

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.

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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).

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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.

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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).

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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.

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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.

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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*,

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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 actions¹⁵⁹

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

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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).

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