

POLITICO

‘The Most Important Woman Lawyer in the History of the Republic’

How did Ruth Bader Ginsburg change America? More than a dozen legal thinkers weigh in.

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It’s hard to think of three letters that have more resonance in modern-day American political life than RBG. Supreme Court Justice Ruth Bader Ginsburg, who died Friday at age 87, was a pop culture icon — the subject of movies and children’s books, the face of posters and T-shirts, the rare political figure with a universally recognized epithet, “notorious.”

She was also, of course, a towering legal mind who shaped American jurisprudence over decades on the court, and before that as a professor and a lawyer, most notably in the realm of gender equality. What legacy does she leave for the country?

Politico Magazine asked more than a dozen legal thinkers — law professors, litigators and constitutional scholars — to tell us how RBG’s life and work reshaped America. Many pointed to her work as a champion of women and voting rights. “Her deep and abiding commitment to justice and equality drove her analytic rigor, not the other way round,” Columbia University’s Gillian Metzger wrote. Others argued that she embodied a “sense of moderation and strategy,” as the Cato Institute’s Ilya Shapiro put it, that perhaps went overlooked.

Still others pointed to the hole that her death leaves on the court — how it could shape abortion rights or even the tenure of Supreme Court justices. And more than a few pointed to her friendship with the late conservative Justice Antonin Scalia, with a sense of hope that their friendship, unlikely as it seems in this fractious moment for the country, was not the last of its kind.

‘She pivoted the entire structure of the Fourteenth Amendment’

Linda Hirshman is a lawyer, writer and author of Sisters in Law: How Sandra Day O’Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World.

Ruth Bader Ginsburg served on the Supreme Court for almost 30 years. She was, in the words of one of her adoring young followers, so old and still so radical. She was famous for her fiery dissents. But that’s not what she’ll be remembered for; dissents mean you were outvoted. And, sure, she delivered the landmark opinion in the 1996 Virginia Military Institute sex discrimination case, *United States v. Virginia*, but the conservative justices, slowly at first and then faster after Sandra Day O’Connor left, cut back on the impact of her formal sex discrimination doctrine.

U.S. Supreme Court Justices Sandra Day O'Connor and Ruth Bader Ginsburg pose for a portrait in Statuary Hall at the U.S. Capitol Building, surrounded by statues of men, March 28, 2001. | David Hume Kennerly/Getty Images

Her legacy is older. It goes back to the years as head of the ACLU Women's Rights Project, when, starting in 1971, she pivoted the entire structure of the Fourteenth Amendment to cover equal rights for women. Her first case, *Reed v. Reed*, came a mere 10 years after the Supreme Court had ruled explicitly that equality was, essentially, "No Girls Allowed." Working in the footsteps of Thurgood Marshall, she slowly and methodically pulled the Constitution toward a larger circle of equality. She was not the most important justice, even if she was the most famous one. She was, as one of my sources told me, quite simply the most important woman lawyer in the history of the Republic.

'She was a champion of our democracy'

Geoffrey Stone is a professor at the University of Chicago Law School.

Justice Ruth Bader Ginsburg was a truly extraordinary person and a truly brilliant Supreme Court justice.

Unlike too many of her colleagues on the court over the years, she understood the most fundamental reasons for judicial review and the most fundamental responsibilities of a justice. Justice Ginsburg knew that democracy may be the best form of government, but recognized that our democracy comes with two serious weaknesses: one, a serious risk that majorities will disregard the rights and interests of members of communities they regard as the "other," and; two, that majorities will manipulate the electoral process in order to ensure that they will retain control of the legislative process.

The most important role of the judiciary is to protect our nation against these two core weaknesses, and Ginsburg was extraordinary in her understanding of that responsibility. She steadfastly protected the rights of African Americans, women, immigrants, gays and lesbians, persons accused of crimes, political dissidents, and other groups in our society whose rights and interests are too often disregarded by a hostile or indifferent majority. And she was devoted to the preservation of a fair electoral system — whether the issue was campaign finance reform, gerrymandered legislative districts or expanding and preserving voting rights.

She was a champion of our democracy and our Constitution, and made a truly remarkable contribution to the most fundamental values of our nation. We will miss her terribly.

'A symbol of everything that is right about our system of justice'

Ted Boutros is a partner in the law firm of Gibson, Dunn & Crutcher and global co-chair of the firm's litigation group.

Arguing before Justice Ginsburg meant you were in the presence of an historic figure, a legend sitting on the bench. She personified the rule of law, equality and justice, and there was no better feeling than to persuade her to vote your way.

As a lawyer, she was an extraordinarily powerful strategist and ingenious civil rights pioneer who changed our nation by developing and deploying legal theories that shattered barriers to equality for women. As a federal appellate judge and later a Supreme Court Justice, she always — always — made you understand what it means to *do* justice, whether the question before the court concerned arcane and complex civil procedure, life and death, fundamental rights, or the Republic itself. During oral argument, if she asked you a question, and you could answer it in a way that satisfied what bothered her, you knew you had at least a fighting chance to win.

Justice Ginsburg is a symbol of everything that is right about our system of justice, our Constitution, our democracy and the rule of law in this country. She was — and is — a role model for all of us as we practice our craft and try to use the law to make society a better and fairer place for everyone.

‘A person who modeled civility, compassion and decency’

Kimberly Wehle is a professor of law at the University of Baltimore School of Law.

As we process the passing of the extraordinary Ruth Bader Ginsberg, let’s think of her legacy not just as a warrior for civil rights — most prominently, as a pioneer for equal rights under the U.S. Constitution irrespective of gender — but also as a person who modeled civility, compassion and decency despite political division. The Supreme Court deals with the most divisive issues in American society, but famously, she and the late Justice Antonin Scalia were close and affable friends, setting aside their differences along the political and ideological spectrum. Judges, like people, decide hard questions based on facts and law—but also in reliance on core human values. They know that law, like life, is rarely black and white. The thorniest questions require deep understanding and tolerance of opposing views. These days, that important insight is all but lost in American politics and large swaths of American society. Let’s find a way to live her legacy every day, and not let Red v. Blue divide us as human beings, as “We the People.”

Part of her legacy will be to encourage the end of lifelong tenure for justices

Sanford V. Levinson is a professor of law at the University of Texas Law School and co-author, with Cynthia Levinson, of Fault Lines in the Constitution.

There are many positive ways that Ruth Bader Ginsburg will be remembered for her illustrious career, but candor requires mentioning that she will also be remembered for her quite unbridled egotism in refusing to retire in 2013, after two decades on the Supreme Court, when Barack Obama was president and Democrats still controlled the Senate.

It might be that part of her legacy will be to encourage the overdue elimination of what is truly the “exceptional” practice of according Supreme Court justices full life tenure — rejected, for good reason, by almost all American states and other countries around the world.

Her death is a call to do more to protect equality

Peggy Cooper Davis is a professor and director of the Experimental Learning Lab at NYU School of Law.

The loss of Justice Ginsburg at this time is unspeakably tragic. Of course we must honor her world-changing body of work. But what we must do even more urgently is struggle in every way we can fathom to turn the political tide that is now threatening further damage to the edifice of equal protection and human rights guarantees that she and others have bravely struggled to build from the ruins of Reconstruction's charter of liberty.

'One of the most articulate defenders of a right to choose abortion'

Mary Ziegler is the a professor at Florida State University College of Law and the author of Abortion and the Law in America: Roe v. Wade to the Present.

Anyone looking to understand the law of sex discrimination in the United States should begin with Ruth Bader Ginsburg. Even before joining the Supreme Court, Ginsburg upended how the law dealt with sex stereotypes. She picked cases that demonstrated that sex-based classifications harmed men as well as women. She helped to pioneer the idea that discrimination against pregnant workers does not reflect real biological differences so much as pernicious generalizations. Her work changed what we mean when we talk about discrimination.

On the Supreme Court, it was no different. Ginsburg was one of the most articulate defenders of a right to choose abortion. There were few areas of the law that she left untouched. For decades, Ginsburg has been a larger-than-life figure, a symbol of women's rise in the legal profession. It is hard to imagine the Supreme Court without her.

Ginsburg's loss also promises to transform American law. Should the current Senate confirm Ginsburg's replacement, the overturning of *Roe v. Wade* will become probable. This is the irony of Ginsburg's legacy. One woman changed the law of sex discrimination in America, in the process, becoming a hero to many. And yet with her passing, so much of that legacy could all too easily be erased.

'A lawyer's lawyer'

Jamal Greene is a professor at Columbia Law School.

Ruth Bader Ginsburg became a cultural icon over her final decade, acquiring a kind of mythic status that extended well beyond the statute books, but at her core she was a lawyer's lawyer. She was cautious by temperament, a master proceduralist, a strategic thinker who always played the long game. She developed a reputation for feistiness, but her secret weapon was that she was in no hurry. As an ACLU lawyer in the 1970s, she took one step at a time, developing the law's reluctant commitment to sex equality not through drama or bombast but through careful case selection and an attention to doctrinal detail that could nudge the law incrementally. It is because of the legal edifice she built that, three years after she joined the Supreme Court, she was able to get several conservative votes for her landmark 1996 opinion requiring the Virginia Military Institute to admit women. The Equal Rights Amendment might not have passed, but because of the careful work of Ruth Bader Ginsburg, it didn't have to.

'Women and men both owe her a great debt'

Susan Deller Ross is a professor and director of the International Women's Human Rights Clinic at Georgetown Law School.

Ruth Bader Ginsburg was a giant on the Supreme Court, and her death is a great loss for the country. First as a litigator before the Supreme Court and then as a justice, she led the court to completely change its attitude toward laws that discriminated against women on the basis of their sex. Before 1971, the court had never used the Fourteenth Amendment to invalidate any such law, no matter how serious. The court had ruled that the government could deny women the right to vote and the right to work as lawyers or bartenders. States could insure that no women would serve on juries and that they could be barred from better-paying jobs if they required working long hours or lifting more than 15 pounds. Starting with her brief in *Reed v. Reed*, Ginsburg persuaded the court to invalidate a whole series of such laws under the Equal Protection Clause. As a justice, she wrote the court's opinion with the strictest test yet to judge discriminatory laws, resulting in the admission of women for the first time to the Virginia Military Institute, in 1996. Women and men both owe her a great debt for her work transforming the American legal landscape to insure that women and men receive equal treatment under the law.

She transcended the traditional role of a justice

Rick Pildes is a professor at New York University School of Law.

We tend to assess the legacy of Supreme Court justices in terms of the influence of their written opinions on the law. A few justices, though, transcend this role – Thurgood Marshall is one, Ruth Bader Ginsburg now another. For these justices, a major aspect of their legacy is the way their presence on the court, as well as the words in their opinions, inspire others to aim for the heights as well.

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Legal insiders had always appreciated Justice Ginsburg's extraordinary career, but it was remarkable to watch the way she was discovered in the last decade of her life by an enormous public across all ages, far beyond the legal community, for whom she became a towering symbol (despite her diminutive stature) of righteousness, fortitude, independence and character.

Despite naysayers, she was to women's rights what Thurgood Marshall was to civil rights

Ilya Shapiro is the director of the Robert A. Levy Center for Constitutional Rights at the Cato Institute and author of Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court.

Thinking about Ruth Bader Ginsburg's legacy brings us back full circle to her nomination in June 1993, when President Bill Clinton highlighted three reasons he picked her. First, her distinguished judicial career. Second, her litigation project, which made her "to the women's movement what Thurgood Marshall was to the rights of African Americans" — a comparison which Justice Antonin Scalia later reiterated in his tribute to her for *Time* magazine's 2015 list of the world's 100 "most influential people." And third, her ability to build consensus as a "moderate liberal."

That sense of moderation and strategy got her in hot water during her confirmation hearings, when abortion rights advocates worried that she was insufficiently supportive of the right to choose. In a lecture at NYU Law School just a few months before her nomination to the Supreme Court, she questioned the rationale and timing of *Roe v. Wade*, blaming the court's overbroad decision for the continued political controversy over abortion. Given that she's become a legal giant and progressive hero, it seems amazing that anyone once doubted Ginsburg's pro-choice commitments.

The Supreme Court will now be as big an issue in the 2020 election as it was in 2016. It would be better if our law and politics didn't turn on the physical health of judges, but, alas, that's not the world we're in.

'She never let abstract ideas distract her from reality'

Gillian Metzger is a professor and co-director of the Center for Constitutional Governance at Columbia Law School.

Justice Ginsburg had an extraordinary mind. But unlike some great minds, she never let abstract ideas distract her from reality. Her deep and abiding commitment to justice and equality drove her analytic rigor, not the other way round. All of the great opinions she penned — *Virginia Military Institute*, her dissents in *Ledbetter* and *Shelby County*, even her dissent this last term in *Little Sisters* — were so powerful because she showed how our greatest constitutional principles and legal traditions must speak to and reflect the reality we all live. This focus on law in reality may have come from her years as a women's rights advocate, but also was what led her to become an advocate in the first place. It is why she became so uniquely notorious, and her death is a huge loss.

'The founding mother — or simply founder — of our nation's sex equality jurisprudence'

Kenji Yoshino is a professor of constitutional law at NYU School of Law.

Justice Ruth Bader Ginsburg transformed sex equality law — as a professor, as an advocate, as a judge and then finally as a justice on the United States Supreme Court. We see that most clearly in her canonical majority opinion in the 1996 case of *United States v. Virginia*, which held that the Virginia Military Institute could not deny women admission. She wrote: “[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunities to women whose talent and capacity place them outside the average description.” Like its author, this sentence was quietly radical. Its logic means that if *any* woman can meet a state's standard for an opportunity, *no* woman can be denied access to it. That view has resonated across the decades to gradually reduce sex stereotypes about women — and men. It helped lay the foundation for cases ranging from the court's 2015 decision recognizing same-sex marriage to its decisions just last term barring employment discrimination on the basis of sexual orientation or gender identity.

It would be too faint praise to observe that Justice Ginsburg's own “talent and capacity” placed her far, far “outside the average description.” More than any other justice, she has embedded the principle that biology is not destiny into our fundamental law. As such, she can rightly be

deemed the founding mother — or simply founder — of our nation’s sex equality jurisprudence. So it seems apt to bid her farewell with Chief Justice John Marshall’s words — penned just over two centuries ago — to the original Founding Fathers: “No tribute can be paid to [her] which exceeds [her] merit.”

‘She was an exemplar of purpose and poise’

Josh Blackman is a constitutional law professor at the South Texas College of Law Houston, an adjunct scholar at the Cato Institute and the President of the Harlan Institute.

On September 17, we marked the 233rd anniversary of the signing of the Constitution. On September 18, we mourned the passing of a constitutional giant. Throughout her remarkable career, Justice Ruth Bader Ginsburg left an indelible mark on how our Constitution is understood, and she was an exemplar of purpose and poise. As an attorney, she litigated the landmark gender equality cases. Her strategy was simple but momentous: Make the all-male Supreme Court understand why the government should not discriminate against people because of their sex. As a Supreme Court justice, she eloquently and persuasively articulated her constitutional vision for nearly three decades. As a colleague, she modeled civility, even with her jurisprudential foes. It is well known that she became dear friends with Justice Antonin Scalia. And as a pop icon, she inspired a generation of young women to aspire for greatness. May her memory be a blessing. The only consolation for this sad moment is that Justice Ginsburg can now be reunited with her beloved husband, Martin. And I hope she can soon enjoy a performance of *The Marriage of Figaro* at the big opera house in the sky — with her old pal Justice Scalia humming along.

She reminded us that realizing America’s ideals is a work-in-progress

Robert L. Tsai is a professor of law at American University and author of Practical Equality.

The promise of equality was her life’s work. From her pioneering litigation strategies as the head of the Women’s Rights Project at the ACLU to her quietly determined efforts to enforce the Constitution’s Fourteenth Amendment as a justice on the Supreme Court, Ruth Bader Ginsburg had the audacity to improve upon Thomas Jefferson’s famous words: “all men are created equal.” She understood that the phrase comprised a living commitment rather than a description of reality. Diminutive in size, she possessed a towering intellect and a tremendous heart — two things essential to understanding the needs of the perennially downtrodden.

On the Court, Ginsburg’s ability to forge genuine friendships across deep ideological differences, most visibly seen in her friendship with Justice Antonin Scalia, modeled the virtues of fighting hard for principles, while keeping in mind that we must be able to live together with fellow citizens of different backgrounds and beliefs. She authored the landmark opinion striking down the Virginia Military Institute’s admission policy excluding women — doing for sex equality what *Brown v. Board* did for racial equality. Poignantly, she pointed out that Jefferson himself believed that women were rightly excluded from democratic life at the time “to prevent deprivation of morals and ambiguity of issue.” Today, however, the notion of equal opportunity means that women “count as citizens in our American democracy equal in stature to men.”

In the later stages of her career, she worried that young people might “take for granted the rights that they have.” If there was one case she would overrule, she once said it would be *Citizens United* because “the notion that we have all the democracy that money can buy strays so far from what our democracy is supposed to be.” Another is *Shelby County*, which involved, in her words, “essentially the destruction of the Voting Rights Act.” Her fierce dissent in that case reminded us of the importance of treating this nation’s history of injustice as a work-in-progress rather than a chapter that should be closed. “For half a century, a concerted effort has been made to end racial discrimination in voting,” she wrote, but voting discrimination itself had evolved “into more subtle second-generation barriers,” and so effective legal tools were still needed. America is a more equal place because RBG insisted that words matter, that human dignity and political power matter.

She was as kind as she was smart

Roberta A. Kaplan is the founding partner at Kaplan Hecker & Fink LLP.

In December 2013, my wife and I got invited to one of the annual Hanukkah parties at the White House, not long after I had won the case of *United States v. Windsor* at the Supreme Court. We brought our 7-year-old son along with us. Our son is a brilliant, creative, amazing person, but he also has severe ADHD, which was much more of a challenge for him then than it is now. As a result, we decided to make a deal with him — we promised Jacob that we would leave the party as soon as things got to be too hard for him to handle.

As we were walking out, Justice Ginsburg was walking in. So I said to Jacob, arguably in violation of our agreement, “Let’s go over and say hello to Justice Ginsburg.” As with most breaches of contract, that was a huge mistake. As we approached Justice Ginsburg, Jacob threw a temper tantrum. It gets worse. The location that he chose for his temper tantrum was literally on top of Justice Ginsburg’s shoes. Right on top of the buckle on her Ferragamos.

I started to apologize, and Justice Ginsburg almost as immediately cut me off. This is what she said: “I have a son. He is almost exactly your age. When he was that age, he acted like this as well. His childhood was a ‘trial.’ But now he is very successful, lives in Chicago, and has a wonderful wife and children. So don’t worry, it will be fine.”

In my line of work, I come across a lot of very smart people all the time. None are smarter than Justice Ginsburg was. But that’s not the point of my story. We all know that Justice Ginsburg was very, very, very smart. The point here is that she was equally as kind. For the rest of my life, I will always be grateful for what she said to me that day.

‘Hers was the path of millions of once-scorned immigrants from exclusion to acceptance’

Michael Waldman is president of the Brennan Center for Justice at NYU School of Law.

Justice Ginsburg’s death is achingly painful for several reasons. As so many have noted, she was one of the few who were as important a force for constitutional change before she donned judicial robes as she was on the bench. Scholars of the Equal Rights Amendment note that so many of its original goals were met by the extraordinary string of rulings Ginsburg won even as

it was being debated. With Thurgood Marshall and Louis Brandeis, she was one of the few public interest lawyers to sit on the court. It is much poorer without that perspective. On the bench, she wrote extraordinarily important rulings on gender equality and workers' rights.

But for those who work on voting rights, it is her recent jurisprudence as a fierce voice for democracy that has been so consequential. Practically every day I quote her dissent in *Shelby County v. Holder*, the 2013 case that gutted the Voting Rights Act of 1965, perhaps the nation's most effective civil rights law. In his majority ruling, Chief Justice John Roberts said, in effect, that ingrained racism was a thing of the past. Ginsburg wrote a now-legendary searing dissent: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet," she wrote. She was prophetic. Texas implemented its harsh voter ID law just two hours later, instantly disenfranchising 608,000 people, according to a federal trial court. The wave of voter suppression laws demonstrates how right Ginsburg was. Now in states across the country, we're engaged in a great struggle over voting rights. It hurts to think of the Supreme Court hearing these cases without Ginsburg's passion and precision.

A final point about what Justice Ginsburg meant. We all saw how she became a cherished cultural figure — "Notorious RBG," the subject of dramas, documentaries and bobblehead dolls. As she well knew, she was a role model for so many as someone who was fearless, brilliant and, yes, ambitious. She meant a lot to a lot of people, especially Jews and Jewish women. Many of us looked at her and saw people like my mother, one of four women in her journalism school class; or my late mother-in-law, who was at Harvard Law School two years ahead of RBG, and like her could not get a job; or my wife, a lawyer; and my daughter, a first-year law student who looks like a young Ruth Bader.

Hers was the path of millions of once-scorned immigrants from exclusion to acceptance. Remarkably, a few years ago, not only Justice Ginsburg but three senators — Chuck Schumer, Bernie Sanders and Norm Coleman — all were graduates of the same public neighborhood high school in Flatbush, Brooklyn. Her story is a reminder of what the country can mean at its best — all too rarely, and for all too few, but an ideal to still be pursued.