Ruth Bader Ginsburg, The Great Proceduralist

JEFFREY S. SUTTON*

Brooklyn is a place for breaking barriers, as one son and one daughter of the Borough confirm. Jackie Robinson and Ruth Bader Ginsburg did it the same way, out-performing the existing stars and mastering the finer points of the game.

Throughout history, sad to say, newcomers rarely enter closed fields merely because they are as good as the current players. The secret to entry, the secret to change, is establishing superiority, especially when it comes to the most difficult-to-execute parts of the game. Opening hearts requires opening minds. And opening minds often requires seeing how the new entrant will change the game.

For all of the talents and personal qualities that Jackie Robinson brought to the challenges of ending the color barrier in baseball and other sports, he was especially good at the inside-baseball parts of the game. Sure, he batted over .300 for six straight seasons, stole lots of bases, could hit for power, and helped the Dodgers win many games.[1] But what fellow players and astute fans likely appreciated most were the less prominent, less measurable, parts of his game: his ability to take the extra base, his penchant for stealing home, his ability to avoid double plays on offense and turn them on defense, his fielding prowess, his ability to advance a runner. He not only could play like the rest; he was better than the rest, or at least most of them, especially if you pulled all of these statistical and non-statistical measures together. All of this through a Major League Baseball career that did not start until age twenty-eight.[2]

If 42's wide-ranging skills brought shame to the color line, 107's skill set did the same for the gender line. No one has yet found a way to apply sabermetrics to the legal profession. But they will. And when they do, when they come up with a Wins Above Replacement scorecard for practicing lawyers and an On Base Plus Slugging Percentage rating for justices, I have a prediction: lawyer Ruth Bader Ginsburg and Justice Ginsburg will do well.

Why? Ask Jackie Robinson. She excelled at the parts of law that distinguish lawyers and judges the most. Sure, she won landmark constitutional cases as an advocate and wrote them as a Justice. But ask a first-year law student or grizzled lawyer what's the most challenging general subject, and you will get the same answer: procedure. Procedural law is lawyer's law. No sane individual would learn it if they didn't have to. But every litigator has to. Few enjoy it at the start. It's technical. It's dry as dust. It's complicated. And it often turns cases.

In the absence of sabermetrics evidence to prove me wrong, I wonder: was Justice Ginsburg the greatest proceduralist to serve on the U.S. Supreme Court? Ample evidence suggests so. During her twenty-seven years on the Court, no

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* Judge, United States Court of Appeals for the Sixth Circuit.

[1] Rick Swaine, *Jackie Robinson*, SOC'Y FOR AM. BASEBALL RES., https://sabr.org/bioproj/person/jackie-robinson/ [https://perma.cc/ZEP5-5C8G].

[2] *Id.*

one to my knowledge took on more of the procedural cases than she did. Her serial assignments confirm what Chief Justice Rehnquist, Chief Justice Roberts, and everyone else knew: she was the go-to justice when it came to untangling vexing procedural disputes. It didn't hurt that, before joining the Court, Justice Ginsburg had taught civil procedure for nearly two decades and had handled many cases on behalf of the American Civil Liberties Union.[3] With characteristic precision and clarity, she brought order (and unanimity) to some of the Court's most perplexing procedural cases over nearly three decades.

No example stands taller than *Arbaugh v. Y & H Corp.*[4] Justice Ginsburg penned a unanimous, to-the-point opinion that brought coherence to an area sorely in need of it: clarifying when a statutory requirement restricts a federal court's subject matter jurisdiction.[5] She noted that "jurisdiction" had come to be a word of "many, too many, meanings," and that courts had been "profligate" in imprecisely using the term.[6] She showed how courts, too often, had been confusing mandatory claim-processing rules for jurisdictional limitations.[7] Failure to appreciate the distinction had real-world consequences. Because a party may not forfeit or waive a jurisdictional limitation, any lax labeling of these requirements permitted sharp-elbowed litigants (or slow-to-learn litigants) to raise the limitation for the first time on appeal. That is always inefficient and sometimes unfair. Mindful of these and other consequences, Justice Ginsburg imposed order on chaos, laying out a "readily administrable bright line" rule: a procedural requirement creates a jurisdictional limitation only if Congress clearly says so.[8]

In the last fourteen years, over 7,000 cases have invoked *Arbaugh*.[9] The U.S. Supreme Court has issued an opinion applying it to a new procedural requirement in almost every one of those years.[10] Justice Ginsburg, no surprise,

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[3] *Ruth Bader Ginsburg*, OYEZ, https://www.oyez.org/justices/ruth_bader_ginsburg [https://perma.cc/5GWY-Y9CE]; *see, e.g.*, Duren v. Missouri, 439 U.S. 357 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Edwards v. Healy, 421 U.S. 772 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973) (arguing as amicus curiae on behalf of the ACLU); Reed v. Reed, 404 U.S. 71 (1971).

[4] 546 U.S. 500 (2006).

[5] *Id.* at 510.

[6] *Id.* (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 90 (1998)).

[7] *Id.*

[8] *Id.* at 515–16.

[9] Citing References to *Arbaugh v. Y & H Corp.*, WESTLAW EDGE, https://westlaw.com (search "546 U.S. 500"; then bring up "Citing References"; follow "Cases").

[10] *See* Fort Bend Cty., Tex. v. Davis, 139 S. Ct. 1843, 1851–52 (2019); Patchak v. Zinke, 138 S. Ct. 897, 906 (2018); Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 20 n.9 (2017); United States v. Kwai Fun Wong, 575 U.S. 402, 409–10 (2015); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013); Gonzalez v. Thaler, 565 U.S. 134, 141–42 (2012); Stern v. Marshall, 564 U.S. 462, 480 (2011); Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 435–36 (2011); United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 271 (2010); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 162–63 (2010); Union Pac. R.R. v. Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment, Cent.

wrote a good many of them. Time after time, she convinced all nine members of the Court to speak as one through her voice, one nearly inaudible at a dinner table but one that spoke volumes in an opinion.[11]

She did the same thing in another area that had bewildered litigants and lower court judges. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.* tackled the "*Rooker-Feldman*" doctrine,[12] which purports to explain when a state court judgment divests a federal district court of jurisdiction to hear claims relating to that judgment.[13] Here again, a tricky point of process had been "[v]ariously interpreted in the lower courts," and "construed to extend far beyond [its] contours" in ways that betrayed a misapprehension of subject matter jurisdiction limits.[14] What had divided the lower courts united the Supreme Court with Justice Ginsburg at the helm. She wrote a unanimous opinion, mopping up the mess and distilling the inquiry into a one-sentence test: the *Rooker-Feldman* doctrine strips federal district courts of jurisdiction only to hear "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."[15]

Exxon Mobil's statistics outrun *Arbaugh*'s. It's racked up more than 8,000 case citations.[16] And the Court has barely touched it since,[17] suggesting Justice Ginsburg did some good in an area that had spawned seven certiorari petitions in one year.[18] While the lower courts have not all followed her lead and while

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Region, 558 U.S. 67, 81–82 (2009); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134 (2008); Bowles v. Russell, 551 U.S. 205, 211 (2007).

[11] *See* Fort Bend Cty., Tex. v. Davis, 139 S. Ct. 1843 (2019); Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13 (2017); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145 (2013); Union Pac. R.R. v. Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67 (2009). Not to mention, Justice Ginsburg wrote at least one unanimous case foreshadowing *Arbaugh*: *Kontrick v. Ryan*, 540 U.S. 443 (2004). I'll hazard a guess that she wrote one more—her fingerprints are all over the Court's per curiam opinion in *Eberhart v. United States*, 546 U.S. 12 (2005).

[12] 544 U.S. 280, 284 (2005).

[13] *Id.* at 283.

[14] *Id.*

[15] *Id.* at 284.

[16] Citing References to *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, WESTLAW EDGE, https://westlaw.com (search "544 U.S. 280"; then bring up "Citing References"; follow "Cases").

[17] *See* Skinner v. Switzer, 562 U.S. 521, 532 (2011); Lance v. Dennis, 546 U.S. 459, 466 (2006).

[18] *See* Blaisdell v. City of Rochester, N.H., 544 U.S. 957 (2005) (First Circuit); Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 284 (2005) (Third Circuit); Stacey v. City of Hermitage, Pa., 546 U.S. 931 (2005) (Third Circuit); Holloway v. Ark. State Bd. of Architects, 544 U.S. 957 (2005) (Eighth Circuit); Synclair v. Fresno Cty., Cal., 546 U.S. 1027 (2005) (Ninth Circuit); Guttman v. Khalsa, 546 U.S. 801 (2005) (Tenth Circuit); Sophocleus v. Ala. Dept. of Transp., 546 U.S. 801 (2005) (Eleventh Circuit).

some work remains to be done in the area,[19] here's to hoping that at some point we can all come to appreciate what she did: if your name is not Rooker or Feldman, the odds are high the doctrine is not for you.

If any of this makes you wonder whether Justice Ginsburg valued form over substance, think again. Her process-driven decisions served the goal of refocusing lawyers and judges on clear rules that served the ends of justice and eliminating those that did not.

One last opinion from her repertoire illustrates the point. *Becker v. Montgomery* isn't a case most students come across in law school.[20] It's too ordinary, too run of the mine. But it's also readable and relatable. Dale Becker filed a civil rights lawsuit on his own, worried about exposure to second-hand cigarette smoke in prison.[21] He lost.[22] Undeterred, he filed an appeal.[23] Perhaps out of a sense of the gravity of the pleading, he typed his signature on the notice of appeal rather than signing it by hand.[24] Without giving Becker a chance to fix the defect, the court of appeals dismissed the appeal for lack of a signature and lack of jurisdiction.[25]

In yet another unanimous opinion, Justice Ginsburg rejected this penny pinching. She explained that Civil Rule 11(a)'s signature requirement contemplated that its omission could be fixed when flagged for the party.[26] She reminded the reader that procedural rules can (and often explicitly do) value substance over form.[27] And she emphasized that "imperfections . . . should not be fatal" when there is no "genuine doubt" about what's going on.[28]

The end of procedure is substance, of course. And that substantive end is best advanced by clear procedural rules, ideally made through unanimous or near-unanimous decisions. Lack of clarity in law not only haunts lawyers; it hurts litigants too. It drives up costs, and it increases barriers to justice. Lower-court judges, the "inferior" judges of the federal system, appreciate clarity as well. Many of our cases would not exist but for imprecise decisions of the Court; and much of this litigation could be resolved far more promptly without the sharp fencing that unruly procedure permits. Thanks to Justice Ginsburg, the

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[19] *See* Vanderkodde v. Elliott, 951 F.3d 397, 404–09 (6th Cir. 2020) (Sutton, J., concurring); *In re* Smith, 349 F. App'x 12, 17–18 (6th Cir. 2009) (Sutton, J., concurring in part and dissenting in part).

[20] 532 U.S. 757 (2001).

[21] *Id.* at 760.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 761.

[25] *Id.*

[26] Becker v. Montgomery, 532 U.S. 757, 764 (2001) ("'omission of the signature requirement' may be 'corrected promptly after being called to the attention of the attorney or party'" (quoting FED. R. CIV. P. 11(a))).

[27] *See id.*; *see, e.g.*, FED. R. APP. P. 3(c)(4) ("An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.").

[28] *Becker*, 532 U.S. at 767.

Court during her twenty-seven-year tenure cleaned up many areas of procedure that stood in the way of the "just, speedy, and inexpensive" resolution of every case, in the words of Rule 1 of the Federal Rules of Civil Procedure.[29] Think about that accomplishment. In how many other areas of federal law do we find clear rules of law announced through super-majority decisions?

Because procedure and substance go together, superiority in the one often leads to superiority in the other. That is Justice Ginsburg. Call her the Notorious RBG if you like. But for me, she is Justice Ginsburg, the Great Proceduralist, who broke barriers in law by mastering the most vexing features of the legal system.

[29] FED. R. CIV. P. 1.