Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure

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I. INTRODUCTION

The Senate confirmation hearing of a nominee to the United States Supreme Court is typically an occasion to ascertain his or her political predilections.[1] Aware of this, Ruth Bader Ginsburg sought to center her confirmation hearing on a deeper discussion of the complex dynamics of judging. "Let me try," she said, "to state in a nutshell how I view the work of judging. My approach, I believe, is neither liberal nor conservative."[2]

Despite her efforts, the media persisted in assigning a label to then-Judge Ginsburg and, pointing to her performance as a former law school professor and a federal appellate judge, portrayed her as "moderate."[3] In agreement, Republican senators who applauded her nomination joined in labeling her as "moderate."[4] After Justice Ginsburg joined the Supreme Court and served for a term, a law review article concluded, on the basis of her first-term voting behavior, that she "was indeed a moderate."[5]

What does "moderate" mean? Politically? Judicially? Does "neither liberal nor conservative" necessarily equate with moderate? Or for that matter, do the labels liberal, conservative, and moderate meaningfully portray Justice Ginsburg's writing and decisionmaking? Conventional political labels suffer from a number of shortcomings. They carry interpretative baggage that may badly mischaracterize the person being labeled; they tend to reflect the perceptions and beliefs of the person assigning the label; they are shorthand

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[1] *See generally* Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988)(commenting on the political significance of the Supreme Court appointment process); William G. Ross, *The Supreme Court Appointment Process: A Search for Synthesis*, 57 ALB. L. REV. 993 (1994)(surveying the problems associated with the Supreme Court appointment process and proposing reform measures).

[2] *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, U.S. Senate*, 103d Cong. 51 (1993) [hereinafter *Hearings*] (testimony of Justice Ruth Bader Ginsburg).

[3] *See* David A. Kaplan & Bob Cohn, *A Frankfurter, Not a Hot Dog*, NEWSWEEK, June 8, 1993, at 29.

[4] *See, e.g.*, 139 CONG. REC. S10085 (daily ed. August 2, 1993)(statement of Sen. Grassley ("Judge Ginsburg showed us that, while she is a political liberal, she is a judicial moderate.")).

[5] Joyce Anne Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 11 (1994).

descriptions that foreclose careful and continued scrutiny of actual behavior.[6] For these reasons, overused labels such as liberal, conservative, or moderate obscure rather than illuminate.[7] And, in our opinion, they are inadequate to describe Justice Ginsburg's dynamic approach to the complex issues of legal process.[8]

This article sets aside the familiar political labels and engages in a deeper analysis of what Justice Ginsburg has done and said. What prompted Justice Ginsburg's reputation as a moderate may be, as a survey of her judicial opinions suggests, her willingness to accommodate a number of differing, sometimes contrasting concerns when crafting a judicial opinion. For

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[6] See MARTHA MINOW, MAKING ALL THE DIFFERENCE 173-77 (1990), for a general survey of labeling theory and its criticisms.

[7] Justice Ginsburg similarly questions the utility of conventional political labels in describing the tenor of judicial action. *See* Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. J.L. & PUB. POL'Y 41, 44 (1986) [hereinafter Ginsburg, *Interpretations*]; *see also* Ruth Bader Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539, 546 (1981) [hereinafter Ginsburg, *Activism*]. In addressing criticisms that the Supreme Court has been swayed by both right-wing and left-wing litigants, Ginsburg wrote:

> I asked then, and I ask again now, whether it is fair to conclude from the business that litigants of various political persuasions bring to court that, in the United States legal system, calls for judicial intervention, for intrusive review of legislative and executive decisions, depend less upon the challenger's "liberal" or "conservative" ideology, and more upon the practical question of whose ox is being gored.

Ginsburg, *Interpretations*, *supra* this note, at 44. To express her point that labels of liberal and conservative are inadequate to explain the dynamics of decision-making, Ginsburg quotes a passage from Gilbert & Sullivan's *Iolanthe*:

> When in that House M.P.'s divide
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> . . . .
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> They've got to leave [their] brains outside
> And vote just as their leaders tell 'em to
> They can do this thanks to the providence:
> That Nature always does contrive
> That ev'ry boy and ev'ry gal
> That's born into the world alive
> Is either a little Liberal
> Or else a little Conservative.

Ginsburg, *Activism*, *supra*, at 557 (alterations in original).

[8] Peter Huber, a former law clerk for Judge Ginsburg, commented: "The beauty of Ruth Ginsburg is that she doesn't readily admit to categorization. The labels don't fit." Tony Mauro, *Judicial Journey Helped to Shape Court Nominee*, USA TODAY, June 18, 1993, at 10A. Similar commentary is offered by Richard Taranto, a former law clerk to Judge Robert Bork: "What makes her extraordinary is that in area after area, she comes to cases with a single-minded dedication to follow the legal standards as they exist . . . It's much harder to pin a substantive label on her." Barbara Franklin, *Business is Upbeat: Ginsburg's Record Shows Fairness, Lack of Bias*, N.Y. L.J., June 17, 1993, at 5.

instance, Justice Ginsburg's procedural decisions evince a strong belief in the ideal of a person's "day in court."[9] Justice Ginsburg has allowed litigants to proceed with their cases despite their apparent difficulty in overcoming procedural barriers such as timeliness[10] and mootness.[11] Yet, she has also on occasion dismissed cases involving important substantive issues on narrow procedural grounds, such as lack of standing.[12]

Analysis of these cases on their own terms and in light of a larger framework of process values reveals the complexity of Justice Ginsburg's philosophy of process and procedure[13]—a philosophy often masked by political labels. This article engages in a detailed analysis of Justice Ginsburg's approach to the procedural aspects of legal process.[14] To aid in this endeavor, the article pays particular attention to her decisions in the context of the most complicated, and therefore revealing, procedural device: the class action.[15] Justice Ginsburg's majority opinion in the asbestos class action, *Amchem Products v. Windsor*,[16] discussed later, lays open a complex array of competing concerns undergirding procedural decisionmaking. *Amchem* and her other judicial opinions in class action cases offer beginning insight into her jurisprudence of process and procedure.[17]

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[9] *See* J. Stratton Shartel, *Ginsburg's Opinions Reveal Willingness to Grant Access to Litigants*, INSIDE LITIG., Aug. 1993, at 1; *see also, e.g.*, Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991)(deciding that a military service person's challenge of an FDA regulation permitting use of unauthorized drugs on military personnel without their consent was not moot, notwithstanding the termination of the military situation creating the need to invoke the regulation).

[10] *See, e.g.*, Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990)(holding that plaintiffs were entitled to an immediate right of appeal even though the district court did not technically enter final judgment in a separate document pursuant to FRCP 58). *See also infra* notes 19-74 and accompanying text.

[11] *See, e.g.*, Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991). *See also infra* notes 63-74 and accompanying text.

[12] *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43 (1997)(requiring a showing of actual or imminent invasion of a legally protected interest that is concrete rather than an interest shared generally by the public at large in order to confer standing to sue). *See also infra* notes 160-175 and accompanying text.

[13] By "process" we mean "legal method"—that is, the manner in which judges reach decisions in cases and articulate reasons for those decisions. By "procedure" we mean specific litigation procedures (such as summary judgment motions) and procedural requirements (such as subject matter jurisdiction and standing).

[14] One caveat is in order. Our assessment of Justice Ginsburg's procedural jurisprudence is based on a relatively limited universe of information. Our views are therefore preliminary and serve as a base for further inquiry.

[15] The class action device is governed by Federal Rule of Civil Procedure 23.

[16] 521 U.S. 591 (1997).

[17] *Amchem* involved the class settlement of asbestos litigation, a legal phenomenon that has posed a formidable challenge to the institutional values of the judicial system. *See* Georgine v.

Part II of this article sketches major procedural themes in Justice Ginsburg's work as a scholar and as a jurist. Part III constructs a conceptual framework of process values to better ground our later assessment of those themes. Part IV revisits, in depth, the themes in Justice Ginsburg's work, employing the process values framework in the context of class action procedure. Finally, Part V offers a description of Justice Ginsburg's jurisprudence of process and procedure that is not laden with the baggage of common political labels. We describe a "values proceduralism."

II. THEMES IN JUSTICE GINSBURG'S JURISPRUDENCE OF LEGAL PROCESS

Justice Ginsburg's views of process and procedure, as reflected in her writings, do not lend themselves to neat political labels. They reflect diverse themes that defy easy characterization. As Justice Ginsburg remarked at her Senate confirmation hearing, her prior judicial opinions and academic writings are "the most tangible, reliable indicator of [her] attitude, outlook, approach and style."[18] This Part follows her lead. It casts aside conventional labels and explores her judicial and scholarly writings to ascertain general themes concerning process and procedure. The major themes of her writings include litigant access, court efficiency, and judicial integrity.

A. Litigant Access

A theme that percolates through Justice Ginsburg's judicial opinions is open court access for aggrieved individuals.[19] As a Circuit Judge of the District of Columbia Circuit Court of Appeals, Judge Ginsburg sometimes disfavored the perfunctory application of threshold procedural requirements, such as the timeliness of appeal,[20] standing[21] and mootness,[22] to bar full development of the merits of a case.

For example, in *Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Commission*,[23] Judge Ginsburg argued that the mechanical

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Amchem Prods., Inc., 83 F.3d 610, 617 (3d Cir. 1996). The Third Circuit Court of Appeals remarked that "[e]very decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other. This is such a case." *Id.*

[18] *Hearings*, *supra* note 2, at 52.

[19] *See* Shartel, *supra* note 9, at 1.

[20] *See, e.g.*, Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n, 781 F.2d 935, 943 (D.C. Cir. 1986)(Ginsburg, J., dissenting); Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990).

[21] *See, e.g.*, Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991).

[22] *See id.*

[23] 781 F.2d 935 (D.C. Cir. 1986). At the outset, we note that our assessment of cases does

construction of the appeal period should not preclude an appeal of an unfavorable, but substantively important, decision of the lower court.[24] The Center for Nuclear Responsibility, Inc. ("CNR"), an organization that promotes nuclear safety, sought to enjoin a final decision of the Nuclear Regulatory Commission ("NRC") allowing amendments to a nuclear power plant's operating license.[25] The district court dismissed the lawsuit for lack of subject matter jurisdiction, holding that it lacked jurisdiction to review the final orders of the NRC.[26] Nevertheless, in the same opinion, the court also reached the merits of CNR's National Environmental Policy Act ("NEPA") claim.[27] On defendants' subsequent motion for clarification, the court amended its opinion to reflect a lack of jurisdiction over the NEPA claim as well.[28] CNR then filed its notice of appeal within sixty days after the amendment of the opinion, but after the sixty-day appeal period following the issuance of the original order.[29]

The defendants argued that the appeal was untimely pursuant to Rule 4 of the Federal Rules of Appellate Procedure ("FRAP").[30] CNR contended that the defendants' motion for clarification tolled the sixty-day period because it was a "motion to alter or amend the judgment" made under Federal Rule of Civil Procedure ("FRCP") 59(e).[31] Defendants responded that the motion was

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not reveal a definitive trend or approach. Rather, our survey of Justice Ginsburg's writings indicates her tendencies or leanings.

[24] *See id.* at 946 (Ginsburg, J., dissenting).

[25] *See id.* at 937.

[26] *See id.* (finding no subject matter jurisdiction under the Atomic Energy Act of 1954 and 28 U.S.C. § 2342(4)).

[27] *See id.* at 938.

[28] *See id.*

[29] *See id.*

[30] *See id.* at 939. A notice of appeal must be filed within 60 days after entry of the "judgment" of the district court. FED. R. APP. P. 4(a). A judgment is entered within the meaning of FRAP 4(a) "when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." FED. R. APP. P. 4(a)(7). FRCP 58 requires that the "judgment" be set forth in a separate document. *See* FED. R. CIV. P. 58. Federal Rule of Civil Procedure 79(a) requires that the clerk of the court enter the judgment on the civil docket. FED. R. CIV. P. 79(a).

[31] *See Center for Nuclear Responsibility*, 781 F.2d at 939. FRAP 4(a)(4) provides, in part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . (iii) under Rule 59 to alter or amend the judgment[.] . . . [T]he time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect.

FED. R. APP. P. 4(a)(4) (1979)(amended 1993). FRCP 59(e) provides: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." FED. R. CIV. P. 59(e).

made pursuant to FRCP 60(b)(1), and accordingly, did not toll the appeal period.[32]

The Court of Appeals agreed with the defendants.[33] The majority noted an absence of definitive authority as to whether a court may correct errors in legal reasoning through a Rule 60(b)(1) motion.[34] "The tension between Rule 59(e) and Rule 60(b)," the court said, "is generated by the competing goals of finality of judgments and rendering justice to particular litigants."[35] Faced with this divide, the court held that Rule 58 is to be "applied mechanically."[36] Since the original order complied with the "separate document" requirement of FRCP 58 and the filing requirement of FRCP 79(a), it was a "final judgment" within the meaning of FRAP 4.[37] Therefore, according to the majority, the defendants' motion to clarify was not a FRCP 59(e) motion and CNR's notice of appeal was untimely.[38]

In a rare dissent,[39] Judge Ginsburg argued that CNR should not have been denied its appeal.[40] CNR was uncertain of the proper court in which to bring its claim.[41] Judge Ginsburg observed that Congress had provided a statutory remedy for litigants in CNR's situation,[42] but the provision had apparently escaped the district court's attention because it was enacted shortly before the court dismissed the case.[43] Nonetheless, she was opposed to a remand of the case:

> [I]t would be a curious procedure indeed to remand this aging matter to the district court so that a district judge could decide whether or not to ticket as a "transfer" the parties' return trip here. Nor is such a convoluted procedure

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[32] *See Center for Nuclear Responsibility*, 781 F.2d at 939. FRCP 60(b) states, in part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.] . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

FED. R. CIV. P. 60(b).

[33] *See Center for Nuclear Responsibility*, 781 F.2d at 937.

[34] *See id.* at 939.

[35] *Id.*

[36] *Id.*

[37] *See id.*

[38] *See id.* at 940.

[39] As discussed below, Justice Ginsburg rarely writes dissenting opinions. *See infra* notes 133-140 and accompanying text.

[40] *See Center for Nuclear Responsibility*, 781 F.2d at 946 (Ginsburg, J., dissenting).

[41] *See id.* at 945 (Ginsburg, J., dissenting).

[42] *See id.* at 943 (Ginsburg, J., dissenting).

[43] *See id.* at 944 (Ginsburg, J., dissenting).

> necessary to a fair decision: all the considerations relevant to "the interest of justice" appear from the record to be within our plain view.[44]

Judge Ginsburg also criticized the majority's rigid application of FRCP 59.[45] "The mechanical analysis offered by the court does not persuade me that we lack power to hear this case. On the contrary, the case belongs in this forum, . . . and we should accord these litigants their long-sought day in court."[46] In Justice Ginsburg's estimation, the Court of Appeals should have heard the merits of CNR's appeal.[47]

Timeliness was also an issue in *Spann v. Colonial Village, Inc.*,[48] in which a black resident of the District of Columbia and two non-profit organizations dedicated to the interest of housing equality challenged real estate advertisements featuring exclusively white models.[49] After a complex series of procedural steps,[50] the lower court dismissed the claims.[51] The defendants argued that the plaintiff's subsequent appeal was premature because the district court did not set forth its final judgment in a separate document pursuant to FRCP 58.[52]

Writing for the majority, Judge Ginsburg observed that FRCP 58 "must be applied in such a way as to favor the right to appeal."[53] She disfavored the "mindless" application of FRCP 58.[54] Rather,

> so long as "it is clear that the district court has intended a final, appealable judgment, mechanical application of the separate-judgment rule should not be used to require the pointless formality of returning to the district court for ministerial entry of judgment; instead, the right to immediate appeal is favored."[55]

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[44] *Id.* at 945 (Ginsburg, J., dissenting).

[45] *See id.* at 946 (Ginsburg, J., dissenting).

[46] *Id.*

[47] *See id.*

[48] 899 F.2d 24 (D.C. Cir. 1990).

[49] *See id.* at 25-26.

[50] *See id.* at 26. The case before the Court of Appeals was a consolidation of actions against two unrelated sets of defendants. *See id.* In the first action, the defendants consisted of an owner and manager of a residential condominium in Virginia and a development corporation. *See id.* In the second action, the defendants were an advertising agency and its owner. *See id.* The case was consolidated in district court. *See id.* The district court made a ruling in favor of the defendants, which plaintiffs appealed. *See id.* The appeal was cut short when the defendants moved successfully in the Court of Appeals to dismiss for want of finality. *See id.* The district court then issued a final judgment in favor of the defendants. *See id.*

[51] *See id.*

[52] *See id.* at 31.

[53] *Id.* at 32 (quoting Matter of Seiscom Delta, Inc., 857 F.2d 279, 283 (5th Cir. 1988)).

[54] *See id.* at 32 n.4 (citing United States v. Perez, 736 F.2d 236, 237-38 (5th Cir. 1984)).

[55] *Id.* at 32 (quoting *Seiscom*, 857 F.2d at 283).

Accordingly, Judge Ginsburg found the lower court's decision final for the purpose of appellate review.[56]

Spann also presented a standing issue.[57] Although the defendants alleged harm that affected only their noneconomic interests, Judge Ginsburg found that the defendants had standing.[58] The defendants' ads, she said, had a destructive effect on the plaintiffs' efforts to educate the public about anti-discriminatory housing practices.[59] The plaintiffs incurred "concrete drains on their time and resources" in redoubling their efforts to educate the community.[60] Judge Ginsburg described the suit as "traditional grist for the judicial mill."[61] Thus, she determined the plaintiffs had suffered an injury sufficient to confer them standing.

Judge Ginsburg also interpreted narrowly another threshold procedural doctrine, mootness,[62] to afford relatively open court access to individuals raising substantial questions of federal law. In *Doe v. Sullivan*,[63] a military serviceman and his wife challenged Food and Drug Administration ("FDA") regulations[64] authorizing the Department of Defense ("DOD") to use unapproved drugs in certain military situations without obtaining military personnels' informed consent.[65] The FDA, pursuant to the regulation, issued consent waivers allowing the DOD to administer certain drugs during the Gulf War.[66] The district court dismissed the suit and Doe appealed.[67] While the appeal was pending, the Gulf War ended, and the DOD notified the FDA that the need for the waiver had ceased.[68] The government then moved to dismiss the appeal as moot.[69]

Judge Ginsburg broadly applied the test of "capable of repetition, yet evading review" to find an exception to the mootness doctrine in Doe's case.[70]

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[56] *See id.* at 32.

[57] *See id.* at 27. The standing doctrine requires a party to have suffered a sufficient injury so as to present a justiciable controversy to the court. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)(articulating a three-part test for standing).

[58] *See Spann*, 899 F.2d at 27-31.

[59] *See id.* at 28.

[60] *Id.* at 29.

[61] *Id.* at 30.

[62] The mootness doctrine renders a claim non-justiciable if the action complained of by the claimant is no longer causing injury. *See* Honig v. Doe, 484 U.S. 305 (1988).

[63] 938 F.2d 1370 (D.C. Cir. 1991).

[64] *See, e.g.*, 21 C.F.R. §§ 312.34, 312.35.

[65] *See Sullivan*, 938 F.2d at 1371-75.

[66] *See id.* at 1374.

[67] *See id.* at 1375.

[68] *See id.*

[69] *See id.*

[70] *Id.* at 1376 (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975)(per curiam)).

Doe's appeal satisfied the evading review standard, Ginsburg wrote, because the consent waiver granted by the FDA was withdrawn after only three months, which was not enough time for Doe to secure judicial review.[71] Moreover, Judge Ginsburg noted that the threat of chemical warfare was ongoing.[72] Since the regulation was still in place, the controversy was capable of repetition.[73] The plaintiffs had not lost a "personal stake" in the case nor had the public or the military service personnel lost an interest in the issue.[74]

Judge Ginsburg's judicial opinions in *Center for Nuclear Responsibility*, *Spann*, and *Sullivan* highlight her receptivity to arguments favoring litigant access to the courts. At a minimum, her writings in these opinions demonstrate her aversion to applying procedural requirements rigidly to preclude aggrieved litigants from presenting their claims before a court.

B. Court Efficiency

Justice Ginsburg's opinions also evince concerns for court efficiency. As a federal judge, Justice Ginsburg expressed worry about the pressures of overloaded federal court dockets:

> [The federal courts] have too much business. Some of it must be trimmed if the quality of federal justice is to remain high, retaining as its hallmark the individual effort of each judge to make each decision on the justiciability or merits of a controversy the product of his or her own careful deliberation.[75]

As a Supreme Court justice, Justice Ginsburg expressed similar concerns, as reflected in her opinion in *Caterpillar Inc. v. Lewis*.[76] In *Caterpillar*, a Kentucky resident, Lewis, brought a products liability action in state court against a nonresident manufacturer, Caterpillar, and an in-state service company.[77] The service company's insurer, also a Kentucky corporation, intervened as a plaintiff asserting subrogation claims against Caterpillar and the servicer.[78] After learning that Lewis had settled his claims against the servicer, Caterpillar removed the remaining claims to federal court on the basis of diversity jurisdiction.[79] Lewis unsuccessfully moved to remand on the ground that the servicer's continued presence in the suit as a party to the

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[71] *See id.*

[72] *See id.* at 1378-79.

[73] *See id.* at 1376-79.

[74] *See id.* at 1378.

[75] Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 7 (1983).

[76] 519 U.S. 61 (1996).

[77] *See id.* at 64-65.

[78] *See id.* at 65.

[79] *See id.*

subrogation claim rendered diversity incomplete.[80] Before trial, the servicer was dismissed from the suit, leaving Caterpillar the sole defendant.[81]

After a trial resulting in a verdict for Caterpillar,[82] Lewis appealed.[83] The Sixth Circuit accepted Lewis' argument that the parties were not completely diverse at the time of removal.[84] Since the district court lacked subject matter jurisdiction at the time of removal, the Sixth Circuit vacated the district court's judgment.[85]

The Supreme Court agreed that the nondiverse service company destroyed diversity jurisdiction at the time of removal. The Court nevertheless held that the district court had jurisdiction at the time of judgment and that this was sufficient to sustain the judgment.[86] Writing for a unanimous Court,[87] Justice Ginsburg implicitly rejected the general rule that subject matter jurisdiction is assessed at the time of case filing[88] and joinder of parties and claims.[89] "Once a diversity case has been tried in federal court," she wrote, "considerations of finality, efficiency, and economy become overwhelming."[90] No jurisdictional defect existed when the district court rendered its judgment.[91] Dismissing the case after it had been litigated for years "would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention."[92] Since vacating the district court's judgment "would impose an exorbitant cost on [the] dual court system, a cost incompatible with the fair and unprotracted administration of justice," the Court reversed the Sixth Circuit's decision reinstating the verdict.[93]

Similar concerns for court efficiency resonated in Justice Ginsburg's decision in *In re Korean Airlines Disaster of September 1, 1983*.[94] A number of federal court cases arising from the crash of an airliner were consolidated

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[80] *See id.* at 65-66.

[81] *See id.* at 66.

[82] *See id.* at 67.

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] *See id.* at 73.

[87] *See id.* at 63.

[88] *See, e.g.*, Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 459 n.1 (1980)(citation omitted) (observing that jurisdiction turns on the facts existing at the commencement of the suit).

[89] *See, e.g.*, Lewis v. Lewis, 358 F.2d 495, 502 (9th Cir. 1966)(holding that diversity is determined at the time the complaint is filed, and in the case of an amended complaint joining new parties, diversity must exist at the time of amendment).

[90] *Caterpillar*, 519 U.S. at 75 (citation omitted).

[91] *See id.* at 77.

[92] *Id.* at 76 (internal quotation marks omitted)(quoting Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 836 (1989)).

[93] *Id.* at 77.

[94] 829 F.2d 1171 (D.C. Cir. 1987).

and transferred into a single court for pretrial proceedings. The plaintiffs in these cases argued that the law of the transferor forum applied to their claims.[95] Judge Ginsburg, then a Circuit Judge on the Court of Appeals for the District of Columbia, rejected their argument.[96] She noted that efficiency was the dominant concern of the consolidation device, and that "[a]pplying divergent interpretations of the governing federal law to plaintiffs, depending solely upon where they initially filed suit, would surely reduce the efficiencies achievable through consolidated preparatory proceedings."[97]

C. Judicial Integrity

Justice Ginsburg's writings, both as a scholar and as a jurist, provide insight into her views on the relationships between different actors in the judicial system, between the judiciary and other political branches, and between substance and procedure.[98] Maintaining the integrity of judicial institutions appears to be a theme that pervades her thoughts on the interaction among judges, the judiciary, lawyers, and litigants. Justice Ginsburg's commentary on four qualities that describe good judges and judging—deference to precedent, collegiality, judicial interdependence, and procedural accountability—point to the notion that the judiciary's legitimacy depends upon developing careful, balanced relationships between the numerous actors and institutions in the judicial system.

1. Stare decisis

As an advocate and a jurist, Justice Ginsburg recognized the significance of precedent. Her experiences in gender discrimination litigation illustrate her approach to stare decisis. As the director of the American Civil Liberties Union Women's Rights Project, Ginsburg followed the legal stratagem of litigating cases that were "clear winners."[99] In a political environment not yet

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[95] *See id.* at 1172.

[96] *See id.* at 1175.

[97] *Id.*

[98] A non-exhaustive list of writings in which Ginsburg expresses her thoughts on relationships between judicial actors include Ruth Bader Ginsburg, *On Muteness, Confidence, and Collegiality: A Response to Professor Nagel*, 61 U. COLO. L. REV. 715 (1990); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990)[hereinafter Ginsburg, *Remarks*]; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992)[hereinafter Ginsburg, *Judicial Voice*]; Ruth Bader Ginsburg, *Styles of Collegial Judging*, 39 FED. BAR NEWS & J. 199 (1992).

[99] *See* Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335, 337 (1992).

hospitable to gender claims, her aim was to validate gender discrimination law, and to establish precedent for more complex cases.

That strategy included advocacy of gender discrimination claims brought by men.[100] The Supreme Court, many thought, would be more receptive to striking down laws that unfairly disadvantaged men. The strategy succeeded in constructing a doctrinal edifice for gender discrimination that later benefited women.[101] The framing of this incremental litigation strategy lay in the building of "precedents one upon the other."[102] Doctrinal change favorable to women claimants was made easier by a line of gender discrimination precedents.[103]

Justice Ginsburg carried her views on stare decisis to the bench. When questioned in her Senate confirmation hearing on how she would vote on controversial issues, she replied that she would be "scrupulous in applying the law on the basis of the Constitution, legislation, and precedent."[104] Explaining her awareness of the reliance interests connected to statutory interpretation, she said:

> The soundness of the reasoning is certainly a consideration. But we shouldn't abandon a precedent just because we think a different solution more rational. Justice Brandeis said some things are better settled than settled right, especially when the legislature sits. So if a precedent settles the construction of a statute, stare decisis means more than attachment to the soundness of the reasoning. *Reliance interests* are important; the *stability, certainty, predictability* of the law is important.[105]

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[100] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973)(rejecting a federal statute requiring the husband of a military servicewoman to prove "dependent" status in order to obtain benefits); Kahn v. Shevin, 416 U.S. 351 (1974)(upholding a state statute allowing widows but not widowers an exemption from small property taxes); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)(holding unconstitutional a provision of the Social Security Act giving benefits to surviving women of a deceased wage earner but not to surviving men); Craig v. Boren, 429 U.S. 190 (1976)(striking down a state statute prohibiting the sale of beer to males under 21 and to females under 18); Califano v. Webster, 430 U.S. 313 (1977)(upholding a state statute allowing women to exclude more low-earning years than men in calculating Social Security retirement benefits).

[101] The Supreme Court finally applied the intermediate level scrutiny standard to gender-based classifications in *Craig v. Boren*, 429 U.S. 190 (1976), an argument Ginsburg made in her brief to the Court in that case. The Court would not likely have established the intermediate scrutiny test in *Boren* were it not for Ginsburg's litigation efforts in prior cases. *See* Markowitz, *supra* note 99, at 356.

[102] Markowitz, *supra* note 99, at 345.

[103] *Id.*

[104] *Hearings*, *supra* note 2, at 192.

[105] *Id.* at 197 (emphasis added).

Justice Ginsburg's statement reveals her belief that maintenance of stability, certainty, and predictability in the legal system justifies close adherence to the dictates of stare decisis.

Justice Ginsburg's judicial record is consistent with her stated respect for stare decisis. She is reluctant to deviate from prior case holdings,[106] even when she believes the established rule is not entirely correct.[107] Her concurrence in *United States Department of Defense v. Federal Labor Relations Authority*[108] exemplifies her willingness to support a decision dictated by precedent even though it is inconsistent with her sense of an appropriate outcome. In *Federal Labor Relations Authority*, two local unions filed unfair labor practice charges with the Federal Labor Relations Authority ("FLRA") after federal agencies refused to comply with the unions' request for the home addresses of the agency employees in the bargaining units.[109] The agencies argued that the Privacy Act of 1974[110] prohibited disclosure.[111] Rejecting that contention, the FLRA concluded that the Federal Service Labor-Management Relations Statute[112] required the agencies to disclose the addresses.[113]

The Fifth Circuit ordered enforcement of the FLRA's orders, finding that the requests for disclosure fell within an exception to the Privacy Act—the Act does not preclude disclosure of personal information that must be divulged under section 552 of the Freedom of Information Act ("FOIA").[114] In reaching this conclusion, the Fifth Circuit balanced the public interest in effective collective bargaining against the employees' interest in keeping their home addresses private.[115]

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[106] *See, e.g.*, Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992)(Ginsburg, J., dissenting)(arguing against the redefinition of the test of "confidentiality" under the Freedom of Information Act established in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), because "stare decisis is a wise policy").

[107] *See, e.g.*, Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C. Cir. 1987)(Ginsburg, J., concurring)(questioning the lodestar rule established in a prior case decided in the Circuit but refusing to circumvent the rule because it was precedent).

[108] 510 U.S. 487 (1994).

[109] *See id.* at 490.

[110] 5 U.S.C. § 552a (1988 & Supp. IV).

[111] *See Federal Labor Relations Auth.*, 510 U.S. at 490 [hereinafter *FLRA*].

[112] 5 U.S.C. § 7101-7135 (1988 & Supp. IV) [hereinafter labor statute].

[113] *See FLRA*, 510 U.S. at 490.

[114] 5 U.S.C. § 552a(b)(2) (1988 & Supp. IV) [hereinafter FOIA]; *see FLRA*, 510 U.S. at 491. The only exception to FOIA disclosure that potentially applied, the provision exempting personnel files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6) (1988 & Supp. IV), did not bar disclosure in this case. *See FLRA*, 510 U.S. at 491.

[115] *See FLRA*, 510 U.S. at 491. Application of this test appeared to run contrary to the Supreme Court's holding in *Department of Justice v. Reporters Committee for Freedom Press*, 489 U.S. 749 (1989).

The Supreme Court reversed, finding that disclosure of the addresses would contravene the Privacy Act.[116] In *Department of Justice v. Reporters Committee for Freedom Press*, the Court specified that the only public interest to be considered under FOIA is "the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'"[117] The fact that FOIA's provisions were implicated indirectly under the Labor Statute did not mean that the FOIA analysis should incorporate the policies underlying the Labor Statute.[118] Guided by *Reporter's Committee*, the majority found the public interest in disclosure of the addresses negligible, as disclosure "would not appreciably further 'the citizens' right to be informed about what their government is up to.'"[119]

Justice Ginsburg disagreed with the majority's analysis.[120] She noted that Congress intended to bolster the position of federal unions by enacting the labor statute.[121] Thus, Congress did not intend to deny federal unions information that private-sector unions routinely received.[122] Moreover, Congress could not have aimed to elevate the privacy interest above the interest in promoting the collective bargaining endeavors of federal unions.[123] Based on this, Justice Ginsburg argued that *Reporter's Committee* did not necessitate the majority's interpretation of FOIA.[124]

Notwithstanding her disagreement with the majority, Justice Ginsburg concurred with the judgment of the Court. She wrote, "I am mindful, however, that the preservation of *Reporter's Committee*, unmodified, is the position solidly approved by my colleagues, and I am also mindful that the pull of precedent is strongest in statutory cases."[125] She therefore concluded that the anomaly resulting from the Court's decision—that federal unions are denied information accessible to private-sector unions—should be rectified not by the Court but by Congress.[126]

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[116] *See FLRA*, 510 U.S. at 489.

[117] *Id.* at 495 (quoting *Reporter's Committee*, 489 U.S. at 775 (alteration in original)).

[118] *See id.* at 498-99.

[119] *Id.* at 497 (quoting *Reporter's Committee*, 489 U.S. at 773).

[120] *See id.* at 504 (Ginsburg, J., concurring).

[121] *See id.* at 506 (Ginsburg, J., concurring).

[122] *See id.*

[123] *See id.*

[124] *See id.*

[125] *Id.* at 509 (Ginsburg, J., concurring).

[126] *See id.*

2. *Collegiality*

Described as a "judge's judge,"[127] Justice Ginsburg has emphasized collegiality in judges' relationships with each other.[128] In their writings, judges should adopt a "judicial voice," one that pays heed to the impact of their expressions on the public's respect for the court.[129] As administrators of "the least dangerous" branch of government,[130] judges "hold neither the sword nor the purse of the community," and must give effect to their judgments through persuasion.[131] Judges should therefore write in a "moderate and restrained voice" that reflects temperance in judgment.[132]

In keeping with a collegial judging style, judges should exercise restraint in writing separately.[133] "[O]verindulgence in separate opinion writing," Ginsburg has warned, "may undermine both the reputation of the judiciary for judgment and the respect accorded court dispositions."[134] When judges endeavor to write separately, they should "engag[e] in a dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even [their] own colleagues."[135] Separate opinions should not "generate more heat than light" [136] by way of "intemperate denunciation of [the writer's] colleagues, violent invective, attributi[on]s of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of [other judges]."[137] Rather, an appropriate separate opinion articulates independent legal reasons for the author's decision and points out differences with the opinions of other members of the court without undermining public confidence in the judiciary.[138]

Restraint in writing separately is conducive to respectful relationships among judges. Ginsburg's writings express her belief that adherence to a

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[127] Peter W. Huber & Richard Taranto, *Ruth Bader Ginsburg, A Judge's Judge*, WALL ST. J., June 15, 1993, at A18; Sheila M. Smith, Comment, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893, 1897 (1995).

[128] *See generally Remarks*, *supra* note 98; *see also Judicial Voice*, *supra* note 98, at 1190-91.

[129] *Judicial Voice*, *supra* note 98, at 1190-91.

[130] THE FEDERALIST NO. 78 (Alexander Hamilton).

[131] *Judicial Voice*, *supra* note 98, at 1186.

[132] *Id.* (quoting Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963)).

[133] *See id.* at 1194-96.

[134] *Id.*

[135] *Id.* at 1186.

[136] *Id.* at 1194.

[137] *Id.* (quoting Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953))(alterations in original).

[138] *See id.* at 1196.

collegial style enables the "steady, upright, and impartial administration of the laws."[139] The operation of the courts is helped by collegial relationships because it fosters good-will among members of a court, and in turn, validates the judiciary in the public's estimation.[140]

3. *Measured movement*

Justice Ginsburg's academic writings offer commentary on how the judiciary should coordinate with other political branches. Justice Ginsburg regards the judicial system as "an interdependent part" of America's democratic system.[141] The office of the judiciary is to formulate legal doctrine—but in doing so, courts should engage in dialogue with other branches of government and also with the populace.[142] Judges can legislate, but "'only interstitially; they are confined from molar to molecular motions.'"[143] In her words, courts will do well to make "measured movement" in crafting legal doctrine.[144] At her Senate confirmation hearing, Justice Ginsburg quoted Justice Benjamin Cardozo to clarify what it means to make measured movement in adjudication: "Justice is not to be taken by storm. She is to be wooed by slow advances."[145] Judges should render decisions with deliberateness, making sure that their rulings are well-reasoned, supported by precedent, and limited in their stride.[146] "Doctrinal limbs too swiftly shaped," she admonishes, "may prove unstable."[147]

Justice Ginsburg cited *Roe v. Wade*[148] as an example of improvident judicial decisionmaking. She criticized the *Roe* Court for not engaging in a dialogue with legislators in formulating its holding.[149] At the time *Roe* was decided, state legislatures across the nation were prepared to liberalize abortion

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[139] *Id.* at 1188 (quoting Alexander Hamilton, THE FEDERALIST NO. 78, at 465 (Clinton Rossiter ed., 1961)).

[140] *See id.* at 1191.

[141] *Id.* at 1198.

[142] *See id.*

[143] *Id.* (quoting Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917)(Holmes, J., dissenting)). Justice Ginsburg's view of the proper role of the courts is echoed by Legal Process theorists. Legal Process scholars argue that courts should fashion legal rules according to a legitimate set of procedures, but they should defer to the legislature as the primary lawmaking branch. *See* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 505 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)).

[144] *See Judicial Voice*, *supra* note 98, at 1198.

[145] *Hearings*, *supra* note 2, at 51.

[146] *See Judicial Voice*, *supra* note 98, at 1208.

[147] *Id.* at 1198.

[148] 410 U.S. 113 (1973).

[149] *See Judicial Voice*, *supra* note 98, at 1205.

statutes.[150] In her view, the Court took the abortion issue away from legislators and instituted its own system of regulation.[151] *Roe* left virtually no state abortion laws standing.[152] *Roe* was, in short, not a measured movement—it was a quantum leap.[153]

Decisions such as *Roe*, Justice Ginsburg argued, threaten to undermine the legitimacy of the court as the "final arbiter of constitutional questions[.]"[154] The Court's adoption of "[t]wo extreme modes of court intervention in social change processes . . . place[s] stress on the institution."[155] At times, the Court is the vanguard of social change; at other times, the Court is a resistor of change.[156] In adopting either stance, Ginsburg observed, the Court has earned the labels "activist" or "imperial," and has weakened its credibility.[157] Courts can, and should, "reinforce or signal a green light for a social change," but "without taking giant strides and thereby risking a backlash too forceful to contain."[158] Justice Ginsburg thus concluded that a temperate approach to judicial decisionmaking is true to the role of the judiciary within the American scheme of governmental power.

4. *Procedural accountability*

A former law clerk to Justice Ginsburg described her penchant for methods and procedures as "almost [a] Talmudic reverence and respect for the process of law . . . ."[159] Although perhaps overstated, this assessment points to Justice Ginsburg's careful use of procedure to assure appropriate airing of legal controversies. Justice Ginsburg's opinion in *Arizonans for Official English v. Arizona*[160] is illustrative.

The plaintiff in *Arizonans*, Maria-Kelly F. Yniguez, was an Arizona state employee at the time she sued the State challenging the constitutionality of a

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[150] *See id.* at 1205.

[151] *See id.*

[152] *See id.*

[153] *See id.*

[154] *Id.* at 1206.

[155] *Id.* at 1205-06.

[156] *See id.* at 1206.

[157] *See id.*

[158] *Id.* at 1208.

[159] Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, § 6 (Magazine), at 90. Peter Huber, the law clerk who made the comment, also noted, "[I]t is an extremely revealing fact about Ruth Ginsburg that she taught civil procedure for 17 years[.] . . . She has this terribly old-fashioned notion that rules can get written down or can evolve through a common-law process and can build upon each other to create a decisional fabric." *Id.* at 86, 90 (internal quotation marks omitted).

[160] 520 U.S. 43 (1997).

provision of the Arizona State Constitution.[161] Yniguez alleged that Article XXVIII of the Arizona State Constitution, which declared English as "the official language of the State" and required the State to "act in English and in no other language,"[162] violated the First Amendment.[163] Yniguez feared she would lose her job or face other sanctions if she spoke in Spanish in the course of her employment.[164] The district court found Article XXVIII fatally overbroad.[165]

Following judgment, the Attorney General, the Arizonans for Official English Committee ("AOE") and its chairman, Robert D. Park, moved to intervene as defendants to appeal the court's invalidation of Article XXVIII.[166] The court denied the motions to intervene,[167] and the Attorney General, AOE and Park appealed to the Ninth Circuit.[168] Meanwhile, Yniguez resigned from her state employment, whereupon the Attorney General informed the Ninth Circuit that the case may have become moot.[169] The Ninth Circuit rejected the suggestion of mootness, pointing out that Yniguez may be entitled to nominal damages.[170] Later, the Ninth Circuit, sitting en banc, reaffirmed its panel's conclusion that the provision was overbroad.[171]

The Supreme Court held that the case was moot. Justice Ginsburg, writing for a unanimous Court, posed the question: "Is this conflict really necessary?"[172] She found the actual controversy extinguished when Yniguez resigned her job.[173] The litigation, however important, was being pursued by groups on behalf of a nonexistent plaintiff. According to Justice Ginsburg, the federal courts should have stopped its adjudication of the state constitutional provision when Yniguez left her job.[174] The Court's vacation of the Ninth

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[161] See *id.* at 48.

[162] ARIZ. CONST. art. XXVIII (1988).

[163] U.S. CONST. amend. I, cl. 2; *see Arizonans*, 520 U.S. at 50.

[164] *See Arizonans*, 520 U.S. at 50.

[165] *See id.* at 54; *see also* Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990).

[166] *See Arizonans*, 520 U.S. at 55-56. Governor Mofford, a defendant in the action, announced that she would not appeal the district court's order. *See id.* at 56.

[167] *See id.* The district court found that the Attorney General, as an organ of the state, was already a party to the action. *See id.* at 56-67. Therefore, it could not intervene. *See id.* Further, the Attorney General was estopped from appealing because of Governor Mofford's decision to forego an appeal. *See id.* at 57.

[168] *See id.* at 57.

[169] *See id.* at 59-60.

[170] *See id.* at 60.

[171] *See id.* at 63; *see* Yniguez v. Arizonans for Official English, 69 F.3d 920, 931-48 (9th Cir. 1995)(en banc).

[172] *Arizonans*, 520 U.S. at 75.

[173] *See id.* at 67.

[174] *See id.* at 68. Additionally, the Court held that the Ninth Circuit erred in declaring that she was entitled to nominal damages because 42 U.S.C. § 1983 created no remedy against a

Circuit decision, she noted, did not preclude legal challenges to Article XXVII. At the time of the *Yniguez* decision, a constitutional challenge to the amendment was percolating through the Arizona state courts.[175]

Justice Ginsburg's dissent in *Agostini v. Felton*[176] similarly evidences her insistence on procedural propriety—or more specifically, her objection to the twisting of procedural rules to accomplish substantive ends. *Agostini* revisited *Aguilar v. Felton*,[177] in which the Court had held that the Establishment Clause[178] barred the New York City Board of Education from maintaining a program that sent public school teachers into parochial schools to teach disadvantaged children.[179] The district court permanently enjoined the Board's program on remand.[180] Ten years after *Aguilar*, the Board sought relief from the injunction pursuant to FRCP 60(b),[181] arguing that the "decisional law [had] changed to make legal what the [injunction] was designed to prevent."[182] Determining that its more recent Establishment Clause cases undermined the assumptions upon which *Aguilar* relied,[183] the Court reopened the judgment under FRCP 60(b)(5) and dissolved the injunction.[184]

In her dissent, Justice Ginsburg disagreed with the majority's use of FRCP 60(b) and Supreme Court Rule 44[185] to overturn the original *Aguilar* decision.

State. *See id.* at 69.

[175] *See* Susan Kiyomi Serrano, Comment, *Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only*, 19 U. HAW. L. REV. 221, 222 (1997).

[176] 521 U.S. 203 (1997).

[177] 473 U.S. 402 (1985).

[178] U.S. CONST. amend. I, cl. 1.

[179] *See Aguilar*, 473 U.S. at 402.

[180] *See Agostini*, 521 U.S. at 212.

[181] FRCP 60(b) provides, in part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b).

[182] *Agostini*, 521 U.S. at 214 (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388 (1992)).

[183] *See id.* at 222.

[184] *See id.* at 240.

[185] Supreme Court Rule 44 states in pertinent part:

> 1. Any petition for the rehearing of any judgment or decision of the Court on the merits

If the Court applied the Court's Rules and FRCP 60(b) properly, she reasoned, it would have deferred reconsideration of *Aguilar* until it was presented with the issue in another case.[186] The Board's petition for reconsideration in *Agostini* did not comport with Supreme Court Rule 44, which provides that such petitions be filed within 25 days of the entry of the judgment in question.[187]

According to Justice Ginsburg, the Court saw no "better [procedural] vehicle"[188] to reconsider *Aguilar* directly, so it tortuously employed FRCP 60(b)(5) as a "substitute."[189] However, she opined, "[t]here are such [procedural] vehicles in motion, and the Court does not say otherwise."[190] Rule 60(b)(5) does not permit relitigation of legal or factual claims underlying the original judgment.[191] It allows modification of the injunction only if the facts or the law had changed so much as to warrant such relief,[192] and this case did not satisfy those requirements.[193] In her estimation, the Court had "just cause" to wait for another case that appropriately invited review of *Aguilar*.[194] "That cause," she explained, "lies in the maintenance of integrity in the interpretation of procedural rules, [and] preservation of the responsive, non-agenda-setting character of this Court[.]"[195]

This survey of Justice Ginsburg's writings on legal process and procedure suggests that her judging style endeavors to accommodate numerous considerations. These considerations include affording litigants the opportunity to resolve their grievances in the courts; ensuring the efficient operation of the courts; and maintaining working relationships among participants within the legal system as well as between the judiciary and the other political branches and the public.

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shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time.

SUP. CT. R. 44.

[186] *See Agostini*, 521 U.S. at 255 (Ginsburg, J., dissenting).

[187] *See id.*

[188] *Id.* at 259 (Ginsburg, J., dissenting)(internal quotation marks omitted)(quoting majority opinion, 521 U.S. at 239).

[189] *Id.* at 255 (Ginsburg, J., dissenting).

[190] *Id.* at 259 (Ginsburg, J., dissenting).

[191] *See id.* at 257 (Ginsburg, J., dissenting).

[192] *See id.*

[193] *See id.* at 257-58. Justice Ginsburg focused on whether the district court abused its discretion when it concluded that the facts and the law had not changed to such an extent as to warrant relief from the injunction. *See id.* at 257. Since *Aguilar* had not been overruled, and the factual situation had not changed, she concluded that the district court was correct in denying the petition for relief under FRCP 60(b). *See id.* at 257-58.

[194] *Id.* at 260 (Ginsburg, J., dissenting).

[195] *Id.*

Identifying general themes in Justice Ginsburg's legal thought is one task. A much more difficult one is ascertaining their complex interplay in Justice Ginsburg's decisionmaking. To aid in our assessment of that interplay, we describe here, and employ later, a broad framework of process values.

III. PROCESS VALUES FRAMEWORK

This Part outlines a framework for assessing Justice Ginsburg's process and procedural jurisprudence. Process values are "the goals and positive contributions of good procedure[.]"[196] The framework we construct consists of three process values—efficiency, fairness and institutional legitimacy. Briefly stated, efficiency in the context of judicial process refers to the minimization of costs to courts and litigants.[197] Fairness may be equated with the opportunity to participate meaningfully in proceedings that affect one's legal interests.[198] Finally, institutional legitimacy denotes the public's acceptance of the judiciary as the public institution for adjudicating legal disputes.[199]

As described earlier, these values are comprised of several more discrete concepts. Additionally, efficiency, fairness, and institutional legitimacy are not neatly separable. They are often in tension, sometimes overlapping or colliding. It is this tension, as procedures are construed and applied in particular situations, that creates a process dynamic helpful to our understanding of Justice Ginsburg's approach to judging.

A. Efficiency

The term "efficiency" in law generally refers to the value of minimizing the costs of fair and accurate judicial administration.[200] Legal efficiency is

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[196] John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 NEW ENG. L. REV. 657, 659 (1994).

[197] *See* Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 917-18 (1997).

[198] *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 483 n.24 (1982)("What a full and fair opportunity to litigate entails is the procedural requirements of due process.").

[199] *See* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 714 (1994). There are differing views on the source of institutional legitimacy. *See* Mark C. Suchman, *On Beyond Interest: Rational, Normative, and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 493 (1997)(examining different theories of the source of legal legitimacy).

[200] Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 277 (1991). The distinction should be made between efficiency for individual litigants and systemic efficiency. *See id.* at 277-78. Securing the "just,

achieved by streamlining the judicial system through the reduction of overall cost and delay.[201] Two theories of systemic efficiency have gained acceptance in legal discourse. The first is utilitarianism, a long-established conception of the aggregate good developed by social philosophers Jeremy Bentham[202] and John Stuart Mill.[203] The principle tenet of utilitarianism is the achievement of the greatest good for the greatest number.[204] Maximization of social welfare is the central aim of utility theory. The utilitarian measures the relationship between every cost and every benefit in order obtain the maximum benefits at the minimum cost possible.[205]

In the context of judicial procedure, utilitarianism holds that litigation is efficient when it maximizes outcome accuracy.[206] The Supreme Court adopted such a view of procedural due process in *Mathews v. Eldridge*.[207] The purpose of procedure, the Court explained, is the accurate application of substantive

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speedy, and inexpensive" adjudication of a claim for an individual litigant is the focus of individual efficiency. *See id.* at 278. By contrast, systemic efficiency perspective is preoccupied with benefits to the judicial system as a whole. *See id.* That which makes the administration of courts efficient, however, does not necessarily inure to the benefit of an individual litigant. *See id.* For instance, a court's decision to consolidate several pending trials that arise from the same transaction conserves the court's resources and time. *See id.* At the same time, consolidation could prolong or complicate the process by which an individual litigant secures compensation. *See id.*

[201] *See id.*

[202] *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1-7 (Clarendon Press 1907)(1823).

[203] *See generally* JOHN STUART MILL, UTILITARIANISM (Oskar Priest ed., Bobbs-Merrill Co., Inc. 1957)(1863).

[204] *See* Bentham, *supra* note 202, at 1-7.

[205] *See* Brunet, *supra* note 200, at 279. Utility theory is predominantly concerned with the aggregate benefits to society as a whole, rather than benefits to individuals. *See* R. MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 40 (1990).

[206] *See* Brunet, *supra* note 200, at 280.

[207] 424 U.S. 319 (1976). The plaintiff in *Mathews*, who was allegedly disabled, challenged the administrative procedure of the Social Security Administration, arguing that his Social Security disability benefits could be terminated only after his disability status was determined at an evidentiary hearing before a hearing examiner. *See id.* at 324-25. The Supreme Court ruled that an evidentiary hearing was not required prior to the termination of his benefits. *See id.* at 349. The Court set out the following analytical framework for determining whether process is due:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requisites would entail.

Id. at 335.

law at reasonable costs,[208] which in turn benefits society at large.[209] A procedure that does not enhance accuracy is inefficient by definition, even if it is cheap or serves some other purpose such as affording a litigant the opportunity to be heard.[210]

A second theory of efficiency emerges from law and economics, a school of legal thought introduced in the 1960s.[211] Efficiency is its central norm.[212] Law and economics conceives of efficiency as value-maximization.[213] It translates utility theory's goal of promoting general social welfare into quantitative terms.[214]

Under a law and economics view of the judicial system, the goal of judicial procedure is to minimize "error costs" and "direct costs."[215] Error costs accrue when the judicial system makes an inaccurate determination, such as when it mistakenly imposes legal liability on a party.[216] Direct costs are incurred in connection with the administration of the judicial system.[217] Ideally, parties to a dispute avoid these costs by agreeing to settle their differences outside of the court system in a manner that serves their best economic interests.[218] Law economics, then, measures the efficiency of legal

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[208] *See id.* at 334.

[209] *See* Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 354 (1990). *See also* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

[210] *See* Yamamoto, *supra* note 209, at 354.

[211] *See, e.g.*, Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[212] *See* Russell Hardin, *Magic on the Frontier: The Norm of Efficiency*, U. PA. L. REV. 1987, 1987 (1996). Law and economics scholars, however, recognize multiple definitions of "efficiency." *See* Gregory S. Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231, 234 (1991). One conception of efficiency is "Pareto" efficiency, which holds that a system is efficient "if it operates to benefit at least one person and harms no one, with the persons affected being the judges of whether benefits or harms have resulted." *Id.* at 234-35. Law and economics also recognizes "Kaldor-Hicks" efficiency. *See id.* Under this definition, a rule is said to enhance efficiency if its total benefits exceed its total costs. *See id.* at 236.

[213] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 10 (1977) [hereinafter Posner, *Economic Analysis*] ("'Efficiency' means exploiting economic resources in such a way that 'value'—human satisfaction as measured by aggregate consumer willingness to pay for goods and services—is maximized.").

[214] *See* RICHARD POSNER, THE ECONOMICS OF JUSTICE 49 (1981).

[215] *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400-01 (1973)[hereinafter Posner, *Economic Approach*]; Posner, *Economic Analysis*, *supra* note 213, at 430.

[216] *See* Posner, *Economic Approach*, *supra* note 215, at 400-01.

[217] *See id.* at 401.

[218] *See* Bryant G. Garth, *Privatization and New Formalism: Making the Courts Safe for*

rules by their ability to replicate this process, incurring the "least expense necessary to achieve accurate determinations."[219]

B. Fairness

Procedural fairness is prominent in the process values framework for two reasons. First, concerns of adjudicatory fairness often counterbalance considerations of efficiency.[220] Second, procedural fairness, which is easier to achieve than substantive fairness,[221] tends to serve as the marker for the overall fairness of adjudication.[222] No single concept encompasses the many values comprising adjudicatory fairness.[223] In the context of litigation, procedural fairness may be viewed in three component parts: litigant autonomy, dignity, and participation.

Litigant autonomy reflects the notion that a party is entitled to exercise control over her own litigation.[224] The party is presumed to retain authority to make all relevant decisions with respect to the prosecution of her claim or

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Bureaucracy, 1988 LAW & SOC. INQ. 157, 161.

[219] *See* Michael D. Bayles, *Principles for Legal Procedure*, 5 LAW & PHIL. 37, 45 (1986)(explaining that the principle of economic costs is to minimize the economic costs of legal procedures).

[220] *See* Brunet, *supra* note 200, at 276 (noting that a "tension between efficiency and fairness clearly exists," but that the tension cannot be defined in simple terms). Pursuit of efficiency conflicts with fairness at times, which is why the fairness-efficiency tension often surfaces in matters of judicial procedure. *See* Frank H. Easterbrook & Thomas E. Baker, *A Self Study of Federal Judicial Rulemaking—A Report from the Subcommittee on Long Range Planning to the Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States*, 168 F.R.D. 679, 692-93 (1996)(observing that the command of FRCP 1 that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action" points to the "inevitable tension" between fairness and efficiency). It is thus important to consider the concerns of fairness alongside our discussion of efficiency.

[221] *See* Allison, *supra* note 196, at 678.

[222] *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 209 (1988); *see also* Allison, *supra* note 196, at 678. Procedural justice is a dimension of John Rawl's theory of distributive justice. *See* JOHN RAWLS, A THEORY OF JUSTICE 83-90 (1971). The fairness of an outcome depends not just on whether it is objectively fair, but also on whether it is subjectively perceived as fair. *See* Laurens Walter et al., *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1402-03 (1979). Rawls argues that "pure procedural justice" may serve as a "surrogate for distributive justice" when the substantive fairness of an outcome cannot be easily ascertained. Allison, *supra* note 196, at 678; Rawls, *supra*, at 83-90.

[223] Brunet, *supra* note 200, at 283.

[224] *See* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 814 (1995).

defense,[225] including the type of lawsuit filed;[226] the forum in which to litigate the case;[227] the claims and defenses that are raised;[228] the resources to be expended;[229] and the decision to settle or go to trial.[230] The American judicial system has long recognized three reasons for the parties' control over the litigation.[231] First, litigant autonomy is rooted in the philosophical tradition that recognizes the dignity of the individual.[232] Second, individual autonomy rests upon the economic assumption that the possessor of a legal interest is best positioned to make decisions about that interest.[233] Finally, placing in the injured party the authority to prosecute claims affects the fairness of the outcome.[234]

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[225] *See id.*

[226] *See id.*

[227] *See id.*

[228] *See id.*

[229] *See id.*

[230] *See id.*; Brunet, *supra* note 200, at 284 ("Litigant autonomy includes various strategy choices that we have occasionally labeled 'rights,' including the plaintiff's ability to select a forum for reasons ranging from geographic preference to choice of law[,] . . . the ability to determine the scope of a case, whether to select a potentially manageable and speedy two-party suit or to file a potentially complicated class action.").

[231] *See* Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 75 (1989).

[232] Immanuel Kant, for instance, posited that the individual is of intrinsic worth, that being dignity. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON AND OTHER WORKS ON THE THEORY OF ETHICS 46-54 (Thomas Kingsmill Abbott ed. & trans., Longmans, Green, and Co. Ltd. 6th ed. 1927)(1785). Kant reasoned that the basis of human dignity is autonomy. *See id.* at 54. It follows that an injured individual is entitled to retain control over the process by which he or she seeks redress, for injury to the person as well as to personal dignity, from the alleged tortfeasor. *See* Transgrud, *supra* note 231, at 74.

[233] *See* Transgrud, *supra* note 231, at 74. Decisions involving the disposition of a personal injury claim, for example, should be left to the litigant. *See id.* Professor Transgrud explains:

> Control and disposition of a valuable piece of property, such as a substantial tort claim, ought to rest with its owner, the injured party or his family, and not with some stranger such as a class representative or lead counsel in a mass tort case consolidated in a common venue.

Id. The litigant is more likely to control the claim in a way that maximizes personal satisfaction, be it by trial, settlement, or alternative means of resolution. *See id.*

[234] *See id.* at 83. A person who is permitted to litigate a tort claim on behalf of the injured party without that party's substantial input may engage in harassment, deception, and other misconduct to win the claim. *See id.* The Agent Orange litigation provides an example of plaintiffs' lawyers engaging in questionable tactics to retain or secure control of the litigation. *See id.* A classic example is that of an attorney who solicits clients in mass tort cases for a class action suit without first explaining to them the implications of maintaining the suit as a class action. *See* Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1137-42 (1995)(describing the account of a couple who was led by attorneys to think that their only way to secure compensation for the husband's mesothelioma was to agree to be named representatives in a class action). In such instances of

The second component, dignity, is associated with the concern for the humiliation or loss of self-respect a person experiences when she is precluded from litigating.[235] Dignity includes "the right to receive a careful, measured, and respectful consideration of a litigant's participation."[236] Closely related to the concept of dignity is the value of participation, or the appreciation of litigation as a way to express one's will in societal decisions of concern to oneself.[237] In tandem, dignity and participation values reflect the norm that "[p]rocedures should be designed to make affected parties feel that they matter."[238] Empirical studies confirm that judicial processes that respect the parties' dignity and participation interests enhance perceptions of adjudicatory fairness.[239]

Respect for individual dignity is important additionally because it is conducive to a functional society.[240] The legitimacy of the judicial system rests on more than substantive outcomes.[241] Procedures that allow those

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overzealous representation, the substantial attorney's fees at stake are more the driving force behind the litigation than the aim of securing corrective justice and compensation for the injured party. *See* Transgrud, *supra* note 231, at 75.

[235] *See* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1172 (1973).

[236] Brunet, *supra* note 200, at 283. *See generally* Mashaw, *supra* note 209, at 49-52 (discussing the dignitary theory of procedural due process); Jerry L. Mashaw, *Administrative Due Process: The Quest For a Dignitary Theory*, 61 B.U. L. REV. 885 (1981)(pointing out the merits of a dignitary theory of administrative due process). A Rand Institute study found that litigants rated dignity as the highest of procedural values. *See* E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION AND JUDICIAL SETTLEMENT CONFERENCES 70 (1989).

[237] *See* Michelman, *supra* note 235, at 1172.

[238] Allison, *supra* note 196, at 681.

[239] *See* Lind & Tyler, *supra* note 222, at 230-40. Lind and Tyler's studies demonstrate that litigants perceive procedures that afford them an opportunity to present their evidence and arguments as fairer than procedures that preclude them from being heard in the process. *See id.* at 215. Fair judicial procedures may enhance the value of dignity independent of the substantive outcome. *See id.* at 207. Richard Safire describes this sense of well-being derived from fair procedural treatment as "inherent dignity." Richard Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. Rev. 111, 121 (1978).

Furthermore, procedures that allow litigants to participate foster perceptions of fairness even when the litigant does not have an opportunity to influence the outcome, *see* Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 56 SMU L. REV. 433, 439-40 (1992), or when the substantive outcome is unfavorable to the litigant. *See* Lind & Tyler, *supra* note 222, at 215. By contrast, a litigant who is deprived of the freedom to make critical decisions about the litigation is likely to perceive the litigation experience as procedurally unfair and arbitrary. *See* Brunet, *supra* note 200, at 284; *see also* Yamamoto, *supra* note 209, at 388.

[240] *See* Yamamoto, *supra* note 209, at 388.

[241] *See id.* at 389.

affected to participate in decisions pertaining to their interests bolster the legitimacy of the government.[242] However, government processes which are apathetic or repugnant to dignity concerns cultivate the belief that government power is nothing but arbitrary and naked coercion.[243]

The last component of fairness, due process,[244] refers to process "which, following the forms of law, is appropriate to the case, and just to the parties to be affected."[245] Justice Frankfurter wrote that due process "[r]epresent[s] a profound attitude of fairness between man and man, and more particularly between the individual and government . . . ."[246] The foundation of due process is the notion that a person should have her rights and liabilities affected by the state only through a fair process. Paramount to fair process in American jurisprudence are notice,[247] adequate representation,[248] and the opportunity to be heard.[249]

C. Institutional Legitimacy

Fairness and efficiency concerns sometimes intersect with the judiciary's interest in maintaining its legitimacy. Called the "least dangerous branch"[250] because of its lack of coercive power and control over the purse-strings of the

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[242] *See* Mashaw, *supra* note 209, at 49-50.

[243] *See id.*; Yamamoto, *supra* note 209, at 389.

[244] "Due process" in this article refers to procedural due process rather than substantive due process.

[245] Hagar v. Reclamation Dist., No. 108, 111 U.S. 701, 708 (1884).

[246] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1951)(Frankfurter, J., concurring).

[247] *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877). In a landmark case which constitutionalized the requirement of personal jurisdiction, the Supreme Court held that a court cannot exert personal jurisdiction over an individual without first having given notice to that person. *See id.*

[248] *See, e.g.*, Hansberry v. Lee, 311 U.S. 32 (1940). The plaintiffs in *Hansberry* sought to enjoin the defendants from breaching a racially-restrictive covenant. *See id.* at 37-38. Defendants argued that the agreement was ineffective because the requisite 95% of landowners had not signed it. *See id.* at 38. Plaintiffs responded that the issue was res judicata by way of stipulation to the requisite number of signatories in an earlier suit. *See id.* The lower courts found in favor of plaintiffs, *see id.* at 38-39, but on certiorari, the Supreme Court held that defendants were not adequately represented by the litigants in the previous suit, whose interests were antagonistic to that of defendants. *See id.* at 42-46.

[249] *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972). Challenges were made to state statutes authorizing the issuance of writs of replevin without the requirement of notice to the defendant or a hearing. *See id.* at 69-70. The Supreme Court struck down the statutes as violative of the due process requirement of the Fourteenth Amendment, holding that parties whose rights are to be affected are entitled under procedural due process to be heard at a meaningful time. *See id.* at 96-97.

[250] Hamilton, *supra* note 130.

community,[251] the judiciary draws its authority from public acceptance of it as the institution fit to interpret and apply the law.[252] When public perception of the judiciary's legitimacy decreases, acceptance by the public of institutional decisions similarly decreases.[253]

Fair judicial process enhances public perceptions of legitimacy[254] when it assures that courts do not assume "functions that exceed the appropriate judicial role."[255] When courts appear to exceed their powers, to transgress

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[251] *See* Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992)(highlighting the importance of the legitimacy of the United States Supreme Court in light of its lack of coercive power or ability to provide financial incentives); *see also* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992)(observing that the judiciary lacks the "standard political levers over people and institutions").

[252] *See* Hamilton, *supra* note 130; *see also* Tyler & Mitchell, *supra* note 199, at 707. The Supreme Court spoke emphatically about the judiciary's dependence on public perceptions of its legitimacy in *Casey*, a case in which the Court upheld *Roe v. Wade*, 410 U.S. 113 (1973). The Court said:

> Our analysis would not be complete, however, without explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of stare decisis, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.
>
> The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

Casey, 505 U.S. at 864-65. The Court attributes its legitimacy to principled decisionmaking. *See id.* at 866. Unless adjudicative outcomes are viewed as principled, the decisions of the court will be viewed with skepticism by the public. *See* Tyler & Mitchell, *supra* note 199, at 707.

[253] *See* JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 90-91 (1983)(detecting a strong link between perceptions of procedural justice and satisfaction levels, and between satisfaction and acceptance of decisions in court-annexed arbitration programs).

[254] *See* Allison, *supra* note 196, at 682; *see also* Tom R. Tyler & Kenneth R. Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 626 (1991). Procedural justice refers to the belief that the procedures by which authorities make decisions are fair. *See id.* (surveying the procedural justice literature).

[255] Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 78 GEO. L.J. 1355, 1403 (1991). The notion that there is a proper allocation of governmental power is reflected in considerations of federalism and the limits of equity power. *See id.* For instance, appellate

procedural restraints, public perceptions of judicial illegitimacy arise.[256] The public commonly understands that the judiciary's role is to decide cases by employing legal principles and reasoning.[257] When courts deviate from this role,[258] the public fears that the courts are usurping the authority of other branches of government without the constraints of political accountability.[259]

A court's effort to influence substantive outcomes may also affect its legitimacy.[260] When called upon to decide a case that will have significant political or social ramifications, a court may apply procedural rules to dispose of the case without resolving the underlying substantive issues.[261] Alterna

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courts may disapprove of district courts intruding on the discretion of state and local executive branches. *See, e.g.*, Inmates of Occoquan v. Barry, 844 F.2d 828, 844 (D.C. Cir. 1988)("In this setting of institutional conditions litigation . . . courts work in an arena that represents a crossroads where the local political branches of government meet the Article III branch and the higher commands of the Constitution."); Ruiz v. Estelle, 679 F.2d 1115, 1145 (5th Cir.)(per curiam)("As a matter of respect for the state's role and for the allocation of functions in our federal system . . . the relief ordered by federal courts must be 'consistent with the policy of minimum intrusion into the affairs of state prison administration that the Supreme Court has articulated for the federal courts.'" (quoting Ruiz v. Estelle, 650 F.2d 555, 571 (5th Cir.), *vacated in part, amended in part*, 688 F.2d 266 (5th Cir. 1982))).

[256] *See* Sturm, *supra* note 255, at 1403.

[257] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 143-44 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994) (arguing that courts have an obligation to justify their decisions by "reasoned elaboration").

[258] Hart and Sacks explain that each governmental institution is "institutionally competent" to address certain types of legal questions. The legislative branch is suited to handle questions that can be answered by political compromise or majority rule. *See id.* at 112, 696-97. The executive branch is most competent to deal with questions that require discretionary decisions to be made. *See id.* at 143-44. The judiciary, however, is charged with the responsibility of formulating general rules that are consistent with precedent and that can be applied to future cases. *See id.*

[259] *See* Sturm, *supra* note 255, at 1406. Criticism of the court for overstepping its bounds may center on the incapacity of the judicial process, a mechanism tailored to address narrow factual situations, to remedy broad social problems. *See id.* at 1406-08. Additionally, the public may perceive the court as compromising the fairness of the process. *See id.* at 1409.

[260] *See* Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 563 (1977).

[261] Robert Cover cites the example of *Robinson v. Smyth*, 126 Eng. Rep. 1007 (C.P. 1799), *reprinted in* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 723 (1975), a case in which the defendant moved to postpone a trial on an action for wages allegedly due to the plaintiff, a seaman. Defendant's justification was the absence of one of its witnesses, who was prepared to testify that plaintiff was defendant's slave. *See id.* If that fact were to be established, defendant would owe plaintiff no wages. *See id.* The court denied the procedural motion, thereby assuring victory for the plaintiff. *See id.* It remarked that the substantive defense was "odious" and that although recognized by law, a court "should not give [it] a day's time." *Id.* Cover submits that the case is troubling, not because the court disfavored the slavery defense, but because it manipulated the process to

tively, procedure is a means by which the court can recast substantive issues in a different, and less controversial, light.[262] In either event, the public may detect that the court has not addressed the issue candidly, and that may diminish the court's legitimacy.[263]

The process values of efficiency, fairness, and institutional legitimacy illuminate our discussion of Justice Ginsburg's procedural philosophy. These often colliding values aid our understanding of a process dynamic that characterizes her judging style.

IV. A GLIMPSE OF JUSTICE GINSBURG'S CLASS ACTION JURISPRUDENCE

The framework of process values just discussed provides a basis for assessing the procedural themes identified in Part II. This Part discusses those themes as parts of Justice Ginsburg's jurisprudence of process and procedure. It does so by focusing on her approach to class actions. Class action litigation is particularly fertile ground because class action procedure implicates the often colliding process values of efficiency, fairness, and institutional legitimacy. This Part begins with a summary of the class action device and the value tensions it embodies. It then analyzes Justice Ginsburg's opinions in three major class action cases.

A. Value Conflicts in Class Action Litigation

The class action device allows a few people to represent many—a class—in the litigation of a matter of interest to the class.[264] Absent procedural defects,[265] the judgment in a class action binds all class members.[266] The class

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effect an admirable substantive end. *See id.* at 723-24. The court denied the defendant an opportunity to present its legally recognized albeit dislikable defense. *See id.*

[262] *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).

[263] *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987)(explaining that the public reacts cynically when it discovers that the court is disingenuous in its reasoning).

[264] Cramton, *supra* note 224, at 819. Class action suits are governed by FRCP 23.

[265] As will be discussed below, class representatives must demonstrate that they meet certain requirements before the court will certify a class. *See infra* notes 277-280 and accompanying discussion. If a court improvidently determines that the requirements are met, the ensuing judgment is subject to collateral attack.

[266] However, certain types of class action suits give class members the option to "opt-out" of the class, thereby preserving their right to prosecute their claim in a separate suit. FRCP 23(c)(2) provides in part: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances[.] . . . The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date. . . ." FED. R. CIV. P. 23(c)(2).

action device, codified in FRCP 23, was designed to empower individual litigants with small claims.[267] Rule 23(b)(3) allows atomized claimants, such as individual consumers, to exert collective power.[268] Rule 23(b)(3) thus creates litigative power by aggregating numerous "negligible claim[s] into a very large one."[269] For plaintiffs and their counsel, the aggregation of claims under the class action device makes litigation economically feasible and gives them settlement leverage, particularly with corporate defendants.[270]

Although the class action was designed to promote justice for individual claimants who might otherwise find the courts inaccessible, the device now also serves the judicial system's interest in efficiency. Class actions reduce the transaction and direct costs of class members.[271] In addition, class actions, at least in concept, ease court congestion by reducing the number of case filings.[272]

Fairness and efficiency values often collide in class actions.[273] By design, class actions treat class members as a group rather than as individuals.[274] Thus, class action litigation tends to overlook individual claimants' concerns about substantive outcomes and procedural fairness. Class member autonomy, participation, and dignity are exchanged for negotiating leverage and overall

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[267] *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 248 (1987).

[268] *See id.*

[269] *Id.* Due to the power of aggregation, extraordinary power derives from the certification of a class. *See* George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 621 (1997). Particularly indicative of the power of certification is that the certification of virtually every mass tort class action leads to settlement rather than trial. *See id.* at 522.

[270] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1350 (1995).

[271] *See* Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997). The Seventh Circuit observed:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Id. at 344

[272] *See* Cramton, *supra* note 224, at 818 ("Collective justice appeals to all parties to some degree and to courts and judges almost without exception.").

[273] *See* FED. R. CIV. P. 23 advisory committee's note. The Advisory Committee sought to "achieve *economies of time, effort, and expense*, and promote uniformity of decision as to persons similarly situated, without sacrificing *procedural fairness* or bringing about other undesirable results." *Id.* (emphasis added)(citing ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY 201 (1950)).

[274] *See* Cramton, *supra* note 224, at 811 (recognizing the tension between individual justice and collective justice in settlement class actions).

efficiency. That class action judgments are binding on class members who had no control over the litigation underscores the efficiency-fairness tension.[275]

Rule 23 therefore establishes procedural checks against the misuse of the class action device.[276] Under FRCP 23(a), class representatives must meet certain prerequisites before the court will certify a class.[277] The most important criterion is that class representatives, who are parties to the suit, adequately represent class members, who are not.[278] After meeting Rule 23(a) prerequisites, class representatives must demonstrate that their suit is maintainable as one of three types of class actions under Rule 23(b).[279] If the

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[275] *See id.* at 825. Professor Cramton observes that there is usually no process for modifying the amounts awarded in distributing a damage award to individual class members. Often, the disposition of a class action irreversibly compromises an individual class member's right to damages. *See id.*

[276] The Advisory Committee Notes to the 1966 Amendments to Rule 23 state:

> The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the *fair conduct* of these actions. . . .

FED. R. CIV. P. 23 advisory committee's note (emphasis added)(ellipses in original)

[277] Rule 23(a) of the Federal Rules of Civil Procedure provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claim or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

[278] *See* FED. R. CIV. P. 23(a)(4).

[279] Rule 23(b) of the Federal Rules of Civil Procedure provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
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> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B)

suit is maintained under Rule 23(b)(3), the class representatives must provide notice to individual members of the class and inform them of their right to exclude themselves from the class.[280] Finally, the district court must approve a class action settlement to protect the interests of class members.[281]

B. Justice Ginsburg and Class Actions

Justice Ginsburg's opinions suggest acute awareness of the process value tensions inherent in class action litigation. *Telecommunications Research & Action Center v. Allnet Communication Services, Inc.*,[282] an associational standing case, illustrates her disapproval of efficiency efforts to circumvent FRCP 23's fairness protections for class members. The plaintiff in *Allnet* was the Telecommunications Research and Action Center ("TRAC"), a non-profit membership organization created to promote fair, reasonable, and nondiscriminatory rates for communications services.[283] TRAC sued Allnet Communications for maintaining discriminatory rates and for changing rates without public notice.[284] Although the membership of TRAC numbered 12,000 when it initiated the non-class action suit,[285] counsel for TRAC identified only five or six members as Allnet subscribers.[286]

The district court dismissed the action because TRAC lacked standing to claim damages on behalf of its members.[287] The Court of Appeals of the District of Columbia affirmed.[288] Writing for the court, then Judge Ginsburg

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the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b).

[280] Rule 23(c)(2) of the Federal Rules of Civil Procedure provides:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date, (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

FED. R. CIV. P. 23(c)(2).

[281] FED. R. CIV. P. 23(e).

[282] 806 F.2d 1093 (D.C. Cir. 1986).

[283] *See id.*

[284] *See id.* at 1093-94.

[285] *See id.* at 1094.

[286] *See id.*

[287] *See id.* Lack of standing was one of several grounds for dismissal.

[288] *See id.*

first reiterated that an association had standing to sue on behalf of its members when

> a) [the association's] members would otherwise have standing to sue in their own right; (b) the interests [the association] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[289]

TRAC met the first two parts of the test,[290] but failed the third prong because money damages ordinarily required individual participation.[291]

Judge Ginsburg then observed that the suit should have been brought as a class action under FRCP 23(b)(3) subject to the procedural safeguards built into the rule.[292] A class action requires that class representatives fairly and adequately represent the class,[293] and a FRCP 23(b)(3) class action requires the "best notice practicable" of the suit to class members.[294] The non-class action suit brought by TRAC had none of these safeguards.[295]

Judge Ginsburg recognized that "[the] court, in matters such as this, writes for a genre of cases, not for one day and case alone."[296] If the court determined that TRAC had standing it would establish precedent that an association could sue on behalf of its members even if those members had differing interests in the outcome of the litigation. Such a rule would enable an association's leaders to file an aggregated suit to gain litigation leverage and then sacrifice the interests of individual association members. Despite the prospect of increasing transactional costs to the plaintiff association, Judge Ginsburg decided that the procedural safeguards of FRCP 23 were necessary to ensure fairness to the individuals otherwise inadequately represented in the litigation.

Justice Ginsburg expressed a similar concern for individual litigant fairness in *Matsushita Electronic Industrial v. Epstein*.[297] *Matsushita* involved two class action shareholder suits filed against MCA after it was acquired by Matsushita Electrical Industrial Co ("Matsushita").[298] The first suit was filed in state court against MCA and its directors for breach of fiduciary duty.[299]

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[289] *Id.* (alterations in original).

[290] *See id.*

[291] *See id.* at 1095.

[292] *See id.* at 1096.

[293] *See* FED. R. CIV. P. 23(a)(4).

[294] FED R. CIV. P. 23(c)(2).

[295] *See Allnet*, 806 F.2d at 1096. By not filing a class action, TRAC avoided the exacting scrutiny of Rule 23 certification criteria, which, in turn, left the interests of the individual association members unconsidered. *See id.*

[296] *Id.* at 1095. Judge Ginsburg's remark reflects her consideration of stare decisis.

[297] 516 U.S. 367 (1996).

[298] *See id.* at 370.

[299] *See id.*

The second suit, filed against Matsushita in federal court, alleged violations of the Securities Exchange Commission's regulatory rules,[300] over which the federal courts have exclusive jurisdiction.[301] The district court refused to certify the class and dismissed the case.[302]

The shareholders appealed the federal court's decision in the second suit to the Ninth Circuit Court of Appeals.[303] Thereafter, the parties to the first state court suit agreed to a settlement establishing a two million dollar fund in return for a global release of all claims based on the Matsushita-MCA acquisition, including all federal claims.[304] The state court certified the class, approved the settlement, and dismissed all the claims with prejudice.[305]

Matsushita then argued to the Ninth Circuit that the court-approved settlement in the first suit barred the appeal of the federal action under the Full Faith and Credit Act.[306] The Ninth Circuit rejected Matsushita's argument, holding that the settlement in the state action was not entitled to full faith and credit.[307] The Supreme Court reversed. The Court determined that the Full Faith and Credit Act afforded the settlement of the state court suit preclusive effect over the federal action even though the federal courts have exclusive jurisdiction over securities claims.[308]

In contrast to the majority's focus on the full faith and credit doctrine, Justice Ginsburg's separate concurring opinion emphasized that a state court judgment was not entitled to full faith and credit unless it satisfied the requirements of the Fourteenth Amendment's Due Process Clause.[309] In support of her argument, Justice Ginsburg cited *Phillips Petroleum Co. v. Shutts*,[310] which held that minimal due process requirements—including notice, an opportunity to be heard, a right to opt out, and adequate representation—had to be satisfied in order for a class action judgment to bind absentee class members.[311] She regarded adequate representation as the "sine qua non for approval of a class action settlement[.]"[312]

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[300] *See id.*

[301] 15 U.S.C. § 78aa.

[302] *See Matsushita*, 516 U.S. at 370.

[303] *See id.*

[304] *See id.* at 370-72.

[305] *See id.* at 371-72.

[306] 28 U.S.C. § 1738; *see Matsushita*, 516 U.S. at 372.

[307] *See Matsushita*, 516 U.S. at 372.

[308] *See id.* at 369.

[309] *See id.* at 388 (Ginsburg, J., concurring in part, dissenting in part).

[310] 472 U.S. 797 (1985).

[311] *See Matsushita*, 516 U.S. at 395 (Ginsburg, J., concurring in part, dissenting in part) (citing *Phillips Petroleum*, 472 U.S. at 812).

[312] *Id.* at 397 (Ginsburg, J., concurring in part, dissenting in part)(citing Prezant v. Angelis, 636 A.2d 915, 926 (1994)).

Justice Ginsburg observed a troublesome conflict of interest in the case. Before approving the second settlement agreement, the Delaware court had rejected an earlier agreement that provided no monetary benefit to class members, released substantial federal claims, and awarded generous attorney's fees.[313] The court had approved the second agreement, but observed that the release of the federal claims was procured in return for meager compensation for class members and a large fee for the class attorneys.[314] Suspicion of collusion ran high.[315] Justice Ginsburg expressed wariness about the defendants' use of the settlement class action device.[316] Use of the temporary settlement class device requires "telescoping the inquiry of adequate representation into the examination of the fairness of the settlement," she wrote.[317] Justice Ginsburg concurred with the majority's decision to remand the case,[318] but stressed "the centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement."[319]

Allnet and *Matsushita* highlight salient points in Justice Ginsburg's approach to class action litigation. In each case, the courts were faced with competing concerns of fairness and efficiency. In both cases, Justice Ginsburg argued forcefully that efficiency concerns did not subvert procedural fairness for individual claimants. The Court's most recent pronouncement on class action procedure, *Amchem Products, Inc. v. Windsor*,[320] replayed this value tension in the context of mass tort litigation and the stresses it places upon the judiciary.

C. Amchem Products, Inc. v. Windsor

Amchem is the first case in which the Supreme Court addressed the recent phenomenon of the employment of the class action device for the sole purpose

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[313] *See id.* at 391 (Ginsburg, J., concurring in part, dissenting in part).

[314] *See id.* at 392. The establishment of the two million settlement fund awarded shareholders two to three cents per share before payment of fees and costs. *See id.* at 392. However, the state court determined that the class would be best served by settlement of the litigation, and that the terms of the settlement were fair and reasonable. *See id.* at 392.

[315] *See id.* at 393.

[316] *See id.* at 396-97; *see also infra* note 321 for a general discussion of the settlement class action device.

[317] *Matsushita*, 516 U.S. at 397 n.6 (Ginsburg, J., concurring in part, dissenting in part).

[318] *See id.* at 388 (Ginsburg, J., concurring in part, dissenting in part).

[319] *Id.* at 399.

[320] 521 U.S. 591 (1997).

of settling mass tort cases.[321] The facts of *Amchem* are complex. We therefore summarize *Amchem*'s background.

1. The background of Amchem

The parties in *Amchem* handled the asbestos claims as a mass tort. Mass torts litigation generally refers to the aggregation of large numbers of claims that arise from similar events or transactions.[322] Mass tort litigation inundated federal courts in 1980s and 1990s[323] as claimants sought compensation under

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[321] *Amchem* was a settlement class action. *See id.* at 597. FRCP 23 makes no reference to the settlement class action device. Rather, the device is a judicially created procedure. *See In re* General Motors Corp. Pick-up Truck Fuel Tank Litig., 55 F.3d 768, 777-78 (3d Cir.), *cert. denied sub nom.* General Motors v. French, 516 U.S. 824 (1995)(observing that the first Manual for Complex Litigation strongly disapproved of settlement classes, but because courts increasingly used the device, later manuals endorsed usage of the device under carefully controlled circumstances). A settlement class action is never intended to be litigated. Settlement class actions are filed for the sole purpose of binding class members to a settlement agreement reached by the class representatives and defendants. Typically, the complaint, answer and settlement agreement are all filed at the same time or one closely following the other. The court is left to approve the settlement pursuant to FRCP 23(e). The controversy engendered by settlement class actions, as exemplified in *Amchem*, stems from the issue of whether the court should engage in analysis of the class certification criteria of FRCP 23(a) and (b) in approving the settlement. *See generally General Motors*, 55 F.3d 768 (3d Cir. 1995). *See infra* note 330 for mass tort cases that have invoked the class action device for settlement purposes.

[322] The American Law Institute proposes the following definition of a "mass tort":

> From the process perspective, the salient defining characteristics of a mass tort include:
> (1) numerous victims who have filed or might file damage claims against the same defendant(s);
> (2) claims arising from a single event or transaction, or from a series of similar events or transactions spread over time;
> (3) questions of law and fact that are complex and expensive to litigate and adjudicate—frequently questions that are scientific and technological in nature;
> (4) important issues of law and fact which are identical or common to all or substantial subgroups of the claims;
> (5) injuries that are widely dispersed over time, territory, and jurisdiction;
> (6) causal indeterminancy—especially in cases involving toxic substance exposure—that precludes use of conventional procedures to determine and standards to measure any causal connection between the plaintiff's injury and the defendant's tortious conduct;
> (7) disease and other injuries from long delayed latent risks, especially in cases involving toxic substance exposure.

2 AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, REPORTER'S STUDY 389 (1991).

[323] *See* Coffee, *supra* note 270, at 1356. Professor Coffee observed, "Hundreds of thousands of people sued scores of corporations for losses due to injuries or diseases that they attributed to catastrophic events, pharmaceutical products, medical devices or toxic substances." *Id.* (quoting Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 961 (1993)).

state law from manufacturers of asbestos products,[324] breast implants,[325] intrauterine devices[326] and automobiles.[327] As court congestion increased, some courts and attorneys turned to class actions as an aggregation device.[328]

Defendants in mass tort cases quickly recognized the strategic utility of FRCP 23 in obtaining cheap global settlements.[329] Defendants could entice plaintiffs' counsel into aggregating claimants into classes using Rule 23 and then negotiating a global settlement that benefited plaintiffs, their attorneys, a small number of class members, and, most of all, the defendants.[330] Initially,

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[324] *See, e.g.*, Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996)(asbestos litigation).

[325] *See, e.g., In re* Silicone Gel Breast Implants Prods. Liab. Litig., No. CV-92-P-10000 - S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994)(breast implants litigation).

[326] *See, e.g., In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal.), *modified*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983)(intrauterine devices litigation).

[327] *See, e.g., In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.), *cert. denied sub nom.* General Motors v. French, 516 U.S. 824 (1995)(automobiles products liability litigation).

[328] *See* Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5, 43 (1991).

[329] *See* Coffee, *supra* note 270, at 1349. See also *infra* note 330 and the accompanying discussion for a more thorough treatment of defendants' use of FRCP 23 to their own advantage. The class action device can be said to have been transformed from the plaintiff's "sword" into the defendant's "shield." *See* Coffee, *supra* note 270, at 1350.

[330] Collusion in mass torts litigation usually entails an agreement between the defendants and plaintiffs' counsel to settle the case below value in return for attorneys' fees that are above market value. *See* Coffee, *supra* note 270, at 1367-84. Defendants have invented a number of devices of collusion. Examples of such devices include the "scrip settlement," which is a nonpecuniary settlement in the form of discount coupons redeemable by members of the injured class to purchase defendant's product at a discount. *See id.* at 1367-68; *see also General Motors*, 55 F.3d 768 (3d Cir. 1995)(scrutinizing auto-manufacturer's proposed settlement in the form of a scrip certificate to class members in the amount of $1,000 which they could redeem for the purchase of manufacturer's brand of trucks). The "cy press settlement" involves an agreement by the defendant to make a payment of goods or services, not directly to the class members, but to a third party for the indirect benefit of the plaintiff class. *See* Coffee, *supra* note 270, at 1368; *see also In re* Matzo Food Prods. Litig., 159 F.R.D. 600 (D.N.J. 1994)(refusing to approve defendant's proposal to settle an antitrust class action by creating a fund that would distribute defendant's food products to charities and paying plaintiffs' attorneys fees). The "reverse auction" is a competition among plaintiffs' attorneys initiated by the defendants to determine which team of attorneys will settle with the defendants first. Since each team of lawyers is prosecuting the same allegations, the first team to settle essentially precludes the others from litigating their cases. *See* Coffee, *supra* note 270, at 1370; *see also* Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir.), *cert. denied*, 513 U.S. 986 (1994)(holding that a release contained in a state court judgment precludes subsequent federal securities action arising from the same facts, even though the state court has no jurisdiction to hear exclusive federal securities claims).

"Inventory settlements" are the subject of *Amchem*. A mass tort plaintiff's attorney

such collusion met little resistance.[331]

Amchem is a particularized version of this mass tort phenomenon. The claimants were workers exposed to asbestos in the 1940s and 1950s who manifested injuries beginning in the 1960s.[332] The claimants filed a stream of individual asbestos cases in federal courts.[333] Realizing the strain of asbestos litigation on federal courts, eight federal judges urged the Judicial Panel on Multidistrict Litigation ("MDL Panel") to consolidate all asbestos cases in a single district.[334] The MDL Panel agreed and in 1991 transferred all pending federal court asbestos cases to the Eastern District of Pennsylvania.[335]

Following the transfer, the plaintiffs and defendants formed separate steering committees.[336] Court-appointed plaintiffs' counsel[337] and counsel for the Center for Claims Resolution ("CCR"), a consortium of 20 former asbestos manufacturers, began negotiations with an eye toward creating a settlement that would resolve both present and future claims.[338] Plaintiffs' counsel and defendants eventually agreed to settle existing and future claims

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typically serves as counsel to an "inventory" of cases which he or she wishes to settle as expeditiously as possible. *See* Coffee, *supra* note 270, at 1373. Defendants, on the other hand, are more concerned about the class of future claimants, which is indeterminable in size and may be much larger than the class of present claimants. *See id.* It is to the advantage of both defendants and plaintiffs' counsel to trade favors—defendants agree to settle the plaintiff's attorney's inventory of cases in return for a global settlement of future claims against defendants on terms favorable to them. *See id.* The global settlement is usually made binding on future claimants by way of a settlement class action (i.e., one created only for settlement purposes). *See id.* at 1373-74. Future claimants, who may be unaware or apathetic about their potential to bring a claim, have no incentive to decide carefully whether to opt out of such class actions. *See* Cramton, *supra* note 224, at 828.

[331] *See* Coffee, *supra* note 270, at 1350-52. Professor Coffee points out that the mass tort class action is uniquely vulnerable to the danger of collusion between defendants and plaintiffs' counsel for three reasons: 1) courts, faced with massive dockets, may be more willing to approve of suspicious settlements that they ordinarily would reject; 2) the court's primary method of regulating plaintiffs' counsel's actions in class actions—control over attorneys' fees—loses potency in the mass torts context because defendants can entice the attorneys with out-of-court compensation over which the court has no control; 3) future claimants (those who have yet to experience any symptoms or illnesses) are often apathetic about mass tort actions brought on their behalf, and therefore, usually fail to object to under-valued settlements of their claims. *See id.*

[332] *See* Georgine v. Amchem Prods., 83 F.3d 610, 618 (3d Cir. 1996).

[333] *See In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 418-19 (J.P.M.L. 1991)(reporting the findings of the Judicial Conference Ad Hoc Committee on Asbestos).

[334] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 599 (1997).

[335] *See id.*; *see also Asbestos Prods.*, 771 F. Supp. at 424.

[336] *See Amchem*, 521 U.S. at 599.

[337] *See id.* Judge Weiner, who presided over the pretrial proceedings of the consolidated case, appointed Ronald Motley, Gene Locks, and later Joseph F. Rice, as plaintiffs' class counsel in the action. *See id.*

[338] *See id.* at 600.

in two separate agreements, one binding on all future claimants, and the other settling the existing claims for $200 million.[339]

On behalf of future claimants, on January 5, 1993, the settling parties filed a complaint; an answer; a joint motion seeking conditional class certification for purposes of settlement; and a stipulation of settlement proposing to settle all present and future claims of class members against CCR companies for asbestos-related personal injury or death that were not filed before January 15, 1993.[340] The proposed settlement established an administrative procedure for determining individual compensation of class members.[341] In 1993, Judge Reed approved the stipulation of settlement and certified the settlement class.[342]

Objectors, consisting of members of the plaintiff class,[343] challenged the settlement on various grounds, including the adequacy of representation, justiciability, subject matter jurisdiction, personal jurisdiction and the adequacy of class notice.[344] The objectors expressed concern about the inadequacy of the compensation for certain claimants, especially those who did not presently manifest asbestos-related health problems.[345] The Third

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[339] *See id.* at 601.

[340] *See id.* at 601-02. The class consisted of

> (1) all persons exposed occupationally or through the occupational exposure of a spouse or household member to asbestos-containing products or asbestos supplied by any CCR defendant, and (2) spouses and family members of such persons, who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action was commenced.

Georgine v. Amchem Prods., 83 F.3d at 610, 619 (3d Cir. 1996).

[341] *See Amchem*, 521 U.S. at 603. As the first step of the administrative procedure, a claimant would have to meet specific medical and exposure criteria. *See id.* If the criteria are met, compensation is provided for four categories of diseases. *See id.* The stipulation fixed a range of damages that CCR would award for each disease for eligible claimants. *See id.* at 603-04.

There are caps on the amount of damages a particular claimant may recover and on the number of qualifying claimants who may be paid in any given year. *See id.* at 604. Recovery exceeding the cap is allowed for "extraordinary" claims, but only a limited number of claims can be found to be "extraordinary." *See id.* There is also a cap on the total amount of compensation available to claimants. *See id.*

Some claimants who qualify for compensation under the settlement are allowed to file a claim in court. *See id.* at 605. However, the settlement limits the number of such exceptions. *See id.* Additionally, claimants who have "pleural" conditions—an accumulation of plaque on the lungs due to asbestos that does not cause physical impairment—are not eligible for compensation. *See id.* at 604. Pleural claimants regularly received substantial money damages in individual tort suits. *See Georgine*, 83 F.3d at 620. The stipulation allowed each defendant to withdraw from the settlement after ten years, but plaintiffs were bound by the settlement in perpetuity. *See Amchem*, at 604-05.

[342] *See id.* at 606.

[343] *See* Georgine v. Amchem Prods., 157 F.R.D. 246, 258 (E.D. Pa. 1994).

[344] *See Georgine*, 83 F.3d at 622.

[345] *See Amchem*, 521 U.S. at 607-08.

Circuit ruled that a settlement class action must satisfy the requirements of FRCP 23(a) and (b)(3).[346]

The court found that under 23(b)(3) common questions of fact and law did not predominate.[347] The court also observed serious intra-class conflicts that precluded satisfaction of the adequacy of representation requirement. It was unfair, the court opined, to bind exposure-only class members who may be insufficiently informed to make a reasoned decision of whether to opt out of the class.[348] The court decertified the class.[349]

2. *Justice Ginsburg's opinion*

Justice Ginsburg wrote the majority opinion affirming the Third Circuit's decision.[350] She first recognized the division among courts over the issue of whether the certification of settlement classes required fulfillment of FRCP 23's certification criteria.[351] She confirmed that the certification requirements *did* apply in the settlement class context.[352] Rule 23 procedural safeguards protecting absentee class members "demand undiluted, even heightened, attention in the settlement context."[353] Certification of a settlement class requires added scrutiny of FRCP 23 requirements because unlike a class action certified for trial, the court has no future opportunity to adjust the class.[354]

Turning to the specific class-certification criteria, Justice Ginsburg emphasized the vital purposes served. The requirements of FRCP 23(a) and (b), she wrote, are not mere procedural technicalities to which courts pay lip-service; rather, they compel careful inquiry into the appropriateness of

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[346] *See Georgine*, 83 F.3d at 624-25.

[347] *See id.* at 626-30.

[348] *See id.* at 633.

[349] *See id.* at 618.

[350] *See Amchem*, 521 U.S. at 597.

[351] *See id.* at 618. The Court cited to the following cases to illustrate the divide among federal courts: *In re* Asbestos Litig., 90 F.3d 963, 975 (5th Cir. 1996)("in settlement class context, common issues arise from the settlement itself")(citation omitted), *cert. pending*, Nos. 96-1379, 96-1394; White v. National Football League, 41 F.3d 402 408 (8th Cir. 1994) ("adequacy of class representation . . . is ultimately determined by the settlement itself"), *cert. denied*, 515 U.S. 1137 (1995); *In re* A.H. Robins Co., 80 F.2d 709, 740 (4th Cir.)("[i]f not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification"), *cert. denied sub nom.* Anderson v. Aetna Casualty & Surety Co., 493 U.S. 959 (1989); Malchman v. Davis, 761 F.2d 893, 900 (2d Cir. 1985) (certification was appropriate, in part, because "the interests of the members of the broadened class in the settlement agreement were commonly held"), *cert. denied*, 475 U.S. 1143 (1986).

[352] *See Amchem*, 521 U.S. at 620.

[353] *Id.*

[354] *See id.*; *see also* FED. R. CIV. P. 23(c) and (d)(conferring power to the court to make orders pertaining to the class after certification).

invoking the class action device:

> The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness. [355]

It is not enough to submit a proposed settlement class action to scrutiny under FRCP 23(e).[356] Under FRCP 23(e), any settlement of a class action must be approved by the court. The inquiry in approving a settlement under FRCP 23(e) is whether the settlement is "fundamentally fair, adequate, and reasonable."[357]

That standard of analysis, Justice Ginsburg said, is inadequate to ascertain whether the interests of class members are served by the settlement:

> [I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed.[358]

Federal courts, therefore, lack authority to certify a settlement class on the ground of overall fairness. Certification under those circumstances would vitiate most of the procedural protections of FRCP 23.[359]

The facts of *Amchem*, Justice Ginsburg observed, reveal the danger of abandoning those protections. The interests of the class members and class representatives were not aligned.[360] A significant disparity existed between the value of recovery for class members who were currently injured and for those who were only exposed to asbestos.[361] Further, Justice Ginsburg perceived a lack of "structural assurance of fair and adequate representation

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[355] *See Amchem*, 521 U.S. at 621.

[356] FRCP 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e).

[357] 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 23.85 (3d ed. 1997); *see also In re* Pacific Enter. Secur. Litig., 47 F.3d 373, 377 (9th Cir. 1995)(affirming the district court's determination that the proposed settlement was "fundamentally fair, adequate, and reasonable" under Rule 23(e)); Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992) (stating that the "fundamentally fair, adequate and reasonable" standard is "universal"); County of Suffolk v. Long Island Lighting Co., Inc., 726 F.2d 1295, 1323 (2d Cir. 1990)(noting that a court must scrutinize a settlement proposal to ensure that it is fair, adequate and reasonable).

[358] *Amchem*, 521 U.S. at 621.

[359] *See id.* at 621-22.

[360] *See id.* at 626.

[361] *See id.*

for the diverse groups and individuals affected."[362] Since the class representatives in this case did not represent the various interests of the class, and since the class was not divided into subclasses, some class members were likely to have been left without an advocate.[363]

Justice Ginsburg also observed that the class was deficient in the sense that common questions of law or fact among members of the class did not predominate over individual questions.[364] The "class members' shared experience of asbestos exposure and their common 'interest in receiving prompt and fair compensation for their claims'" did not supply the requisite commonality in law or fact.[365]

D. Justice Ginsburg's Process Jurisprudence

What do Justice Ginsburg's class action opinions reveal about her process jurisprudence? We observe initially that class action litigation involves an interplay among the three, sometimes conflicting, process values—efficiency, fairness and institutional legitimacy—and Justice Ginsburg's writing evinces careful effort to accommodate all three, but with differing emphases under differing circumstances. She does not pay fealty to a particular process value. Instead, the policies underlying the procedure in question and the specific facts of a case animate her procedural decisionmaking. Consistent with this approach, Justice Ginsburg's opinions emphasize the importance of fairness at certain times and court efficiency at others.[366]

Her opinions in *Allnet*, *Matsushita* and *Amchem*, in particular, wrestle with the tension between efficiency and fairness. The risk of shortchanging the interests of absentee class members runs high in class action litigation, and the procedural safeguards built into FRCP 23 are designed to mitigate that possibility. For that reason, concerns of efficiency, both in the systemic and the individual sense, although important to Justice Ginsburg, do not compel her to approve of an otherwise unfair process for class members.

In *Allnet*, for example, the prospect of burdening the plaintiffs with added transaction costs did not persuade her that the court should have granted them standing to litigate against Allnet on behalf of all organization members.[367]

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[362] *Id.* at 627.

[363] *See id.*

[364] *See id.* at 622; *see also* FED. R. CIV. P. 23(b)(3)(requiring predominance of questions of law or fact).

[365] *Amchem*, 521 U.S. at 622 (quoting Georgine v. Amchem Prods., 157 F.R.D. 246, 316 (E.D. Pa. 1994)).

[366] *See supra* Part II.

[367] *See* Telecommunications Research & Action Ctr. v. Allnet Commun. Servs., Inc., 806 F.2d 1093, 1096 (D.C. Cir. 1986). Judge Ginsburg recounted the following exchange during oral argument:

The efficiency achieved by TRAC's associational form of action did not justify the circumvention of safeguards assuring the adequacy of representation of the association's members. In Justice Ginsburg's view, the suit should have been brought as a class action.

In *Matsushita*, Justice Ginsburg perceived the majority's holding to be skewed in favor of court efficiency—it lightened federal court dockets by barring the adjudication of claims already settled and approved by a state court. Hints of collusion in the state court settlement—the release of all claims against the defendant, including federal claims over which federal courts had exclusive jurisdiction, in exchange for undervalued compensation for the shareholders and a handsome fee for the class attorneys[368]—suggested a process failure. For this reason, Justice Ginsburg declined to join the majority. Despite the costly and time-consuming prospect of allowing certain class claimants "more than one day in court,"[369] as the majority put it, Justice Ginsburg maintained that fairness commanded a more searching examination of whether the state court judgment respected the class members' rights to fair participation or representation in the litigation.

Amchem perhaps most clearly reveals Justice Ginsburg's thoughtful handling of the fairness-efficiency dynamic. As a mass tort case, *Amchem* threatened to inundate the federal judiciary with massive, repetitious litigation involving state law issues and large numbers of parties.[370] Faced with an ostensible assault on the functioning capacity of the federal courts, Justice Ginsburg first considered the efficiency-enhancing aspects of FRCP 23:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[371]

More tellingly, TRAC's counsel stated at oral argument that the form of action the organization selected was influenced by this consideration: "[I]t didn't involve the kind of notice requirements and expense that a class action might." This colloquy took place:

> Court: Is it the notice—the cost of giving notice—that led you away from the class action?
>
> Counsel: That's correct in that there were virtually no up-front costs to the association in utilizing this remedy. . . .

Id. (ellipses in original).

[368] *See* Matsushita Elec. Indus. v. Epstein, 519 U.S. 367, 388 (1996)(Ginsburg, J., concurring in part, dissenting in part).

[369] *Allnet*, 806 F.2d at 881.

[370] *See Amchem*, 521 U.S. at 597-98 (citing REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2-3 (Mar. 1991)).

[371] *Id.* at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

Justice Ginsburg then examined how the class action device constrained the autonomy and participation rights of individual class members:

> Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: 'The new provision invites a close look at the case before it is accepted as a class action . . . .'[372]

Personal injuries inflicted on an individual's body are specific and personal.[373] Accordingly, Justice Ginsburg observed that "[e]ach plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]; each ha[s] a substantial stake in making individual decisions on whether and when to settle."[374]

Justice Ginsburg's initial observations in *Amchem* highlight the efficiency-fairness dialectic in class actions. The object of FRCP 23 is to "'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'"[375] Rule 23 encroaches on individual autonomy while it promotes efficiency.[376]

For Justice Ginsburg, the *Amchem* class action was a prime example of the untoward results of sacrificing procedural fairness. Plaintiff's counsel selected class representatives whose interests did not align with those of future claimants.[377] As claimants with matured claims, the named plaintiffs sought immediate compensation.[378] Future claimants, on the other hand, were interested in "ensuring an ample, inflation-protected fund for the future."[379] Under the proposed settlement, present claimants benefited substantially while future claimants received undervalued returns for their sacrifice of control over participation in the litigation.

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[372] *Id.* at 615 (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 (1967)).

[373] *See* Resnik, *supra* note 328, at 23.

[374] *Amchem*, 521 U.S. at 616 (alterations in original)(internal quotation marks omitted) (quoting *Georgine*, 83 F.3d at 633).

[375] *Id.* at 615 (alteration in original)(quoting FED. R. CIV. P. 23(b)(3) advisory committee's note).

[376] *See* Resnik, *supra* note 328, at 23. Class actions operate in the manner of a sacrifice—class members surrender their right of control and participation in the litigation of their claims in return for increased effectiveness in securing corrective justice and individual compensation. *See id.* Rule 23's certification requirements, particularly "adequacy of representation," "predominance," and "superiority," ensure that the equation balances in favor of absent class members. *See* FED. R. CIV. P. 23 advisory committee's note; *see also supra* notes 273 and 276.

[377] *See Amchem*, 521 U.S. at 626.

[378] *See id.*

[379] *Id.*

The structure of the proposed settlement thus emitted strong signals of collusion between plaintiff's counsel and defendants. To Justice Ginsburg, that was a *de facto* violation of the adequacy of representation requirement.[380] When the representatives or counsel bargain away the interests of the class members in return for personal gain, the class members are left bereft of not only representation, but also a fair outcome.

Allnet, *Matsushita* and *Amchem* suggest that the enormous systemic stress of asbestos litigation is insufficient, in itself, to convince Justice Ginsburg to certify a procedurally faulty class action. It would be a misreading of Justice Ginsburg's opinions in *Allnet*, *Matsushita*, and *Amchem*, however, to conclude that she is insensitive to efficiency-oriented arguments. She is aware that procedure can be instrumental in conserving the limited resources available to courts.[381] When judicial economy can be promoted by stretching a procedural rule without sacrificing substantially fairness to litigants, Justice Ginsburg is at times willing to stretch the rule to promote efficiency. In *Caterpillar*, for example, she implicitly modified the traditional timeframe for establishing subject matter jurisdiction because considerations of "finality,

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[380] The interests of the class representatives must not be antagonistic toward those of the class members. *See, e.g.*, Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994)(noting that adequate representation "depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive."); Retired Chicago Police Ass'n v. Chicago, 7 F.3d 584, 598 (7th Cir. 1993)(stating that the two parts of the adequacy of representation requirement are the adequacy of class counsel and the adequacy of representation of the "different, separate, and distinct interest[s]" of class members); *In re* the Drexel Burnham Lambert Group, 960 F.2d 285, 291 (2d Cir. 1992)(holding that adequacy of representation is measured by the dual standards of class counsel being qualified, experienced and able to conduct the litigation, and of the class members not holding interests that are antagonistic to one another).

Additionally, the class representatives must have interests in the litigation that operate as an incentive for them to represent the class claims vigorously through class counsel. *See, e.g.*, *In re* American Med. Sys., Inc., 75 F.3d 1069, 1083 (6th Cir. 1996)(requiring class representative to share common interests with absent class members and to vigorously represent the interests of the class through qualified counsel); Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1023 (11th Cir. 1996)(defining adequacy of representation to mean that the class representative shares common interests with class members and will vigorously protect class interests through qualified counsel); Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988)(stating that a court's inquiry into adequacy of representation should include whether the putative class representative has the ability and incentive to represent the class claims vigorously).

[381] *See, e.g.*, BMW of North Am., Inc. v. Gore, 517 U.S. 559 (1996). In *Gore*, Justice Ginsburg wrote a dissent criticizing the majority for constitutionalizing the law of punitive damages. *See id.* at 1614-20 (Ginsburg, J., dissenting). The majority position permitted the Supreme Court to review the constitutionality of state high court decisions regarding punitive damage awards. *See id.* at 1595-98. Justice Ginsburg voiced concern that "the Court will work at this business alone. It will not be aided by the federal district courts and courts of appeals. It will be the only federal court policing the area." *Id.* at 1617 (Ginsburg, J., dissenting).

efficiency, and economy . . . [were] overwhelming,"[382] and because the removal scheme devised by Congress allowed for "expeditious superintendence by district courts."[383] Justice Ginsburg's ruling precluded the plaintiffs from relitigating their state claims in their court of choice—state court.

The safest description of Justice Ginsburg's approach to the efficiency-fairness tension in complex cases is that it defies simplistic description.[384] Whether her procedural decision in a particular case tips in favor of fairness or efficiency depends on the specific facts before the Court and the value concerns underlying the rule, both in the particular case and the genre of similar cases, a dynamic discussed further in the next Part.

At bottom, Justice Ginsburg's class action opinions evince an overarching concern for institutional legitimacy, which grows out of her respect for the "[r]ule of law virtues of consistency, predictability, clarity, and stability."[385] Her application of FRCP 23 reinforced the legitimacy of the judiciary in two ways: by preserving the integrity of FRCP 23 and by approving only careful, restrained exercises of federal court authority. Her insistence on "heightened attention"[386] to FRCP 23's requirements contributes to public perception of the federal judiciary as a procedurally fair institution. If the Court had validated the *Amchem* settlement class while bypassing the class certification criteria, it would probably have engendered two negative results. First, the public would likely perceive the federal judiciary as an arbitrary, result-oriented institution that abides by its own rules only when compelled to do so. Second, the Court would likely have undermined FRCP 23, relegating it to a "check[] shorn of utility."[387] Neither result is conducive to litigant, lawyer, or public faith in the judicial system, and certainly not to the integrity of federal class actions.

Amchem also tempted the Court to wield federal judicial power broadly. Plaintiff's counsel and defendants invited the Court to approve a use of FRCP 23 that approximated a legislative solution to the asbestos litigation crisis. As a subscriber of the "measured movement" approach to judicial decision-making, Justice Ginsburg was unwilling to condone such an expansive

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[382] Caterpillar v. Lewis, 519 U.S. 61, 75 (1996).

[383] *Id.* at 76.

[384] That Justice Ginsburg's emphasis shifts from fairness to efficiency and vice-versa underscores the inappropriateness of assigning her a conventional label. One may be tempted to portray her as liberal because she sometimes favors an individual litigant's "day in court" over efficiency, but that is an invalid assumption. Part V posits a more sophisticated explanation of her procedural decisions in the form of values proceduralism.

[385] Ginsburg, *Judicial Voice*, *supra* note 98, at 1191. Consistency, predictability, clarity, and stability also seem to be value concerns that permeate her thoughts on stare decisis. *See supra* note 105 and accompanying text.

[386] *Amchem*, 521 U.S. at 620.

[387] *Id.* at 621.

application of Rule 23. Approval of the proposed settlement in *Amchem* would be akin to establishing a court-ordained, "nationwide administrative claims processing regime[.]"[388] Justice Ginsburg acknowledged that such an approach may "provide the most secure, fair, and efficient means of compensating victims of asbestos exposure," but "Congress . . . has not adopted such a solution."[389] In restraining the Court from acting beyond its prescribed authority, Justice Ginsburg appeared to preempt public criticism of a legislating Court.

At the root of Justice Ginsburg's concern for institutional legitimacy is her belief that the rule of law is viable only when the court's directives are clear and reasonable and the judiciary works incessantly to accommodate competing process values. Her argument in *Arizonans* and *Agostini* resurfaces in *Amchem*: the legitimacy of the Court depends in part on adherence to procedural rules designed to assure dignity and participation, even when straying from the rules might yield a substantively satisfying or efficient result.[390] Succumbing to the temptation to stray undermines the potency of the procedural device and portrays the Court as vulnerable to social and political pressures.[391] In her view, the Court should confine its authority to the power prescribed in formal procedural rules that by design reflect a balance of competing values. In keeping with this exercise of restraint, the Court must refrain from interpretive leaps such as that suggested by the class counsel and the defendants in *Amchem*. At the same time, when the Court's determinations are not constrained by formally prescribed rules—e.g., in determining whether subject matter jurisdiction at the moment of judgment is sufficient, as in *Caterpillar*—then the Court should formulate its own procedural rules in a manner that best accommodates the full range of competing process values for the "genre of cases."

Although *Allnet*, *Matsushita*, *Amchem*, and *Caterpillar* do not comprise a definitive blueprint of Justice Ginsburg's approach of legal process and

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[388] *Id.* at 628.

[389] *Id.* at 628-29. Justice Ginsburg's concern that the proposed settlement *Amchem* would overstep the authority of the judiciary seems similar to Lon Fuller's argument that courts should not decide substantive legal questions involving "polycentric" tasks. *See* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978). A polycentric task is one that requires consideration of the interests of a multiplicity of parties. *See id.* at 395. Since disputes that are polycentric in nature can be resolved in more than one way, Fuller argues that the court should avoid them, as it is not equipped to make such complex policy decisions. *See id.* at 395-98. In *Amchem*, there was no singular method of settling the asbestos litigation that would have served the conflicting interests of all class members. The solution pressed upon the Court arguably involved policymaking to a degree that it could not competently, nor prudently, handle.

[390] *See supra* notes 254-263 and accompanying discussion.

[391] *See* Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992).

procedure, they do provide preliminary insight. Her judicial opinions address the efficiency-fairness tension, along with the Court's broader objective of preserving its legitimacy. None of those values, taken alone, dictate her decisions. Nonetheless, the interplay among those values animates her procedural decisionmaking. The final Part of this article endeavors to more fully describe that dynamic.

IV. VALUES PROCEDURALISM

Justice Ginsburg's writings confirm that her views on judicial process are integral to her decisionmaking. Her opinions in class action cases provide insight into her approach to the procedural aspects of legal process, and on a more general level, her jurisprudence. We draw two inferences from these cases. First, the value choices she makes in rendering a procedural decision are usually deliberate and calculated. As she expressed in *Allnet*, her judicial opinions are written for a "genre of cases, not for one day and case alone."[392] Aware of the precedential impact of her opinions, she is careful not to articulate a view that may be used in a future case to disrupt the balance among process values. *Allnet* was such a case, in which she declined standing to the plaintiff association because a contrary ruling would have opened the door to potentially unfair and abusive associational litigation.

The second inference, a correlative of the first, is that Justice Ginsburg is averse to applying procedural rules in a "mechanical" or "mindless" fashion.[393] Her dynamic rather than dogmatic approach finds guidance not only from the terms of a rule,[394] but also from contextual considerations of fact, policy, and value. By dynamism we mean that her jurisprudence of process and procedure is not fixed on any particular value. Her procedural decisions reflect her sensitivity to the commonality and antagonism that exists among process values.

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[392] Telecommunications Research & Action Ctr. v. Allnet, 806 F.2d 1093, 1095 (D.C. Cir. 1986).

[393] *See* Center for Nuclear Responsibility v. United States Nuclear Regulatory Comm'n, 781 F.2d 935, 946 (D.C. Cir. 1986)(Ginsburg, J., dissenting)(rejecting the majority's "mindless" application of Rule 58); Spann v. Colonial Village, Inc., 899 F.2d 24, 32 n.4 (D.C. Cir. 1990)(citing United States v. Perez, 736 F.2d 236, 237-38 (5th Cir. 1984))(disfavoring the "mindless" application of Rule 58).

[394] That Justice Ginsburg does not necessarily confine herself to the text of a rule in determining the correct procedural result in a case does not mean that she believes judges are free to abrogate the procedural requirements of a rule. To the contrary, as previously discussed in Part II.C., she insists on the accurate application of procedure. *See* Agostini v. Felton, 521 U.S. 203, 212 (1997), 521 U.S. at 212; *see also supra* notes 176-95 and accompanying discussion. We merely suggest that what is "accurate" in her view depends upon the contextual and value considerations attendant to a given case.

Dispelling the notion that Justice Ginsburg's approach to process and procedure is one-dimensional is but one step in doing justice for the Justice. The class action cases permit the next step: a description of the dynamic. The remainder of this Part takes up this task. Before proceeding, however, we bear in mind that our conclusions are based on a limited universe of ever-expanding information.

We know from her judicial opinions that Justice Ginsburg strives to be a principled decisionmaker; the question that remains is by what principles she abides. In hopes of illuminating the interplay of those principles, we suggest a descriptive term: values proceduralism.[395] Values proceduralism refers to the interpretation or application of open-ended or ambiguous procedural rules in a manner that reflects a context-dependent accommodation of process values. In following this mode of procedural decisionmaking, a jurist is not captivated by concerns emanating from a particular process value. She does not even arrive at a decision by weighing value concerns anew in every case, as a utilitarian or law and economics theorist engages in cost-benefits analysis. Rather, the jurist looks at the technical requirements and larger aims of the procedural rule in question and examines the differing balances of process values served by one construction of the rule rather than another. She then selects the construction that best reflects the accommodation of values that she perceives to be embodied in the rule.[396] Justice Ginsburg's writings tend to embrace this values proceduralism approach.

Integral to the values proceduralism approach is careful attention to the process value concerns embodied in specific procedures. Only analysis of the formation of a procedural rule reveals its purposes and its accommodation of competing process values. Once a judge identifies those aspects of a rule, she can better determine how they should play out with the facts presented in a given case.

Values proceduralism describes Justice Ginsburg's practice of looking closely at the value concerns underlying a rule for guidance in construing and applying the rule. Justice Ginsburg's opinions in *Amchem* and *Agostini* illustrate this approach. In *Amchem*, Justice Ginsburg refused to approve a settlement class that bypasses the safeguards in FRCP 23, for that would facilitate the convenient, yet unfair, settlement of future claims, a result

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[395] We hope that "values proceduralism," as a newly-minted term, will avoid the problems associated with conventional labels. *See supra* note 6 and accompanying discussion.

[396] Values proceduralism runs parallel, in some respects, to Legal Process theory. Members of the Legal Process movement argue that judges should develop the common law in light of the purposes and policies behind the legal rules they are obligated to interpret and apply. *See* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 505-08 (1988)(book review) (summarizing the Legal Process movement). In taking a values proceduralism approach, as we suggest she does, Justice Ginsburg's judging style appears to bear the influence of Legal Process theory.

inconsistent with the balance between efficiency and fair representation that is structured into FRCP 23. Similarly, Justice Ginsburg disagreed with the majority's employment of FRCP 60(b) in *Agostini* to revisit the Court's holding in *Aguilar*. In her view, Rule 60(b) is not a tool for reopening the litigation of legal or factual claims that form the basis of a judgment. Construing the rule as the majority did would undermine the integrity of the Court, a process value firmly embedded in the rule.[397]

Conceptualizing Justice Ginsburg's procedural approach as one of values proceduralism offers a broad framework for understanding how the diverse themes in Justice Ginsburg's writings comprise her judicial philosophy. The numerous concerns that surface in her writings are taken by some as inconsistencies in her procedural jurisprudence, or as indications of her "moderate" style of judging. Both of these interpretations misconstrue her approach to procedural aspects of legal process.[398] Justice Ginsburg's opinions disclose no predilection toward any one value concern; they instead highlight her aim of construing and applying procedural rules in ways that best reflect the accommodation of the value concerns embedded in the rules.

Implicit in the values proceduralism approach is faith in the capacity of

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[397] That the integrity of the courts is a concern embodied in Rule 60(b)(5) is evinced by the conditions the rule establishes for setting aside a final judgment or order. *See* FED. R. CIV. P. 60(b)(5). Rule 60(b)(5) dictates that courts cannot nullify a prior judicial pronouncement arbitrarily. Relief from a judgment or order is proper only in circumstances where denial of such relief would be unjust.

[398] For instance, Justice Ginsburg has rendered decisions that favor efficiency in some instances and fairness in others. Her pattern of judicial behavior makes sense in light of the differing value concerns served by the procedural rules implicated in those cases. Where efficiency is a primary concern of the procedural rule at issue, Justice Ginsburg's decisions tend to reflect a concomitant emphasis on enhancing court efficiency. *See* Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996); *In re* Korean Airlines, 829 F.2d 1171 (D.C. Cir. 1987); *see also supra* notes 77-93 and 95-97 and accompanying text. In contrast, when Justice Ginsburg detects that a procedural rule is especially concerned with ensuring fairness to litigants (e.g., FRCP 23), she endeavors to construe and apply the rule so as to give effect to its accommodation of fairness. As another example, Justice Ginsburg's different approaches to the mootness doctrine in *Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991), and *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), are also reconcilable under the rubric of values proceduralism. Justice Ginsburg found that *Arizonans* presented a moot claim, whereas *Sullivan* did not. The difference turned on the question of how, in her view, the mootness doctrine accommodates competing value concerns. The mootness doctrine prevents the waste of judicial resources on extinguished disputes, but it does not bar adjudication of controversies that are not truly resolved—i.e., those that are "capable of repetition, yet evading review." *Sullivan*, 938 F.2d at 1376. In *Sullivan*, the plaintiff had no opportunity to litigate his claim before the court, as the consent waivers were withdrawn within three months. Justice Ginsburg perceived that the dispute at issue in that case could foreseeably arise again in the future. *Arizonans* presented a different factual circumstance. There, the plaintiff had been afforded her day in court, and the challenge to the English Only law was kept alive in the Arizona state courts, assuring some form of judicial review. *See* Serrano, *supra* note 175, at 222.

procedures particularly, and process rules generally, to serve two important functions. The first is to foster the perception that procedural rules make for fair adjudication of disputes. Procedural fairness is integral to an individual's assessment of the overall fairness of the judicial system, and sometimes, may even alleviate misgivings about the fairness of the substantive result. The second is to maintain the legitimacy of the judiciary. Procedural rules, as components of legal process, bear heavily on the public's sense of the integrity of the courts. Although no guarantor of appropriate judicial behavior, procedure cultivates confidence among the public that the courts will exercise their authority within a settled, pre-established framework. In that sense, procedural rules instill a sense of stability to the judicial system, as they are constants, to some degree, around which individuals may make decisions regarding how to deal with their legal interests, rights, and claims.[399]

V. CONCLUSION

Portrayed as the consummate moderate, Justice Ginsburg's judicial philosophy has often been described in terms loaded with political baggage. Such descriptions fail to illuminate the complex value considerations informing her judicial decisionmaking. Our examination of Justice Ginsburg's writings reveals that the sometimes seemingly inconsistent themes in her process jurisprudence—a flexible approach to procedural rules in one situation and strict adherence in others—is instead what we have described as a values proceduralism. As scholars and commentators of her judicial philosophy, we should avoid misshapen political labels and instead, do justice for the Justice.

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[399] *See* Hardin, *supra* note 212, at 1988. The doctrine of stare decisis shares in the conception of rules as an instrument of stability. Stare decisis indicates how a court may rule on an issue that has been previously decided by precedent. *See id.* Posner, commenting on stare decisis from a law and economics perspective, describes the body of precedents in an area of law as a "stock of capital goods" that yields productive services over time. Posner, *Economic Analysis*, *supra* note 213, at 419-21. Like settled rules of substantive law, rules of process and procedure can form the basis of reliance interests.