See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017); *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2352–53 (2020) (plurality opinion).

¹²³ *Morales-Santana*, 137 S. Ct. at 1699.

¹²⁴ *Id.* at 1700, 1700 n.27.

¹²⁵ *Barr*, 140 S. Ct. at 2352–53 (2020) (plurality opinion).

¹²⁶ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2155 (2016). That said, it is not clear what evidence, if any, would be sufficient to overcome the presumption applied in *Barr*. But if that presumption is in effect irrebuttable, should we not call it what it really is—a rule and not a presumption?

ism, after all, is a means to “enhance the rule of law and the appearance of neutral, evenhanded justice” by more faithfully tracking what Congress did, at least where the gap between action and intent is not significant.¹²⁷ Indeed, his rule might well be reformulated as a useful rule of thumb under conditions of uncertainty, as much as a prophylaxis against excessively legislative action by the court.¹²⁸ This rule of thumb operationalizes the assumption that a court’s task, after a finding of unconstitutionality, is to excise as little of the statute as possible,¹²⁹ and hence demonstrate as much fidelity to the original plan of the enacting legislature as feasible.¹³⁰

But is this the best way of framing the issue at stake? I think there is reason to think not. To begin with, I think that the statutory interpretation lens elides an important distinction between severability and the leveling-up or leveling-down problem. Further, I agree with Richard Fallon that when a violation of a formal constitutional equality norm has been identified, the ensuing dispositional “question is not whether the statute should be severed, but whether applicable remedial principles permit or require a court to extend more favorable treatment to a group that Congress [or a state] attempted to treat less favorably.”¹³¹ Even if, as then-Professor Ginsburg put it, the court is acting as a “short-term surrogate for the legislature,”¹³² that

¹²⁷ *Id.* at 2163.

¹²⁸ Cf. Robert L. Nightingale, Note, *How to Trim a Christmas Tree: Beyond Severability and Inseparability for Omnibus Statutes*, 125 YALE L.J. 1672, 1743 (2016) (reasoning from legislative intent to the presumption of severability).

¹²⁹ *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (directing that “a court should refrain from invalidating more of the statute than is necessary”).

¹³⁰ The Court, to be sure, occasionally recognizes that this task entails some normative judgment. See *Clinton v. City of New York*, 524 U.S. 417, 441 (1998) (“The cancellation of one section of a statute may be the functional equivalent of a partial repeal . . .”). But it is at pains otherwise to minimize, or perhaps suppress recognition, of that normative aspect of the task. See, e.g., *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (“[M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from ‘rewrit[ing] state law to conform it to constitutional requirements’ even as we strive to salvage it.” (quoting *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397 (1988))); *Reno v. Am. C.L. Union*, 521 U.S. 844, 884–85 (1997) (“This Court ‘will not rewrite a . . . law to conform it to constitutional requirements.’” (alteration in original) (quoting *Am. Booksellers Ass’n*, 484 U.S. at 397))).

¹³¹ Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 TEX. L. REV. 215, 257 (2020). Fallon cites *Morales-Santana* for this proposition, *id.* at 257 n.231, but Justice Ginsburg relied less on “applicable remedial principles” and more on hypothesized congressional intent. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699–1700 (2017). Hence, I would not invoke her opinion in the way that Fallon does, even though I agree with his ultimate normative conclusion.

¹³² Ginsburg, *Some Thoughts*, *supra* note 116, at 317.

does not mean that it should use rule-like presumptions or open-ended inquiry as a means to create a facsimile of legislative intent.

As a threshold matter, it is certainly right that, as Fallon implies, the core case of severability presents a different sort of problem to the leveling-up or leveling-down question.¹³³ In the core case of severability, the Court is confronted with a discrete provision that contains a constitutional flaw. Given a judicial finding of unconstitutionality running against that specific provision, the question of severability is whether other elements of the same statutory scheme should be treated as invalid or unenforceable.¹³⁴ Where the Court has identified a formal constitutional equality concern, there are two provisions imposing different rules on distinct classes: the ten- and one-year physical presence requirements in *Morales-Santana*,¹³⁵ and the prohibition and permission for robocalls by non-governmental and state-backed debt collectors in *Barr*.¹³⁶ In these cases, the constitutional problem does not arise because one or another provision contains a constitutional flaw. It arises because there is a differential between the legal treatment accorded under each of the two provisions—a combinatory effect rather than the effect of one provision in isolation. Unlike the severability cases, therefore, there is not a single provision that can be targeted for excision, followed by an inquiry into whether other parts of the statute are so intricately with it that they must fall too. The constitutional problem by its nature adheres not in a single provision, but in the gap between two provisions.¹³⁷

¹³³ See Fallon, *supra* note 131, at 215.

¹³⁴ See, e.g., *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (“In order for other . . . provisions to fall, it must be ‘evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not.’” (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987))); see also *Ayotte*, 546 U.S. at 330 (2006) (“After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?”).

¹³⁵ See *Morales-Santana*, 137 S. Ct. at 1679, 1687.

¹³⁶ See *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2335–36 (2020) (plurality opinion).

¹³⁷ Consider the following view of severability:

“When some part of the sub-constitutional law is found invalid, [courts] sometimes must determine whether any other legal rule is conditional on, and hence inseverable, from it. In cases of inseverability, legal rules that are not themselves unconstitutional may thus be found to be inoperative, and courts must decide accordingly.”

John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 82 (2014); accord *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring) (citing Harrison, *supra*). This procedure breaks apart at the first step because there is no one invalid provision; it is the relationship of two provisions that generates the invalidity. Again, the point is that the leveling-up or leveling-down problem is not usefully analyzed by assuming it presents the same problem as severability.

Judges occasionally lose sight of this and so make analytically confused statements. The plurality opinion in *Barr*, for example, glimpsed the problem at certain moments, but at other moments spoke of the “constitutionally offending provision” in the singular.¹³⁸ The problem with this statement is that it treats a legal conclusion as a threshold fact from which analysis can proceed. That is, it assumes there is one provision that is the baseline and the other that is an offensive exception. But the problem in *Barr* is not whether provisions B, C, and D would have been enacted in the absence of provision A. It is the analytically distinct question of which of two provisions, A and B, must fall if both cannot constitutionally coexist.

Because the question of leveling up or down is analytically distinct from the severability question, it cannot be assumed that the way doctrinal forms for resolving severability can be mechanically extended to that new context. More particularly, it is uncertain that either the Ginsburg formulation in *Morales-Santana* or the Kavanaugh formulation in *Barr* gets us very far. In both cases, they offer familiar and hence comforting verbal formulations that do not really help in thinking about the distinctive problem of opting for either leveling up or down. This is because that problem is not well stated as a problem of statutory meaning, as Fallon put it,¹³⁹ but rather as a question of distinctive judicial judgment.

To see this, consider again Justice Ginsburg’s “legislature’s intent” framing.¹⁴⁰ In the severability context, courts appear to assume that the relevant intent is that of the enacting legislature, not the intent of the contemporaneous body with power to enact a new measure.¹⁴¹ This is a plausible enough heuristic. Constitutional problems may be frequent enough that legislators, as a very general matter, have formed a view, perhaps embodied in the text or structure of a statute, of how the statute should operate once a constitutional excision has occurred. Further, it seems at a minimum eminently reasonable to say, alongside Justice Kavanaugh, that the search for retail evidence of this intent is best superseded by a rule-like presumption that as little as possible of the statutory text should be excised as feasible.

¹³⁸ *Barr*, 140 S. Ct. at 2353 (plurality opinion).

¹³⁹ See Fallon, *supra* note 131, at 215.

¹⁴⁰ *Morales-Santana*, 137 S. Ct. at 1699 (2017).

¹⁴¹ See, e.g., *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 687 (1987) (finding “abundant indication of a clear congressional intent of severability both in the language and structure of the Act and in its legislative history”).

Yet the assumptions underwriting this approach have less force when the question is whether to level up or down. The latter is a small subset of potential constitutional problems. It is therefore far less likely that the legislature will have formulated either a general approach or a specific opinion to the distinct and different puzzle of choosing between different provisions.¹⁴² The search for specific legislative intent posited by Justice Ginsburg is hence far less likely to yield results. Nor is it clear that there exists a default rule tracking the preferences of an enacting Congress of the sort that Justice Kavanaugh offered in *Barr*.¹⁴³ That is, whereas it makes reasonable sense to assume, as a quite general matter, that Congress would wish courts to adopt a severability default rule of minimal excision, it is quite unclear how Congress would wish courts to resolve the choice between two provisions, A and B, one of which must fall for the statute as a whole to be constitutional.

Indeed, a close reading of *Barr* suggests that Justice Kavanaugh's presumption of severability is not doing the analytic work that he imputes to it. On his accounting, this presumption directs courts to "invalidate[] and sever[] unconstitutional provisions from the remainder of the law rather than razing whole statutes."¹⁴⁴ But as noted above, this formulation assumes what it presumes to decide—the existence of an offending provision or provisions. Where the constitutional problem arises not from the text of specific provisions, but from the coexistence of two separate provisions, this understanding of severability gives no guidance as to which provision to cast away. Justice Kavanaugh avoided this difficulty by stipulating, almost *ipse dixit*, that the robocall provision of the TCPA was "the constitutionally offending provision."¹⁴⁵ The only reason offered for this decisive stipulation was that the robocall exception was a later addition to a "prior law" that had already been proved to operate "independently . . . for 20-plus

¹⁴² There are some instances in which the enacting Congress can be plausibly said to have made such a choice. For instance, in *Heckler v. Matthews*, Congress has explicitly included instructions of how to resolve the leveling-up or leveling-down choice. 465 U.S. 728, 737–38 (1984). But Congress did so because it was responding to an earlier equality-related ruling; the downstream problems of formal equality were hence squarely presented to it.

¹⁴³ Note that "the statutory default rules that minimize political dissatisfaction often do *not* track the most likely meaning or even preferences of the enacting legislature." Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 Colum. L. Rev. 2027, 2030 (2002). Instead, they may "maximize the extent to which statutory results accurately reflect enactable political preference." *Id.* at 2034. The problem is that this formulation does not get us much further with the problem of leveling up or down.

¹⁴⁴ *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2351 (2020) (plurality opinion).

¹⁴⁵ *Id.* at 2353.

years.”¹⁴⁶ It is not at all clear, however, why the relative novelty of the robocall exception should have counted against it; after all, in other cases of unavoidable statutory conflicts, the more recent provision will control.¹⁴⁷ Indeed, from at least one vantage point, the decision to characterize the robocall provision as an exception turned practicality on its head: Justice Gorsuch pointed out that the “exception” might be understood as sweeping in “a seemingly infinite number of robocalls of the type consumers appear to find most invasive.”¹⁴⁸

To be clear, I am not arguing that Justice Gorsuch had the better of the argument on this last point. I am rather pointing out that the analytic framework offered by Justice Kavanaugh, like that offered by Justice Ginsburg, cannot carry the weight it purports to hold. The leveling-up or leveling-down choice should not be examined through the lens of severability doctrine, and, more generally, should not be assimilated into the mine run of statutory interpretation problems.

B. *Reconsidering the Litigation Incentive and Parfit’s Leveling-Down Objections*

As we have seen, critics have suggested that leveling down is incentive-incompatible with the expected operation of constitutional litigation, or, worse, “impossible to believe” and “implausible.”¹⁴⁹ These objections are at best overstated, and this Section will explain why.

First, it is unlikely that the effect of leveling down on litigation incentives would be as dramatic as the critics suppose. The litigation-incentives argument assumes that constitutional litigation is filed because individual plaintiffs are materially harmed and want to gain some material recompense via judicial action. The connection between material harms and the incentive to engage in constitutional litigation, however, is far more tenuous in practice than this assumes.

On the one hand, relatively few people who experience material harms at the hands of state agents—commonly the police—end up

¹⁴⁶ *Id.*

¹⁴⁷ *See, e.g.,* *Watt v. Alaska*, 451 U.S. 259, 266–67 (1981). The presumption against implied repeals, which seems to counsel in favor of older over newer statutes, is not helpful here. That canon applies when a court is “[p]resented with two statutes” and endeavors to “regard each as effective” unless their provisions are “irreconcilable.” *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (quoting *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974)). The problem is that once a formal equality violation has been demonstrated, “irreconcilable” differences necessarily exist, and so the path of reconciliation is no longer available.

¹⁴⁸ *Barr*, 140 S. Ct. at 2365 (Gorsuch, J., concurring in part and dissenting in part) (emphases omitted).

¹⁴⁹ Parfit, *supra* note 112, at 98.

seeking redress in court; whether they do or not depends on a host of highly local factors, from the availability of civil-rights attorneys to the attitudes of the local state and federal benches.¹⁵⁰ On the other hand, the absence of material harm in other domains does not always seem to hinder litigation from being filed. For example, challenges to affirmative action in university admissions are brought by individuals who would not have been admitted even without the university's use of race, and who have, in any event, gone to attend another degree program.¹⁵¹ It seems likely that equality cases will, for the foreseeable future, be often brought by ideological organizations and attorneys who have independent resources to pursue litigation. To be sure, an ideological organization might hesitate before filing suit because of a concern that a victory on the merits may be accompanied by a "loss" through a leveling-down disposition; the ACLU, for example, might be unwilling to bring speech rights cases if it believes victory will lead to *more* and not less speech regulation. But even here, the mere possibility of such an outcome might have effects at the margin, but it is unlikely to lead *all* suits to dry up. There is no particular reason to think, therefore, that the flow of constitutional equality cases will dry up entirely any time soon if leveling down were used more often.

This observation, though, reveals a more subtle version of the litigation-incentives critique, albeit one that is not particular to equality cases in which leveling down is an option. Notwithstanding the formal demands of Article III standing doctrine, the federal courts no longer orient toward, or serve well, the individuals who have experienced the most serious harms as a consequence of constitutional violations. They are instead generally open to ideologically motivated litigants who seek to use the courts to further a policy agenda. The possibility of leveling down is certainly a component of this phenomenon, but hardly the only or the most important one. Because the substance of constitutional law overlaps greatly with the domain of democratic policy, and because judges cannot, and do not, screen for cases in which judicial review is a substitute for success in the elected branches, the courts operate as forums for pitched ideological conflict while failing to serve the corrective justice and deterrence functions that ordinarily

¹⁵⁰ Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1601 (2020) (explaining that "whether people seek redress for violations of their rights and whether they succeed also depends in significant part on the civil rights ecosystem in which the claims arose").

¹⁵¹ See Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 299 (2015) (discussing Abigail Fisher's standing in a challenge to the University of Texas's admissions policy); see also Adam D. Chandler, *How (Not) to Bring an Affirmative-Action Challenge*, 122 YALE L.J. ONLINE 85, 85–86 (2012).

would justify money damages for past harms.¹⁵² Put otherwise, the larger problem to which critics glancingly refer is the capture of the federal courts for ideological conflict as opposed to mere constitutional dispute resolution.¹⁵³

Second, I am not persuaded that the leveling-down objection associated with Parfit provides a reason against leveling down as a judicial disposition.¹⁵⁴ As a correlative, the critiques from constitutional purpose that in effect repackage Parfit's argument are no more convincing. As a starting point, the objection, at least insofar as it is adopted by American legal scholars, seems to rest on normative premises that are either implausible or at least unpalatable. Their arguments seem to rest on an individualistic, additive, and welfarist perspective: that is, the relevant metric of welfare is individual; individual welfare can be calculated discretely and then aggregated through a simple additive function; and the relation between or distribution of those individual welfare evaluations is irrelevant.¹⁵⁵ That is, the assumption is that if a court levels down, no good has resulted. But this seems to assume that the existence of inequality cannot generate harms, which seems improbable. Inequality, after all, is likely to be a predicate fact that allows—even if it does not necessarily entail—stratification and domination. Certain forms of equality might be deemed necessary, moreover, for the operation of democracy.¹⁵⁶

It is also implausible to say that the mere fact of inequality *simpliciter* is never morally or legally inconsequential. To give one example of great salience at the time of this writing, there are now a considerable number of studies that the “most powerful” predictor of the rate of deaths from the COVID-19 virus “is inequality—usually

¹⁵² *Barr*, 140 S. Ct. at 2356 (plurality opinion) (noting that leveling up would “end up harming a different and far larger set of strangers to this suit—the tens of millions of consumers who would be bombarded every day with nonstop robocalls”).

¹⁵³ Constitutional law scholars bare some blame for this because they focus so relentlessly on the Supreme Court's law-declaration function, rather than on the blue-collar work of actually providing warranted redress. Federal courts, by all accounts, do not perform their remedial task well. See generally AZIZ Z. HUO, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* (2021) (criticizing the remedial choices made by the federal courts).

¹⁵⁴ To be clear, Parfit does not embrace the argument. See Parfit, *supra* note 112.

¹⁵⁵ Larry Temkin, *Equality, Priority, and the Levelling Down Objection*, in *THE IDEAL OF EQUALITY* 126, 137 (Matthew Clayton & Andrew Williams eds., 2002) (noting that the objection assumes that “equality has no intrinsic value, and non-instrumental egalitarianism must be rejected”). More generally, the leveling-down objection rejects the possibility that “something is intrinsically valuable according to someone, but not intrinsically valuable for him.” Nils Holtung, *Egalitarianism and the Levelling Down Objection*, 58 *ANALYSIS* 166, 167 (1998).

¹⁵⁶ For a useful analysis of how this might be so, see Robert C. Post, *Democracy and Equality*, 603 *ANNALS AM. ACAD. POL. & SOC. SCI.* 24 (2006).

measured as the Gini coefficient of income.”¹⁵⁷ That is, in a quite immediate and direct way, “higher inequality tends to lead to more suffering.”¹⁵⁸ This sort of dynamic effect is not well captured in the criticisms offered against decisions such as *Morales-Santana*, which focus quite narrowly on the specific point in time after the decision is made. Through a more general lens, T.M. Scanlon has identified a range of ways in which inequality standing alone can be objectionable, including the way it can engender “humiliating differences in status” or give “the rich unacceptable forms of power over those who have less.”¹⁵⁹ Discussing differences in status, which may often be at issue in Equal Protection jurisprudence, Scanlon notes that “depriv[ing] some people of a feeling of superiority that they may value” is not morally objectionable leveling down because “this is not something that they could complain of losing.”¹⁶⁰ Advancing a related point, Parfit observes that if one embraces the leveling-down objection, this has the effect of shutting off certain, arguably desirable, forms of critique. For instance, “[i]f inequality is not in itself bad, we may find it harder to explain . . . why we should redistribute resources.”¹⁶¹ Although there is a possibility of reasonable disagreement here, I do not see a good reason for ruling out such concerns *ex ante*, nor, I suspect, would many of leveling down’s critics if they were pressed on the point.

A similar point can be made by terms of purely legal norms without recourse to moral reasoning of any form. In the American constitutional context, it is implausible to say that equality is *not* an independent constitutional value quite apart from its welfarist effect. The Constitution, moreover, contains a large number of rights. As Peter Westen famously argued, it is possible to rewrite any right in the form of a claim to an equal entitlement to some good.¹⁶² The Constitution guarantees to individuals both the sum of these entitlements and also “equal protection.” The use of Parfit’s leveling-down objection in the constitutional context in effect eliminates the latter term.

¹⁵⁷ *Why Have Some Places Suffered More Covid-19 Deaths Than Others?*, *ECONOMIST* (July 31, 2021), <https://www.economist.com/finance-and-economics/2021/07/31/why-have-some-places-suffered-more-covid-19-deaths-than-others> [perma.cc/GD2P-G2GB]. It should go without saying that my argument here is not that we should level down with respect to COVID-19, only that the latter demonstrates an intrinsic harm of inequality.

¹⁵⁸ *Id.*

¹⁵⁹ T.M. SCANLON, *WHY DOES INEQUALITY MATTER?* 8 (Julian Savulescu ed., 2018).

¹⁶⁰ *Id.* at 28; *see, e.g., id.* at 31 (noting that the “harms” of “discrimination and caste systems” are “good reasons for eliminating the positions of privilege”).

¹⁶¹ Parfit, *supra* note 112, at 99.

¹⁶² Westen, *supra* note 25, at 548–50.

More modestly, the argument might be empirically contingent: given the harms wrought by leveling down, the critics might say, it is simply implausible to think that the good that comes from affirming an abstract hypothesis of formal equality is worth it. On this view, equality may be a separate and distinct good, but it can never outweigh the material losses from leveling down. And if the judicial choice is between affirming the abstract value of formal equality plus leveling up and affirming that equality value and leveling down, there is no good reason for a court to do the latter when it can always do the former.

Yet even on this view, there may well be reasons to level down because of the costs associated with the exercise of a right. For example, a leveling-up disposition in *Barr* would likely have dramatically increased the volume of robocalls received by American households. As Justice Kavanaugh rightly noted, this counts as a cost that—even if not dispositive on its own—may well have tipped the balance toward leveling down in an all-things-considered analysis.¹⁶³ Another concern is that leveling up might have dynamic effects of its own: rather than mitigating the flow of litigants, leveling up might prompt Congress to avoid carveouts even when constitutionally feasible, and instead impose unvariegated rules that uniformly allocate harsh burdens.¹⁶⁴ If this concern were substantial enough, the “constitutional concern about the disempowerment of women” that commentators evoke would, in practice, offer no basis for distinguishing between leveling up and down.¹⁶⁵

¹⁶³ *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2353–56 (2020) (plurality opinion).

¹⁶⁴ That some carveouts might withstand constitutional scrutiny is demonstrated by *Heckler v. Mathews*, 465 U.S. 728, 729 (1984) (upholding a statute that revived a previously invalidated gender-based classification because it was “directly and substantially related to the important governmental objective of protecting individuals who planned their retirements in reasonable reliance on the [invalidated] law”). The worry here is likely to be most acute in respect to gender equality claims. Unlike race-based constitutional equality doctrine, the law of constitutional gender equality does not foreclose all forms of “affirmative action” for women. *See United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (“Sex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’ to ‘promot[e] equal employment opportunity,’ [and] to advance full development of the talent and capacities of our Nation’s people.” (citations omitted) (first quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977) (per curiam); and then quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987))). Congress may well be less likely to exercise this discretion if an error in judgment leads to an undesirable burdensome result.

¹⁶⁵ Caminker, *supra* note 93, at 1198.

* * *

In summary, the choice between leveling up and down cannot be reduced to an exercise in statutory interpretation. It is also not isomorphic with severability doctrine. Instead, it presents a distinct kind of judicial choice. In thinking about that choice, this Article suggests that the litigation incentives and the Parfit-derived leveling-down objection do not supply reasons against leveling down. This leaves the question whether the constitutional value of equality can be deployed to resist that disposition. The best way of answering that question is simply by offering a reading of constitutional equality that can sustain leveling down as a dispensation.

III. THE (MODEST) CASE FOR LEVELING DOWN

This Part offers a concededly constrained justification for leveling down by developing the connection between two plausible views of constitutional equality's function. That is, rather than trying to defeat the arguments from constitutional purpose, canvassed in Part I, on their own terms, this Part suggests new terrain upon which leveling down can find firmer ethical footing. Here, I follow Mike Seidman's argument that leveling down might be justified by "map[ping] various solutions onto the functions served by equality claims in the first place."¹⁶⁶ Seidman suggests that the Equal Protection Clause can be understood as "a protection against a caste system" and a shield against "the social message of inferiority conveyed by separation."¹⁶⁷ He further cites the "special standing rules for equal treatment cases," such as the affirmative action cases discussed above, as evidence that the Court treats "equality as an independent, noninstrumental good."¹⁶⁸

Building on Seidman's basic methodological and substantive insights, I draw here on two very different views of constitutional equality—one conservative and canonical, and the other almost heretical but progressive in valence—in order to show not only that leveling down can be deduced directly from equality norms, but also to demonstrate that the decision to level down does not have an obvious ideological coloration. It can be put to use to quite diverse normative ends. Importantly, the arguments developed here are not based on the specter of negative externalities: that is, it is not the case under either

¹⁶⁶ Louis Michael Seidman, *The Ratchet Wreck: Equality's Leveling Down Problem*, 110 KY. L.J. 59, 60 (2021).

¹⁶⁷ *Id.* at 91.

¹⁶⁸ *Id.* at 90.

of these arguments that leveling down is simply the “least bad” option, picked because of the unintended costs of leveling up. Instead, there is something positive to be said on its behalf.

To be clear up front, my argument is not that leveling down is always required or inevitably desirable. It is not. Rather, my avowedly modest ambition is to demonstrate that it is possible to generate a range of appealing normative foundations for leveling down.

A. *Leveling Down as Antibalkanization*

In recent decisions concerning racial discrimination and the Equal Protection Clause, the Court has identified two interrelated goals. The first is that “the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class,”¹⁶⁹ and must respect their “‘personal right[]’ to be treated with equal dignity and respect.”¹⁷⁰ In consequence, strict scrutiny is applied “to any admissions program using racial categories or classifications.”¹⁷¹ The second is getting the state entirely out of the “sordid business [of] divvying us up by race.”¹⁷² This second goal is focused on informal and formal structures of political organization, rather than the treatment of specific individuals. Reva Siegel has characterized it as an “antibalkanization” norm, which she offers as a general vision of Equal Protection to rank alongside anticlassification and antisubordination accounts.¹⁷³ An advocate of the latter “thinks about equal protection purposively and structurally: [they] assess[] the constitutionality of government action by asking about the kind of polity it creates,” and in particular attends to “the forms of estrangement that both racial stratification and practices of racial remediation may engender.”¹⁷⁴ These twinned goals of individualization and antibalkanization provide nominal guideposts for the doctrine. Some have persuasively argued that if the Court indeed had these goals, it would adopt a different set of doctrinal rules.¹⁷⁵ For present purposes,

¹⁶⁹ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (plurality opinion) (emphasis added) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

¹⁷⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

¹⁷¹ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013).

¹⁷² *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).

¹⁷³ Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1287 (2011).

¹⁷⁴ *Id.* at 1300–01.

¹⁷⁵ On individualization, see Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 *YALE L.J.* 1600, 1641–42 (2020) (casting “serious doubt on the notion that race-based

this Article sets aside those objections and instead asks whether leveling down could be justified as a way of executing those values.

Assume arguendo that the sincerely pursued ambition of Equal Protection doctrine is a social order in which individuals are evaluated and assigned benefits or burdens on some account of their merit without regard to their protected status.¹⁷⁶ The risk to that social order might vary over time. At one point in time, it may be imperiled by a dominant caste that creates carveouts for disfavored groups in ways that deprive them of the benefits and protections of the law. Under these circumstances, providing equality plaintiffs with a leveling-up remedy by default would make a good deal of sense.

But at a different point in time, the threat might come from a different direction. The concern might instead be that the law will be used not to selectively subordinate, but instead to target small groups for special and unwarranted benefits. The risk to a morally acceptable social ordering would then arise from efforts to legislatively insulate small groups from the forms of social evaluation and judgment to which everyone else in the society was subject. In a pungent op-ed penned before he became a judge or a Justice, Brett Kavanaugh captured the basic gist of this argument with a sweeping brief against various forms of affirmative action on the ground that they operated as a “naked racial-spoils system.”¹⁷⁷

This intuition might play out in doctrine as follows: prohibited characteristics might be a proxy for measures that are intended to bypass the general norm of individualized consideration and evaluation, in ways that insulate, and hence extend in time, the material or status entitlements of a small group. The fact that the sheltered group is one that has been historically disadvantaged or an object of discrimination would not guarantee that the effect of such measures would merely be

generalizations and inferences are by their nature disrespectful of anyone’s individuality,” as the doctrine presently suggests). On antibalkanization, see Seidman, *supra* note 166, at 51 (noting that “sometimes facially neutral policies *do* reenforce caste and subordination”).

¹⁷⁶ This assumes that it is possible to define “merit” without respect to race or gender—i.e., that understandings of social and economic distinction are not themselves inflected by pernicious forms of stratification. I am skeptical of this assumption but stipulate it here for the sake of developing this argument. Accord Ayyan Zubair, *Brown’s Lost Promise: New York City Specialized High Schools as a Case Study in the Illusory Support for Class-Based Affirmative Action*, 11 CALIF. L. REV. ONLINE 557, 570 (2021).

¹⁷⁷ Brett Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL ST. J., Sept. 27, 1999, at A35. For an extended and early version of this argument, see William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 778 (1979) (arguing that the use of racial classification results in “racism, racial spoils systems, racial competition, and racial odium”).

a leveling up. For it may be the case that “special preference programs often are perceived as targets for exploitation by opportunists who seek to take advantage of monetary rewards without advancing the stated policy of minority inclusion.”¹⁷⁸

If all this were to be the case in fact,¹⁷⁹ then the leveling-down disposition in equality law would make a good deal more sense. That solution might be preferred in race-related cases, for example, if it was understood as a way to “avoid[] both a whites-only racial spoils system reflecting the status quo and a minority-favoring racial spoils system based on the politics of remediation.”¹⁸⁰ A leveling-up disposition, moreover, would be inappropriate for a number of reasons. It would, at a very minimum, extend the supernumerary demands placed on the public fisc by privileged minorities in ways that strained public finances. And more seriously, such a disposition would displace the possibility of individuated judgments about merit, or the lack thereof. By creating a level playing field upon which individual merit can be evaluated, the leveling-down disposition advances the larger normative goal of ensuring discrete person-focused rather than group-dependent forms of advancement.

To be clear, although this is an account of leveling down that fits with current constitutional doctrine in respect to race, it rests on a constitutional theory of equality that I find empirically implausible and normatively unappealing with respect to the racial dynamics observable in the larger context of American society.¹⁸¹ I do not offer it, therefore, in a spirit of endorsement. Rather, I aim simply to demonstrate how the leveling-down disposition can be deduced from a theory of constitutional equality with resonance in present conservative doctrine.

Even if, like me, you find this account unappealing or implausible with respect to race, it is worth considering whether this account finds greater resonance in respect to other constitutional equality rules and, in particular, for the dormant Commerce Clause. The latter is com-

¹⁷⁸ *Metro Broad. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting); *see also* *Fullilove v. Klutznick*, 448 U.S. 448, 538 (1980) (Stevens, J., dissenting) (“[T]he most disadvantaged within each class are the least likely to receive any benefit from the special privilege even though they are the persons most likely still to be suffering the consequences of the past wrong.”).

¹⁷⁹ To be clear, I sketch this argument without vouching for its empirical or moral credentials. *See infra* text accompanying note 181.

¹⁸⁰ William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279, 1307 (2005).

¹⁸¹ In particular, it indexes a fear that white ethnics are the principal victims of invidious discrimination.

monly understood as animated by a concern about “economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”¹⁸² Measures that violate the dormant Commerce Clause commonly seek to advantage or subsidize a comparatively small group of in-state actors rather than imposing a burden on a larger group of out-of-state actors.¹⁸³ A default leveling-down response to measures that impermissibly “favor local businesses over out-of-state businesses”¹⁸⁴ may well be more sensible more often than a leveling-up response. State governments, after all, are in the general business of responding to the legitimate demands of their constituents by supplying them with benefits. There are well known difficulties, of course, in distinguishing between legitimate subsidies and those that raise constitutional concern because of their effects on out-of-state actors.¹⁸⁵ But assuming these can be overcome, the case for leveling down in the dormant Commerce Clause context does not appear to implicate the serious normative and empirical objections imaginable, and that are in my view persuasive, in the race context.

B. *Leveling Down as Antisubordination*

An important, but now thoroughly marginalized, vein of theorizing constitutional equality aims at preventing persisting “subordination” of a group that has historically experienced disadvantage, discrimination, or other like forms of social marginalization.¹⁸⁶ Indeed,

¹⁸² *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)).

¹⁸³ See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 576 (1997) (“The Maine law expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market, singling out camps that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business.”).

¹⁸⁴ *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 272 (1984).

¹⁸⁵ Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 967 (1998) (framing this dormant commerce clause problem and noting that “[t]he Court has been especially aggressive in applying the dormant Commerce Clause to invalidate discriminatory state tax laws . . . [because of] a ‘strict rule of equality,’ which mandates that a state treat out-of-state commercial interests no worse than it treats its own”).

¹⁸⁶ For influential early versions of this argument in the race context, see Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CALIF. L. REV. 935, 960 (1994) (“[T]he antisubordination principle contends that certain groups should not occupy socially, culturally, or materially subordinate positions in society.”); see also Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 157 (1976) (arguing that the Equal Protection Clause prohibits laws or official practices that “aggravate[] . . . the subordinate position of a specially disadvantaged group”). For a parallel argument in the gender context, see CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32–45 (1987); see also

perhaps “the most elementary antidiscrimination principle singles out one kind of economically rational stereotyping and condemns it, on the theory that such stereotyping has the harmful long-term consequence of perpetuating group-based inequalities.”¹⁸⁷

At first blush, antisubordination accounts of equality may seem squarely at odds with the use of leveling down. If the problem is marginalization, why would additional marginalization ever be desirable? But this conclusion moves too fast. The manner in which subordination is implemented will depend on the nature of impediments thrown up to hinder marginalized groups. Just as the logic of racial balkanization can be advanced through different mechanisms, so too systems of subordination and hierarchy can be pursued through diametrically opposed strategies. On the one hand, a system of social, economic, and political hierarchy might be maintained through laws that formally disqualify the disfavored group from certain positions, privileges, or benefits. This was how race and gender stratification were maintained for centuries in the United States. On the other hand, the same system of stratification can be propped up by measures that channel particularly key resources to one group in ways that ensure its persisting economic, social, or political advantage. That is, law can be used to lock in resources essential to the intertemporal preservation of hierarchy.

Where the first condition holds, leveling up provides an appealing remedy. In this vein, Section 1 of the Civil Rights Act of 1866—which was among the very first civil-rights measures passed in the Civil War’s wake—did not command formal inequality.¹⁸⁸ Instead, it directed that all citizens, regardless of their race, were entitled to “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”¹⁸⁹ That is, the Congress of 1866 aimed to level up African-Americans, and former slaves in particular, to the station of “white citizens.”¹⁹⁰ It did not merely equalize; it also fixed the direction of that equality project.

On the other hand, where social norms of equality and legal rules demanding formally even-handed treatment have emerged, a previ-

Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953–57 (2002).

¹⁸⁷ Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2418 (1994).

¹⁸⁸ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982).

¹⁸⁹ *Id.* For a discussion of the enactment history of the measure, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968).

¹⁹⁰ Ch. 31, § 1, 14 Stat. 27.

ously dominant social group is commonly not without the means to promote and sustain its own advantages.¹⁹¹ It can do so effectively without violating formal equality through the transmission of privilege via mechanisms that are formally and legally open but functionally closed to entry for most members of a minority group. The sociologist Charles Tilly has hence used the term “opportunity hoarding” whereby elites “maintain themselves as elites by controlling valuable resources and engaging the effort of less-favored others in generating returns from those resources.”¹⁹² Tilly argues that preserving opportunities in these ways happen when elites are able to solve their “organizational problems by means of categorical distinctions” that are used to organize, implicitly or explicitly, “systems of social closure, exclusion, and control.”¹⁹³

Perhaps the most important form of “opportunity hoarding” relevant to race-related dynamics in the United States operates with respect to secondary education. I focus here on race to flesh this argument out; I leave for another occasion consideration of how a parallel argument could be made in respect to gender or ethnicity.

High quality education, at least in contemporary America, is a scarce resource. Funding for primary and secondary education also is highly localized in the United States.¹⁹⁴ Against a historical context of racial segregation and hyper-segregation,¹⁹⁵ and wide racial wealth gaps,¹⁹⁶ middle-class, typically white communities, can use their “exclusionary” zoning power as an instrument for minimizing affordable

¹⁹¹ CHARLES TILLY, *DURABLE INEQUALITY* 94, 147–69 (1998).

¹⁹² *Id.* For an application of Tilly’s ideas in the policing context, see Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 680, 765 (2020).

¹⁹³ TILLY, *supra* note 191, at 8; Charles Tilly, *Changing Forms of Inequality*, 21 SOCIO. THEORY 31, 33 (2003) (“Categories . . . transfer shared understandings, practices, and interpersonal relations from setting to setting, making old routines easy to reproduce in new settings.”).

¹⁹⁴ See Sarah Mervosh, *How Much Wealthier Are White School Districts than Nonwhite Ones? \$23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html> [https://perma.cc/7L5S-WCUL]; see also Douglas S. Massey, *Still the Linchpin: Segregation and Stratification in the USA*, 12 RACE & SOC. PROBS. 1, 5 (2020).

¹⁹⁵ Massey, *supra* note 194, at 1 (“Although average levels of black–white segregation have moderated over the ensuing decades, the declines have been uneven and black segregation has by no means disappeared. Indeed, in some metropolitan areas, it remains extreme.”).

¹⁹⁶ Dionissi Aliprantis & Daniel R. Carroll, *What Is Behind the Persistence of the Racial Wealth Gap?* ECON. COMMENT. (Fed. Reserve Bank of Cleveland, Cleveland, Ohio), Feb. 28, 2019, <https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racial-wealth-gap> [https://perma.cc/7766-YUUC].

housing, and hence control access to good schooling.¹⁹⁷ They can hereby arbitrage “a market distortion restricting access to a scarce good (in this case, land),” into a social policy that “restricts opportunities (such as good schools) to other children.”¹⁹⁸ This arbitrage between economic status and educational opportunity leads to large funding gaps between majority-white and majority-nonwhite school districts.¹⁹⁹ The ensuing patchwork of educational opportunities are thus properly characterized as white “opportunity hoarding” achieved through the medium of “social structures . . . that limit the access of outgroup members to resources controlled by the ingroup.”²⁰⁰ Most blatantly, “criminal or civil penalties against parents for enrolling their children in a school district in which neither the child nor parent resides” shore up the systemized preservation of education opportunities and their intergenerational transmission.²⁰¹ The net effect is that economic mobility is indexed by geography because where one grows up, and hence where one is educated, has a powerful effect on whether one thrives economically as an adult.²⁰²

Current Equal Protection law is insensitive to these mechanisms for preserving racialized economic and social advantage across generations despite their entangling of racialized public and private action.²⁰³ But imagine a Court that understood the Equal Protection

¹⁹⁷ See Olatunde C. A. Johnson, “*Social Engineering*”: Notes on the Law and Political Economy of Integration, 40 CARDOZO L. REV. 1149, 1165 (2019) (“Relatively wealthy communities can use land use mechanisms (such as exclusionary zoning) and taxing to bar entry . . .”).

¹⁹⁸ Richard V. Reeves, ‘*Exclusionary Zoning*’ is Opportunity Hoarding by Upper Middle Class, BROOKINGS (May 24, 2017), <https://www.brookings.edu/opinions/exclusionary-zoning-is-opportunity-hoarding-by-upper-middle-class> [https://perma.cc/LUD7-8SMP].

¹⁹⁹ See Mervosh, *supra* note 194 (“School districts that predominantly serve students of color received \$23 billion less in funding than mostly white school districts in the United States in 2016, despite serving the same number of students . . .”).

²⁰⁰ Massey, *supra* note 194, at 1; Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2386 (2021) (arguing that residential segregation by race and wealth hence interlaces with localized funding “to allow students in predominantly white school districts to hoard the best educational opportunities”).

²⁰¹ LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397, 398 (2019).

²⁰² Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility I: Childhood Exposure Effects*, 133 Q.J. ECON. 1107, 1107–08 (2018). Even processes that change residential patterns, such as gentrification, have the effect of reproducing racial stratification. See Jackelyn Hwang & Lei Ding, *Unequal Displacement: Gentrification, Racial Stratification, and Residential Destinations in Philadelphia*, 126 AM. J. SOCIO. 354 (2020).

²⁰³ Indeed, at times the Court positively puts its weight behind these dynamics. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 702–04 (2007) (finding a school district’s use of race as the determining factor when assigning students to schools, with the goal of bringing the school’s racial composition in line with the composition of the district as a whole, was not narrowly tailored and therefore unconstitutional).

Clause to have an antidisubordinating ambition, one with special reference to the historical marginalization of Black Americans. The doctrine might pick out measures that had not just a disparate impact on Black Americans, but that had the predictable effect of extending racial disadvantages and disparities in time. The ensuing equality-related doctrine would not be focused on formal classifications and would take very different account of sociological and econometric evidence of the mechanisms that link race to disadvantage in durable ways. It seems plausible to say that the ensuing doctrine would be more faithful to the original meaning of the Equal Protection Clause, and certainly closer to the original understanding of the Radical Republicans who drafted it and pushed it through to ratification.²⁰⁴

One piece of that imagined doctrine would be the expanded use of the leveling-down disposition. A court concerned with actually existing forms of racial and gender subordination, that is, would find constitutional violations where a legal mechanism was found to be channeling valuable social resources to “insiders” in such a way as to preserve the marginalized standing of “outsiders.” Because the preservation of social hierarchies depends on mechanisms that fence out others from goods such as education that provide a foundation for economic and social advancement, the appropriate disposition in these cases would be to eliminate the distinctive access regime that has been maintained by the dominant group. In the educational context, for instance, this would mean severing the connection between residence and schooling, disallowing localized monopolies on high-quality education, mandating both resource and pupil sharing between districts, and having recourse again to the integrative measures deployed in the twentieth century desegregation campaign. Leveling down, in short, would entail dismantling the mechanisms that had been used to concentrate resources or goods such as education, deconcentrating them even at the cost of diluting their quality.²⁰⁵ It would

²⁰⁴ See, e.g., Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (documenting how “race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection”).

²⁰⁵ Some of the same missions might be advanced through leveling-up remedies of the kind that Joseph Fishkin has explored in his work that draws attention to “bottlenecks,” or narrow passages that an individual must traverse to have access to an array of opportunities. JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* 13, 156–60 (2014). Fishkin argues in favor of measures such as eliminating college-degree requirements for jobs for which they are unnecessary and promoting community colleges for those who do not score well on

mean equalizing educational resources across geographic units despite the countervailing dynamics of economic and racial segregation.

My aim here is not to set out in precise detail the doctrinal tools that courts could use to dismantle opportunity hoarding that disadvantages women or racial and ethnic minorities.²⁰⁶ Rather, my narrower and more modest point is conceptual: leveling down is a plausible doctrinal response to a particular kind of equality problem.

Contrary to what at first blush might appear to be the case, this suggests that there is not a necessary connection between status-quo oriented normative goals and leveling down. To the contrary, eliminating privileges can be an effective tool in progressive visions of inequality in a world already characterized by social closure and opportunity hoarding.

CONCLUSION

The aim in this Article has been to explore the possible justifications for leveling down in the wake of a formal equality violation under the Equal Protection Clause, the First Amendment's free speech and religious freedom components, and the dormant Commerce Clause. The inquiry was catalyzed by Justice Ginsburg's resolution of Mr. Morales-Santana's Equal Protection claim.²⁰⁷ But the analysis has led me to reject the analytic framing offered by Justice Ginsburg in that decision, as well as in her 1978 article on the same topic. Without endorsing the specific result in *Morales-Santana*, I have suggested that different accounts of constitutional equality can work as a foundation for leveling-down remedies.

But was *Morales-Santana* rightly decided? Given the celebratory purpose for which this Article is written, I do not want to pass judgment on that point. More modestly, I will conclude by suggesting a "path not taken" in an earlier decision that may well have made for a more attractive resolution in that case. Recall that I earlier observed that the Court had ruled out on prudential grounds the remedy of "selective prospectivity," in which a specific litigant obtains a remedy for a historical wrong, even though others harmed at the same time do

standardized tests. *Id.* at 146–49. These are leveling-up solutions to the problems similar those to discussed in the main text.

²⁰⁶ For one empirical accounting, see Matthew G. Springer, Keke Liu & James W. Guthrie, *The Impact of School Finance Litigation on Resource Distribution: a Comparison of Court-Mandated Equity and Adequacy Reforms*, 17 EDUC. ECON. 421 (2009).

²⁰⁷ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017).

not obtain relief.²⁰⁸ I suggest there that selective prospectivity had perhaps more to be said in its favor. A revised argument for selective prospectivity in cases such as *Morales-Santana* and *Barr* would start with the observation, made by Justice Gorsuch in the latter case, that “the traditional remedy for proven violations of legal rights likely to work irreparable injury in the future” is that “plaintiffs are entitled to an injunction preventing [a law’s] enforcement against them.”²⁰⁹ The conditions for application of the “traditional rule” certainly held in *Morales-Santana* as well as *Barr*: deportation to the Dominican Republic and loss of the right of residence in the United States likely both count as irreparable injuries.²¹⁰ The issuance of an injunction would also be consistent with, and perhaps demanded by, the “valid rule” doctrine which “directs that federal court litigants are ‘always’ allowed to ‘insist that [their] conduct be judged in accordance with a rule that is constitutionally valid.’”²¹¹ The equality-related concerns adduced in other instances against selective prospectivity have little force in the leveling-down context. The litigant who enjoys the benefit is being singled out for a good reason: they were subject to an unconstitutional rule, and then challenged that rule successfully. Subsequent litigants, however, who are subject to the new, leveled-down rule that results from the litigation have no equality-related cause to complain. By the time that a court reaches these cases, the law no longer contains a violation of formal equality. Unlike the initial litigant, they are not being subject to an invalid rule and hence have no entitlement to a constitutional remedy. In an era of apparent remedial restraint, this form of selective prospectivity has the potential both to allay the policy-related equality concerns leveled against its criminal procedure adjunct, and also to supply a variant on leveling down that meets many, if not all, of the objections discussed in Part II, including most obviously the litigation incentive problem.

Justice Ginsburg’s opinion in *Morales-Santana*, even if it did not explore that route, nevertheless exemplifies her typical blend of concern for the disenfranchised and deep commitment to the technical forms of the law. It is her at her best, in other words, and so worthy of tribute. This Article, I hope, evinces a fidelity to her spirit—a fidelity

²⁰⁸ See *supra* text accompanying note 90 (discussing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (plurality opinion)).

²⁰⁹ *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2365 (2020) (Gorsuch, J., concurring in part and dissenting in part).

²¹⁰ See *Morales-Santana*, 137 S. Ct. at 1686; *Barr*, 140 S. Ct. at 2365.

²¹¹ *Aziz Z. Huq, Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1452 (2013) (alteration in original) (quoting Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 4).

that I and many others in her wake strive to emulate in our work as scholars, lawyers, and jurists.

The Orthodox, and Unorthodox, RBG: Administrative Law and Civil Procedure

Abbe R. Gluck* & Anne Joseph O'Connell**

ABSTRACT

Justice Ginsburg was not usually a doctrinal revolutionary when it came to the fields of administrative law and civil procedure. Her adherence to precedent and careful attention to the proper division of labor among the branches restrained the Justice when confronted with modern doctrines of administrative deference and the creative use of class actions to address nationwide injuries. She also loved black-letter procedure: the strong confines of the Federal Rules, the domains in Congress's control, and the benefits derived from well-honed, careful doctrinal moves. But sometimes, she met the moment, and took a leap. Whether it was providing regulatory beneficiaries access to the courts or striving to modernize the Court's personal jurisdiction doctrine, a Justice loyal to doctrinal orthodoxies was, every once in a while, someone we might call "the unorthodox RBG."

*In administrative law, she was not an early adherent to agency deference in statutory interpretation: The Supreme Court unanimously reversed then-Judge Ginsburg in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Even as Justice Ginsburg came to align herself with Chevron's proponents, she saw an active role for the courts in safeguarding Congress's power over agencies. Her deference typically paired a belief in the expertise of agencies with a real-world understanding of hard policy problems that she viewed agencies were better able than courts to address. She did not, however, hesitate to question "bureaucratic arrogance" on substance or procedure when agency action hurt groups she cared deeply about.*

In civil procedure, Justice Ginsburg marked a huge path in the field of personal jurisdiction, where she clarified and redefined the law of general jurisdiction and helped frame a more modern approach to specific jurisdiction. She also loomed large in class actions, always aware of the special power of collective litigation. What links Justice Ginsburg's work in these two areas—class action and jurisdiction—is her effort to confront the challenges the modern national economy poses for the modern procedural landscape. Her juris-

* Alfred M. Rankin Professor of Law, Yale Law School.

** Adelbert H. Sweet Professor of Law, Stanford Law School. We are grateful for research assistance from Tanveer Singh, Emma Leeds Armstrong, Sydney Jordan, Maggie Mills, Taylor Nicholas, Mason Sands, Bardia Vaseghi, Charlotte Witherspoon, and the Stanford Law School reference librarians as well as for the editorial assistance of the law review. We are indebted most of all to Justice Ginsburg, our boss in the 2003 Supreme Court Term and our mentor for life. With each day since her passing, it becomes clearer to us how much she influenced us and how much we learned from her. We loved and miss her dearly.

diction jurisprudence rose to meet that challenge. Her orthodoxy in the class action context may have proved too strict, however. Her unbending reading of Federal Rule of Civil Procedure 23's class action requirements helped give rise to today's highly unorthodox forms of aggregate litigation, including multidistrict litigation, with the very pathologies she had hoped to avoid by adhering to the Rule.

Our previous work on "unorthodox" lawmaking, rulemaking, and civil procedure diagnoses legal unorthodoxies as symptoms of broader pressures on the system, not the causes. Not all unorthodoxies are necessarily bad. There is often a tradeoff between action and gridlock, and between stasis and evolution that is captured by the choice between orthodox and unorthodox legal doctrine. And many of today's unorthodoxies, like Chevron was when it was first announced, become tomorrow's black-letter law. We examine how Justice Ginsburg navigated those tensions in two areas of her deep doctrinal expertise.

TABLE OF CONTENTS

INTRODUCTION	1534
I. ADMINISTRATIVE LAW	1536
A. <i>Reversed in Chevron</i>	1538
B. <i>An Evolving Approach to Chevron</i>	1540
C. <i>Deviations</i>	1544
D. <i>Federal vs. State Regulators</i>	1548
II. CIVIL PROCEDURE	1550
A. <i>Justice Ginsburg's Rule 23 Orthodoxy as Unintended Catalyst for Modern Aggregation Unorthodoxies</i>	1551
1. <i>Amchem's "Fidelity" to Rule 23</i>	1552
2. <i>Amchem's After-Effects and the Decline of Class Actions</i>	1555
3. <i>Justice Ginsburg's Later Class Action Cases</i>	1559
a. <i>Wal-Mart v. Dukes: A Conservative Approach to Backpay</i>	1559
b. <i>Epic Systems v. Lewis and the Importance of Collective Action</i>	1562
B. <i>Personal Jurisdiction and a More Unorthodox RBG</i>	1563
1. <i>Specific Jurisdiction and the Modern National Economy</i>	1564
2. <i>General Jurisdiction: Justice Ginsburg's New "At Home" Test</i>	1567
CONCLUSION	1571

INTRODUCTION

Justice Ginsburg, notorious as she is deservedly remembered, was not usually a doctrinal revolutionary when it came to two of our shared areas of intellectual love: administrative law and civil procedure. Her adherence to precedent, insistence on proper procedures, and careful attention to the proper division of labor among the branches restrained our Justice when it came to early embrace of administrative deference, and it significantly limited her approach to class action doctrine in ways that had unintended aftereffects on access to aggregate litigation. Other times, however, she met the moment and took a leap. Whether it was providing regulatory beneficiaries access to the courts or the indelible imprint she made striving to modernize the Court's personal jurisdiction doctrine, a Justice loyal to doctrinal orthodoxies was, every once in a while, someone who might be called "the unorthodox RBG."

Justice Ginsburg was our role model in the law. From her incomparable work ethic, to her attention to detail and the on-the-ground consequences of judicial actions for real people, to her enduring faith in the law and our government institutions—especially the courts—she will remain a towering presence for us, and for countless others, always. She also loved a good conversation, especially about her opinions and the subjects she was passionate about, including administrative law and civil procedure. We are proud to share those subjects with her as areas of academic expertise, and it is in that spirit that we offer these thoughts about the tensions she navigated when pressure was placed on traditional doctrines that she held dear. What a joy it would be to know her response.

For administrative law, although then-Judge Ginsburg authored the appellate decision the Supreme Court unanimously reversed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹ and initially worried that the Court's framework might not adequately respect Congress, she often deferred to agencies in its aftermath. Justice Ginsburg's deference generally combined an orthodox belief in the expertise of agencies with a real-world appreciation of complex policy problems that, in her view, agencies were better equipped than courts to handle. She did not, however, hesitate to question agency decisions on substance or procedure when it undermined the needs of groups she cared deeply about (for example, women seeking contraceptive

¹ 467 U.S. 837 (1984).

services).² Her perceived need for federal direction and coordination to address pressing substantive problems drew both from practical realities and a rather conventional view of Congress. In some sense, Justice Ginsburg largely saw our institutions of governance in orthodox terms, but her approach to deference was influenced by her understanding of the modern complexities of the problems they addressed.

When it comes to civil procedure, Justice Ginsburg leaves a huge legacy in the field of personal jurisdiction, where she clarified and redefined the law of general jurisdiction and helped chart a path for a more modern approach to specific jurisdiction. She also loomed large in class actions, always aware of the special power of collective litigation, especially for the less powerful members of society. But she also loved black-letter *procedure*: the strong confines of the Federal Rules, the domains in Congress's control, and the benefits derived from well-honed, careful doctrinal moves.

That fidelity to traditional constraints restrained her sometimes. In particular, her orthodoxy in the class action context may have proved too strict; her unbending reading of Federal Rule of Civil Procedure 23 helped give rise to today's highly unorthodox forms of aggregate litigation, including multidistrict litigation, which suffer the very pathologies she feared would arise from creative class actions. In the context of jurisdiction, she was more aggressive. She led the Court in crafting its modern doctrines of general jurisdiction.³ She also boldly articulated what a contemporary vision of specific jurisdiction in a national economy might look like. Her seemingly revolutionary vision of specific jurisdiction has not yet carried the day, but that vision was also the logical outgrowth of decades of continuous doctrinal refinement and, in that sense, less revolutionary than upon initial glance. Interestingly, what links Justice Ginsburg's work in these two areas—class actions and jurisdiction—is her effort to confront the challenges that the modern national economy poses for today's procedural landscape. Her jurisdiction jurisprudence rose to meet that challenge; her class action jurisprudence may, in the end, have been too slow to evolve.

Our previous work on “unorthodox” lawmaking, rulemaking, and civil procedure diagnoses legal unorthodoxies as symptoms of broader

² See *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 250 (1993) [hereinafter *Ginsburg Supreme Court Nomination Hearing*].

³ See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

pressures on the system, not the causes.⁴ We have also been emphatic that not all unorthodoxies are bad. There is often a tradeoff between action and gridlock, and between stasis and evolution (legal, legislative, or otherwise), that is captured by the choice between orthodox and unorthodox legal doctrine. And many of today's unorthodoxies, like *Chevron* was when it was first announced, become tomorrow's black-letter law. We examine how Justice Ginsburg navigated those tensions in two areas of her deep doctrinal expertise.

I. ADMINISTRATIVE LAW

Justice Ginsburg rarely garners attention in the field of administrative law,⁵ especially when compared with how she is feted for her work in civil procedure and sex discrimination.⁶ But for thirteen years before joining the Supreme Court, she served on the D.C. Circuit, which has a higher proportion of administrative law cases than any other appellate court. There, as well as on the Court afterwards, she wrote opinions critical to our understanding of the administrative state.

⁴ See generally Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017); Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

⁵ For important exceptions, see James J. Brudney, *The Supreme Court as Interstitial Actor: Justice Ginsburg's Eclectic Approach to Statutory Interpretation*, 70 OHIO STATE L.J. 889, 901–11 (2009); see also Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370, 415–24 (2021); Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 825–28 (2007); Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 627–28, 636–37 (2021); Mark P. Nevitt & Robert V. Percival, *Could Official Climate Denial Revive the Common Law as a Regulatory Backstop?*, 96 WASH. U. L. REV. 441, 467–71 (2018).

⁶ See, e.g., 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, 21 (2004); Elijah Yip & Eric K. Yamamoto, *Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure*, 20 U. HAW. L. REV. 647, 647 (1998); Tobias Barrington Wolff, *Ruth Bader Ginsburg and Sensible Pragmatism in Federal Jurisdictional Policy*, 70 OHIO STATE L.J. 839, 840 (2009); Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725, 726 (2009); Carol Pressman, *The House That Ruth Built: Justice Ruth Bader Ginsburg, Gender and Justice*, 14 N.Y. L. SCH. J. HUM. RTS. 311, 335–36 (1997); Judith Resnik, *Opening the Door: Ruth Bader Ginsburg, Law's Boundaries, and the Gender of Opportunities*, 25 COLUM. J. GENDER & L. 81, 83 (2013); Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 HASTINGS L.J. 1267, 1269 (2012); Brenda Feigen, *Goodbye, Old Friend: Tribute to Justice Ruth Bader Ginsburg*, 121 COLUM. L. REV. 519, 532–33 (2021); Jonathan L. Entin, *Ruth Bader Ginsburg: An Appreciation*, 42 CARDOZO L. REV. 2991, 2993–94 (2021).

One of her early opinions was perhaps inauspicious. The Court unanimously reversed her decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁷ widely viewed as one of the most important cases in the modern administrative state for establishing a deferential framework for review of agency decisions.⁸ After reversal, she did not become an early convert.⁹ *Chevron* was too unorthodox—it arguably departed from precedent that largely provided for de novo judicial review of pure questions of law,¹⁰ and it raised questions for then-Judge Ginsburg about the relative roles of Congress, the executive, and the courts. She even suggested in her Supreme Court confirmation hearing that Congress could instruct the courts not to defer to agency interpretations.¹¹ Justice Ginsburg eventually became a strong adherent of *Chevron*, and of course the opinion itself evolved from unorthodox to the new orthodoxy.¹² As Thomas Merrill has shown, the Court itself presumably did not intend to change the world of administrative law in *Chevron*, but the decision took hold in litigation filings and lower court opinions and eventually came to be understood as a new decisional framework and one of the most cited cases in the field.¹³ Justice Ginsburg’s administrative law jurisprudence evolved along with it, likely because of her fidelity to precedent and because she saw *Chevron*’s increasing use by administrations of both political stripes, not just conservatives.

Nevertheless, Justice Ginsburg remained attentive to real-world effects and the on-the-ground consequences of agency action. Occasionally, those realities made her distrust some aspects of agency actions and deviate from *Chevron*. She did so notably in her last opinion, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,¹⁴ in which her concern for women’s access to reproductive

⁷ 467 U.S. 837 (1984).

⁸ Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 254 (2014).

⁹ *Ginsburg Supreme Court Nomination Hearing*, *supra* note 2, at 249–50.

¹⁰ See *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 130–31 (1944). Indeed, before *Chevron*, then-Judge Ginsburg reviewed pure questions of law de novo. See, e.g., *Am. Fed’n Gov’t Emps., AFL-CIO v. Carmen*, 669 F.2d 815, 821–22 (D.C. Cir. 1981) (providing no deference to a General Services Administration regulation in interpreting whether Congress had permitted the executive branch to charge its employees for parking).

¹¹ See *Ginsburg Supreme Court Nomination Hearing*, *supra* note 2, at 250 (“Congress can say it doesn’t want us to defer to the agency. There was a time when the Bumpers [a Democratic Senator] amendment had quite a following. That measure would have told courts not to defer.”).

¹² See, e.g., *EPA v. EME Homer City Generation*, 572 U.S. 489 (2014).

¹³ Merrill, *supra* note 8.

¹⁴ 140 S. Ct. 2367 (2020) (Ginsburg, J., dissenting).

health care was evident throughout a dissent where she refused to defer to the executive. Her broad views of standing also permitted judicial review of agency decisions, even if the courts would have eventually deferred. In other words, she both pushed for a plaintiff's day in court and allowed the government defendant a leg up in the substantive conflict.

She hewed to traditional positions in other ways, too. As we shall see in her jurisprudence involving the Federal Rules of Civil Procedure, Justice Ginsburg sometimes preferred Congress to be the institution to break new regulatory ground over courts. And, despite some skepticism of "[b]ureaucrats,"¹⁵ she often picked federal agencies over state agencies. Federal institutions—Congress most of all—were better equipped, in her mind, to manage the messiness of critical public policies.¹⁶

A. *Reversed in Chevron*

Then-Judge Ginsburg's famously reversed *Chevron* opinion rested less on any negative views of agency expertise and flexibility than it did on her fidelity to precedent.

In 1978, the D.C. Circuit—in an opinion written by liberal lion Judge J. Skelly Wright—agreed with the Sierra Club that Section 111 of the Clean Air Act "defines a 'source' as an *individual* facility, as distinguished from a combination of facilities such as a plant, and that the bubble concept," which allowed multiple polluting emission points to be considered together, "must therefore be rejected *in toto*" for many new and modified pollution sources.¹⁷ By contrast, two years later, a decision written by a more conservative judge determined that the latest amendments to the Clean Air Act required the agency to establish a similar bubble policy under the new Prevention of Significant Deterioration ("PSD") program.¹⁸

¹⁵ *Ginsburg Supreme Court Nomination Hearing*, *supra* note 2, at 250.

¹⁶ Within the executive branch, Ginsburg did seem to side with the President as "decider," rather than President as "overseer," camp before that administrative law debate took off:

Finally, even in the absence of a clear statutory provision establishing a governing role for the President, we would not conclude that Congress, simply by assigning a function to an executive agency, thereby intended to exclude initiating action by the President. As this court has had recent occasion to observe, "Within the range of choice allowed by statute, the President may direct his subordinates' choices."

Am. Fed'n Gov't Emps., AFL-CIO, 669 F.2d at 823; *see generally* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

¹⁷ *ASARCO Inc. v. EPA*, 578 F.2d 319, 325 (D.C. Cir. 1978).

¹⁸ *See Ala. Power Co. v. Costle*, 636 F.2d 323, 402 (D.C. Cir. 1980). For more on these earlier decisions, see Merrill, *supra* note 8, at 260–64.

A third case—the case that would go on to become *Chevron*—asked the D.C. Circuit to determine whether the EPA could adopt a bubble definition for “source” in the most polluted places, known as non-attainment areas.¹⁹ Judge Ginsburg wrote for a unanimous panel:

In ruling upon EPA’s regulatory change, we do not write on a clean slate. Our course is marked by two prior decisions in which panels of this court determined the applicability *vel non* of the bubble concept to distinct Clean Air Act programs. In *Alabama Power Co. v. Costle*, . . . the court held EPA *must* employ the concept in the Act’s [PSD] regime, a scheme designed to *maintain* air quality in clean air areas; in *ASARCO, Inc. v. EPA*, . . . the court *ruled out* application of the concept to national new source performance standards (“NSPSs”) which the Act directs EPA to set with a view to *enhancing* air quality.²⁰

Merrill describes the opinion, “stripped of details about the statutory and regulatory background,” as “reduced to a syllogism” and “the most restrained” of the three rulings.²¹ Ginsburg’s restraint, argues Merrill, derived from her reading her court’s precedent as determinative of the pending question.²² The two prior cases had created “a bright line test for determining the propriety of EPA’s resort to a bubble concept.”²³

Justice Ginsburg did pair her fidelity to precedent with skepticism of the agency’s policy determination, which reversed the previous administration’s position in concluding that applying the bubble concept to non-attainment areas would not harm air quality. She found the agency’s defense lacking, indeed, missing altogether.²⁴ Merrill finds that Justice Ginsburg’s “demand for consistency in this context amounted to privileging policy judgments previously reached by the D.C. Circuit,”²⁵ presumably over any agency expertise. But this ordering—placing judicial competence over agency actions—did not continue.

¹⁹ NRDC v. Gorsuch, 685 F.2d 718, 718 (D.C. Cir. 1982).

²⁰ *Id.* at 720.

²¹ Merrill, *supra* note 8, at 265–66.

²² *See id.*

²³ *Gorsuch*, 685 F.2d at 726.

²⁴ *Id.* at 727 n.41 (“[I]n abandoning its earlier position, EPA did not cite, nor have we found in the record, any study, survey, or support for the opposite position, now tendered by EPA, that the dual definition would indeed retard improvement of air quality *in the aggregate*. Therefore, EPA’s decision . . . if based on this rationale, would not rise to the level of reasoned decisionmaking . . .”).

²⁵ Merrill, *supra* note 8, at 266.

B. *An Evolving Approach to Chevron*

Justice Ginsburg's trail in administrative law was more winding than pathmarking.²⁶ Given the *Chevron* reversal, it was perhaps unsurprising that Justice Ginsburg started out skeptical of agency deference. In the run-up to her Supreme Court confirmation hearing, the Alliance for Justice analyzed twenty-two of Ginsburg's appellate opinions in cases that reached the Supreme Court, with a particular eye toward how and where Judge Ginsburg had departed from the retiring Justice White. It found that, "in administrative law cases, a staple of the D.C. Circuit, Judge Ginsburg has been less deferential to agencies than the Court and more willing to overturn their actions on the grounds that [they] are contrary to the intent of Congress or based on inadequate facts."²⁷ In contrasting her voting record to Justice White's, it determined that "[t]he two jurists voted similarly in eight cases and differently in ten (four Court decisions did not list the Justices' votes or Justice White did not participate). In six cases on which they disagreed, the Supreme Court and Justice White took a more deferential view of agency decisions."²⁸

In her confirmation hearing for the Court, Ginsburg described her understanding of *Chevron* in some depth in responding to then-Senator Joseph Biden's written questioning. To start, she believed that the first step—determining whether Congress has spoken precisely and therefore avoiding deference—was "neither mechanical nor narrow."²⁹ Ginsburg also viewed the second step—deferring to reasonable interpretations of ambiguous statutes—as having some teeth.³⁰ And she stressed that agencies must act noncapriciously: "It must reflect reasoned decisionmaking, judged in light of such factors as the thoroughness of the agency's consideration of evidence and policies, the need for expertise on the question, and the consistency of the agency position with earlier views or the presence of articulated reasons for changing such views."³¹ On the Court, Justice Ginsburg often

²⁶ See Melissa Block, *Pathmarking The Way: Ruth Bader Ginsburg's Lifelong Fight For Gender Equality*, NPR (Sept. 24, 2020), <https://www.npr.org/2020/09/24/916377135/pathmarking-the-way-ruth-bader-ginsburgs-lifelong-fight-for-gender-equality> [<https://perma.cc/YY5X-7KWJ>] (noting the Justice's signature use of the word "pathmarking" in her opinions).

²⁷ *Ginsburg Supreme Court Nomination Hearing*, *supra* note 2, at 673 (report submitted by the Alliance for Justice).

²⁸ *Id.*

²⁹ *Id.* at 570.

³⁰ *Id.* ("The agency view must itself be consistent with statutory language and congressional policy.").

³¹ *Id.*

did support agency flexibility and deferred to agency judgments, particularly when rooted in agency expertise, which, for her, was the strongest justification for *Chevron* deference. But she deviated from this position at times.³² And she sometimes eschewed *Chevron*—perhaps strategically to build a majority as the case’s influence waned in recent years—even though her opinion still favored the agency.³³ For example, in *BNSF Railway Co. v. Loos*,³⁴ she wrote for seven Justices that, as a matter of de novo statutory interpretation, “a railroad’s payment to an employee for working time lost due to an on-the-job injury is taxable ‘compensation.’”³⁵ She noted that the agency had reached the same conclusion but did not cite or rely on *Chevron*.³⁶ Justice Gorsuch’s dissent noted *Chevron*’s absence from the majority opinion.³⁷

One way to view Justice Ginsburg’s evolving relationship to *Chevron* is through the lens of the Justice as a procedure purist. She valued guardrails when it came to procedure—whether those guardrails were judicial precedent or necessary steps that legal actors must undertake to justify their decisions. In her confirmation hearing, responding to questioning about administrative deference, she told Senator Moseley-Braun that “deference does not mean abdication.”³⁸ She recognized agency authority, but she wanted it wielded legitimately, and for Justice Ginsburg that meant she wanted agencies to give reasons for their positions. As she explained to Senator Metzenbaum about one of her opinions: “I did not say the Board lacked power to issue a bargaining order in that setting. Far from it. I said give us a reason.”³⁹

³² For instance, she joined part of Justice Scalia’s dissent in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, which rejected the agency’s changed interpretation that the provision of cable-modem service could be classified as an information service (rather than as a telecommunications service). 545 U.S. 967, 1014 (2005) (Scalia, J., dissenting). She did not, however, sign onto Justice Scalia’s argument that judicial precedent always trumps a later agency interpretation. *Id.* at 1019 (Scalia, J., dissenting). Justice Ginsburg also agreed with Justice Breyer’s dissenting position in *FCC v. Fox Television Stations, Inc.* that the FCC had not sufficiently explained its policy change on fleeting expletives. 556 U.S. 502, 546–47 (2009) (Breyer, J., dissenting).

³³ The Court last relied on *Chevron* deference in 2016. James Kunhardt & Anne Joseph O’Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS INST. (Aug. 18, 2022), <https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/> [https://perma.cc/3XEF-XAVE].

³⁴ 139 S. Ct. 893 (2019).

³⁵ *Id.* at 895.

³⁶ *Id.* at 897.

³⁷ *Id.* at 908 (Gorsuch, J., dissenting); see also Green, *supra* note 5, at 627.

³⁸ *Ginsburg Supreme Court Nomination Hearing*, *supra* note 2, at 250.

³⁹ *Id.* at 153.

Similarly, although the *Chevron* Court had partially rested deference on agencies being more politically accountable than courts,⁴⁰ Justice Ginsburg seemed more interested in their accountability relative to Congress's and the courts' role in preserving that institutional balance. For the Justice, elections played a critical role in distinguishing agencies from Congress, and courts were needed to oversee agencies.⁴¹ This perspective may explain the position she took in her confirmation hearing that Congress could direct courts as to *Chevron*'s application—as she put it, “Congress can say it doesn’t want us to defer to the agency.”⁴² But unlike some conservative jurists today who want the courts to overturn *Chevron*,⁴³ Ginsburg was not calling for a reversal of *Chevron* or the reversal of a deference presumption. For Justice Ginsburg, the question was not about constitutional discomfort with the administrative state qua administrative state—she had no such discomfort; it was about proper institutional arrangements and relative institutional capacities.⁴⁴

Because of these views, Justice Ginsburg grounded her support of *Chevron* in expertise more than in accountability or other rationales used by proponents of deference.⁴⁵ Justice Scalia, for example, favored *Chevron* because he believed the framework provided a presumptive and clear drafting rule for Congress.⁴⁶

In *EPA v. EME Homer City Generation, L.P.*,⁴⁷ for example, Justice Ginsburg wrote for six members of the Court to uphold, under the Clean Air Act's Good Neighbor Provision, the EPA's Clean Air Inter-

⁴⁰ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

⁴¹ *Ginsburg Supreme Court Nomination Hearing*, *supra* note 2, at 250 (“Bureaucrats don’t have to stand for election as you do. Courts are needed to check against bureaucratic arrogance”). She noted that “agencies do feel beholden to the legislature. That is where they get their money from, and so they are accountable to you as well.” *Id.*

⁴² *Id.*

⁴³ See, e.g., *Baldwin v. United States*, 140 S. Ct. 690 (2020) (Thomas, J., dissenting); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

⁴⁴ *Ginsburg Supreme Court Nomination Hearing*, *supra* note 2, at 250.

⁴⁵ See, e.g., Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2087 (1990) (“The fact-finding capacity and electoral accountability of [agency] administrators are far greater than those of courts.”).

⁴⁶ See *United States v. Mead Corp.*, 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) (“*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion.”).

⁴⁷ 572 U.S. 489 (2014).

state Rule, which limits nitrogen oxide and sulfur dioxide emissions in upwind states.⁴⁸ She started right off with the problem's complexity (implicitly calling on agency expertise) and then turned to the *Chevron* framework, calling out her own reversal as an appellate judge:

In *Chevron*, . . . we reversed a D.C. Circuit decision that failed to accord deference to EPA's reasonable interpretation of an ambiguous [Clean Air Act] provision. Satisfied that the Good Neighbor Provision does not command the Court of Appeals' cost-blind construction, and that EPA reasonably interpreted the provision, we reverse the D.C. Circuit's judgment.⁴⁹

The D.C. Circuit had stopped at the first step of the *Chevron* framework with the EPA's rule,⁵⁰ but Justice Ginsburg disagreed.⁵¹ She again emphasized the complexities of "[t]he realities of interstate air pollution," arguing that the D.C. Circuit's "proportionality edict . . . appears to work neither mathematically nor in practical application."⁵² Under the second step of *Chevron*, Justice Ginsburg found that "the allocation method chosen by EPA is a 'permissible construction of the statute.'"⁵³ Three decades after her own reversed decision in *Chevron*, it had all come full circle.

Her attentiveness to institutional arrangements together with her belief in agency expertise also led the Justice to prefer agency regulation to judge-made law—federal common law—when Congress has stepped in to regulate a field. In *American Electric Power Co. v. Connecticut*,⁵⁴ writing for a unanimous Court on the preemption issue, Justice Ginsburg held that Congress had "displaced" federal common law nuisance lawsuits with the Clean Air Act, even if the agency had not yet regulated in the area.⁵⁵ She paired her deference to Congress with a view of agency competence to make complex policy decisions:

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack

⁴⁸ *Id.* at 493, 496. Justices Scalia and Thomas dissented; Justice Alito did not participate.

⁴⁹ *Id.* at 496.

⁵⁰ *See id.* at 504.

⁵¹ *See id.* at 515.

⁵² *Id.* at 516.

⁵³ *Id.* at 518.

⁵⁴ 564 U.S. 410 (2011).

⁵⁵ *Id.* at 423–25.

the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.⁵⁶

This preference for agency decisionmaking fit well with the orderly procedures the now-orthodox *Chevron* case established: “Indeed, this prescribed order of decisionmaking—the first decider under the Act is the expert administrative agency, the second, federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law.”⁵⁷ What was originally unorthodox for Justice Ginsburg had become a “prescribed order of decisionmaking.”⁵⁸

C. Deviations

On the one hand, Justice Ginsburg’s embrace of these decisional frameworks is, as John Manning wrote, evidence of her adherence to the legal process school’s traditional belief in “institutional settlement;” that settling who the deciders are, and in what order, is even more important than the decision in any particular case.⁵⁹ But Justice Ginsburg never fully gave in to this position. She did not hesitate to question “bureaucratic arrogance” on substance or procedure when it undermined the needs of groups she cared deeply about, such as women seeking no-cost contraception services and other regulatory beneficiaries.⁶⁰

On substance, Justice Ginsburg’s last opinion, a dissent for her and Justice Sotomayor in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,⁶¹ argued against religious and moral exemptions to providing no-cost contraceptive services under the Patient Protection and Affordable Care Act (“ACA”). Those exemptions had been initially promulgated, without prior notice and opportunity for public comment, via a joint rulemaking carried out by three cabinet departments: Health and Human Services, Labor, and Treasury. Justice Ginsburg’s dissent opens with the detailed story of the design and fight for the Women’s Health Amendment and the dif-

⁵⁶ *Id.* at 428.

⁵⁷ *Id.* at 427.

⁵⁸ *Id.*

⁵⁹ See John F. Manning, *Justice Ginsburg and the New Legal Process*, 127 HARV. L. REV. 455, 455 (2013) (“Justice Ginsburg exemplifies [Hart and Sacks’s] New Legal Process style of interpretation.”); see also John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 154 (2011) (“One of Hart and Sacks’s central assumptions was that of ‘institutional settlement.’”) (footnote omitted).

⁶⁰ *Ginsburg Supreme Court Nomination Hearing*, *supra* note 2, at 250.

⁶¹ 140 S. Ct. 2367 (2020) (Ginsburg, J., dissenting).

ference its enactment made for women's wellbeing.⁶² The exemptions at issue would “‘reintroduce[] the very health inequities and barriers to care that Congress intended to eliminate when it enacted the women's preventive services provision of the ACA.’”⁶³

She refused to “condone harm to third parties occasioned by entire disregard of their needs,” as greater agency deference in the case might have demanded.⁶⁴ And she homed in on empirical evidence from the start, emphasizing that some “70,500 [to] 126,400 women would immediately lose access to no-cost contraceptive services”—figures conspicuously absent from the majority's opinion.⁶⁵ The Justice also noted, in positing that the lower courts did not abuse their discretion by issuing nationwide injunctions, that the realities of work and education do not neatly map onto state boundary lines.⁶⁶ Against that backdrop, Justice Ginsburg also questioned the agencies' expertise, noting that: “HRSA's [Health Resources and Services Administration]⁶⁷ expertise does not include any proficiency in delineating religious and moral exemptions.”⁶⁸

Justice Ginsburg also expressed discomfort in the fact that the exemption was made through multiple agencies engaging in joint rulemaking—namely, the Internal Revenue Service, the Employee Benefits Security Administration, and the Centers for Medicare and Medicaid Services.⁶⁹ As we have pointed out, this is increasingly common in modern regulation (and tied to congressional delegations) and often necessary (and not improper) when complex subject matters ne-

⁶² See *id.* at 2401–02 (“When . . . women had to choose between feeding their children, paying the rent, and meeting other financial obligations, they skipped important preventive screenings and took a chance with their personal health.” (quoting 155 Cong. Rec. 28844 (statement of Sen. Hagan))).

⁶³ *Id.* at 2409.

⁶⁴ *Id.* at 2400–01.

⁶⁵ *Id.* at 2401.

⁶⁶ *Id.* at 2412 n.28 (“The Court of Appeals noted, for example, that some 800,000 residents of Pennsylvania and New Jersey work—and thus receive their health insurance—out of State. Similarly, many students who attend colleges and universities in Pennsylvania and New Jersey receive their health insurance from their parents' out-of-state health plans.” (citation omitted)).

⁶⁷ HRSA is a subagency of the U.S. Department of Health and Human Services (HHS). *HHS Agencies & Offices*, HHS.Gov, www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html [<https://perma.cc/BLB2-J4PS>].

⁶⁸ *Little Sisters*, 140 S. Ct. at 2406 (Ginsburg, J., dissenting). One of us resists her reliance for this point on a statement in *King v. Burwell*, 576 U.S. 473 (2015), in which the Court refused to defer to an IRS interpretation of the ACA. Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 94 (2015) (arguing the Court overlooked the IRS's large role in administering the ACA).

⁶⁹ *Little Sisters*, 140 S. Ct. at 2406 (Ginsburg, J., dissenting).

cessitate overlapping jurisdiction.⁷⁰ But, hewing to an orthodox model of one agency regulating, Justice Ginsburg challenged the participation of multiple agencies.

On procedure, Justice Ginsburg's broad view of standing, particularly for regulatory beneficiaries and those who typically wield less political power in modern governance, permitted judicial review of agency action, even if that review would, in all likelihood, turn out to be quite deferential to the agency.⁷¹ As she said in her confirmation hearing to the Court, "I think it is important that there be review, judicial review, of bureaucratic actions."⁷²

Her most cited standing opinion, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,⁷³ involved a suit brought by environmental groups against the owner of a "hazardous waste incinerator facility" with a "wastewater treatment plant" under the Clean Water Act's citizen suit provision for not complying with their permit (including mercury discharges).⁷⁴

⁷⁰ The so-called "tri agency" rulemaking in the context of the ACA is very common, given that all three agencies have roles implementing the statute under their respective law. Gluck, O'Connell & Po, *supra* note 4, at 1800–01 tbl.1 (noting a rise in unorthodox rulemaking practices, including "[o]verlapping delegations to multiple agencies and joint rulemaking" (emphasis omitted)).

⁷¹ While Justice Ginsburg often found that litigants had constitutional access to the courts, she did shut the courthouse doors to Administrative Procedure Act ("APA") claims in particular contexts. Notably, in *Women's Equity Action League v. Cavazos*, then-Judge Ginsburg held that § 704 of the APA precluded plaintiffs from pressing "a broad-gauged right of action directly against the federal government officers charged with monitoring and enforcing funding recipients' compliance with discrimination proscriptions" because the plaintiffs had "another adequate remedy"—specifically, they could sue the educational entities directly under Title VI. 906 F.2d 742, 746–47 (D.C. Cir. 1990). As with her ruling in *Chevron*, Justice Ginsburg noted that precedent "impelled" her ruling. *Id.* at 744. Justice Ginsburg's broad view of standing is also present in this litigation; she took pains to distinguish it from *Allen v. Wright*, where the Court found the plaintiffs lacked standing, finding that the plaintiffs here had experienced "direct injury." *Women's Equity Action League v. Cavazos*, 879 F.2d 880, 885 (D.C. Cir. 1989). Barring the plaintiffs' claims on statutory grounds, however, may have had broad effects unintended by the Justice. According to some scholars, courts later used Ginsburg's ruling to "channel antidiscrimination claims away from the APA," even after the Court rendered the alternative remedy she had relied on, Title VI, "demonstrably inadequate." Ceballos, Engstrom & Ho, *supra* note 5, at 370, 382.

⁷² *Ginsburg Supreme Court Nomination Hearing*, *supra* note 2, at 250. In *EME Homer City Generation*, for example, Justice Ginsburg did not treat challengers' apparent failure to sufficiently raise objections in the public comment period as jurisdictionally barring those objections in the federal courts. *EPA v. EME Homer City Generation*, 572 U.S. 489, 512 (2014). After refusing to bar the challenges, she then relied on *Chevron* deference to dismiss them on substantive grounds. *Id.*

⁷³ 528 U.S. 167 (2000).

⁷⁴ *Id.* at 175–76.

To start, Justice Ginsburg found that “sworn statements” from group members “adequately documented injury in fact.”⁷⁵ On the key issue of redressability, while conceding that not all civil penalties “provide sufficient deterrence to support redressability,” Justice Ginsburg determined that the penalties sought by Friends of the Earth “carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE’s injuries by abating current violations and preventing future ones.”⁷⁶ Congress mattered here, too. Quoting Justice Frankfurter, she noted that the connection between remedies and deterrence “is a matter within the legislature’s range of choice.”⁷⁷

Her *Laidlaw* decision expanded standing after considerable narrowing of access to the courts.⁷⁸ The opinion, while seemingly revolutionary when it was issued, became more accepted over time. Last year, the Court—without the Justice—determined that “an award of nominal damages by itself” can meet the redressability prong of the standing inquiry for a past injury.⁷⁹ Although the Court cited *Laidlaw* only once, and not for its core holding on redressability, its shadow looms large.⁸⁰

As for administrative procedure, then-Judge Ginsburg wrestled with an agency’s claim of good cause to skip prior notice and opportunity for public comment a few years after *Chevron*. In a challenge to a Federal Energy Regulatory Commission (“FERC”) interim rule permitting utilities to include in their base rate some of their in-progress construction costs, Judge Ginsburg noted that “petitioners have raised a substantial and troublesome question” about what she viewed as an unorthodox agency process—one that has since become even more widely used.⁸¹ She nevertheless determined that the agency had “es-

⁷⁵ *Id.* at 183 (“We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.”).

⁷⁶ *Id.* at 187.

⁷⁷ *Id.* Heather Elliott, another Ginsburg clerk, argues that the Justice’s *Laidlaw* decision reflects “a different conception of separation of powers,” specifically that “it is not the role of the Court to limit Congress’s legislative power through increasingly narrow rules of standing (here, by finding that the remedy Congress made available in a citizen suit could not satisfy the standing requirement of redressability).” Elliott, *supra* note 6, at 747. Here, we see again her respect for Congress. *See id.* at 748.

⁷⁸ See Shapiro, *supra* note 6, at 24 (“After at least a decade of increasing reluctance by the Court to allow private suits to remedy violations of law, this opinion came (forgive the metaphor) as a drink of clean water.”).

⁷⁹ *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

⁸⁰ *Id.* at 796, 801–02.

⁸¹ *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1132 (1987). See generally Gluck,

tablished the requisite ‘good cause’” to proceed without traditional procedures, but she did not do so lightly.⁸² Although Justice Ginsburg focused her dissent in *Little Sisters* on other issues, seven Justices in that case also determined that interim final rules followed by the opportunity to comment and the issuance of final final rules satisfied the Administrative Procedure Act (“APA”)’s rulemaking mandates.⁸³ She was not willing to agree to that unconventional process.⁸⁴

Real-world factors, along with the temporary nature of FERC’s rule, helped Judge Ginsburg accept the agency’s deviations from the APA. Aware that “court tolerance of ‘temporary’ measures installed without a public airing may give the agency an apparent incentive to proceed with its permanent rulemaking at a leisurely pace,” Judge Ginsburg stressed that “the agency must convince us, as FERC has done here, that it is not engaging in dilatory tactics during the interim period.”⁸⁵ Finally, she found that “the combined effect of the [other] cited considerations” about the realities of the rulemaking process—particularly the connections among different complex regulatory proceedings that had created reliance interests by utilities with financial consequences—“leads us to accept FERC’s conclusion that delaying its interim rule would be contrary to the public interest.”⁸⁶ In short, actual agency operations supported unorthodox procedures.

D. *Federal vs. State Regulators*

Despite her focus on institutions, Justice Ginsburg did not have a fully developed theory of federalism in administrative law. On the one hand, she wrote some opinions that were quite nationalist, even in contexts of cooperative federalist schemes like the Clean Air Act. For example, in *Alaska Department of Environmental Conservation v. EPA*,⁸⁷ she sided with the federal agency over the state one. On the other hand, she dissented in *City of Chicago v. International College of*

O’Connell & Po, *supra* note 4, at 1809–11 (documenting rise in rulemaking without prior notice and comment).

⁸² *Mid-Tex Elec. Coop., Inc.*, 822 F.2d at 1132.

⁸³ *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2386 (2020).

⁸⁴ See Kristin E. Hickman, *Did Little Sisters of the Poor Just Gut APA Rulemaking Procedures?*, NOTICE & COMMENT BLOG (July 9, 2020), <https://www.yalejreg.com/nc/did-little-sisters-of-the-poor-just-gut-apa-rulemaking-procedures/> [<https://perma.cc/CW5C-WS8Y>].

⁸⁵ *Mid-Tex Elec. Coop., Inc.*, 822 F.2d at 1132. (footnote omitted).

⁸⁶ *Id.* at 1133.

⁸⁷ 540 U.S. 461 (2004).

Surgeons,⁸⁸ believing that the federal courts could not exercise supplemental jurisdiction over claims against state agencies.

We note this not-quite-worked-out theory of federal-state relations was evident in her civil procedure work as well. As we detail below, her class action jurisprudence was rather conservative in its state law centrality. By contrast, she took a more nationalist perspective in the doctrine of personal jurisdiction.

The year we both clerked for Justice Ginsburg, she wrote the Court's decision in *Alaska Department of Environmental Conservation v. EPA*. This time, Justice Ginsburg wrote about the Clean Air Act's PSD program, which concerned attainment areas, rather than the non-attainment areas that were at issue in *Chevron*. She determined that the Act allows the federal agency to "act to block construction of a new major pollutant emitting facility permitted by [the state agency] when EPA finds [the state agency]'s BACT [best available control technology] determination unreasonable in light of" EPA guidance.⁸⁹

In essence, the dispute came down to the scope of EPA's authority over state permitting authorities, a rather traditional question of statutory interpretation.⁹⁰ While acknowledging the critical role of the states in the Clean Air Act's regulatory scheme, she rejected Alaska's argument that its oversight mandate "may be enforced only through state administrative and judicial processes."⁹¹ She noted: "It would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court."⁹²

She did not, however, generally push for federal judicial authority over state agencies on state law grounds. She dissented in *City of Chi-*

⁸⁸ 522 U.S. 156 (1997).

⁸⁹ *Alaska Dep't of Env't Conservation*, 540 U.S. at 469.

⁹⁰ See *id.* at 485 (determining whether the EPA could determine if the BACT was "faithful" to the Act). Coming three years after *United States v. Mead Corp.*, 533 U.S. 218 (2001), in which the Court cut back *Chevron* deference in the absence of more formal procedures like notice and comment rulemaking, Justice Ginsburg noted that the agency's "interpretation in this case, presented in internal guidance memoranda . . . does not qualify for the dispositive force described in *Chevron*" but that "[c]ogent . . . interpretations . . . nevertheless warrant respect." 540 U.S. at 487–88 (internal quotation marks omitted). She "accord[ed] EPA's reading of the relevant statutory provisions . . . that measure of respect." *Id.* at 488. Interestingly, the dissent criticized Ginsburg for using "*Chevron*'s vocabulary, despite its explicit holding that *Chevron* does not apply" *Id.* at 517 (Kennedy, J., dissenting). Gifford disagrees "slightly," positing that "Justice Ginsburg uses *Chevron*-like language referring to the agency's interpretation as permissible, while also employing the very different language of independent judicial interpretation." Gifford, *supra* note 5, at 827.

⁹¹ *Alaska Dep't of Env't Conservation*, 540 U.S. at 491–92.

⁹² *Id.* at 492 (emphasis added).

cago v. International College of Surgeons,⁹³ where the Court found supplemental jurisdiction to hear state administrative challenges. She posited that the court's holding "qualifies as a watershed decision."⁹⁴ She warned that after the decision "litigants . . . may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions."⁹⁵ This gave too much power to federal courts and undermined "the vital interest States have in developing and elaborating state administrative law."⁹⁶

Thus, even though Justice Ginsburg had widened her appreciation of federal agencies since writing the D.C. Circuit opinion in *Chevron*, a key difference between these two cases is that only in the first was the federal agency reviewing state agency action taken under federal law. In the second, it was a federal court reviewing state agency action taken under state law. That was an unorthodox bridge too far.

We now turn to the Justice's orthodoxies and unorthodoxies in civil procedure.

II. CIVIL PROCEDURE

Civil procedure, as most everyone knows, was one of Justice Ginsburg's first loves in the law.⁹⁷ She traveled to Sweden shortly after law school through a Columbia Law School international program to work on a book about Swedish civil procedure, and she then taught civil procedure as a law professor.⁹⁸ She often commented that her

⁹³ 522 U.S. 156 (1997).

⁹⁴ *Id.* at 175 (Ginsburg, J., dissenting in part).

⁹⁵ *Id.*

⁹⁶ *Id.* at 185. For Wolff, Ginsburg's dissent rightfully rejects the majority's "disrupt[ion of] a set of doctrines relating to the respective functions of district and circuit courts" and its "interject[ion of] the federal courts into the administration of state agency review in a newly invasive fashion." Wolff, *supra* note 6, at 865.

⁹⁷ See Zachary D. Tripp & Gillian E. Metzger, *Professor Justice Ginsburg: Justice Ginsburg's Love of Procedure and Jurisdiction*, 121 COLUM. L. REV. 729, 729 (2021) ("[A]s a Justice, these subjects continued to bring her great joy . . . [She] also eagerly sought out assignments to write the opinions in [the civil procedure] cases."); Katherine Franke, *The Liberal, Yet Powerful, Feminism of Ruth Bader Ginsburg*, SCOTUSBLOG (Oct. 9, 2020, 2:00 PM), <https://www.scotusblog.com/2020/10/symposium-the-liberal-yet-powerful-feminism-of-ruth-bader-ginsburg/> [<https://perma.cc/SK3S-SDUE>] ("[U]nderstanding Ginsburg's legacy is enhanced by an appreciation of how she was a proceduralist at heart. In the early 1960s, Ginsburg traveled to Sweden and learned Swedish to work on a project with legal scholar Anders Bruzelius on the rules of civil procedure in Europe. That early love of procedure informed, if not underwrote, her approach to sex equality.").

⁹⁸ See Tripp & Metzger, *supra* note 97.

time in Sweden was foundational to her views on access to courts, fairness, and equality.⁹⁹

On the Supreme Court, Justice Ginsburg quickly developed a reputation as the Court's resident procedure expert. She wrote main opinions in many of the most important procedure cases currently in textbooks, in areas ranging from the *Erie* doctrine,¹⁰⁰ to claim preclusion,¹⁰¹ to subject matter jurisdiction,¹⁰² and more. She said at least once, "I would love to write all of the procedure decisions at the Supreme Court, but none of us are allowed to be specialists."¹⁰³ Here, we focus on two particular areas of Justice Ginsburg's procedure jurisprudence: complex civil litigation and personal jurisdiction. These two topics provide an especially clear window into the ways in which our Justice at times evolved her jurisprudence to meet new problems of the day and at other times clung to a more traditional view—sometimes with unintended effects.

A. *Justice Ginsburg's Rule 23 Orthodoxy as Unintended Catalyst for Modern Aggregation Unorthodoxies*

Justice Ginsburg was a class action purist. No opinion exemplifies this more or, ironically, ultimately became more important to undermining the very class action rule she tried so hard to protect, than Justice Ginsburg's 1997 majority opinion in *Amchem v. Windsor*,¹⁰⁴ which invalidated a historic settlement in the national asbestos litigation.¹⁰⁵ In the rearview mirror, *Amchem*'s significance looms large precisely because Justice Ginsburg's highly orthodox interpretation of the class action rule, Federal Rule of Civil Procedure 23, forced subsequent litigants to seek different, more creative, forms of procedure to address modern complex litigation challenges.

⁹⁹ See, e.g., Ruth Bader Ginsburg, Gillian Metzger & Abbe Gluck, *A Conversation with Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 6, 7–8 (2013) (noting how the greater equality between men and women she observed while in Sweden influenced her views on gender equality); see also Franke, *supra* note 97.

¹⁰⁰ See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (Ginsburg, J., concurring in part and dissenting in part); *Gasparini v. Ctr. for Humans, Inc.*, 518 U.S. 415 (1996).

¹⁰¹ See, e.g., *Taylor v. Sturgell*, 553 U.S. 880 (2008).

¹⁰² See, e.g., *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368 (2012).

¹⁰³ Aaron Saiger, *A Conversation with Justice Ruth Bader Ginsburg*, 85 FORDHAM L. REV. 1497, 1514 (2017); cf. Tripp & Metzger, *supra* note 97, at 729 n.3 (counting thirty-four percent of Justice Ginsburg's majority opinions as "centered on issues of procedure or jurisdiction").

¹⁰⁴ 521 U.S. 591 (1997).

¹⁰⁵ See *id.* at 597.

To understand the significance of *Amchem*'s legacy, one need only look to today's massive national opioid litigation.¹⁰⁶ Those proceedings, rife with controversial procedural innovations and complexities, are tied by the umbilical cord to *Amchem*. More than twenty years later, we are still grappling with the opioid cases and others with questions about how to secure "global peace"—settlement of a diverse array of lawsuits filed across the nation in both state and federal courts, with some suits yet to be filed but on their way.¹⁰⁷ These same issues plagued the Court in *Amchem*, where Justice Ginsburg held out for more traditional uses of Rule 23 to address the problem or, alternatively, the hope that Congress would act.¹⁰⁸ Neither happened. Instead, to fill the void that *Amchem* left behind, we have seen the retrenchment, rather than the evolution and expansion, of class actions. In their place we have witnessed—including in cases like the opioid litigation—the explosion of multidistrict litigation ("MDL"), an unorthodox modern workaround to the class action that lacks many of the Rule 23 safeguards that Justice Ginsburg was trying so hard to protect.¹⁰⁹

1. *Amchem's "Fidelity" to Rule 23*

By the late 1980s, more than 20,000 asbestos injury claims were being filed each year, with nearly no cases going to trial.¹¹⁰ A 1991 Judicial Conference Ad Hoc Committee report on the asbestos litigation called the crisis "a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively."¹¹¹ The Committee looked to legislation as the solution because it concluded that, among other reasons, no single court could possibly have jurisdiction over the thousands of cases filed in both state and federal courts nationwide.¹¹²

¹⁰⁶ The opioid litigation includes a massive multidistrict litigation with more than two thousand cases; see, e.g., *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375 (J.P.M.L. 2017); as well as hundreds of other cases filed in state courts and bankruptcy courts, see Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 35 (2021).

¹⁰⁷ See Abbe R. Gluck, *MDL Nationalism, Federalism, and the Opioid Epidemic*, 70 DEPAUL L. REV. 321, 321 (2021).

¹⁰⁸ See *Amchem Prods., Inc.*, 521 U.S. at 629.

¹⁰⁹ See Gluck & Burch, *supra* note 106, at 51–73.

¹¹⁰ Patrick M. Hanlon, *An Experiment in Law Reform: Amchem Products v. Windsor*, 46 U. MICH. J.L. REFORM 1279, 1287, 1294 (2013) ("Only 2 percent of asbestos cases reached a verdict—only about one quarter the rate in other product liability cases.").

¹¹¹ JUD. CONF. OF THE U.S., AD HOC COMM. ON ASBESTOS LITIG., REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2 (1991).

¹¹² *Id.* at 3 ("The committee firmly believes that the ultimate solution should be legislation

At the time, the Judicial Panel on Multidistrict Litigation had consolidated some 26,000 lawsuits across eighty-seven district courts before a single district judge in Philadelphia,¹¹³ but the MDL could not solve the challenge of how to deal with future cases. “Settlement talks thus concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation.”¹¹⁴ The class action at issue before the district court was ultimately filed alongside a settlement stipulation that laid out the administrative scheme for disposing of the claims and proposing “to settle, and to preclude nearly all class members from litigating against [the asbestos] companies, all claims not filed before January 15, 1993, involving compensation for present and future asbestos-related personal injury or death” in court.¹¹⁵ As one of the attorneys involved noted: “The *Amchem* settlement established a framework for the disposition of asbestos cases that did not require an imminent threat of trial. Settlement was a matter of administration, not litigation. . . . It was tort reform from the trenches.”¹¹⁶

Justice Ginsburg did not bite. The case went up to the Court on review after the Third Circuit vacated the class certification, based on the “number of uncommon issues in this humongous class action” and the existence of “serious intra-class conflicts,” especially between those “plaintiffs already afflicted with an asbestos-related disease [and] plaintiffs without manifest injury.”¹¹⁷ Justice Ginsburg was involved in the first extended exchange at oral argument, indicating she was concerned with what amounted to an unorthodox nationwide resolution. She noted that, while there may be reasons to deviate from basic rules of litigation, it “is not for the courts to make up in the guise of procedure.”¹¹⁸

Especially significant for the doctrine she would develop in the majority opinion that followed, at oral argument the Justice conceptu-

recognizing the national proportions of the problem in both federal and state courts and creating a national asbestos dispute resolution scheme that permits consolidation of all asbestos claims in a single forum—whether judicial or administrative—with jurisdiction over all defendants and appropriate assets.”).

¹¹³ *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 416 (J.P.M.L. 1991).

¹¹⁴ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 601 (1997); *see also* Jennifer Dinham Henderson, *Protecting Rule 23 Class Members from Unfair Class Action Settlements: The Supreme Court’s Amchem and Ortiz Decisions*, 27 WM. MITCHELL L. REV. 489, 498 (2000).

¹¹⁵ *Amchem Prods., Inc.*, 521 U.S. at 603.

¹¹⁶ Hanlon, *supra* note 110, at 1279–80, 1300, 1302.

¹¹⁷ *Amchem Prods., Inc.*, 521 U.S. at 610 (citing *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d. Cir. 1996)).

¹¹⁸ Transcript of Oral Argument at 9, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (No. 96-270).

alized the boundaries of the Rule 23(b)(3) damages class action as quite limited. She described them in terms that ultimately damned many future efforts to use class actions for cases involving large numbers of claims brought under many different state laws. And she resisted the creative attempt to use 23(b)(3) in ways she did not think the Rules provided for:

There's no way that, looking at these as discrete claims, one could say that a common question predominates.

You have different State laws involved, California very generous, Maine less generous. You look at it and say, my goodness, this is just a hodge-podge. . . .

So going in with a case . . . common questions don't predominate, and then you look to the rules, and I guess that's what is bothering me most about this.

You go back to 1966, when we first got (b)(3) class actions, and you've got the Rules Advisory Committee telling this Court and also Congress that you couldn't even have mass accident cases under (b)(3). That's not what it was meant for.

And then it suddenly gets changed to be something so much vaster than was ever intended.¹¹⁹

Nor did she think MDL was the answer to the problem of resolving future cases and reaching "global resolution."¹²⁰ She disputed the notion that an MDL judge, as a class action alternative, could resolve future, not yet filed claims. Justice Stevens picked up her line of questioning, noting so doing would be "like asking the court to be an arbitrator."¹²¹

In her opinion for the Court that followed, Justice Ginsburg emphasized courts' obligations to follow the Rules as they are written, even in special circumstances, and even in settlement-only class actions.¹²² She focused on the rulemaking process itself and how its de-

¹¹⁹ *Id.* at 15–16.

¹²⁰ *Id.* at 20 (noting that Judge Weiner, the judge overseeing the MDL, the MDL panel, and the Federal Judiciary Center urged "global negotiations for a global resolution").

¹²¹ *Id.* at 23.

¹²² Justice Ginsburg carved out one narrow exception to strict application of the Rules: "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial." *Amchem Prods., Inc.*, 521 U.S. at 620. She emphasized, however, that "other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." *Id.*

liberative nature was another reason to “limit[] judicial inventiveness”:

And, of overriding importance, courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. . . . The text of a rule thus proposed and reviewed limits judicial inventiveness.¹²³

She also specifically highlighted her concern about Rule 23(b)(3)’s requirement that common issues “predominate” because the case had “named parties with diverse medical conditions [seeking] to act on behalf of a single giant class rather than on behalf of discrete subclasses.”¹²⁴

Justice Breyer concurred and dissented in part, chiding the majority for “understat[ing] the importance of settlement in this case.”¹²⁵ But Justice Ginsburg preferred instead to leave the matter to Congress (notwithstanding the fact that Congress had already failed to solve the problem). She wrote:

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. . . . Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view. . . .¹²⁶

Her “fidelity to the Rules Enabling Act” and Rule 23 orthodoxies carried the day.

2. *Amchem’s After-Effects and the Decline of Class Actions*

In the years that followed, Justice Ginsburg’s interpretation of Rule 23 did not result in the careful subclassing and smaller actions that she had hoped for as the answer to the commonality and representation issues she saw in *Amchem*.¹²⁷ *Amchem* was a symptom of a

¹²³ *Id.*

¹²⁴ *Id.* at 626.

¹²⁵ *Id.* at 630–34 (Breyer, J., concurring in part and dissenting in part).

¹²⁶ *Id.* at 628–29.

¹²⁷ See Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 979 (2012) (“The aftermath of *Amchem* and *Ortiz* was swift and pronounced, as the plaintiff and defense bars turned away from the class action to other avenues for resolving mass tort litigation. Bankruptcy became the preferred option”); Elizabeth J.

larger problem—sprawling nationwide tort actions often involving products liability or health claims, with multiple defendants across many states—rather than a unique event. *Amchem* cast a pall over such actions under Rule 23(b)(3), but it did not stop creative lawyers from finding other ways to seek the aggregate resolutions they needed. Enter unorthodox uses of MDL—the use of which Justice Ginsburg had criticized during oral argument—and also bankruptcy, to step into the breach.

Two of the leading scholar-practitioners in the aggregation context note that *Amchem*, along with another asbestos case that followed, *Ortiz v. Fibreboard, Corp.*,¹²⁸ “rejected any easy application of the class action mechanism to the complete resolution of mass harm cases that could not be folded into traditional class action criteria.”¹²⁹ As a result, the cases “ushered in a wave of new mechanisms designed to deal with the complications of consensual settlement through Rule 23,” including through MDL.¹³⁰ Subclassing proved too impractical and ineffective. As one commentator noted, the class action framework after *Amchem* “fe[lt] . . . less necessary and far less convenient, insofar as it foster[ed] competition among subclass counsel in a system characterized by substantial court control aimed at facilitating cooperation among counsel and eventual global settlement.”¹³¹ Leading plaintiffs’ attorney Elizabeth Cabraser argues that *Amchem* “transformed Federal Rule of Civil Procedure 23(b)(3)’s ‘superiority’ requirement into a mandate of perfection.”¹³²

Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 862 (2017) (“[E]ven the largest class actions have utilized only minimal subclassing to address fundamental crevices in the class, rather than attempting to provide separate representation for all potential subclasses.”).

¹²⁸ 527 U.S. 815 (1999). In *Ortiz*, the Court declined to certify another asbestos litigation settlement class action, this time one based on a limited fund theory. *Id.* at 821. In essence, the parties formed a class action to settle Fibreboard’s insurance claims for a fixed sum of approximately \$1.5 billion, arguing that the money to be paid out represented a “limited fund” under Rule 23(b)(1)(B). *Id.* at 824–28. The Court rejected this theory, relying in part on its reasoning in *Amchem*. At one point, it noted that the “discussion in *Amchem* will suffice to show how this litigation defies customary judicial administration and calls for national legislation.” *Id.* at 821; see also *id.* at 856 (“[I]t is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogenous subclasses . . . with separate representation.”); *id.* at 858 (noting the class representatives’ argument that “‘the certified class members’ common interest . . . was so weighty as to diminish the deficiencies [of the settlement class]’ . . . is simply a variation of the position put forward by the proponents of the settlement in *Amchem*”).

¹²⁹ Cabraser & Issacharoff, *supra* note 127, at 847.

¹³⁰ *Id.*

¹³¹ Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 843 (2017).

¹³² Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475–76 (2005).

The explosion of MDL in the years since *Amchem*—indeed, as a response to it—is an unintended part of Justice Ginsburg’s legacy. And its importance cannot be overstated. MDL cases have risen to more than forty percent of the federal civil docket, a figure that shocks many court watchers.¹³³ Unlike the more demanding prerequisites for certifying a class action under Rule 23, the MDL statute requires only that there be “one or more common questions of fact . . . pending in different districts.”¹³⁴ The justification for the lower standard is that the MDL statute contemplates that the cases are to be consolidated before a single federal court only for efficient pretrial treatment, and must return to their home district for resolution. That assumption of remand has proven entirely fictitious. In reality, fewer than three percent of MDL actions return home.¹³⁵ Nearly all are resolved—almost always through settlement—in the MDL court, without the protections of Rule 23.¹³⁶

As one of us has detailed elsewhere, MDL plaintiffs lack Rule 23’s due process guiderails safeguarding representation, or even the opportunity to opt out.¹³⁷ MDLs often blur questions of jurisdiction and differences across state and federal law in their drive to settle—a concern Justice Ginsburg herself highlighted at the *Amchem* argument.¹³⁸ MDL judges are open about their liberal use of Federal Rule of Civil Procedure 16, the judicial case management rule, using it to innovate new procedures to expedite claim resolution and encourage settlement.¹³⁹ Some have called MDL the “Wild West” of civil procedure.¹⁴⁰ Others believe its unorthodoxy and creativity is necessary to

¹³³ Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017).

¹³⁴ See 28 U.S.C. § 1407(a) (2012) (“When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”).

¹³⁵ See Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400 (2014).

¹³⁶ See Gluck & Burch, *supra* note 106, at 16.

¹³⁷ *Id.* at 67–71.

¹³⁸ See Gluck, *supra* note 4, at 1704 (“When it comes to substantive differences across state law, some of the federal judges acknowledged that state law issues can get ‘mushed’ together by the MDL’s tendency to group similar cases together—cases that may include actions from states with closely related laws.”); Gluck & Burch, *supra* note 106, at 1, 14 (detailing the MDL’s “dramatic assertions of jurisdictional authority,” “often . . . [binding] plaintiffs [within] the MDL . . . [and those] outside of its jurisdiction”).

¹³⁹ See Gluck, *supra* note 4, at 1688 (“FRCP 16’s case management framework may be said to loosely bind, or at least inspire, the MDL process. . . . As one judge put it: ‘[MDL is] like Rule 16 on steroids. In the MDL, you need to strategize more. You have to look beyond immediate deadlines and see how all the pieces fit together.’”).

¹⁴⁰ Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation*,

meet the challenges of the moment. Either way, MDLs are in many ways the antithesis of the vision Justice Ginsburg advocated in *Amchem*.

Drawing on our previous work in the legislative and regulatory contexts on unorthodox lawmaking and rulemaking, one of us has identified MDL as the paradigm example of “unorthodox civil procedure,” a response of a system under new pressures when old rules are not proving effective or capacious enough for modern challenges.¹⁴¹ Much like in the other contexts, in the world of civil procedure, these unorthodoxies are symptoms of broader challenges, not their cause. MDLs have been lauded by some for providing access to court when the Court’s stingy approach to class actions has closed the courthouse doors, but they have been critiqued by others not only for the lack of procedural safeguards for plaintiffs, but also for the “cowboy-on-the-frontier” mentality of MDL judges.¹⁴²

A word about bankruptcy is also in order. The asbestos plaintiffs in *Amchem* eventually found their answer in bankruptcy, where that process “in effect created a huge administrative processing regime—the very thing Justice Ginsburg had thought only Congress could establish.”¹⁴³ Fast forward to today’s also sprawling and intractable opioid litigation, which has faced the same issues of potential litigant-wide preclusion that stymied *Amchem* and which took the form of MDL precisely because of *Amchem*’s limits. Despite counsels’ efforts to devise innovative solutions to the problem of settling future claims within the MDL on behalf of plaintiffs who have yet to sue,¹⁴⁴ the opioid MDL has still struggled for global peace—except in the bank-

Due Process, and the Dangers of Procedural Collectivism, 95 B.U. L. REV. 109, 111 (2015) (describing the MDL as a “cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies”).

¹⁴¹ See Gluck, *supra* note 4, at 1677–78.

¹⁴² See *id.*, at 1675; Redish & Karaba, *supra* note 140, at 110–11, 133 (raising due process concerns).

¹⁴³ Hanlon, *supra* note 110, at 1280; see McKenzie, *supra* note 127, at 979 (noting that “[b]ankruptcy became the preferred option for [resolving] . . . the asbestos litigation that had fared so poorly before the Supreme Court in *Amchem* and *Ortiz*”).

¹⁴⁴ In the opioid litigation, the Sixth Circuit struck down a negotiation class certified by Judge Dan Polster—the judge overseeing the opioid MDL—finding it inconsistent with the text of Rule 23:

In the final analysis, we do not see how the negotiation class can be squared with Rule 23. However innovative and effective the addition of negotiation classes would be to the resolution of mass tort claims—particularly those of grave social consequence—we are to be “mindful that the Rule as now composed sets the requirements [courts] are bound to enforce,” and we “are not free to amend a rule outside the process Congress ordered.”

ruptcy context.¹⁴⁵ In the portion of these cases that have concerned the bankrupt manufacturer, Purdue Pharma, bankruptcy has been able to provide global resolution of claims nationwide, because of the bankruptcy court's unique authority to pause and consolidate claims regardless of commonality, plaintiff identity, or jurisdictional home.¹⁴⁶ These cases are also a part of *Amchem*'s legacy, evincing the market that *Amchem* created for legal workarounds to the difficulties of aggregation under Rule 23. We doubt that Justice Ginsburg envisioned bankruptcy proceedings, which come under the purview of Article I judges and, like MDLs, lack the protections of Rule 23, as the answer to the limitations of the class action.

3. Justice Ginsburg's Later Class Action Cases

Noting the obstacles that *Amchem* constructed for class action plaintiffs, one commenter opined: "Whatever one thinks of the outcome, one can admire the honesty of [Justice Ginsburg's] approach."¹⁴⁷ Indeed, to the end, the Justice remained a class action purist. She wrote the only dissents in the last two major aggregate litigation cases during her time on the Court, *Wal-Mart Stores, Inc. v. Dukes*¹⁴⁸ and *Epic Systems Corp. v. Lewis*,¹⁴⁹ and they were both more traditionalist than revolutionary or regretful.

a. Wal-Mart v. Dukes: A Conservative Approach to Backpay

Wal-Mart was an employment discrimination class action brought by 1.5 million current and former female employees at Wal-Mart who argued, among other things, that the company's policy of giving discretion to local managers over pay and promotions was "exercised disproportionately in favor of men," resulting in lower wages and fewer promotions for female employees relative to similarly situated male employees.¹⁵⁰ They also alleged that Wal-Mart's awareness of and failure to act on these disparities constituted disparate treatment.¹⁵¹ The employees sued for both injunctive relief and backpay, using the sub-

In re Nat'l Prescription Opiate Litig., 976 F.3d 664, 667–68, 676 (6th Cir. 2020) (quoting *Amchem*, 521 U.S. at 620).

¹⁴⁵ See Gluck, *supra* note 107, at 325–26.

¹⁴⁶ See Gluck & Burch, *supra* note 106, at 47–51 (chronicling these developments).

¹⁴⁷ Donald R. Frederico, *The Arc of Class Actions: A View from the Trenches*, 32 LOY. CONSUMER L. REV. 266, 268 (2020).

¹⁴⁸ 564 U.S. 338 (2011).

¹⁴⁹ 138 S. Ct. 1612 (2018).

¹⁵⁰ *Wal-Mart*, 564 U.S. at 344.

¹⁵¹ *Id.* at 345.

section of Rule 23, 23(b)(2), that encompasses injunctive and declaratory relief.¹⁵²

The entire Court agreed that Rule 23(b)(2), while it might possibly accommodate some monetary claims alongside injunctive relief, could not be used to include an individualized monetary claim like backpay. Rule 23(b)(2), Justice Scalia's majority opinion held, contemplates only "indivisible" relief. But thanks to *Amchem*, that strict reading of 23(b)(2) might have proved fatal to the case: had the case consequently been remanded for review, as Justice Ginsburg would have done, it would instead have fallen under the damages subsection of Rule 23, Rule 23(b)(3).¹⁵³ There, *Amchem* might have reared its head, requiring the Court to take a stingy approach to evaluating Rule 23(b)(3)'s requirement that common issues predominate. The case never got that far, however, because Justice Scalia invalidated the class out of the gate on the basic commonality prong of Rule 23(a), the gateway for *all* of the Rule 23(b) actions.¹⁵⁴

Justice Ginsburg's dissent from the Rule 23(a) portion of the opinion accused the majority of inappropriately blending the threshold Rule 23(a) "commonality" inquiry with the far more stringent "predominance" inquiry required under 23(b)(3) for a damages class action.¹⁵⁵ Rule 23(a)'s threshold, as Justice Ginsburg noted at oral argument, is "not supposed to be very difficult to overcome. It's just a common question of fact . . . that dominates."¹⁵⁶ But, as noted, Justice Ginsburg herself agreed with the majority's orthodox reading of 23(b)(2), on injunctive class actions. In fact, Justice Scalia's majority opinion in *Wal-Mart* quotes Justice Ginsburg's opinion in *Amchem* for the proposition that Rule 23(b)(2) could not be used for the backpay claim at all. Rather, the majority wrote, Rule 23(b)(3), as opposed to (b)(1) and (b)(2), was supposed to be the sole "'adventuresome innovation' of the 1966 amendments."¹⁵⁷ In so doing, the Court consigned future backpay claims like those of the Wal-Mart employees to a Rule

¹⁵² *Id.* at 342.

¹⁵³ *Id.* at 360, 368.

¹⁵⁴ *Id.* at 352 ("Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.").

¹⁵⁵ *Id.* at 367–68, 375 (Ginsburg, J., concurring in part and dissenting in part) ("[T]he Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.").

¹⁵⁶ Transcript of Oral Argument at 33, *Wal-Mart v. Dukes*, 564 U.S. 338 (2011) (No. 10-277).

¹⁵⁷ *Wal-Mart*, 564 U.S. at 362 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)).

23(b)(3) analysis, where predominance would be much harder to achieve after *Amchem*.

Some commentators were shocked that Justice Ginsburg and the other more liberal Justices went along with this reading of 23(b)(2) as informed by *Amchem*'s interpretation of Rule 23(b)(3). Some even called it unorthodox. Suzette Malveaux, among others, charged that "the decision effectively reversed almost a half century of Title VII jurisprudence permitting back pay under similar circumstances" and noted:

Once the Court concluded that back pay had to be calculated individually, it was not a stretch for the Court to find that back pay was . . . inappropriate for Rule 23(b)(2) certification. . . . Rule 23(b)(3) certification is available if common issues predominate over individual ones and a class action is a superior mechanism for resolving the dispute. Not surprisingly, if a court decides that monetary relief has to be calculated on an individualized basis, the court is more likely to conclude that individual issues predominate over common ones, thereby foreclosing Rule 23(b)(3) certification.¹⁵⁸

John Coffee likewise criticized the liberal wing of the Court, and suggested that Justice Ginsburg was naïve to assume that a Rule 23(b)(3) remand would be successful post *Amchem*:

That the court's liberals went docilely along with the conservative majority on the Rule 23(b)(2) money damages issue seems surprising and raises a question: Did they really understand the impact of what they were doing?

The simple truth is that employment discrimination litigation cannot normally be certified under Rule 23(b)(3) because of the "predominance" requirement of that rule, which requires that the common questions of law and fact "predominate" over the individual ones. . . .

Reinforcing this sense is the casual assertion by Justice Ruth Bader Ginsburg in her *Wal-Mart* dissent that the case should be remanded to the district court for a determination as to whether it could be certified under Rule 23(b)(3). . . . That idea is a non-starter. In all circuits, the predominance standard has long been the Grim Reaper of putative class actions ¹⁵⁹

¹⁵⁸ Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape After Wal-Mart v. Dukes*, 62 DEPAUL L. REV. 659, 666–67 (2013) (footnote omitted).

¹⁵⁹ John C. Coffee, Jr., "You Can't Just Get There From Here": A Primer on *Wal-Mart v. Dukes*, BLOOMBERG LAW (July 22, 2011, 12:00 AM) (citations omitted), <https://bloomber->

In other words, *Amchem* had made assignment to Rule 23(b)(3) a near death trap for aggregation.

b. Epic Systems v. Lewis and the Importance of Collective Action

One of Justice Ginsburg's last opinions on the Court was her dissent in *Epic Systems Corp. v. Lewis*,¹⁶⁰ which considered whether the collective action protections of the National Labor Relations Act ("NLRA") precluded enforcement of an employment agreement that mandated individual arbitration to resolve employer-related disputes and required employees to waive class and collective proceedings.¹⁶¹ Most broadly, the opinion can be viewed as the evolution of Justice Ginsburg's increasingly vocal disagreement with, what had been at the time, a unanimous view among the Justices in favor of a strong presumption of enforcing arbitration agreements under the Federal Arbitration Act.¹⁶² But her opinion also emphasized the importance of access to collective action. She wrote:

The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA [Norris-LaGuardia Act] and the NLRA, and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer." Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.¹⁶³

Here again, Justice Ginsburg looks to Congress. But unlike in *Amchem*, it was not because she did not think the Court had the power to further the right to collective action. In *Epic Systems* it was

glaw.com [https://perma.cc/8TCU-LQZ7] (search article title in quotation marks and select correct result).

¹⁶⁰ 138 S. Ct. 1612 (2018).

¹⁶¹ Petition for Writ of Certiorari at i, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (16-285) (providing the question upon which the Court granted certiorari as: "Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.").

¹⁶² In recent cases, the Court has softened its pro-arbitration stance somewhat. See, e.g., *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788–89 (2022) (holding that workers who load cargo on and off airplanes are a "class of workers engaged in foreign or interstate commerce" exempted from the Federal Arbitration Act's ambit); *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1712 (2022) (holding that courts may not "create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's 'policy favoring arbitration'").

¹⁶³ *Epic Systems*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting) (citations omitted).

because the Court's collective action jurisprudence had, for a majority of her colleagues even if not for Justice Ginsburg, taken a backseat to other interests. One can only speculate whether a different opinion in *Amchem* would have changed the story.

B. *Personal Jurisdiction and a More Unorthodox RBG*

Complications to traditional procedure doctrines caused by the rise of the modern national economy are in the background in *Amchem* and its class action progeny, but they are at the forefront of the Court's personal jurisdiction jurisprudence. In the class action context, nationwide litigation across different states and court systems makes commonality difficult under Rule 23 and deprives most cases of a single locale for global jurisdiction. In the context of personal jurisdiction, plaintiffs seeking to sue corporations that direct their goods to the U.S. economy as a whole, rather than to a particular state, may fall into doctrinal gaps that prevent assertion of jurisdiction altogether as long as a state-centric, balkanized view continues to carry the day.

For class actions, Justice Ginsburg indeed preferred to balkanize: she favored subclassing over all-encompassing aggregation. But in the jurisdiction context, Justice Ginsburg responded differently to the challenges of the time. Her specific jurisdiction jurisprudence developed to fill the nationwide jurisdiction gap for products targeting the national economy. Here, Justice Ginsburg felt freer to innovate and update than she did in the class action arena. The likely reason for the difference was that, with class actions, a Federal Rule of Civil Procedure was involved. In contrast, the Court's jurisdiction doctrines have been developed as a matter of federal common law and not through statutory rules.¹⁶⁴ It also seems likely that, precisely for those reasons, Justice Ginsburg saw her procedural moves in the personal jurisdiction context as wholly unrevolutionary and, instead, as simply the natural extension and clarification of a steadily evolving set of judge-made doctrines. Whether one views Justice Ginsburg's work in this context as orthodox or unorthodox, these contributions endure as arguably her most significant to civil procedure.

¹⁶⁴ In administrative law, she likewise prioritized federal statutes over judge-made doctrine where those statutes aimed to fully regulate a topic. Where there was room to develop doctrine, she viewed agencies as more expert than courts in complex regulatory policy—relative competencies that do not translate to procedure where courts are the experts. *See supra* Part I.

1. *Specific Jurisdiction and the Modern National Economy*

The United States is not Old England and never was. Yet, our procedure doctrines have been grounded from the outset in the old English concept of territorial jurisdiction. The famous chestnut, *Pennoyer v. Neff*,¹⁶⁵ allowed a client who left the jurisdiction without paying for legal services rendered to get off the hook because of his physical absence from the territory.¹⁶⁶ Over time, it became clear that this territorial concept would not suffice in the context of the geographical sprawl of the then-new American nation. The 1945 decision *International Shoe Co. v. Washington*¹⁶⁷ was, as every law school graduate knows, the turning point. There, the Court articulated a framework for jurisdictional determinations involving corporations that lack physical presence in a state even as its goods or services are present. The *Shoe* test, centered on the quantity and quality of the corporation's contacts—specifically, how continuous and systematic they are and how related they are to the events at issue—remains the cornerstone of specific jurisdiction.¹⁶⁸

The problem for our modern national economy is that the *Shoe* test is state-centered. Contacts with the *state* are what is being evaluated. Over time, the cases modernized somewhat further within this framework, but the state has remained at the inquiry's center. In the 1980 case *World-Wide Volkswagen Corp. v. Woodson*,¹⁶⁹ for instance, the Court framed the question as to whether it was reasonably foreseeable for a company distributing and selling vehicles in New York, New Jersey, and Connecticut to be sued in Oklahoma for an accident in that state where one of their vehicles was involved.¹⁷⁰ The Court held it was not, with *Pennoyer*'s territorial shadow looming large.¹⁷¹

¹⁶⁵ 95 U.S. 714 (1878).

¹⁶⁶ *Id.* at 719–20, 734–36 (holding that “the personal judgment recovered in the State court of Oregon against the plaintiff herein [Neff], then a non-resident of the State, was without any validity, and did not authorize a sale of the property in controversy”).

¹⁶⁷ 326 U.S. 310 (1945).

¹⁶⁸ *Id.* at 316. (“Historically . . . [one’s] presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment But now . . . due process requires only that in order to subject a defendant to a judgment *in personam*, if [one] be not present within the territory of the forum, [one must] have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”).

¹⁶⁹ 444 U.S. 286 (1980).

¹⁷⁰ *Id.* at 288–89.

¹⁷¹ *Id.* at 299 (reversing the judgment of the Supreme Court of Oklahoma “[b]ecause . . . petitioners have no ‘contacts, ties, or relations’ with the State of Oklahoma” (quoting *International Shoe*, 326 U.S. at 319)).

Later cases failed to resolve the question in a satisfactory manner. *Asahi Metal Industry Co. v. Superior Court of California*¹⁷² was the next moment of potential pivot. There, the Court considered whether a Japanese tire valve producer that sold its part to a Taiwanese tire manufacturer could be sued for an accident in California.¹⁷³ The Court ultimately remained split over whether merely placing one's goods in the national "stream of commerce" was enough for jurisdictional purposes or whether there had to be something extra, that is, some direction of a good toward a particular state.¹⁷⁴

A quarter century passed between *Asahi*'s fractured opinions and the Court's next major decision on personal jurisdiction. *J. McIntyre Machinery, Ltd. v. Nicaastro*¹⁷⁵ was therefore Justice Ginsburg's first opportunity on the Court to shape specific jurisdiction doctrine. The case concerned an injury in New Jersey caused by a metal-shearing machine, imported from the United Kingdom, whose British manufacturer contended it had aimed its products at the U.S. economy at large and not at any particular state.¹⁷⁶ McIntyre argued that its nationally focused marketing strategy effectively deprived the United States of *any* forum for pursuing injury claims.¹⁷⁷ Justice Ginsburg reacted strongly to this assertion at oral argument:

Your proposition is that a company can deliberately send its products, want[ing] to explore the U.S. market. But I take it that there is no place in the United States, because New Jersey is no different than California or any other place—is it your position that there is no forum in which McIntyre can be sued, even though it set up this distribution arrangement for the very purpose of having its machines in as many locations in the United States as it could?¹⁷⁸

Yet, once again, the Court fractured.¹⁷⁹ In a plurality opinion, Justice Kennedy stuck with *Pennoyer*'s territorial federalism, holding that New Jersey could not assert jurisdiction because "personal jurisdiction

¹⁷² 480 U.S. 102 (1987).

¹⁷³ *Id.* at 104.

¹⁷⁴ *See id.* at 105.

¹⁷⁵ 564 U.S. 873 (2011).

¹⁷⁶ *See id.* at 886.

¹⁷⁷ Transcript of Oral Argument at 7–8, *J. McIntyre Mach., Ltd. v. Nicaastro*, 564 U.S. 873 (2011) (No. 09-1343). The company's counsel appeared to advance a general jurisdiction theory at oral argument, insisting that Nicaastro's personal injury claims could be pursued in Ohio based on a contract between McIntyre and its distributor in Ohio. Justice Ginsburg, joined by Justice Kagan, rejected this argument and the Court declined to address it in its opinion.

¹⁷⁸ *Id.* at 7–8.

¹⁷⁹ *See Nicaastro*, 564 U.S. at 873 (plurality opinion of Kennedy, J., joined by Roberts, C.J.,

requires a forum-by-forum, or sovereign-by-sovereign, analysis.”¹⁸⁰ He left open the question whether Congress could legislate to authorize nationwide jurisdiction,¹⁸¹ but found the company’s particular contacts with the state of New Jersey insufficient.¹⁸²

Justice Ginsburg disputed the constitutional premise of Justice Kennedy’s federalism-based argument, instead positing that “the constitutional limits on a state court’s adjudicatory authority derive from considerations of due process, not state sovereignty,” and noting that the fact that individuals can waive jurisdiction proves as much, as an individual cannot waive a state’s sovereign authority.¹⁸³ Justice Ginsburg would have found jurisdiction at the place of injury for goods targeted at the United States as a whole.¹⁸⁴ She accused the majority of “turn[ing] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.”¹⁸⁵ Justice Ginsburg argued that the scenario in *Nicastro* was “illustrative of marketing arrangements for sales in the United States common in today’s commercial world” and lauded other courts that had “rightly rejected the conclusion that a manufacturer selling its products across the USA may evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury.”¹⁸⁶

As Glenn Koppel noted at the time,¹⁸⁷ even as Justice Ginsburg was staking out the possibility of an entirely new rule—designating

Scalia & Thomas, JJ.); *id.* at 887 (Breyer, J., concurring, joined by Alito, J.); *id.* at 893 (Ginsburg, J., dissenting, joined by Sotomayor & Kagan, JJ.).

¹⁸⁰ *Id.* at 884.

¹⁸¹ *Id.* at 885 (“It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case, however, and it is neither necessary nor appropriate to address here any constitutional concerns that might be attendant to that exercise of power.”).

¹⁸² *Id.* at 885–86 (“In this case, [J. McIntyre] directed marketing and sales efforts at the United States. . . . Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey. . . . The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State.”).

¹⁸³ *Id.* at 899–900 (Ginsburg, J., dissenting).

¹⁸⁴ *Id.* at 910.

¹⁸⁵ *Id.* at 894.

¹⁸⁶ *Id.* at 902–06.

¹⁸⁷ Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism: Shady Grove Versus Nicastro*, 16 LEWIS & CLARK L. REV. 905, 917–18 (2012) (“Justice Ginsburg’s dissent [in *Nicastro*] struck a distinctly functional note that echoed Justice Brennan’s emphasis on second prong ‘fairness’ and ‘reasonableness’ factors.”).

the place of injury as the locus of a suit when the nation as a whole is targeted—her opinion also evoked Justice Brennan’s own *World-Wide Volkswagen* dissent from thirty-one years before. In that dissent, Justice Brennan had written that *International Shoe*’s “almost exclusive focus on the rights of defendants[] may be outdated” and that “[t]he model of society on which the *International Shoe* Court based its opinion is no longer accurate” in light of the “nationalization of commerce.”¹⁸⁸ In this sense, Justice Ginsburg’s effort to update specific jurisdiction was both unorthodox and, at the same time, followed down the paved path of earlier dissents.

2. General Jurisdiction: Justice Ginsburg’s New “At Home” Test

Justice Ginsburg’s view of specific jurisdiction did not carry the day in *Nicastro*, but she did successfully reshape the doctrine of general jurisdiction in a case heard the same day, *Goodyear Dunlop Tires Operations, S.A. v. Brown*.¹⁸⁹ A finding of general jurisdiction is powerful: the defendant can be sued in that jurisdiction for any act committed anywhere—even outside the jurisdiction or outside the United States.¹⁹⁰

As most Court watchers know, general jurisdiction was essentially a static, yet fuzzy, doctrine for decades prior to *Goodyear*. It had been taken up by the Court only twice after it originated in 1952¹⁹¹ and, until that point, been viewed by many as something akin to “doing business” jurisdiction.¹⁹² The “doing business” concept, however, blurred the line between specific jurisdiction and threatened, in an era in which corporations “do business” in many places at once, to be the exception that swallowed the rule.¹⁹³

¹⁸⁸ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 308–09 (1980) (Brennan, J., dissenting).

¹⁸⁹ 564 U.S. 915 (2011).

¹⁹⁰ *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014).

¹⁹¹ *Goodyear*, 564 U.S. at 925 (“In only two decisions postdating *International Shoe* . . . has this Court considered whether an out-of-state corporate defendant’s in-state contacts were sufficiently ‘continuous and systematic’ to justify the exercise of general jurisdiction over claims unrelated to those contacts.”). These two cases were *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

¹⁹² See, e.g., Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 171.

¹⁹³ See, e.g., Lea Brilmayer, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 781 (1988) (“Many companies do business in all fifty states. Constitutional limitations on choice of law would be rendered meaningless if any of the fifty states could apply its law to all the activities of a company.” (footnote omitted)).

Justice Ginsburg fixed that in *Goodyear*, embarking on a multi-case process of revising, clarifying, and modernizing the doctrine in response to current economic conditions. *Goodyear* confronts head-on the role of general jurisdiction in the era of the nationally—even internationally—integrated economy. Can Starbucks be sued for anything, anywhere, in all fifty states, merely because of its business reach? Or is there some more limited number of jurisdictions—some number between one and fifty—that is a better fit? Justice Ginsburg, speaking for the majority both in *Goodyear*¹⁹⁴ and also in *Daimler AG v. Bauman*,¹⁹⁵ the second case addressing this question, strove to find a limit. She devised a new standard that would subject companies to general jurisdiction only in those very few places in the world where they would be considered “essentially at home.”¹⁹⁶ Justice Sotomayor concurred in *Daimler* to urge a more capacious view than Justice Ginsburg’s, favoring the possibility of nationwide general jurisdiction anywhere a corporation does significant business.¹⁹⁷

Justice Ginsburg forcefully objected to Justice Sotomayor’s view as collapsing the difference between specific and general jurisdiction.¹⁹⁸ This was orthodox RBG. It was clear that Justice Ginsburg viewed the relationship between specific and general jurisdiction as a carefully calibrated balance. General jurisdiction was much more powerful and, hence, more limited, but those limitations were tempered by the kind of modern expansion of specific jurisdiction that she

¹⁹⁴ *Goodyear*, 564 U.S. at 918.

¹⁹⁵ 571 U.S. 117, 120 (2014).

¹⁹⁶ *Goodyear*, 564 U.S. at 919. The Court has not put a numerical limit on the number of places where a corporation might be at “home.” Justice Ginsburg noted the possibility of two, but also implied that some number greater than that might also be possible. *See Daimler*, 571 U.S. at 137 (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business . . .”).

¹⁹⁷ *Daimler*, 571 U.S. at 143 (Sotomayor, J., concurring) (“[T]he Court’s focus on *Daimler*’s operations outside of California ignores the lodestar of our personal jurisdiction jurisprudence: A State may subject a defendant to the burden of suit if the defendant has sufficiently taken advantage of the State’s laws and protections through its contacts in the State; whether the defendant has contacts elsewhere is immaterial.”).

¹⁹⁸ *Id.* at 139–40 n.20 (“To clarify in light of Justice Sotomayor’s opinion concurring in the judgment, the general jurisdiction inquiry does not ‘focu[s] solely on the magnitude of the defendant’s in-state contacts.’ . . . Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States.” (citations omitted)); *see also id.* (disputing “Justice Sotomayor’s proposal to import *Asahi*’s ‘reasonableness’ check into the general jurisdiction determination” on the ground that the premise of general jurisdiction, by definition, is that jurisdiction is always reasonable and so the need for a reasonableness check would prove the point that the general and specific standards have collapsed).

advocated for in *Nicastro*.¹⁹⁹ As she noted during oral argument in *Daimler*:

Goodyear distinguished the two by saying general jurisdiction means it's equivalent to residence for an individual. It's where you are at home. . . . [A]nd general jurisdiction was much broader in the days before long-arm statutes. But now that we have specific jurisdiction, so you can sue where the event occurred, just as specific jurisdiction has expanded, so general jurisdiction has shrunk.²⁰⁰

The Justice remained a purist to the end when it came to the differences between the two doctrines. For example, in the first big specific jurisdiction case to arrive at the Court after *Goodyear* and *Nicastro* and the last specific jurisdiction case in which the Justice participated, *Bristol-Myers Squibb Co. v. Superior Court of California* (“*BMS*”),²⁰¹ non-California residents tried to join residents of that state in a California drug injury suit against a pharmaceutical company even though the nonresidents had neither obtained the drug nor been injured by it in the state.²⁰² In the lower courts, the nonresidents had unsuccessfully argued a general jurisdiction theory based on the extent of Bristol-Myers Squibb's business in the state.²⁰³ The California Supreme Court, however, eventually held that the state could assert specific jurisdiction over BMS using what it called a “sliding scale” approach to jurisdiction, under which the greater number of contacts with the forum meant the less important relatedness became.²⁰⁴

Justice Ginsburg was adamant at oral argument that general jurisdiction cannot be created through the “backdoor” with a theory of specific jurisdiction in which companies that are not “at home” in the state may nonetheless be subject to litigation of claims unrelated to

¹⁹⁹ See *id.* at 128 (“Our subsequent decisions have continued to bear out the prediction that ‘specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene.’” (citations omitted) (footnote omitted)); see also Transcript of Oral Argument at 22–23, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (No. 10-76) (“[W]hat’s troubling here is that the North Carolina court seems to be blending the two together: specific jurisdiction based on the claim arising in the forum, and general jurisdiction with a claim that has nothing to do with the forum, and its insertion of jurisdiction over any and all claims.”).

²⁰⁰ Transcript of Oral Argument at 38, *Daimler AG v. Bauman*, 571 U.S. 117 (No. 11-965).

²⁰¹ 137 S. Ct. 1773 (2017).

²⁰² *Id.* at 1778.

²⁰³ See *id.*

²⁰⁴ *Id.*

their activity in that forum simply because they do a large amount of business there.²⁰⁵ She said:

What you're suggesting is that the Court was wrong . . . in *Daimler* and [*Goodyear*] . . . [In] this very case, it was originally argued as a general jurisdiction case. Then we came out with *Daimler*, and then they said oh, no, we know it's not general jurisdiction. It's got to be specific. . . . So one comment that . . . you, no doubt, know has been made about this case, is that it is an attempt to reintroduce general jurisdiction, which was lost in *Daimler*, by the backdoor.²⁰⁶

Interestingly, at oral argument, the Court also contemplated how to address the constitutional concerns over jurisdiction at issue in *BMS* without simultaneously damning the ability of MDL to fill the gap. As we noted in the discussion of class actions, MDLs consolidate for pre-trial proceedings cases filed horizontally across the country, with plaintiffs injured in many different states, not unlike the fact pattern in *BMS*. Justice Ginsburg specifically asked whether Congress could expand the MDL statute to cover trial and not just pretrial proceedings.²⁰⁷ The purist in her would not let the parties corrupt the concept of general jurisdiction—or, as she put it, “reintroduce general jurisdiction, which was lost in *Daimler*, by the backdoor.”²⁰⁸ The pragmatist in her recognized that “it would be ideal if we could get all the [drug] plaintiffs together in one forum,” especially given the nationwide character of the litigation.²⁰⁹ But the orthodox proceduralist in the end was resigned that, “whatever we rule . . . in this case, there's still going to be a lot of . . . Plavix litigation spread around the United States.”²¹⁰

In the end, the Court's 8-1 opinion (written by Justice Alito with Justice Sotomayor in dissent) reaffirmed *Goodyear*'s limits on general jurisdiction. The opinion left the door open for Congress to act on a

²⁰⁵ See Transcript of Oral Argument at 54, *Bristol-Myers Squibb Co. v. Sup. Ct. Cal.*, 137 S. Ct. 1773 (No. 16-466).

²⁰⁶ *Id.* at 54.

²⁰⁷ *Id.* at 19 (quoting Justice Ginsburg as asking: “But would there be any constitutional impediment to having a multidistrict statute amended so that the . . . the forum in which the cases are consolidated could go on to the merits?”); see also *id.* at 17–18 (quoting Justice Breyer as stating: “We need a panel. We need Congress. We need the multidistrict panel. But that isn't the Constitution. And then what I fear is if we say it's the Constitution, what do we do to either the class actions or maybe even multidistrict litigation?”). In fact, some cases involving the drug injury at issue in *BMS* were pending in a separate MDL at the time.

²⁰⁸ *Id.* at 54–55.

²⁰⁹ *Id.* at 31.

²¹⁰ *Id.* at 31–32.

question of nationwide jurisdiction or nationwide MDL to fill in this jurisdictional void for nationwide aggregate litigation.²¹¹

And this, of course, brings us right back to *Amchem*. Justice Ginsburg's opinion there had made it so difficult to use the class action rules for nationwide actions that creative efforts to quasi-aggregate were forced to develop, as they did in *BMS*, pressing the boundaries not only of aggregation doctrine but of personal jurisdiction. Her orthodoxy had bred the very unorthodoxies she had been trying to restrain.

CONCLUSION

The bringing together of these two fields, administrative law and civil procedure, is, to some extent, largely artificial and dependent on the interests of the two of us as co-clerks for the Justice. But the fields are of course linked by their connections to fair procedure and the safeguarding of the integrity of our institutions, which were central values our Justice strove to protect. Both fields also require boundary drawing and illustrate how the unorthodox can become the orthodox.

Justice Ginsburg often sided with tradition but did, from time to time, work outside of it. She appreciated the complexity of regulatory policymaking and importance of litigation, even if her more conventional views of institutions could not sufficiently solve every pressing problem. But the law's impact on the lives of real people, especially those less powerful in our society, was always very top of mind for our Justice. We are grateful to her for all she taught us in these contexts of the law, but also in the broader context of our lives.

²¹¹ *Bristol-Myers Squibb Co. v. Sup. Ct. Cal.*, 137 S. Ct. 1773, 1777, 1781–84 (2017).

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

Amanda L. Tyler*

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."

TABLE OF CONTENTS

INTRODUCTION	1573
I. JUSTICE GINSBURG'S PROCEDURE AND FEDERAL	
COURTS JURISPRUDENCE	1575
A. Territorial Jurisdiction	1576
B. Class Actions	1577

* Shannon Cecil Turner Professor of Law, University of California, Berkeley School of Law. I am indebted to Andrew Bradt and Bradford Clark for helpful comments and conversations along with Yegina Whang, Berkeley Law 2022, for extraordinary research assistance.

C. “Stay in Your Lane” Jurisprudence	1579
D. Government and Officer Accountability Under the Constitution	1580
II. JUSTICE GINSBURG’S JUDICIAL PHILOSOPHY	1583
III. SOME “PUZZLEMENTS”	1588
CONCLUSION	1593

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-

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.

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. Nicaastro*.¹⁵ The case involved the question whether an employee (Nicaastro) 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. Nicaastro 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. Nicaastro 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. Nicaastro would have to go to the United Kingdom to sue the manufacturer. Mr. Nicaastro 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 case²¹—something that, for better or worse, the governing *Interna-*

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

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.

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

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,

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]

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:

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-

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

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.

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

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 horrors’ 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

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, *Supplemental 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 long-standing 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,

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

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.

¹³⁸ *Id.* at 31.

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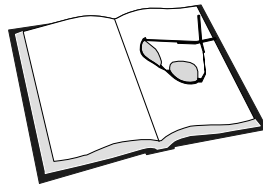
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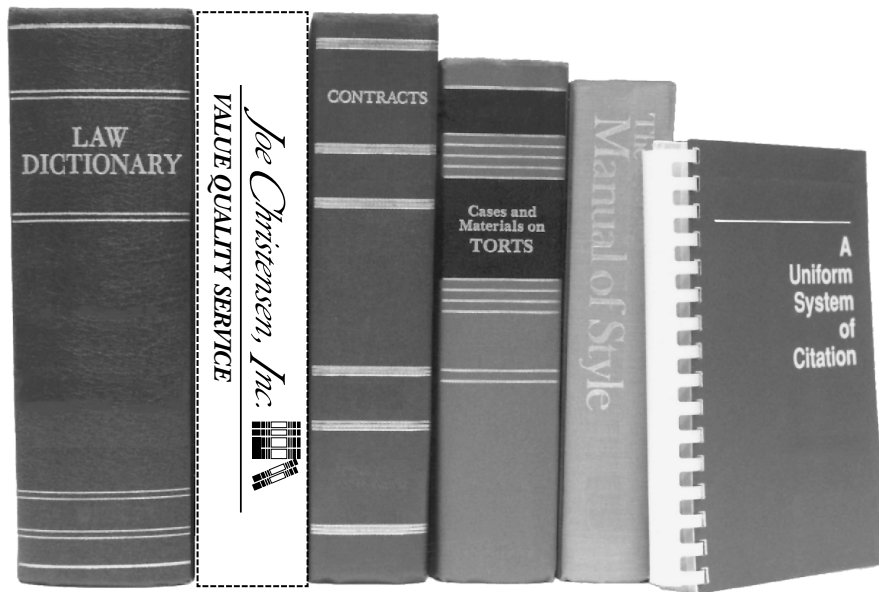
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