

# Ruth Bader Ginsburg and Sensible Pragmatism in Federal Jurisdictional Policy

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*The core of legal pragmatism is pragmatic adjudication, and its core is heightened judicial concern for consequences and thus a disposition to base policy judgments on them rather than on conceptualisms and generalities. But rather than being a synonym for ad hoc adjudication, in the sense of having regard only for the consequences to the parties to the immediate case, sensible legal pragmatism tells the judge to consider systemic, including institutional, consequences as well as consequences of the decision in the case at hand.*

—Richard A. Posner<sup>1</sup>

*The more you understand our thinking, the more you find it difficult to talk about.*

—Shunryu Suzuki<sup>2</sup>

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<sup>1</sup> RICHARD A. POSNER, *HOW JUDGES THINK* 238 (2008).

<sup>2</sup> SHUNRYU SUZUKI, *ZEN MIND, BEGINNER'S MIND* 90 (1970).

## I. INTRODUCTION

Setting out to assess the distinctive contribution that Justice Ruth Bader Ginsburg has made to the Supreme Court's jurisprudence in the fields of procedure and jurisdiction is a daunting task. Justice Ginsburg is a career-long procedure expert who made serious scholarly contributions to the field before being appointed to the bench. Since joining the Supreme Court fifteen years ago, she has authored many of its most consequential procedure opinions: *Amchem Products, Inc. v. Windsor*,<sup>3</sup> the leading statement on the boundaries of adequate representation in class action litigation; *Gasperini v. Center for Humanities, Inc.*,<sup>4</sup> the Court's last major statement on the *Erie* doctrine; *Taylor v. Sturgell*,<sup>5</sup> its most consequential statement on the doctrine of privity and the requirements for binding nonparties to the preclusive effects of a judgment; *New Hampshire v. Maine*,<sup>6</sup> in which the Court embraced the doctrine of judicial estoppel as a matter of federal common law; *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*,<sup>7</sup> which restated and clarified the *Rooker/Feldman* doctrine relating to the original jurisdiction of the federal district courts—the list goes on. Justice Ginsburg has been quoted more than once as saying that she would write the opinions for all the procedure cases that come before the Court if only her colleagues would let her,<sup>8</sup> and her love of the subject is readily apparent in the product of her pen.

My examination of Justice Ginsburg's approach to procedure and jurisdiction will take as its point of departure one of her less well-known contributions: her dissenting opinion in *City of Chicago v. International College of Surgeons*.<sup>9</sup> The case involved what to many will be a recondite issue: the power of a federal district court, following removal, to undertake a closed-record review of an administrative decision that has been rendered by a state agency—a form of review that appears appellate in nature and hence not appropriate for a court whose jurisdiction is original in character—when that review is joined to a related federal constitutional claim.<sup>10</sup> Though the doctrinal question was obscure, the differing approaches of the majority and

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<sup>3</sup> 521 U.S. 591 (1997).

<sup>4</sup> 518 U.S. 415 (1996).

<sup>5</sup> 128 S. Ct. 2161 (2008).

<sup>6</sup> 532 U.S. 742 (2001).

<sup>7</sup> 544 U.S. 280 (2005).

<sup>8</sup> Justice Ginsburg repeated this sentiment to me at the Moritz College of Law symposium, revealing a guileless smile that made the distinguished and eminent jurist look for a moment like a child on Christmas morning.

<sup>9</sup> 522 U.S. 156, 175 (1997) (Ginsburg, J., dissenting).

<sup>10</sup> *Id.* at 159, 163 (majority opinion).

the dissent in *Surgeons* highlight two interrelated issues of broad importance, which I will examine in this Article.

The first issue relates to a particular philosophy of judging and its relationship to language. Justice Ginsburg's procedure jurisprudence exhibits a powerful strain of sensible legal pragmatism in the sense that Judge Posner has used that term.<sup>11</sup> Her approach to procedure questions seems to be guided most strongly by her apprehension of the impact that the Court's ruling will have upon a body of stable practice that has arisen over time, rather than being guided by strong commitments to particular formal or conceptual precepts. That pragmatism appears to be inspired in part by Justice Ginsburg's acute awareness of the Achilles' heel of textualism: the limited capacity of statutory language to encompass, in its express terms, sensible solutions to problems not addressed or contemplated by the drafters.

*Surgeons* illustrates this dynamic. In dissenting from the majority's ruling (written by Justice O'Connor)—which authorized federal district courts to hear appeals from closed-record proceedings by state agencies<sup>12</sup>—Justice Ginsburg fights against a facile textualist result. Although the decision of the majority finds some superficial justification in broadly worded statutory language, it effects a dramatic change in jurisdictional policy that, Justice Ginsburg argues, the drafters of the relevant statutory provisions cannot be assumed to have anticipated, intended, or desired.<sup>13</sup> In this respect, Justice Ginsburg's analytical method in *Surgeons* prefigures her more widely known dissent in the *Allapattah/Ortega* cases (which dealt in part with the same statutory scheme).<sup>14</sup> Professor James Pfander has coined the term "sympathetic textualism" in analyzing the statutory conundrum that gave rise to *Allapattah* to describe such a pragmatic, practice-based approach, and the phrase captures a part of what I aim to describe here.<sup>15</sup> If anything, Justice Ginsburg's deployment of that method in *Surgeons* is even more pointed. Ginsburg argues passionately in *Surgeons* for a recognition of the inherent limitations of language in embodying legislative priorities.<sup>16</sup>

The second issue that I will examine relates more specifically to the questions of jurisdictional policy with which the *Surgeons* Court grappled. The issue might be thought of as a special application of the pragmatist vs. textualist debate described above, but it also speaks to a broader set of

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<sup>11</sup> See POSNER, *supra* note 1, at 238.

<sup>12</sup> *Surgeons*, 522 U.S. at 163.

<sup>13</sup> *Id.* at 177 (Ginsburg, J., dissenting).

<sup>14</sup> *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 577–95 (2005) (Ginsburg, J., dissenting).

<sup>15</sup> See James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 112–14 (1999).

<sup>16</sup> See *Surgeons*, 552 U.S. at 183–84 (Ginsburg, J., dissenting).

questions about the federal courts and their administration of their own jurisdiction. Federal statutes that extend or restrict the jurisdiction of the federal courts are methods that Congress can use to carry its substantive policy goals into effect. In shaping the jurisdiction of the federal courts, whether through broad and generic grants of jurisdiction such as the diversity and federal question statutes or through the enactment of more targeted provisions, Congress acts to promote and protect interests that it considers important or to dissuade practices that it considers inimical. In other work, I have focused attention on certain targeted statutory grants of federal jurisdiction and emphasized the need to recognize the specific legislative policies that they embody.<sup>17</sup> *Surgeons* brings to the fore a complementary issue: the resistance that the Court sometimes displays toward adopting a pragmatic, practice-based approach to the policies embodied in broad, general-purpose jurisdictional statutes.<sup>18</sup> Much of the disagreement between the majority and the dissent in *Surgeons* centers on their different views about how readily a court should read general-purpose jurisdictional statutes to displace broad and stable bodies of practice in the administration of lawsuits within the federal courts.<sup>19</sup>

## II. *CHICAGO V. INTERNATIONAL COLLEGE OF SURGEONS* AND ORIGINAL JURISDICTION

### A. *The Dispute*

*Surgeons* called upon the Court to answer two questions about the intersection of the federal statutes governing removal and supplemental jurisdiction.<sup>20</sup> The first question provoked unanimous agreement: When measuring the substantive scope of the claims that it has the power to hear when a case is removed from state court, can a district court employ the full measure of the supplemental jurisdiction statute just as it would if the case had been filed in federal court in the first instance? The majority and dissent both answered that question in the affirmative.<sup>21</sup> The second question

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<sup>17</sup> See Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2054 (2008).

<sup>18</sup> See *Surgeons*, 522 U.S. at 163–72.

<sup>19</sup> *Id.* at 167, 171–72 (majority opinion); *id.* at 175–76, 186–87, 191 (Ginsburg, J., dissenting).

<sup>20</sup> See 28 U.S.C. § 1367 (2006) (supplemental jurisdiction); 28 U.S.C. § 1441 (2006) (removal); *Surgeons*, 522 U.S. at 175 (Ginsburg, J., dissenting).

<sup>21</sup> See *Surgeons*, 522 U.S. at 165 (majority opinion); *id.* at 176 n.1 (Ginsburg, J., dissenting). The unanimity of the Court's ruling in this regard does not mean that it was

provoked sharp disagreement: When a plaintiff joins an on-the-record appeal from a state agency proceeding to a facial constitutional challenge in state court, may a federal district court hear the case following removal despite the presence of a claim that appears to be appellate, rather than original, in character? Speaking for herself and six colleagues, Justice O'Connor answered this question in the affirmative.<sup>22</sup> Justice Ginsburg, joined by Justice Stevens, dissented.<sup>23</sup>

The dispute in *Surgeons* arose out of the enforcement of Chicago's landmarking laws. The International College of Surgeons (ICS) owned two properties on Lake Shore Drive—old mansions situated across from Lake Michigan—that it wished to develop into high-rise apartments. The Commission on Chicago Historical and Architectural Landmarks (the Commission) designated the mansions as landmarks, making them subject to limitations on development in cases involving the kind of radical alteration that ICS contemplated (near total demolition, leaving only the facades in place). ICS initiated a proceeding before the Commission in which it requested a permit that would allow the development despite the landmark designation. Following a hearing, the Commission rejected the request. ICS then initiated a second proceeding before the Commission under a separate statutory provision that authorized exemptions from landmarking restrictions based upon hardship. The Commission denied the exemption as well.<sup>24</sup>

After each of these denials before the municipal agency, ICS initiated state court proceedings under the Illinois Administrative Review Law to challenge the Commission's decisions. In both cases, ICS brought several types of claims: (1) a request for review of the agency's administrative decision, based on the record developed at the hearing, asserting that the ruling was not justified by the record evidence; (2) federal constitutional claims, both facial and as applied, challenging the landmark ordinance and the manner in which the Commission conducted its proceedings pursuant to that ordinance; and (3) state constitutional claims similar to the federal claims. In response, the defendants removed the cases to federal court, where they were consolidated into a single proceeding. The district court proceeded to rule on the merits, but the Seventh Circuit reversed, concluding that the federal courts lacked jurisdiction and sending the case back with instructions to remand to state court. The Court then granted certiorari on the

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unproblematic. There are some interesting comparisons to be drawn between the treatment of the term "civil action" that the Court relies upon in reaching this conclusion in *Surgeons* and its treatment of that term in the *Allapattah/Ortega* cases. I leave these issues unexplored here, but thank Linda Silberman for alerting me to them.

<sup>22</sup> *Id.* at 167–69.

<sup>23</sup> *Id.* at 186–87 (Ginsburg, J., dissenting).

<sup>24</sup> *Id.* at 159–60 (majority opinion).

jurisdictional issues. The dispute related to the meaning of the term “original jurisdiction” in the statutes governing federal question jurisdiction, removal, and supplemental jurisdiction.<sup>25</sup>

As a general matter, federal district courts are only authorized to exercise original jurisdiction—that is, jurisdiction over disputes that begin their existence with the filing of the case in the district court—in the first instance.<sup>26</sup> In a typical lawsuit, that means filing a complaint with the district court, undertaking any necessary motion practice at the pleadings stage, and then beginning the process of discovery on the road toward eventually having a trial. The idea is for the district court to be the court of first resort in the dispute, overseeing and guiding the development of the record and serving as the primary finder of fact (whether in a bench trial or before a jury). Such an exercise of jurisdiction—one that is original in character—is to be contrasted with an exercise of “appellate jurisdiction,” in which the court works with a discovery record or trial record as it was developed in prior proceedings, along with any factual findings, and reviews that record and those findings, usually with deference, along with any legal issues. General purpose jurisdictional statutes like the diversity and federal question provisions specify that district courts only have the power to exercise original jurisdiction, and the Supreme Court has made clear that this allocation of authority is an essential feature of the federal judicial system.<sup>27</sup>

The removal statute, in turn, authorizes a district court to hear a case by way of removal from state court only if it is a “civil action . . . of which the district courts of the United States have original jurisdiction.”<sup>28</sup> This use of the term “original jurisdiction” encompasses two concepts. First, the lawsuit must be one that could have been filed in a district court in the first place in that it falls within the substantive scope of the district court’s jurisdiction (federal question or diversity, in most cases). Second, the lawsuit must be one that could have been filed in a district court in the first place in that it is original, as opposed to appellate, in character.

The supplemental jurisdiction statute, 28 U.S.C. § 1367, also uses the term “original jurisdiction,” although it does so in a somewhat different posture. This difference in posture lies at the heart of the jurisdictional dispute in *Surgeons*. The statute provides in pertinent part:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental

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<sup>25</sup> *Id.* at 161–65.

<sup>26</sup> 28 U.S.C. §§ 1331, 1332 (2006).

<sup>27</sup> *See, e.g.,* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 431–39 (1996).

<sup>28</sup> 28 U.S.C. § 1441(a) (2006).

jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.<sup>29</sup>

As used in § 1367, “original jurisdiction” is a reference to the substantive range of disputes that the district court is empowered to adjudicate. The supplemental jurisdiction statute was designed to codify the doctrines of pendent and ancillary jurisdiction (with a few modifications) and thereby to authorize district courts to hear certain non-diverse state law claims. In providing that district courts that have “original jurisdiction” of a civil action shall also have “supplemental jurisdiction” over related claims, the statute aims to specify this class of additional non-diverse claims.<sup>30</sup> The federal question and diversity statutes empower district courts to hear certain substantive categories of civil action in their original jurisdiction, and the supplemental jurisdiction statute expands the substantive categories of claims that can be heard as part of the action to include non-diverse state law claims, provided that they are sufficiently related to the federal claims.

This straightforward application of the supplemental jurisdiction statute was one of the disputed issues in *Surgeons*. The plaintiffs asserted both federal question claims (the facial and as-applied federal constitutional challenges), which turned exclusively on the interpretation of federal law, and also claims under state law and the state constitution that arose out of the same common nucleus of operative facts. Given the absence of diversity, the authority of the supplemental jurisdiction statute was necessary for the district court to hear those state law claims. The Court’s holding on the first question described above—that the district court can employ the full range of the supplemental jurisdiction statute in cases that come to it by way of removal, just as it would in cases filed in district court in the first instance—gave the district court that necessary power.<sup>31</sup>

But was that power sufficient to overcome the second potential disability and enable the district court to hear the claims in *Surgeons*? This was the second question for decision in the case, and it implicated the other posture in which the majority found the term “original jurisdiction” to operate in § 1367.<sup>32</sup> Recall that some of the claims in *Surgeons* were distinctly appellate in character: they involved the review of claims that had first been brought in a state agency, on a record that was developed in the agency proceeding, where the court was called upon to review the conclusions of the agency on

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<sup>29</sup> 28 U.S.C. § 1367(a) (2006).

<sup>30</sup> *Id.*

<sup>31</sup> *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 160–68 (1997).

<sup>32</sup> *Id.* at 167.

the record developed below and to accord deference to their findings.<sup>33</sup> There were, in other words, two independent problems when it came to removing these claims to federal court: (1) the substantive character of the claims was inadequate, because they did not arise under federal law and the parties were not diverse; and (2) the claims appeared to be appellate in character, making them inappropriate for a federal district court in any event. Section 1367 enabled the district court to overcome the first problem, whether the claims were filed in federal court in the first instance or (as the *Surgeons* Court held) removed there from state court. But did § 1367 empower the district court to overcome the second problem and hear claims that were not original in character but rather appellate, so long as they were attached to factually related claims that had an independent basis of federal jurisdiction?

The majority answered in the affirmative. The supplemental jurisdiction statute provides that district courts have authority to hear “all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III,”<sup>34</sup> and the Court held that this language swept away not only infirmities to the substantive scope of non-diverse state law claims (which is what the statute was clearly intended to do), but also infirmities arising from the lack of original character in claims that were in fact appellate in nature<sup>35</sup>—an issue that there is no earthly reason to believe Congress intended to address.<sup>36</sup> The revolutionary quality of this reading of § 1367—that its reference to “original jurisdiction” should be read not only to expand the substantive scope of the claims that federal district courts can hear but also to authorize district courts

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<sup>33</sup> *Id.* at 159–60. As the Court indicated, Illinois law strictly limited the review available for agency decisions:

“No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.”

*Id.* at 162 n.2 (quoting 735 ILL. COMP. STAT. 5/3-110 (Supp. 1997) ).

<sup>34</sup> 28 U.S.C. § 1367(a) (2006).

<sup>35</sup> *Surgeons*, 522 U.S. at 168–69.

<sup>36</sup> In discussing another set of interpretive problems under § 1367—the questions surrounding class actions and Rule 20 joinder that gave rise to the Court’s opinion in the *Allapattah/Ortega* cases—Professor Pfander has trenchantly observed: “By reading section 1367 as a general grant of pendent and ancillary jurisdiction and as a decision otherwise to leave many jurisdictional issues untouched, the sympathetic account narrows the range of issues that the federal courts must regard as ones that Congress has definitively resolved.” Pfander, *supra* note 15, at 154; *see also id.* at 125 n.67 (identifying *Surgeons* as one of the casualties of aggressive textualism under § 1367).

to act as appellate tribunals in state agency cases—was the source of the disagreement between the majority and the dissent.<sup>37</sup>

In reaching its conclusion, the majority framed its analysis as a simple matter of applying the plain language of the statute. “[O]nce the case was removed, the District Court had original jurisdiction over ICS’ claims arising under federal law, and thus could exercise supplemental jurisdiction over the accompanying state law claims so long as those claims constitute ‘other claims that . . . form part of the same case or controversy.’”<sup>38</sup> Reinforcing its heavy reliance upon the text of § 1367, the majority went on to explain that its ruling in *Surgeons* did not depend upon any assumption that ICS’s claims could have been brought on a stand-alone basis.<sup>39</sup> Had ICS been diverse from the defendants, and had it chosen to seek only review of the agency decision without adding federal constitutional claims, then the question of whether those claims are appellate in nature and hence incompatible with the original jurisdiction of the district court would have been squarely presented. That question, however, was not relevant to the majority’s analysis. “[T]o decide that state law claims for on-the-record review of a local agency’s decision fall within the district courts’ ‘supplemental’ jurisdiction under § 1367(a),” the Court held, “does not answer the question, nor do we, whether those same claims, if brought alone, would substantiate the district courts’ ‘original’ jurisdiction over diversity cases under § 1332.”<sup>40</sup>

This is an astonishing assertion. *Surgeons* appears to stand for the proposition that the most blatant violation of the *Rooker/Feldman* doctrine—asking a district court to exercise appellate review of a state court judgment and relieve the disappointed party of the effects of that judgment—can be accomplished simply by joining that appellate claim to a factually related original federal question claim and bringing the appeal under the umbrella of the court’s “supplemental” jurisdiction. The majority’s attachment to strict textualism leads it down this path without any apparent hesitation.

Justice Ginsburg frames the consequences of this strict textualism squarely in her dissent. “The bare words of §§ 1331, 1332, and 1367(a) permit the Court’s construction,” she acknowledges, after laying out the

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<sup>37</sup> *Surgeons*, 522 U.S. at 167–68 (majority opinion); *id.* at 186–87 (Ginsburg, J., dissenting).

<sup>38</sup> *Id.* at 165 (majority opinion) (quoting 28 U.S.C. § 1367(a) (2006)).

<sup>39</sup> *Id.* at 172.

<sup>40</sup> *Id.*; *see also id.* at 175 (Ginsburg, J., dissenting):

The review that state law provides is classically appellate in character—on the agency’s record, not *de novo*. Nevertheless, the Court decides today that this standard brand of appellate review can be shifted from the appropriate state tribunal to a federal court of first instance at the option of either party—plaintiff originally or defendant by removal.

revolutionary nature of the Court's holding.<sup>41</sup> "For the reasons advanced in this opinion, however, I do not construe these prescriptions, on allocation of judicial business to federal courts of first instance, to embrace the category of appellate business at issue here."<sup>42</sup> The Court's most dedicated proceduralist then goes on to set forth a different approach to the question.<sup>43</sup>

### B. *The Doctrinal Landscape*

Several precedents offered a clear basis for holding that deferential closed-record review of a state agency proceeding constituted an appellate proceeding not within the original jurisdiction of a district court. The Court had squarely held as much in its most closely analogous decision, *Chicago, Rock Island & Pacific Railroad Co. v. Stude*.<sup>44</sup> *Stude* involved an appeal from a condemnation proceeding under the eminent domain laws of Iowa. Plaintiff, the condemnor, was dissatisfied with the finding made by the state executive authority (the sheriff) concerning the compensation that it owed for the condemned land. The condemnor filed suit in federal court on the basis of diversity, invoking an Iowa law that authorized parties to take an appeal from a condemnation award.<sup>45</sup> Iowa law required the petitioner in such an action to file with the court the complete record developed in the sheriff's proceeding and treated that record as presumptive evidence of the rights of the parties.<sup>46</sup>

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<sup>41</sup> *Id.* at 175–76 (Ginsburg, J., dissenting).

<sup>42</sup> *Id.* at 176.

<sup>43</sup> *Id.*

<sup>44</sup> 346 U.S. 574, 580–82 (1954).

<sup>45</sup> *Id.* at 575–77. The condemnor also filed a parallel action in Iowa state court. *Id.* at 577. Pursuant to state law, the condemnor was realigned as the defendant in that action (even though it was the condemnor that initiated it). *Id.* Following that realignment, the putative "defendant" removed its own action to federal court. *See id.* Presumably, the condemnor took this action in anticipation of the possibility that jurisdiction would not lie in the federal district court. If the federal action were dismissed after a lengthy proceeding, the statute of limitations might run on the action and the condemnor might find itself without a remedy. If the removed state action were remanded to state court, however, the statute of limitations would be satisfied and the condemnor could proceed, albeit not in its preferred forum. And, in fact, the Supreme Court ordered that the removed action be remanded, holding that the condemnor was still a "plaintiff" within the meaning of the federal removal statute and hence unable to invoke its provisions, notwithstanding the formal realignment of parties that occurred in the state court proceeding. *See id.* at 578–80.

<sup>46</sup> *See Stude*, 346 U.S. at 581–82.

The right to take the land and the ensuing right to damages here spring from the exercise of the power of eminent domain . . . . The sheriff, or the clerk of the state district court in case of appeal, must file in the county recorder's office all the papers

The review requested, in other words, constituted deferential review of a record developed in proceedings before a state executive body.

The Court concluded that such a proceeding was not appropriately original in character and affirmed the federal district court's granting of a motion to dismiss. As both a formal and a functional matter, the Court explained, "[t]he steps taken by the petitioner were those to perfect an appeal to the Federal District Court" rather than to file an original action.<sup>47</sup> "The transcript on appeal was filed in the federal court, and the complaint filed sought a review of the commission's assessment of damages" rather than making any "prayer for damages" for some cognizable injury (the petitioner being the condemnor and not the party whose land was seized).<sup>48</sup> "In short, it was an attempt of the petitioner to review the state proceedings on appeal to the Federal District Court."<sup>49</sup> Such an action could not be heard under the court's original jurisdiction, regardless of what the state courts permitted, for a district court "does not sit to review on appeal action taken administratively or judicially in a state proceeding. A state 'legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction.'"<sup>50</sup>

The Court indirectly reinforced this proposition in *Horton v. Liberty Mutual Insurance Co.*<sup>51</sup> *Horton* involved an award under a Texas worker's compensation statute. The decision focuses primarily on the 1958 amendments to the federal diversity statute and the proper method for calculating the amount in controversy in a diversity action involving an anticipated compulsory counterclaim. Because the action was filed in an attempt to set aside the worker's compensation award and secure an alternative outcome, however, the question also arose whether the suit was original in character and hence a proper action for the federal district court to entertain. In a brisk passage of the opinion that was not substantially contested by the sharp dissent in the 5–4 ruling, the majority explained that this action was indeed original in character because of the de novo nature of the proceedings required under state law.<sup>52</sup> The controlling Texas statutes provided that, upon the filing of a lawsuit by either party following a

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filed in the [eminent domain] proceeding. The Iowa Code makes this record presumptive evidence of title in the condemnor.

*Id.* at 581 (citations omitted).

<sup>47</sup> *Id.* at 580.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 581.

<sup>50</sup> *Id.* (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 317 (1943)).

<sup>51</sup> 367 U.S. 348 (1961).

<sup>52</sup> *Id.* at 349–55.

worker's compensation award, the award was vacated and the suit would proceed afresh, without reference to the prior award or the previously developed record.<sup>53</sup> This fact distinguished the proceeding in *Horton* from that in *Stude*, the Court found, rendering the award by the Texas worker's compensation board merely a "condition[] precedent" to filing the state law action rather than a judgment or finding from which to appeal.<sup>54</sup> "[T]he trial in court is not an appellate proceeding. It is a trial de novo wholly without reference to what may have been decided by the Board."<sup>55</sup> As Justice Ginsburg indicated in her *Surgeons* dissent, "it [had] been taken almost for granted" under these precedents "that federal courts of first instance lack authority under §§ 1331 and 1332 to displace state courts as forums for on-the-record review of state and local agency actions."<sup>56</sup>

Those familiar with federal agency practice may find the strength of these precedents surprising, since on-the-record deferential review of federal agency decisions under the Administrative Procedure Act (APA) and related statutes is well-established. That reaction would be misplaced. There is a distinction between review of decisions by state agencies and by federal agencies that is central to the jurisdictional policies that inform the administration of the original jurisdiction of federal district courts—a fact that the *Surgeons* majority entirely misunderstood in reaching its holding.

The source of a federal district court's authority to review decisions by federal agencies was clarified in *Califano v. Sanders*, a decision that confronted the intersection of the APA and other federal agency statutes with the general statutory grant of federal question jurisdiction, 28 U.S.C. § 1331.<sup>57</sup> At the time of the decision, § 1331 had recently been amended to eliminate the amount-in-controversy requirement for actions brought against the United States, its agencies, and its officers or employees, and that shift in jurisdictional policy proved central to the Court's decision.<sup>58</sup>

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<sup>53</sup> See *id.* at 349–50; *id.* at 354 (“The suit to set aside an award of the board is in fact a suit, not an appeal. It is filed as any other suit is filed and when filed the subject matter is withdrawn from the board.”) (quoting *Booth v. Tex. Employers’ Ins. Ass’n*, 123 S.W.2d 322, 328 (Tex. 1938)).

<sup>54</sup> *Id.* at 354–55.

<sup>55</sup> *Id.* at 355.

<sup>56</sup> *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 177 (1997) (Ginsburg, J., dissenting).

<sup>57</sup> 430 U.S. 99 (1977).

<sup>58</sup> See Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721. The statute was amended again in 1980 to eliminate the amount-in-controversy requirement altogether, along with other sections that related to the amount-in-controversy (like a provision for the imposition of costs), leaving the simple statute that is still in effect today. See Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369 (eliminating amount-in-controversy for

Prior to the Court's ruling in *Sanders*, it was already clear that the decisions of federal agencies could be reviewed in federal court, but there was some ambiguity concerning the sources of authority for such review.<sup>59</sup> The APA "evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials,"<sup>60</sup> the *Sanders* Court explained, and the Court's earlier cases had assumed without much discussion that the federal courts had jurisdiction to exercise such review.<sup>61</sup> Nonetheless, the APA contains no express grant of jurisdiction. Some agency-specific statutes do contain express jurisdictional provisions, but those sometimes have limitations attached to them. Such was the case in *Sanders* itself, which involved the Social Security Act.<sup>62</sup>

The petitioner, *Sanders*, filed a claim for disability benefits from the Social Security Administration in 1964 and was denied. He exhausted his administrative remedies but did not then seek judicial assistance. The Act provided for judicial review but required him to file within sixty days. Seven years later, *Sanders* returned to the Social Security Administration and asked an administrative law judge (ALJ) to reopen his benefits case. The ALJ denied the request, and *Sanders* then sought federal judicial review of that denial. Under the Act, review of a request to reopen an earlier benefits determination was expressly prohibited, and, in any event, granting *Sanders*'s request would have allowed him to circumvent the sixty-day window for judicial review. *Sanders* nonetheless argued that the APA should be read to contain an implied grant of jurisdiction for review of all agency decisions in the federal courts.<sup>63</sup>

The Court disagreed, holding that the APA did not contain any implied grant of jurisdiction. In reaching that conclusion, the Court was guided by its understanding of the jurisdictional policies underlying the entire collection of statutes that bore on the question, read *in pari materia*. As the Court

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all federal question cases); 28 U.S.C. § 1331 (2006) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

<sup>59</sup> Indeed, *Sanders* was decided in the midst of a wide-ranging debate over the proper structure of judicial review of federal agency action, as well as the proper sources of authority for such review. The contemporaneous analysis offered by Professors Currie and Goodman provides a broad and sophisticated account of the issue. See David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975).

<sup>60</sup> *Sanders*, 430 U.S. at 104.

<sup>61</sup> See *id.* at 105 (discussing, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)).

<sup>62</sup> *Id.* at 101–02.

<sup>63</sup> *Id.* at 101–07.

acknowledged, the APA's broad statement of purpose concerning judicial review appeared in danger of being frustrated in the large number of cases that were not covered by a specialized jurisdictional provision like the one contained in the Social Security Act, did not satisfy the jurisdictional amount in § 1331, and did not qualify for mandamus or any other extraordinary relief under the All Writs Act.<sup>64</sup> The Court summed up the argument "in favor of APA jurisdiction" as resting "exclusively on the broad policy consideration that, given the shortcomings of federal mandamus jurisdiction, such a construction is warranted by the rational policy of affording federal judicial review of actions by federal officials acting pursuant to federal law, notwithstanding the absence of the requisite jurisdictional amount."<sup>65</sup>

That argument, however, was undercut by the change to the jurisdictional landscape that the 1976 amendment to § 1331 had wrought. The amendment was a targeted provision aimed at removing the potential impediment to federal review of agency and executive action and thereby "restructur[ing] afresh the scope of federal-question jurisdiction."<sup>66</sup> "In amending § 1331," the Court explained, Congress "expressly acted to fill the jurisdictional void created by the pre-existing amount-in-controversy requirement."<sup>67</sup> With that amendment, the policy imperative to find an implied grant of jurisdiction under the APA—and, with it, the ability to circumvent the specific limitations set forth in the Social Security Act—was eliminated.<sup>68</sup> "A broad reading of the APA in this instance," the Court concluded, "would serve no purpose other than to modify Congress' new jurisdictional enactment by overriding its decision to limit § 1331 through the preservation of [the provisions of the Social Security Act]."<sup>69</sup>

The ruling in *Sanders* thus proceeded from an assessment of the body of policy decisions that Congress had implemented over the course of many years and multiple statutes in shaping the jurisdiction of the federal courts. It was, in fact, a jurisdictionally conservative ruling, construing the policies embodied in those statutes to foreclose an expansive reading of implied jurisdiction under the APA.<sup>70</sup> Most important for present purposes, *Sanders* did not offer a broad account of the meaning of "original jurisdiction" under § 1331. It did not address the issue at all. Rather, *Sanders* dealt with a systemic question that was internal to the federal executive and courts: Given

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<sup>64</sup> *Id.* at 105–07.

<sup>65</sup> *Sanders*, 430 U.S. at 106 (citation omitted).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 106–07.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 105.

the institutional importance of having well-defined avenues for judicial review of agency and executive action, coupled with the clearly stated congressional policy favoring such review, what was the most appropriate avenue for judicial review within the existing statutory apparatus?<sup>71</sup>

Indeed, this understanding of agency review as posing a quintessentially intrasystemic question is one that the Court had already articulated in the state law context in *Stude*. In explaining its conclusion that deferential on-the-record appeals fall outside the scope of a district court's original diversity jurisdiction, the Court observed:

The petitioner, after giving notice of appeal by filing notice with the sheriff, etc., could not perfect that appeal to any court but the court which the statute of Iowa directed, which was the District Court of that State for the County of Pottawattamie. The United States District Court for the Southern District of Iowa does not sit to review on appeal action taken administratively or judicially in a state proceeding. A state "legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction."<sup>72</sup>

The *Sanders* Court did not feel the need to distinguish *Stude* in reaching its ruling, despite the superficial similarity between the state agency review that was rejected in *Stude* and the federal agency review that was affirmed in general terms in *Sanders*.<sup>73</sup> To the contrary, the *Sanders* Court could well have cited *Stude* as precedent. Both cases embrace a shared vision of the propriety of having a sovereign's own courts available to exercise on-the-record appellate review of that sovereign's agency action. The Court was simply called upon in the two cases to assess that shared policy vision against a distinct pair of statutory questions—in *Stude*, whether the exercise of federal diversity jurisdiction in a state agency case would be inconsistent with the general requirement that district court proceedings be original in character;<sup>74</sup> in *Sanders*, whether the targeted extension of § 1331 to cover judicial review of agency action foreclosed the use of the APA to achieve a similar result with fewer jurisdictional restrictions.<sup>75</sup>

It is thus a sign of the misguided nature of the majority's doctrinal analysis in *Surgeons* that the opinion for the Court relies upon *Sanders* in

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<sup>71</sup> *Sanders*, 430 U.S. at 104–05.

<sup>72</sup> *Chi., Rock Island & Pac. R.R. Co. v. Stude*, 346 U.S. 574, 581 (1954) (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 317 (1943)).

<sup>73</sup> *Sanders*, 430 U.S. at 109.

<sup>74</sup> *Stude*, 346 U.S. at 576–79.

<sup>75</sup> *Sanders*, 430 U.S. at 104–05.

support of its ruling. “After all,” the Court assures us after setting forth its broad reading of the supplemental jurisdiction statute,

district courts routinely conduct deferential review pursuant to their original jurisdiction over federal questions, including on-the-record review of federal administrative action. See *Califano v. Sanders* [citation omitted]. Nothing in § 1367(a) suggests that district courts are without supplemental jurisdiction over claims seeking precisely the same brand of review of local administrative determinations.<sup>76</sup>

Nothing, that is, except the entire body of jurisdictional rulings underlying both lines of cases.<sup>77</sup> It was this sweeping restructuring of the

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<sup>76</sup> *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 171 (1997).

<sup>77</sup> The majority also relies upon a poorly worded sentence in *Stude* in a fashion that demonstrates either a profound lack of understanding of that line of cases or a remarkable lack of analytical integrity. In the portion of the *Stude* opinion dealing with the question of removal—that is, whether the condemnor, who had been realigned as a defendant after initiating suit in state court, could remove its own lawsuit to the federal tribunal—the Court wrote the following as a preface to its analysis.

We come therefore to the merits of the motion to remand. The question on this motion is whether the petitioner was a defendant nonresident of Iowa and therefore authorized to remove to the Federal District Court as provided by statute. 28 U.S.C. § 1441(a).

The proceeding before the sheriff is administrative until the appeal has been taken to the district court of the county. Then the proceeding becomes a civil action pending before “those exercising judicial functions for the purpose of reviewing the question of damages.” When the proceeding has reached the stage of a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court.

Is the petitioner such a defendant?

*Stude*, 346 U.S. at 578–79 (citations omitted). This was all merely a clearing of the throat. The Court was making clear that, with the initiation of a lawsuit in state court, the proceeding had become a civil action subject to removal by the defendant—in contrast, for example, to the situation that would have obtained had a party attempted to remove the original sheriff’s proceeding, which was not a “civil action” of any kind, original or appellate. Under federal law, the filing of a notice of removal instantly transfers the case to the federal forum, where it then becomes the job of that court to determine whether removal was proper. See 28 U.S.C. § 1446(d) (“Promptly after the filing of such notice of removal of a civil action the defendant or defendants . . . shall file a copy of the notice . . . which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.”). Once the condemnor effectuated removal in *Stude*, the question became: Was the suit properly removed? There were any number of reasons for finding that the answer was no. One reason was that an on-the-record appeal of a state agency proceeding called for an exercise of appellate rather than original

jurisdictional landscape that Justice Ginsburg criticized when she wrote that “[t]he Court’s authorization of cross-system appeals qualifies as a watershed decision,” protesting that this form of appeal was “unauthorized by Congress,” regardless of the neat textual syllogisms that one could construct with the broad language of the several statutes.<sup>78</sup>

### III. STATUTORY INTERPRETATION, JURISDICTIONAL POLICY, AND THE LIMITS OF TEXTUALISM

#### A. Pragmatism and Textualism

While Justice Ginsburg had the better of the argument in *Surgeons* when it came to the doctrine contained in the Court’s prior cases, her disagreement with the majority extended beyond divergent interpretations of precedent. The majority and the dissent displayed opposing jurisprudential approaches to the interpretation of broadly worded jurisdictional statutes as well.

Justice O’Connor’s majority opinion employs an approach to the federal question and supplemental jurisdiction statutes that exhibits a willingness, even a seeming enthusiasm, to erase prior nuance in defining the scope of federal jurisdictional power. It is a rapacious attitude toward jurisdictional text—often accompanied by a form of false modesty of the “Who are we to question Congress?” variety—that the judiciary has adopted with increasing regularity when presented with general purpose jurisdictional provisions.<sup>79</sup>

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jurisdiction by the district court—which is precisely what the Court held in the second portion of its opinion, where it directed that the defendant’s motion to dismiss be granted. *See Stude*, 346 U.S. at 580–82. Another reason was that the Chicago, Rock Island & Pacific Railroad was not a “defendant” for purposes of the removal statute, despite the realignment of parties that occurred in the state court, because it was the railroad that had initiated the lawsuit—which is precisely what the Court held in this first portion of its opinion. *See id.* at 578–80. In the passage relied upon by the majority in *Surgeons*, the *Stude* Court was merely indicating that the case had reached the point where it was appropriate for the district court to determine whether removal was proper.

What the *Stude* Court did not mean was that an on-the-record agency appeal is a proper type of action for a federal district court to entertain. It held exactly the opposite. *Id.* at 582. Nonetheless, the majority in *Surgeons* cited this passage for precisely that proposition, writing:

[T]he Court observed that, as a general matter, a state court action for judicial review of an administrative condemnation proceeding is “in its nature a civil action and subject to removal by the defendant to the United States District Court.” If anything, then, *Stude* indicates that the jurisdiction of federal district courts encompasses ICS’ claims for review of the Landmark Commission’s decisions.

*Surgeons*, 522 U.S. at 170 (citation omitted).

<sup>78</sup> *Surgeons*, 522 U.S. at 175, 176 (Ginsburg, J., dissenting).

<sup>79</sup> *Id.* at 165, 169 (majority opinion).

Addressing this phenomenon, Professor Pfander puts the matter politely when he writes that “the prospects for . . . creative solutions [to textual problems in jurisdictional statutes] have diminished in recent years as the federal courts have adopted a more text-centered approach to statutory interpretation.”<sup>80</sup> The *Surgeons* majority took no apparent caution from the widely understood fact that Congress sought only to address the substantive scope of federal court jurisdiction when it crafted § 1367 and did not turn its attention in any way to the original or appellate character of the claims that district courts are authorized to hear.<sup>81</sup>

It was not always thus. Not long ago, the Court conducted its analysis of jurisdictional statutes with greater solicitude for past policy and practice. Consider *Horton v. Liberty Mutual Insurance Co.*,<sup>82</sup> one of the precedents that the Court scrutinized in *Surgeons* and that is discussed briefly above. The principal issue before the *Horton* Court involved the proper interpretation of the amount-in-controversy requirement in a case involving de novo consideration of an administrative award under a worker’s compensation statute. The case presented the Court with the first occasion to rule on such a question following the major revision of the diversity statute that Congress enacted in 1958. The 1958 revision aimed to curb certain abusive practices by corporate litigants, particularly in worker’s compensation cases, whereby employers could make worker’s compensation proceedings expensive, inconvenient and burdensome for employees. While

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<sup>80</sup> Pfander, *supra* note 15, at 110–11.

<sup>81</sup> See Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991). This account offered by three academics who assisted Congress in drafting the provisions of § 1367 remains one of the most important references in understanding the range of issues to which the statute was directed. The original or appellate character of claims heard in federal district courts is unsurprisingly absent from their account. As the name suggests, the essay was a response that the authors offered to a sharp critique of the statute published by Professor Freer. See Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991). Near the end of his critique, Professor Freer set forth an interpretive “parade of horrors” that he accused the drafters of creating in § 1367—a far-ranging exploration of every source of confusion that he believed the statute’s language might create. But even he did not speculate that a district court might rely upon the statute to entertain claims that were appellate in character. See *id.* at 481–86. (In explaining their reasons for being unmoved by this interpretive parade of horrors, Rowe, Burbank and Mengler exhibited a faith in the interpretive powers of the judiciary that the *Surgeons* majority unfortunately belies. See Rowe, Burbank & Mengler, *supra*, at 959 (“To our minds, responsible courts should usually have little if any difficulty reading [§ 1367] to avoid the ‘absurd’ results conjured up by a disappointed advocate of a radically different structure.”)).

<sup>82</sup> 367 U.S. 348 (1961).

the Court divided closely and sharply on the amount-in-controversy question, the majority and dissent both grappled in a serious fashion with the litigation practices that had led to the 1958 revision and the set of jurisdictional policies that Congress appeared to have embraced in its statutory amendments.<sup>83</sup>

In a similar fashion, and in contrast to the majority, Justice Ginsburg's dissent in *Surgeons* displays a steely-eyed assessment of the difficult process of reducing legislative policies to concrete form. The "bare words" of the jurisdictional statutes do not speak meaningfully to the question of original versus appellate jurisdiction, she explains, and must be read in light of a respectful account of the coherent body of past jurisdictional practice that served as the background against which the statutes were enacted.<sup>84</sup> In the process, Justice Ginsburg invokes one of her sources of intellectual inspiration, the late Walter Wheeler Cook, whom she has credited with producing her favorite quotation:

The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should

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<sup>83</sup> *Id.* at 349–51. The majority acknowledged that Congress was motivated by the imperative to protect employees from abusive litigation practices, writing:

In discussing the question of state workmen's compensation cases, the Senate Report on the amendment evidenced a concern not only about the problem of congestion in the federal courts, but also about trial burdens that claimants might suffer by having to go to trial in the federal rather than state courts due to the fact that the state courts are likely to be closer to an injured worker's home and may also provide him with special procedural advantages in workmen's compensation cases.

*Id.* at 351–52. The Court nonetheless found that Congress's failure to place explicit limitations on the range of worker's compensation cases that could be filed in federal district court—despite its enactment of specific limitations on removal of such cases—militated against the more restrictive rule that the employee sought. *See id.* at 352. The dissent assessed the underlying jurisdictional policies differently, finding that the Court's ruling authorized a novel approach to the amount-in-controversy rule that was incompatible with the 1958 revision:

This is the first time the Court has let a plaintiff affix jurisdiction by prophesying what the defendant would or might claim, rather than by stating what the plaintiff itself did claim. In so generously construing the statute, the Court confounds the test heretofore applied in diversity cases. It also nullifies the result of years of the study by the United States Judicial Conference and the Administrative Office of the United States Courts, as well as by the Congress . . . . Once again the United States District Courts in Texas will be flooded by compensation cases, and the Congress once again will be obliged to amend the diversity statute.

*Id.* at 356 (Clark, J., dissenting) (citations omitted).

<sup>84</sup> *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 176 (1997) (Ginsburg, J., dissenting).

have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.<sup>85</sup>

Ginsburg displays a concern in *Surgeons*, even a suspicion, over the ways in which legislators and judges rely upon language as a tool for reducing concepts or policies to concrete form.<sup>86</sup> There is no alternative to this static use of language in the law and legal practice, of course. But the degree of Justice Ginsburg's suspicion marks her clearly as an anti-formalist in this area of law. She does not view open-ended statutory text as the beginning point and ending point of a jurisdictional or procedural inquiry, but rather as a necessarily imperfect guide in the attempt to reduce into operational terms a set of concepts that are meant to resolve complex problems.

Justice Ginsburg combines this concern over the inherent limitations of statutory language with a particular strain of interpretive conservatism. Her dissent in *Surgeons*, and her work in the area of procedure more broadly, exhibits a healthy respect for the wisdom of past practice as it develops over time. For Justice Ginsburg, the starting point in applying open-ended congressional language to a question of procedure or jurisdiction is an appreciation for the stable and sensible solutions that lawyers and judges have crafted in responding to analogous problems in past disputes. In this area of law, at least, her approach might be described as Hayekian in its respect for the value of the organic development of complex practices.<sup>87</sup>

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<sup>85</sup> Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 337 (1933), quoted in *Surgeons*, 522 U.S. at 184 (Ginsburg, J., dissenting). For Justice Ginsburg's embrace of this sentiment, see Ruth Bader Ginsburg, *In Celebration of Charles Alan Wright*, 76 TEX. L. REV. 1581, 1584 (1998) (referring to this passage as her "favorite quotation").

<sup>86</sup> *Surgeons*, 522 U.S. at 183-85 (Ginsburg, J., dissenting).

<sup>87</sup> Friedrich Hayek, a respected economist, is perhaps best known in the legal academy for his later work commenting on matters of social and political philosophy. Hayek voiced skepticism toward efforts at social organization that flow from a central planning model, arguing that central planners often lack the practical knowledge necessary to craft effective policies for the varying local circumstances. Instead, Hayek emphasized the wisdom of the "man on the spot" with indigenous knowledge of his own time and place.

If we can agree that the economic problem of society is mainly one of rapid adaptation to changes in the particular circumstances of time and place, it would seem to follow that the ultimate decisions must be left to the people who are familiar with these circumstances, who know directly of the relevant changes and of the resources immediately available to meet them.

Professor Pfander captures this mindset well when describing a classic statement on the matter by Professor Shapiro, explaining their shared belief that “statutes rarely produce unannounced but revolutionary changes in the law.”<sup>88</sup> It should come as no surprise that Justice Ginsburg relied heavily on Professor Pfander’s account of sympathetic textualism in crafting her dissent from the Supreme Court’s better known interpretation of § 1367 in the *Allapattah/Ortega* litigation eight years later.<sup>89</sup>

It would be setting up a straw man to tar all strict textualist arguments in the field of statutory interpretation with the clumsiness of the *Surgeons* majority. But the *Surgeons* opinion does help to bring into sharper relief the poor fit that strict textualism often exhibits with jurisdictional statutes. Long before the birth of the legal realist movement with which Walter Wheeler Cook is identified, the Supreme Court adopted an approach to the

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Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 524 (1945).

<sup>88</sup> Pfander, *supra* note 15, at 113–14. Professor Pfander is discussing Professor David Shapiro’s noted article on canons of statutory interpretation. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992). Professor Shapiro stresses the virtues of those approaches to statutory interpretation “that aid in reading statutes against the entire background of existing customs, practices, rights, and obligations—in other words, those that emphasize the importance of not changing existing understandings any more than is needed to implement the statutory objective.” *Id.* at 926. Shapiro acknowledges the critique that such an approach may exhibit a tendency toward conservatism in the narrowly descriptive sense: the preservation of existing distributions and arrangements. In response, he observes:

First, a preference for continuity is not always a preference for the haves over the have-nots; in an era in which the movement for change favors deregulation or reduction of entitlements, it may be quite the opposite. Second, I believe that peaceful change is facilitated when it occurs in a context of relative stability with respect to existing relationships and understandings. Revolution denies the value of continuity; reform reaffirms it.

*Id.*

<sup>89</sup> In one representative passage, for example, Justice Ginsburg relies upon Professor Pfander’s article as support for a reading of § 1367’s original jurisdiction language that would preserve past practice in the administration of the amount-in-controversy requirement.

In other words, § 1367(a) would preserve undiminished, as part and parcel of § 1332 “original jurisdiction” determinations, both the “complete diversity” rule and the decisions restricting aggregation to arrive at the amount in controversy. Section 1367(b)’s office, then, would be “to prevent the erosion of the complete diversity [and amount-in-controversy] requirement[s] that might otherwise result from an expansive application of what was once termed the doctrine of ancillary jurisdiction.”

*Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 589–90 (2005) (Ginsburg, J., dissenting) (quoting Pfander, *supra* note 15, at 114).

interpretation of jurisdictional statutes that privileged the implementation of important judicial, legislative and constitutional policies over a fancied textual simplicity. Most conspicuously, the federal question and diversity statutes both employ language nearly identical to their counterpart provisions in Article III, yet the Supreme Court has adopted constructions of the operative statutory terms—“arising under the Constitution, laws, or treaties of the United States”<sup>90</sup> and “between citizens of different States,”<sup>91</sup> respectively—that extend much less far than it has found Article III to permit.<sup>92</sup> As has been extensively discussed over the years, there are good policy reasons for this development of distinct constitutional and statutory standards, despite the decision by Congress to import the Article III language directly into the U.S. Code when crafting the statutes.<sup>93</sup> Those policies would have been altogether frustrated by a textualist approach that insisted upon “assum[ing] that a word which appears in two or more legal rules . . . has and should have precisely the same scope in all of them.”<sup>94</sup>

More recently, in a partial break from its trend toward restrictive interpretations, the Supreme Court acknowledged that the broad grant of

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<sup>90</sup> 28 U.S.C. § 1331; *compare id.* with U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .”).

<sup>91</sup> 28 U.S.C. § 1332(a)(1); *compare id.* with U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to . . . Controversies . . . between Citizens of different States . . .”).

<sup>92</sup> For federal question jurisdiction, compare *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824) (holding that federal question jurisdiction exists under Article III whenever a federal question “forms an ingredient of the original cause”) with *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–53 (1908) (construing the general federal question statute to reach only those cases in which a substantial federal issue appears on the face of a well pleaded complaint). For diversity jurisdiction, compare *State Farm Fire & Cas. v. Tashire*, 386 U.S. 523, 531 (1967) (holding that federal jurisdiction on the basis of minimal diversity of parties authorized by the interpleader statute is permissible under Article III), with *Strawbridge v. Curtiss*, 7 U.S. 267 (1806) (construing the general diversity statute to require complete diversity of parties).

<sup>93</sup> See, e.g., David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 568 (1985):

The sparse legislative history of the 1875 act establishing general federal question jurisdiction suggests that Congress intended the grant to be as broad as the Constitution allowed. The accepted wisdom, however, has been that the statute cannot and should not be so construed; otherwise, the federal courts would be inundated with cases that might better be resolved elsewhere.

<sup>94</sup> Cook, *supra* note 85, at 337.

jurisdiction contained in the Alien Tort Claims Act over claims brought by foreign nationals under the law of nations includes a limited grant of authority for federal courts to identify and enforce causes of action under international law.<sup>95</sup> The Court reached a similar conclusion in the field of labor law with the *Lincoln Mills* decision, finding that a statutory scheme and its accompanying grant of jurisdiction authorized the federal courts to develop substantive federal common law—a holding that allowed the Court to avoid a more constitutionally challenging jurisdictional question.<sup>96</sup> Broadly crafted jurisdictional statutes have frequently been treated as congressional invitations to dialogue with the federal courts, which have a capacity to assess the desirable metes and bounds of jurisdiction through adjudication over time that Congress may lack.<sup>97</sup>

The federal courts have not always been wise or benign in their use of this authority. Professor Purcell documents the Court's extended manipulation of federal diversity jurisdiction in his magisterial account of the federal courts and the industrial revolution;<sup>98</sup> Professor Hasday has criticized the Court's decision to treat domestic disputes as outside the ambit of the diversity statute, a judicially crafted exception that continues in force to this day.<sup>99</sup> Nevertheless, the provenance of this more policy-sensitive approach to open-ended statutory text runs deep in the field of federal jurisdiction, as does congressional cooperation or acquiescence in the endeavor.<sup>100</sup>

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<sup>95</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) (interpreting the Alien Tort Claims Act, 28 U.S.C. § 1350, to empower federal courts to articulate “a relatively modest set of actions alleging violations of the law of nations”); see also Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2054–56 & nn.43–45 (2008) (discussing these issues of jurisdictional policy).

<sup>96</sup> See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 449–51 (1957) (interpreting the Taft-Hartley Act of 1947 to authorize substantive federal common law for collective bargaining agreements enforceable in the federal courts through the targeted grant of jurisdiction codified at 29 U.S.C. § 185(a)).

<sup>97</sup> See Shapiro, *supra* note 93, at 574–77 (discussing the contours of judicial discretion over time in the interpretation of federal jurisdictional statutes and noting, “All of these examples illustrate the productive dialogue that can occur between the courts and the legislature when each recognizes the shared responsibility for defining the contours of judicial authority.”).

<sup>98</sup> See EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958* 244–48 (1992).

<sup>99</sup> See Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1388–94 (1998).

<sup>100</sup> Professor Pfander provides a concise summary of some of the practical considerations that account for the development of this accommodation over time.

Justice Ginsburg's understanding of this history clearly informed her *Surgeons* dissent. Ginsburg recognized that the effort that Congress undertook in crafting § 1367—to adjust the doctrines of pendent and ancillary jurisdiction in a modest fashion and provide them with overdue statutory authorization—called for sensible pragmatism, not adventuresome and unyielding textualism, in construing the statute's use of broad terms as points of reference.<sup>101</sup> Professor Shapiro captures the point succinctly.

[I]n a society in which revolution is not the order of the day, and in which all legislation occurs against a background of customs and understandings of the way things are done, it disserves the drafters of legislation to take a casual or even a wholly “neutral” attitude towards change. In . . . a cooperative setting, a speaker wishing to use language efficiently and effectively will communicate as much as is necessary for purposes of the exchange, but no more. Thus, in a world in which change is news but continuity is not, a speaker who is issuing an order or prohibition is likely to focus on what is being changed and to expect the listener to understand that, so far as this communication is concerned, all else remains the same.<sup>102</sup>

So Justice Ginsburg, in the same spirit, observed near the end of her dissent:

History and policy tug strongly here as well. There surely has been no “expression of congressional dissatisfaction” with the near-unanimous view of the Circuits that federal courts may not engage in cross-system appellate review, and “the elaboration of [state] administrative law” is a “prim[e] responsibilit[y] of the state judiciary.”<sup>103</sup>

The story is not all grim for Justice Ginsburg's pragmatism in matters of jurisdictional policy. Her approach has sometimes prevailed. Ginsburg has

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For a variety of reasons having to do with the nature of the political process, Congress simply has not done an effective job of keeping jurisdictional rules in good repair. Partly this congressional neglect reflects the inability of federal judges to play an institutionally effective role in securing jurisdictional legislation; partly it reflects the absence of well-organized interest group support; partly it reflects the relatively specialized nature of the subject matter and its inaccessibility to those without special competence in the subjects of civil procedure and federal courts. For all these reasons, Congress has been content, absent a crisis, to leave the elaboration of jurisdictional rules to the courts and similar specialists.

Pfander, *supra* note 15, at 156.

<sup>101</sup> *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 177–78, 191 (1997) (Ginsburg, J., dissenting).

<sup>102</sup> Shapiro, *supra* note 88, at 942 (citations omitted).

<sup>103</sup> *Surgeons*, 522 U.S. at 191 (Ginsburg, J., dissenting) (citation omitted).

been the Court's leading voice in reversing the tendency to treat time limitations and certain threshold statutory provisions as "jurisdictional" in nature (and hence not subject to waiver or equitable alteration), a misguided trend that she has largely ended.<sup>104</sup> And notwithstanding the resistance that she encountered in *Surgeons*, Justice Ginsburg has twice succeeded in reaffirming and clarifying the respective roles of district courts and courts of appeals in the division of judicial labor within the federal courts: in *Gasperini v. Center for Humanities*<sup>105</sup>—a major decision in the recondite area of federal jurisdictional policy that is the *Erie* doctrine—where, in stark contrast to *Surgeons*, the majority joined Justice Ginsburg in resisting the importation of a state court's incompatible division of original and appellate authority into a federal proceeding; and in *Exxon Mobil v. Saudi Basic Industries*,<sup>106</sup> where the Court followed Ginsburg's lead in clarifying and narrowing the types of cases deemed impermissibly appellate for a district court under the *Rooker/Feldman* doctrine. Nonetheless, *Surgeons* stands as a prominent instance of misplaced textualism trumping sensible pragmatism.

The passage of the Zen master Shunryu Suzuki that appears at the top of this Essay—"The more you understand our thinking, the more you find it difficult to talk about"<sup>107</sup>—captures something of the dilemma that the Court's procedural master struggled with in her unsuccessful attempt to sway her colleagues in *Surgeons*. Strict textualism proceeds from the belief that the words that Congress selects in crafting legislation should be treated as though they reflect a complete understanding of the policies that they may displace, even in circumstances that formed no part of the debate and negotiation over the statute. Justice Ginsburg's dissent, in contrast, reveals her awareness of the limits of statutory language in its ability to capture, specify or preserve the policies that underlie and inform broad statutory provisions, particularly in the field of federal jurisdiction.

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<sup>104</sup> See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513–16 (2006) (holding that the numerosity requirement under Title VII of the Civil Rights Act of 1964, requiring that an employer have at least fifteen employees to be subject to the statute's provisions, is not "jurisdictional" and can be waived); *Scarborough v. Principi*, 541 U.S. 401, 418–19 (2004) (holding that an attorney can amend a timely fee application under the Equal Access to Justice Act to correct a ministerial error even after the time limit for filing has run; the time limit is not "jurisdictional" in this sense); *Kontrick v. Ryan*, 540 U.S. 443, 447 (2004) (holding that time limitations on ability of creditor to file objections in bankruptcy proceeding are waivable, and overruling earlier precedent that deemed such limits "jurisdictional"). The exception is *Bowles v. Russell*, 551 U.S. 205, 205–06 (2007), where a 5–4 majority chose to retain that characterization in the case of a time limitation on the filing of a habeas appeal that was contained in a federal statute.

<sup>105</sup> 518 U.S. 415, 438–39 (1996).

<sup>106</sup> 544 U.S. 280, 284, 293 (2005).

<sup>107</sup> SUZUKI, *supra* note 2, at 90.

### B. Jurisdictional Policy in the Federal Courts

The majority's handling of the dispute in *Surgeons* is emblematic of a larger deficiency in the Court's current treatment of jurisdictional policy issues. The need has become urgent for the judiciary to recapture the understanding, largely atrophied in recent years, that statutory grants of jurisdiction are tools by which Congress authorizes the federal courts to enforce federal policies and safeguard federal interests. "A grant of jurisdiction," as Professor Wechsler explained, "is . . . one mode by which Congress may assert its regulatory powers."<sup>108</sup>

One dimension of this imperative relates to targeted grants of jurisdiction, which Congress sometimes attaches to statutory schemes for a discrete and focused purpose. I have written about Congress's use of this jurisdictional tool in conjunction with the Class Action Fairness Act of 2005, and other examples abound.<sup>109</sup> In a similar mode, Congress periodically makes adjustments to the federal question and diversity statutes, often with focused purposes in mind. Two examples of this kind of jurisdictional adjustment are discussed in the pages above. In *Sanders*, the Court interpreted the selective elimination of the amount-in-controversy requirement for federal agencies and officers under § 1331 as an acknowledgment of the importance of intrasystem review of executive action through properly regulated channels.<sup>110</sup> And in *Horton*, the majority and dissent both acknowledged the targeted purposes for which Congress had amended the diversity statute—to reduce opportunities for strategic behavior by corporate litigants and to prevent interference with the fair enforcement of state worker's compensation statutes—and conducted their respective analyses accordingly.<sup>111</sup>

*Surgeons* demonstrates the complementary importance of reading general-purpose grants of jurisdiction in light of the body of policy and practice against which they are enacted. In this respect, *Surgeons* may be even more consequential than the *Allapattah/Ortega* litigation, despite the greater attention that the latter have received. The Court interpreted § 1367 to authorize a pair of discrete results in *Allapattah* and *Ortega*—the authorization of supplemental jurisdiction for small-value class action claims and the circumventing of the rules of aggregation for the claims of multiple Rule 20 plaintiffs—that arose from an idiosyncrasy in the text of the statute

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<sup>108</sup> Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 225 (1948).

<sup>109</sup> See Wolff, *supra* note 17, at 2054–66.

<sup>110</sup> See *supra* text accompanying notes 73–74.

<sup>111</sup> See *supra* text accompanying notes 82–83.

and relates only to its internal administration.<sup>112</sup> The result in *Surgeons*, in contrast, reaches outside the supplemental jurisdiction statute to disrupt a set of doctrines relating to the respective functions of district and circuit courts, and it interjects the federal courts into the administration of state agency review in a newly invasive fashion. *Surgeons* makes clear that Professor Pfander's call for "sympathetic textualism"—an apt phrase for the more limited disagreements over the internal administration of § 1367 that were at issue in *Allapattah* and *Ortega*—must be coupled with a reinvigoration of the role of jurisdictional policy in adjudication involving the federal courts.<sup>113</sup> As Justice Ginsburg recognizes, this is a field where the institutional competence of the federal judiciary is high and the need for active involvement is great.

#### IV. CONCLUSION

In *How Judges Think*, Judge Posner likens judging to the endeavor of artistry. Good judges, Posner writes, aspire to a species of excellence in their craft that is similar to the work of an artist who seeks to identify and then give voice to solutions that are both successful and conceptually beautiful.<sup>114</sup> Shunryu Suzuki, writing on the subject of expertise and dedicated practice in his work on Zen and the mind of the practitioner, says, "[i]n the beginner's mind there are many possibilities, but in the expert's there are few."<sup>115</sup>

Justice Ruth Bader Ginsburg's contributions to the fields of procedure and jurisdiction exhibit the quality of a dedicated artist seeking to be excellent in the search for solutions to complex problems. At the same time, the sensible pragmatism that she brings to this search allows her to escape the constraints of the ossified expert. Every year that Justice Ginsburg remains on the Court offers the promise of more clarity and good sense in the administration of the federal courts and their processes. For the dedicated proceduralist, the product of her pen is a joy to read. It is the work of a master.

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<sup>112</sup> *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 549 (2005). The result in *Allapattah* may wind up having little practical significance. Even following *Allapattah*, § 1367 only authorizes supplemental jurisdiction over absent class member when the named plaintiff has claims that exceed the jurisdictional amount of \$75,000. *Id.* at 566–67. And following the enactment of the Class Action Fairness Act, supplemental jurisdiction is only necessary for those class actions where the aggregate amount in controversy is less than \$5,000,000 or the case fails to satisfy the provisions for minimal diversity set forth in the statute. *See* 28 U.S.C. § 1332(d). There will be some such cases, but they are likely to be few.

<sup>113</sup> Pfander, *supra* note 15, at 112–13.

<sup>114</sup> *See* POSNER, *supra* note 1, at 62.

<sup>115</sup> SUZUKI, *supra* note 2, at 21.