

## SOME PERSONAL REFLECTIONS ON RUTH BADER GINSBURG'S CONTRIBUTION TO BUSINESS LAW

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Ruth Bader Ginsburg was, is, my hero.

I'd be unsurprised and unembarrassed if every essay in this issue of the *Review* honoring the Justice begins with those same words, or words to like effect. Assembling as it does the perspectives of those who had the great good luck to work with Justice Ginsburg, or be touched by her, this collection will necessarily reflect the views of unequivocal admirers.

I say that because to know Justice Ginsburg, as a lawyer, or a mentor, or a judge, or in any way at all really, was to admire her. She saw the ends of legal problems when most of us were squinting to see the beginnings. Yet her prodigious analytical capacity is only part of her legacy. Tick through the virtues—patience, fortitude, compassion, courage, humility, resolve, vision, justice, hope—anyone even remotely familiar with the Justice's story and achievements will recognize them all, immediately. Go ahead and try to find one she lacked; I doubt you will succeed.<sup>1</sup>

Also immediately apparent is the Justice's contribution to contemporary U.S. jurisprudence. Her startling influence on the development of equal protection and gender equality law is well known, and will be told well again in the pages of this collection, as it should be. As one of the commercial litigators in the RBG family, however, I have been asked to reflect on Justice Ginsburg's influence on business law, and on my work as a corporate litigator.

This I am delighted to do. While the Justice's legacy is not often associated with business law, her work influenced it mightily. Constitutional and statutory interpretation has profound economic consequences, and Justice Ginsburg saw every interconnection. From this perspective, all her contributions as a jurist are contributions to the development of business law. The astonishing series of gender equality victories she achieved as a litigator in the 1970s, surely recounted elsewhere in this issue of the *Review*, came in disputes that were fundamentally about business, about

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1. See Prachi Gupta, 17 Reasons Ruth Bader Ginsburg Is Goals AF, *Cosmopolitan* (Jul. 14, 2016), <https://www.cosmopolitan.com/politics/news/a61317/ruth-bader-ginsburg-is-goals-af> [<https://perma.cc/Q84L-3VZB>].

commerce.<sup>2</sup> The suits challenged the notion of “women’s work” and overthrew the assumption that women should be—and were—economically dependent on their fathers and then their husbands. They were brilliant bowshots in the campaign the Justice waged her whole life in support of the principle that one’s *work*—whether in the home or outside of it—should not be limited by one’s gender. The implications of the decisions in those suits reshaped the workplace. They are reshaping the C-suite. And they continue to reshape the boardroom. Without Justice Ginsburg’s advocacy in front of the Supreme Court a generation ago, the growing belief among investors that the negligible number of women on corporate boards is unacceptable would still be years away. California’s Women on Boards Act—which mandates female representation among the directors of major California companies<sup>3</sup>—and similar legislation percolating in other states would be aspiration rather than law.

Much the same influence can be attributed to many of Justice Ginsburg’s most notable judicial opinions. *United States v. Virginia (VMI)*<sup>4</sup> is of course known as a landmark equal protection decision, and it is. But do not doubt its significance for business. By decisively rejecting unequal access to elite institutions and the training and networking opportunities they provide, the *VMI* case finally outlawed a pernicious cause of unequal access to opportunity in business. In the Justice’s words: Women must have “equal opportunity to aspire, achieve, participate in and contribute to society.”<sup>5</sup>

Similarly, Justice Ginsburg’s majority opinion in *Friends of the Earth v. Laidlaw*<sup>6</sup> is regarded as an important advance in the law of Article III standing, and it is. But the decision—which overturned a Fourth Circuit ruling barring citizen-suit standing to enforce federal environmental laws<sup>7</sup>—has left an important mark on corporate conduct. By recognizing the rights of citizens to enforce environmental statutes, the decision fueled pressure on corporations to address environmental and climate-related risk in the face of government inaction. No one practicing business law today can doubt the significance of such pressure on corporate environmental conduct. Justice Ginsburg’s *Laidlaw* decision is an important reason why.

The Justice’s arbitration jurisprudence was notable for its concern with the realities of commercial power dynamics. She was often in dissent in arbitration cases, as recent Supreme Court majorities have sustained

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2. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (social security benefits); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (unpaid maternity leave); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (military benefits); *Reed v. Reed*, 404 U.S. 71 (1971) (probate); *Moritz v. Comm’r*, 469 F.2d 466 (10th Cir. 1972) (tax).

3. See Cal. Corp. Code §§ 301.3, 2115.5 (2020); S. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

4. 518 U.S. 515 (1996).

5. *Id.* at 532.

6. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167 (2000).

7. *Id.* at 173–74.

mandatory arbitration that can leave workers and consumers without practical legal remedies. Her dissenting opinion in *Epic Systems Corp. v. Lewis*<sup>8</sup> stands among her best in any area of the law. In it, she explains “why the Court’s decision”—which held that businesses could require the use of individual arbitration to resolve employee disputes—was “egregiously wrong.”<sup>9</sup> The majority’s rule, she showed, interfered with employees’ ability to associate legally and thus exacerbated the disparity in bargaining power between many businesses and their employees—a result inconsistent with the Court’s labor relations precedents and unnecessary under its arbitration precedents. She wrote:

As I see it, in relatively recent years, the Court’s Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court’s decisions as they are, nothing compels the destructive result the Court reaches today.<sup>10</sup>

And then, taking aim at the radical acceleration of the Court’s embrace of mandatory arbitration, the Justice added this lethal citation: “Cf. R. Bork, *The Tempting of America* 169 (1990) (‘Judges . . . live on the slippery slope of analogies; they are not supposed to ski it to the bottom.’).”<sup>11</sup> But for all of its force, her dissent was not for show and not for spleen. That was never Ruth Bader Ginsburg’s way. Her dissents always had tactical purpose, whether to narrow the scope of an unwelcome majority holding, or (as in this case) to leave a trail of analytical bread crumbs for legislators and future courts looking for ways to unwind the damage.

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This is all to make the simple point that, insofar as business law is inextricable from every other important branch of law, Justice Ginsburg’s outsized jurisprudential contributions to equal protection law, civil procedure, and constitutional and federal statutory interpretation have necessarily affected commercial relations and commercial litigation. To ask about Justice Ginsburg’s influence in the realm of business law is to ask about her influence in all manner of jurisprudence. The decisions proscribing unequal treatment that she coaxed, miraculously, from the courts as an advocate and later authored as a judge are the same decisions that had the greatest impact on commercial law. The Justice, whose own experience and long observation confirmed the extent of power imbalances and discrimination in the workplace, was keenly aware of this. Influencing the world of commerce and commercial law was an integral part of her project.

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8. 138 S. Ct. 1612 (2018).

9. *Id.* at 1633 (Ginsburg, J., dissenting).

10. *Id.* at 1645.

11. *Id.*

To illustrate the point, let me reflect on three of Justice Ginsburg's opinions, somewhat idiosyncratically selected, one for the majority and two powerful dissents.

In 1997, when the Justice was not yet a *Time* magazine cover star<sup>12</sup> and the "Supreme Meme Queen,"<sup>13</sup> but only one of the finest jurists this country has ever produced, she authored *United States v. O'Hagan*.<sup>14</sup> Before the Court in *O'Hagan* was a question that had long vexed the SEC, federal prosecutors, and the lower courts: Can someone who is not subject to SEC rules prohibiting securities sales by corporate insiders be liable under Rule 10(b)-5 for insider trading?

O'Hagan, a lawyer whose firm represented a merger target, overheard talk of the deal (apparently in a lunchroom) and loaded up on shares. The deal closed, the shares appreciated, and O'Hagan made a lot of money. The SEC then launched an investigation that culminated in his criminal conviction for securities laws violations. The Eighth Circuit reversed, finding that the "misappropriation theory" of securities fraud upon which the Commission had relied exceeded its rulemaking authority.<sup>15</sup> Under that theory, a person could be liable for insider trading if she misappropriated the confidential information of another, even if she was not a corporate insider. The appeals court recognized only the "classical theory"—which imposes liability only when a corporate insider trades on the basis of material non-public information. In its view, the "misappropriation theory" was unmoored from Section 10(b)'s requirement that securities fraud be "in connection with the purchase or sale of [a] security."<sup>16</sup>

This created a clear split of circuit authority. Justice Ginsburg—somewhat curiously, given her jurisprudential interests and relatively recent appointment to the Court—was tapped to resolve it. She did so with characteristic decisiveness and precision. To be sure, her opinion for the majority emphasized that liability under Rule 10(b)-5 cannot extend beyond the statutory prohibition. But, she emphasized, the statute's language reaches any "deceptive device or contrivance" used "in connection with the purchase or sale of any security."<sup>17</sup> It was no stretch to find this language applicable to the conduct before the Court. "[M]isappropriators . . . deal in deception," observed the Justice.<sup>18</sup> Critical to the rule as announced was that the defendant had obtained the non-public information

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12. See Ruth Bader Ginsburg, *Time*, April 2015, Sebastian Kim, <http://www.sebastiankim.com/time-april-2015-1> [<https://perma.cc/W85Z-VMMK>] (last visited Mar. 20, 2021).

13. Jude Ellison Sady Doyle, *How Justice Ruth Bader Ginsburg Became the Supreme Meme Queen*, *In These Times* (Nov. 4, 2015), <https://inthesetimes.com/article/the-supreme-meme-queen-justice-ruth-bader-ginsburg> [<https://perma.cc/X84H-VSXS>].

14. 521 U.S. 642 (1997).

15. *United States v. O'Hagan*, 92 F.3d 612, 618 (8th Cir. 1996).

16. *Id.*

17. *O'Hagan*, 521 U.S. at 650–51.

18. *Id.* at 653.

through a relationship of confidence, and then misused it: “A misappropriator who trades on the basis of material, nonpublic information, in short, gains his advantageous market position through deception; he deceives the source of the information and simultaneously harms members of the investing public.”<sup>19</sup>

True to a style of judging that always managed to be at once bold and restrained, Justice Ginsburg took care to limit the ruling’s reach:

The misappropriation theory targets information of a sort that misappropriators ordinarily capitalize upon to gain no-risk profits through the purchase or sale of securities. Should a misappropriator put such information to other use, the statute’s prohibition would not be implicated. The theory does not catch all conceivable forms of fraud involving confidential information; rather, it catches fraudulent means of capitalizing on such information through securities transactions.<sup>20</sup>

Likewise “vital” to the outcome, in the Justice’s view, were “sturdy safeguards . . . regarding scienter” that would shield defendants from unfair or excessive liability.<sup>21</sup> The decision was immediately recognized as, and remains, a definitive statement of insider trading law. It has been relied upon as guiding precedent hundreds of times and the misappropriation theory it announced has become a fundamental tool in the ongoing fight to ensure fair securities markets.

You will have also heard of the second of Justice Ginsburg’s business opinions I highlight here: *Ledbetter v. Goodyear Tire*.<sup>22</sup> I expect that many other essays in this collection will address *Ledbetter*; I would be unsurprised if all of them did. Which is as it should be. Her dissent, and its aftermath, is a remarkable judicial achievement.

And it fairly deserves mention as part of Justice Ginsburg’s legacy in business law. The plaintiff, Lilly Ledbetter, discovered that her employer, Goodyear, had for years been paying her far less than her male peers. She sued under Title VII of the Civil Rights Act of 1964. The jury found in Ledbetter’s favor and awarded her thousands in back pay and millions in punitive damages. The Eleventh Circuit overturned the judgment on the ground that Ledbetter had challenged the discriminatory pay decisions too late—after the expiration of the 180-day period set by statute for filing of a claim.<sup>23</sup>

The Supreme Court majority affirmed, holding that Ledbetter “should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made”—even if the decision affected

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19. *Id.* at 656.

20. *Id.*

21. *Id.* at 665.

22. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

23. *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1189–90 (11th Cir. 2005).

Ledbetter's pay long after that period ended.<sup>24</sup> Justice Ginsburg's irresistible dissent needs no elaboration for this audience. Its crux was that Ledbetter, and employees in general, could not reasonably be required to file a claim in that period when the relevant "[c]omparative pay information . . . is often hidden from the employee[s'] view."<sup>25</sup> But of course there's no doing the dissent justice here, in this summary. (Go give it a quick read; it's worth it.)

Has there ever been a more immediately effective dissent? Not only did the Justice dismantle the majority's reasoning—not only did she expose the fundamental inequity of the majority's result—but she then drew a map for Congress to fix the majority's error and explained why it must do so. "[T]he ball is in [your] court," she told the legislature.<sup>26</sup> And guess what? Congress promptly righted the wrong and made clear that the statute would be interpreted precisely as Justice Ginsburg had urged it must be to give practical effect to its equal-pay-for-equal-work principle.<sup>27</sup> Congress's confirmation that the issuance of a paycheck reflecting a discriminatory pay decision is itself a discriminatory act was a triumph for equal protection, to be sure. But it was also an achievement in business law: The workplace is where that discrimination happens. And since *Ledbetter*, businesses who carry past pay discrimination forward in current paychecks will not be tolerated.

The third illustrative opinion, Justice Ginsburg's dissent in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, will always have pride of place for me.<sup>28</sup> The Supreme Court decided *Grupo Mexicano* during October Term 1998, the year I had the good fortune to clerk for Justice Ginsburg. The case occupied the intersection of business law, equity jurisdiction, and expedited litigation. I think it is no coincidence that I've spent much of my post-clerkship career practicing law in that same busy crossroads.

Like much business litigation, *Grupo Mexicano* appeared complicated but was really quite simple. The petitioner, Grupo Mexicano, was a Mexican holding company. In the early 1990s, it sold notes to investors that ranked equally in priority of payment with the rest of the company's unsecured debt. But by late 1997, the company had suffered extensive losses arising from its participation in a toll road construction program, and it was clear that it would be unable to repay its debts. In violation of the equal-treatment terms of the notes, it preferred its Mexican creditors over all others in disposing of what assets it had. The Alliance Bond Fund, a group

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24. *Ledbetter*, 550 U.S. at 621.

25. *Id.* at 645 (Ginsburg, J., dissenting).

26. *Id.* at 661.

27. See Lilly Ledbetter Fair Pay Act of 2009, § 3, Pub. L. No. 111-2, 123 Stat. 5, 5–6 (codified at 42 U.S.C. § 2000e-5(e) (2018)).

28. 527 U.S. 308 (1999).

of noteholders, accelerated the principal amount of their debt and brought expedited litigation in New York federal court to recover.<sup>29</sup>

As Justice Ginsburg observed, “[u]ncontested evidence presented to the District Court at the preliminary injunction hearing showed” that Grupo Mexicano “had defaulted on its contractual obligations,” that “Alliance had satisfied all conditions precedent to its breach of contract claims,” and that “[Grupo Mexicano] had no plausible defense on the merits.”<sup>30</sup> The “unchallenged evidence” also showed that “absent provisional action by the District Court, Alliance would have been unable to collect on the money judgment for which it qualified.”<sup>31</sup>

So the district judge had a choice. He could enter an injunctive order freezing Grupo Mexicano’s assets pending a final judgment, or not—in which case the company would distribute its remaining assets as it liked, leaving Alliance and other noteholders with a valid claim but no remedy. The court entered the freeze injunction. Grupo Mexicano then took an expedited appeal to the Second Circuit, arguing that an injunction preserving assets in support of an ultimate money judgment was unauthorized at equity. After the Second Circuit affirmed, the Supreme Court granted certiorari.

A 5-4 majority of the Court determined to reverse, in a decision that launched a still-ongoing debate about the scope of federal equitable power. For the majority, the case was an exercise in simple historiography. The equitable power of the federal courts is no more than the “authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.”<sup>32</sup> Accordingly, “the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789.”<sup>33</sup> “We must ask, therefore,” said the Court, “whether the relief respondents requested here was traditionally accorded by courts of equity.”<sup>34</sup>

The answer to that question, said the Court, was no. Equity had occasionally issued a remedy called a “creditor’s bill” to facilitate a money judgment. But the Court found (on the strength of a very hazy historical record) that remedy was available “only [to] a creditor who had already obtained a judgment.”<sup>35</sup> Finding no example of an English Chancellor having issued a freeze order to protect a pre-judgment debt that was surely

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29. *Id.* at 310–13.

30. *Id.* at 333–34 (Ginsburg, J., concurring in part and dissenting in part).

31. *Id.*

32. *Id.* at 318 (majority opinion).

33. *Id.*

34. *Id.* at 319.

35. *Id.*

due and owing, the majority found that a U.S. district court couldn't issue one either. Nor did it matter, held the Court, that equitable courts *may* have had the power, long before adoption of the Constitution, to issue provisional remedies of this kind. Whatever the boundaries of the historical Chancellor's power, the clinching point for the majority was that "English courts of equity did not *actually exercise* this power until 1975."<sup>36</sup> To loosen the reins on equity any further, worried the majority, would risk arbitrary rule reflecting "the measure [of] the Chancellor's foot."<sup>37</sup>

This was a battle about the soul of equity and Justice Ginsburg knew it. Her dissent began where the Justice's opinions usually began: the beginning. Equitable jurisdiction attaches, she reminded the Court, "where 'the remedy in equity could alone furnish relief, and [] the ends of justice requir[e] the injunction to be issued.'"<sup>38</sup> Limiting federal equitable power solely to the arsenal of remedies employed by eighteenth-century judges reflects "an unjustifiably static conception of equity jurisdiction" that unwisely "disarm[s] the district courts."<sup>39</sup> The Court has "never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor" but has instead, since its "earliest cases[,] . . . valued the adaptable character of federal equitable power."<sup>40</sup> Equity's job has always been "to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising."<sup>41</sup> And it can't do that job unless it is permitted to "evolve over time."<sup>42</sup> Illustrating the point, the Justice observed that "we have upheld diverse injunctions that would have been beyond the contemplation of the 18th-century Chancellor."<sup>43</sup> As proof, she cited the Court's approval of the desegregation mandate of *Brown v. Board of Education* and intricate programs of corporate dissolution to enforce the antitrust laws.<sup>44</sup>

Justice Ginsburg also knew getting the rules of equity right was "of special importance in the commercial law context."<sup>45</sup> Precisely to ensure a "dynamic equity jurisprudence" in view of "the increasing complexities of modern business relations[,] equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to

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36. *Id.* at 329.

37. *Id.* at 332–33 (quoting 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 19, at 21 (Boston, Hilliard, Gray & Co. 1836)).

38. *Id.* at 335 (Ginsburg, J., concurring in part and dissenting in part) (quoting *Watson v. Sutherland*, 72 U.S. (5 Wall.) 74, 79 (1866)).

39. *Id.* at 334–36.

40. *Id.* at 336.

41. *Id.* (quoting *Union Pac. Ry. Co. v. Chi., Rock Island & Pac. Ry. Co.*, 163 U.S. 564, 601 (1896)).

42. *Id.*

43. *Id.* at 337.

44. See *id.* at 337 n.4.

45. *Id.* at 337.

circumscribe them.”<sup>46</sup> Historical Chancery, she explained, may have had no occasion to issue freeze injunctions “because they were not needed to secure a just result in an age of slow-moving capital and comparatively immobile wealth.”<sup>47</sup> But—given the emergence of “sophisticated foreign-haven judgement proofing strategies[] [and] technology that permits the nearly instantaneous transfer of assets abroad”—the Justice saw no reason to think that “a responsible Chancellor today would deny Alliance [the] relief” it sought and the lower courts had approved.<sup>48</sup> “I would find the default rule in the grand aims of equity,” Justice Ginsburg concluded.<sup>49</sup> “Where, as here, legal remedies are not ‘practical and efficient,’ the federal courts must rely on their ‘flexible jurisdiction in equity [] to protect all rights and do justice to all concerned.’”<sup>50</sup>

Emphasizing the importance of the controversy and the intensity of the disagreement, Justice Ginsburg read her dissent aloud from the bench on June 17, 1999. (This is among the first dissents the Justice read from the Supreme Court bench and thus stands at the beginning of what she developed into a powerful tradition.)<sup>51</sup> Like all her dissents, this one served a constructive purpose. In the years since (and notwithstanding) *Grupo Mexicano*, federal court freeze orders have been upheld in a variety of situations,<sup>52</sup> and the case has remained at the forefront of a lively scholarly and judicial debate about equity’s proper scope.<sup>53</sup>

Put me down as confident the debate will ultimately be resolved in favor of Justice Ginsburg’s *Grupo Mexicano* dissent. Her opinion recognized that what modern commercial practice requires is a “pie-powder court”—a reference to the specialized, now-extinct English market courts of the Middle Ages—capable of resolving business disputes “on the instant and

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46. Id. (quoting *Union Pac.*, 163 U.S. at 601).

47. Id. at 338.

48. Id. at 338–39.

49. Id. at 342.

50. Id. (first quoting *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 431 (1868); then quoting *Providence Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 805, 807 (1870)).

51. See Nichola D. Gutgold, Ginsburg Read Dissents Aloud When She Wanted to Send Message, *Morning Call* (Aug. 24, 2010), <https://www.mcall.com/opinion/mc-xpm-2010-08-24-mc-justice-ginsburg-gutgold-yv-20100824-story.html> [<https://perma.cc/UJQ9-KTQR>] (“[I]f I want to emphasize that the court not only got it wrong, but egregiously so, reading aloud a dissent can have an immediate objective.”).

52. See Judith Resnik, Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power, 78 *Ind. L.J.* 223, 254–55 (2003).

53. See generally, e.g., Samuel L. Bray, The Supreme Court and the New Equity, 68 *Vand. L. Rev.* 997, 1011 (2015) (“[I]n *Grupo Mexicano* . . . the Justices might really have been debating something else. Perhaps the majority and dissent were rehashing their disagreement over constitutional methodology, with Justice Scalia trying to advance, and Justice Ginsburg trying to resist, a particular kind of originalist approach to equity.”); Stephen B. Burbank, The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study, 75 *Notre Dame L. Rev.* 1291 (2000) (evaluating the *Grupo Mexicano* decision and how both the majority and dissent had a major impact on the course of equitable remedies).

on the spot.”<sup>54</sup> Much of my professional life is spent practicing in the Delaware Court of Chancery. Delaware’s Chancery is the modern heritor of its English ancestor. And it is the sophisticated modern evolution of the “pie-powder court” Justice Ginsburg described—capable of deploying equity’s remedial flexibility to resolve complex corporate control and transactional disputes at the speed of business, if not quite “on the instant and on the spot.” That court proves every day the wisdom of the Justice’s analysis and sustains the accuracy of her vision. And in much the same way, courts all over the country prove every day the Justice’s wisdom, and sustain the accuracy of her vision, not just in equity and business litigation, but in every area and every corner of the law.

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54. *Grupo Mexicano*, 527 U.S. at 334 (Ginsburg, J., concurring in part and dissenting in part) (quoting *Parks v. Boston*, 32 Mass. 198, 208 (1834) (Shaw, C.J.)). The murky historical origin of the term “pie-powder” made for extensive discussion in chambers. The best explanation seems to be that it derives from the old French *pied-poudré*, (“dusty foot”) reflecting the dust on the floors of English markets that accumulated on merchants’ shoes. See Charles Gross, *The Court of Piepowder*, 20 *Q.J. Econ.* 231, 231 (1906).