

# Remembering Ruth Bader Ginsburg

By Ed Breen

So much said and written – and, yes, felt – in the few hours since Ruth Bader Ginsburg took her leave from us. By the end of the weekend even her sternest critics were beginning to acknowledge that, yes, this diminutive woman had done much to level the landscape on which we all live. Yes, they said, sometimes grudgingly, she left the place better than she had found it.

But it was in dissent that she truly shone. Not dissent in the sense of lets-go-out-back-and-settle-this, but rather in setting the table for what was to come, anticipating what we all might need and preparing the law to accommodate.

It was, of course, she who more than anyone before her understood that the time had come to right the wrongs of gender inequality and she hesitated not one instant in wading into the pool of testosterone that was the American legal system to pull the plug, to drain the swamp.

She was too tiny to be a bully and too refined to be boorish, thus she relied on intelligence and wit and

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common sense – all commodities in short supply right now.

Few of us, even lawyers and judges, hold the right of dissent in the way that an appellate court judge does — and the Supreme Court of the United States is the ultimate in the court of last resort, of final appeal. We live in a world which rewards winners; trophies, salaries, applause, attention, accolades, all go the winner. History is written by the winners. But it is from the losers, especially in the

courts, especially in dissenting opinions from thoughtful judges and jurists that we hear the first murmurs of what may be to come.

The historian Alan Barth devoted a book to the study of dissents and dissenters, those justices of the Court most given to speaking on behalf of the minority to tell the majority that they were incorrect, that they have made a wrong decision and to draw a small map to begin the journey in the correct direction. Justices John Harlan and William O. Douglas did that. And so did Ruth Bader Ginsburg.

One commentator over the weekend put it this way: “Her most striking work,” he said, “was when she failed to persuade the majority of her views. In 2013, in *Shelby County v. Holder*, a court decision which effectively struck at the heart of the Voting Rights Act of 1965, she wrote in her dissenting opinion that the majority had been shortsighted in saying the law was no longer needed.”

“‘It is like throwing away your umbrella in a rainstorm,’ she wrote, ‘because you are not getting wet.’”

On another occasion, in writing her dissent she summarized oh, so briefly: “The ball,” she wrote, “is in Congress’s court.”

Because we build our legal system one law upon another, one decision and one precedent upon another, she frequently said she believed the Court had acted too swiftly and too directly in its sweeping decision in the abortion issue in *Roe v. Wade*, not because she did not agree with the conclusion, but because she believed the foundation on which the decision sat was more quicksand than bedrock.

“I think it’s inescapable that the court gave the anti-abortion forces a single target to aim at,” she said in 2013. “The unelected judges decided this question for the country, and never mind that the issue was in flux in the state legislatures.”

And it is exactly that that is certain to bring the “Roe” question back to the court very soon. Perhaps it was she, the dissenter who provided the warning of unintended and unhappy consequences.

“A dissent in a court of la



**Ruth Bader Ginsburg**

st resort,” Justice Charles Evans Hughes wrote back in 1928, “is an appeal to the brooding spirit of the law, to the intelligence of a future day.”

Ruth Bader Ginsburg put the same thought – the same dissent – in words we understand:

“I think the simplest explanation of feminism,” she said, “and one that captures the idea, is a song that Marlo Thomas sang, ‘Free to be You and Me.’ Free to

be, if you were a girl—doctor, lawyer, Indian chief. Anything you want to be. And if you’re a boy, and you like teaching, you like nursing, you would like to have a doll, that’s OK too. That notion that we should each be free to develop our own talents, whatever they may be, and not be held back by artificial barriers—manmade barriers that certainly were not heaven sent.”



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