

Gezegehung Justice Ruth Bader Ginsburg

by J anne Rauch-Zender

In this installment of Board Briefs, *Tax Notes State* advisory board members honor the late Supreme Court Justice Ruth Bader Ginsburg.

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Remembering Justice Ginsburg



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I doubt I can add anything to the richly deserved outpouring of praise and admiration for the extraordinary life of Justice Ruth Bader Ginsburg other than to express my heartfelt embrace of those sentiments. I will therefore confine my remarks to the two instances in my life when I was fortunate enough to cross paths with Justice Ginsburg in person, as these reflect both her celebrated legacy as a Supreme Court Justice and her profound humanity.

My first encounter with Justice Ginsburg was during my oral argument in *Hunt-Wesson Inc. v. Franchise Tax Board*,¹ which involved the constitutionality of California's "interest offset"

¹ 528 U.S. 458 (2000).

rule. This rule denied a non-domiciliary corporation the benefit of an interest expense deduction by requiring it to allocate its interest expense to nontaxable income regardless of whether the interest expense bore any relationship to the production of that income. Despite the highly technical nature of the issue before the Court, Justice Ginsburg cut to the chase in her first question to me: "Mr. Hellerstein, your position is not that California couldn't reject any part of this. It could have an offset, but it has to be according to some apportionment, some reasonable apportionment."² I was happy to respond as follows: "That is precisely right, Justice Ginsburg. Our position is that there are a wide variety of acceptable methodologies for assigning or allocating income to various jurisdictions."³

But Justice Ginsburg was not finished. She was plainly aware of and properly concerned about the possibility that corporations may seek to "game the system" by structuring their affairs to avoid taxation of the income that California was seeking to tax. So later in the argument she followed up with the question: "Well, what about the argument that, indeed, your client is getting a windfall because home States like Illinois give a tax break for this category of investment income?"⁴ Fortunately for me and for my client, I was able to reply: "Well, in fact, Justice Ginsburg, Illinois is not a tax haven,"⁵ and it had taxed a portion of the income at issue.

As I reflect on my brief interchanges with Justice Ginsburg, I am struck by the acuity of her questions that focused on the key issues that lay at

² Transcript of Oral Argument, *Hunt-Wesson Inc.*, p. 15.

³ *Id.*

⁴ *Id.* at 23.

⁵ *Id.*

the heart of the controversy and revealed her lucid understanding of a superficially complex dispute.

My second “encounter” with Justice Ginsburg was less personal but no less memorable: Justice Ginsburg was the commencement speaker at my daughter’s college graduation from Brown University in 2002. Although many of the details of Justice Ginsburg’s commencement address escape me now, I will never forget her anecdote about the advice that her mother-in-law-to-be gave to her when she was about to marry Martin – the distinguished tax lawyer with whom she had a remarkable 56-year marriage until his death in 2010. “The secret of a good marriage,” her future mother-in-law counseled, “is sometimes to be a little hard of hearing.” It was an opinion with which my wife of 50 years and I have come to wholly concur!

In short, Justice Ginsburg will always be remembered as an exceptional and pathbreaking lawyer and Justice. But she should also be remembered as a deeply sympathetic and wise human being.

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A Complete Portrait



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America and the Supreme Court have lost a great justice upon the death of Justice Ginsburg. I could write

about, as others have done, her many important decisions while at the Court, such as *United States v. Virginia*,⁶ in which, writing for the majority, she called the women's school at the Virginia Military Institute (VMI) "a pale shadow" of the men's VMI in a landmark discrimination case decided under the Fourteenth Amendment's equal protection clause. I could write about her dissent in *Gonzales v. Carhart*,⁷ in which she called out the Court's retreat from and hostility to *Roe v. Wade*.

I could write out her state and local tax opinions, including her writing for the Court in *Barclays Bank PLC v. Franchise Tax Board*⁸ and *Colgate-Palmolive Co. v. Franchise Tax Board*, which I worked on while at FTB's legal division many years ago. I could point out that she was only the second woman on the Court since it was established in 1769 under the Constitution (Justice Sandra Day O'Connor being the first). But a discussion limited to her decisions or her place on the Court is not a complete portrait. More important is a testament to the strength of her convictions and her invaluable success as a role model for women, especially those who are lawyers. Mentors and role models are important in all aspects of life, especially in instances in which there are few of them and the need is high.

As a male, I have not experienced a lack of role models in my career or the unequal treatment that female attorneys have, although I have borne witness. Sometimes it is more subtle, such as the treatment of a female attorney by a

male judge. Sometimes it is less subtle, such as different pay scales for male and female associates in a firm. Justice Ginsburg gave a voice to women who otherwise would not have been heard. The work she did to advance gender equality has benefited the country as a whole and furthered democratic ideals.

⁶ 518 U.S. 515 (1996).

⁷ 127 S. Ct. 1610 (2007).

⁸ 512 U.S. 298 (1994).

Goodbye, Bubbie



Billy Hamilton is the deputy chancellor and CFO of the Texas A&M University System.

I am not a lawyer, much less a legal scholar, although I did manage to help produce one lawyer who I am counting on for

legal advice should I decide an inversion is in order for my multinational.

Since that's the extent of my legal grounding, I don't claim to be an expert on Justice Ginsburg, but I am saddened by her passing. In recent years she's become a giant of the legal profession, though standing barely over 5 feet. She seems to have possessed a formidable intellect, but also remained an accessible human being.

She had children, a career, and wound up lionized as "the Notorious RBG." She was a fierce advocate of women's rights, but also an advocate of equal justice for all of us. Now she's gone, and her loss should be deeply felt by us all.

I read up on Justice Ginsburg and two things caught my eye. First, she wrote the opinion in *Barclays* in 1994, in her second year on the Court. (If you're a tax lawyer, don't roll your eyes; I know you already knew that.) *Barclays* is one of those cases that state tax lawyers throw around to sound smart, and the rest of us just nod as though we were just reviewing the facts of the case the day before.

Barclays was an important decision for the states — sort of. In her majority opinion, Justice Ginsburg upheld the judgments of the appellate courts supporting California's corporate franchise tax and found that the tax didn't burden foreign-based multinational entities or result in double taxation and that worldwide combined reporting was constitutional. Not that the ruling helped California, which eventually caved to the Reagan administration and "fixed" the law to reduce business objections. I judged the issue controversial enough to include in a column I wrote about the 10 major state tax "disagreements" of the last 30 years.

The other thing I learned, although it also wasn't a secret, was that the Notorious RBG was a

grandmother. She had two children with her husband, Martin, and four grandchildren.

That fact interests me because I am a relatively new grandparent. As I told my son-in-law recently, I am trying to segue seamlessly from overly indulgent father to overly indulgent grandfather, although I'm trying to be a better grandpa than I sometimes have been a dad.

Ginsburg was just that — a good grandmother, just as she was a good lawyer, a good judge, a good wife, and a good mother. One of her grandchildren — Clara Spera, a Harvard law graduate — transcribed Ginsburg's final wishes. In 2018 she wrote a fond essay about her grandmother in *Glamour*. One thing she wrote particularly struck me:

I have learned from her focus on consensus building and her appreciation for measured improvement over time. Previously, I thought that winning, and only on my own terms, was the path to success. . . . But her work and friendships — like with the late Justice Antonin Scalia — have inspired me to listen to those I may disagree with and to find areas where we can build together.

Wow. We can all learn from that. I hope my grandkids remember me for saying something as meaningful — and not just for saying they could have another cookie (or two) if they didn't tell grandma.

Let me end with a preview of grandparenthood for younger readers: When you and your friends' first grandchildren are born, you will be surprised by how many of the newly minted grandparents fret over what they will be called, foolishly trying to pick a grandparent name for themselves. Some want grandma and grandpa, some nana and papa. One guy I know pushed for captain. Eventually, of course, the kids decide, and you can as easily wind up Geegoo as Grandma or Captain.

Ruth Bader Ginsburg, towering figure of American jurisprudence and the very embodiment of the conviction of true equal justice under the law, had a grandparent name. As Spera wrote in her article: "You know her as the Notorious RBG, but she's Bubbie to me." Not to be overly familiar, but as one grandparent to another: Goodbye, Bubbie. Godspeed.

An Argument Between Friends



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Justice Ginsburg will be remembered for her trailblazing work to eradicate invidious gender discrimination

under the law. For this cause, she was, and remained, an advocate, committed to changing the minds of others at a time when many were not even aware that their minds might need changing.

Since her death, much has been made of Justice Ginsburg's dissents. But I would rather talk about her majority opinion in the 1996 case of *United States v. Virginia*.⁹ With Justice Clarence Thomas abstaining, the Court ruled 7-1 in favor of requiring the Virginia Military Institute — an all-male, state-supported school — to admit qualified women to its military-style educational program — training “citizen soldiers.” This ruling came after the state attempted, without success, to create a roughly comparable women-only school. The sole dissent in the case was filed by Justice Ginsburg's good friend, Justice Antonin Scalia.

Let me talk about the dissent first. Justice Scalia's opinion described the history of women's higher education, including a long period of excluding and segregating women. But this, he concluded, was simply evidence that such segregation must serve some important governmental interest. He further contended that women could not be admitted to VMI without significantly altering goal of creating citizen soldiers and the institute's military-style approach to education.

Justice Ginsburg's opinion also describes the history of women's higher education, generally, and in Virginia in particular, as going through three phases: “protecting” women from higher education (that is, excluding them); establishing women-only schools with far less resources and stature; and finally, converting all-male schools to

coeducation. Unlike her colleague, however, her conclusion was that such change was necessary and inevitable. Similarly, she praised the goal of creating citizen soldiers, but further insisted: “Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men.” And in response to the argument that the school's instructional and disciplinary methods would not suit most women, she simply noted that, “Virginia never asserted that VMI's method of education suits *most men*.”

Whether you are male or female, try this thought experiment: Read the majority and dissenting opinions in the VMI case, then imagine having this same argument with one of your opposite-sex colleagues. Do you think you would be friends after the dust settled?

In a speech made at VMI after Justice Scalia's death, Justice Ginsburg noted that the “very long” opinion in the case was her 17th or 18th draft because she and Scalia had conducted a written sparring match, exchanging revised opinions in response to each other's latest versions. She also admitted that the points he raised helped her strengthen her own opinion. “That's the kind of colleague that he was. He improved your product,” she said, noting also, “I miss him very much.”

The life of Justice Ginsburg is not just a lesson in how to advocate; it is also a lesson in how to listen to the other side to make your own arguments, and friendships, better.

⁹ See *supra* note 6.

A Judicial Champion



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Justice Ginsburg is most commonly associated in the public's mind with her liberal stance on cases dealing with civil rights, sexual preference, and support of progressive government programs. These include such cases as her frequently cited majority opinion in *United States v. Virginia*,¹⁰ requiring the admission of women to Virginia's previously all-male public military college.

The justice is even better known, however, for her strong dissenting opinions. Her vigorous opposition includes such highly visible cases as *Bush v. Gore*,¹¹ in which she rebuked the conservative majority for suspending the recount of disputed Florida ballots, effectively securing George W. Bush's election as President. Her dissent in *Gonzales v. Carhart*¹² voiced alarm over the Supreme Court's retreat from *Roe v. Wade* by upholding a federal ban on partial-birth abortions. Her dissent in *Shelby County v. Holder*¹³ warned against nullifying provisions of the Voting Rights Act, including a strident criticism of the majority's view that the Jim Crow-era discrimination no longer warranted the Act's voter protection measures. In *Burwell v. Hobby Lobby*,¹⁴ a contraception case, her dissent admonished the Court for its interpretation of the Religious Freedom Restoration Act by accommodating corporations' religious beliefs over the reproductive rights of those same companies' female employees.

Although she earned fame for her dissents, Justice Ginsburg had a restrained and targeted

approach to the practice of dissenting. In a lecture she gave that was subsequently published, she wrote:

I will continue to speak in dissent when important matters are at stake. I stress important matters because I try to follow Justice Brandeis's counsel. He cautioned that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."¹⁵

Not all of Justice Ginsburg's opinions reflected a predictable liberal position. For example, although a strong advocate of First Amendment free speech rights, in *Republican Party of Minnesota v. White*,¹⁶ she dissented from a majority decision that struck down, on First Amendment grounds, a Minnesota canon of judicial conduct that barred candidates for elected judgeships from publicly expressing their political views. Her opinion was that candidates for elected judgeships must sacrifice some constitutional rights if they are to preserve another "essential bulwark of constitutional government . . . the guarantee of an independent, impartial judiciary."

Another example was her recently joining conservative members of the Court in ruling that a natural gas pipeline can be permitted to cross the Appalachian Trail — a finding that favored the pipeline developer, as well as the Trump Administration, and disappointed liberal environmental organizations.¹⁷

The likely legacy of Ruth Bader Ginsburg will lie in her well-deserved, iconic status as a relentless advocate for the advancement of women's rights. As a jurist, her legal writing and analysis are of journeyman quality. She will not be remembered for the scholarship of a Holmes or Frankfurter, nor will she be remembered for the evocative clarity of a Jackson or Scalia. Instead, her legacy will endure as a judicial champion and leading protagonist for gender equality. Justice Ginsburg was an astute strategist who understood, and used, the authority of the Supreme Court to change the social structure of America.

¹⁰ See *supra* note 6.

¹¹ 531 U.S. 98 (2000).

¹² *Supra* note 7.

¹³ 570 U.S. 529 (2013).

¹⁴ 573 U.S. 682 (2014).

¹⁵ *The Role of Dissenting Opinions*, 95 *Minn. L. Rev.* 1 (2010), quoting J. Brandeis's dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932).

¹⁶ 536 U.S. 765 (2002).

¹⁷ *Atlantic Coast Pipeline LLC v. Cowpasture River Preservation Association*, Dkt. 18-1587 (June 27, 2019).

A Lady Always Knows When It's Time to Leave



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I admit it. I, too, was (and postmortem, still am) one of the honorable Justice Ruth Bader Ginsburg's countless

groupies. I didn't always agree with her decisions, but I slept well at night knowing that she sat on our highest bench. That's right. Even her sharing in the coauthorship of the *Wayfair* opinion could not shake her from being one of my all-time favorite role models. She believed in the rule of law and voted her conscience, based on her vast intellect, incredible wealth of experience, and undeniable understanding of human nature.

So, why would anyone have wanted RBG to leave her position one second before she was ready? Who on earth could have been more qualified to sit on our highest judicial bench than she was? Yet, apparently during the last decade of her life, she was plagued by (ironically) discriminatory, highly political requests for her to resign so that the then-sitting president could appoint someone much younger to keep "her" spot on bench warm for decades to come. How dare they!

According to Article II, section 1 of the Constitution, Ginsburg was entitled to hold her appointment "during good Behavior." Legally, it was her choice, and her choice alone, to decide whether and when to retire. Yet even after her death, a few critics still are "woulda, coulda, shoulda-ing" her decision to remain in her position for so long as she believed she could, just because it looks like now, a different president will get to choose her replacement.

Mama Lohman would have called the conduct of RBG's critics down-right tacky and common. I could not agree more. RBG was passionate about continuing to serve our country for so long as she had the breath to do it. Our country has benefited significantly over the past 27 years by having RBG, at great personal sacrifice, remain as one of our nine Supreme

Court justices. I can think of no other person who was more qualified than she was to carry out those duties, despite her battles with age and illness. None of us is clairvoyant — none of us can predict what the future will bring. At least in my opinion, a "known" RBG was worth two of any unknowns, and what a hard act to follow!

Once Ginsburg's replacement is appointed by the president and confirmed by the Senate, that person will become completely independent for life (subject to "good Behavior") and that person's public allegiance to his or her political affiliation must cease. A Supreme Court justice is the toughest legal position in our country. RBG's replacement will soon "enjoy" having the sword of Damocles hanging over his or her head — each and every time a decision must be made that will affect all of us, be it in rendering or concurring with the opinion of the Court or in voicing the dissent. Good luck to that person! May that person live up to the impossibly high standards to which RBG adhered, and may that person do so with as much dignity, grace, and humor as she did.

The honorable Ruth Bader Ginsburg, however, has earned her rest, and may her critics finally let her rest in peace. The United States was a far better place for having RBG on the Supreme Court. She will be sorely missed, never forgotten, and impossible to replace. She was, in fact, a great lady.

A Legend From a Tax Perspective



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The views expressed here are hers and hers alone and should not be attributed to Mayer Brown LLP or any of its clients.

Justice Ginsburg¹⁸ pushed hard to open doors that would allow women to walk on broader and variant paths. That truly is a notorious accomplishment, and one that is near and dear to my heart. But Justice Ginsburg's legacy touches not only women — just look at the large number of women tax practitioners — but us all. And given her judicial longevity, it should come as no surprise that she has also left her mark on tax jurisprudence and provided us with valuable lessons on effective advocacy.

Justice Ginsburg was a savvy and persuasive litigator. She understood that male jurists might need to be able to personalize gender discrimination. Working with her husband, Martin Ginsburg, one of the most talented and skilled tax attorneys of his time, she opted to use the tax law as the vehicle to highlight gender hypocrisy. The case, *Commissioner of Internal Revenue v. Moritz*,¹⁹ involved a disallowance of a \$600 deduction taken by a son for the care of his dependent invalid mother; the amount of tax at issue was a mere \$296.70.²⁰ At the time, expenses for dependent care were limited to taxpayers who were women or widowers, or husbands whose wives were incapacitated or institutionalized, if the care permitted the taxpayers to work. Charles Moritz, who never married, did not fall within the class of persons eligible to claim the deduction. The Tax Court rejected Moritz's claim of discrimination,

¹⁸The name on her birth certificate was "Joan Ruth Bader," and her childhood nickname was "Kiki." Her questionnaire for her Supreme Court nomination makes interesting reading and can be found online.

¹⁹412 U.S. 906 (1973).

²⁰Brief for Petitioner-Appellant, *Moritz v. Commissioner of Internal Revenue*, 1973WL391987 at *2.

relying on the mantra that deductions are matters of legislative grace.²¹ The Ginsburgs, the ACLU, and others took over the representation of Moritz on appeal, and the Tenth Circuit²² reversed the Tax Court and found "invidious discrimination."²³ The Supreme Court denied the petition for writ of certiorari.²⁴ Lesson learned: Strategic litigation (finding a sympathetic plaintiff or presenting the plaintiff in a good light) and understanding the arbiters and any potential biases they may have is key to success.

Although Justice Ginsburg sided with the majority of the Court in *South Dakota v. Wayfair Inc.*,²⁵ to overrule *Quill Corp. v. North Dakota*,²⁶ perhaps because of her view that overruling *Quill* would serve to equalize sellers rather than discriminate against interstate commerce, she may have paved the way for a more circumscribed view of nexus on due process grounds. As state tax practitioners know, states and localities have long taken expansive views of tax nexus to support taxation of nonresidents and multistate businesses. Several SCOTUS decisions in recent years have taken a narrower view of personal jurisdiction under the due process clause than have some state and lower federal courts. In one of those cases, *Goodyear Dunlop Tires Operations SA v. Brown*,²⁷ the Court, in a unanimous decision delivered by Justice Ginsburg, rejected the argument that the in-state actions of affiliates can trigger nexus for other out-of-state affiliates — a position that Justice Ginsburg summarized as "it's all one ball of wax, parent and sub, they merge, it's one enterprise; so if the subs do something anyplace, the parent is — it's all part of one thing."²⁸ In

²¹55 T.C. 113 (1970).

²²The primary question presented to the Tenth Circuit was: "Is the statutory classification based on the sex of the wage earner, established in section 214(a) of the Internal Revenue Code for a purpose unrelated to any biological or functional difference between the sexes, an 'invidious classification' proscribed by the fifth amendment to the United States Constitution?" Brief for Petitioner-Appellant, 1973WL391987, at *1.

²³469 F.2d 466 (10th Cir. 1972).

²⁴412 U.S. 906 (1973).

²⁵585 U.S. ___, 138 S. Ct. 2080 (2018).

²⁶504 U.S. 298 (1992).

²⁷564 U.S. 915 (2011).

²⁸Transcript of Oral Argument, *Goodyear*.

another due process case, *Daimler AG v. Bauman*,²⁹ Justice Ginsburg wrote the majority decision, which rejected the Ninth Circuit's view upholding personal jurisdiction over *Daimler AG* as "grasping" and limited assertions of general jurisdiction for out-of-state corporations to only those corporations that are "at home" in the state — *i.e.*, that "continuous corporate operations" must be "substantial," making the corporation "essentially at home in the forum state."³⁰

Her views may well end up driving state tax nexus litigation for years to come, keeping her alive in our thoughts for reasons other than just her critical contributions to gender and civil rights, which moved our society in the right direction. R.I.P. R.B.G.

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²⁹ 571 U.S. 117 (2014).

³⁰ *Id.* at 138 (citing *Goodyear*).

My Dinner With Ruth³¹

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Never underestimate serendipity, especially when it can lead to dinner with Justice Ginsburg,

who at the time was on the D.C. Circuit.

I was getting off an elevator in Washington, and there was Marty Ginsburg. Seeing him always brought a smile. We first met years ago at the nefarious Eagle Lodge,³² where New York University sponsored an off-the-record meeting among government officials (including the Treasury assistant secretary for tax policy, the IRS commissioner, the IRS chief counsel, and high-level Justice Department decision-makers) and a select group of private sector lawyers and law professors. Invitation only, let your hair down, and no journalists or the public allowed.

Marty held court there. His intellectual prowess was legendary as was his hysterical New York sense of humor, and I loved kibitzing with him.

He was also very kind,³³ so how could I refuse an invitation to join him and a small group of his minions for dinner? It was late, and it turned out that both of us had just finished a major project, and were in that special state of giddiness, relief, and exaltation. Off we trotted to a nearby restaurant for a celebratory meal.

He called Ruth to join us. I only heard part of the conversation, but it went something like this:

³¹ No disrespect is intended in calling the Justice Ruth. That is the way she introduced herself and the way her husband introduced her. And it captures who she was.

³² See Jonathan Barry Forman, "Eagle Lodge 11: How I Taught the Treasury to Keep a Secret," *Tax Notes*, Feb. 26, 1990, p. 1065; Lee A. Sheppard, "Behind Closed Doors at Eagle Lodge," *Tax Notes*, Mar. 18, 1985, p. 1077; and Sheppard, "The Inner Circle at Eagle Lodge," *Tax Notes*, Mar. 11, 1985, p. 960.

³³ Marty was the quintessential mensch. His love and support for the justice has been the stuff of movies and countless articles. Just about every one of my women friends has said they wished they had a husband like him. I suspect my wife has probably harbored similar sentiments but is wise enough not to say so — at least to me.

"You have to eat, Ruth. And it will be too late for me to cook when I get home."³⁴ You can leave the dinner anytime you want."

The fear that she might have to confront the kitchen — alone — must have won the argument because she arrived shortly. Marty knew she would not tolerate a lot of schmoozing when she had briefs to work on, so we immediately sat down. As hungry as I was, I quickly lost my appetite when Marty bellowed out, "Ruth, sit here next to the professor." Others might have strenuously lobbied for this opportunity, especially those appearing before her, but I was paralyzed with fear.

I lost my confidence, even if she had not yet become that cultural icon, "RBG." I am not great at small talk, which I suspect she would have viewed as a waste of time anyway. But how could I possibly be a worthy dinner companion? I of course knew about the *Moritz* case that she and Marty had won, and I knew of her background and history before the Supreme Court, but I could only mentally muster boring and predictable thoughts about how to break the ice. How could I waste her precious time on my drivel?

I was tongue-tied and intimidated. Luckily, she broke the ice first and rescued me. "So what are you working on?" Never ever, either before or since, has anyone in a social situation asked me that, and she was totally sincere, not feigning interest just to mark time until she could escape and get back to work.

Given that she was married to the preeminent tax professor in the country, and that I actually was working on something, I took the bait, and through appetizers and our entrees, she listened, became the Socratic professor she once was, cross-examined me, peppered me with questions, and insightfully suggested new connections and themes that I might pursue. All of this was done with gentleness, warmth, encouragement, and with her blue eyes sparkling. (And, yes, I did rewrite parts of what I was working on.)

Buoyed by that, I felt I could move on to something more personal, her days at Harvard

³⁴ The justice was a notoriously bad cook. By contrast, everyone tried to finagle a home-cooked meal with Marty because of his famous culinary skills. Apparently, he cooked every New Year's Eve for the Scalias and the Ginsburgs.

Law School. Although I was a decade behind her, my class nevertheless had fewer than 30 women. In her era, there were still traditions like “Ladies’ Day,” in which a particularly infamous, elderly professor would call the few female students to the front of the class and quiz them about cases with questions calculated to embarrass them, to the great amusement and entertainment of the men.

And we gossiped. (I am comfortable using that term because many others have used it as well about her.) We talked about Columbia, Harvard, the pompous and self-important, articles that never should have been published, and memorable moments in our classrooms, both good and bad. We talked about Jackie Robinson and growing up in Brooklyn, and how similar it was to my growing up in Newark, New Jersey. I sensed I was with an old, wise friend.

And we must have talked about my life because Marty interjected, “Ruth, stop being Yente,”³⁵ to which she immediately responded, “Well, Marty, it did work for us.” Later I learned that he met her on a blind date arranged by his roommate, their yente, at Cornell.

What an evening. Her warmth, wit, and genuineness were so nurturing. I felt like I had become part of her extended family. I knew I was in the presence of greatness not because of her intellect, and not because she was this extraordinary lawyer and judge who had transformed our country, but because of her warmth, humanity, and wisdom. What a rare combination — desperately needed to heal the country at this fragile time.

³⁵ A reference to the matchmaker in *Fiddler on the Roof*.




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The Impressions Left on Me by RBG



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Ruth Bader Ginsburg, also known in recent years as simply “RBG” or “the Notorious RBG,” will forever be recognized as a

trailblazing champion of social justice and women’s rights in particular. The pinnacle of most legal careers is to argue a case in the United States Supreme Court. RBG did that six times before ascending to the bench in 1993 as only its second female justice, and the first Jewish woman to sit on the Supreme Court. Not many then climb even higher, reaching the pop icon living legend status of being known merely by one’s initials — and notoriously at that — let alone then becoming the subject of a Hollywood movie. Eighty-seven years of life lived to its fullest.

RBG will certainly be remembered for her advocacy as an ACLU lawyer, her civil rights opinions in *United States v. Virginia*,³⁶ and *Olmstead v. L.C.*,³⁷ and her sharp dissents such as in *Bush v. Gore*,³⁸ to name just a few of her opinions in her long and storied career. But Justice Ginsburg also helped form today’s landscape in state taxation. Writing for the majority, RBG recognized a state’s ability to tax all the income of its residents in *Oklahoma Tax Commission v. Chickasaw Nation*,³⁹ and then followed with her strong dissent in *Comptroller of the Treasury v. Wynne*.⁴⁰ RBG also joined her conservative colleagues in the landmark 5-4 decision in *Wayfair Inc.*,⁴¹ eliminating the physical presence requirement in allowing states to require remote sellers to collect and remit sales tax under the commerce clause. With the proliferation of remote workers as a result of the pandemic, and the continued

expansion of e-commerce with its remote sellers, these cases have a tremendous impact today in determining the scope of a state’s taxing authority.

RBG’s memory, however, transcends her scholarly legal opinions. You don’t become a “pop icon” or “notorious” without good reason. She has represented the Court and our country with grit, integrity, and unquestionable character, and in so doing influenced future generations as a role model who acted on her ideals for the greater good, advanced the rights of women, spoke out strongly and logically in her opinions, yet did so with grace and civility.

The stories of RBG’s relationship with the late Justice Antonin Scalia are inspirational. They were two extremely strong-minded, passionate advocates who had markedly different views of the law. One was viewed as an icon on the left, the other an icon on the right. Yet, by all reports, they were the closest of friends and helped each other with writing opinions, even when they didn’t agree with those opinions.

Unfortunately, the example they set seems lost today. The adage “disagree without being disagreeable” appears to be a forgotten relic of the past. Instead, civility is seen as weakness, if not a character flaw, and reaching across the aisle as political treason.

If John Lennon were alive today and writing the lyrics to “Imagine”, those lyrics might make reference to RBG and Justice Scalia, two formative philosophical combatants on diametrically opposing sides of many legal issues who then dined together, vacationed together, and cared about each other. “Imagine” a president and a Congress, comprised of senators and representatives of all parties and backgrounds, who, despite their different ideologies, experiences, and political affiliations, could vigorously debate issues while at the same time treating each other with dignity and respect. RBG set the example; it is up to others to follow her lead.

Rest in peace RBG.

³⁶ See *supra* note 6.

³⁷ 527 U.S. 581 (1999).

³⁸ See *supra* note 11.

³⁹ 515 U.S. 450 (1995).

⁴⁰ 575 U.S. 542 (2015).

⁴¹ *Supra* note 25.

A Tax Tiger at Heart



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With the recent passing of Justice Ruth Bader

Ginsburg, many tributes, anecdotes, and stories have appeared in multiple media concerning her spectacular career and the generational impact she had in multiple areas of jurisprudence. All of that is without question well deserved.

But after *Tax Notes State* asked for a short piece about Justice Ginsburg and her impact on the law, I immediately put pencil to paper to talk about something that I've thought for years and years — Justice Ginsburg was not only a legend, or, as Chief Justice John Roberts recently referred to her, “a rock star”; Justice Ginsburg was, deep down, a Tax Tiger.

I draw this conclusion based on her decades of marriage to an outstanding tax attorney and thought leader, Martin David Ginsburg, who, while I never had the pleasure of studying under, I certainly knew of and greatly respected as he taught many of my peers in various tax classes. And, of course, there is the famous case that is covered in the recent motion picture about Justice Ginsburg relating to the tax treatment of a caregiver. But it is neither of these things that confirmed to me that she was a Tax Tiger; no, it was where baseball, tax, and Justice Ginsburg intersected: *United States v. Cleveland Indians Baseball Co.*⁴² “Really,” you say?

I am an Ohio native and I grew up watching the Indians — or the Tribe, as they were known decades ago — on cable TV then in its infancy courtesy of channel 43 out of Cleveland, WU AB-TV. Even though I lived in Cincinnati Reds country, the Reds were not on cable TV daily in that day, just the Tribe and a few other teams.

So, when Justice Ginsburg wrote for the High Court in the *Cleveland Indians Baseball Co.* case, I paid great attention to her opinion. Not only because of the taxpayer involved, but also because of the subject matter being addressed — whether back wages should be taxed according to the year when they should have been paid, rather than taxed in the year they were actually paid, all arising out of the context of a grievance dispute involving the Indians and 14 ball players for back wages due. The Indians paid tax on these amounts in the year of settlement (or payment, as in the current year), filed a refund claim with the IRS, and then sued successfully in the U.S. District Court in Cleveland. Why would the Indians advance a refund claim? We all know that the social security tax on wages has increased steadily year over year, and it was so between the underlying years involved (1986 and 1987) and the year of payment, 1994. In other words, if the wages were deemed allocable to 1986 and 1987, there would have been virtually no additional tax due on the payments involved.

Justice Ginsburg wrote for the Court in a unanimous opinion and ruled rather plainly that wages are subject to FICA and FUTA taxes by reference to the year the wages are in fact paid, and not by reference to the underlying year involved. Her analysis throughout the opinion is quite micro-analytical, yet direct, clear, and to the point. There are several noteworthy comments made throughout the opinion, but one in particular always stuck with me given my tax controversy practice. In referencing the Supreme Court's deference to the IRS's administrative interpretation on the involved point, Justice Ginsburg cited authority in noting that the Court does “not sit as a committee of revision to perfect the administration of tax laws.” I always thought this observation, this judicial tenet, this important “footnote” really meant that *sometimes, oftentimes*, close enough is good enough, and if the agency has been consistent in how it's been administering the law, well, that is the way it is going to be upon judicial review thereof.

The case is much more technical than I can discuss in this short piece, but the takeaway is that Justice Ginsburg knew what all tax lawyers know, in that the taxing agencies administering the laws receive a lot of deference in their efforts, and when

⁴² 532 U.S. 200 (2001).

hyper-technical areas of the law are brought before the Court, as they often are, and framed as very narrow points of law and issues — oftentimes, it is really *close enough is good enough*, and that is the way it is.

Succinct, pragmatic, deliberate, insightful, and persistent are some of the terms that have been used over the last week or so concerning Justice Ginsburg. Her unanimous opinion in *Cleveland Indians Baseball Co.* is all these and more. So, one of the teachings I will remember from the very learned and capable Justice Ginsburg, who had an outstanding tax attorney as her life partner and so she knew enough about the world of tax from day-to-day conversations, is that in tax — and dare I say, life — sometimes close enough is as good as it gets and as good as it needs to be. RIP RBG.

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'The Dissenter'



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On September 18, 2020, this nation lost not only an exceptionally

accomplished jurist but a powerful voice for gender equality and those who have been made to feel they don't belong. Justice Ruth Bader Ginsburg broke the glass ceiling and showed those of us who came behind her in the law that we belonged and had opportunities to change the world. As she said, "If you are going to change things, you have to be with the people who hold the levers."⁴³ Throughout her career, including in her 27 years on the Court, Justice Ginsburg made sure she was with the people who held the levers. As the first director of the American Civil Liberties Union's Women's Rights Project and a staunch advocate for gender equality, she argued six cases before the Court — winning five, which resulted in the beginning of the Court striking down statutes that differentiated based on gender. Her decisions and forceful dissents echoed her goal not only of dismantling the artificial legal barriers to women's equality but also protecting everyone's fundamental rights, such as the right to vote.⁴⁴

We can all learn from Justice Ginsburg's determination to persevere in the face of what may be considered insurmountable obstacles. As the Court shifted, Justice Ginsburg found herself in the minority, but she used that role to her advantage. Known as "the Dissenter," her dissents were intended to persuade. That persuasion can be seen in the 2009 enactment of the Lilly Ledbetter Fair Pay Act.⁴⁵ The lesson to be learned is that as we encounter positions that differ from our own, we should attempt to persuade rather than create acrimony.

While known as an advocate for equal rights, Justice Ginsburg also played a role in shaping state tax policy. Her decisions and dissents set forth her belief that states had the ability to tax the worldwide income of their residents. She wrote the majority opinion in *Barclays Bank*,⁴⁶ which upheld California's worldwide combined reporting and concluded that the tax scheme did not place an undue burden on the foreign-based multinational entities. And, writing for a unanimous Court, Justice Ginsburg concluded that Oklahoma was allowed to tax the income of members of the Chickasaw Tribe who lived outside the tribal lands.⁴⁷ Drafting the dissent in *Wynne*,⁴⁸ she argued that a fundamental principle of taxation allows a state to tax all the income of its residents, even income earned outside the taxing jurisdiction. Most recently, Justice Ginsburg joined the majority in *Wayfair*,⁴⁹ upholding the South Dakota statute. These decisions and dissents will continue to shape the focus of state policy.

Those of us who came behind Justice Ginsburg owe her a debt of gratitude for breaking the ground and paving the way for our careers and instilling in us the belief that we in fact do belong. Her storied career shows us that professional disappointments are character builders and building blocks that lead to successes, sometimes in unexpected ways. Justice Ginsburg's tenacity showed us that doubts or resentments encountered along the way should never affect our own self-worth. Her ability to persuade showed us that dissents can indeed result in change rather than just spark divisions. More importantly, her wisdom imparted on leadership is a mantra we should all live by: "Fight for the things that you care about, but do it in a way that will lead others to join you."⁵⁰ Rest in peace, RBG.

⁴³ 2009 *New York Times* interview.

⁴⁴ See *Shelby County Alabama v. Holder*, *supra* note 13.

⁴⁵ The dissent in *Ledbetter v. Goodyear Tire and Rubber Co.*, ___ 550 U.S. 613 (2007), was the basis for the law.

⁴⁶ *Supra* note 8.

⁴⁷ *Oklahoma Tax Commission v. Chickasaw Nation*, 534 U.S. 84 (2001).

⁴⁸ *Supra* note 40.

⁴⁹ *Supra* note 25.

⁵⁰ *Talking at Harvard Law School in 2015.*

Justice Ginsburg: A Friend of the States



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The tributes pouring in to praise the life of Justice Ruth Bader Ginsburg rightfully document her life as a champion of women's rights, a dissenter, and a feminist icon. This article pays tribute to her contributions to the library of constitutional doctrines that govern state and local tax that exhibit another side of Justice Ginsburg — a concern for fundamental fairness and reasonableness.

Justice Ginsburg was a friend of the states. She sought to apply a dose of reasonableness to the facts presented. Her support of the interests of state and local government should be appreciated by every state in the nation (her views directly affected California, allowing the state to dodge a multibillion-dollar bullet when the issue of worldwide combined reporting and foreign commerce came before the Court).

Foreign Commerce Clause

Justice Ginsburg left her mark on the history of California state and local tax in *Barclays Bank*.⁵¹ The case provides insight into Justice Ginsburg's views about the scope of the commerce clause as a limitation on a state's right to assess its tax on individuals and businesses.

The case involved the application of worldwide combined reporting to a foreign multinational. Worldwide combined reporting is the method promoted by California as the answer to the dilemma (and potential unfairness) of transfer pricing. What this means is that California requires multinational business entities (whether domiciled domestically or overseas) to

⁵¹ *Supra* note 8.

report their worldwide income in accordance with California tax principles and then apportion to the state. The litigants were Barclays Bank International Limited (BBI) and its wholly owned subsidiary, Barclays Bank of California, both of which were doing business in the state. These companies were part of the Barclays Group, which was based in the United Kingdom and consisted of more than 220 corporations that operated in approximately 60 nations. BBI and Barclays both reported their income to California but did not report the income of the worldwide group. Upon audit, it was determined that these companies were part of a unitary group and the FTB applied worldwide combined reporting. Barclays challenged the assessment and ultimately the case proceeded to the U.S. Supreme Court. Barclays argued that the state's method violated the commerce clause's anti-discrimination requirement based on the disproportionately large tax compliance burden imposed on foreign multinationals.

Barclays also argued that worldwide combined reporting deviated from method used by the other states, which violated the federal government's interest in providing uniform standards for taxing foreign commerce.

The Court upheld worldwide combined reporting, and Justice Ginsburg authored the majority opinion. The opinion illustrates Justice Ginsburg's consistent support of a state's right to tax the worldwide income of a resident.

Although the Court had considered California's worldwide combined reporting method once before,⁵² it had not considered how this method would play out if the taxpayer were headquartered/domiciled overseas. Foreign commerce brings into play the foreign commerce clause, which requires the Court to consider not only the four-factor test set forth in *Complete Auto Transit Inc. v. Brady*⁵³ but also the enhanced risk of double international tax when foreign commerce is involved and whether the state tax prevents the federal government from speaking with one voice

⁵² *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983).

⁵³ 430 U.S. 274. This test requires that the tax be assessed on a transaction in which there is substantial nexus with the taxing state; the tax is fairly apportioned; the tax does not discriminate against interstate commerce; and the tax is fairly related to the services provided by the state.

when regulating commercial relations with foreign governments.

The Court held that the California “reasonable approximations” method of reducing the compliance burden is compatible with due process and the system does not expose foreign multinationals to constitutionally intolerable multiple tax. In addition, California’s method does not prevent the federal government from speaking with “one voice” in international trade. Justice Ginsburg pointed out that Congress had ample opportunity to step into the area and enact legislation, or in one case to ratify a treaty provision that would have prohibited the practice. It is here that Justice Ginsburg notes that it is within the regulatory authority of Congress to enact legislation that prohibits the use of worldwide combined reporting. It is not the role of the Court (nor the executive branch) to strike down California’s tax scheme.

By reaching this conclusion, Justice Ginsburg’s opinion marked the end of the one-voice analysis. The Court essentially holds that if Congress is silent on an issue and does not take action to prohibit whatever the state is doing, then Congress has “acted” to condone the state’s action.

California’s worldwide combined reporting remains in effect today, but criticism died down considerably with the enactment of a water’s edge election (largely brought about by the *Barclay’s* case) that allows taxpayers to elect to narrow the definition of the taxable unitary group to the entities doing business within the domestic water’s edge.

Dormant Commerce Clause

Some 20 years later, Justice Ginsburg again expressed her belief that a state has the right to tax its residents. In *Comptroller of the Treasury of Maryland v. Wynne*,⁵⁴ the Court ruled that the failure of the Maryland income tax law to allow a credit against the county tax for a Maryland resident taxpayer regarding passthrough income of an S corporation that arises from activities in another state and that is taxed in that state violates

the federal dormant commerce clause. Justice Ginsburg did not agree.

Justice Ginsburg’s dissent makes clear that a nation or state may tax all the income of its residents, even income earned outside the taxing jurisdiction. Ginsburg states that there is nothing in the Constitution or in prior decisions of the Supreme Court that dictates that one of two states (the domiciliary state or the source state) must recede simply because both have a lawful tax policy that reaches the same income. The Constitution does not prefer one lawful basis for state taxation of a person’s income over another. In this dissenting opinion, Justice Ginsburg and her very good friend, Justice Antonin Scalia, join together, sharing the same view. On the issue of the scope of a state’s right to tax, Justice Ginsburg found herself aligned with the conservative justices, as illustrated by the next case.

On June 21, 2018, the Court issued a decision in *South Dakota v. Wayfair*,⁵⁵ overturning the physical presence standard set forth in *Quill v. North Dakota*.⁵⁶ The Court ruled that the physical presence requirement set forth in *Quill* is an “unsound and incorrect” interpretation of the commerce clause that has created unfair and unjust marketplace distortions favoring remote sellers and causing states to lose out on enormous amounts of tax revenue. The Court stated that the correct standard in determining the constitutionality of a state tax law is whether the tax applies to an activity that has “substantial nexus” with the taxing state. An extensive virtual presence meets this requirement. Justice Ginsburg (not surprisingly) joined the majority opinion in this 5-4 decision.

Conclusion

Justice Ginsburg might not be remembered for her state tax opinions (compared with her groundbreaking opinions in the area of women’s rights) but these decisions do illustrate her adherence to reasonableness and fairness for everyone. ■

⁵⁴ *Supra* note 40.

⁵⁵ *Supra* note 25.

⁵⁶ *Supra* note 26.