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RBG's Biggest Opinions, From Civil Rights To Civil Procedure

By **Cara Bayles**

Law360 (September 20, 2020, 7:33 PM EDT) --Justice Ruth Bader Ginsburg was perhaps best known for her dissents, but scholars and those who knew her say her majority opinions may better reflect her judicial philosophy, as well as her time as a law professor and civil rights lawyer.

The strongly worded dissents that she delivered while wearing the glittering, black neck-piece she called her "dissenting collar" became a hallmark of Justice Ginsburg's later years on the U.S. Supreme Court, when its lineup swung to the right thanks to more conservative appointments and she became its leading liberal.

But from the early years of her tenure on the high court, the justice, who died Friday at age 87, wrote majority decisions that showed her breadth as a lawyer and a thoughtful scholar, who gently guided the reader to her conclusion using evidence and careful, persuasive argument.

"She strongly believed that if you disagree with people, you have to convince them with the strength of your position," said Orrick Herrington & Sutcliffe LLP appellate attorney Tiffany Wright, who clerked for Justice Sonia Sotomayor. "Her majority opinions are less fiery, but very much RBG."

But she was also "a lawyer's lawyer — precise, analytical, and evenhanded," according to Joseph Palmore, her former clerk and a former assistant to the solicitor general who now co-chairs Morrison & Foerster LLP's appellate practice. She loved even the more granular rules of litigation.

"One of my favorite facts about her is that her first book, published in 1965, was a treatise on Swedish civil procedure," he said.

As an attorney, Justice Ginsburg took a cautious approach in litigation that steadily chipped away at gender discrimination in the law, according to Tara Grove, a law professor at the University of Alabama. That informed the jurist's approach to case law as well, Grove said. She likened it to a baseball player hitting a single instead of risking a strikeout by aiming for a home run.

"She knew, as a lawyer and as a justice, 'I can only get my colleagues to go so far,'" Grove said. "She was so successful because she had a good sense of what was possible in the moment, with an eye on the long haul."

U.S. v. Virginia (1996)

Three years into her tenure on the high court, Justice Ginsburg wrote for the majority in a landmark gender discrimination case, finding the admissions policy at the publicly funded, all-male Virginia Military Institute violated the 14th Amendment's equal protection clause.

The school, Justice Ginsburg noted, was unique in its tough, bootcamp-style training, and was known to be a rigorous institution with a mission and record of "producing leaders," including military generals, business executives and congressmen.

When women who were denied admission on the basis of their gender filed suit, the school eventually opted to create a counterpart program called the Virginia's Women's Institute for Leadership. A district court approved the compromise. The high court did not.

In a 7-1 opinion, Justice Ginsburg called the women's school "a pale shadow" of VMI, noting it didn't offer the same curriculum, methodology or opportunities as the all-male institution. Some women preferred the offerings at VMI, she said, and could meet all the physical standards and requirements the school set for male cadets.

That meant the school hadn't met the bar set by court precedent, which held that sex discrimination by a public entity must come with "an exceedingly persuasive justification."

"The Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature — equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities," she wrote.

Writing that majority decision was a natural progression from the impact litigation Justice Ginsburg had worked on as an attorney with the American Civil Liberties Union's Women's Rights Project, which she co-founded in 1972.

"Hearing from her on those issues is important. I'm glad we have the benefit of it," Wright said. "It was always clear she put an extraordinary amount of work into her decisions."

The decision not only changed the admission policy at VMI but is considered a landmark constitutional law case barring gender discrimination on the basis of stereotypes of ability and preference.

Olmstead v. L.C. (1999)

Nine years after Congress passed the Americans with Disabilities Act, Justice Ginsburg wrote an opinion credited with cementing its scope to include people with mental disabilities, finding the "unjustified institutional isolation of persons with disabilities is a form of discrimination."

Two women with developmental disabilities and mental health issues had sued the state of Georgia, alleging that while the professionals treating them said they should be placed in community-based programs, they remained isolated in an institution.

The state argued it wasn't discriminating against the women, because it kept them in these facilities due

to funding constraints. But Justice Ginsburg noted that Medicaid covers community-based care facilities, which tend to be less expensive than institutional care.

She also noted that while the ADA doesn't demand that institutions be phased out, it does envision allowing greater independence for people with disabilities. Forcing those with mental disabilities to choose between accommodations and independence would have a discriminatory effect, she said.

Otherwise, "in order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice," she wrote.

Justice Ginsburg was able to be a little bolder in that case, because she was interpreting a relatively new statute, not the Constitution, Grove said. That may have been the influence of Justice Antonin Scalia's textualism, which held, "when you're interpreting a statute, the best way to interpret it is not narrowly, but broadly."

Goodyear Dunlop Tires Operations SA et al. v. Brown (2011)

Another of Justice Ginsburg's legal passions was civil procedure, as her Goodyear decision shows. The opinion limited the definition of general jurisdiction, so that lawsuits against companies could be filed only when corporations were "at home in the forum state."

The families of two North Carolinian teenagers killed in a bus crash in Paris had filed a state court wrongful death suit against the international tire manufacturer, but, Justice Ginsburg wrote, "a connection so limited between the forum and the foreign corporation ... is an inadequate basis for the exercise of general jurisdiction."

Grove praised the Goodyear decision for cleaning up a jurisdictional mess. Other scholars have criticized the decision. Emory law professor Richard Freer said it "unduly restricted general jurisdiction over corporations in ways that may unduly hamper plaintiffs' access to justice — particularly in cases involving Internet contact and in cases by American plaintiffs against foreign companies."

In general, her record on access to justice in civil procedure cases was varied and nuanced. Other procedural decisions she authored — like Friends of the Earth Inc. v. Laidlaw Environmental Services, which in 2000 found residents impacted by pollution from a factory could sue the company responsible, and Arbaugh v. Y&H Corp, which found individuals could sue over employment discrimination — expanded court access, according to John Rappaport, her former clerk and a law professor at the University of Chicago.

"The thread running through all of these cases, I think, is access to the courts," he said in an email. "In each instance, Justice Ginsburg opened the door a little bit wider for "the little guy."

Justice Ginsburg taught civil procedure during her academic career as a law professor at Rutgers and Columbia University. That likely influenced Goodyear and the other civil procedure cases, which Palmore said tend to fly under the radar.

"These decisions — on subjects like personal jurisdiction and the intricacies of the civil rules — obviously

received much less public attention than her opinions on civil rights and other high-profile subjects," he said. "But they have a big impact on how litigation is conducted in federal court."

Arizona State Legislature v. Arizona Independent Redistricting Commission (2015)

Justice Ginsburg also authored a 5-4 decision upholding the district lines for state and congressional elections carved out by an independent commission in Arizona.

The commission had been set up through a statewide ballot initiative, in an effort to prevent partisan gerrymandering. After the new map of voting districts had been drawn, the state legislature sued the commission, saying it had violated the U.S. Constitution's elections clause, which placed those duties in the hands of state lawmakers.

But Justice Ginsburg noted that Arizona's own constitution barred lawmakers from nixing a law put in place by a statewide ballot initiative.

And the historical record showed that the elections clause was merely intended to prevent "potential abuses by state-level politicians," and predated the advent of referendum votes.

"The Elections Clause ... is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands," she said in the majority opinion.

Though Grove said she doesn't necessarily agree with that argument, she admitted the jurist "does one heck of a job making the case."

"She says: Let's look at all the precedents where we have read 'legislature' really broadly, to encompass a lawmaking entity. And let's face it, in our system today referenda can be a type of lawmaking body," Grove said. "It's extremely precedent-based, the kind of legal memorandum that a law professor would love."

Timbs v. Indiana (2018)

Just two years ago, Justice Ginsburg officially extended the Eighth Amendment's bar on excessive civil forfeitures, a move that could help criminal defendants nationwide fight seizures of their assets.

After Tyson Timbs pled guilty to selling heroin, the state went after the car he drove while dealing. It was worth $42,000, more than four times the maximum $10,000 fine associated with his crime. A trial judge denied the state's forfeiture bid, saying it flouted the Eighth Amendment. Indiana's high court reversed, finding there was no indication that law applied to state jurisdictions.

But Justice Ginsburg wrote in the unanimous decision that under the 14th Amendment, the protection "applies identically to both the federal government and the states."

Invoking the Magna Carta, American colonial law, and the process of Reconstruction after the Civil War, she gave a swift history lesson on the legal prohibition on excessive fines and the ways they'd been undermined for discriminatory and political purposes.

"For good reason, the protection against excessive fines has been a constant shield throughout Anglo-

American history: Exorbitant tolls undermine other constitutional liberties," she wrote.

Lessons like this weren't unusual for Justice Ginsburg. She similarly took a detour on the history of women's disenfranchisement and state-sanctioned gender discrimination in U.S. v. Virginia, for instance.

"That context matters, particularly when you're talking about issues of gender and race in this country," Wright said. "I think in both her majority opinions and her dissents, she thought it was important to remind people of what that history is and how it informs the law. The law only makes sense if you pay attention to that history."

Wright said just as Justice Ginsburg was committed to historical context, Justice Sotomayor can be counted on to discuss the real-world implications of a ruling.

"Those are two different forms of context that I think should be critical for any Supreme Court opinion. And you could always count on the two of them for that," she said. "I'm going to miss that partnership."

--Editing by Pamela Wilkinson and Kat Laskowski.