

## PROFESSOR JUSTICE GINSBURG: JUSTICE GINSBURG'S LOVE OF PROCEDURE AND JURISDICTION

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As two of Justice Ginsburg's former clerks, we are keenly aware of the popular image of the Justice as the "Notorious RBG": the champion of women's rights and the forceful dissenter, strongly disputing the Roberts Court's conservative turn and articulating the case for the liberal New Deal constitutional vision, with its commitment to protecting individual rights and broad view of national power.

This she did, powerfully and eloquently. But to understand Justice Ginsburg—the person, the Justice, and her jurisprudence—it is also critical to account for her role as the Supreme Court's leading civil procedure and federal jurisdiction maven.

Justice Ginsburg had a deep and abiding love for these foundational (but less flashy) parts of the legal system. Before becoming a judge, she had been a professor of civil procedure and had even written a book about Swedish civil procedure.<sup>1</sup> And as a Justice, these subjects continued to bring her great joy. She often asked the first question in procedure and jurisdictional cases—and indeed often dominated the oral arguments through her incisive and frequent questioning. Anyone who wants to hear the Justice at her feistiest need only listen to the oral arguments in a few procedure or jurisdiction cases, like *Bristol-Myers Squibb Co. v. Superior Court* or *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*<sup>2</sup>

Justice Ginsburg also eagerly sought out assignments to write the opinions in these cases. She would return from conference with a big smile on her face when she succeeded in landing such an assignment, looking very much like the cat that ate the cream. And succeed she often did. Over her twenty-seven years on the Court, Justice Ginsburg issued more than eighty decisions touching on all aspects of civil procedure and federal jurisdiction.<sup>3</sup>

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1. Ruth Bader Ginsburg & Anders Bruzelius, *Civil Procedure in Sweden* (1965).

2. E.g., Transcript of Oral Argument, *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) (No. 16-466), 2017 WL 1482003; Transcript of Oral Argument, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (No. 08-1008), 2009 WL 3554562 [hereinafter *Shady Grove* Oral Argument Transcript].

3. By our count, recognizing that classifying cases is an art and not a science, 34% (73) of Justice Ginsburg's 213 majority opinions for the Court centered on issues of procedure or jurisdiction. See Adam Feldman, *Empirical SCOTUS: Justice Ginsburg Leaves a Lasting Legacy on the Court*, SCOTUSblog (Sept. 25, 2020), <https://www.scotusblog.com/2020/09/empirical-scotus-justice-ginsburg-leaves-a-lasting-legacy-on-the-court>

Among others, she wrote leading (or, in Ginsburgese, “pathmarking”<sup>4</sup>) decisions on what constitutes a “jurisdictional” rule,<sup>5</sup> personal jurisdiction,<sup>6</sup> the requirements for class certification,<sup>7</sup> and preclusion.<sup>8</sup> In turn, Justice Ginsburg’s absence will be sorely felt in these areas. As Justice Kavanaugh recently commented at oral argument, “[Y]ou know, it’s never good to be on the wrong side of a Justice Ginsburg opinion, but particularly on a jurisdictional issue.”<sup>9</sup>

These opinions, often unanimous or nearly so, were as much paradigms of the Ginsburg style as her vaunted dissents. Carefully crafted and spare, with no unnecessary tangents, they invariably seek to clarify and remove confusion on procedural matters for lower court judges. Indeed, many of these decisions have a strong teaching quality. For example, her many decisions in the *Arbaugh* line of cases bring clarity to the task of federal district court judges by ending loose uses (and misuses) of the term “jurisdictional.” As she said for the Court, again and again, jurisdiction is “a word of many, too many, meanings,”<sup>10</sup> and her decisions help to eliminate the resulting confusion and in turn to clarify what questions a judge must answer even if not raised by the litigants. Her decisions in the *Goodyear*

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[<https://perma.cc/4W6X-CTKV>] (identifying Justice Ginsburg as writing 213 majority opinions). This heavy procedural and jurisdictional cast of the Justice’s jurisprudence was present throughout her time on the Court. See David L. Shapiro, Justice Ginsburg’s First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction, 104 Colum. L. Rev. 21, 21 (2004) (noting that “approximately fifty” of Ginsburg’s “some two hundred opinions” after ten years on the Court “deal[t] in whole or in part with issues of civil procedure and/or federal jurisdiction”).

4. “Pathmarking” was one of the Justice’s favorite and most distinctive terms. Her “pathmarking” use of “pathmarking” in the Supreme Court was in dissent in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 844 (1994) (Ginsburg, J., concurring in part). She appears to have coined the term early in her tenure at the D.C. Circuit. See *United States v. Ross*, 655 F.2d 1159, 1163 (D.C. Cir. 1981) (referring to a “pathmarking decision”); Ruth Bader Ginsburg, *The Work of Professor Allan Delker Vestal*, 70 Iowa L. Rev. 13, 13 (1984) (“Professor Vestal made many vibrant contributions to the law. His pathmarking work involved the law of prior adjudication.”). Justice Ginsburg explained that the term was a tribute to a book by the Swedish diplomat, Dag Hammarskjöld. See Dag Hammarskjöld, *Markings* (Leif Sjöberg & W.H. Auden trans., Faber & Faber 1964); see also Adam Liptak, *Kagan Says Her Path to Supreme Court Was Made Smoother by Ginsburg’s*, N.Y. Times (Feb. 10, 2014), <https://www.nytimes.com/2014/02/11/us/kagan-says-her-path-to-supreme-court-was-made-smoother-by-ginsburg.html> (on file with the *Columbia Law Review*).

5. *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).

6. *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

7. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

8. *Taylor v. Sturgell*, 553 U.S. 880 (2008).

9. Transcript of Oral Argument at 65, *BP P.L.C. v. Mayor of Balt.*, No. 19-1189 (U.S. argued Jan. 19, 2021), 2021 WL 177489.

10. E.g., *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848 (2019); *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013); *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009); *Arbaugh*, 546 U.S. at 510; *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004).

line of cases similarly bring clarity to lower court judges, and especially state court judges, who had often blurred the lines between general (“all purposes”) and specific (or “case-linked”) jurisdiction, in ways that Justice Ginsburg explained were spurious.<sup>11</sup> And her decision in *Taylor v. Sturgell* is effectively a textbook treatment of issue preclusion, eliminating confusion about when it is appropriate to bind a nonparty.<sup>12</sup>

Like her Notorious dissents, her decisions in civil procedure and jurisdiction cases share a pragmatic focus on law on the ground and a commitment to judicial modesty. But they stand out for their attentiveness to doctrinal and institutional interstices over abstract principle. This nuanced approach, along with her deep understanding of the limited judicial role, sometimes led to surprising results. Among other things, these decisions articulate a different account of federalism than her dissents alone convey—one that puts pride of place on federal–state comity and accommodation, even while acknowledging the dominance of federal law.

#### I. PRAGMATISM, LOWER COURT DEFERENCE, AND CLARITY

Justice Ginsburg’s presence looms particularly large in less high-profile, even somewhat quotidian cases that nonetheless set essential parameters of federal court jurisdiction and the relationship between the federal and state courts. The Supreme Court’s jurisprudence on removal from state to federal court over the last twenty-seven years, for example, was often crafted by the Justice.<sup>13</sup> She also almost singlehandedly redefined what it means for a given statutory limit on bringing claims to be “jurisdictional,” apparently succeeding through her dogged determination in bringing the Court around to her view that most such limits were simply claims-processing rules that could be waived or forfeited, even if they were mandatory and thus admitted of no exceptions.<sup>14</sup>

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11. E.g., *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549 (2017); *Daimler*, 571 U.S. at 125–39; *Goodyear*, 564 U.S. at 923–29.

12. 553 U.S. 880 (2008).

13. E.g., *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81 (2014); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005); *Jefferson County v. Acker*, 527 U.S. 423 (1999); *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999); *Rivet v. Regions Bank*, 522 U.S. 470 (1998); *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).

14. See, e.g., *supra* note 10 (collecting cases). *Bowles v. Russell*, which held that the statutory time limits in 28 U.S.C. § 2107 for filing a notice of appeal in a civil case are jurisdictional, represents the only notable decision in which the Justice’s view lost out. 551 U.S. 205 (2007). But the Court (per Justice Ginsburg) has since made clear that the *Bowles* exception is narrowly confined, apparently limited to Section 2107 alone. See, e.g., *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 21 (2017).

Frequently unanimous, these opinions demonstrate her colleagues' recognition of Justice Ginsburg's deep knowledge on questions of procedure and jurisdiction. They also reveal the Justice's intensely pragmatic approach. These opinions share an insistent focus on what makes sense on the ground rather than abstract conceptual distinctions. As Professors Scott Dodson and David Franklin have separately argued, this focus also animated the Justice's concerns for judicial economy and her faith in the discretion of the lower court judge.<sup>15</sup> For example, her repeated efforts to treat time limitations as mandatory but waivable (rather than strictly "jurisdictional" and thus nonwaivable) help to avoid the considerable waste of judicial resources that would arise if judges were constantly forced to answer questions no litigant put to them.<sup>16</sup>

Justice Ginsburg's majority opinions in *Ruhrigas AG v. Marathon Oil Co.*<sup>17</sup> and *Sinochem International Co. v. Malaysia International Shipping Corp.*<sup>18</sup> are of a similar ilk. In both, the Justice rejected formalistic claims of jurisdictional priority—refusing to demand that district courts undertake difficult determinations of subject matter jurisdiction before more efficiently dismissing cases on other nonmerits grounds (namely, personal jurisdiction or forum non conveniens). Instead, she left to the district court's discretion the choice of which threshold basis for dismissal should come first, simply instructing that courts should dismiss on the basis of subject matter jurisdiction when they can readily do so without unnecessary burden.<sup>19</sup>

## II. COMMITMENT TO JUDICIAL MODESTY

Justice Ginsburg's strong views about process norms—and her abiding sense of judicial modesty—could also take priority over substantive doctrinal concerns. Take, for example, one of the Justice's last opinions, *United States v. Sineneng-Smith*.<sup>20</sup> *Sineneng-Smith* came to the Supreme Court with many of the hallmarks of a controversial Trump Administration immigration case—and also an expectation from many that Justice

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15. Scott Dodson, A Revolution in Jurisdiction, *in* *The Legacy of Ruth Bader Ginsburg* 137 (Scott Dodson ed., 2015); David L. Franklin, Justice Ginsburg's Common-Law Federalism, 43 *New Eng. L. Rev.* 751 (2009).

16. *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849–50 (2019); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510–11, 513–16 (2006).

17. 526 U.S. 574 (1999).

18. 549 U.S. 422 (2007).

19. *Sinochem Int'l Co.*, 549 U.S. at 435–36 (finding that the district court properly dismissed on forum non conveniens grounds rather than expending resources on more complicated subject matter and personal jurisdictional determinations); *Ruhrigas AG*, 526 U.S. at 587–88 (“Where . . . a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction.”).

20. 140 S. Ct. 1575 (2020).

Ginsburg would vote in favor of the criminal defendant.<sup>21</sup> Instead, Justice Ginsburg completely recast the case in process terms and wrote an opinion for a unanimous Supreme Court on the side of the government and sharply rebuking the Ninth Circuit.

Evelyn Sineneng-Smith was an immigration consultant who ran a fraudulent scheme in which she duped her mainly Filipino clients into paying her thousands of dollars to file applications for a program that would allow them to obtain lawful status, notwithstanding that she knew the program deadline had long passed and the applications would go nowhere.<sup>22</sup> The government charged and convicted her on multiple counts, including for violating a statutory prohibition on “encouraging or inducing” an alien to unlawfully enter or remain in the United States for commercial advantage or private financial gain.<sup>23</sup>

On appeal, the Ninth Circuit *sua sponte* asked for briefing on whether the restriction on “encouraging or inducing” an alien to remain unlawfully in the United States was facially unconstitutional. After supplemental briefing and argument, the Ninth Circuit struck down the statute as facially overbroad.<sup>24</sup> It determined that the statute criminalized “the simple words—spoken to a son, a wife, a parent, a friend, a neighbor, a coworker, a student, a client—‘I encourage you to stay here,’” as well as social media posts or a “speech addressed to a gathered crowd” encouraging those without legal status to remain.<sup>25</sup> According to the appeals court, the statute would allow a felony prosecution of “an attorney who tells her client that she should remain in the country while contesting removal,” even if that was good faith legal advice.<sup>26</sup> And the Ninth Circuit’s list of hypotheticals were almost certainly magnified by the panel’s fears that the Trump Administration would use aggressive prosecutions under Section 1324(a) as a weapon to crack down on illegal immigration and pro-immigration advocacy or charity work.

The government sought certiorari and the Supreme Court granted the petition to decide whether the statute was facially unconstitutional.<sup>27</sup>

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21. Of course, Justice Ginsburg often broke from such conventional expectations. For example, in *Dahda v. United States*, 138 S. Ct. 1491 (2018), a criminal case involving wiretaps, the conventional expectation would have been that Justice Ginsburg would favor the defendant and be skeptical of the government’s broad use of wiretap authority. Instead, at the oral argument, she immediately interrupted the defense counsel’s opening with a series of difficult questions that made clear she fully agreed with the government’s position. See Transcript of Oral Argument at 4–5, *Dahda*, 138 S. Ct. 1491 (No. 17-43), 2018 WL 1015564. With her strong support in hand, the government won unanimously.

22. *Sineneng-Smith*, 140 S. Ct. at 1577–78.

23. *Id.* at 1578; see also 8 U.S.C. § 1324(a)(1)(A)(iv), (B)(i) (2018).

24. *United States v. Sineneng-Smith*, 910 F.3d 461, 467–68 (9th Cir. 2018).

25. *Id.* at 465, 484.

26. *Id.* at 484.

27. Mr. Tripp represented the government in filing its petition for a writ of certiorari but left the Office of the Solicitor General before the petition was granted.

At the Court, the government's main strategy was to argue that the provision was narrower than the Ninth Circuit believed and was a "conventional prohibition on soliciting or facilitating" unlawful activity that fell within the well-settled First Amendment exception for "speech integral to criminal conduct."<sup>28</sup> In response, Sineneng-Smith contended that the Ninth Circuit's broad interpretation was compelled by the ordinary meaning of "encourage or induce," with the result that the provision could not fit within the exception and instead raised grave First Amendment concerns.<sup>29</sup> The oral argument proceeded along the same lines, with the Justices posing difficult questions to each side about the scope of the statute and the "speech integral to crime" exception and whether or to what extent Congress can punish solicitation of underlying activity that is unlawful but not itself a crime.<sup>30</sup>

The case thus appeared poised to be a test of the competing visions of the statute, as well as a vehicle for resolving some thorny questions of First Amendment doctrine. Instead, perhaps at the Justices' conference a few days after argument, Justice Ginsburg completely recast the case. The Ninth Circuit's real mistake, the Justice held, *was to take over litigation of the case from the parties in order to answer a completely different question from any the parties had actually asked.*

"In our adversarial system of adjudication," she explained, "we follow the principle of party presentation," meaning that "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."<sup>31</sup> According to the Justice, "[C]ourts are essentially passive instruments of government": "They 'do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.'"<sup>32</sup> Justice Ginsburg concluded that "the Ninth Circuit's radical transformation of this case"—including *sua sponte* inviting briefing from three specific immigrants' rights groups and allocating those hand-picked counsel more argument

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28. Brief for the United States at 18, 31–32, *Sineneng-Smith*, 140 S. Ct. 1575 (No. 19-67), 2019 WL 6524882; see also *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (listing "speech integral to criminal conduct" among the limitations on speech traditionally tolerated under the First Amendment).

29. Brief for Respondent at 14, *Sineneng-Smith*, 140 S. Ct. 1575 (No. 19-67), 2020 WL 257581.

30. See Transcript of Oral Argument, *Sineneng-Smith*, 140 S. Ct. 1575 (No. 19-67).

31. *Sineneng-Smith*, 140 S. Ct. at 1579 (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (Ginsburg, J.)).

32. *Id.* (alterations in original) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc)). Justice Ginsburg quoted the same passage in *Greenlaw*, 554 U.S. at 244. One of the highlights of Mr. Tripp's clerkship was working with Justice Ginsburg on the opinion in *Greenlaw* and, in particular, finding that quote. The Justice had tremendous respect for Judge Arnold, and that passage encapsulated the point in elegant prose much like the Justice's own writing. When she first read it, the Justice responded with a huge smile, which was the highest compliment.

time than *Sineneng-Smith*'s own counsel—"depart[ed] so drastically from the principle of party presentation as to constitute an abuse of discretion."<sup>33</sup>

*Sineneng-Smith* thus came as a big surprise, but in many respects it is a quintessential Justice Ginsburg opinion. Like all of her opinions, it is crisp, concise, and beautifully written. It displays her well-refined sense of legal process and the appropriate judicial role. Through the opinion, the Justice teaches the reader (and lower courts) about the "party presentation" principle<sup>34</sup>—a principle that is familiar in the abstract but rarely discussed or used as the basis for deciding an appeal. Like many of her process opinions, it is unanimous, with all the other Justices ultimately embracing Justice Ginsburg's understanding of the Ninth Circuit's error. And it vividly demonstrates how those process values and commitment to passive virtues would take priority for Justice Ginsburg over substantive concerns like statutory interpretation or First Amendment doctrine. Indeed, in *Sineneng-Smith*, Justice Ginsburg did not merely arrive at the correct procedural answer but apparently was the first *even to conceive of the case in those terms*. None of the parties had discussed the party-presentation principle or cited the leading case, the Justice's own prior opinion in *Greenlaw*.

The irony of *Sineneng-Smith* is that, after sternly reprimanding the Ninth Circuit for deciding the case on the basis of an argument that no party had raised, the Supreme Court proceeded to turn around and do the same. Justice Ginsburg was clearly aware of the concern, going so far as to include an appendix of the many situations in which the Supreme Court has requested supplemental briefing or appointed amici.<sup>35</sup> She distinguished such actions on the grounds that courts are not "hidebound by the precise arguments of counsel" and "[t]he party presentation principle is supple, not ironclad."<sup>36</sup> Nonetheless, there were limits, and the Justice was unapologetic in holding that the Ninth Circuit's dramatic steps to take control of the litigation, reframe and broaden the issues, and strike down a federal statute on its face went "well beyond the pale."<sup>37</sup> Justice Ginsburg's decision for the Court, by contrast, merely returned the case to its original, more mundane form.

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33. *Sineneng-Smith*, 140 S. Ct. at 1578, 1581–82.

34. *Id.* at 1579.

35. See *id.* at 1582–83. Some commentators have suggested that the Supreme Court has been more willing to reach out beyond the parties for arguments in recent years. E.g., Henry M. Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665 (2012).

36. *Sineneng-Smith*, 140 S. Ct. at 1579, 1581.

37. *Id.* at 1581–82.

III. "COMPLEMENTARY SYSTEMS FOR ADMINISTERING JUSTICE"<sup>38</sup>

The Justice's voice stands out especially in cases involving complex interactions between federal and state courts. The same traits of pragmatism, lower court deference, and judicial modesty are evident, but the driving force is the Justice's view of the federal and state courts as two essential and "complementary systems for administering justice in our Nation."<sup>39</sup> "Cooperation and comity, not competition and conflict," the Justice emphasized, "are essential to the federal design."<sup>40</sup> Three of the Justice's opinions depict her vision particularly well.

The first two, *Gasperini v. Center for Humanities*<sup>41</sup> and *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,<sup>42</sup> involve the same general question: Whether a given state rule would apply to an action governed by state substantive law but heard in federal court because the plaintiffs and defendants are from different states and thus satisfy the requirements for federal court diversity jurisdiction. After struggling with this question for many years in the aftermath of *Erie Railroad Company v. Tomkins*,<sup>43</sup> the Supreme Court set out a deceptively simple solution: "[F]ederal courts are to apply state substantive law and federal procedural law."<sup>44</sup> This means that federal courts should enforce any applicable Federal Rule of Civil Procedure (FRCP) that is rationally viewed as procedural; otherwise, federal courts should apply the relevant state rule when doing so would advance *Erie's* twin goals of avoiding inequitable variation in results between federal and state courts and limiting forum shopping.<sup>45</sup> Although providing good guideposts in the "mine run"<sup>46</sup> of cases, this approach

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38. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999).

39. *Id.*

40. *Id.*

41. 518 U.S. 415 (1996).

42. 559 U.S. 393 (2010).

43. 304 U.S. 64 (1938).

44. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965).

45. *Id.* at 468, 470, 472.

46. "Mine run," used instead of the more common "run of the mill," is another distinctive Ginsburg phrase. See, e.g., *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014) (referring to "mine-run diversity cases"); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012) (referring to "mine-run TCPA claims"); *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (arguing that "[i]n the mine run of cases, jurisdiction 'will involve no arduous inquiry'" (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587 (1999))). The Justice first employed "mine run" in the Supreme Court in *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996), but had used it in the D.C. Circuit and her academic writing long before. See *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982) (referring to "the mine run of litigation"); Ruth Bader Ginsburg, *Special Findings and Jury Unanimity in the Federal Courts*, 65 *Colum. L. Rev.* 256, 258 (1965) ("run of the mine cases"). Even Marty Ginsburg used the phrase, perhaps a sign of the Justice's editing. See Martin D. Ginsburg, *Rethinking the Tax Law in the New Installment Sales World*, 59 *Taxes* 886, 891 (1981). At both the Supreme Court and the D.C. Circuit, however, somebody else beat Justice Ginsburg to the punch. See *Monroe v. Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting); *Am. Sec. Council Ed. Found. v. Fed.*



leaves open what federal courts should do when the import of a federal rule is unclear, or when the relevant state and federal rules appear to be heavily substantive as well as procedural.

*Gasperini* involved a New York law allowing an appellate court to review the size of a jury verdict and order a new trial when the appellate court determines that the verdict deviates materially from what would be reasonable compensation.<sup>47</sup> The Court was confronted with the question of whether the state law, despite its ostensible manifestation as a procedural rule of review, was in fact a substantive requirement that ought to apply in a federal court diversity action under *Erie*. Writing for the Court, Justice Ginsburg first concluded that the state requirement was substantive, and then confronted the trickier question of whether it could be squared with the Seventh Amendment's general prohibition on reexamining jury trial determinations in federal courts.<sup>48</sup> The Justice's response was to pull apart two aspects of jury trial reexamination: the long-established ability of federal district courts to grant a new trial and the far less settled ability of a federal appellate court to set aside a jury verdict as excessive. She concluded that the state's "dominant interest can be respected, without disrupting the federal system, by . . . recognizing that the federal district court" can apply New York's law requiring review of jury verdicts.<sup>49</sup> In short, sensitive to the distinct positions of appellate and district courts in the federal system, the Justice offered a contextualized approach that "accommodate[d]" the "principal state and federal interests" involved by reinforcing the role of the district court judge.<sup>50</sup> And to reach that result "[s]he threaded her way through [a] maze" of *Erie* precedents and procedural rules "with all the skill of Theseus conquering the intricacies of the Labyrinth."<sup>51</sup>

Fast forward nearly fifteen years, and the Court was confronted with a similar problem in *Shady Grove*. At issue was another New York law, this one prohibiting litigants from bringing class actions to recover statutory penalties.<sup>52</sup> Nonetheless, seeking to recover statutory penalties under New York law in a diversity action in federal court, a plaintiff claimed the right to proceed in a class action form by virtue of the authorization of class actions contained in FRCP 23. It was plain in oral argument that the Justice was not buying that. First out of the gate with a question, she insisted that

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Comm'ns Comm'n, 607 F.2d 438, 463 (D.C. Cir. 1979) (Wilkey, J., dissenting); see also *United States v. Scophony Corp.*, 333 U.S. 795, 814 n.26 (1948) (Rutledge, J.) ("run-of-the-mine"). Thus, the Justice's use of "mine run" was unusually frequent, but not pathmarking.

47. *Gasperini v. Ctr. for Humans.*, 518 U.S. 415, 418–19 (1996).

48. *Id.* at 430, 431–36.

49. *Id.* at 433, 437.

50. *Id.* at 437; see also Franklin, *supra* note 15, at 752–54 (discussing Justice Ginsburg's similar approach to state-court judges).

51. Shapiro, *supra* note 3, at 25.

52. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 397 (2010).

New York's law was "a procedural standard that has a manifestly substantive purpose, which is to restrict recoveries of penalties."<sup>53</sup> She plaintively added:

If New York wants to say this kind of claim can be brought only as an individual action, not as a class action, why shouldn't the Federal court say that's perfectly fine; this class of cases can't be brought as a class action; we respect the State's position on that? Why should we as a Federal court in a diversity case create a claim that the—that the State never created?<sup>54</sup>

But the Justice did not win a majority for her view. Instead, in a plurality opinion authored by Justice Scalia, the Court held that Rule 23 categorically allowed litigants meeting its requirements to bring a class action, and further that as Rule 23 was arguably procedural it governed under *Erie*.<sup>55</sup> This categorical reading of Rule 23 was anathema to Justice Ginsburg. Her dissenting opinion, joined by Justices Kennedy, Breyer, and Alito, faulted the Court for "read[ing] Rule 23 relentlessly to override New York's restriction on the availability of statutory damages," thereby "find[ing] conflict where none is necessary."<sup>56</sup> The better course, she made clear, was to "avoid[] immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest."<sup>57</sup> The Justice insisted this was also the approach the Court had pursued in the past, and made clear through abundant citation that she believed that *Gasperini* should have controlled the outcome here.<sup>58</sup> On her account, in actions governed by state law, Rule 23 should be read as simply governing the procedural aspects of class litigation in federal court, leaving to state law the substantive determination of whether statutory penalties are a type of remedy that should be available when such representative actions are brought.<sup>59</sup>

Nor were these opinions a fluke for the Justice. Similar sensitivity to respecting state substantive choices is apparent in Justice Ginsburg's dissent in *Bush v. Gore*, where she faulted some members of the Court for being insufficiently deferential to state court determinations of state law, notwithstanding that the state law determinations were of pivotal

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53. *Shady Grove* Oral Argument Transcript, *supra* note 2, at 4.

54. *Id.* at 6.

55. *Shady Grove*, 559 U.S. at 398, 407–08. In a solo concurrence, Justice Stevens argued that a procedural federal rule could not displace a procedural state rule that the state used to define the scope of substantive rights and remedies under the Rules Enabling Act, but concluded that the New York law at issue was properly viewed as procedural. *Id.* at 420, 422, 436 (Stevens, J., concurring).

56. *Id.* at 437, 446 (Ginsburg, J., dissenting).

57. *Id.* at 439.

58. *Id.* at 441–43; see also Merritt McAlister (@merrittm), Twitter (Sept. 18, 2020), <https://twitter.com/merrittm/status/1307110594668003329> (on file with the *Columbia Law Review*) (showing a photo of a slip copy of *Gasperini*, on which the Justice had written: "One of my favorites. Should have controlled *Shady Grove!*").

59. *Shady Grove*, 559 U.S. at 446–51 (Ginsburg, J., dissenting).

importance to the selection of the nation's president.<sup>60</sup> It is equally evident in many of the Justice's preemption decisions. As others have noted, Justice Ginsburg was often reluctant to find state law preempted, especially when state court actions were involved.<sup>61</sup> In her view, just as federal courts should seek to accommodate state substantive interests in applying federal procedural rules, federal courts should find state law displaced only when that result was really necessary to a congressional statutory regime.

Yet Justice Ginsburg's sensitivity to state interests had limits, as the third opinion, *Sprint Communications, Inc. v. Jacobs*, reveals.<sup>62</sup> *Sprint* involved the question of whether federal courts should abstain from hearing a preemption challenge to a state board's determination so that a state court could review the determination first in an ongoing proceeding.<sup>63</sup> In an opinion written for a unanimous Court, the Justice held that such abstention would be inappropriate, insisting that federal court abstention for parallel state proceedings should be reserved only for state criminal or quasi-criminal proceedings or state proceedings touching on a state court's ability to perform its judicial function.<sup>64</sup> In emphasizing the restricted scope of abstention, the Justice emphasized the need for judicial modesty in the face of congressional jurisdictional choices: "Jurisdiction existing, . . . a federal court's obligation to hear and decide a case is 'virtually unflagging.'"<sup>65</sup> But equally important appeared to be recognition that accommodating state interests could not come at the expense of federal courts' fulfilling their function in the federal system, of which parallel state and federal proceedings are an essential part.<sup>66</sup>

These three Ginsburg opinions offer an important supplement to the Justice's more famous Notorious dissents. Those dissents strongly defended congressional authority vis-à-vis the states, insisting that the Court should defer to congressional judgments about how and when to protect individual rights against state violation and emphasizing Congress has "capacious power" to regulate.<sup>67</sup> Here, Justice Ginsburg similarly

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60. 531 U.S. 98, 136 (2000) (Ginsburg, J., dissenting).

61. See Franklin, *supra* note 15, at 754–55.

62. 571 U.S. 69 (2013).

63. *Id.* at 72.

64. *Id.* at 78–79.

65. *Id.* at 77 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

66. See *id.* at 73, 81–82.

67. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 602 (2012) (Ginsburg, J., concurring in part and dissenting in part); see also *Shelby County v. Holder*, 570 U.S. 529, 566 (2013) (Ginsburg, J., dissenting) ("It is well established that Congress' judgement regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference."); *Coleman v. Court of Appeals*, 566 U.S. 30, 59 (2012) (Ginsburg, J., dissenting) (advocating for the validity of the Family and Medical Leave Act's self-care provision under the Fourteenth Amendment's prohibition on gender discrimination in the workplace because "Congress' concern was solidly grounded in workplace realities").

underscored that federal courts should adhere to congressional choices on procedure and jurisdiction, and no one questioned Congress's power to make those choices. But these opinions demonstrate the important distinction Justice Ginsburg drew between Congress having the power to trump state choices and Congress actually doing so. On the Justice's account, the main dynamics of federal–state relations were not conflict and displacement but comity, complementarity, and accommodation. These opinions thus instruct us not to be fooled by the occasional constitutional blockbuster into seeing federal–state contestation as the norm rather than the exception. They further highlight the need to look at the federal court system with granularity, attentive to the multiple nodes of federal–state interaction and underscoring the critical role of lower court discretion in accommodating federal and state interests. And for those RBG clerks who are practitioners or professors in these areas, these opinions offer a frequent reminder of the Justice's wisdom and how much she taught us.